

Gender Equality

From the "Famous Five"

BY MICHELLE FALARDEAU-RAMSAY, Q.C.

Pour montrer l'évolution des droits à l'égalité, l'auteure utilise, à commencer par les "5 fameuses" du cas Personne en 1929, la tradition chez les Canadiennes, de se servir du système judiciaire incluant les tribunaux administratifs.

When I graduated from law school in the late '50s, I was one of only six women in a class of 200. I was asked at the time, on more than one occasion, whether I was studying law because I wanted to marry a lawyer, a question that would be inconceivable today. The first time I appeared in court on behalf of a client, I was asked by a colleague whether I would cry if I lost the case. And I remember one occasion in the Montreal courthouse when three male colleagues stood guard while I used the men's washroom, because it had not occurred to anyone to put a ladies' room in the area reserved for lawyers.

It is ironic that in spite of the barriers women faced in the legal profession until very recently, it is that very profession—in the form of lawyers, judges, and the judicial system as a whole—that has played a crucial role in advancing equality for Canadian women over nearly seven decades. The role of the law in advancing gender equality is even more ironic in light of the fact that even after 1929, women were still denied the equal benefit of the law in so many different areas, including family law and property rights. Yet I would maintain that over the past two decades, women have had as much, if not more, progress promoting equality through the courts than they have through the legislatures.

On October 18, 1929, the Judicial Committee unanimously decided that the word "persons" included members both of the male and female sex."

In this article, I will look at the what the role of the courts has been in promoting gender equality; how women in the legal profession—from Nellie McClung to Claire L'Heureux-Dubé—have succeeded in advancing the cause of women's rights; and finally, what are the legal challenges still facing women as we approach the dawn of a new millennium?

The Famous Five

Nellie McClung herself once said, "people must know the past to understand the present and face

the future." In the early years of Confederation, women faced severe discrimination under the law and were systematically excluded from the judicial system. Certain criminal laws, such as infanticide, applied only to women, and different punishments for crimes were meted out depending on the sex of the offender. Family law, under both civil law in Quebec and common law in other parts of Canada, treated women entirely as dependents. For example, a husband's permission was necessary for a wife to engage in business, or even to administer or sell property which she had owned before marriage.

Nor could women have any influence over the laws that affected them. Women could not vote or hold public office, and it was not until 1897 that the first woman—Clara Brett Martin—was admitted to the Bar of a Canadian province. In some provinces, the prohibition on women practising law lasted well into the twentieth century.

This was the backdrop to the Persons Case, which was launched in 1928. As you are no doubt well aware, the case involved five women who successfully challenged the provision in the *British North America Act* that made women "non-persons" in the matter of rights and privileges.¹ While the actual challenge dealt with the right of women to be named to the Senate, the case had significantly broader implications. The question the "Famous Five" put in front of the Supreme Court was simply this: "Does the word 'person' in Section 24 of the *British North America Act, 1867*, include female persons?" The Court deliberated for a month, and on April 24, 1929, it ruled that the *BNA Act* did not include women. The Famous Five then persuaded the government of Canada to appeal the decision to the British Privy Council, then the highest court of appeal.

On October 18, 1929, the five Lords of the Judicial Committee unanimously decided that the word "persons" in Section 24 of the *Act* "included members both of the male and female sex." They went on to describe the exclusion of women from public office as "a relic of days more barbarous than ours."

From a legal perspective, the Persons Case is significant not only because it allowed women to be named to the Senate, but because it gave women's struggle for equality a legitimacy in law. It inspired future generations of women to continue to fight for their rights in the legislatures, the courts, and in all areas of society.

and the Law to the New Millennium

Gender equality and the courts

The Persons Case was the beginning of what has become a tradition of Canadian women using the judicial system, including administrative tribunals, to advance equality rights. There have been literally dozens of tribunal and court decisions—before and after the coming into force of Sections 15 and 28 of the *Canadian Charter of Rights and Freedoms*—which have advanced the cause of gender equality.

A prime example of this has been the history of jurisprudence related to sexual harassment. In 1980, an Ontario Human Rights Board of Inquiry ruled in the *Cherie Bell* case that sexual harassment was a form of discrimination based on sex. Later in the decade, the Supreme court decisions in *Robichaud* and *Janzen* further established an employee's right to a harassment-free working environment. Although the Canadian Human Rights Commission had accepted sexual harassment complaints since its establishment in 1977—and the *Canadian Human Rights Act* was amended in 1983 to specifically prohibit sexual harassment—these two Supreme Court decisions were without a doubt the single most important developments in the area of harassment law.

Similarly, the Court's 1987 decision in *Action Travail des Femmes v. CN Rail*, which, like *Robichaud*, began as a complaint under the *Act*, broke new ground for women seeking employment in non-traditional occupations. The *Action Travail* case was significant in that it established the authority of a human rights tribunal to order special measures in cases of systemic discrimination. This decision not only benefited women, but other traditionally-disadvantaged groups as well, as evidenced by this year's tribunal decision in *NCARR v. Health Canada*, in which the tribunal ordered special measures aimed at visible minorities seeking management and administrative jobs with that government department.

Two years later, the human rights tribunal decision in the *Gauthier* case ordered the Canadian Armed Forces to integrate women into all combat-related positions, with the exception of submariners. The Canadian Armed Forces have not made as much progress toward integration as we would like to see. It is clear that commitment at the top is crucial if the principle of integration is to be translated into reality. That commitment must be filtered down through all levels of the Forces, both in terms of recruit-

ment efforts and in the way women are treated when they arrive. We continue to work with the Forces in their efforts to integrate women.

In addition to the numerous cases that have been dealt with under provincial and federal human rights legislation, there have also been a significant number of constitutional cases that have advanced the cause of gender equality. The Supreme Court's *Morgentaler* decision, which struck down the *Criminal Code* provisions on abortion, comes immediately to mind. So does the Court's decision in *Andrews v. Law Society of British Columbia*, which did not directly involve gender equality, but established the principle that s.15 of the *Charter* is meant to overcome conditions of disadvantage created by law in our society. The Court went on to say that equality under the *Charter* does not require that all laws apply in the same way to everyone; such a system would fail to take into account differences among individuals and might, in fact, increase disadvantages.

In short, *Andrews* confirmed the important human rights principle that treating people equally does not mean treating people in exactly the same way, a principle that has since been the basis of countless tribunal and court decisions on matters and gender equality.

In 1990, the Court's decision in *R. v. Lavallée* forever altered the concept of "reasonableness" in cases involving self-defence by victims of domestic violence. In this case, an appeal of the conviction of an abused woman accused of killing her common-law husband, Madam Justice Wilson made it clear that what is considered "reasonable" for a man may not be "reasonable" for a woman. She wrote:

If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical reasonable man. (874)

It was the beginning of what has become a tradition of women using the judicial system to advance equality rights."

Other decisions have provided not only important precedents, but also social commentary relating to women's status. In *Moge v. Moge*, in which the Court decided in favour of a divorced woman whose support payments had been discontinued, Madame Justice L'Heureux-Dubé expounded on a theme that went far beyond Mrs. Moge's specific situation: the condition of poor women. Writing for the majority, she described the feminization of poverty as "an entrenched social phenomenon," pointing out that the percentage of poor women in Canada doubled between 1971 and 1986.

This is not to give the impression that women have always succeeded when they have brought gender equality cases before tribunals and the courts. A number of the cases I have mentioned ended up at the Supreme Court because lower courts failed to uphold the women's position. It may not be common knowledge here, for example, that the very first human rights tribunal that dealt with Bonnie Robichaud's sexual harassment complaint back in 1982 dismissed it. Similarly, the successes of Mary Two-Axe Early and Sandra Lovelace in fighting for the legal rights of Aboriginal women were preceded by two failed attempts by women in the 1970s to challenge the *Indian Act* before the courts.

But even when women have lost their cases, the decisions have had lasting significance. The *Bliss* case, in which the Supreme Court ruled in 1979 that the *Unemployment Insurance Act* did not discriminate against Stella Bliss on the basis of sex but rather on the basis of pregnancy, resulted in federal legislation repealing the section of the *Act* requiring someone claiming pregnancy benefits to have been in the workforce longer than someone claiming ordinary benefits. More recently, the *Thibaudeau* case resulted in changes to the law governing the deductibility of child support payments, even though a majority of the Court had ruled that Suzanne Thibaudeau was not a victim of sex discrimination.

Women in the legal profession: have they made a difference?

We are aware that Canadian courts, by handing down decisions like *Robichaud* and *Action Travail des Femmes*, have made a significant impact on gender equality in Canada. Moreover, they have paved the way for equality for other disadvantaged groups as well; for example, the duty of an employer to provide a harassment-free environment not only covers sexual harassment, but also harassment on other prohibited grounds of discrimination such as race, religion, or sexual orientation. Similarly, *Action Travail* gave judicial sanction to the setting of numerical hiring goals as a remedy in cases of systemic discrimination; the more recent human rights tribunal decision in *NCARR v. Health Canada*, which ordered a similar remedy for visible minorities in administrative and public service positions, is the natural outgrowth of the *Action Travail* case.

But there is another issue to be raised in the "gender equality and the law" equation: and that is whether the slow but steady influx of women into the higher ranks of the legal profession has had an impact on the furthering of gender equality before the law. Have women lawyers had a particular role to play in advancing women's equality? And does the mere existence of one or more women on the bench increase the possibility that a court decision will break new ground in the area of equality rights?

This is, of course, a somewhat controversial issue that has been debated within both the women's movement and the legal profession for some time. After all, if justice is truly blind, is it not gender-neutral as well? And if women and men are equal, why should women act any differently than men in the performance of their duties?

It is, needless to say, a debate that interests me personally as well as professionally. When I was first appointed Chief Commissioner of the Canadian Human Rights Commission, I was often asked whether my being a woman would make a difference to the way I carried out my work. It would have been easy for me to say that it wouldn't; that I would just do my work in a professional way and my gender would not have any bearing one way or the other. But that would not have been totally honest; I know that my experiences as a woman affect the way I see the world, and the way I look at human rights issues in particular. I also know it affects my management style and the way I interact with others. I do not believe that this in any way detracts from my ability to be objective when making decisions on human rights complaints, or my professionalism in other areas of my work.

We also know from the history of sexual assault and domestic violence cases that justice has never been truly gender-neutral; that it has taken a long time for a male-dominated judiciary to treat these kinds of crimes with the kind of seriousness they deserved. As the Canadian Bar Association's *Report on Gender Equality in the Legal Profession* succinctly put it:

There is no such thing as a neutral perspective.... A white view of the world is not neutral. A masculine view of the world is not neutral. A heterosexual view of the world is not neutral. Women of Colour, Aboriginal women, disabled women, lesbian women have all had experiences of life that differ profoundly from those of the dominant Canadian culture and each group brings a unique and different perspective to our understanding of life and the law. (4)

Similarly, Judge Rosalie Abella, in an article called "The Dynamic Nature of Equality," made the point that

every decision-maker who walks into a courtroom to hear a case is armed not only with the relevant legal texts, but with a set of values, experiences, and assumptions that are thoroughly imbedded. (8-9)

I am not saying that female judges automatically view cases through a feminist lens; or that male judges are unable to bring a perspective to the bench that is sympathetic to women's experience. After all, a man, Owen Shine, wrote the Ontario Board of Inquiry decision in the *Cherie Bell* case, the first case at any level to establish that sexual harassment was a form of sex discrimination. The Supreme Court decision in *Action Travail des Femmes* was written by Mr. Justice Dickson and in *Robichaud* by Mr. Justice La Forest. We are also familiar with cases in which the opposite was true. There was, for example, the controversial case in Quebec a few years back in which a female judge imposed a less severe penalty in an incest situation because the young victim retained her virginity.

But in a number of cases, it has been clear that having a woman on the bench has made a difference, a prime example was Madam Justice Wilson's judgment in *Morgentaler*. In striking down the abortion law, the majority of the Court ruled that, at a minimum, the law posed unnecessary risks to a woman's emotional and physical well-being. Justice Wilson's own judgment, however, went farther, arguing that the law violated women's rights in a more profound way, treating a woman as "a passive recipient of a decision made by others as to whether her body is to be used to nurture a new life." "Can there be anything that comports less with human dignity and self-respect?" she concluded.

Similarly, one wonders if Madam Justice Wilson's judgment in *Lavallée* or Madame Justice L'Heureux-Dubé's in *Moge* would have been written in exactly the same way if it had been written by a man. In both those cases, the female justices were writing a majority opinion, so it is clear that men on the court were in agreement with the decision. But could it indeed be argued that female "values, experiences, and assumptions"—to quote Rosalie Abella—were behind the actual words that were written in these decisions?

Perhaps even more germane are the gender equality cases in which the women on the Supreme Court came together as the sole dissenters: the *Thibaudeau* case immediately comes to mind. Was it coincidence that only Madam Justices McLachlin and L'Heureux-Dubé held for Suzanne Thibaudeau in her fight over the deductibility of child support payments? Although the two dissenting opinions varied in the reasoning which led to their conclusion, the fact that the vast majority of separated and divorced custodial parents are women was at the crux of both dissents.

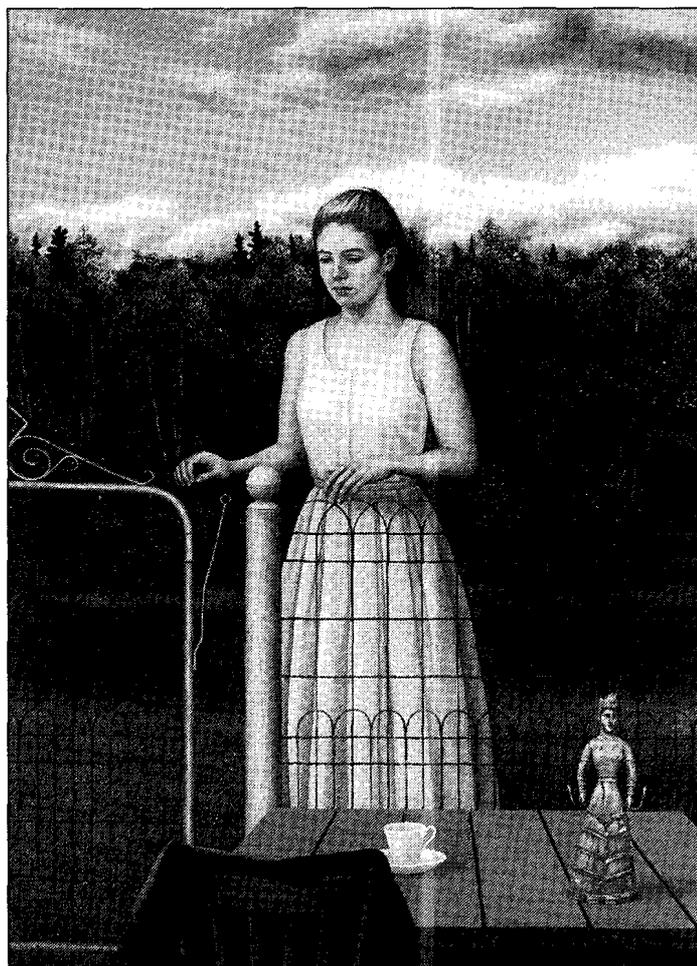
While I believe judges must be impartial and base their judgments on sound legal principles, they are also human beings, the product of their experiences. It only makes sense that women lawyers and judges bring a different voice to their work, just as I bring a different voice to my work as Chief Commissioner.

I would also be remiss if I did not mention in this context the remarkable work of women lawyers and in

particular, the role of both the National Association of Women and the Law (NAWL) and the Women's Legal Education and Action Fund (LEAF). Some of the cases I have mentioned might not have even come before the courts had it not been for LEAF's involvement. And it is clear that women are leading the charge to transform the legal profession itself, as evidenced by *Creating Choices: The Report of the Task Force on Federally Sentenced Women*.

Future challenges

Because we now have a critical mass of women entering the profession, this transformation is inevitable, in spite of the obstacles we still have to overcome. Modern-day critics of the women's movement—the "backlash," as it is often called—argue that these issues are no longer relevant, because haven't women achieved the equality they have sought for so long? But you and I know that anyone who believes this is living in a dream world. And just as we still face significant challenges in breaking down the barriers to women within our own profession, there are still major legal challenges to be met in terms of equality for women in society as a whole.



Valerie Palmer, "Spring," oil on linen, 49.5" x 35.5", 1992.
Courtesy of Nancy Poole's Studio, Toronto, Ontario. Photo: Tom Moore

The fact that the Canadian Human Rights Commission alone receives some 300 sex discrimination complaints each year—more than 95 per cent of them filed by women—is evidence that true equality for women is yet to be realized. About one-third of those complaints involve allegations of sexual harassment in the workplace—and here we are over ten years after the Supreme Court's decision in *Robichaud*. For these women, the struggle for equality is far from over.

Nor is the struggle for equality over for women who are still fighting for pay equity: the right to be paid according to what their jobs are really worth. It is not over for women seeking entry to blue-collar jobs or combat roles in the Canadian Armed Forces. It is not over for victims of sexual assault, who still face the possibility that their psychological and medical histories will be revealed in court. And it is certainly not over for visible minority, immigrant, and Aboriginal women; or for lesbians; or for women with disabilities; or for sole-support mothers, and other women on low incomes.

Moreover, equality is not an absolute phenomenon; it is something that relates directly to what is taking place in the broader society. Human rights law, because of its very nature, is always a work in progress. Because it deals with the rights of people who have traditionally been disadvantaged and is therefore closely tied to society itself, it is constantly advancing to keep up with changing perceptions of what constitutes equality. As Rosalie Abella so eloquently put it.

Equality is evolutionary, in process as well as in substance; it is cumulative, it is contextual, and it is persistent. Equality is, at the very least, freedom from adverse discrimination. But what constitutes adverse discrimination changes with time, with information, with experience and with insight. What we tolerated as a society 100, 50, or even 10 years ago is no longer necessarily tolerable. Equality is thus a process, a process of constant and flexible examination, of vigilant introspection, and of aggressive open-mindedness. (4)

Women in the legal profession have an important role to play in what Judge Abella describes as this evolutionary process. Women lawyers and judges have broken new ground in the area of gender equality, both within their profession and in the courts. But they cannot do it alone: the rest of society—including the justice system—must also be transformed to create a culture of equality. As Bertha Wilson herself has said: "It will be a Pyrrhic victory for women and for the justice system as a whole if changes in the law only come through the efforts of women lawyers and women judges" (516).

The legal profession—women and men—can play a leadership role in ensuring that this culture of equality is a reality for the generations of women that will follow us

in the new millennium. We have the knowledge, the resources, and the tools to make it happen. If the Famous Five were alive today, they would no doubt be impressed with the progress that has been made in the years since their era. Let us hope that our daughters and granddaughters and great-granddaughters will look back at the progress that has been made since our era, and be able to make the same observation.

This article has been adapted from a presentation made at the National Association of Women and the Law's "Gender Equality and the Law" Conference, held in Halifax, Nova Scotia, October 30-November 2, 1997.

Michelle Falardeau-Ramsay is Chief Commissioner for the Canadian Human Rights Commission.

¹The five women who brought the Persons Case to the Privy Council were Emily Murphy (1868–1933), Nellie McClung (1875–1951), Mary Irene Parby (1868–1965), Henrietta Muir Edwards (1849–1931), and Louise McKinney (1868–1933).

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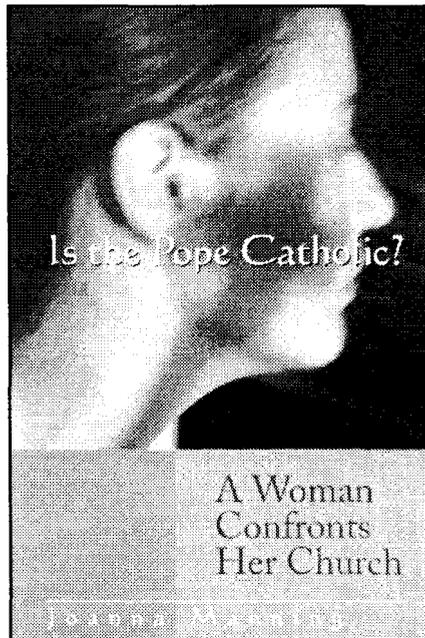
A Woman Confronts Her Church

The papacy of John Paul II has seen the Catholic church assume centre stage in global politics. But therein lies a paradox: the church preaches universal human values, yet, at the same time, treats women as second-class citizens.

From the renewed ban on women priests to the Vatican's interventions at UN conferences, John Paul and his supporters have reversed women's progress towards equality. This has bitterly divided Catholics and undermined the Church's credibility.

Drawing on her experience as a former nun, a teacher in the Catholic school system, and an outspoken advocate of women's equality, Joanna Manning powerfully and persuasively articulates how John Paul's views on women are not only a disaster for the Catholic church, but also a threat to the well-being of all women, regardless of belief.

In 1995 Joanna Manning received the Marion Tyrell Award for outstanding contribution to Catholic education. Manning has published articles in *The Globe and Mail*, *Toronto Star*, and *Catholic New Times*. She also operates Anne Frank House in Toronto, a non-profit housing community for refugees.



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