HISTORICAL NOTE

LEGAL IMPLICATIONS OF THE PERSONS CASE [1]

A. Anne McLellan*

To many, the most significant legal implication of the Persons Case, is that women were recognized "in law" or "by law" as "persons". In fact, this is not an accurate interpretation of the effect of the decision of the Judicial Committee of the Privy Council[2]; this decision was one of limited legal effect for women, deciding nothing more, or less, than that for the purposes of s.24 of the Constitution Act, 1867,[3] the word "persons" could include women. Women had already achieved some of the attributes of personhood before this decision[4] and others would not be gained by women for years after this decision. However, it is a case that has taken on a much larger symbolic importance and, in a country where there are so few public symbols of women's success, the Persons Case provides the occasion to celebrate, and deliberate upon, that which has been achieved and that which remains to be done.

In the comments which follow, I will briefly outline the historical setting of this legal action, the results thereof, at both the Supreme Court of Canada and the Judicial Committee of the Privy Council, and finally, some thoughts on the legal implications of this case, as I see them.

The "Famous Five"[5] petitioned the Minister of Justice for Canada, seeking the agreement of the government to refer this matter directly to the Supreme Court of Canada. The Minister concluded that the question, of whether "persons" in section 24 of the Constitution Act, 1867 included women, was one of great public importance and recommended to his colleagues that this matter be referred to the Supreme Court of Canada. He saw his recommendation as "An act of justice to the women of Canada ..."[6]

The case was argued on March 14, 1928 before the Supreme Court of Canada. The petitioners were represented by the Honourable N.W. Rowell, Q.C. distinguished counsel from Toronto. Interestingly, the petitioners' factum or brief of argument was 2 1/2 pages long, and their main argument was simply that there was nothing in the word "persons" to suggest that it was limited to male "persons". The word in its natural meaning was equally applicable to female "persons". They also invoked the English Interpretation Act, to assist in defining "persons" and the male pronoun "he". The Act stated that "in all Acts, words importing the masculine gender shall be deemed and taken to include females, unless the contrary as to gender ... is expressly provided". The argument was that Section 24 of the Constitution Act, 1867, which referred to "persons", included females, unless the contrary was expressly provided, which it was not.

The Attorney General of Canada submitted a 24 page factum, which argued for a narrow construction of the word "persons", largely because the Constitution Act, 1867 was to be interpreted in the sense that it bore, according to the intent of the legislature, when the Act was passed. In other words, to quote from the factum, "that which it meant when enacted it means today, and its legal connotation has not been extended, and cannot be influenced, by recent innovations touching upon the political status of women ..."

The second argument advanced by the Attorney General was that the common law of England, as it existed when the Constitution Act was passed in 1867, placed women under a legal incapacity to be elected to serve in Parliament, to vote and, in essence, established that no woman, married or unmarried, could take part in the government of the state. The Attorney General found support for this general prohibition dating back to Roman times.

The only province which filed a factum with the Court was Québec, which largely reiterated the propositions advanced by the federal Attorney General.

It should be noted that the Alberta government supported the cause of the "five" and asked the applicants' counsel to represent its point of view before the Supreme Court of Canada.[7]

Stripped of its legal niceties, the argument for the federal government, was that the Constitution of Canada should be interpreted as it would have been understood in 1867, that is, at the time of its enactment by the Parliament of the United Kingdom. The word "persons" in s.24 of the Act could not include women because at that time, women were under an historic disability to participate in public life. If women were to be included within the meaning of the word "persons" that could only be achieved by an amendment to the Constitution itself, or perhaps, by an act of the Parliament of Canada.

The decision of the Supreme Court of Canada came on April 24, 1928 and all five justices decided against the women's claim. The reasoning varied among the judges, but the majority clearly believed that women were subject to a common law disqualification in relation to holding public office. Further, they felt that the Constitution had to be interpreted as it was understood in 1867, and not in light of so-called modern developments, such as women's suffrage.

The five women, but most notably, Emily Murphy, continued to express confidence that they would ultimately carry the day and asked that the Governor General in Council proceed with an appeal to the Judicial Committee of the Privy

(Continued on Page 12)

(Persons Case continued)

Council. Argument was heard on July 22 and lasted for four days. Finally, on October 18, 1929, the "Famous Five" received the answer and vindication for which they had been waiting.

In a decision which has been described as a major rebuke of the approach and reasoning of the Supreme Court of Canada,[8] the Judicial Committee of the Privy Council, speaking through Lord Sankey said:

> The exclusion of women from all public offices is a relic of days more barbarous than ours.[9]
>
> ...
>
> Their Lordships do not think it is right to apply rigidly to Canada of today the decisions and the reasonings therefor which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries to countries in different stages of development.

In some of the most famous words uttered in relation to the interpretation of the Canadian Constitution, Lord Sankey continued:

> The B.N.A. Act planted in Canada a living tree capable of growth and expansion within its natural limits... Their Lordships do not conceive it to be the duty of this Board to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation
>
> ...
>
> There are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute would be often subversive of Parliament's real intent if applied to an act to ensure the Peace, Order and Good Government of a British Colony.

The Judicial Committee of the Privy Council ultimately concluded that the word "persons" in s.24 was ambiguous and might include members of either sex.

Any attempt to justify the decision of the Judicial Committee on the basis of precedent or a consistent interpretation of existing statutes is, I believe, difficult, if not impossible. It is better to simply accept the notion that the Judicial Committee decided that offering an interpretation of s.24, which excluded women, would be out of step with political events in Canada and the United Kingdom, whereby women were granted the right to vote and to sit in the House of Commons. Further, such a narrow and "legalistic" interpretation of the word "persons", based on the intention of the enacting or founding fathers in 1867, would bring the constitution and the courts into disrepute. The impression would be created that the constitution was static and not responsive to important changes in society (other than through constitutional amendment). By invoking the metaphor of the "living tree", Lord Sankey was suggesting a method of interpretation for the Canadian Constitution which would permit it to grow with, and respond to, significant societal developments.

The immediate legal significance of the case was to include women within the word "persons", thereby providing to them the possibility of being called to serve as senators by the Governor General. As the Judicial Committee pointed out, no one had a right to be a senator; the Judicial Committee was simply deciding who was "eligible" to serve, if invited to do so.

On many occasions, I have heard it stated that, before this decision, women were not "persons". That, of course, was not true; women were "persons" for many purposes before this decision. At the same time, they continued to be denied that status for other purposes after the decision. The point decided by the Judicial Committee was a specific and narrow one; yet that does not detract from its importance, and in particular, from its symbolic importance. Five courageous women had fought the apathy and timidity of the federal government as well as the conservatism of the Supreme Court of Canada and had won. This provided a much needed "shot in the arm" for the still relatively small "women's movement" in Canada.

There are a number of points which I would like to address, which to some extent, are raised in, or by, the Persons Case, and which I suggest still speak to us of the continuing efforts which must be made, through both the legislative and judicial processes, to achieve equality for women.

1. (a) The position of the federal government is of interest; it chose to argue against the position advanced by the "Famous Five"; this, in spite of commitments made by, among others, Arthur Meighen and MacKenzie King to seek a constitutional amendment to this provision of the Constitution. Further, the federal Parliament had recently amended its laws to permit women to vote, and hold office, in the House of Commons.

The strategy of the federal government, hostile in appearance, if not in reality, to this issue of women's equality, lead many women to question the good faith of their elected representatives. One reason for this adversarial approach might have been that the federal government was fearful that principles of interpretation, antithetical to their long-term interests, might be articulated by the courts in the context of this case. For example, the federal government was most insistent that the courts interpret the language of the Constitution as that language would have been used and understood in 1867. In essence, the federal government was arguing for originalism or strict construction, as the theory of constitutional interpretation for Canada. Such a theory has a number of effects, one of which is to limit the scope of

(Continued on Page 13)

(Persons Case continued)

judicial review, and, consequently decrease the opportunity of the courts to "second guess" legislative choices. Approaches to constitutional interpretation based upon notions of a "living tree", or the constitution as an organic, ever-changing set of rules and values, provide courts with the opportunity to define the constitution in keeping with current societal values and expectations. Such an approach tends to place greater restrictions upon legislatures and can lead to allegations that courts are "second guessing" popularly elected law-makers and are setting themselves up as super-legislative bodies.[10] These arguments are undoubtedly very familiar in the context of the Charter of Rights and Freedoms. However, it is possible that the federal government, in 1928-29, realized the implications for Parliament's power, if a "living tree" approach was adopted in relation to the interpretation of the Constitution by the courts.

(b) The antagonistic strategy adopted by the federal government in the Persons Case is not a relic of the past. One of the complaints heard frequently from women's groups, as well as from other interest groups, in relation to Charter litigation, is that all governments - federal and provincial - adopt a hostile stance to the claims being made by them.[11] The first response of government is often to tell a group that comes to them with a rights concern: "We'll let the courts decide." Most governments are well aware of the limited resources of groups seeking to challenge laws or administrative action and are well aware of the high costs of litigation. The assumption made by government, and I fear it is fairly accurate, is that many of these claims will never be pursued.

2. What implications does the "living tree doctrine" have for women? This doctrine of interpretation was not immediately embraced by Canadian courts. In fact, it was not until the advent of the Charter, that Lord Sankey's approach to constitutional interpretation truly flourished.

In early Charter litigation, the Chief Justice of Canada endorsed this language,[12] and the approach it represents, sending an important signal that the courts should take a large and liberal interpretation to the rights guaranteed in the Charter. In R. v. Beauregard,[13] albeit not a Charter case, Chief Justice Dickson said:

> The Canadian Constitution is not locked forever in a 119 year old casket. It lives and breathes and is capable of growing to keep pace with the growth of the country and its people.

Is an interpretative approach based on the notion of a "living tree" necessarily good for women? One's answer will depend upon one's assessment of the state and condition of the society which is to be reflected by the "living tree". Originalism takes us back to the time when the constitution was enacted. The intention of the drafters or founding fathers is the central focus of this inquiry. Since constitutions, such as those of the United States and Canada, with the exception of the Charter, were enacted in times very different from our own, when the legal position of women within society was to regard them as little more than the property of fathers or husbands, an approach based on originalism may not easily or happily accommodate and protect the expansive rights arguments being advanced by women today.

A "living tree" approach to constitutional interpretation has the potential of being beneficial for women, permitting courts to take account of the changing expectations and roles of women in society. However, as society changes, so may the interpretation of the constitution, and women must be aware of, and be prepared for, the possibility that these changes will not always inure to their benefit.

3. The "Famous Five" had their claim vindicated in a court of law, only after having unsuccessfully lobbied five successive federal governments to propose an amendment to the constitution. Promises were made but none kept, leading Emily Murphy, in a letter to Nellie McClung, to state:

> We have now come to realize that the matter is one which cannot with any degree of fairness be submitted for decision to a body of male persons, many of whom have expressed themselves toward it in a manner that is distinctly hostile.[14]

What does this tell us of the strategies that women should adopt to effect legal change? Should women place their emphasis on, and trust in, the courts? Should women be wary of the courts, populated largely by aging white males? Should women see the political/legislative process as the one to employ for long-term, comprehensive legal change? I think the answer must be that women cannot afford to pursue one of these strategies to the exclusion of the other. The courts have let women down. In cases like Lavell,[15] Murdoch[16] and Bliss,[17] the claims of women were dismissed, largely on the basis of stereotypical thinking about the roles and abilities of women. However, lately, in cases like Brooks[18] and Janzen,[19] the Supreme Court of Canada has spoken eloquently of the realities of women's lives and the barriers they face in the workplace.

Legislatures, and the political process that underlies them, have not always been accessible or accommodating to women's concerns. The party structure has, until recently, prevented women from being equal participants in the political process with the result that few women have had the opportunity to seek elected office, and thereby have the opportunity to represent women's points of view in our main law-making institutions.

(Continued on Page 14)

(Persons Case continued)

Women must pursue strategies for change which involve both the judicial and the legislative processes.

4. The "Famous Five were seeking a form of equality which we would describe today as formal equality or equality of opportunity. They were asking to be treated like men; their point of reference was men and the benefits and opportunities which men possessed and which women did not. Of course, such a claim or aspiration was a reasonable one for that time. Indeed, a claim to formal equality - to be accorded the same opportunity available to men to serve in the Senate - adequately answers the issue of inequality raised by the "Five". However, it should be noted that the equality claims of women today go far beyond formal equality. Claims for substantive equality, claims which seek equality of result and not simply equality of opportunity, claims that recognize the important differences between men and women, as well as the similarities, indicate the present, and future, of equality discourse and litigation.

In conclusion, the "Famous Five" were truly remarkable women - for their time or any time. The strategies they adopted to achieve change can serve as a model for women today. They turned first to the political and legislative processes to effect change in an offending law; when that failed to achieve the desired results, they turned to the courts. Both are important strategies for women to pursue if significant legal and social change, in the position of women in modern society, is to take place.

**This is the text of a talk delivered on October 18, 1989 at the University of Alberta, as part of the celebration of the 60th anniversary of the Persons Case.*

1. Re Section 24 of the B.N.A. Act [1930] 1 D.L.R. 98 (J.C.P.C.) The case takes its unofficial name from the question referred to the Supreme Court of Canada by the Governor General in Council: "Does the word "persons" in section 24 of the British North America Act, 1867, include female persons?"
2. The Judicial Committee of the Privy Council was, until 1949, the final court of appeal for Canada.
3. Section 24 authorizes the Governor General to summon qualified "persons" to the Senate.
4. For example, the Married Women's Property Act had been passed in 1922 (R.S.A. 1922, c.214). Further, women had received the right to vote in most provinces and at the federal level and to seek election to provincial legislatures and the federal Parliament.
5. They were, in alphabetical order: Henrietta Muir Edwards, Nellie R. McClung, Louise C. McKinney, Emily F. Murphy, Irene Parlby.
6. Taken from the Order of Reference by the Governor General in Council, P.C. 2034, October 19, 1927.
7. This is not surprising in that Alberta had extended the right to vote and seek election to the Legislature to women in 1916. Also, Alberta had appointed the first two women magistrates in the British Empire, Emily Murphy and Alice Jamieson. The case of Rex v. Cyr (1917), 12 A.L.R. 320 (C.A.) served as a precursor to the Persons Case and concluded that women were qualified to be appointed to the office of magistrate.
8. Snell & Vaughan, The Supreme Court of Canada (Toronto: University of Toronto Press, 1985) 141-42.
9. One presumes that Lord Sankey is not referring to the situation in the United Kingdom a mere seven years earlier when the House of Lords decided Viscountess Rhondda's Claim (1922) 2 A.C. 339, in which it was determined that the common law gave no right or title to a peeress to sit in the House of Lords. If the right to sit was to be conferred, Parliament would have to say so in express words.
10. See, for a general discussion of these concerns in relation to the judiciary, Mandel, Michael, The Charter of Rights and the Legalization of Politics in Canada, (Toronto: Wall & Thompson, 1989).
11. For a recent reference to this concern, see Brodsky & Day, Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back? (Canadian Advisory Council on the Status of Women, 1989).
12. Hunter v. Southam, [1984] 2 S.C.R. 145.
13. [1986] 2 S.C.R. 56.
14. Letter to Nellie McClung from Emily Murphy. August 5, 1927. McClung Papers as reproduced in Our Nell - A Scrapbook Biography of Nellie L. McClung, (Goodread Biographies, 1985).
15. [1974] S.C.R. 1349.
16. [1975] 1 S.C.R. 423.
17. [1979] 1 S.C.R. 373.
18. (1989) 94 N.R. 373.
19. (1989) 95 N.R. 81.

* **A. Anne McLellan**, Professor of Law, University of Alberta.