

The "Persons" Controversy: The Legal Aspects of the Fight for Women Senators

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Canada is a country where anniversary celebrations play a large role in maintaining the historical consciousness of the people. The women's movement has not escaped this phenomenon. Thus, in 1979, the country witnessed the spawning of numerous projects, conferences and articles celebrating the fiftieth anniversary of the "persons case" decision. Judging from the attention that it received, the obvious conclusion would be that the case represented a significant step in the evolution of women's rights in Canada as well as an important development in Canadian legal history.

The central focus of discussions of the case has been the fact that, incredulous as it might seem, Canadian women, until 1929, were not legally considered to be "persons." But, like most historical events, context is a key in understanding the whole story. This paper focuses on two interacting forces that place the "persons" case in the broader framework of Canadian constitutional and legal history. It examines the historical development of the persons issue in Canada and illustrates the underlying theme of Senate reform and judicial mandate that influenced the final outcome. By

treating the subject in this manner, it becomes apparent that the "persons" case, although interesting as an issue in legal history, does not represent the major breakthrough that the attention it received in 1979 would have us believe.

In Canada the "persons" problem had a relatively short, albeit volatile, career. It first became an issue in 1916, shortly after Emily Murphy was appointed Police Magistrate for the newly created Women's Court of Edmonton.¹ Although she had no formal legal training, members of her family in Ontario were firmly associated with that calling. Her brother William Ferguson, for example, became a Judge in that province in 1916.² Her cousin Howard Ferguson, who became the Conservative Premier of Ontario in 1923, also practised law prior to embarking upon his political career.³ According to her biographer, Murphy had received an excellent education and had often discussed the law with her father and brothers. As soon as she was appointed Police Magistrate, she made good use of her past experiences and set out to correct existing deficiencies in her legal knowledge.⁴

Unveiling of Tablet to Five Alberta Women who launched the Persons Case.

Participating in the 1938 ceremony with Rt. Hon. W.L. Mackenzie King—left to right: (back row) Hon. Senator Fallis; Senator Cairine Wilson; (front row) Irene Parlby; Mrs. J.C. Kenwood; Nellie L. McClung. The tablet was located in the lobby of the Senate Chamber at the persistent urging of the Canadian Federation of Business and Professional Women's Clubs. (Photo courtesy of the Public Archives Canada C-54523)



The appointment had made Murphy the first woman Magistrate in the British Empire. However, this distinction did not prevent her from having difficulties.⁵ On her first day in court, an Edmonton defense lawyer objected to her presence on the bench on the grounds that she was not eligible to hold the office because of her sex. The comment was also made that this was based on a long-standing interpretation of the word "person" and how it applied to eligibility for public office.⁶ Although the remark had no effect upon the outcome of the trial, it had a profound impact upon Magistrate Murphy. The lawyer's comment whetted her interest and she began to investigate the implications of what he had said. To her surprise and consternation, she found that women under British Common Law⁷ were only considered to be persons in "the matter of pains and penalties, but not in the matter of rights and privileges."⁸

Even though the same point was brought up numerous times in her courtroom, nothing came of the matter until Alice Jamieson was appointed Police Magistrate for the Women's Court of Calgary. She too encountered the "person" arguments that Emily Murphy had faced. This state of affairs existed until 1918, when, in an appeal arising from the Calgary court, the Honourable Mr. Justice Scott of the Supreme Court of Alberta ruled that as far as that province was concerned, "there was at common law no legal disqualification for holding public office arising from any distinction of sex."⁹ Of course, this Judge's decision had little influence upon the interpretation of "person" in other parts of Canada because provincial legal decisions carry almost no weight when they represent new explanations of long-standing precedents such as the "persons" interpretation.

Whereas the Alberta decision can be seen as a defensive action, in that it was aimed at

maintaining the rights of women to hold positions in the judiciary, other activities of a more aggressive nature aimed at gaining additional privileges for women were taking place in the Dominion. In 1919, partly as a response to a heightened sense of political awareness resulting from successes in the suffrage struggle and partly as a result of vacancies in the Senate, the Federated Women's Institutes of Canada and the National Council of Women petitioned the federal government to have a woman appointed to the Upper House. The argument used by the petitioners was that since the Senate considered legislation that affected women and children, it was only right that women should be represented so as to safeguard their interests in that House.¹⁰

In a sense the women were correct in using this argument. The function of the Senate is to oversee the activities of the House of Commons, thereby guaranteeing that the elected representatives do not get carried away with spontaneous, ill-considered legislation promoted by vote-getting, crowd-pleasing rhetoric and motives. In order to carry out this multi-faceted duty, Senators have a designated term of appointment and thus, theoretically, are above the petty squabbings and intrigues of the House of Commons politician. Further, all pieces of federal legislation must be approved by the Senate before becoming law. Significantly, however, Senators are appointed to represent a region of the country, not a class or group of people.¹¹ Therefore, the notion that there should be women Senators to protect the interests of Canadian women could be challenged as being at odds with the actual functions and duties of Senators.¹²

Although the arguments presented by the petitioners for the admission of women to the Senate had considerable merit, the request was denied. The basis of this refusal was not the

“rightness” of women’s representation in the Senate, but rather, the constitutional interpretation of the word “persons” as it pertained to qualifying for the Senate.¹³ No doubt this pronouncement came as a surprise to many Canadian women who had never questioned the possibility that they were not persons.

For the next five years considerable activity was focused on the question of the eligibility of women to sit in the Senate. In January 1921, the secretary of the Montreal Women’s Club wrote to Emily Murphy asking if she would allow her name to be put forward as that club’s nominee for the Senate.¹⁴ In May of the same year, Nellie McClung wrote to Senator W.H. Sharpe:

The only objection that any person can have to Mrs. Murphy for the Senate is that she is a woman. She can qualify in a dozen different ways, each one of them far beyond the qualifications of the average Senator. She is a writer, a lecturer, a public-minded citizen, a leader among women, a woman of open mind and generous heart, who has done much to bring about better conditions in Canada. She is recognized as an authority in matters of law, and above all, she is our choice at this time. Men and women all over Canada, east, west, north and south, are asking for her appointment.¹⁵

It is important to note that this was an era when mounting criticism was being leveled at the very existence of the Senate. The Progressive Party had as one of its planks the abolition of the Red Chamber and throughout the 1920s numerous speakers rose in the House of Commons suggesting either the abolition or the reform of the Senate. Indeed, the *Grain Growers’ Guide*, the leading reform organ for the

prairies, noted with dismay in September 1921, that a delegation of women had pressed Prime Minister Meighen for the appointment of Emily Murphy to the Senate. The editorial did not oppose women in the Senate but rather, it objected to the very existence of that Chamber. It stated:

It does not look well, to say the least, to see women, directly they become enfranchised, playing the game just as the men played it and hunting for special favors and privileges presumably as the price of their votes. A non-elected Senate is an anachronism; it should have no place in a democracy and as nobody ever knows what goes on in the Senate or cares to read the speeches of Senators, Mrs. Murphy would only waste her time and eloquence in that chamber. She should get out and tell the people what reforms she wants to see established and if they approve she will have no difficulty in persuading them to send her to the proper place for the enactment of the required legislation—the House of Commons.¹⁶

The controversy over the Senate culminated, in 1927, in a constitutional conference between the nine provinces and the federal government to discuss various proposals to reform the upper house. Significantly, the issue of women’s eligibility to the Senate was not mentioned at this gathering. In fact, few references can be found in either the House of Commons debates or the Senate debates which even mentioned this reform. There was one notable exception. This occurred in 1921 when the Government Member of Parliament for Kindersley, Mr. Meyers, proposed that along with other reforms to the Senate, “the right of sitting in the Senate should be also accorded to women.” He argued that since the government had

. . . extended the suffrage to women and they are now entitled to sit in this Chamber as well as in the Provincial Legislatures, I see no reason why they should not be enabled to sit in the Upper Chamber of this Parliament.¹⁷

Meyers' proposal was not taken up by the Meighen government. This lack of action is understandable because the Meighen government was ushered out of office in that year. Moreover, MacKenzie King's minority government which succeeded to office, was dependent upon the Progressive Party for survival. Given that Party's assault on the Senate as an outmoded and restrictive encumbrance to a truly democratic Canada, King felt it prudent not to move too quickly on the issue.

Government inaction did not deter women from seeking equal rights of representation. The cry for a woman Senator was raised by a vocal minority whenever a vacancy became available. But even within the ranks of the dedicated few, there were problems of partisanship and dissension. Emily Murphy noted in a letter to Nellie McClung:

I had letter from Mrs. John Scott today. She says that the Montreal Women's Club would not send a resolution to the Conservative Convention at Wpg. / sic/ because it *was* a Conservative Convention, and the majority of the Montreal Club were Liberals. *Vice Versa*, the women at Wpg. gave two reasons for not asking the Conservative Convention to go on record. (1) *The men didn't want it*; (2) they were not going to work for anything that might end in Mary Ellen Smith being appointed.¹⁸

Understandably, Murphy's reaction to this situation was less than generous as she berated

these groups for being "small-hearted, stupid, selfish and graceless."¹⁹ The dreams of the previous decade that women would inject a purer, nonpartisan outlook into politics, by 1927 was shown in many ways to be false.

Besides marking the end of the first decade of enfranchisement for the five westernmost provinces, 1927 was an important date regarding the whole "persons" question. According to her biographer, it was in the early part of that year that Emily Murphy's brother, William, a prominent Ontario lawyer who had been appointed to the bench of the First Appellate Division of the Supreme Court of Ontario in 1916, informed her about a little known section of the federal Supreme Court Act.²⁰ This section allowed interested persons, appealing as a unit, to ask for the interpretation of a constitutional point raised under the BNA Act. If the Department of Justice agreed that the question was of sufficient public importance, it would then be referred by the Governor-General-in-Council to the Supreme Court for a ruling.²¹ This revelation reputedly set Murphy furiously casting about for suitable "interested Persons," finally deciding that Henrietta (Muir) Edwards, Nellie McClung, Louise McKinney and Irene Parlby should be her co-appellants.²² In a letter to Nellie McClung on August 5, 1927, she urged:

I do not feel it even remotely necessary to urge upon you the extreme desirability of your lending your much valued influence to this matter which is so closely allied with the political, social and philanthropic interests of all Canadian women.²³

Thus was set in motion the most important constitutional debate concerning women's rights in Canada since their Dominion enfranchisement in 1918.

The five petitioners, being fully aware of the failure of previous attempts at having women appointed to the Senate, deemed it advisable to avoid all reference to the term "persons" in the questions submitted to the Supreme Court. Thus, the final wording of the three questions that were presented for consideration dealt with the two themes of the constitutional ability of the federal government to both appoint women to the Senate and, failing that, to amend the statutes governing admission to the Senate. The questions read as follows:

1. Is power vested in the Governor-General of Canada, or the Parliament of Canada, or either of them, to appoint a female to the Senate of Canada?
2. Is it constitutionally possible for the Parliament of Canada, under the provisions of the British North America Act, or otherwise, to make provision for the appointment of a female to the Senate of Canada?
3. If any statute be necessary to qualify a female to sit in the Senate of Canada, must this statute be enacted by the Imperial parliament, or does power lie with the Parliament of Canada, or the Senate of Canada?²⁴

These questions were forwarded to the Minister of Justice. In response to them the federal Cabinet decided that the "question whether the word 'Persons' in said section 24 includes female persons is one of great public importance." Thus, "on the recommendation of the Minister of Justice" the following question was forwarded to the Governor-General for submission to the Supreme Court.

Does the word "Persons" in section 24 of the British North America Act, 1867, include female persons?²⁵

The discrepancy between the questions submitted to the Minister of Justice by the petitioners and the final form of the question forwarded to the Supreme Court provoked an immediate and vehement response from Emily Murphy. In her reply to the letter from the Clerk of the Privy Council of November 2, 1927, she wrote:

We respectfully beg to point out that the question referred to the Supreme Court . . . is not the one submitted by your petitioners either in word or in meaning and is, in consequence, a matter of amazement and perturbation to us In framing their questions on constitution, your petitioners were not unmindful of the fact that the officers of the Crown had already expressed the opinion publicly, and to various delegations, that a female was not a "person" under the B.N.A. Act and, for this, and other very excellent reasons, refrained from using the word "person" in any of our questions. We, therefore, reiterate that the citation as forwarded to the Supreme Court of Canada by your Order-in-Council is not our question, nor a correct interpretation thereof, and that accordingly it requires to be withdrawn.²⁶

In connection with her concern about the wording of the actual questions put before the Supreme Court, Murphy was also worried "about the uncertainty that prevails under Canada's 'autonomy'."²⁷ This uncertainty had considerable bearing upon any remedial legislation brought into existence if the Supreme Court ruled against the petitioners. Although the sections of the BNA Act governing the composition of the House of Commons could be changed by the Dominion Parliament, the sections dealing with the selection of Senators could not. Instead, agreement

of both Houses of Parliament as well as unanimous agreement of the provinces was required before a petition to the British Parliament regarding a change in these sections of the BNA Act could be made. As was pointed out in an editorial in the *Manitoba Free Press*:

The Hon. H. Ferguson is reported to have said that he is all for women but he cannot bear to see the B.N.A. Act tampered with, and if such drastic action must be taken before the Red Chamber opens its gilded doors to women, he would favour them being reserved as at present for a men's own.²⁸

The questionable ability of the House of Commons to pass legislation enabling women to sit in the Senate and the vocal resistance of men like Premier Ferguson of Ontario to "tampering" with the BNA Act represent two very poignant reasons for Emily Murphy's reservations. It is interesting to note that Ferguson's biographer, P.N. Oliver, has observed that:

when federal politicians . . . talked of new procedures for constitutional amendment, Ferguson sprang forward to defend the status quo; when the same politicians suggested that the Supreme Court of Canada replace the Privy Council as the final court of appeal, Ferguson muttered of veiled treason to the Empire.²⁹

Moreover, the fact that women in Quebec still did not have the right to vote in the 1920s meant that Ottawa could expect little enthusiasm from that province on the question of constitutional reform to give women access to the Senate.³⁰

It must be remembered also that there still existed considerable misgivings about the very



EMILY MURPHY (Photo courtesy of the Public Archives Canada C-89581)

existence of the Senate. Although, by 1928 the force of the Progressive Party was largely spent, reform of the Senate was still a potent issue. J.S. Woodsworth, the prominent Labour Member of Parliament for Winnipeg North Centre, was one critic who periodically rose in the House of Commons blasting the government over the undemocratic nature of the Senate.³¹ Obviously, King's government had more than the Conservative Premier of Ontario to consider.

With these potential problems as a backdrop for constitutional reform, the careful phrasing of the questions presented by the petitioners comes into sharper relief. They knew what they were up against; if it was found that the BNA Act had to be amended in order to admit women to the Senate, then the measure would face a great deal of resistance and inevitably get bogged down in partisan political squabbles and questions of principle other than the status of women.³² The women had selected N.W. Rowell, one of the top constitutional lawyers in the country, to argue their case. Rowell was sympathetic to the issue and since he was a prominent Liberal it could not be charged that the decision was influenced by nefarious political considerations.³³ Nor was the cost of the procedure a problem. Owing to the wording of subsection 5 of section 55 of the Supreme Court Act (which provides that "the reasonable expenses" of arguing the case might be paid by the Minister of Justice out of any moneys appropriated by Parliament for expenses of litigation³⁴), the women did not even have to worry about legal fees. Thus there was little that the petitioners could do but await the Court's decision.

It was not until April 24, 1928, that the Supreme Court of Canada handed down its judgement on the question, "Does the word 'Persons' in section 24 of the British North America Act, 1867, include female persons?"³⁵ It was unanimously agreed by Justices Anglin, Duff, Mignault, Lamont and Smith that:

Women are not 'qualified persons' within the meaning of section 24 of the B.N.A. Act, 1867, and therefore are not eligible for appointment by the Governor General to the Senate of Canada.³⁶

Although this judgement may have disappointed many, it was not a surprising decision

when one examines the rationale used by the Justices and understands the scope of the Supreme Court at that time. A foremost consideration was that, in 1928, the Supreme Court was not the final court of appeal. Furthermore, its traditional role was not that of innovator, in that it did not have the judicial mandate, due mainly to historical practise, to overturn strongly established precedents. Another equally strong basis for the Court's decision was the relative weight that they allotted to the word "persons." They found in examining the sections of the BNA Act dealing with the selection and appointment of Senators that the word "persons" was always used in conjunction with either "qualified" or "fit and qualified." On the basis of this they decided that the question which had to be answered was "whether 'female persons' are qualified to be summoned to the Senate."³⁷ To the layman these distinctions appear to be irrelevant semantic problems but in the judgement that followed these distinctions play an important role.

Having established the exact question to be answered by the court, the Justices proceeded to weigh the various arguments put forward by the litigants. The key argument used by Lucien Cannon, solicitor general in King's government, against the petitioners was based upon the case of *Chorlton v. Lings* which was heard before the British Court of Common Pleas in 1867. This precedent setting judgement determined that:

Considering that there is no evidence of women ever having voted for members of parliament in cities or boroughs, and that they have been deemed for centuries to be legally incapable of so doing, one would have expected that the Legislature, if desirous of making an alteration so important and extensive as to admit them to

the franchise, would have said so plainly and distinctly.³⁸

Furthermore, this argument was supported by more recent decisions which lent considerable strength to the case against the petitioners. In 1922, for example, Viscount Birkenhead, L.C., in rejecting the claim of Viscountess Rhondda to sit in the British House of Lords stated:

It is sufficient to say that the Legislature in dealing with this matter cannot be taken to have departed from the usage of centuries or to have employed such loose and ambiguous words to carry out so momentous a revolution in the constitution of this House. And I am content to base my judgement on this alone.³⁹

N.W. Rowell, in his plea for the petitioners, contended that there were sections of the BNA Act where the word "persons" was obviously used to include the more general meaning, including women as well as men.⁴⁰ Further, he invoked the aid of the statutory interpretation provisions in force in England in 1867 known as Lord Brougham's Act—which read:

Be it enacted that in all Acts words importing the Masculine Gender shall be deemed and taken to include Females, and the Singular to include the Plural, and the Plural the Singular, unless the contrary as to Gender or Number is expressly provided.⁴¹

Rowell's strategy in adopting these arguments were threefold. First, by stressing the fact that there were instances in the construction of the BNA Act where the word "persons" obviously included women, it is apparent that he was attempting to undermine the precedent of *Chorlton v. Lings*. Along these same lines Rowell was also attempting to

establish as historical fact that women were considered to be persons when the Act was framed in 1867. Finally, by using Lord Brougham's Act, he hoped that, since no specified gender was "expressly provided" for in the sections of the BNA Act dealing with the Senate, the Justices would leniently interpret the word "persons" to include both men and women.

In the opening remarks to his judgement, Chief Justice Anglin stated:

In considering this matter we are, of course, in no wise concerned with the desirability or the undesirability of the presence of women in the Senate, nor with any political aspect of the question submitted. Our whole duty is to construe, to the best of our ability, the relevant provisions of the B.N.A. Act, 1867, and upon that construction to base our answer.⁴²

Furthermore, he added that if "the phrase 'qualified persons' in section 24 includes women today, it has so included them since 1867."⁴³ These pronouncements are particularly important because they indicate the court's predilection to remain within the strict confines of the law and the precedents that had arisen to that point. This court certainly was not about to make any radical reinterpretations of the British North America Act. Rather, they strove to establish the original intent of the framers of the legislation without regard for changing social and political consequences.

Rowell's contention that "persons" in other sections of the BNA Act included women was forcefully argued. But it floundered on the point that "persons" in these instances was not used in conjunction with either "qualified" or "fit and qualified", thus running aground on Anglin's precondition that females must be

“qualified” or “fit and qualified” persons. Likewise, Rowell’s reference to Lord Brougham’s Act was quashed by Anglin, who pointed out that “ ‘persons’ is not a ‘word importing the masculine gender.’ Therefore, *ex facie*, Lord Brougham’s Act has no application to it.”⁴⁴ Since these were the key arguments presented for the petitioners their dismissal by the Justices helps to explain the final outcome of the hearing.

Regardless of the strengths and weaknesses of the petitioners’ case, the court’s predisposition for legal precedent and historical fact, explains the ultimate decision. Justice Duff stated:

... it is sometimes the duty of a court of law to resort, not only to other provisions of the enactment itself, but to the state of the law at the time the enactment was passed, and to the history, especially the legislative history, of the subjects with which the enactment deals.⁴⁵

By their interpretation of the pertinent sections of the BNA Act the court made it clear that they believed that women had not been included by the framers of the Act in 1867. The judgement of the court was based on the belief that had the legislators intended that women be included in the group of “qualified” persons there would have been an explicit reference indicating what would have been a revolutionary break with legislative tradition. The historic *Chorlton v. Lings* case cited as an argument against the petitioners was used as the legal basis for this decision. This was clearly stated by Chief Justice Anglin in his closing remarks:

In our opinion *Chorlton v. Lings* is conclusive against the petitioners alike on the question of the common law incapacity of women to exercise such public functions as those of a member of the Senate of

Canada and on that of their being expressly excluded from the class of “qualified persons” within section 24 of the BNA Act by the terms in which section 23 is couched, so that Lord Brougham’s Act cannot be invoked to extend those terms to bring “women” within their purview.

We are, for these reasons, of the opinion that women are not eligible for appointment by the Governor General to the Senate of Canada.⁴⁶

This judgement received a mixed press in English Canada. A *Manitoba Free Press* editorial perhaps best expressed the prevailing sentiment in government circles. The main focus of the editorial was upon the “unexpected implications (that) may arise from the Supreme Court ruling.”⁴⁷ The editorial raised the possibility that women were not eligible to sit in the various provincial legislatures and in the House of Commons. It continued by exploring the ramifications of having to ask women already sitting in Canadian legislatures to vacate their seats. This situation was treated satirically by the author and the implications were that few would seriously consider such an interpretation. The problem of how to make women eligible for the Senate, however, was treated with all seriousness. It was pointed out that:

What we will have to do now is to obtain an amendment to the B.N.A. Act. Canada, of course, has no power to change the Act; we will have to ask the British government to do it for us. The House of Commons will have to move, the Senate will have to approve, the provinces, we suppose, will have to be consulted, and if one of them object we have the word of Mr. Cahan of Montreal, Mr. Ferguson of Toronto, and other

more or less legal minds that the British government will sit tight and refuse to lift a finger to help the women of Canada.⁴⁸

Judging from the tone of the editorial it was these latter consequences of the "persons" case that presented the "unexpected implications" to which the author referred.

While the press mulled over the implications of the Supreme Court decision, an immediate reaction was forthcoming from the federal government. In response to a question from Mr. A.W. Neill, the Independent Member of Parliament from Comox-Alberni, the Honourable Ernest Lapointe, Minister of Justice replied:

. . . In view of this judgement, and in view of the fact that women in this country now have an equal franchise with men, and in view of the further fact that one of the seats in this house is occupied by a woman, the government have decided that they should have the equal right to sit in the other chamber, and means will be taken to secure an amendment to the British North America Act in that respect.⁴⁹

Although no one questioned Lapointe's sincerity, his promise to find the means to place women in the Senate provoked considerable debate. The main issue was the questionable ability of the House of Commons to pass binding legislation which would fulfill his promise.

The question of women's eligibility in the Senate became embroiled in the much broader issue of federal sovereignty in matters of constitutional reform and, as such, it was used as a political football by politicians seeking to embarrass Mackenzie King's Liberal government. This opportunism is best illustrated by

an exchange between R.B. Bennett and W.L. Mackenzie King in the House of Commons on June 11, 1928.

Mr. Bennett: . . . We are not a sovereign power even for domestic purposes, and I can best illustrate that statement by a reference to one house of this parliament. The Supreme Court of Canada has decided that women may not be appointed to the Senate, and we have not the power to change our constitution in that regard. That must be done by an amendment to the B.N.A. Act.

Mr. MacKenzie King: It is a matter of method, that is all; the power comes from us.

Mr. Bennett: No, the legislative power is exercised at Westminster, not at Ottawa⁵⁰

Many political observers agreed with Bennett and believed that Lapointe would not be able to follow through on his pledge.⁵¹ This group included Emily Murphy. On May 2, 1928, only eight days after the judgement of the Supreme Court had been passed down, Emily Murphy sent copies of an appeal to the Judicial Committee of the Privy Council (JC-PC) to the other appellants. Although she was cautious about criticizing Lapointe's promise it was made clear that she distrusted the politics involved in amendments to the BNA Act. She stated:

Be it understood that this appeal must not be construed as in anywise expressing a lack of confidence in the determination of the Honourable, the Minister of Justice and his colleagues of the Cabinet to devise means whereby the BNA Act may be amended to permit of women sitting in the Senate of Canada, but only that we, as Petitioners, can have no certainty that the exigencies of politics or the dissent of

one or more of the Provinces may not preclude the possibility of such amendment.⁵²

Bearing in mind Premier Ferguson's fear of federal "tampering" with the BNA Act and Premier Taschereau's opposition to female enfranchisement,⁵³ Murphy's reservations about the "exigencies of politics" and the "dissent" of a Province was not without a basis in fact. In August of the same year Murphy wrote to Nellie McClung commenting upon the federal government's willingness to pay for the costs of the appeal to the JCPC. "Apparently, no means have been 'devised' else they would not be willing to pay the costs of appeal,"⁵⁴ she concluded. The comment that followed illustrates Murphy's clear grasp of the realities of Canadian politics and of the problems of constitutional reform in this country:

It is well though that it has turned out this way for if a woman or women had been appointed through "means" Quebec would have likely appealed against it, so we may as well get it settled now so far as the legal end is concerned.⁵⁵

Although Murphy expressed a great deal of confidence in the ultimate success of the appeal the first arguments heard by the JCPC were not delivered until July 22, 1929, nearly fifteen months after the Supreme Court decision.⁵⁶ But the long wait was not in vain, for on October 18, 1929, Lord Sankey of the JCPC announced:

Their Lordships are of the opinion that the word "persons" in section 24 does include women, and that women are eligible to be summoned to and become members of the Senate of Canada.⁵⁷

One would think that in order for such a decision to be reached, especially in light of the

unanimous ruling of the Supreme Court of Canada, new and conclusive evidence had been introduced to sway the Privy Council's decision. But, surprisingly enough, no dramatic new arguments were put forward by either side. An important factor in the JCPC decision was the historic mandate of the two courts. On the one hand the Supreme Court of Canada held a secondary position in the Canadian judicial hierarchy as compared with that of the JCPC. Further, the lesser court had traditionally exercised a relatively limited role in initiating new and overturning old precedents. The JCPC, on the other hand, represented the final court of appeal in the Dominion's legal system. This position coupled with the immunity of JCPC judges from Canadian political changes allowed the JCPC to have greater scope in reinterpreting past legislation and, as evidenced by its numerous rulings on issues of federal-provincial powers, the court used this function freely.⁵⁸

Related to the varying mandates of the two courts was the weight placed upon the historical arguments used in the previous hearing. In passing down the judgement Lord Sankey noted:

The exclusion of women from all public offices is a relic of days more barbarous than ours, but it must be remembered that the necessity of the times often forced on man customs which in later years were not necessary The fact that no woman had served or has claimed to serve such an office is not of great weight when it is remembered that custom would have prevented the claim being made, or the point being contested. Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared.

The appeal to history therefore in this particular matter is not conclusive.⁵⁹

An issue in the appeal judgement which affected the outcome was the willingness of the Privy Council to be influenced and directed by modern political and social developments. This particular stance was a complete reversal of that taken by the Canadian Supreme Court. In their judgement the Privy Council ruled that they did "not think it right to apply rigidly to Canada of to-day" the customs and reasonings used in other centuries and in other countries.⁶⁰ Furthermore, they were determined not to restrict the BNA Act to a "narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion . . . may be mistress in her own house."⁶¹ In light of the changing relationship between Britain and her Dominions, destined to be formalized by the Statute of Westminster in 1931, the impact of the altering political and social realities undoubtedly played a very substantial role in the final JCPC ruling of 1929.

A Canadian Press interview that appeared in the *Vancouver Province* quoted the following optimistic remarks made by Emily Murphy about the results of the appeal.

. . . that the members of the Judicial Committee of the Privy Council have given a wider and more favourable interpretation of the word "persons" than that of the Supreme Court of Canada, is a matter of much gratification to myself and my co-appellants in Alberta. The same is applicable to all the women of Canada, whom we have had the pleasure to represent in the long and somewhat arduous struggle for full political rights.⁶²

And on paper it did appear that the JCPC ruling had heralded a new day for the political

equality of men and women in Canada. But this was not the case in the cold realities of Canadian politics.

Although the first woman Senator was appointed within months of the JCPC ruling, the general trend has been to overlook women when Senatorial vacancies have come up. Indeed, the pattern for these few appointments has been to provide token plums to loyal party workers by the party in power at Ottawa. Thus, the first woman Senator in Canada was not Emily Murphy, whose strong family ties with the Central Canadian Conservative establishment eliminated her from consideration by the Mackenzie King Liberals. Rather this honor was bestowed upon Cairine Wilson whose activities as a former president of the Women's Liberal Federation allowed King to extend a seat in the Senate to a Liberal of impeccable, though uncontroversial, qualifications.⁶³

Furthermore, Senators and politicians generally did not accept the view that women had special interests that must be represented in the Upper House. This point was brought home graphically by Senator Liard of Saskatchewan in response to a comment made by Cairine Wilson in her maiden speech to the Senate. Liard stated:

. . . she/Wilson/claimed to be "the representative of the women of Canada" in this Chamber . . . may I point out that our fair colleague is hardly correct in so designating herself. She is a Senator from the Province of Ontario, and is one of the representatives in this Chamber of all the people of Ontario, men, women and children. She stands in a position no different from that of any other member of this House: no one of us represents any particular class, creed or sex, but each

member is here to speak for all the people.⁶⁴

Unfortunately, Murphy's ideal of "full political rights" for women is as much of a dream today, over fifty years after the JCPC ruling as it was in 1929. Although the "persons" case is particularly interesting for the constitutional and judicial problems that it contains, it represents a mere splinter in an almost impregnable wall of restrictions that prevent to this day women's complete equality in Canadian society.

NOTES

1. Bryne Hope Sanders, *Emily Murphy—Crusader* (Toronto: 1945), pp. 135-138.
2. *Ibid.*, p. 222.
3. Peter N. Oliver, *G. Howard Ferguson: Ontario Tory* (Toronto: 1977), p. 273.
4. Sanders, *Murphy*, pp. 1-50.
5. *Ibid.*, pp. 135-138. The Women's Court was established at the request of various women's groups in Edmonton. It was initiated on the belief that a woman, facing a minor offence, would receive a more compassionate hearing from a female magistrate. Emily Murphy was appointed to conduct the first Women's Court partly because of her standing in the community and partly because of her forthright concern about the women appearing in court.
6. Barbara Villy Cormack, *Perennials and Politics: The Life Story of Hon. Irene Parlby* (Sherwood Park, Alberta: n.d.), p. 109.
7. Common Law is the basis of all English Canadian law as well as federal law. In Quebec, Civil Law is the basis of the provincial legal system.
8. Kathering Govier, "How Canadian Women Came to be Senators . . . and Persons, too," unpublished essay held in the Glenbow Archives, p. 6.
9. *Ibid.*, p. 6; see also Johanna Wenzel, "How Emily Murphy became a person," *Golden Harvest* (Jan./Feb. 1966), p. 34.
10. "Women not legally 'Persons' until 1929," *Lethbridge Herald*, October 18, 1969. In an interview printed in the Jan. 31, 1928 issue of the *Edmonton Journal*, Emily Murphy stated: "It was at a conference of the Federated Women's Institutes of Canada, held in Winnipeg, that I framed the first of many resolutions asking that women be appointed to the Senate. This resolution was passed by representatives of all provinces then assembled and forwarded to the Minister of Justice. Subsequently nearly every important organization of women, including the National Council of Women, have endorsed this stand, sending numerous delegations and petitions to Ottawa."
11. Robert A. Mackay, *The Unreformed Senate of Canada* (Toronto: 1963), passim.
12. *Infra.*, p. 20.
13. Sanders, *Murphy*, p. 216.
14. *Ibid.*, p. 216.
15. *Ibid.*, p. 221.
16. *Grain Growers' Guide*, 7 Sept. 1921, p. 5. In fact throughout 1921 various editorial remarks were made about the desire of women, especially women linked to Emily Murphy, to gain access to the Senate. None gave support to this reform and all criticized the women for attempting to become associated with what was seen as a useless appendage to the parliamentary system in Canada. See the *Guide*, 30 May, 1921, p. 35; 6 July, 1921, p. 17; 16 Nov., 1921, p. 24.
17. Dominion of Canada, *Debates of the House of Commons 1921*, vol. I (Ottawa: 1921), p. 389.
18. Emily Murphy to Nellie McClung, 2 December 1927. Correspondence relating to the 'persons' case and referred to in this paper can be found in the McClung Papers in the Public Archives of British Columbia. These papers are hereafter cited as *M.P.*
19. *Ibid.*
20. Sanders, *Murphy*, p. 222.
21. Section 55, subsections 1a, 4 and 5 of the Supreme Court Act are the specific parts of the legislation which pertained to petitioning the Government for an interpretation of the B.N.A. Act.
22. Sanders, *Murphy*, p. 223.
23. Murphy to McClung, 5 August, 1927, *M.P.*
24. Murphy to Stuart Edwards, Deputy Minister of Justice, 9 November, 1927, *M.P.*
25. E.J. Lemaire, Clerk of the Privy Council to Emily Murphy, 2 November, 1927, *M.P.*
26. Murphy to S. Edwards, *op. cit.*, *M.P.*
27. Murphy to McClung, 5 November, 1927, *M.P.*
28. *Manitoba Free Press*, 22 October, 1927, p. 13.
29. Oliver, *Ferguson*, pp. 171-172.
30. Catherine Cleverdon, *The Woman Suffrage Movement in Canada* (Toronto: 1974), p. 229.
31. Dominion of Canada, *Debates of the House of Commons 1924*, vol. 1, p. 509.
32. Although Emily Murphy had "not thought it necessary to submit the matter to Canadian women generally" (see Murphy to McClung, 5 August, 1927, *M.P.*) since they had "already endorsed the principle," there apparently was some surprise expressed by women's groups, especially from eastern Canada, at the petitioners' action. In a letter to Nellie McClung, dated 2 December, 1927, Murphy commented:
I hear, though, that it has been a terrible shock to the Eastern women that five coal-heavers and plough-pushers from Alberta . . . went over their heads to the Supreme Court without ever saying "Please ma'am can we do it?" We know now how to stir up interest in the East—just start it going ourselves.
33. Margaret Prang, *N.W. Rowell. Ontario Nationalist* (Toronto: 1975), p. 444; Murphy to McClung, 5 August, 1927, *M.P.*
34. See section 55, subsection 5 of the Supreme Court Act.
35. *Canada Law Reports, Supreme Court of Canada* (Ottawa: 1928), p. 278.
36. *Ibid.*, p. 278.

37. *Ibid.*, p. 276.
38. *Ibid.*, p. 281.
39. *Ibid.*, p. 289.
40. *Ibid.*, p. 290.
41. *Ibid.*, p. 286.
42. *Ibid.*, p. 281-282.
43. *Ibid.*, p. 282.
44. *Ibid.*, p. 288.
45. *Ibid.*, p. 291.
46. *Ibid.*, p. 290.
47. *Manitoba Free Press*, 25 April, 1928, p. 15.
48. *Ibid.*, p. 15.
49. Dominion of Canada, *House of Commons Debates*, Session 1928, vol. II, 24 April, 1928, p. 2311.
50. *Ibid.*, 11 June, 1928, p. 4164.
51. See *Manitoba Free Press*, 25 April, 1928, p. 15 and *Vancouver Province*, 24 April, 1928, p. 1, for examples of this opinion.
52. Murphy to McClung, 2 May 1928, *M.P.*
53. Cleverdon, *Woman Suffrage*, p. 229.
54. Murphy to McClung, 16 August, 1928, *M.P.*
55. *Ibid.*
56. *All England Reports Reprint*, 1929, p. 571.
57. *Ibid.*, p. 573.
58. From the mid-1880s the JCPC in a series of landmark decisions reshaped the constitutional powers of the federal and provincial governments from what had been established by the British North American Act. These judgements have been viewed by some historians, most notably D.G. Creighton, as the undoing of the original purposes of confederation.
59. *Ibid.*, pp. 574-576.
60. *Ibid.*, p. 577.
61. *Ibid.*, p. 578.
62. *Vancouver Province*, 18 October, 1929, p. 18.
63. One might also conjecture that King chose an Ontario woman to become the first female Senator in the hopes that women voters would be attracted to the Liberal party which at that time was stumbling badly in that important province.
64. Dominion of Canada, *Debates of the Senate of the Dominion of Canada 1930*, 27 Feb. 1930, p. 47. For Senator Wilson's speech see pp. 8-9 of the same volume.