Forfeiture of Office on Conviction of an "Infamous Crime"

Edward McWhinney

In 1987 a Member of the British Columbia Legislative Assembly was convicted for counselling a local printing firm to alter an invoice so that another firm could write off the costs of an election brochure. The relevant sections of the Canadian Criminal Code were sections 324 and 325 (forgery, making a false document knowing it to be false), and section 422 (counselling other persons to commit offences). The Member was fined $1,500.00 and placed upon probation for ninety days. The conviction was upheld, on appeal, by the Court of Appeal of the Province, in 1988.
The case raised the question of the meaning that ought to be given, in a contemporary context, to precisely drafted language, of respectably ancient constitutional lineage, contained in constitutional charters or similar basic laws that have failed to be up-dated so as to accord with contemporary conditions and demands.

The *Constitution Act of British Columbia* contains the following express provision as to forfeiture of the seat of a member of the Legislature:

54. "If a member of the Legislative Assembly ... becomes a bankrupt, an insolvent debtor or a public defaulter or is convicted of treason, or felony or any infamous crime. ...his election becomes void and the seat of the member shall be vacated. A writ shall issue, within 6 months after the time when the seat of the member became vacated, for a new election."

Section 54 represents a codification of the constitutional law of Great Britain, as it existed in the late Victorian era at the time of the original enactment of the *Constitution Act of British Columbia*. As such, section 54 is a blend of old English Common Law constitutional law dating back to mediaeval times, and some latter day English statutory innovations like the several additions effected under the Bankruptcy Acts of 1812 and 1869.

The task in interpreting section 54 of the *Constitution Act of British Columbia* today is to give a contemporary meaning and application to words used, originally, more than a century ago. Since constitutional texts do not operate in a social vacuum, they cannot be interpreted in the abstract.

Edward McWhinney, Q.C. is Professor of Constitutional Law at Simon Fraser University in British Columbia. His article is a revised version of a constitutional opinion furnished to the Speaker of the British Columbia Legislature in December 1987.

Their legal operation today must turn upon an examination of their original social context and the community policies to which they responded over the long course of historical evolution from mediaeval to Victorian England.

Their legal operation must also be conditioned by the degree and quality of "reception" in British Columbia in the late 19th century not merely of the words and phrases used by English law makers and judges in earlier times, but also of the changing community policies to which those English jurists had responded in developing their distinctive English jurisprudence. For the process of historical "reception" from one constitutional-legal culture to another cannot be a purely mechanical one, producing an automatic carry-over of the whole corpus of rules and principles and processes, but must involve, instead, a conscious form of testing and selection, with only those elements of the "foreign" law accepted that are manifestly relevant and applicable in the new society in the light of its own distinctive conditions and needs.

The process of legal interpretation, and especially constitutional-legal interpretation, involves no necessary and inevitable surrender to the dead-hand control of past history. As Oliver Wendell Holmes remarked, it is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. Lord Sankey expressed Holmes' truth in a specifically Canadian context when, on behalf of the Privy Council, he spoke of the Canadian constitution as a "living tree capable of growth and expansion within its natural limits".[1]

Thus, in rendering full value to the words as originally used in section 54, with their own original (English) historical connotations, we must seek to give them a fully contemporary application that will respond in measure to the contemporary political and social reality in Canada and in British Columbia in particular.

The Meaning of Felony

One of our first discoveries, in approaching the interpretation of the phrase, in section 54 – "convicted of treason, or felony or any infamous crime", is that the concept of "felony" is legally anachronistic in terms of Canadian law, having lapsed into desuetude and been suppressed altogether in the modern definitions and generic classifications of crime under the contemporary Canadian Criminal Code. Even within that English law from which the concept of "felony" was originally "received" or derived for purposes of the Constitution of British Columbia, its meaning had become blurred and the underlying social policies confused or lost, well before the late Victorian era, – the actual time of "reception" in British Columbia.

The English Common Law connotation of "felony" does not, it is clear, stem from any consistent logical development, but from history, including historical accidents, of development of particular categories of crimes and even particular crimes themselves. The course of English legal history bases a definition of "felonies" either in terms of *consequences* – the general atteint, and forfeiture of land or goods or both, attaching to convicted felons; or in terms of *incidents and procedures* – the facts that a suspected felon could be arrested by a private person without judicial authority, and that, in an actual trial for felony, the accused could exercise a right of peremptory challenge of jurors (up to twenty in number) and could not be tried *in absentia*, and that, in the case of peers of the realm, there was the special rule as to trial by the King-in-Parliament. Medley notes that in early mediaeval times, felony was any crime that could be prosecuted by appeal to battle ("wager of battle").[2]

If the meaning of "felony" is to be sought either in the definition-in-terms-of-consequences or in the definition-in-terms-of-incidents-and-procedures, then these English historical prescriptions are manifestly inapplicable and unsuitable to societal conditions in Canada, and therefore incapable of legal "reception", either in late 19th century or contemporary terms.

The meaning of "felony", for present Canadian purposes, must therefore be sought elsewhere – in its intrinsic elements, rather than through pursuit of extrinsic, historically-based considerations. The classical English texts on criminal law – Kenny, for example, in his successive editions[3] – classified crimes according to their technical degree of importance as either Indictable Offences (admitting of trial by jury) and Petty Offences (those which could only be tried summarily, by justices of the peace sitting without a jury); and broke down indictable Offences into the three categories – Treasons, Other Felonies, and Misdemeanours. Among the various "Other Felonies" that developed historically – leaving aside, for present purposes, the consequences of adjudgment in felony that we have already discussed of forfeiture of property – a dominant element seems to have been their deemed gravity or heinousness in their particular societal context, distinguishing them thereby from mere Misdemeanours. Thus, the earliest use of the term felony appears to have been to denote breaches of what might be called the feudal bond, obligating the vassal in service to his lord.[4] This was followed, in the course of the twelfth and thirteenth centuries, in the historical development of the English Common Law, by the addition of homicide, rape, arson, larceny, robbery, burglary and kindred offences.

According to Medley, by the end of the thirteenth century there were some seven or eight definite crimes that came under the head of "felony".[5] Very much later, through statutory intrusion on the Common Law, counterfeiting the coin of the realm (which had originally been treason) had been legislated into a felony; while forgery of most documents (a misdemeanour at Common Law) also had been made a felony through statute law. Maitland concluded that

the original common denominator of the Common Law felonies, at the time when the Common Law was first taking shape in the thirteenth century, was that they were all considered as "peculiarly grave"; and that they were, broadly speaking, capital crimes (save petty larceny or stealing to less value than 12 pence).[6]

If there was this common core, so to speak, in the earliest historical period of the Common Law, the legal purity or integrity of the felony concept soon became corrupted by highly pragmatic considerations. The obvious financial benefits occurring to the feudal authorities from the resultant widespread forfeiture of properties of those adjudged guilty in felony, led to an abusive expansion of the categories of felonies;[7] and, paradoxically, the excessive severity and cruelty of the punishments led, by a form of "pious perjury", to the progressive extension of the "benefit of clergy" (and consequent exemption from legal penalties) to ever-widening classes of people.[8] A great deal of the creative energies of the Tudor monarchs had thereby to be devoted to special statutes cutting down on the "benefit of clergy" by, in effect, limiting it to ordained clerks and removing it altogether in respect to certain categories of offences, – as, for example, piratical offences, highway robbery, horse-stealing, stealing from churches, and, in 1576, rape.

The effect of these changes was to introduce a further legal refinement to the classification of felonies, dividing them between "clergyable" and "unclergyable".[9] The various statutory innovations, over the centuries, however, did much to attenuate, or destroy, the key element of "heinousness" in the identification of the nature and character of a felony, rendering increasingly arbitrary and illogical the demarcation of felonies from misdemeanours. As late as 1786, killing of a horse in an unlicensed place was made a felony, rather than a misdemeanour. The gravity of a criminal offence, for purposes of Canadian law, can gain little today by reference to the vagaries and varieties of English statute-law classifications of felonies/misdemeanours.

Parliamentary Consequences of Felony Convictions in England

The convicted felon, under English Common Law constitutional law, lost any office or pension. He could not vote for, or sit in Parliament or hold military or civil or ecclesiastical office, until after he had been pardoned or had worked out his sentence. These disqualifications did not apply to persons convicted of misdemeanours. Parliament could, however, always opt to expel, on its own grounds of unfitness and by its own vote, any member who might happen to be convicted of a misdemeanour.

There are historical examples of the objection of felony being raised as a ground of disqualification for election to Parliament, going back to the reign of James I. The case of Goodwin, an outlaw who, in defiance of the King's special writ forbidding the election of bankrupts and outlaws as knights of the shire, had been returned for Buckinghamshire in 1604 is interesting in that the House of Commons pleaded that, even if he were an outlaw, a fact which they disputed, there were precedents for persons of that category as Members of the House.[10] The latter-day English constitutional cases, however, tended to concern the eligibility of previously convicted felons who had already served their sentences, to sit in the House of Commons. Medley thought that the House of Commons, in such cases, might always try to exercise its power to expel for unfitness, as it could certainly do in the lesser case of conviction for misdemeanour.[11] The matter was, however, resolved beyond possibility of legal doubt in 1870, and in a way beneficial to previously convicted felons, by statute law declaring such persons who had already served their term or received a pardon to be legally eligible for seats in the House of Commons.[12]

The change in community policies evident in this amelioration of the positive law as to disqualification from Parliamentary honours of convicted felons seems not merely a consequence of the increasing acceptance of the artificiality and arbitrariness of the old felony/misdemeanours dichotomy, with the absolute bar in the one case and the purely discretionary, facultative approach (leaving any action to the initiative of Parliament itself) in the other case. Rather, the effects of the democratisation of the English constitutional system in the course of the 19th century, and the marked, further opening up of the adult male franchise with the passage of the Second Reform Bill of 1867 on Parliamentary representation, should not be discounted.

Combined with the long-range effects of the Septennial Act of 1716[13] which brought to an end the system of near-perpetual "long" Parliaments that had characterised the Yorkist and then Stuart reigns by enforcing periodicity of elections to the Commons,[14] this meant a substantially representative and democratically-elected legislature that would present itself to its constituents at regular intervals for further constitutional legitimation or renewal. Why not leave to an ultimately sovereign electorate, in this way, the application of any moral or political sanctions that might be deemed appropriately to attach to any past or present acts of felony? The 1870 statute, in positively removing the constitutional stigma and also the practical constitutional-legal impediment in the case of past conviction for felony that had already been purged or pardoned, confirmed that it had become, by the late 19th century, a formal and not a substantial bar surviving from a mediaeval past. These policy considerations seem reinforced, in modern times, by the passage from the Septennial Act stipulation for general elections of Parliament

at a maximum of seven-year intervals, to the present maximum, in Great Britain, of five-year terms.

General Constitutional Conclusions

The following general constitutional conclusions may be made as to the contemporary meaning and interpretation of section 54 of the Constitution Act (B.C.):

Section 54 of the Constitution Act, in speaking of conviction of "felony", employs language that is, by now, legally anachronistic in relation to Canada and British Columbia, and, in any case, that has historical incidents and consequences that are inapplicable and inappropriate under distinctive local conditions.

Legal meaning can only be given to the language of section 54, in a contemporary Canadian and British Columbia context, by discarding the casual, accidental elements of "felony" arising, in time past, in response to special historical conditions in English society, and concentrating, instead, on the key, continuing element – the insistence, (in spite of some idiosyncratic, seemingly even absurd examples emerging at particular time periods), on a common core of heinousness of the offence charged.

The insistence that conviction for felony can only be interpreted meaningfully, in contemporary terms, as conviction for a heinous offence, is confirmed by reading the purported "criminal" bar in its entirety – conviction of "treason, or felony or any infamous crime". The ordinary rules of statutory construction, and application of the *ejusdem generis* rule, would interpret "felony" in its statutory context as deriving its connotation from, and being influenced and limited by, "treason" and "any infamous crime", and therefore denoting only criminal offences of extreme gravity.

Specific Constitutional Application Today

1. *The timing of initiation of any action.* On the assumption that the substantive test of conviction of "treason, or felony or any infamous crime" is met, when can the remedial action envisaged under s. 54 be legally initiated? In the *Wilson* affair, in the Legislative Assembly of Manitoba in December, 1980,[15] the Legislative Assembly voted to expel the Member concerned after his conviction and sentencing to seven years imprisonment on charges of conspiracy to import and traffic in marijuana, although at the time of the Legislative Assembly's action an appeal against the criminal conviction had already been filed and the Member concerned was released on bail. Such legislative action – literally, "jumping the gun" on the final determination by the courts of law of the guilt or innocence of the Member concerned for the crime with which he was originally charged and which formed the basis of the Legislature's own action – would seem capable, only with extreme difficulty, of being reconciled with the Canadian Charter of Rights and Freedoms' general constitutional guarantees of due process of law (Legal Rights, sections 7-14). The conclusions by Chief Justice Glube of the Supreme Court of Nova Scotia (Trial Division),[16] that the Charter of Rights and Freedoms does indeed apply to establish judicially enforceable constitutional limits to a Provincial Legislature's dispositions as to eligibility of its Members, seem constitutionally persuasive in this regard. Nor does the statutory *arrière-pensée* by the Manitoba Legislature, in retroactively amending its own Legislative Assembly Act, after it had purported to dispose of the Wilson affair by expulsion of the Member, so as to provide, in effect, for reinstatement of a Member and for a (discretionary) reimbursement of Parliamentary salaries if the Member's appeal against criminal conviction should eventually be upheld by the courts,[17] appear to accord any better with contemporary constitutional standards of due process to which legislative prescriptions such as s. 54 of the Constitution Act (B.C.) must legally conform.

Any remedial action of the Legislative Assembly of B.C., in terms of s. 54, in regard to the conviction by a Member for "treason, or felony or any infamous crime", could therefore, it is submitted, only be constitutionally initiated after the final exhaustion of all appeals or the expiry of the time in which such appeals may be brought; and the Member concerned would remain constitutionally entitled to all his Parliamentary rights and privileges, including salary and allowances, pending final termination of the appeals processes.

2. *The effect to be given to an unconditional discharge, if granted, on appeal from sentence, if the original criminal conviction should itself be upheld.* As we have noted above, the English constitutional-legal bar to eligibility for seats in Parliament, arising from conviction for felony, was not an absolute one, but lasted only so long as the term applied by the courts had not been served or the person concerned had not received a pardon. The criminal penalty once purged, the constitutional rights and privileges of the person concerned revived. While there is no apparent legislative precedent, one way or another, going to the legal effect of an unconditional discharge on conviction for "treason, or felony or any infamous crime", it seems difficult not to accord to it the quality of effectively purging the offence.

3. *The rôle, if any, of the Legislative Assembly.* The Legislative Assembly of B.C., as a lineal descendant of the English Parliament, inherits its not inconsiderable inherent judicial powers and functions stemming from the mediaeval "High Court of Parliament". Mr. Justice Dryer of the Supreme Court of British Columbia, in a 1978 judgment, referred to the "old dualism [that] remains unresolved" as to

the respective *rôles* of the Legislature and the Courts in interpreting the constitutional-legal ambit of Parliamentary privileges.[18] In *Reference re Amendment of the Constitution of Canada*, in late 1981,[19] the Supreme Court of Canada majority referred, in passing, to the "'court' aspect of Parliament and the immunity of its processes from judicial review." Chief Justice Glube of the Supreme Court of Nova Scotia, in the opinion, in 1987, in the *Maclean* case, cited this dictum with approval in going on to rule, nevertheless, that the constitutional Charter of Rights and Freedoms, adopted in 1982, operates legally to limit Provincial Legislatures, – by virtue of Charter s. 3, – in their purported dealings with the eligibility of their Members. This would appear to provide an excellent contemporary Canadian constitutional rationale of the relation between the Legislature and other, coordinate constitutional institutions like the Courts in the interpretation and application of the rights and privileges of Members. On this view, the Courts should sensibly defer to the Legislative judgment in such matters, though the Democratic Rights (sections 3-5) established in the Charter remain in reserve, for judicial application if need be, in case of allegedly politically abusive action by the Legislature.

Résumé

The provisions of s. 54 of the Constitution Act (B.C.) are not self-executing, and can only be activated by Resolution of the Legislative Assembly.

It is for the Legislative Assembly to determine the meaning of conviction of "treason, or felony or any infamous crime" in s. 54.

In a contemporary Canadian and B.C. context "treason, or felony or any infamous crime" is limited, in its connotation, to crimes of a particularly heinous character.

Unless the Legislative Assembly should resolve that this substantive test of heinousness has been met, then no action under s. 54 would arise.

Any action, or non-action, by the Legislative Assembly in regard to s. 54 should not be judicially reviewable except as to the one point as to any incidents, by way of further penalty or disability (present or future), sought to be attached by the Legislative Assembly beyond the voiding of election and vacating of seat envisaged, in terms, under s. 54. In particular, no condition could, compatibly with the Canadian Charter of Rights and Freedoms, legally be attached to any Resolution that would bar the Member concerned from presenting himself as a candidate for re-election in the resultant by-election or at any future general election. ■

Notes

1. *Edwards*, v. *Attorney General for Canada*, [1930] A.C. 124 (P.C.).
2. Medley, *English Constitutional History*, (4th ed., 1907), p. 355.
3. Kenny, *Outlines of Criminal Law* [1902; 15th rev. ed., (by G. Godfrey Phillips, 1942], p. 104.
4. Kenny, *op. cit*., p. 106.
5. Medley, *op. cit*.
6. Maitland, *The Constitutional History of England* (1909), p. 229.
7. Medley, *op. cit*.
8. Maitland, *op. cit*.
9. Hallam, *Constitutional History of England* (1876), vol. 3; Stephen, *History of Criminal Law*, vol. 2.
10. Prothero, *Statutes and Constitutional Documents. 1559 - 1625*, pp. 325-331.
11. Medley, *op. cit*., p. 193.
12. 33 & 34 Vict. c.23, s.2.
13. Dicey, *Law of the Constitution* [1885; 9th ed. (by E.C.S. Wade), 1939], p. 44; Maitland, *op. cit*., p. 292.
14. Medley, *op. cit*., p. 263.
15. Discussed in Mackintosh, "The Right of Legislatures to expel Members: a Manitoba case study", *Canadian Parliamentary Review*, vol. 4, no. 4, (1981-82), p. 18.
16. *Maclean v. Attorney General of Nova Scotia*, (Supreme Court of Nova Scotia, Trial Division), decision of 5 January 1987.
17. Legislative Assembly Act (Manitoba), s. 19(1) (as amended); discussed in Mackintosh, *Canadian Parliamentary Review*, vol. 4, no. 4, at p. 24.
18. *Wallace v. Attorney General of British Columbia*, [1978] 1 W.W.R. 411, 413.
19. 125 D.L.R. (3d) 1 (1982).