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SASKATCHEWAN
LAW REVIEW

The Legacy of the "Persons Case": Cultivating the Living Tree's Equality Leaves

*The Honourable Claire L'Heureux-Dubé**

As we approach the end of 1999, we mark the seventieth anniversary of the Persons Case almost to the day.[1] The year 2000 will mark the 15th anniversary of the entry into force of s. 15 of the *Canadian Charter of Rights and Freedoms*.[2] It therefore seems an exciting time to reflect upon the progress that has been made in the struggle for equality—an ongoing struggle in which LEAF has played, and will continue to play, a very important role. It is also an important time to express our hopes for the future—not just for women, but for all those who have experienced the marginalization and disempowerment that accompany the status of "non-personhood" in the eyes of the law.

I. INTRODUCTION

Taking the Persons Case as a starting point for my discussion today of Canada's growing body of equality jurisprudence, I think it is safe to say that while this case had a positive impact on the lives of a relatively select group of women, it did not take us very far along the road to equality. Notwithstanding its limitations, however, the British Privy Council's decision provides significant insight into some of the ways in which the law may serve to advance human rights and equality.

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* Justice of the Supreme Court of Canada. Remarks made on the occasion of the LEAF Persons Day Breakfasts in Saskatoon and Regina, Saskatchewan, on October 28 and 29, 1999. I wish to thank my law clerk, Laurie Sargent, for her superb assistance in the preparation of this address.

1 *Edwards* v. *Canada (A.G.)*, [1930] A.C. 124 (P.C.) [hereinafter "Persons Case"]. The judgment was handed down by the British Privy Council on October 18, 1929. For interesting discussions of this case, see also D. Bright, "The Other Woman: Lizzie Cyr and the Origins of the 'Persons Case'" (1998) 13:2 Can. J. L. & Soc. 99; and K. Lahey, "Legal 'Persons' and the Charter of Rights: Gender, Race and Sexuality in Canada" (1998) 77 Can. Bar Rev. 402.

2 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

As you know, the Persons Case established that women were "persons" for the purposes of the Canadian Constitution and its provision on appointments to the Senate. It is important to underline, however, that Lord Sankey's reasons made virtually no mention of what was really at issue: discrimination against women. In fact, he took care to note: "[T]heir Lordships [are not] deciding any question as to the rights of women but only a question as to their eligibility for a particular position."[3] Similarly, Lord Sankey stated: "No doubt in any code where women were expressly excluded from public office the problem would present no difficulty".[4] In other words, if the discrimination were express, there would be no need or means to strike it down.

Not exactly a landmark statement in favour of women's equality. Nevertheless, the outcome of the Privy Council's decision was positive for women's rights. It is interesting to consider how this came about, even though notions of equality and discrimination were not a dominant feature of legal thinking at the time.

Lord Sankey based his conclusion that women were "persons" for the purposes of the Canadian Constitution on a particular method of statutory interpretation: focusing on the text of the Constitution itself, rather than on legislative intent.[5] Lord Sankey conveyed this approach through the now famous metaphor of the Constitution viewed as a "living tree capable of growth and expansion within its natural limits."[6] Using this interpretive method, the Privy Council was able to depart significantly from its prior jurisprudence on the question of whether the term "person" included women. This points to the true legacy of this case—a legacy which relates primarily to legal language and reasoning, as well as to the interaction between law and society.

Thus, while it may be accurate to view the Persons Case itself as merely a tiny shoot which took over fifty years to begin to develop more fully into the equality branch of the living tree that is Canadian constitutional law, the Persons Case provides several interesting insights into ways in which we may continue to cultivate greater equality for all in Canada.

II. THE FLEXIBLE LANGUAGE OF THE LAW

Imagine, for a moment, that you are fluent in the English language, but that you have never heard of the Persons Case. Imagine that a friend tells you that prior to 1929, it was unclear whether women

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3 *Supra* note 1 at 137.
4 *Ibid.* at 133.
5 *Ibid.* at 133-36.
6 *Ibid.* at 136.

were persons or not. I think this might strike you as rather odd. After all, common sense, as well as a basic dictionary meaning, indicates that "person" is a gender-neutral term which refers to individual human beings of either sex.

Imagine then that your friend explains to you that in 1928, the Supreme Court of Canada decided that women were not persons,[7] but then in 1929, the British Privy Council, acting as Canada's highest Court of Appeal, determined that women were persons in Canada. Ironically, the Privy Council came to this conclusion despite the fact that the English courts had decided just a few years earlier that women were not persons in England.[8]

You might be forgiven for thinking that the top legal minds of the era suffered from serious lapses in grammar and logic, at least from time to time. You would be reassured, however, by the fact that the Privy Council did come to the sensible conclusion that women were persons. You might nevertheless be concerned to discover they did not decide the issue on the basis that the term "person", used sensibly and fairly, must include men and women. Instead, they did so on the basis that the term was "ambiguous". In other words, the meaning of the term could vary, depending on the context in which it was used. In this particular case, the term "person" included both men and women, given that none of the rest of the sentences surrounding the term expressly or implicitly excluded women from the definition of "person".

At this point, you might be thoroughly perplexed and rather skeptical about the law and its approach to the meaning of words. You might also be tempted to reach two rather inconsistent conclusions. On the one hand, you might want to ensure that words you consider to be important are given a clear and complete definition so as to avoid the manipulation of a word to the point that it is rendered meaningless. On the other hand, you might also understand that the legal meaning of terms has a certain malleability which allows for growth and change. After all, it was ambiguity, in the Persons Case, that allowed the Privy Council to give an old word a new meaning for the purposes of the law, thereby shedding at least some of the bias and stereotype that had skewed the courts' use of the term "person" until this point.

I would like to focus on this linguistic aspect of the Persons Case for a moment. I have often spoken about the fact that we are all engaged in the process of learning to speak the "language of equality".

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7 *Reference as to the Meaning of the Word "Persons" in Section 24 of the British North America Act, 1867*, [1928] S.C.R. 276, 4 D.L.R. 98, rev'd *Edwards* v. *Canada (A.G.)*, *supra* note 1.

8 See A. Sachs & J. Wilson, *Sexism and the Law: A Study of Male Beliefs and Legal Bias in Britain and the United States* (Oxford: Martin Robinson, 1978) at 22-38.

The Persons Case provides a good example of why it is important to imbue legal terms such as "person" and "equality" with a rich meaning. Otherwise, they will be susceptible to a variety of interpretations, some of which will have negative implications for many members of our society. Paradoxically, however, the Persons Case also points to the advantages inherent in maintaining some flexibility in the meaning of these same terms: it is this flexibility which allows future generations to adapt the law to their needs, realities, and values.

In my view, over the past fifteen years or so, the Supreme Court has primarily been engaged in the first type of activity: developing a more complete and sophisticated meaning of the term "equality". Until the adoption of the *Charter*, equality for women, and other vulnerable or minority groups, was not a recognized constitutional principle. At most, the introduction of the *Canadian Bill of Rights*[9] in 1960 led to a narrow, formalistic understanding of equality rights that did not provide adequate tools for those who sought to eliminate discrimination.

One of the most obvious examples of this inadequacy may be found in the Supreme Court of Canada's 1979 decision in *Bliss* v. *Attorney General of Canada*.[10] The appellant was challenging provisions of the federal *Unemployment Insurance Act*[11] which treated unemployment due to pregnancy differently from all other forms of unemployment. Essentially, the Act sought to ensure that pregnant women would be entitled to unemployment insurance benefits regardless of whether they were capable of work during their period of unemployment due to pregnancy and childbirth. In doing so, however, the Act placed a much higher threshold in terms of the number of weeks a pregnant woman had to work in order to be entitled to benefits under these special provisions, as compared to everyone else seeking benefits under the Act's general provisions.

The Court decided that the denial of benefits under these more general provisions on the basis of pregnancy did not constitute sex discrimination since inequality between the sexes was created, according to the unanimous Court, "not...by legislation but by nature."[12] The Court, therefore, approved the following statement from the Federal Court of Appeal: "If section 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women."[13]

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9 R.S.C. 1985, App. III [hereinafter *Bill of Rights*].
10 [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417.
11 R.S.C. 1985, c. U-1.
12 *Bliss*, *supra* note 10 at 190.
13 *Ibid.* at 190-91.

This is a good example of how the term "equality" was given an impoverished meaning by the Supreme Court as it interpreted the *Bill of Rights* at the time. The Court generally used the term "equality" to mean equal treatment for people who were the same. In reality, this gave the term "equality" an incomplete meaning that provided protection only to the extent that the members of these groups were no different from white, able-bodied men. They may have been legal persons at a formal level. At a substantive level, however, they continued to be denied full personhood due to the fact that they were different from what society, as reflected in the law, considered to be the "norm".

Partly in reaction to this formalistic approach and the resulting criticism from equality-seeking groups, those involved in drafting the *Charter* introduced a strong guarantee of equality before and under the law, as well as the right to equal protection and equal benefit of the law without discrimination. Section 15 lists the grounds on which discrimination is prohibited including, but not limited to, race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. Section 28 confirms that the rights and freedoms referred to in the *Charter* are guaranteed equally to male and female persons.

Over time, the Court has come to recognize the importance of the link established in s. 15 between equality and discrimination. The inextricable linkage of the two concepts is indicative of an advanced and nuanced understanding of the values that underlie equality. Used in this sense, equality isn't about always being treated the same, and it isn't a mathematical equation waiting to be solved. Rather, it is about equal human dignity and full membership in society. It is about promoting an equal sense of self-worth and about treating people with equal concern, equal respect, and equal consideration. This is a much more fully developed understanding of the meaning of the term "equality", a meaning that can help us to determine the values that are offended when we discriminate, consciously or not. Our Court's jurisprudence has attempted to recognize this and to develop the complex analysis needed to determine when substantive equality has been violated.

From the first time the Supreme Court dealt with the interpretation of s. 15 in *Andrews*,[14] as in subsequent equality rights cases decided in the post-*Charter* era, the Court rejected the formalistic analysis characteristic of its decisions under the *Bill of Rights*. It has focused, instead, on social context and historical patterns of discrimination in determining whether this more developed notion of substantive equality had been violated.

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14 *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1.

Thus, although the same term, "equality", was used in both the *Bill of Rights*[15] and the *Charter*, its meaning has evolved significantly. Similarly, the Court has embarked on a process of unifying the judicial approach to equality issues, whether they arise under a human rights code or under the *Charter*. This gradual process of change has included the development of overarching principles to guide courts undertaking an equality analysis, as well as an expansion of the scope of protection guaranteed by s. 15.

In an early example of this change in the meaning of equality, the Supreme Court in *Brooks*[16] overturned its previous decision in *Bliss* and held that the express exclusion of pregnant women from a private employer's accident and sickness plan constituted a form of sex discrimination. As this case involved a private insurance plan, the appellants' challenge was based on the Manitoba *Human Rights Act*,[17] not the *Charter*. Invoking its decision in *Andrews*, however, the Court reasoned that the plan disadvantaged pregnant women solely because of their pregnancy—a condition unique to women. It also noted that pregnancy is something that benefits all of society, and concluded that the costs of pregnancy should not be imposed solely on women.

Chief Justice Dickson, for a unanimous Court, therefore overturned the Court's own *ratio* in *Bliss*. In doing so, he recognized that the Court's reasoning in *Bliss* was, in fact, contrary to the purpose of anti-discrimination legislation, which is to remove unfair disadvantages that have been imposed on individuals or groups in society.[18] Based on a more contextual understanding of equality, the Court was able to depart from prior jurisprudence and to affirm the protection provided by the constitutional entrenchment of the equality guarantee.

More recently, in cases such as *Law* v. *Canada*,[19] the Supreme Court has continued to clarify and unify its overall approach to equality analysis by emphasizing the importance of taking a "purposive and contextual approach to discrimination analysis",[20] rather than an indirect and category-based approach to the definition of discrimination. It is now fair to say that the Court has adopted the view I advanced in *Egan* v. *Canada*:[21] that "at the heart of section 15 is the promotion of a society in which all are secure in the knowledge that they are

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15 *Supra* note 9, s. 1(b).
16 *Brooks* v. *Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, 59 D.L.R. (4th) 321.
17 R.S.M. 1987, c. H175.
18 *Brooks*, *supra* note 16 at 1238.
19 [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1. See also *M.* v. *H.*, [1999] 2 S.C.R. 3, 171 D.L.R. (4th) 577.
20 *Law*, *supra* note 19 at para. 88.
21 [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609.

recognized at law as equal human begins, equally capable, and equally deserving."[22]

Similarly, several recent cases have further developed the meaning of equality by holding that, although in some sense equality is a comparative concept, it does not always require that we treat people in the same way. In fact, sometimes it requires that we recognize and respect these differences and treat them accordingly.

A good example of this is found in the "B.C. Firefighters" case,[23] which was handed down this September. The appellant union alleged that the claimant, a female firefighter who had performed her work satisfactorily for over three years, was improperly dismissed on the basis of her failure to meet a discriminatory aerobic standard required under a new series of fitness tests adopted by the B.C. Government.

The Court held that under the B.C. *Human Rights Code*,[24] the minimum fitness standard discriminated against women and could not be justified as a *bona fide* occupational requirement. In other words, a lower standard could still provide sufficient protection to the public, while also having a less discriminatory impact on women. This case is an excellent example of our growing understanding of the meaning of equality and the ways in which it can be achieved. As in many other cases of human rights code violations, courts are recognizing that a standard set in relation to a traditionally dominant group—such as male firefighters—must be reviewed from an equality perspective in order to determine whether it is reasonably necessary for the fulfilment of a legitimate work-related purpose.

Gradually, and on a case by case basis, therefore, courts and litigants are helping to cultivate a more resilient and sophisticated meaning of equality as guaranteed by the *Charter* and other human rights instruments.[25]

This process is not without its setbacks, however, particularly as firmly entrenched words and meanings are challenged on equality grounds. Again, however, the Persons Case offers valuable insight

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22 *Law*, *supra* note 19 at paras. 49, 88.

23 *British Columbia (Public Service Employee Relations Commission)* v. *BCGSEU*, [1999] 3 S.C.R. 3, 176 D.L.R. (4th) 1 [hereinafter *British Columbia* or "BC Firefighters"].

24 R.S.B.C. 1996, c. 210.

25 See also *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385. This case dealt with the failure of the Alberta *Individual's Rights Protection Act* (R.S.A. 1980, c. I-2) to provide gays and lesbians with protection against discrimination. Technically, gays, lesbians, and heterosexual people were treated the same; none could bring claims under Alberta human rights legislation based on sexual orientation. However, the fact that only gays and lesbians, not heterosexuals, generally experience discrimination on the basis of sexual orientation meant that the failure to include them in the legislation, even though it formally treated all citizens equally, constituted discrimination.

into the important interaction between the meaning of words and interpretive techniques, particularly when definitional issues arise as they did recently, for example, in *M.* v. *H.*[26]

In contrast to the Privy Council in the Persons Case, however, the Court now has at its disposal a very powerful interpretive tool: s. 15 of the *Charter*, as it has been interpreted and given substantive meaning over the past fourteen years. Thus, rather than having to resort solely to methods of textual interpretation, the Court is able to deal with definitional challenges in ways that apply and enrich the meaning of the equality guarantee.

III. EQUALITY IMPLICATIONS OF EVERY ASPECT OF THE LAW

Additional insight may still be gained, however, from the Privy Council's use of the "living tree" approach to constitutional interpretation. That is, even something as abstract and apparently objective as a technique of constitutional interpretation can have major implications for equality rights.

For in fact, it was Lord Sankey's "living tree" approach to constitutional interpretation that freed the text of this fundamental document from the values held at the time of its creation. In doing so, it freed the word "person" from its prior judicial interpretation. As a consequence, this method of interpretation contributed in its own way to the process that has gradually been liberating women and other disadvantaged groups from a discriminatory past and making a more equal future possible.

This brings me to the importance of understanding the direct and indirect effects of legal reasoning and interpretive methods and their implications for equality-seeking groups. Our Court's decisions have shown that it is not sufficient to be attentive to the concept of equality only when it is raised as part of a direct constitutional challenge to the law. Rather, in examining other areas of law, as well as our own methods of reasoning, we must be alert to the ways the law's assumptions and application may or may not respect the principles of equality.

What I have called the "interpretive lens of equality" offers us new understandings of how our legal tests and methods of reasoning may impact on employment law, family law, criminal law, and laws affecting the poor and the elderly. The task of rooting out inequality

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26 *Supra* note 19. In *M.* v. *H.*, the respondent challenged the definition of "spouse" found in the Ontario *Family Law Act* (R.S.O. 1990, c. F.3) . The Act defined "spouse" to include: "either of a man and woman who are not married to each other and have cohabited...continuously for a period of not less than three years" (s. 29). The Court held that the definition, which on its face excluded same-sex partners, constituted an unjustifiable violation of s. 15 of the *Charter*.

and injustice from our society is advancing to a higher stage since, increasingly, we are recognizing that inequality and discrimination often stem not from express intentions on the part of any given individual or group, but rather from the effects of innocently motivated actions. This requires that we understand equality and make it part of our thinking on every issue. We must keep our minds open to as yet unchallenged assumptions and stereotypes.[27]

I will mention just a few examples of cases in which attention to the meaning of equality has led courts to reconsider established tests and methods, even in the absence of a direct constitutional challenge. Returning for a moment to the recent B.C. Firefighters case, it is important to note that while the case raised equality issues under the B.C. *Human Rights Code*, the Supreme Court was asked to reconsider its approach to discrimination in the employment context more generally. Although this was not done on the basis of a s. 15 challenge, equality analysis permeates the Court's decision to adopt a new approach in determining whether an employer has established that a *prima facie* discriminatory standard is a *bona fide* occupational requirement, or "BFOR".[28]

The Court benefited from the work of academics and the submissions of interveners on this point, as they provided helpful suggestions for modifying the traditional BFOR analysis. The original analysis, which distinguished between direct and indirect discrimination, had been developed by courts for the purpose of promoting equality as guaranteed by human rights codes. When re-examined through the lens of substantive equality, however, it became clear that the approach to adverse effect discrimination was problematic since it tended to legitimize standards that were "neutral" on their face, but were discriminatory in their application. Justice McLachlin, for the Court, cited Day and Brodsky[29] on this point:

> The difficulty with this paradigm is that it does not challenge the imbalances of power, or the discourses of dominance, such as racism, ablebodyism and sexism, which result in a society being designed well for some and not for others. It allows those who consider themselves "normal" to continue

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27 See *e.g. R.* v. *Seaboyer*, [1991] 2 S.C.R. 577 at 604, 630, McLachlin J., and at 651, L'Heureux-Dubé J. 83 D.L.R. (4th) 193; *R.* v. *Osolin*, [1993] 4 S.C.R. 595 at 670, 109 D.L.R. (4th) 478, Cory J.; *R.* v. *Esau*, [1997] 2 S.C.R. 777 at para. 82, 148 D.L.R. (4th) 662, McLachlin J.; *R.* v. *Ewanchuk*, [1999] 1 S.C.R. 330 at paras. 91-93, 99, L'Heureux-Dubé J.; *R.* v. *G.W.*, [1999] 3 S.C.R. 597, 178 D.L.R. (4th) 76, L'Heureux-Dubé J.

28 See especially *British Columbia*, *supra* note 23 at paras. 45-49.

29 S. Day & G. Brodsky, "The Duty to Accommodate: Who Will Benefit?" (1996) 75 Can. Bar Rev. 433.

> to construct institutions and relations in their image, as long as others, when they challenge this construction are "accommodated".[30]

So, although at one level this case was about an individual's right to be treated equally in her workplace, at another level the case also involved important modifications to the legal reasoning or "test" to be applied in human rights code cases. The lens of equality, when focused on the BFOR test itself, revealed a need to correct the unintended, but potentially negative equality implications of the test's earlier formulation.

In *G.(J.)*,[31] a recently decided case on legal aid for parents facing child custody hearings, I, and two of my colleagues, pointed out that the "interpretive lens of the equality guarantee"[32] should influence the interpretation of other constitutional rights such as the s. 7 right not to be deprived of life, liberty, and security of the person except in accordance with the principles of fundamental justice.[33] In this case, the Court determined that governments may have an obligation to provide parents with state-funded counsel when their right to security of the person, including psychological integrity, is at stake. The Court held that in many cases, child custody hearings will engage the right to security of the person, given the serious and profound effect that removal of a child by the state may have on a person's psychological integrity.

In addition, three of us took the view that the case raised issues of equality because women, and especially single mothers, are disproportionately and particularly affected by child protection proceedings. It was also recognized that discrimination and disempowerment may be compounded. Statistics tell us that members of vulnerable groups such as visible minorities, Aboriginal people, and the disabled are most often involved in child protection proceedings.[34] In such cases, it is especially important to keep equality considerations in mind.

In a similar vein, but with respect to evidentiary rules in the family law context, *Moge* v. *Moge*[35] introduced a new approach to fact-finding. Despite the fact that this case was not brought under s. 15 of the *Charter*, this Court held that equality considerations must inform the determination of spousal support obligations under the

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30 *British Columbia, supra* note 23 at para. 41.
31 *New Brunswick (Minister of Health and Community Services)* v. *G.(J.)*, [1999] 3 S.C.R. 46, 177 D.L.R. (4th) 124.
32 *Ibid.* at para. 112.
33 *Ibid.*
34 *Ibid.* at paras. 113-14, L'Heureux-Dubé J.
35 [1992] 3 S.C.R. 813, 99 D.L.R. (4th) 456.

Divorce Act.[36] The Court recognized that, in order to be sensitive to the equality implications of interpreting a provision in a particular way, judges may need to examine the factual, social, and economic context in which a particular piece of legislation operates.

In that particular case, focusing on equality enabled the Court to look at the perspective and experiences of women and children, so as to ensure that the principles governing spousal support took into account their needs and realities. Moreover, as a result of that case, the concept of substantive equality became important not only for the area of family law, but also more generally for judicial methods of fact-finding and analysis.

Cases such as these emphasize the fact that one's approach to every issue that comes before the courts, and not just to equality challenges, should be informed by the s. 15 equality guarantee. The interpretive lens of equality can help to strengthen and render more meaningful the protections offered by the other *Charter* rights, as well as generating a more consistent and equality-centred jurisprudence.

IV. THE RELATIONSHIP BETWEEN SOCIAL VALUES AND JURISPRUDENCE

These cases also show, however, that thinking about equality involves much more than just analyzing discrimination claims or devising tests for the application of human rights codes in the abstract. Thinking about equality requires an understanding of the historical disadvantages experienced by members of some groups, an awareness of groups' differences and unique experiences, and a sensitivity to the fact that much of the law has been designed from the perspective, and in the interests, of those with power and privilege. This brings me to my last point of discussion today: the relationship between law and society.

It is probably safe to say that it was no historical accident that the Persons Case was handed down just a few years after Canadian women gained the franchise. Although this fact was not used expressly to justify the decision, the legislative enfranchisement of women no doubt helped to create a climate in which the Privy Council felt it was able to break with prior jurisprudence regarding what was, at the time, a heated topic of public debate.

It is also no accident, however, that it took over fifty years from the time the Persons Case was decided before equality became a serious concern for the courts. In the interim, Canadian society underwent major changes in structure and attitude. Women's movements, among others, had a significant influence on the behaviour, language, and values of most, if not all, Canadians.

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36 R.S.C. 1985 (2nd Supp.), c. 3.

The introduction of the *Charter* in 1982 had the positive effect of making the relationship between judicial decision-making and societal values more transparent. But do not misunderstand me—I do not mean that the *Charter* has given judges license to inject their personal views into their decisions. I mean that Parliament and the provincial legislatures, in adopting the *Charter* and human rights codes, have told courts that they must give effect to the substantive values that underpin our "free and democratic society."

As stated by Justices Cory and Iacobucci in *Vriend*, the introduction of the *Charter* has brought about a "redefinition of our democracy."[37] They observed, regarding the courts' expanded power to strike down legislation passed by the legislature:

> Democratic values and principles under the *Charter* demand that legislators and the executive take these into account; and if they fail to do so, courts should stand ready to intervene to protect these democratic values as appropriate. As other have so forcefully stated, judges are not acting undemocratically by intervening when there are indications that a legislative or executive decision was not reached in accordance with the democratic principles mandated by the *Charter*.[38]

Thus, what the Privy Council had to do indirectly in the Persons Case by way of interpretive principles, the courts must now do directly through application of constitutionally enshrined human rights principles.

The Court has also taken care to emphasize that judges must not second-guess legislatures or make value judgments on what they consider to be the proper policy choice. Rather, judges are called upon to uphold the Constitution as they have been invited to do so by the Constitution itself. Respect by the courts for the legislature and executive is as important as ensuring that the other branches respect each others' role and the role of the courts.[39]

Courts must not be swayed by popular opinion as canvassed in media polls or editorials. Pursuant to the *Charter* however, the role of the courts is inextricably linked to the values and principles held by the society in which they judge, as they are substantively expressed in the first 29 sections of the *Charter* as well as contemplated explicitly in the language of s. 1. In particular, courts must look to the social

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37 *Vriend, supra* note 25 at para. 134.
38 *Ibid.* at para. 142.
39 *Ibid.* at paras. 136-37.

context in which any given piece of legislation or government action operates in order to determine whether its purpose or impact is inconsistent with the rights guaranteed by the *Charter*.

While this gives courts a more substantive basis for review than that which existed at the time the Persons Case was decided, they cannot be expected to police every aspect of social interaction. Nor are they always the most appropriate institution to do so. This is why it is so important that each and every person endeavour to cultivate a society in which respect for the inherent dignity of the human person, social justice, equality, and respect of difference prevails in every aspect of our lives. This engages a responsibility to promote equality not only for those who are similar to us, but also for those who may be the object of different forms of discrimination.

In conclusion, the insights offered by the Persons Case remind us that, using a variety of legal tools and methods, we have made a significant amount of progress along the road to equality since 1929. Let us continue to learn from this case, and even more so, from Canada's growing branch of equality jurisprudence, in the hope that one day, Canada's constitutional living tree will have equality at its roots and in its trunk—and all the way through every branch and leaf!