

LEGAL "PERSONS" AND THE CHARTER OF RIGHTS: GENDER, RACE, AND SEXUALITY IN CANADA

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In this essay the writer argues that the "Persons" case has not been constructively employed to further full "legal personality" for all Canadians. The author further states that the Vriend case itself and the decision not to utilise the override provision augurs well but she writes that the lesbian and gay communities still await recognition of full constitutional personhood.

Dans cet article, l'auteur soutient que le cas des "personnes" n'a pas été employé de manière constructive afin de promouvoir pleinement la "personnalité légale" pour tous les canadiens et canadiennes. De plus, l'auteure maintient que le cas Vriend en soi et la décision de ne pas utiliser les dispositions annulées augure bien mais, elle avance que les communautés gaies et lesbiennes sont toujours en attente d'une pleine reconnaissance en tant que personnes au niveau constitutionnel.

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Introduction

Shortly after section 15(1) of the Canadian *Charter of Rights and Freedoms* came into effect in 1985, the Honourable John Crosbie, then Minister of Justice and Attorney General of Canada, emphasized that section 15 represented "only the legal minimum that must be respected by

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governments.”¹ He went on to reassure Canadians that the open-ended language in section 15(1) was intended to ensure that the constitution of Canada remained a “living tree,” which is how the Privy Council described it when ruling in the historic 1929 “Persons” case that women had the legal capacity to sit in the Senate.²

As Charter litigation over the status, rights, and responsibilities of disadvantaged groups has unfolded in the intervening years, the original purposes behind constitutional equality guarantees, human rights codes, and bills of rights seem to have become obscured as equality jurisprudence has become increasingly structured around technical tests of “discrimination,” “benefit versus burden,” and section 1 “justification.” As I read the history of the “Persons” case in Canada and the history of constitutional and statutory human rights guarantees elsewhere, the original purposes of all human rights provisions have been quite simple: to nullify the age-old “civil incapacities” or “legal disabilities” that have been used to control and disadvantage selected groups throughout legal history. I have concluded that until human rights codes, international covenants, and Charter equality guarantees expressly give effect to this purpose, the roots of legal discrimination, which run much more deeply in Canadian jurisprudence than the roots of the “living tree” will remain beyond the reach of the legal system.

I develop this argument by looking first at the legal context of the “Persons” case, and then by answering a series of questions: Why are concepts of “legal personhood” central to Euro-Canadian legal discourse? Why still talk about “persons” or “civil status” now? How does contemporary jurisprudence deal with issues relating to “civil capacity” or “legal personality”? An examination of leading decisions on issues of gender and race discrimination indicates that contemporary Charter jurisprudence continues to tolerate selected “civil incapacities,” thus making the attainment of “equality” for some groups unlikely in the near future. However, leading decisions on sexuality in the Canadian and United States Supreme Courts suggest that the concept of “constitutional personhood” is still in the process of emerging in human rights discourse, holding out hope that issues relating to sex and race may be revisited with better results.

¹ Hon. John Crosbie, *Toward Equality: The Response to the Report of the Parliamentary Committee on Equality Rights* (Ottawa: MSSC, 1986) at 3.

² *Edwards v. A.-G. Canada*, [1930] A.C. 124 (P.C.), rev’g *Reference as to the meaning of the word “persons” in section 24 of the British North America Act, 1867*, [1928] S.C.R. 276 (released on October 18, 1929) [hereinafter referred to as the “Persons” case].

I. Legal Context of the "Persons" Case

The "Persons" case arose out of grassroots women's activism in Alberta. In the 1910s, the Council of Women successfully lobbied for the establishment of a Women's Court staffed by women magistrates for women offenders.³ Some male defense lawyers were very unhappy with this development. Searching for a way to attack the new Women's Court, some claimed that the appointment of women magistrates was illegal because under English common law, married women did not have the "legal capacities" of men. The theory was that because women did not have the legal capacity to vote under English common law, and because English law had been exported to Canada during the colonial period, women did not have the legal capacity to hold public office in Alberta.⁴

Fortunately, the Alberta Supreme Court rejected this position in *R. v. Cyr* in 1917.⁵ However, women activists, including Emily Murphy, realized that until the highest courts had ruled on women's legal status under the constitution, the issue could be raised over and over, possibly with disastrous results. With the help of her brothers, she discovered that any five Canadians could bring a reference to the Supreme Court of Canada in relation to the Constitution, and, after choosing Nellie McClung, Henrietta Edwards, Irene Parlby, and Louis McKinney to join her, they even managed to convince the Department of Justice to pay their legal fees.⁶

The Supreme Court of Canada ruled against them, but a further appeal to the Privy Council resulted in the ruling that women were "persons" within the meaning of the constitution. The court concluded that women's civil disabilities under English law should not automatically be read into Canadian law, and, invoking an image that has vitalized constitutional thinking since then, reasoned that the constitution of Canada was a "living tree" that had been planted in Canadian soil, to take root and grow in accordance with the specificities of Canadian culture.

The "Persons" case has been profoundly important to women and to all historically disadvantaged groups in Canada for two reasons. First, it represented

³ The Council had proposed that women offenders be tried in a special court presided over by women magistrates because members of the Council had been prevented from attending the trials of women charged with prostitution for fear that they might hear things not "fit for their ears". See Christine Mander, *Emily Murphy: Rebel* (Toronto: Simon & Pierre, 1985) at 12-13.

⁴ See *Bersford-Hope v. Lady Sandhurst* (1889) 23 Q.B.D. 79, 83 applying *Chorlton v. Lings* L.R. 4 C.P. 374 in which an English court ruled that even though some classes of women in England had had voting rights under customary laws, they no longer had that right in the 1800s.

⁵ [1917] Alta. L. Rep. 321.

⁶ It is important to note that Emily Murphy could not have initiated this process if she had not been significantly privileged by race, class, heterosexual privilege, and family affiliation. For an excellent analysis of Murphy's homophobia, ablism, racism, and middle-class moralism, see A. Acorn, *Snapshots Then and Now: Feminism and the Law in Alberta* (1996), 35 Alta. L. Rev. 140.

a judicial pronouncement at the highest level that age-old legal incapacities based on marriage or sex were not necessarily binding for all time. On a pragmatic level, it ensured that women had the legal capacity to hold public office in Canada, and it opened the door to the extension of other elements of full legal personality to married women as well. Second, the Privy Council treated this issue of civil or legal capacity, which had originally been fashioned by courts, as being clearly within the purview of the judiciary. This emphasizes that courts clearly have jurisdiction to make and to ~~unmake~~ limitations on civil status.⁷

II. Why do Concepts of "Legal Personality" Matter?

"Legal personhood" or "civil capacity" has been used to regulate participation in the state or civil society for almost as long as written law codes have been used to regulate human conduct — some 4500 years.⁸ Without civil status ("legal personhood" or "legal personality"), people cannot access the legal process, but merely exist in the shadows of the law, subject to the whims of anyone who has more personal power, or who can invoke the power of the state to back up them up.

Under Roman civil law, which is where the concept of legal "persons" or "citizens" crystallized, legal personality was classically defined as consisting of the following elements:

participation rights: the right to enter the state and to be recognized as a citizen or as an individual;

public rights: the right to invoke state protection from violence, the right to hold public office, and the right to share in the benefits and functions provided by the state;

juridical rights: the right to sue or be sued, the right to testify as a witness in legal proceedings, and the right to sit on a jury;

private law rights: the right to own property, enter into contracts, marry, inherit and bequeath property, and have custody of children.⁹

⁷ There is a long line of precedent for this judicial role. In the 1810s, legal rulings rendered slavery inoperable in Lower Canada, New Brunswick, and Nova Scotia.

⁸ See, for example, Urukagina's Code (Sumer, c. 2350 B.C.E.) and Ur-Nammu Lawcode (Ur, c. 2050 B.C.E.), both of which are described in S.N. Kramer, *The Sumerians: Their History, Culture, and Character* (Chicago: University of Chicago Press, 1963); Lipit-Ishtar Code (Sumer, c. 2000 B.C.E.), discussed in S.N. Kramer, trans., "The Lipit-Ishtar Lawcode," in *Ancient Near Eastern Texts Relating to the Old Testament*, ed. J.B. Pritchard (Princeton, N.J.: Princeton University Press, 1955, 2d ed.) at 159-161; Laws of Eshnunna (Ammurrite state, c. 1760 B.C.E.), found in A. Goetze, trans., "The Laws of Eshnunna," in J.B. Pritchard, ed., *Ancient Near Eastern Texts Relating to the Old Testament* (Princeton, N.J.: Princeton University Press, 1955, 2d. ed.) at 161-63; Hammurabi Code (Babylon, c. 1750 B.C.E.) and Assyrian Code (Assyria, c. 1300 B.C.E.), in E.M. MacDonald, *The Position of Women as Reflected in the Semitic Codes of Law* (Toronto: University of Toronto Press, 1931).

⁹ This tabulation is based on my reading of Roman civil law at successive stages of development. Not all citizens enjoyed all of these rights at all times; "public morality," for example, was under the control of the censors at key points in Roman history. But see generally Ch. Letourneau, "Slavery in Rome," in *Property: Its Origin and Development* (London: Walter Scott Ltd., 1892) at 272-75; M. Kaser, "The Legal Position of Slaves," in

This concept of "legal persons" and "non-persons" was of course not unique to Roman civil law. Denial of some of these elements of civil status can be traced back to the first recorded law codes in the middle east, and were almost fully present in the Code of Hammu'rabi.

The classical notion of "civil status" or "legal personality" has remained completely central to hierarchical legal cultures since the end of the Roman empire in the 300s C.E. It was perfected long before the Anglo-Normans in England decided to use it to exclude women from the essentially military political structures established after the Norman Conquest, and it has been deployed historically by European states as a legal mechanism to reinforce social control. Thus these elements of "civil status" were used by the Visigoths in the "dark ages" to define the absolute lack of legal rights of Jewish persons, setting the stage for the Inquisition¹⁰; they were used to define the status of slaves in the southern United States¹¹; they have been used by European colonialists to control indigenous peoples on other continents¹²; and they were used in the early stages of the Third Reich in Germany to eliminate potential legal barriers to the Holocaust.¹³

It is worth noting that not every culture developed in this vein. Before the Norman Conquest, English culture in some areas was more egalitarian. Under some Anglo-Saxon customary laws, women had no special legal disabilities, but had the same legal capacities to own property or to hold public office. The same thing could be said about other legal cultures around the globe and throughout history, ranging from the customary laws of many indigenous cultures in North America to those in Africa, the Antipodes, South America, Europe, and Asia. However, in England, the Normans displaced the egalitarian Anglo-Saxon culture and replaced it with military feudal structures designed to maintain tight control over this newly conquered territory. In order to concentrate ownership of property and the management of the entire state in exclusively male hands, post-Norman lawmakers reached back into Roman civil law for legal structures that would justify excluding women, children, and the historic owners of the land from ownership under the Norman kings.

Roman Private Law, trans. R. Dannenbring (Durban: Butterworths, 1965) at 69-71; A. Watson, "Family Law," in *The Law of the Ancient Romans* (Dallas: Southern Methodist Univ. Press, 1970) at 32-39, for discussions of these elements in relation to the categories of "slaves" and women.

¹⁰ See generally S.P. Scott, trans., *The Visigothic Code* (Boston: Boston Book Co., 1910), Titles II and III; P.D. King, *Law and Society in the Visigothic Kingdom* (Cambridge: Cambridge University Press, 1972) at 131, 143.

¹¹ See Bardolph, *Civil Rights Record*. Cited at note 21.

¹² See R.H. Bartlett, "Parallels in Aboriginal Land Policy in Canada and South Africa" (1988), 4 Canadian Native Law Reporter 1-35, for a detailed comparison between these two sets of apartheid laws.

¹³ The various legal provisions of the Third Reich in Germany in the 1930s and 1940s, such as *Reich Citizenship Law* (September 15, 1935), as well as other documentation can be found in J. Noakes and G. Pridham, eds., *Nazism: A History in Documents and Eyewitness Accounts, 1919-1945* (New York: Stocken Books, 1983 trans.).

Thus the first legal treatise published in England contained the maxim that was later reiterated by Blackstone and other influential common law commentators: "Husband and wife were one person, and that person was the husband".¹⁴ Commentators also read into English law the main elements of the doctrine of coverture, or the legal disability of married women, including the prohibition on ownership of property by married women, even when her husband had acquired the property from her and had died before her.¹⁵

As English law evolved after the Norman conquest, English courts read into the common law relating to women all of the elements of civil incapacity that had crystallized in Roman civil law: Women thus could not own or administer their own property, enter into contracts, sue or be sued, sit on juries, testify in legal proceedings, divorce, receive custody of their own children, or establish their own domicile.¹⁶

"Legal personhood" still matters in Canadian jurisprudence because classification of people as "persons" in law can be used to identify those people and entities that are accorded "juridical existence" — that have the bare ability to "act" in law.

This is not a trivial matter. No human being or artificial entity can act, can function, without "legal capacity". Thus the *Alberta Business Corporations Act*, for example, stipulates, as do all other corporate statutes since the famous House of Lords decision in *Salomon v. Salomon*¹⁷, that "a corporation has the capacity and...rights, powers and privileges of a natural person".¹⁸ No fewer than 22 other Alberta statutes declare various professional bodies, crown corporations, and regulatory agencies to have "all the rights, powers and privileges of a natural person",¹⁹ for if they did not, those entities would not be

¹⁴ R. de Glanvill, VII *Tractatus de legibus* [*Treatise on Laws*] at 5. Glanvill died in 1190.

¹⁵ The wife's right of inheritance was limited to any marriage-gifts that had been made to the husband and wife, and consisted merely of a life estate in one-third of any such property. The husband received a life estate in the whole of any property that originated with his wife's line, and came to be known as "curtesy" because he received it not as the result of customary law, but "curtesy of England".

¹⁶ See J.H. Baker, "*Baron et Feme: Unity of Person*," in *An Introduction to English Legal History* (London: Butterworths, 1971) at 258-66. For discussions of these elements in Roman civil law in relation to women and slaves, see generally CH. Letourneau, "Slavery in Rome," in *Property: Its Origin and Development* (London: Walter Scott Ltd., 1892) at 272-75.

¹⁷ [1897] A.C. 22 (H.L.).

¹⁸ S.A., c. B-15, s. 15(1).

¹⁹ Eg., the Optometry Profession Act, S.A., c. O-10, s. 5(2) stipulates that the Optometry Association has all the "rights, powers and privileges of a natural person." See also Professional and Occupational Associations Registration Act, S.A., c. P-18.5, s. 11(1), etc. Other statutes deem the Crown of Alberta to pay various taxes "as if it were a natural person". See, for example, Hotel Room Tax Act, S.A., c. H-11.5, s. 2(3).

able to engage in the ordinary transactions expected of functioning businesses or agencies in today's world. The legislation in every other jurisdiction is substantially similar.

I mention the parallel treatment of corporations and other entities here because I think it is important to realize that at the same time that trust companies, dental and optometry associations, regional airport authorities, and the like have been declared to possess **all** the rights, powers and privileges of a natural person, special legislation has been used in Canada to deny Aboriginal peoples, Chinese-Canadians, Japanese-Canadians,²⁰ Catholics, Jews, African slaves,²¹ and women²² many — and sometimes all — the “rights, powers and privileges of a natural person”.²³

The legal definition of “person” has always been and continues to this day to be one of the very most important legal categories operating in Canadian law. As the “Persons” case demonstrated so vividly in 1929, not even constitutional provisions can be drafted without using some nouns to refer to human beings. These terms thus are some of the very most basic building blocks of legal discourse.

III. *Why Still Talk About “Persons” or Civil Status Now?*

Notwithstanding the central role that legal personhood plays in structuring law, there has been a radical shift in the way legal culture has dealt with legally-enforced hierarchies since the “Persons” case was decided. Cultural manifestations such as the “Emily Murphy” heritage minute on television reflect the fairly widespread belief that the struggles for bare legal personality are now relegated to the past, and that the struggle against historical disadvantage has shifted from the search for legal capacity or civil status as a “person” to an attack on social practices described variously as “discrimination” or “inequality”.

This shift is very much the product of the “human rights” movement that was fuelled by reactions to the European Holocaust. So profoundly did the Third

²⁰ See the various statutory amendments and Orders in Council collected in Appendices III through XI of Ken Adachi, *The Enemy That Never Was* (Toronto: McClelland and Stewart, 1979), which ordered the internment of Japanese-Canadian persons during World War II, appropriation of real and personal property, and deportation of Japanese nationals who “manifested their sympathy with or support of Japan” “by making requests for repatriation to Japan and otherwise”.

²¹ See Bardolph, *Civil Rights Record: Black Americans and the Law, 1819-1970* (New York: Thomas Y. Crowell Co., 1970).

²² See “Declaration of Sentiments,” in *The Feminist Papers*, ed. A. Rossi (New York: Bantam Books, 1972) at 415-19.

²³ The notion of “civil disability” also operates to define the capacities of other groups of people as well, such as children, persons with physical, intellectual, or mental characteristics that affect their functioning, or “aliens”. See D.M. da Costa, R.J. Balfour, and E.E. Gillese, eds., “The Anglo-Canadian System of Landholding: A Historical Introduction,” in *Property Law: Cases, Text and Materials* (Toronto: Emond Montgomery, 2d ed., 1990) at 7:33, 8:9-13.

Reich strip Jewish, Polish, non-state, and other people of their civil status, and so brutally was this civil disablement integral to the genocide of these peoples,²⁴ that the international community described these pogroms as violations of fundamental "human dignity".²⁵ In the wake of global reactions against Nazi practices, legislation was enacted in Canada, in the United States, in other countries, and internationally to recognize and protect "human dignity" under the rubric of "human rights," to prevent some private actors as well as states from enacting prejudice against disadvantaged groups in such systematic ways again.

This shift has affected the way "rights" are now described in contemporary laws, but it has not actually affected what rights are still at the centre of concern. The text of any late twentieth-century human rights statute reveals that even though human rights legislation is generally described as having been enacted in order to protect "human dignity," human rights statutes are still fundamentally concerned — at their core — to secure to disadvantaged groups the basic civil capacities that have historically defined legal "personhood." While some people might still quibble over how far concepts of "equality" should be extended, legislatures have agreed that basic civil capacities are crucial to the protection of the "human dignity" that human rights legislation declares to be its concern.

The way this shift has been expressed in contemporary human rights statutes is illustrated by the *Alberta Individual's Rights Protection Act*,²⁶ which is typical of such Canadian legislation. The preamble to the Act declares:

[R]ecognition of the inherent dignity and the equal and inalienable rights of all persons is the foundation of freedom, justice and peace in the world.

[It is] a fundamental principle and...a matter of public policy that all persons are equal in dignity and rights without regard to race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry or place of origin.²⁷

This language undeniably locates the legislation squarely in the mainstream of contemporary human rights legislation, despite its unique name.

The actual terms of the Act reveal, however, that, despite the sweeping general statement of purpose in the preamble, the statute really functions as a "persons" statute. That is, this statute was designed to secure the incidents of legal capacity to those groups that have historically been most vulnerable to their denial. Thus sections 7 and 8 secure equal rights to seek and enter into contracts of employment, meaning that no class of people can be denied access

²⁴ For the laws of the Third Reich that systematically stripped Jewish persons of the incidents of civil capacity, see the documents collected in J. Noakes and G. Pridham, eds., *Nazism: A History in Documents and Eyewitness Accounts, 1919-1945* (New York: Stocken Books, 1983 trans.).

²⁵ For example, the preamble to the San Francisco Charter affirmed the United Nations' "faith in fundamental human rights" and the "dignity and worth of the human person". Quoted in *Re Drummond Wren*, [1945] 4 D.L.R. (Ont. H. Ct.), per Mackay J.

²⁶ S.A., c. I-2.

²⁷ *Ibid.* section 1.

to wage labour markets, and section 6 ensures that women who have the legal right to work also have the right to claim equal wages. Section 4 secures the right to enter into tenancy contracts, protecting the right to accommodation; section 2 prohibits public announcements of intention to exclude classes of people; section 3 secures equal access to and enjoyment of “[public] accommodation, services or facilities”. Section 10 makes it illegal to exclude people from trade unions or similar organizations on the basis of enumerated grounds.

Going back to the elements of legal capacity that crystallized in Roman civil law, the Act thus can be seen as completing the restoration of civil capacities that had been denied historically to disadvantaged groups. Married women’s property legislation, voting laws, family law, the “Persons” case, and interpretation statutes had secured many of the juridical and participation rights previously denied to women, racialized persons, members of religious groups, and married women in Alberta. The Act — like all the other human rights statutes in Canada — completed the restoration of full civil status to members of these groups by securing the remaining public rights (such as the right to meet in public, speak, attend entertainment, share in public resources) and private law rights (such as the capacity to rent property and enter into contracts) associated with full legal personhood.

The shift of emphasis from basic concepts of “legal capacity” to the seemingly wider concern with human dignity and equality in human rights law is generally a positive development. However, it is troubling that this shift appears to have obscured the fact that “equality” guarantees originally meant, and still mean, that it is illegal to use civil incapacities to deprive some groups of people of access to the legal process. A private employer’s refusal to hire a person because of gender, for example, has the same effect as judicial doctrine that says that women do not have the legal capacity to enter into contracts, including employment contracts. Refusing to permit a racialized person enter a movie theatre has the same effect as statutes that deprive persons of colour from freedom of movement, or that restrict them to segregated facilities, when there are no civil remedies for such refusal.

The deep connections between the incidents of legal personality and modernist “rights” discourse have not gone entirely unnoticed by the Canadian judiciary. But where these connections have played a role in Charter jurisprudence, this notice has been fairly summary, even oblique. In several leading Charter cases, the Supreme Court of Canada has used the term “personhood” to refer to the bundle of civil capacities that construct legal personality.²⁸ In two such cases, the Supreme Court has commented on some

²⁸ In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 (S.C.C.), McIntyre J. stated that “the characteristic of citizenship is one typically not within the control of the individual”; this comment was later quoted with approval in *A.-G. Canada v. Ward*, [1993] 2 S.C.R. 689 (S.C.C.). In *R. v. Zundel*, [1992] 2 S.C.R. 731 (S.C.C.), Cory and Iacobucci JJ., who dissented from the vacation of Zundel’s conviction for publishing Holocaust denial material, argued that “The government’s denial of personhood by denying legal recourse may be even more painful than the initial act of hatred”.

of the obligations owed by states to their citizens, confirming at least in *dicta* that states owe their citizens protection from illegal violence²⁹ and the right to remain within the territory of the state.³⁰ However, with the exception of a few dissenting section 15(1) opinions discussed below, the courts have stopped short of directly confirming the fact that neither statutory nor constitutional human rights guarantees have much meaning if they do not at least secure the incidents of full legal personality to members of historically disadvantaged groups.

Thus I think it is still important to talk about legal personhood or civil capacity, for if Canadian lawyers and judges lose the ability to see how tolerating differential legal treatment actually impairs legal personality, then human rights laws — including the *Charter of Rights* — will not only obscure what is really going on, but will even become the means by which civil incapacities continue to be given legal effect.

Unfortunately, this is exactly what seems to be happening in recent Charter jurisprudence. In recent cases relating to the basic legal capacities of women and Aboriginal women in Canada, the courts have applied the Charter not to strike down provisions that impair civil status, but to uphold them.

IV. *Denial of Women's Full Civil Status*

Many women believed that the long search for “equality” that had grown out of winning the vote and then the “Persons” case had come to a successful conclusion when the equality provisions of the *Charter of Rights* came into effect in 1985. After all, sections 15 and 28 of the *Charter of Rights* are the Canadian version of the *Equal Rights Amendment* (ERA) that women in the United States had sought for so long. Even better, the equality guarantees in the Charter are far more detailed and expansive than the ERA would have been, having been drafted to prevent judges from using the kind of reasoning that United States judges so often used to narrow the impact of the equal protection clause of the fourteenth amendment to the United States Constitution. The detailed and comprehensive provisions of the Charter have given Canadian women more hope than women in most other countries have ever had.

²⁹ In *Ward*, the Court stated that there is a presumption that a state will protect a national from violence, and that Convention Refugee status will be denied unless the claimant can demonstrate that this duty has not been met. Thus it can be said that one of the incidents of legal personhood is the right to be protected by the state from violence.

³⁰ In *United States v. Cotroni*, [1989] 1 S.C.R. 1469 (S.C.C.), the Supreme Court confirmed that denial of the right to remain physically within the territory of Canada violated section 6 of the Charter, but was subject to demonstrably justifiable in the case of extradition treaties. In *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.), and *Hunt v. T & Nplc*, [1993] 4 S.C.R. 289 (S.C.C.), the Court discussed “comity” in the context of the nature of “nationhood” and “citizenship.”

Why is it, then, that despite the expansive language of section 15(1) of the Charter, all of the Charter equality challenges relating to the legal status of women that have reached the Supreme Court of Canada have failed?

A. *Symes v. The Queen*

In *The Queen v. Symes*,³¹ the Supreme Court of Canada ruled that interpreting the business expense deduction provisions of the *Income Tax Act* to exclude child care expenses did not violate section 15(1) of the Charter. This case did not squarely challenge the constitutionality of section 63 of the *Income Tax Act*, which places several big limits on the deductibility of child care expenses,³² but it did challenge the interpretation of the deduction for business expenses under the Act.

By forcing women who incur child care expenses to deduct those expenses under section 63 of the Act or forego the deduction, the *Symes* decision clearly perpetuates the economic disadvantage that women with children face when they decide whether to work for wages or work in the home without pay. As the result of the *Symes* decision, women have two very unattractive choices.

On the one hand, women with non-deductible child care expenses can choose to receive lower net after-tax incomes than workers who have no child care expenses, or who can deduct them fully. It is no accident that the present structure of section 63 gives full deductibility to women with low incomes and low child care expenses — women who really “have” to work — at the same time that it denies full deductibility to women whose husbands can “afford” to support them and the children, or to women with large expenses relative to their incomes.³³ This effect is aggravated by additional provisions that are designed to force the lower-income spouse to claim child care expenses — even if that spouse does not have enough income to completely absorb the expenses, even if the actual financial cost of the child care expenses was really borne by the spouse with the higher income, and even if the expenses were actually incurred to enable the spouse with the higher income to work. These provisions intensify the disparity between the net after-tax incomes received by women with children and those women who do not have children. They also intensify the disparity in after-tax incomes received by women with children and men with children.

On the other hand, women with non-deductible child care expenses can choose instead to work in the home without pay. This increases the husband's net after-tax income by giving him the economic benefit of “free” child care as well

³¹ 89 DTC 5243 (F.C.T.D.), rev'd [1993] 4 S.C.R. 695, 91 DTC 5397.

³² Section 63 limits the amount that can be deducted for each child and for each family, and it also forces the spouse with the lowest income to claim the deduction, which reduces the value of the deduction by the difference between the two spouses' marginal tax rates.

³³ See K.A. Lahey, “Tax Developments: The 1995 Term” (1996), 7 S.C.L.R. (2d) 381 for an extended discussion of this point.

as the financial benefit of the dependent spouse credit which he could not receive when his wife was working.³⁴

In other words, the structure of the child care expenses deduction system which Symes sought to circumvent has been found to be constitutionally permissible, even though it clearly impairs women's incomes, and even though it clearly links women's tax position to their husbands' tax position. Both of these effects grew out of the ancient belief that women are not economically autonomous, that during marriage they and their husband are "one". By denying women deductions for expenses that they did actually incur, and by forcing many women to claim expenses that they did not actually pay, section 63 of the *Income Tax Act* denies women's full legal personality. Women are still treated as if they were legally and economically merged with their husbands for purposes of the administration of the child care expense deduction. Even more seriously, this statutory merger is designed to place *de facto* limits on the value of the child care deduction when women are married to or cohabiting with a male partner.

B. *The Queen v. Thibaudeau*

The decision in *The Queen v. Thibaudeau*³⁵ also gives contemporary expression to the judicial doctrine of coverture. Suzanne Thibaudeau challenged section 56 of the *Income Tax Act*, which treats child support payments received by custodial parents as the income of the parent who receives support payments. This provision violates the fundamental nature of "income" as defined by the courts, because it thereby takes the amounts paid as support out of the husband's taxable income and shifts his tax liability on that income to his wife. This mechanism itself violates women's legal and economic autonomy by imputing one legal person's income to another person. This is a mid-twentieth-century variant of the doctrine of coverture, adopted at a time when the only parliamentary concern was with men's economic status and there were almost no women in parliament to object to it.³⁶

Challenging this statutory merger with her former husband, Suzanne Thibaudeau refused to pay tax on the child support payments and instead filed income tax returns for her children in which she treated them as having received those support payments. When Revenue Canada insisted on including the support payments in her income, she argued that this violated her equality rights because it shifted her husband's income tax liability on that income to her. She

³⁴ It is true that the wife would have received her own credit if she had had income, but by shifting the credit to the husband and allowing him to claim it even if the wife has no positive income flow, the husband's net after-tax income — which he owns absolutely and solely — increases while his wife has literally nothing to show for her work except an inchoate right to support and division of family property should they separate.

³⁵ 92 DTC 2111 (English), 92 DTC 2098 (French) (T.C.C.), rev'd 94 DTC 6230 (F.C.A.), rev'd 95 DTC 5273 (S.C.C.).

³⁶ See Lahey, "Tax Developments", *supra* note 33.

also argued that it actually impaired her ability to support the children because her after-tax support payments were far smaller than the amounts the court had found she needed to support her children at her income level.

When hearing this Charter challenge, the Supreme Court of Canada refused to look at how section 56 of the *Income Tax Act* alone affected Thibaudeau alone. Instead, the Court framed the legal issue as how both sections 56 and 60 of the *Income Tax Act* together affected Thibaudeau and her former husband *as a unit*. The court concluded that when the issue was looked at from this perspective, section 56 did not burden anyone — that it was “really” just part of an overall legislative scheme which factually gave this former couple a tax benefit.

Factually the court was right in saying that sections 56 and 60 together generated a net tax benefit in the *Thibaudeau* situation. But factually they made one huge error: They equated Suzanne Thibaudeau’s interest in her husband’s net after-tax benefit with her husband’s interest. That is, they treated this formerly married and now divorced single mother as remaining financially merged with her former husband — a member of a legal unit called the “former couple” — and thereby denied her legal personality.³⁷

The *Thibaudeau* case did exactly what the Supreme Court of Canada would have done in 1928 had the “Persons” Case arisen under the *Income Tax Act* instead of under the constitutional provisions relating to eligibility to sit in the Senate: They treated Suzanne Thibaudeau as a non-person, as a mere economic appendage of her husband, as being legally merged with and indistinguishable from her husband — even after divorce. Because of this decision, the doctrine of coverture clearly lives on in Canadian constitutional law, and appears to extend even further now to merge women with their husbands even after divorce.³⁸

³⁷ This analysis is also deeply contradictory. If Thibaudeau and her former husband had still been married, he would have not been able to deduct anything for the child support payments beyond the small credits for dependent children that were in effect at the time. So the court’s analysis is out of kilter with tax policy analysis as well as with social policy relating to married women.

³⁸ Justice Gonthier wrote:

“The group contemplated by the legislation consists of separated or divorced couples.... That is not the group to which the respondent claims to belong: she claims she is a member of the smaller group of custodial parents having some financial self-sufficiency and consequently receiving maintenance solely for the benefit of their children. *** [S]o far as the children of the family unit are concerned, ... **separated or divorced parents still form an entity**....” 95 DTC at 5285, La Forest, J. concurring [emphasis added].

Justice Cory wrote: “The fact that one member of the unit might derive a greater benefit from the legislation than the other does not, in and of itself, trigger a s. 15 violation” because sections 56 and 60 conferred a net tax benefit on the “**post-divorce ‘family unit’**.” 95 DTC at 5275, Sopinka, J. concurring, 95 DTC at 5274. Remember that section 60 was not even mentioned in any of the pleadings, and constitutional notice as to section 60 had never even been filed by any of the parties.

The Court did not accidentally reach this result simply because they did not understand what they were doing. Both Justices McLachlin and L'Heureux-Dubé pointed out in dissenting opinions that the government's position resurrected the age-old civil disabilities of women and the exclusion of women from the status of "persons" in Canadian law.

Justice McLachlin cautioned that the majority had made a serious error because section 15(1) of the Charter gives *individuals* — not "the fractured family" — the right to equal treatment under law. As she wrote,

[Section] 15(1) is designed to protect *individuals* from unequal treatment. Its opening words state: 'Every *individual* is equal before and under the law and has the right to the equal protection and benefit of the law'. Where unequal treatment of one individual as compared with another is established, it is no answer to the inequality to say that a social unit of which the individual is a member has, viewed globally, been fairly treated.³⁹

Justice L'Heureux-Dubé made the same point. She concluded that the government was constitutionally barred from treating "the couple" as the unit of analysis. She made this point in terms of both the legal and social realities of divorce and in terms of constitutional history:

[N]otwithstanding both parents' continuing mutual obligation to support the children of the relationship, it is unrealistic to assume that they continue to function as a single unit even after they have separated or divorced. [T]he ITA, itself, ceases to treat divorced couples, and separated couples who were cohabiting, as a single economic or taxation unit in virtually every other respect....

Defining the unit of analysis as the "couple" is, in my view, inconsistent with the purpose and spirit of s. 15. There is no doubt, for instance, that an unequal burden arose in the old Marital Property Acts of the nineteenth century, under which, upon marriage, the wife's assets automatically became those of the man. Yet if the only unit of analysis were taken to be the "couple", we would be precluded from looking to the effects of these provisions on each member of the couple, and we would have to conclude that they did not violate s. 15 of the Charter.

[A]lthough the purpose of the impugned legislation may indeed be to confer net tax savings upon couples, it does not follow that its effect is experienced equally by both members of the couple. [T]he effects on separated or divorced custodial parents must be compared with the effects on separated or divorced non-custodial parents.⁴⁰

Although the federal government has now repealed sections 56 and 60 of the *Income Tax Act* effective May 1, 1997, the government still holds the constitutional power to submerge women's legal and economic identities with those of their husbands or former husbands whenever it wishes, so long as there is a purported "benefit" to the "unit" in some situations.

³⁹ 95 DTC at 5294 (emphasis added).

⁴⁰ 95 DTC at 5303.

C. Poulter, Collins

The *Symes* and *Thibaudeau* cases are just the tip of the iceberg. As deficit-reduction politics become more widespread, the "marital unit" and "opposite-sex cohabitants" are becoming almost universal units of social and economic policy. Social security, social assistance, unemployment insurance benefits, tax benefits, and almost every other direct and indirect government expenditure programme has become conditioned not on the needs of the individual, but on the needs of the "married couple," "cohabitants," or the "family unit."

This regression in fiscal policy generally benefits men as the expense of women. Benefit payments that reflect the needs of two adults will be larger than those based on individual needs, placing larger amounts of money under de facto under male control more often than not. Women pay a high price for any increases in overall benefit levels, because the use of the couple as the benefit unit often limits the benefits women had been receiving when they were treated as *feme sole*.

Take for example the recent decision of the Tax Court of Canada in *Poulter v. M.N.R.*⁴¹ In that case, a single mother who had always received the child tax benefit became deemed to be a "spouse" in 1993 when the definition of "spouse" in the *Income Tax Act* was amended to include opposite-sex cohabitants.⁴² Despite evidence that the taxpayer's male affiliate did not play any parental role at all, neither economically, emotionally, nor socially, the Tax Court ruled that the taxpayer had been properly denied the benefit. By a stroke of the Minister of Finance's pen, Ms. Poulter lost her economic and *legal* status as an individual, and thereby lost important social assistance payments that are delivered to single parents through the income tax system.

A variation on the same theme was litigated in *Collins v. M.N.R.*⁴³ In that case, the wife's income was considerably higher than her husband's. The family allowance payments she received were deemed to be her income and were taxed at her marginal rate of 26 percent. However, under section 63 of *Income Tax Act*, her husband was required to treat her child care expenses as his own because his income was lower than hers. Thus the financial value of the child care deduction was reduced from 26 percent of the amount spent to only 17 percent of that amount spent.⁴⁴ Both spouses challenged these assessments under the Charter. The court rejected both challenges, ruling that neither provision discriminated against the taxpayers because any disparate impact generated by either provision

⁴¹ [1995] T.C.J. No. 228 (T.C.C.).

⁴² *Income Tax Act*, section 252(4)(a), added by S.C. 1993, c. 24, section 140(3), applicable after 1992. The 1993 amendments included non-married opposite-sex partners in the definition of "spouse" if they parented a child or had cohabited for at least twelve months.

⁴³ [1994] T.C.J. No. 929 (T.C.C.).

⁴⁴ When the provincial layer of tax liability is taken into account, those figures are closer to 26 percent and 41 percent.

related merely to “family status,” which is not an enumerated ground under the Charter.⁴⁵

The number of provisions in federal and provincial laws that produce similar results grows each time direct and indirect government benefits are tied to marriage or opposite-sex cohabitation. This trend is accelerating every year, and every time a new provision comes into effect, it rolls the clock back on the “Persons” case even further.

VI. *Race and Civil Status*

The legal capacities of racialized people appear to be particularly vulnerable in Canadian legal discourse. The most pervasive and systematic erasure of legal personality continues to be found in the *Indian Act*, but it can also be found in seemingly unrelated structures such as the Foreign Domestic Worker Program managed by Immigration Canada and in immigration law more generally.

Historically justified by the necessity of “taking care” of indigenous peoples,⁴⁶ the *Indian Act*⁴⁷ enacts the federal government’s decision to act as “trustee” of all the legal capacities of Aboriginal people in Canada. This has reduced Aboriginal people to a status that is identical to that associated with slavery, apartheid,⁴⁸ married women under English common law, infants, and incompetent persons.

The *Indian Act* provides that no property interest, contract, transmission of interests, or other function on reserves has any legal significance unless and until it is authorized by the Minister for Indian Affairs and comports with the terms of the Act. Status as an “Indian” is of course also regulated, and has notoriously withheld even statutory status from Aboriginal women who married non-Indian men.

Since the enactment of Bill C-31 and the proliferation of settlements and court decisions in relation to native land claims, it has been perhaps perceived that Aboriginal persons are making considerable headway in obtaining full civil capacities. Nothing could be further from the truth. Not only does Bill C-31 fail to completely solve the problem created by generations of disenfranchisement on the basis of marriage,⁴⁹ but the *Indian Act* continues to impose on women

⁴⁵ This must be an error, since “family status” was how married women’s civil disabilities were framed at common law.

⁴⁶ See R.G. Moore, J. Leslie, and R. Maguire, “The Indian Department: 1755-1830,” in *The Historical Development of the Indian Act* (Ottawa: Indian and Northern Affairs Treaties and Historical Research Centre, 1978), vol. 2 at 60-62.

⁴⁷ R.S.C. 1985, c. I-5.

⁴⁸ See R.H. Bartlett, “Parallels in Aboriginal Land Policy in Canada and South Africa” (1988), 4 Canadian Native Law Reporter 1-35.

⁴⁹ See V. Kirkness, “Emerging Native Woman” (1987-1988), 2 Canadian Journal of Women and the Law 408 for a discussion of the history of the notorious section 12(1)(b) of the *Indian Act* and the discriminatory impact of Bill C-31. Native women in Canada have always received fewer rights far later than all other women in Canada. Native women did

who are governed by its terms the same disabilities in relation to property ownership that married women's property legislation began to eradicate over a century ago. In addition, women who are governed by the *Indian Act* are precluded from taking advantage of provincial married women's property legislation, because the *Indian Act* suspends the civil status of status Indian women. Thus they cannot seek in provincial court that which they have been denied by the terms of the *Indian Act* either.

As a result, in *Derrickson v. Derrickson*,⁵⁰ *Paul v. Paul*,⁵¹ and *Sampson v. Gosnell Estate*,⁵² provincial courts have consistently ruled that Aboriginal women who were denied claims to property located on reserves because of the application of the *Indian Act* had no remedies under provincial law precisely because of their status as "Indians". In some cases, the property in question had been, before they married, their sole property through inheritance before marriage. Yet the fact of their marriage nullified their interest in that land, and the silence in the *Indian Act* in relation to division of marital property upon separation or divorce left them with no remedies anywhere.

Although the federal government is under a constitutional duty to meet its obligations to Aboriginal peoples without discrimination, male domination of Indian bands established under the *Indian Act* has ensured that Aboriginal women have little to no access to formal and informal political processes. During the negotiations leading to the national referendum on the Charlottetown Accord, the federal government refused to extend funding to the Native Women's Association of Canada (NWAC) on an equal footing with other non-governmental Aboriginal public interest groups. When NWAC challenged this denial of access and funding under the Charter equality guarantees, the Supreme Court of Canada concluded that even though the other Aboriginal groups were indeed male dominated, they did not completely disagree with the political goal of equality for Aboriginal women. Thus the federal funding formula did not violate NWAC's equality rights.⁵³

The *Indian Act* is not the only race-based statute in Canada that limits or nullifies important incidents of legal personality. The foreign domestic worker regulations under the Immigration Act⁵⁴ require people who come to Canada under these regulations — people who are preponderantly women of colour — to contribute fully to the CPP and EI programmes, but deny them the right to

not attain the federal vote until 1960, nearly three decades after the Privy Council decision. *Canada Elections Act*, S.C. 1960, 8-9 Elizabeth II, c. 39, s. 14(2). See also D.N. Paul, *We Were Not the Savages: A Micmac Perspective on the Collision of European and Aboriginal Civilizations* (Nimbus Publishing Ltd.) at 305.

⁵⁰ [1984] 2 W.W.R. 754 (B.C.C.A.), [1986] 1 S.C.R. 285.

⁵¹ [1986] 1 S.C.R. 306.

⁵² [1989] B.C.J. No. 426 (B.C.C.A.).

⁵³ *Native Women's Assn. of Canada v. Canada* (1994), 119 D.L.R. (4th) 224, per Sopinka J., McLachlin and L'Heureux-Dubé JJ. concurring as to result.

⁵⁴ S.C. 1944, c. 31.

claim benefits under those programmes in the event of retirement or unemployment because the events which trigger eligibility under those statutes are also the events that terminate their rights to continue living in Canada.⁵⁵ This programme also makes it almost impossible for women who come to Canada as foreign domestic workers to bring their spouses or children — employers do not want live-in families; they merely want live-in domestic workers — thus infringing the all-important civil capacity of legal recognition of family relationships. The status of foreign domestic workers has been likened to that of indentured servants, but even that charge has not helped convince the federal government to give domestic workers the same immigration status as other high-demand workers.⁵⁶

The vulnerability of racialized people to denial of their fundamental legal capacities is not limited to the foreign domestic worker program or the *Indian Act*. Recently, an Ontario court ruled quashed a deportation order against a woman of colour from Grenada on the basis that it would infringe the rights of her young children, citizens by birth in Canada, of their rights as citizens of Canada to remain in Canada.⁵⁷ Instead of acquiescing in this judicial correction of immigration practices, the federal government instead took the opportunity to question whether children born to immigrant mothers who do not have landed immigrant status should receive the same automatic citizenship that all other children born in Canada receive. As the federal immigration Minister stated: “[The ruling] raises a more fundamental issue here and it is the question to give citizenship to children who are born in Canada when their parents are not Canadians.”⁵⁸

VII. *Civil Status and Sexuality*

Until recently, the courts have tended to be as unconcerned with the legal personality of gays and lesbians as they have that of women and raced people. However, beginning with the decisions in *Egan and Nesbit v. The Queen*,⁵⁹ the connection between legal personhood and sexuality has been injected into the constitutional analysis of discrimination on the basis of sexual orientation in the Canadian context. Although the appeal in *Egan and Nesbit* ultimately failed, the

⁵⁵ Andrea Timoll discusses this programme from this perspective in *The Erasure of Women of Colour in Canadian Jurisprudence* (Kingston: Queen's University, 1995).

⁵⁶ For an excellent and detailed study of this area of immigration law, see A.B. Bakan and D. Stasiulis, *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto: University of Toronto Press, 1997).

⁵⁷ *Francis v. Canada (Minister of Citizenship and Immigration)*, [1998] O.J. No 1791 (Ont. Ct. Gen Div.) (QL), per McNeely J.

⁵⁸ B. Cheadle, “Robillard wants to revisit automatic citizenship for newborns” *Canadian Press* (Ottawa) (May 8, 1998).

⁵⁹ [1993] 3 F.C. 401, 103 D.L.R. (4th), aff'd [1992] 1 F.C. 687, 87 D.L.R. (4th) 320 (F.C.T.D.).

United States Supreme Court in *Romer v. Evans*⁶⁰ and the Canadian Supreme Court in *Vriend v. Alberta*⁶¹ both relied explicitly on a theory of constitutional personhood in explaining why human rights legislative that did not prohibit discrimination on the basis of sexual orientation violated the constitutional right to equal protection of the law. These decisions suggest that these courts have begun to acknowledge the link between human rights and bare legal capacity.

A. *Egan and Nesbit v. The Queen*

In *Egan and Nesbit v. The Queen*, the Supreme Court of Canada unquestionably considered gay men to be “individuals” or “persons” in constitutional law. But by going on to rule that gay men who had cohabited for over twenty years could not receive the spousal allowance under the *Old Age Security Act* in circumstances in which opposite-sex couples would have received it, the court refused to rule that gay men have the legal capacity to form legally-recognized relationships.⁶² Thus they can only form *de facto* relationships. To put this denial of civil status into context, this ruling has done the same thing to gay couples that the old “miscegenation” statutes of the United States did to inter-racial couples. Those statutes were eventually declared to be unconstitutional by the United States Supreme Court in 1967.⁶³

At least by the time the *Egan and Nesbit* case reached the Federal Court of Appeal, it was clear that denial of the spousal allowance did raise fundamental legal capacities. In his dissenting opinion in that court, Justice Linden made direct reference to the “Persons” case in trying to persuade the majority of that court to give *Egan and Nesbit*’s relationship the same status as short-term opposite-sex cohabitation:

A brief look back into legal history reveals shameful instances in which groups we now consider to be entitled to protection from discrimination have been excluded from constitutional recognition. For instance, in 1856 the United States Supreme Court ruled in *Dred Scott v. Sandford* (1856), 19 How. 393, at p. 404, that individuals whose ancestors were brought to the United States from Africa and sold as slaves were not *citizens* under the Constitution.

Chief Justice Tanney stated:

The words “*people* of the United States” and “*citizens*” are synonymous terms, and mean the same thing...The question before us is, whether the class of persons

⁶⁰ [1996] W.L. 262293, [1996] U.S. LEXIS 3245 (U.S.S.C., May 20, 1996), per Kennedy J., with Stevens, O’Connor, Souter, Ginsburg, and Breyer JJ., Scalia J. dissenting with Rehnquist C.J. and Thomas J.

⁶¹ [1994] 6 W.W.R. 414 (Alta. Q.B.) (February 23, 1996), rev’d [1996] 132 D.L.R. (4th) 595 (Alta. C.A.), reinstated [1998] S.C.J. No. 29 (S.C.C.), per Lamer C.J.

⁶² See also *The Queen v. Mossop*, [1993] 1 S.C.R. 554, in which the court ruled that a gay man was not denied rights relating to “family status” because the denial was based on sexual orientation.

⁶³ In *Loving v. Virginia*, 388 U.S. 1, 18 L.Ed. 2d 1010 (1967), per Warren C.J., the Court ruled that race-based “miscegenation” statutes violated the equal protection and due process clauses of the fourteenth amendment to the United States Constitution.

described in the plea of abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

Similarly, in 1928 the Supreme Court of Canada compared women to "criminals and lunatics and minors" when it ruled that women were not "*qualified persons*" within the meaning of section 24 of the *Constitution Act*, 1867 and therefore could not be appointed to the Senate (Reference as to the meaning of the word "persons" in section 24 of the *British North America Act*, 1867, [1928] S.C.R. 276, rev'd by *Edwards v. A.G. Canada*, [1930] A.C. 124 (P.C.)). Similar shameful examples of indefensible discrimination in the past can be found here and elsewhere in relation to race, religion, nationality, disability, gender, age, common law unions, divorced people, children born outside of marriage and many others.⁶⁴

Justice Linden went on to elaborate on the constitutional significance of the "Persons" case:

One lesson to be learned from these cases is that a decision excluding a group from Charter protection cannot be justified by reference to the discriminatory treatment accorded that group in the past. We must be prepared to admit new grounds of discrimination; if we fail to do so, we perpetuate that discrimination. Certainly that was the view of the Privy Council when it overturned the Supreme Court's infamous ruling in the Persons case. In a passage which continues to guide the interpretation of our Constitution, Lord Sankey L.C. in *Edwards v. A.G. Canada*, supra, at p. 136, issued the following statement:

The *British North America Act* planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada...

Their Lordships do not conceive it to be the duty of this Board — it is certainly not their desire — to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation.

The living tree doctrine applies equally to the *Charter of Rights and Freedoms*. (See *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155). We should, therefore, keep this metaphor clearly in mind when determining whether a ground of discrimination should be treated as an analogous ground for the purposes of subsection 15(1).⁶⁵

The Supreme Court did not consider *Egan and Nesbit* in a vacuum. It considered that appeal together with *Miron v. Trudel*,⁶⁶ in which the court ruled that

⁶⁴ [1993] 3 F.C. at 428-429, dissenting [emphasis added].

⁶⁵ [1993] 3 F.C. at 429.

⁶⁶ [1995] 2 S.C.R. 418.

opposite-sex cohabitants can receive benefits reserved for married couples. In effect, these two rulings have placed a “heterosexuals only” boundary around the entire apparatus of state support to cohabiting couples—including the types of tax benefits given to former husbands in *Thibaudeau*.

B. *Romer v. Evans*

The connection between sexuality and legal personality urged by Justice Linden in *Egan and Nesbit* was finally recognized by a majority of a court in *Romer v. Evans*,⁶⁷ released by the United States Supreme Court in 1996. This case arose out of the adoption of a state constitutional amendment that invalidated provisions that protected the human rights of sexual minorities. Because this constitutional amendment (known as “Amendment 2”) denied lesbians, gays, and bisexuals access to human rights commissions, the Court concluded that this amendment violated the equal protection clause of the fourteenth amendment to the United States Constitution.

Writing for the majority of the Court, Justice Kennedy concluded that Amendment 2 deprived one class of persons of ordinary civil capacities that most people have come to take for granted:

[W]e cannot accept the view that Amendment 2’s prohibition on specific legal protections does no more than deprive homosexuals of special rights. To the contrary, the amendment imposes a *special disability* upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint. *** These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.⁶⁸

He then went on to state that “Equal protection of the laws is not achieved through indiscriminate imposition of inequalities,” that “laws singling out a certain class of citizens for disfavoured legal status or general hardships are...a denial of equal protection of the laws in the most literal sense,”⁶⁹ that the amendment “classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else,” and that “a State cannot so deem a class of persons a stranger to its laws.”⁷⁰

The majority opinion in *Romer v. Evans* is unquestionably grounded in the long line of constitutional decisions that began the slow process of abolishing civil incapacities on this continent. Justice Kennedy opened the majority opinion by reminding the Court that the denial of basic civil capacities was as constitutionally repugnant as segregation and “separate but equal” facilities:

⁶⁷ 116 S. Ct. 1620 (U.S.S.C., 1996), per Kennedy J., with Stevens, O’Connor, Souter, Ginsburg, and Breyer JJ. Scalia J. dissenting with Rehnquist C.J. and Thomas J.

⁶⁸ 116 S.Ct. at 1626-27 (emphasis added).

⁶⁹ 116 S.Ct. at 1628.

⁷⁰ 116 S.Ct. at 1628-29.

One century ago, the first Justice Harlan admonished this Court that the Constitution 'neither knows nor tolerates classes among citizens.' *Plessy v. Ferguson*, 163 U.S. 537, 559, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) (dissenting opinion). Unheeded then, those words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake.⁷¹

In *Plessy v. Ferguson*, an African American man had been arrested when he refused to leave the "white" compartment in a segregated railway train. The majority of the Court, in which Justice Harlan had been the lone dissenter, ruled that such segregated facilities did not violate the equal protection clause of the fourteenth amendment if they were "substantially equal." That principle of constitutional law remained unchanged until 1954.⁷²

Justice Kennedy's references to the changes in the legal status of African-Americans in the United States over the last century is instructive. He did not quote these passages from the majority opinion in *Plessy*, but they help put the reasoning in cases like *Bowers v. Hardwick* and *Egan and Nesbit* into perspective:

Laws forbidding the intermarriage of the two races may be said in a technical sense to interfere with the freedom of contract, and yet have been universally recognized as within the police power of the State....

Every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class....

If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane....⁷³

Elsewhere the majority opinion in *Plessy* had appealed to the "usages, customs and traditions of the people" to justify segregation, and claimed that such segregation "stamps the colored race with a badge of inferiority...solely because the colored races chooses to put that construction upon it."⁷⁴

C. *Vriend v. Alberta*

Justice Kennedy's opinion in *Romer v. Evans* clearly placed the human rights of sexual minorities into the context of constitutional personhood. Unlike in *Egan and Nesbit*, this connection was not lost on the Supreme Court of Canada when it came to rule on the exclusion of lesbians and gays from the Alberta human rights statute in *Vriend v. Alberta* in 1998.

⁷¹ 116 S.Ct. at 1623.

⁷² Technically, the principle of separate-but-equal accommodation began to crumble in 1938, when the United States Supreme Court ruled that paying the tuition for African-Americans to attend universities out of state was not "equal" accommodation. See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), is considered to have deprived *Plessy* of any further authority.

⁷³ *Plessy v. Ferguson*, 163 U.S. at 545, 550, 552.

⁷⁴ 163 U.S. at 551.

In structure, Chief Justice Lamer shaped his opinion in *Vriend* around the two main points that have to be established under section 15(1) of the Charter: that the legislation being challenged makes a distinction that results in the denial of equality rights, and that this denial constitutes discrimination on the basis of an enumerated or analogous ground. With respect to the first point, the Chief Justice concluded that the omission of sexual orientation from the Alberta Individual Rights *Protection Act* drew two types of distinctions on the basis of sexual orientation — distinctions between homosexuals and other groups protected under the IRPA, and a distinction between homosexuals and heterosexuals — and that these distinctions had the effect of denying gays and lesbians equal benefit and equal protection of the law.

When addressing the second point, whether these distinctions “discriminated” in the constitutional sense, the Chief Justice concluded that denial of access to human rights protections had “dire and demeaning consequences” for lesbians and gays in Alberta. He quoted directly from *Romer v. Evans* in explaining why denial of civil remedies for discrimination and leaving sexual minorities without “effective legal recourse” for this discrimination “imposes a heavy and disabling burden on those excluded”:

[T]he [exclusion] imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint....

These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.⁷⁵

The Chief Justice then went on to emphasize that although the exclusions in Colorado and Alberta came into existence in different ways, the effect of the Alberta exclusion was similar. He pointed out that even if this exclusion could not be shown to contribute to the greater incidence of discrimination, it “sends a strong and sinister message,” suggests that it is “not as serious or as deserving of condemnation as other forms of discrimination,” and could even be considered to be “tantamount to condoning or even encouraging discrimination.” He concluded that the effect of such exclusion would be to burden gays and lesbians with “constant fear of discrimination” with its attendant psychological harm and harm to self-esteem — “a particularly cruel form of discrimination.”⁷⁶

Rejecting the Government of Alberta’s attempts to justify this exclusion under section 1 of the Charter and even rejecting efforts to limit the Court’s ruling to the employment provision of the IRPA, the Court read “sexual orientation” into the IRPA for purposes of all categories of discrimination.

⁷⁵ Para. 98.

⁷⁶ Paras. 100-102.

Conclusion

The "Persons" case has been cited continuously in Charter litigation for the same proposition that the Honourable John Crosbie put forward in 1986 — that the Charter, like the rest of the Canadian constitution before it, is to be given "large and liberal interpretation" under the doctrine of the "living tree."⁷⁷ But not once has the "Persons" case been cited or relied upon in any litigation whatsoever since 1929 for the substantive proposition that all people in Canada have, as a minimum, the classical incidents of full "legal personality": the rights to enter into or remain in the state, sue and be sued, hold public office, sit on juries, act as witness in legal proceedings, enter into contracts, own property, marry, have custody of their children, establish their own domiciles.

Although the result in *Vriend* and the reasons for that result auger well for the future, *Vriend* by no means signals full judicial agreement that the fundamental legal capacities known as "personhood" will always be protected by the Charter. At least in theory, governments can still attempt to use the parliamentary override in section 33 of the Charter to insulate discriminatory provisions from Charter review. While the political debate over the propriety of having an override in the constitution remains unresolved,⁷⁸ there is some sense that outside Québec, which has made extensive use of the override,⁷⁹ it has been used so rarely that it may well have now "become associated with the intense political moments that produce political oppression," as John Whyte has predicted. Certainly this appears to have been the case in Alberta, where early threats that the government of Alberta would use section 33 of the Charter to nullify a ruling in favour of Delwin Vriend quickly dissipated as the government began to realize that the public did indeed associate use of the override with oppression, at least in relation to the issue of avoiding liability for forced sterilizations.⁸⁰

⁷⁷ Beginning with the first Charter challenge. See *Southam Inc. v. The Queen*, 41 O.R. (2d) 113, 123 (O.C.A.), per MacKinnon A.C.J.O., Jessup and Martin J.J.A., foll'd [1984] 2 S.C.R. 145 (S.C.C.), per Dickson J.

⁷⁸ For an overview of these arguments, see J. Whyte, "On not Standing for Notwithstanding" (1990), 28 Alta. L. Rev. 347 and P. Russell, "Standing up for Notwithstanding" (1991), 29 Alta. L. Rev. 293.

⁷⁹ Not always successfully. As the jurisprudence in this area demonstrates, the override has to be used very carefully to achieve the intended political effect. See generally *Irwin Toy Ltd. v. Québec (A.-G.)*, [1989] 1 S.C.R. 927; *Thibault v. Corporation professionnelle des medecins du Québec*, [1988] 1 S.C.R. 1033; *Devine v. Québec (A.-G.)*, [1988] 2 S.C.R. 790; *Ford v. Québec (A.-G.)*, [1988] 2 S.C.R. 712; *Québec (A.-G.) v. Québec Assn. of Protestant School Boards*, [1984] 2 S.C.R. 66; *Alliance des professeurs de Montreal et al. v. Québec (A.-G.)* (1983), 9 C.C.C. (3d) 268.

⁸⁰ The timing of Premier Ralph Klein's suggestion that the section 33 override be used in the wake of the Supreme Court's ruling in *Vriend* may well have had a lot to do with how it was perceived. In mid-March of 1998, Klein introduced legislation to limit compensation to 700 victims of forced sterilization. This unleashed a flood of public outrage, forcing him to hastily withdraw the bill. At the time, however, he claimed that the government might use the override in the *Vriend* situation. See "Alta-Sterilization Bill," *Canada Digest*:

Given the realities of Charter litigation, however, governments may not have to risk public outrage at the use of the section 33 override to continue denying the full legal personhood to some groups of people in Canada. Governments will no doubt contend that the *Vriend* decision has little impact on authorities like *Symes*, *Thibaudeau*, or *Egan and Nesbit*, all of which revolve around the relationship between marital status (or the lack of legally recognized marital status) and social benefits policies. Courts unwilling to recognize the full legal capacities of sexual minorities may well wish to read *Vriend* as being not about constitutional personhood, but about individual juridical rights that are qualitatively different from relationship rights. Shorn of their connections with the deeper discourse over who is a "person" in law, cases relating to women who wish to be treated as individuals or queer individuals who wish to be treated as "spouses" may appear to have little in common with *Vriend*.⁸¹

The Supreme Court of Canada has made great strides in *Miron v. Trudel* in uncovering the links between relationship recognition and fundamental human rights, but the further link that was made in *Loving v. Virginia* between relationship recognition and constitutional personhood has not yet been made explicit in Canadian jurisprudence, and the eagerness of feminist critics of lesbian and gay relationship forms to explain why relationship recognition is inconsistent with queer existences may delay the resolution of that issue.⁸² Just as inter-racial marriages were not given legal recognition as a matter of fundamental legal personhood until the later years of the civil rights movement in the United States, it may well be that relationship recognition issues such as those in *Egan and Nesbit* will also be treated as less important than access to the

Alberta (March 12, 1998). By the end of March, Klein had not withdrawn this suggestion, but appeared to be backing off of it, saying only that he while he would not rule out using section 33, "there are legal issues to consider." "Alberta awaiting *Vriend* gay-rights decision" *Canadian Press* (March 31, 1998). By the time the decision was released a few days later, he admitted that he was ruling out use of section 33, and had shifted his focus to setting up a task force to study the implications of the ruling for specific issues such as marriage and making general comments about the powers exercised by courts. *Canadian News Digest*, *Canadian Press* (April 6, 1998).

⁸¹ At the moment, the Ontario Court of Appeal decisions in *Rosenberg* and *M. v. H.* provide an excellent bulwark against trying to narrow the result in *Vriend* to "individual" rights. However, the final strength of that bulwark will depend very much on how the Supreme Court of Canada disposes of the appeal in *M. v. H.* See *Rosenberg v. A.-G. Canada* (1995), 127 D.L.R. (4th) 738, 25 O.R. (3d) 612 (Ont. Gen. Div.), per Charron J., rev'd [1998] O.J. No. 1627 (O.C.A.) (Q.L.), per McKinley, Abella, and Goudge J.J.A.; *M. v. H.* (1996), 27 O.R. (3d) 593, 132 D.L.R. (4th) 538 (Ont. Gen. Div.), Epstein J., aff'd (1996), 31 O.R. (3d) 417, 142 D.L.R. (4th) 1 (Ont. C.A.), per Doherty and Charron J., Finlayson J. dissenting, leave to appeal granted April 24, 1997, per L'Heureux-Dubé, Sopinka, and Iacobucci J.J., on condition that government pay all costs in any event of the cause; argued March 18, 1998.

⁸² For a detailed discussion of this complex and multi-layered debate, see K.A. Lahey, *Are We "Persons" Yet? Law and Sexuality in Canada* (in press, Toronto: University of Toronto Press, ISBN 0802042058), chapter nine.

legal process, individual rights such as employment rights, and private employment benefits.

One thing is certain, however, and that is that now that the Supreme Court of Canada has finally incorporated the doctrine of constitutional personhood into Charter equality analysis, many more cases can now plumb and test that doctrine in widely varying contexts. For example, the issues relating to Aboriginal women's marital property rights have recently been challenged under the Charter, and further Charter challenges to the use of the married or deemed-married couple as the benefit unit for purposes of tax benefits and social assistance are certain to be filed as time goes on. Until such challenges become successful, however, the Privy Council decision in the "Persons" case may well remain not the law of Canada, but merely an interesting historical artifact.