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AUDITOR GENERAL LOSES BATTLE AGAINST FEDERAL CABINET

David Schneiderman*

Auditor General v. Minister of Energy, Mines and Resources

The tension between public accountability and political secrecy has not slackened as result of a recent Supreme Court of Canada decision denying the Auditor General of Canada access to confidential federal Cabinet documents. For close to seven years, Auditor General Kenneth Dye has been seeking access to material considered by Cabinet regarding the $1.7 million purchase of Petrofina by Petro-Canada in 1981. In the absence of specific authority in the legislation to compel the production of confidential Cabinet documents, the Supreme Court of Canada would not consider Mr. Dye's request.

The Auditor General is charged with the responsibility of auditing the government's finances. He is also responsible for determining whether "money had been expended with due regard to economy or efficiency". In order to determine whether sufficient regard was paid to economy and efficiency in the purchase of Petrofina, the Auditor General wished to review the material that the Trudeau Cabinet had relied upon in authorizing Petrofina's purchase by Petro-Canada. These requests were mostly denied by Petro-Canada and successive Federal Governments, both Liberal and Conservative.

To accede to this request, the Government argued, would be to ignore the principle that Cabinet deliberations remain confidential. The principle operates so as to make Cabinet speak in one collective voice, through the Government of the day. Moreover, argued the Government, the Auditor General had no business second-guessing political decisions that had been duly authorized by Parliament, namely the appropriation of public funds to Petro-Canada in order to purchase Petrofina.

In the face of these denials, the Auditor General commenced litigation in the Federal Court, arguing that the Cabinet was obliged by law to disclose the documents. The Auditor General Act, he argued, required compliance, even by Cabinet, with a request for the production of documents.

The Government, in response, filed a certificate under the Canada Evidence Act certifying that the documents sought were confidential Cabinet documents. The intended effect of the certificate was to preclude the Court from considering whether the documents were, in fact, confidential Cabinet documents and whether, in fact, any harm to Cabinet would flow from their disclosure to the Auditor General.

Chief Justice Jerome of the Federal Court, Trial Division, agreed with the Auditor General's arguments and ordered disclosure, notwithstanding the filing of the Canada Evidence Act certificate. This decision was reversed on appeal to the Federal Court of Appeal. Mr. Justice Heald, one of the Federal Court of Appeal judges in the majority, held that the effect of the lower court's order would be to "allow the Auditor General to audit the political process". On further appeal to the Supreme Court of Canada, the appeal was dismissed. In the Supreme Court's view, the statutory authority to inspect and audit Parliament's books did not entitle the Auditor General to enforce that authority in the courts.

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Chief Justice Dickson, writing for the Supreme Court of Canada, stated that accepting the Auditor General's interpretation of his statutory duty " would result in a *de facto* shift in the constitutional balance of powers in the expenditure auditing process". In the absence of express language in the law commanding the disclosure of Cabinet documents, the Court would not, on its own, enlarge the Auditor General's mandate.

Chief Justice Dickson acknowledged that the courts have greatly expanded powers as a result of the Charter. But in those areas that remain untouched by the Charter, as in this case, it is the Parliament and the Legislatures, and not the Courts, who have the constitutional authority to redraw statutory boundaries.

The Auditor General's remedy, in the face of the refusal by Cabinet to disclose the documents, was to report the refusal to Parliament, thereby leaving the issue to be resolved politically. This remedy, in the opinion of the Supreme Court, was an "adequate alternative". However, the Court would not concede that, in reality, the Auditor General would be reporting back to a Parliament controlled by an executive that has continually refused to disclose the documents in question. According to the Chief Justice:

> That the executive through its control of a House of Commons majority may in practice dictate the position the House of Commons takes on the scope of Parliament's auditing function is not ... constitutionally cognizable by the judiciary. The grundnorm with which the courts must work in this context is that of the sovereignty of Parliament.

In the Court's view, this remedy should not be underestimated. The Auditor General's complaint that the Government has withheld crucial information about an acquisition of immense proportions will likely be brought to the public's attention and may "affect the public's assessment of the government's performance." In this way, Parliamentary supremacy is maintained and the democratic process is strengthened. However, in this way, the public will not get to know whether the price paid for Petrofina was fair value. In the judgment of the Supreme Court of Canada, the remedy lies with the politicians and not with the courts.

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*__David Schneiderman__ is the Executive Director of the Centre for Constitutional Studies, University of Alberta.

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THE NATURE OF EQUALITY: APPLES AND ORANGES / CHESTS AND BREASTS

Dale Gibson*

"It's nonsensical," say some, "to assert that all humans are equal. No two humans are born with equal attributes; we all differ from each other, sometimes radically, with respect to intelligence, physical capabilities, appearance, social and economic status and every other personal characteristic."

If claims to equality were taken to be representations of fact, this criticism would be entirely justified. But of course human equality is not a physical or social reality; it is an entitlement: a right to be treated with equal respect, and to be accorded equal opportunities of access to life's bounties. It is precisely because all human beings are not born equal in their actual potentialities that section 15 of the Canadian Charter of Rights and Freedoms, and other legal guarantees of Canadians' human rights, embody certain entitlements to equality of treatment.

"But even that is unrealistic", the critics complain, "because human beings and social situations are so infinitely variable that it would be simply impossible in many, if not most settings to treat everyone identically. Men and women require somewhat different washroom facilities; the disabled require somewhat different building access and transportation facilities than others; children require somewhat different restrictions on their activities than adults." Of course. The fallacy here is the assumption that "equal" means "identical". While it does mean that in the world of mathematics, it means something quite different in the realm of human rights. Equality between humans simply means treating as similarly as circumstances permit those persons who are similarly situated to each other in important respects relevant to the treatment. Aristotle described it as treating likes alike; unalikes differently.

One of the chief sources of confusion about the concept of "equality" when encountered in a human rights context is the absolute, mathematical, sense in which we all learned to employ it in early childhood. One plus one equals two. Thirteen minus five, divided by four, also equals two. Therefore, one plus one equals thirteen minus five divided by four. Comprehending this kind of equality is simplicity itself because every "one" is identical to every other "one." Numbers are absolutely interchangeable; "one," "two" or "thirteen" mean exactly the same thing whether used to count dollars or people, whether in Canada or Tibet, whether in 1989, 1889 or 2089.

When we use "equality" to express the right of one person to be treated in a certain manner by others, we speak in highly relativistic terms. People are not ciphers. Women and men are legally equal, but they differ in many important respects. To some extent those differences justify distinctive treatment. Moreover, while some of the justifiable differences in the way men and women are treated can be attributed to physiological characteristics, many of them are culturally determined, and vary from place to place, time to time. Accepted ideas as to how women ought to be treated (indeed, common understandings of what "woman" means, in terms of social roles) vary between Canada and Tibet, and between 1889 and 1989.

When we ask what kind of treatment "equality" implies for women in such sharply contrasting settings, we stumble over the problem of whether the question should be approached descriptively or prescriptively. If we permit a simple description of prevailing norms to justify in perpetuity the way a particular society treats its women, we rule out progress. Yet significant progress toward an expanded concept of equality, especially for women, is a historical fact. The massive changes that have occurred between 1889 (or even 1959) and 1989 in Canadians' views about women's roles in society demonstrate the mutability of social norms. It also demonstrates the susceptibility of those norms to the educational influence of ideals like "equality."

On the other hand, if we adopt a relentlessly prescriptive approach, we overlook societal inertia. Where vested attitudes are concerned, it takes a long time to move from where we were to where we ought to be. Evolution is a sluggish process. While the egalitarian ideal seems clearly to be a major evolutionary force, it is only one of several, sometimes contradictory, forces. Furthermore, the ideal itself (in the sense of the type and extent of equality to which a given community can realistically aspire at a particular point in its history) is both ambivalent and variable. Ambivalent in that the descriptive and prescriptive approaches are in constant tension; one must look both backward and forward for inspiration: backward to tradition, forward to future improvement. Variable in that the descriptive and prescriptive points of view about equality will never remain acceptably reconciled for long in any given community. No sooner do traditional social norms adjust to the nagging of progress than the new orthodoxy is attacked for falling unduly short of perfection, and the process begins anew.

The type of equality that section 15 of the Charter and other egalitarian human rights standards are concerned with is much more like the equality of apples and oranges than equality of an arithmetic kind. "Apples and oranges?", you ask. That expression is a common metaphor for dissimilarity, and apples and oranges do admittedly differ from each other in many important ways: colour, taste, origin and so on. But they also resemble each other in important ways. They are both tasty fruits, roughly spherical and about the same size. Asking whether apples and oranges are alike will not yield a useful answer unless the

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question is put in a particular context rather than in the abstract. Are they alike in their suitability for planting in a Canadian garden? Certainly not. Will the preservation of both be enhanced by refrigeration? Yes, indeed. Are they equally appropriate for inclusion in a fruit salad? That depends upon the other ingredients of the salad.

Comparing people, or groups of people, or situations in which people find themselves, is much like comparing apples and oranges. Women resemble men in many respects; they differ from men in many other respects. Whether they should be considered alike for a particular purpose on a given occasion will depend upon the precise purpose and occasion.

Consider sun-bathing. Suppose that regulations applicable to a municipal beach prohibit topless sun-bathing by women, but permit it for men, and that the regulation is challenged under section 15 of the Charter. Is this a situation of treating likes differently? Men and women are certainly alike in some relevant characteristics. Many persons of both genders consider an even sun-tan to be attractive, and find the coolness and lack of confinement of toplessness on a fine summer's day to be a pleasurable experience. So far as the latter factor is concerned, in fact, the comfort of occasional toplessness may well be an even greater relief for many women than for most men. There are major differences as well, of course. Some, such as the fact that women bear children, have little relevance to topless sun-bathing, and can be ignored. Highly pertinent, however, is the fact that our society attributes considerably more sexual significance to women's breasts than to men's chests.

Can we conclude, therefore, that men and women are not alike for the purpose of determining the constitutionality of a regulation about topless sun-bathing in public places? Most Canadians in the 1980's would probably do so. It is important to understand, however, that there is a right way and a wrong way to reach that conclusion. The wrong way would be to decide that simply because there is an important difference between women and men which is relevant to the purpose of the regulation in question, the inquiry is complete. That approach would altogether overlook the similarities between men and women which are pertinent to sun-bathing. These must be weighed against the dissimilarities before a conclusion can be reached.

The point may be illustrated by considering another hypothetical sun-bathing prohibition - this one against sun-bathing by black persons in the presence of white persons. Apart from the obvious similarities, blacks and whites differ in some respects that the supporters of such a prohibition might deem relevant. Blacks have less need for tanning than whites. There is also a greater likelihood that certain bigots among Canada's overwhelming white majority would be more offended by scanty attire on blacks than on whites. There is a greater possibility of racial hostility being directed against blacks than against whites on Canadian beaches. Can we conclude that blacks and whites are therefore not alike for the purpose of determining the constitutionality of a racially based prohibition on sun-bathing in public places? Most Canadians in the 1980's would indignantly reply: "Certainly not!" Why not? Because the differences between blacks and whites in this context are not nearly as <u>important</u> as the relevant similarities in the opinion of most modern Canadians. Neither differences nor resemblances are conclusive in themselves; what is determinative is the respective <u>weights</u> of the similar and dissimilar factors, measured on the scale of contemporary, but forward-looking, public opinion.

Returning to the question of female toplessness, the "right" way to determine that its prohibition would not violate the Charter would be to weigh relevant gender resemblances and differences in accordance with prevailing progressive social standards, and then to conclude that the problems associated with attitudinal sensitivities about female breasts over-balance the benefits of permitting topless sun-bathing in public places by women. (It might be a different story twenty years from now; the hypothetical ban on black sun-bathing would probably have been thought perfectly justifiable a century ago.) The point is that the task of determining whether any two persons, groups or situations are alike is a <u>comparative</u> exercise. It is only in the wholly abstract realm of mathematics that a single dissimilar factor can be decisive.

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* **Dale Gibson**, is the Belzberg Professor of Constitutional Studies at the Faculty of Law, University of Alberta. This article is based upon an extract from Professor Gibson's forthcoming book, <u>Law of the Charter: Equality Rights</u>.

SUPREME COURT SCEPTICAL ABOUT PRESUMPTION OF CROWN IMMUNITY

Christina Gauk*

The presumption of Crown immunity - that the Crown is not bound by statutes other than those which provide that the Crown is bound - exists both in the common law, and in statutory form in eight of the ten provinces and in the federal jurisdiction. Two provinces, British Columbia and Prince Edward Island, have reversed the presumption so that the Crown is bound by all statutes other than those which exempt it.

The Supreme Court's ruling in AGT v. CNCP is the most recent example of current judicial scepticism about the continuing validity of the presumption. The Court allowed the provincial Crown agent Alberta Government Telephones (AGT) its claim of immunity under s. 16 of the federal Interpretation Act in the particular circumstances before it. However, though it did not apply them to the facts of the case, the majority reaffirmed a series of exceptions to the operation of the presumption. The judgment may even be taken as a suggestion to Parliament that unless it can find an explanation for the continued existence of the presumption, it ought to follow the lead of the two legislatures which have reversed it.

The case arose on the application by CNCP to the Canadian RadioTelevision and Telecommunications Commission (CRTC) for orders requiring AGT to provide facilities for the interchange of telecommunications traffic between the system operated by CNCP and the system operated by AGT. The orders sought were to be made pursuant to regulatory authority given the CRTC over telecommunications carriers by the Railway Act.

AGT resisted the application on the basis that it was not subject to the CRTC's regulatory authority. AGT argued, first, that it was not a work or undertaking under federal legislative authority within the meaning of s. 92(10)(a) of the Constitution Act, 1867. Second, it argued that as a provincial Crown agent it was entitled to claim the immunity from federal statutes given to the Crown by s. 16 of the federal Interpretation Act.

AGT's application for a writ of prohibition to the Federal Court, Trial Division was granted. Reed J. held that AGT was a federal work or undertaking and therefore fell within federal legislative authority, but that the CRTC could not grant the orders because AGT as provincial Crown agent was entitled to claim immunity from the provisions of the Railway Act.

Pratte J. of the Federal Court of Appeal agreed with Reed J.'s conclusion that AGT was a federal undertaking, but held that in operating an interprovincial undertaking, AGT had exceeded the mandate given it by the provincial AGT Act, and in so doing had lost its right to claim Crown immunity. The order of prohibition was accordingly set aside.

The Supreme Court readily came to the same conclusion as the earlier level of courts with respect to whether AGT operated a federal or a provincial undertaking. Writing for the majority, Dickson C.J. said that the type of service which AGT normally provided was more significant than the fact that its physical facilities and its customers were all within the province. A service involving the transmission and reception of electronic signals at the borders of Alberta, connecting Alberta with the rest of Canada, the U.S. and other parts of the world, clearly extended beyond the Province. Beyond the mere physical interconnection, AGT's various bilateral and multilateral commercial arrangements, particularly its membership in Telecom Canada, the organization through which the various telecommunication company members coordinate their network of services, enabled it to play a crucial role in the national telecommunications system. These factors characterized AGT as an interprovincial undertaking.

The second and more difficult constitutional issue was whether AGT was immune as Crown agent from the regulatory authority of the CRTC exercising its powers under the Railway Act, by virtue of s. 16 of the federal Interpretation Act. Section 16 provides that "[n]o enactment is binding on Her Majesty, or affects Her Majesty or Her Majesty's rights or prerogatives in any manner, except only as therein mentioned or referred to." AGT's claim of the s. 16 immunity depended first on whether the reference to "Her Majesty" in s. 16 embraces the Crown in right of a province as well as the Crown in right of Canada. The Court held that the presumption of immunity does operate in favour of the provincial Crown, adding, however, that there is no impediment to Parliament's embracing the provincial Crown in its competent legislation if it chooses to do so.

The next question was whether the Railway Act "mentioned or referred to" the provincial Crown so as to bind it within the terms of the express exception to immunity contained in s. 16 itself. On this question the Court was prepared to hold, contrary to some pronouncements in its own earlier judgments, that the phrase "mentioned or referred to" could be met not only by express words but also by necessary implication. A strict requirement for express words would involve an "overbroad extension of state immunity". Accordingly, the Court reasserted the doctrine of necessary

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implication, though confining the doctrine to "a clear intention to bind which ... is manifest from the very terms of the statute" or "where the purpose of the statute would be wholly frustrated if the government were not bound". However, the Court found no such intention to bind with respect to AGT in the Railway Act.

The Court next turned to consider whether AGT had triggered any exceptions to the presumption of Crown immunity by its conduct. Though the majority ultimately concluded that AGT had not done this, it undertook a review of the various doctrines, and indicated a willingness to entertain two of the three suggested exceptions in appropriate circumstances under the present law. At the same time the Court seemed to invite legislative reform which would eliminate the presumption altogether.

The first of the possible exceptions was the "benefit\burden" exception or "waiver doctrine" - that immunity from the burdens of a statute is waived by the Crown where it takes advantage of the statute's benefits. The majority affirmed the existence of the doctrine as it had recently been laid down in Sparling v. Quebec [1988] 2 S.C.R. 1015. However, adopting the requirement set out in Sparling that the nexus between the benefit taken and the burden imposed be "sufficiently related so that the benefit must have been intended to be conditional upon compliance with the restriction", the majority held that the advantages obtained by AGT as a party to some agreements which are subject to CRTC approval under the Railway Act, were insufficient to link it to CRTC jurisdiction. The benefits derived by AGT under the Railway Act were of a general nature. It was not a case of AGT's having relied on the Act for advantages while seeking to avoid attached restrictions. AGT had not itself sought CRTC approval of the agreements. Neither had there been, as had been in the Sparling case, "an implied general submission to the entire statutory scheme of benefits and burdens". However, while denying that AGT had waived immunity according to this test, the majority acknowledged a conflict between the conclusion to which it was constrained under the existing law, and "basic notions of equality before the law" and "our intuitive sense of fairness". Dickson C.J. cited his own earlier pronouncement in R. v. Eldorado Nuclear: "The more active the government becomes in activities that had once been considered the preserve of private persons, the less easy it is to understand why the Crown need be, or ought to be, in a position different from the subject."

The next exception to be considered was that of the Crown exceeding its statutory mandate or purpose. Again, the majority accepted the doctrine - that the Crown acting beyond its statutory mandate could thereby lose its immunity (though the fact that a provincial Crown undertakes an interprovincial work does not of itself trigger the doctrine) - but disagreed that AGT had exceeded its statutory purpose. It interpreted the AGT Act as empowering AGT to enter into interconnection agreements in order to fulfil its statutory purpose of providing an integrated interprovincial telecommunications service for its customers.

The final exception put to the Court was the "commercial activities" exception - that immunity is not available to the Crown operating a commercial entity. The majority rejected this exception, refusing to draw an analogy to public international law which accords immunity for governmental, but not for commercial activity. It pointed out that "[i]n trying to draw a line between what is governmental and what is proprietary, one fast becomes fixed in a quagmire of political and economic distinctions with no hope of reasoned separation." Nevertheless the judgment again hinted that the involvement of government in the commercial arena may justify legislated reversal of the presumption: "Why AGT or other Crown agencies undertaking business ventures in an ordinary commercial capacity ought to be immune from otherwise valid federal legislation is a question which only Parliament can explain."

Wilson, J. in dissent agreed with much of the judgment of the majority, but disagreed as to the applicability of the waiver doctrine. In her view the "benefit/burden" exception as laid down in Sparling was too narrowly expressed by the majority. The doctrine as she saw it does not require that "the burdens must constitute specific limitations on a specific benefit". Rather, it is enough to waive immunity that "the Crown agent has engaged in a deliberate and sustained course of conduct through which it has benefited from a particular provision or provisions of a statute". In her view this description suited AGT's having "endeavoured to take advantage of the benefits of interconnection agreements which under the legislation required the approval of the CRTC". Thus Wilson J. did not regard the case as one which required deferral to the legislative will on the matter of Crown immunity. Nonetheless, she lent her voice to that of the majority in questioning the desirability of the continued existence of the presumption in modern times, stating: "I have serious doubts that the doctrine of Crown immunity, developed at a time when the role of government was perceived as a very narrow one, was ever intended to protect the Crown when it acted, not in its special role qua Crown, but in competition with other commercial entities in the market place."

With the exception of Madame Justice Wilson, the Supreme Court declined to allow the exceptions to the presumption of immunity to "swallow the rule", on the ground that this would be "overly legislative" on its part. The concluding sentence in the majority judgment reminds Parliament and the provincial legislatures that they do have the power to legislate the same result.

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* **Christina Gauk** is Counsel to the Alberta Law Reform Institute.

CASE COMMENT

NELLES v. HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO ET AL.

John M. Law*

The recent judgment of the Supreme Court of Canada in Nelles v. The Queen in Right of Ontario et al.[1] defies easy categorization. On one hand, it is a decision falling squarely within the realm of tort law, concerned with the tort of malicious prosecution and the statutory and common law immunities available to defendants. On the other hand, it is a decision very much concerned with public law issues: the lawful exercise of public power; the damage remedy as a means of compensation for a citizen as a consequence of the abusive or erroneous misuse of that power; and the nature and scope of immunities accorded, in the public interest, to the State and its officers in the discharge of their responsibilities. In truth, the decision falls squarely at the intersection of private and public law principles used, crudely at times, to fashion a remedy in damages for a citizen complaining of loss as a consequence of official action.[2] I propose to focus my remarks on two of the public law issues: Crown immunity and public prosecutorial immunity.

FACTS

Given the publicity surrounding the events that gave rise to this case, no more than a thumbnail sketch of the facts is necessary. In 1981, the plaintiff, Susan Nelles, a nurse employed at Toronto's Hospital for Sick Children, was charged with four counts of murder in connection with a number of mysterious deaths of infant patients. In 1982, after a lengthy preliminary inquiry, she was discharged on all four counts as the evidence adduced by the Crown was insufficient to warrant putting her on trial. Subsequently, she brought an action in damages against the Province of Ontario, the Attorney General and his agents, Crown Attorneys,[3] and the police framed in negligence, malicious prosecution, false imprisonment, and the infringement of her rights under ss. 7 and 11(c) and (d) of the Charter. In response, the Crown and the Attorney General brought a preliminary motion to strike out the plaintiff's statement of claim, dismissing her action. The Crown asserted its statutory immunity under ss. 5(6) of the Ontario Proceedings Against the Crown Act,[4] and the Attorney General and his agents claimed, at common law, an absolute immunity from suit.[5]

CROWN IMMUNITY

At common law, the Crown is immune from liability in tort. This anachronistic situation has only been partially alleviated through the Crown's consent to suit contained in Crown proceedings legislation at both the federal[6] and provincial levels.[7] I say partially, as the legislation limits the vicarious liability of the Crown in respect of certain functions and activities. One of these involves the discharge of responsibilities of a "judicial" nature. The Ontario Crown argued that the actions of its servants, the Attorney General and the Crown Attorneys, fell within this exemption from liability.

Fitzgerald J. of the High Court agreed with the Crown's submissions, holding that a claim for damages resting on the alleged infringement of the plaintiff's Charter rights did not abrogate the common law and statutory immunities asserted by the Crown and the Attorney General.[8] On appeal, the Ontario Court of Appeal characterized the prosecutorial functions of the Attorney General and Crown Attorneys as "quasi-judicial" in nature.[9] This characterization was sufficient to engage the Crown's immunity under ss. 5(6) of the Act. Further, it was pointed out that as the Crown's liability was vicarious, the Crown could claim the benefit of any immunity accorded to its servants.

The Supreme Court of Canada upheld the judgments of the lower courts on the issue of the Crown's immunity from suit in this action. Surprisingly, in light of the Court's later comments on the inadequacy of the functional approach to the issue of prosecutorial immunity, the Court characterized the functions of the Attorney General and Crown Attorneys as "judicial"[10] for the purpose of determining the Crown's immunity under the Act. While the conclusion of the Court on this issue was probably correct, it again serves to remind us of the inadequate nature of current Crown liability regimes. The legislation extant in most Canadian provinces is dated[11] and, in its current form, precludes any rational approach to the issue of State liability and damages for tortious or constitutional wrongs. Criminal prosecutions are conducted in Canada by the State, and where the system of public prosecutions malfunctions, why should the State escape liability? Surely, the State is a more responsible defendant than a Crown Attorney or public prosecutor. Equally, why should the Crown be entitled to claim the benefit of a personal immunity fashioned to protect a public officer, in the public interest, from the harsh consequences of liability? A statutory scheme that shifts the burden to the officer or permits the Crown to claim the benefit of a personal immunity is surely flawed.

Finally, the model of Crown proceedings legislation extant in most Canadian jurisdictions seems strongly out of place in a constitutional regime represented by the Charter. While, on one hand, the Charter recognizes the obligation of the State to act in a manner consistent with a citizen's constitutionally guaranteed rights and freedoms, Crown proceedings legislation, on the other hand, handicaps the citizen in litigation with the State. While the Charter seeks to protect the citizen from the unconstitutional actions of the State, to balance the relationship between the citizen and the State,

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(Nelles continued)
Crown proceedings legislation seeks to protect the State from the legal demands of the citizen; to perpetuate a relationship of inequality. It is submitted that the current form of State liability is an ill fit in a constitutional democracy and ought to be reformed before it is dismantled section by section in constitutional litigation.[12] Indeed, in Nelles, Lamer J. appears to suggest a first step in this regard with respect s. 5(6) of the Ontario Act.[13]

PROSECUTORIAL IMMUNITY

The chief significance of the judgment of the Supreme Court in Nelles concerns the nature and scope of the common law immunity from civil suit asserted by the Attorney General and his agents in answer to the plaintiff's claim. In holding that they were not entitled to an absolute immunity from civil suit but only a qualified or lesser immunity, the Supreme Court broke sharply with what had been the emerging trend on the standard of immunity attaching to the office of public prosecutor. Faced with a paucity of English[14] and Commonwealth[15] authority on the question, Canadian courts, in a number of recent cases,[16] have embraced American precedent in according public prosecutors an absolute immunity. In the leading American authority, Imbler v. Pachtman,[17] the Supreme Court of the United States had recognized an absolute immunity in respect of the prosecutor's "quasi-judicial or advocatory"[18] functions. However, the scope of the immunity was apparently limited as the question of whether an absolute immunity attached to a prosecutor's administrative or investigative functions was left open. The policy rationales supporting such an immunity were much the same as those supporting the absolute immunity of a judge from liability in tort; that is, " ... harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust."[19] This standard of immunity would serve to protect the prosecutor even if he acted out of malice or for some other reason not connected with the public good.[20]

The Supreme Court of Canada declined to follow the leading American authority for a number of reasons, most of them policy based. To begin with, the Court expressly disapproved of the functional approach utilized in Imbler. Describing it as "unprincipled" and "arbitrary," the Court did not find it to be of help in determining the issue of prosecutorial immunity.[21] This opinion is to be applauded as characterization of function has long hindered a rational consideration of many public law issues. By way of example, one need only point to the "judicial, administrative" distinction utilized in determining the scope of judicial review in administrative law. As the threshold issue in the imposition of liability, characterization of an officer's function tends to obscure the underlying policy issues. It encourages mechanistic decision-making. It tends to focus attention on the nature of the public prosecutor's office, at the expense of a consideration of the officer's conduct or the injury suffered by the plaintiff.

The Supreme Court's rejection of the functional approach may have consequences beyond the immediate case. The functional approach has been used in a number of cases concerning the liability of public officers in tort.[22] By analogy to the courts of law, an immunity from suit has been accorded to public officers in the exercise of their discretionary authority on the basis that they are exercising a "judicial" or "quasi-judicial" function.[23] The usefulness of these decisions, as precedents in future cases, may be called into question.

Further, the Court questioned the existence of an absolute immunity on constitutional grounds.[24] In Imbler v. Pachtman,[25] the Supreme Court of the United States held that the policy reasons supporting an absolute immunity for prosecutors, at common law, applied with equal force in an action alleging an infringement of the plaintiff's civil rights. In other words, the fact that the action was framed in constitutional terms did not compel a lesser or qualified standard of immunity. Three members of the Supreme Court of Canada apparently took issue with this, reasoning that the existence of an absolute immunity may preclude a court from granting a just and appropriate remedy under s. 24(1) of the Charter where the action is framed in constitutional rather than common law terms. This is an "undesirable" result[26] in a situation, such as this, where a prosecutor's alleged misconduct will not only support a common law action for malicious prosecution, but also an action in damages under the Charter for the infringement of an accused's rights under ss. 7 and 11.

While the Court declined to address the constitutional validity of common law and statutory immunities which may have the effect of precluding a damage remedy under the Charter, these comments do raise serious questions in this regard. To date, the Supreme Court has not had to address the issue of the damage remedy under the Charter, in terms of a separate regime of liability for unconstitutional action.[27] When it does, it will undoubtedly have to address the issue of officer immunity. The right of a citizen, whose constitutional rights have been infringed, to a "just" and "appropriate" remedy in damages under the Charter may compel a different approach to the issue of officer immunity[28]--an approach that places more emphasis on the citizen's constitutional right to a remedy than on the officer's need for immunity. As a general rule, a lesser standard of immunity may ensue which, in turn, may cause the courts to question the prevailing standards of immunity in common law actions.

In the end result, the Supreme Court saw the issue of a public prosecutor's immunity from suit to be " ... ultimately ... a question of policy."[29] One of the traditional policy rationales advanced in support of an absolute immunity is

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A CHANGE IN CHARGE REQUIRES A SECOND CHANCE TO CONSULT COUNSEL

Bruce P. Elman*

The theme of the denial of "right to counsel" appears to have endless variations. One such variation was the subject of the Supreme Court of Canada's recent decision in **Black v. The Queen**. As is usual in these cases, issues regarding the admissibility of evidence also arose.

The facts in this case are unremarkable. Late on the evening of the 11th of October, 1985, the Halifax police were summoned to an apartment in the Mulgrave Park district. When they arrived, they found Deborah Lynn Tufts with a stab wound near the throat. Based upon information received from those at the scene, the two police officers proceeded to the apartment occupied by Cynthia Virginia Black, the appellant. It was some time before the appellant opened her door. Ms. Black had a cut lip and appeared to be in an intoxicated state.

One of the police officers, Constable Small, advised Ms. Black that she was charged with "attempted murder". He read her the standard police warning and advised her that she had the right to call a lawyer. The other officer, Sergeant O'Neil, recalled that the appellant was told that she was being arrested "for a stabbing".

Ms. Black was taken to the police station and, at approximately 11:58 p.m., was placed in an interrogation room. She asked to speak to her lawyer, one Mr. Digby. Constable Small reached Mr. Digby at his home and advised him that the appellant was in custody and wished to speak to him. The officer, then, passed the phone to Ms. Black and left the room. The conversation lasted for 30 - 40 seconds.

For the next hour and a half, the appellant was left in the interrogation room. At 1:35 a.m., two officers entered to obtain pictures of the appellant and give her a change of clothes. They later returned to retrieve her clothes. On a third occasion, they entered the interrogation room to ask Ms. Black to identify a pair of sandals and a knife. The appellant was co-operative, identifying the sandals. She had no knowledge regarding the knife, however.

At about 1:40 a.m. Detective Benjamin and Constable Ross entered the interrogation room. Later, Detective Benjamin was to testify that Ms. Black appeared "nervous", "upset", and "under the influence of alcohol". Nonetheless, the officers proceeded to advise the appellant that Deborah Tufts had died and that she would now be charged with first degree murder. Ms. Black became emotionally distraught, reacting hysterically to this information. Once she had been calmed, the officers advised her of her rights in the following terms:

> I wish to give you the following warning. You must clearly understand that anything said to you previously should not influence you or make you feel compelled to say anything at this time. Whatever you felt influenced and compelled to say earlier you are not now obliged to repeat nor are you obliged to say anything further but whatever you do say may be given in evidence. Do you understand that which has been said to you?

Once again, the appellant became agitated and requested to speak to Mr. Digby. Detective Ross attempted to reach Mr. Digby, but on each occasion the line was busy. Upon being asked whether she wanted another lawyer contacted, Ms. Black responded that she wanted to speak to Mr. Digby as she had spoken to him previously. The appellant did, however, speak to her elderly grandmother for five or six minutes and appeared much more relaxed following this telephone conversation.

Ms. Black asked whether she would be spending the weekend in jail and, when told that she would be, expressed concern for one of her children. She was asked for the location of the knife. She "grinned" and responded that it was "at home". She then gave a statement of an inculpatory nature to the police.

Following this, the police officers took Ms. Black to the hospital where she was treated for her injuries. A blood sample was taken which revealed a very high blood-alcohol level. Subsequently, Ms. Black was taken to her apartment. She went to kitchen drawer, took out a knife, and handed it to the officers indicating that it was the murder weapon.

Later, however, the appellant claimed that the statement she had given the police was untrue. She said that she had given the statement only because Detective had promised her that she would be released on bail if she did so. She claimed that she had invented the story so that she could be released for the weekend.

THE TRIAL: At the trial, Justice Kelly was confronted by two evidentiary issues. First, was the accused's initial statement to the police officers admissible? And second, was the evidence of the discovery of the knife subsequent to the confession admissible? In regard to the first issue, the trial judge focused on whether the accused had been given a full opportunity to consult counsel after being told that Ms. Tufts had died and that the charge was being changed from attempted murder to first degree murder. Justice Kelly noted

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that the change in charge "brought about a significant change in her legal position" and that "she was entitled to a further opportunity to consult counsel" under section 10(b) of the **Charter**. Ms. Black had been denied her right to counsel and, in Justice Kelly's view, the confession she gave to the police had to be excluded.

Subsequently, Justice Kelly had to decide whether to exclude evidence concerning the discovery of the knife. He concluded that the discovery of the knife followed the breach of the accused's rights and, adopting the same reasoning as regards the initial confession, Justice Kelly excluded this evidence as well. In the result, Ms. Black was acquitted of murder but convicted of manslaughter.

ON APPEAL: The Appeal Division of the Nova Scotia Supreme Court, with Justice Jones dissenting, took a different view of the case. In their opinion there was no violation of Ms. Black's right to counsel. If any violation of section 10(b) did occur, it was, according to Justice Pace, a "technical breach" not warranting exclusion pursuant to section 24(2) of the **Charter**. The majority of the Court ordered a new trial. Ms. Black appealed.

THE SUPREME COURT: The judgment of the Supreme Court is organized around the answers to five questions. Let us deal with them in order:

(1) Did the Appellant fully exercise her right to counsel during the course of her telephone conversation with Mr. Digby at 11:58 p.m.? The Crown argued that Ms. Black had fully exercised her right to counsel when she spoke to Mr. Digby at 11:58 p.m. The change of charge from attempted murder to first degree murder was, according to this line of reasoning, irrelevant. The Supreme Court disagreed. They noted that "an individual can only exercise his section 10(b) rights in a meaningful way if he knows the extent of his jeopardy". Thus the answer to question (1) was "no". The second question followed from the first.

(2) If not, was the appellant given a reasonable opportunity to exercise her right to counsel prior to giving the inculpatory statement? Ms. Black, in the Court's opinion, was not given a reasonable opportunity to consult counsel. The Court noted that the appellant had been reasonably diligent in attempting to obtain counsel. She was entitled to the lawyer of her choice and there was no reason to compel her to obtain a substitute for him. Ms. Black had asserted her right to counsel and, as there was no urgency, she should not have been compelled to make a statement without the opportunity of consulting with her lawyer.

(3) Did the appellant waive her rights? There was no express waiver by Ms. Black of her constitutional rights. Any waiver had to be implied from the circumstances of the case. In rejecting the Crown argument that Ms. Black had waived her right to counsel, the Court pointed out that she was a known alcoholic, that she had limited intelligence and only a grade four education. In addition, she was drunk when apprehended, registering a high blood-alcohol reading an hour and a half after her arrest. She was emotionally distraught and, at times hysterical, during her interrogation. Even though Ms. Black had initiated the conversation with Constable Ross, the Court was not satisfied that she had waived her right to counsel. Having found a denial of right to counsel and no waiver of the right, the Court next tackled the issue of exclusion.

(4) If there was a breach of the appellant's section 10(b) rights should the inculpatory statement be excluded under section 24(2)? On this issue the Court concluded that the trial judge correctly rejected the inculpatory statement. In the Court's view, admission of the statement would have affected the fairness of the trial and violated the accused right against self-incrimination. The breach of Ms. Black's rights was serious one. The seriousness of the charge of murder, the Court noted, did not require the admission of the confession in evidence. One issue remained.

(5)If there was a breach of the appellant's section 10(b) rights, should evidence regarding the recovery of the knife be excluded? A question arose as to whether the evidence regarding the discovery of the knife was "obtained in a manner that infringed" Ms. Black's rights, that is whether this evidence fell within the ambit of section 24(2) of the **Charter**. The Supreme Court found that the evidence of the discovery of the knife was "derivative evidence obtained as a direct result" of the appellant's confession. The discovery of the knife was "inextricably linked" to the violation of Ms. Black's right to counsel. Both occurred "in the course of a single transaction". Therefore, the evidence of the discovery of the knife was clearly within the ambit of section 24(2) of the **Charter**. The question still remained whether the admission of the evidence of the discovery of the knife would bring the administration of justice into disrepute and, therefore, lead to its exclusion.

In answering this question, the Court separated the knife itself from Ms. Black's conduct during its recovery. In regard to the latter, the Court held that Ms. Black's conduct in retrieving the knife and any communication uttered during that recovery had to be excluded on the same basis as the original statement. The knife was a different matter. It was, according to the Court, "real evidence" which existed separate and apart from the breach of the appellant's rights. Furthermore, the Court noted, the knife would inevitably have been uncovered by the police without infringing on Ms. Black's right to counsel.

In conclusion, the Supreme Court granted Ms. Black's appeal and restored the trial verdict.

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HISTORICAL NOTE

LEGAL IMPLICATIONS OF THE PERSONS CASE [1]

A. Anne McLellan*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Nelles continued)
the argument that it "... encourages public trust and confidence in the impartiality of prosecutors."[30] However, as the Court points out, the public trust in the office of the prosecutor is severely undermined when a prosecutor abuses his office with impunity. An absolute immunity results in a general lack of accountability to the public, and a specific lack of accountability to an injured party. Such a result is disturbing in a legal system which values equality under the law.

Closely allied is the concern that the prospect of suit and liability will have a "chilling effect" on the prosecutor in the fearless discharge of his duties; i.e., in order to avoid a suit, he will compromise the proper performance of his official responsibilities. In response, the Court pointed out that a lesser or qualified standard of immunity will adequately meet this concern. It will serve to protect a prosecutor in the proper, good faith discharge of his responsibilities. Only where a prosecutor has abused his office by acting with malice and without reasonable and probable cause will he be exposed to liability. This has a beneficial deterrence effect which will augment deterrents already in place, such as prosecution under the Criminal Code, and internal or professional discipline.

The Supreme Court is clearly right in refusing to be swayed by the potentially chilling effects of liability. In a regime of public tort liability where immunity has, more often than not, been the norm, the potentially detrimental effects of liability are purely speculative.[31] Little hard evidence exists for the proposition that the possibility of a suit for malicious prosecution will compromise the proper performance of an Attorney General's or Crown Attorney's prosecutorial functions. Concerns about the deterrent effect of liability should be alleviated by the fact that a malicious prosecution action casts a heavy onus on a plaintiff, and by the further fact that the Courts are able, on preliminary motion, to strike out frivolous or vexatious actions.[32] Any fears about a flood of litigation impairing the public prosecutorial system should be calmed by the Court's restriction of its judgment to the tort of malicious prosecution. Good-faith errors in judgment will not give rise to an action in negligence against a prosecutor.[33] And, should the fears about liability come to pass, they can be largely alleviated by a statutory scheme of state liability in place of a common law scheme of officer liability.[34]

In conclusion, the judgment of the Supreme Court of Canada in Nelles v. The Queen is appropriate. In a rational and reasoned fashion, it has struck a suitable balance between the interests of an injured plaintiff, the interests of the Crown and its public prosecutors, and the interests of the public at large.

1. The Supreme Court of Canada, unreported judgment, August 14, 1989.
2. Hogg, Peter W., "Liability of the Crown," (2nd ed.), (Toronto: Carswells, 1989).
3. Throughout all of the proceedings, the Courts did not draw a distinction between the position of the Attorney General or his agents, Crown Attorneys. If the Attorney General was absolutely immune from civil suit in respect of his prosecutorial functions, so were his agents, the Crown Attorneys involved.
4. R.S.O., 1980, c. 393.
5. See: Hogg, Peter W., supra, note 2, pp. 151-153; Richman v. McMurtry, (1983) 41 O.R. (2d) 559 (H.C.); Bosada v. Pinos, (1984) 44 O.R. (2d) 789 (H.C.); Owsley v. The Queen (1983) 34 C.P.C. 96 (Ont. H.C.); Nelles v. The Queen, (1985) 51 O.R. (2d) 513, (C.A.).
6. R.S.C. 1985, c. C-50.
7. In 1950, the Conference of Commissioners on Uniformity of Legislation in Canada adopted a model statute. This statute has been adopted by the legislatures of Alberta, Manitoba, New Brunswick, Nova Scotia, Ontario, Saskatchewan, and, to a lesser degree, British Columbia.
8. The order of Fitzgerald J. was reported in its entirety by Thorson J.A. in his judgment in Nelles v. The Queen, (1985) 21 D.L.R. (4th) 103 at 107. (Ont. C.A.).
9. Nelles v. The Queen, ibid., at 112-113.
10. Nelles v. The Queen, supra, footnote 1, (S.C.C.).
11. Eight provinces and the federal government have a Crown proceedings legislation modelled after the English legislation, Crown Proceedings Act, (1947) 10 & 11 Geo. VI, c. 44, and based on the model act adopted the Uniformity Commissioners in 1950.
12. One of the chief avenues of attack to the Crown's immunities and privileges in litigation with a subject would be on the basis of s. 15 of the Charter. In a number of recent cases, questions have been raised about the equality of the individual in litigation with the Crown and the viability of this avenue of approach; Leighton v. The Queen, [1989] 1 F.C. 75 (F.C.T.D.); Wright v. Attorney General of Canada, (1987) 36 C.R.R. 361; R. v. Stoddart, (1987), 59 C.R. (3d) 134 (Ont. C.A.).
13. Nelles v. The Queen, supra, footnote 1 (S.C.C.).
14. Riches v. D.P.P., [1973] 1 W.L.R. 1019 (C.A.); Hester v. MacDonald, [1961] S.C. 370.
15. As Lamer J. points out in his judgment in Nelles v. The Queen (S.C.C., 1989), there does not appear to be any Australian or New Zealand reported cases on the issue of immunity for public prosecutors.
16. Richman v. McMurtry, supra, footnote 5; Bosada v. Pinos, supra, footnote 5; Owsley v. The Queen, supra, footnote 5; Nelles v. The Queen,supra, footnote 5. Contra: Curry v. Dargie, (1984) 28 C.C.L.T. 93 (N.S.C.A.); German v. Major, (1985), 39 Alta. L.R. (2d) 270 (Alta. C.A.).
17. 96 S. Ct. 984, (1976), (U.S.S.C.).
18. Nelles v. The Queen, supra, footnote 1, per Lamer J.
19. Imbler v. Pachtman, 96 S. Ct. 984, at 991 per Powell J.
20. Hogg, Peter W., supra, footnote 2, p. 151.
21. Nelles v. The Queen, supra, footnote 1, per Lamer J.
22. E.g. Everett v. Griffiths, [1921] A.C. 631 (H.L.).
23. See: generally, Rubinstein, A., "Liability in Tort of Judicial Officers," (1963-64) 15 U.T.L.J. 317.
24. In this respect, LaForest J. limited his agreement with the judgment of Lamer J. to the common law position, preferring to leave the constitutional implications to another day.
25. 96 S. Ct. 984 (1976) (U.S.S.C.).
26. Nelles v. The Queen, supra, footnote 1, per Lamer J.
27. Pilkington, Marilyn L., "Damages as a Remedy for Infringement of the Canadian Charter of Rights and Freedoms," (1984) 62 Can. Bar Rev. 517; Cooper-Stephenson, "Tort Theory for the Charter Damages Remedy," (1988) 52 Sask. L. Rev. 1.
28. Pilkington, ibid., pp. 558-561.
29. Nelles v. The Queen, supra, footnote 1, per Lamer J.
30. Ibid.
31. Ibid.
32. Although in Nelles v. The Queen, supra, footnote 1, MacIntyre J. was of the opinion that it would be dangerous to rule on the existence of an immunity for public prosecutors on a preliminary motion in the absence of evidence.
33. Nelles v. The Queen, supra, footnote 1, per Lamer J.: " ... errors in the exercise of discretion and judgment are not actionable."
34. See: generally, Shuck, P., Suing Government, (New Haven: Yale University Press, 1983).

* **John M. Law**, Associate Professor of Law, University of Alberta.

(Black v. The Queen continued)

COMMENT: There are both positive and negative aspects to the decision of the Supreme Court of Canada in **Black v. The Queen**. The Supreme Court's endorsement of the proposition, that an accused must be given a new opportunity to consult counsel when there has been a change in the offence charged, is an important development. There are many reasons supporting such a proposition. Most fundamentally, it is difficult to conceive of a meaningful consultation with counsel in the absence of information regarding the nature of the offence with which the accused is charged. Without information as to the offence charged, there is no opportunity for the accused to exercise fully her right to counsel.

Another welcome element in the Supreme Court's judgment is its affirmation of the notion that no causal connection between the infringement of the accused's rights and the obtaining of the questioned evidence is required for the exclusion of that evidence. The Court endorsed the notion put forward by Chief Justice Dickson in **Regina v. Strachan** ([1988] 2 S.C.R. 980 at 1006) that "all evidence gathered following a violation of a Charter right" should be considered "within the scope of section 24(2)".

The third positive aspect of the judgment involves the exclusion of evidence regarding the accused's words and actions in recovering the knife. This is the logical outcome of applying the Chief Justice's statements in **Strachan** to the facts of the **Black** case. To the extent that the tests for exclusion of evidence in section 24(2) are, thereby, extended to derivative evidence this part of the Court's decision is an important reaffirmation of the notion that the ambit of the remedial power in section 24(2) of the **Charter** extends beyond evidence obtained directly as a result of a **Charter** violation.

On the discouraging side, however, we see, once again, the Court's almost knee-jerk reaction to the presence of physical evidence. The knife, it might be argued, was as much a part of the "unconstitutional transaction" as was the conduct, verbal and physical, of the accused in leading the police to her apartment and retrieving the knife for them. Diligent police work might have resulted in the recovery of the knife but that does not mean that the Crown should invariably get the benefit of such a presumption. The mere characterization of the knife as "real evidence" should not be determinative of its admissibility. Why is the disrepute attaching to the administration of justice any less problematic in relation to real evidence than any other type of evidence? The Supreme Court has yet to answer this question in convincing fashion.

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* **Bruce P. Elman** is Professor of Law, and Chair of the Centre for Constitutional Studies, University of Alberta.