THE PERSONS CASE AND THE LIVING TREE THEORY OF CONSTITUTIONAL INTERPRETATION

The Honourable Justice Robert J. Sharpe*

On 18 October 1929, the Judicial Committee of the Privy Council ruled that women were legally eligible for appointment to the Senate of Canada.[1] The judgment was written by Lord Sankey, the reform-minded Lord Chancellor appointed by Labour Prime Minister Ramsay MacDonald. Lord Sankey departed from a long line of cases and proclaimed an organic and progressive theory of constitutional interpretation. The *British North America Act, 1867*[2] had, according to Lord Sankey, planted in Canada "a living tree capable of growth and expansion within its natural limits."[3] This allowed him to rule that "the exclusion of women from all public offices is a relic of days more barbarous than ours."[4]

The Privy Council's decision, popularly known in Canada as the "Person's Case", was a bold legal step that reverberates to this day as a proclamation of equality and universal personhood, and as a guiding principle of constitutional interpretation.

My lecture, drawn from a book I co-authored,[5] is a case study based upon archival other contemporary sources that attempts to put the Persons Case in its historical context. Who were the people behind the case? What were the legal, social and political forces that produced this remarkable decision? I hope that the story I am about to tell you will provide some insight into the human and contextual factors that shape and influence the legal and interpretive process.

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[1] *Edwards v Attorney General of Canada*, [1930] AC 128 [*Edwards*].

[2] 30 & 31 Vict, c 3, since 1982, *The Constitution Act, 1867*.

[3] *Edwards*, *supra* note 1 at 135.

[4] *Ibid* at 128.

[5] Robert Sharpe & Patricia McMahon, *The Persons Case: The Origins and Legacy of the Fight for Legal Personhood* (Toronto: Osgoode Society and University of Toronto Press, 2007).

ARE WOMEN PERSONS?

Let me start by explaining the precise legal issue put to the Privy Council in the Persons Case. The *British North America Act, 1867*, a statute enacted by the Westminster Parliament that served as Canada's Constitution until 1982, provides for an appointed upper house, the Senate. The Act states that on the advice of the Canadian government, the Governor-General of Canada, as the Queen's representative, can summon "qualified Persons to the Senate," and that "every Person so summoned shall become and be a Member of the Senate and a Senator."[6] Do the words "qualified persons" include women? Today the answer is obviously "yes" but it was not so straightforward in 1929. There is no doubt that when the *British North America Act* was written in 1867, the drafters did not imagine women being considered "qualified Persons" capable of being appointed to the Senate. By 1929, Canadian women had entered the work force. They could vote and sit in the House of Commons but eligibility for the Senate remained cast in the language of 1867. The English courts had consistently interpreted similar statutory qualifications for public office as excluding women.[7] The conventional legal thinking of the day was that the words of the constitution had to bear the same meaning in 1929 as they had borne in 1867, and that it would take a constitutional amendment to make possible a female Senator.

EMILY MURPHY'S SENATE CAMPAIGN

The Privy Council's decision in the Persons Case was the result of the untiring efforts of Emily Murphy, a well-published author and social crusader,[8] and the first woman to be appointed as a magistrate in the British Empire when she was named to the newly created Women's Court in Edmonton Alberta in 1916.[9] Murphy was not legally trained and she did not conduct herself either in or out of court as a traditional judge. She saw her role as being that of a social worker and she never surrendered her mantle as a social reformer. Courts, she proclaimed, should be "casualty clearing stations where 'magistrate-physicians' carefully diagnosed the offenders' problems and applied the proper remedy."[10] Despite her judicial office, Murphy continued to speak out on social issues affecting women and children and she continued to advocate legal reforms. She attracted national attention with her tirade against the evil of drugs in a book entitled *The Black Candle*, arguing that illicit drug use posed

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[6] *Supra* note 2 at s 24.

[7] See *infra*, under the heading "The Department of Justice Opinion and the Persons Cases".

[8] Byrne Hope Sanders, *Emily Murphy: Crusader* (Toronto: Macmillan, 1945).

[9] "Woman Magistrate in Edmonton", *Edmonton Journal* (14 June 1916).

[10] Emily Murphy, "A Straight Talk on Courts", *Maclean's* (1 October 1920).

a dire threat to the moral health of the nation.[11] Clearly, Murphy's ambitions could not be satisfied by the lowly position of a Police Magistrate and, very shortly after she was appointed to the bench, she set about to get herself appointed to the Canadian Senate.

Murphy's campaign was widely supported by women's groups and petitions from around the country flowed to the Prime Minister's office. Her friends found it difficult to understand why she was so determined to gain admission to a body frequently ridiculed, as one newspaper put it, as a "superfluous fossil institution,"[12] but they supported her out of feminist solidarity.

THE DEPARTMENT OF JUSTICE OPINION AND THE PERSONS CASES

Murphy quickly found that her quest for a Senate appointment faced a formidable hurdle. In response to her lobbying efforts, the Canadian Department of Justice developed a detailed legal opinion to the effect that women were not qualified persons for appointment to the Senate.[13] According to the government's law officers, nothing short of a constitutional amendment was needed if Murphy was to fulfill her Senate dream.

That opinion was well supported by authority. In a series of decisions knows as "the Persons cases," the English courts had steadfastly denied that a woman could vote, hold public office, or gain admission to the universities or the professions. The leading decision, *Chorlton v Lings*,[14] decided in 1868 dealt with the *Representation of the People Act*, *1867*, which was debated and enacted the same year as the *BNA Act*. This legislation extended the vote to "every man" of full age who was a householder and not "subject to any legal incapacity."[15] Relying on the *Interpretation Act, 1850* that provided that "words importing the Masculine Gender shall be taken to include Females… unless the contrary … is expressly provided,"[16]

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[11] (Toronto: Thomas Allen, 1922). Cited in "The Grave Drug Menace", *Maclean's* (15 February 1920); "The Underground System", *Maclean's* (15 March 1920); "Fighting the Drug Menace", *Maclean's* (15 April 1920); "The Doctor – and the Drug", *Maclean's* (15 May 1920); "What Must be Done", *Maclean's* (15 June 1920).

[12] *Grain Growers' Guide* (1921), Edmonton, City of Edmonton Archives (clipping in Emily Murphy Collection, MS2, Scrapbook 4).

[13] Memorandum from WSE (2 March 1921), Ottawa, Archives Canada (Department of Justice File, RG 13, vol 2524, vol 2525, File C-1004).

[14] *Chorlton v Lings* (1868), LR 4 CP 374 [*Chorlton*].

[15] 30 & 31 Vict c 102, s 3.

[16] 13–14 Vict c 21, s 4.

5000 female voters from Manchester insisted that they were entitled to vote. Their case was argued by John Duke Coleridge, QC, an eminent barrister and prominent Liberal member of the House of Commons, later Chief Justice, and Richard Pankhurst, a radical lawyer, who later married Emmeline Goulden, the leading figure in the suffrage movement. Coleridge and Pankhurst contended that the law extending the vote to "every man" had to be read in light of the *Interpretation Act* stipulation that masculine words presumptively included females and that women were every bit as entitled as men to vote. The argument was summarily rejected. Chief Justice Bovill conceded that the word "men" ordinarily included women by virtue of the *Interpretation Act* but that the provision did not apply where the result was "ridiculous."[17] So far as the Chief Justice was concerned, enfranchising women clearly fell into the category of ridiculous.

There were many other "Persons cases" that followed the same line of reasoning. A 1908 decision of the House of Lords held that a statute that gave a vote to "all persons" who had graduated from certain universities did not give the vote to female graduates.[18] The tone of Lord Chancellor Loreburn's judgment is revealing:

> It is incomprehensible to me that any one acquainted with our laws or the methods by which they are ascertained can think, if any one does think, that there is room for argument on such a point.[19]

Parliament appeared to resolve the matter by enacting the *Sex Disqualification (Removal) Act, 1919* providing that "[a] person shall not be disqualified by sex or marriage from the exercise of any public function."[20] But when Margaret Haig Thomas inherited her father's peerage and sought admission to the House of Lords as Viscountess Rhonnda, the door was slammed by Lord Birkenhead's ruling. The words used by Parliament, he stated, were so "vague and general" that "when dealing with a constitutional question of the utmost gravity" they could not be interpreted as "affecting a revolutionary change in the privileges of this House," and that Parliament "cannot be taken to have employed such loose and ambiguous words to carry out so momentous a revolution in the constitution of this House."[21]

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[17] *Chorlton*, *supra* note 14 at 386.

[18] *Nairn v the University of St. Andrews*, [1909] AC 147.

[19] *Ibid* at 160.

[20] UK 9 & 10 GeoV, c 71, s 1.

[21] *Viscountess Rhonnda's Claim (Committee for Privileges)*, [1922] AC 339 at 365, 375.

Against this tide of authority stood one bold decision from Alberta that had rejected a challenge to the appointment of women as magistrates.[22] As Murphy later recorded: "[O]n my initial appearance as a Police Magistrate…my jurisdiction was sharply challenged by counsel for the defence… It was then argued in almost every case upon which I sat that women were eligible to hold office."[23]

In a ruling that foreshadowed the Persons Case, a strong and independent-minded Alberta Judge, Charles Allan Stuart, affirmed the legality of appointing female magistrates. Stuart proclaimed, "the Courts of this province are not in every case to be held strictly bound by the decisions of the English courts" and insisted that he was "at liberty to take cognizance of the different conditions… and the general attitude of the community"[24] to hold women eligible for public office.

Murphy regarded the challenge to her right to sit on the bench as an affront to her personal dignity. It was an insult that reverberated in her mind for years to come and, combined with Justice Stuart's progressive decision, fuelled her determination to fight the Persons case to the end.

LEGAL OPINIONS

To meet the road block created by the Department of Justice opinion, Murphy sought opinions of her own. First, she prevailed upon her brother William Ferguson, an Ontario Judge who could not give her a formal opinion but who obliged under the guise of a "dear sister" letter clearly intended for wider circulation.[25] To bolster brother William's encouraging advice, Murphy retained a distinguished Quebec lawyer, Eugene Lafleur, who frequently argued constitutional cases for the federal government. Lafleur was known to be sympathetic to women's causes but he disappointed Murphy. He wrote that while the word "persons" was gender neutral and certainly could include women, the problem was the attitude of the judges. He advised that the Alberta judgment affirming Murphy's appointment as a magistrate simply could not withstand scrutiny in the face of the overwhelming body of English cases to the contrary.[26]

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[22] *R v Cyr*, [1917] 3 WWR 849 [*Cyr*]. The case dealt specifically with Alice Jamieson who had been appointed as a magistrate in Calgary a few months after Murphy's appointment.

[23] Letter from Emily Murphy to JF Hynes (20 December 1932) in *Emily Ferguson Murphy Papers*, University of Waterloo, Doris Lewis Rare Book Room (WA 13, File 5).

[24] *Cyr*, *supra* note 22 at 857.

[25] Letter from WN Ferguson to Emily Murphy (18 March 1921), Ottawa, Archives Canada (Arthur Meighen Papers, Series 2, MG 26, 1, vol 48, File 192).

[26] E Lafleur, "Opinion: Appointment of Women to the Senate of Canada" (9 December 1921), Waterloo (Murphy Papers, File 16).

LOBBYING MACKENZIE KING

Murphy was undeterred by this legal set-back and decided to turn to politicking. She began a shameless lobbying campaign directed at Canada's Prime Minister Mackenzie King. King was first elected in 1921. He would be Canada's longest-serving Prime Minister and he was an extraordinarily crafty politician. He played along with Murphy, never saying no but realizing all the while that his political situation made it virtually impossible to appoint her to the Senate. In 1921, King led a minority government and his coalition partner, a radical populist party from the West, advocated Senate abolition, not reform. By the time King secured a majority in 1926, the federal government was deadlocked with the provinces on the issue of an amending formula for the *British North America Act*. Only the Westminster Parliament could amend Canada's 1867 constitution but in the 1920s, Canadian politicians could not agree among themselves how and when to ask Westminster for an amendment.

Neither Senate reform nor constitutional amendment were in the political cards. Another factor, unknown to Murphy, was King's own sexist assessment of her. King, a life-long bachelor who regularly conducted séances to consult his deceased mother on important issues of state, also kept a detailed and often revealing diary. Here is what he wrote in his diary about Emily Murphy after agreeing to her persistent requests for a personal meeting: he found her "very friendly and pleasant to talk with" and a "genuine person," but added that she was "a little too masculine, & possibly a little too sensational. I don't care for aggressive women & she possesses a little aggressiveness …."[27]

GOING TO COURT

As the months and years passed with vague assurances from King that he would do what he could, it became apparent to Murphy that she had to turn to the courts. There she faced not only the legal opinions that her case was doomed to fail but also significant procedural and practical hurdles. Murphy had no standing and no recognizable legal claim to advance. As the Department of Justice opinion that blocked her was merely advice given by the government, there was no way for her to attack it in court. Moreover, she lacked the means to fund a costly legal challenge.

But again, brother William Ferguson, the Ontario judge, came to her rescue. He advised Murphy to petition the government to direct a reference on the point to

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[27] Diary of, William Lyon Mackenzie King (26 October 1922), online: Archives Canada <http://king.collectionscanada.ca>.

the Supreme Court.[28] If the government agreed, the standing issue disappeared as did the matter of cost, as the government would fund the case.

References are a frequently used and distinctively Canadian device to bring contentious constitutional issues before the courts expeditiously.[29] The government simply states the question of constitutionality and asks the Supreme Court to decide. Murphy had no right to demand a reference but fortunately for her, the wily Prime Minister King was very fond of the reference power, especially when it allowed him to get a contentious issue off his desk. Emily Murphy's Senate campaign had become an annoyance and when she asked for a reference, King happily handed the ball over to the Supreme Court of Canada.

THE FAMOUS FIVE

Murphy wanted to distance her request for a reference from her own ambitions and to make the case appear to be a request from the women's movement. She enlisted four prominent women from her native Alberta to sign the petition.

Henrietta Edwards had been a stalwart member of the women's movement for over fifty years. Although she was not a lawyer, she wrote books on the legal rights of women and lobbied for their improvement.[30] Nellie McClung was well-known across Canada as a writer and as a passionate advocate for temperance and women's suffrage.[31] Louise McKinney, a leading figure in the temperance movement, was the first woman elected to the Alberta legislature in 1917, the year after Alberta women got the vote.[32] Irene Parlby, a founder of the United Farm Women's Association, was elected to the Alberta legislature in 1921 and was serving as a minister without portfolio in the cabinet of the United Farmers Association government when the Persons case was argued.[33]

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[28] Letter from Emily Murphy to JP Hynes (20 December 1932), Waterloo (Murphy Papers, File 5).

[29] See BL Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review*, 3d ed (Toronto: Butterworths, 1988) at 73-86; R Sharpe & K Roach, *The Charter of Rights and Freedoms*, 3d ed (Toronto: Irwin Law, 2005) at 107-10.

[30] Henrietta Edwards, *Legal Status of Canadian Women* (Calgary: National Council of Women of Canada, 1908); *Legal Status of Canadian of Women in Alberta* (Edmonton: Attorney General of Alberta, 1921).

[31] See Nellie McClung, *In Times Like These* (Toronto: University of Toronto Press, 1972).

[32] See Nancy M Sheehan, "Achieving Personhood: Louise McKinney and the WCTU in Alberta, 1905-1930" in *Women as Persons, Proceedings of the Third Annual Meeting of the Canadian Research Institute for the Advancement of Women,Edmonton, November 9-11, 1979* (Toronto: Resources for Feminist Research, 1980).

[33] Barbara Villy Cormack, *Perennials and Politics* (Sherwood Park, AB: Professional Print, 1968).

The five women who signed the petition – after their victory in the Persons case known to Canadians by the heroic title "The Famous Five" – were determined social reformers who had fought for suffrage and for laws to improve the lives of women under Canadian law. Yet by 1928, they had lost touch with the aspirations of the next generation of women and their views diverged sharply from those of modern feminists. They espoused the distinctive role of women as mothers and wives. Maternal feminists[34] believed that the application of female, maternal virtue to issues of social welfare would improve Canadian society and the lot of the disadvantaged, especially impoverished women and children. They advocated the legal equality of men and women but they did not seek to obliterate traditional gender roles. All five women were also strong Christians, adherents of the social gospel movement, and believed in societal improvement through the application of Christian morality in public life. Temperance and the prohibition of alcohol were central to the maternal feminist agenda. Alcohol was blamed for poisoning private, domestic life and was thought to have a corrupting influence on politics. Maternal feminists, in short were only distantly related to modern feminists. They were overwhelmingly middle-class, white, heterosexual, Anglo-Saxon Christians with an elitist sense of their own virtue and moral superiority. They viewed women as "naturally the guardians of the race,"[35] and that race was decidedly white, British, and Protestant. Maternal feminists were progressive but they shared the racist and xenophobic attitudes that prevailed in the society in which they lived. Worse still to the modern eye, Murphy and her group promoted eugenics as a means to improve public health including laws that permitted the sterilization of "mental defectives."[36]

These views shock the modern reader and quite rightly attract fire from today's feminists, who on the one hand revere the Famous Five for the achievement of the Persons Case, yet struggle "to transcend" what they regard as the "insensitivity and arrogance" and "debilitating moral blind spots" of their predecessors.[37]

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[34] J McLaren, "Maternal Feminism in Action – Emily Murphy, Police Magistrate" (1988) 8 Windsor Yearbook of Access to Justice 234; A Acorn, "Snap-shots Then and Now: Feminism and Law in Alberta" (1996) 35 Alta LR 140; Linda Kealy, ed, *A Not Unreasonable Claim: Women and Reform in Canada 1880's–1920's* (Toronto: The Women's Press, 1979) at 7; Veronica Strong-Boag, introduction to Nellie McClung, *In Times Like These* (Toronto: University of Toronto Press, 1972); Marlene LeGates, *In Their Time: A History of Feminism in Western Society* (London: Routledge, 2001) at 243; Sarah Carter, Lesley Erickson, Patricia Roome, and Char Smith, eds, *Unsettled Pasts – Reconceiving the West Through Women's History* (Calgary: University of Calgary Press, 2005).

[35] McClung, *supra* note 31 at 22.

[36] *Sterilization Act*, SA 1928, c 37. See Timothy Christian, *The Mentally Ill and Human Rights in Alberta: A Study of the Alberta Sexual Sterilization Act (*Edmonton: Alberta Law Foundation, 1974).

[37] Acorn, *supra* note 33 at 141-42; Mariana Valverde, "When the Mother of the Race is Free: Race, Reproduction, and Sexuality in First Wave Feminism" in F Iacovetta and M Valderde, eds, *Gender Conflicts: New Essays in Women's History* (Toronto: University of Toronto Press, 1992) at ch 1.

AT THE SUPREME COURT OF CANADA

The Supreme Court heard the case in a single day on 14 March 1928, the day Emily Murphy turned sixty years old. Less than six weeks later the court rendered its decision. The lead judgment was delivered by Chief Justice Frank Anglin, who believed in "scientific jurisprudence," a version of legal formalism that saw the law in terms of fixed, immutable rules akin to the laws of science.[38] Anglin remained true to his jurisprudential views when he sat down to write his judgment in the *Persons Case*. He insisted that he was "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".[39] Adhering strictly to what he perceived to be the letter of the constitution and the English precedents, Anglin held that the words "qualified persons" had to "bear to-day the same construction which the courts would, if then required to pass upon them, have given to them when they were first enacted."[40] Anglin's starting point, freezing the meaning of the constitution in terms of the prevailing norms of 1867, determined the outcome. Anglin was simply not prepared to question the thinking of another age about the role of women in public life as that would bring about a "striking constitutional departure from the common law."[41]

No one can challenge the ideal that our system of law should be as free as possible from the personal beliefs, biases, and prejudices of judges. The difficulty is that the law does not operate in a vacuum. Legal texts and legal decision-making are imbued with moral, philosophical, and social values. To pretend that the law is a purely objective, morally neutral phenomenon ignores important questions of value that drive and determine decisions. Judges cannot decide cases entirely on the basis of neutral, objective principles, and the pretence that they do conceals a significant component of judicial reasoning.

The law's treatment of women provides a classic example.[42] The common law denied women property rights and the rights to vote and to hold public office. The denial of equal treatment to women was the product of social and political forces. It was a matter of moral and political choice. There is nothing inherent or

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[38] Frank Anglin, "Some Differences Between the Law of Quebec and the Law as Administered in the other Provinces of Canada" (1923) 1:33 Can Bar Rev 43; Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal: McGill-Queen's University Press, 1992) at 56.

[39] *Reference Re the Meaning of the Word 'Persons' in Section 24 of the British North America Act*, [1928] SCR 276 at 281.

[40] *Ibid* at 282.

[41] *Ibid* at 285.

[42] See Mary Jane Mossman, "Feminism and Legal Method: The Difference It Makes" (1986) 3:30 Aust J of Law and Soc where she discusses this point in relation to the Persons case.

morally neutral about the subjection of women to inferior status, yet the formalist tradition of law, to which Chief Justice Anglin and his colleagues were so firmly wedded, precluded scrutiny of those values and choices long after they had ceased to reflect contemporary reality.

There is, to be sure, a legitimate debate on the extent to which judges should shape or change the law to meet changing social problems, but to pretend that judges never change or "make" the law is untenable. The common law is constantly shaped and moulded by the courts to suit the changing needs of society. Even when courts interpret and apply statutes enacted by Parliament, judges cannot avoid taking into account the needs of contemporary society. As we have seen, by refusing to apply the gender neutral principle proclaimed by the *Interpretation Act* and other legislation, judges had thwarted the will of Parliament.

The Supreme Court's decision was denounced in the media as absurd,[43] yet the judgment caused nary a ripple in Canada's conservative legal community, which seemed to have regarded the result as inevitable.

ON TO THE JUDICIAL COMMITTEE THE PRIVY COUNCIL

Emily Murphy regarded the Supreme Court's decision as a temporary set-back and she prepared for her next battle in the Judicial Committee of the Privy Council, which was, until 1949, Canada's court of last resort. This august imperial institution, one of the last vestiges of Canada's colonial past, served as the final judicial arbiter for legal disputes throughout the Empire and played a pivotal role in Canada's constitutional evolution for more than eighty years. Scholars still debate the merits of the Judicial Committee's influence on Canada's constitutional arrangements.[44] In the seemingly unending string of jurisdictional disputes between Canada's Parliament and the provinces, the Judicial Committee favoured provincial autonomy at the expense of federal authority. Many Canadian lawyers, legal scholars and politicians found this pattern in the Privy Council's jurisprudence disturbing,[45] but as it was

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[43] "It looks as though Bumble ["the law is a Ass"] was right", *Ottawa Evening Journal* (25 April 1928) quoted in David Ricardo Williams, *Duff: A Life in the Law* (Vancouver: University of British Columbia Press, 1984) at 146; "Women Liberals Become Indignant at Ottawa Ruling", *Toronto Globe* (25 April 1928); "Federal Women to Ask Change in Act Wording", *Toronto Daily Star* (24 April 1928); Agnes MacPhail, "Seek Way to Admit Women to Senate", *Toronto Daily Star* (25 April 1928).

[44] See John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2002).

[45] Richard Risk, "The Scholars and the Constitution: P.O.G.G. and the Privy Council" (1996) 23 Man LJ 496, reprinted in Richard Risk, *A History of Canadian Legal Thought: Collected Essays* (Toronto: University of Toronto Press, 2006) at 233; HA Smith, "Residue of Power in Canada" (1926) 4 Can Bar Rev 432 was among the first outspoken critics in the 1920s to complain about the JCPC and its

based on a rejection of the "intention" theory of interpretation, it significantly improved Murphy's chances. The fathers of Confederation envisaged a powerful central government and a highly centralized federation where the provinces were viewed as little more than glorified municipalities. Led by Sankey's friend and predecessor as Lord Chancellor, Viscount Richard Haldane, a Hegelian philosopher and leading proponent of provincial rights,[46] the Privy Council refused to abide by the apparent intention of the framers of Canada's 1867 constitution.

Canadian constitutional lawyers were so alarmed by Haldane's approach that there were calls for abolition of appeals to the Privy Council.[47] But the Privy Council's refusal to be bound by the framers' intentions augured well for Emily Murphy if – and it was a very big if – that judicial philosophy had sufficient force to overtake the sexist attitudes revealed in the earlier Persons case decisions.

JOHN SANKEY: LORD CHANCELLOR

On that front, Emily Murphy's timing was perfect. In the summer of 1929, Britain elected a Labour government and Prime Minister Ramsay Macdonald appointed John Sankey as Lord Chancellor. Emily Murphy's case would be one of the first Sankey heard while presiding over the Judicial Committee of the Privy Council.

John Sankey was a man of humble origins. He did, however, have an Oxford education. He was called to the bar in 1892. He had a varied practice on the South Wales circuit, with a concentration on workers' compensation cases. Sankey's initial political instincts were conservative and he was elected to the London County Council under the Conservative banner in 1910. However, politics did not figure in his appointment to the High Court Bench in 1914 by Richard Haldane, Lord Chancellor in Asquith's Liberal government. Sankey earned a reputation as a solid judge who performed his duties "without fuss or notoriety."[48]

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construction of the *BNA Act*. Others followed suit, but primarily in the 1930s. See Risk, *A History of Canadian Legal Thought* at 241.

[46] Frederick Vaughan**,** *Viscount Haldane: Wicked Stepfather of the Canadian Constitution* (Toronto: Osgoode Society and University of Toronto Press, 2010).

[47] Among those making these pleas were Chief Justice Anglin: James G Snell and Frederick Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press, 1985) at 183. Newton Rowell, Murphy's counsel on the Persons Case also sought to have the Privy Council removed as Canada's court of last resort: Letter from Rowell to King, (11 March 1926) in M Prang, *N.W. Rowell: Ontario Nationalist* (Toronto: University of Toronto Press, 1975) at 441.

[48] RFV Heuston, *Lives of the Lord Chancellors, 1885–1940* (Oxford: Clarendon Press, 1964) at 525.

In 1919, Prime Minister Lloyd George appointed Sankey as the chairman of a commission to investigate the coal-mining industry. The industry, plagued by low production, squalid working conditions, and bitter relations between the owners and the miners, was in crisis because of the social and political upheaval of the war, the rise of the Labour movement, and the demands of workers for a greater share of the nation's wealth. This appointment transformed Sankey's political outlook and changed the direction of his career. Two of his fellow commissioners were Sidney Webb, a social reformer and the founder of the Fabian Society, and R.H. Tawney, a prominent economic historian and an activist in the Workers' Educational Association. The hearings were difficult and acrimonious. Sankey recorded in his diary that presiding over the hearings was "like sitting on a barrel of gunpowder,"[49] to which he added: "It would be possible to say without exaggeration of the miners' leaders that they were the stupidest men in England if we had not frequent occasion to meet the owners."[50]

Sankey's work on the commission had a profound and lasting effect upon his outlook. His "sense of justice was outraged by the descriptions of the living conditions of the miners; and his sense of decency was shocked by the cynical and selfish attitude of the owners".[51] To the shock of his conservative judicial colleagues, Sankey recommended nationalization of the coal mine industry. The government did not act but Sankey was a changed man, drifting steadily away from his innate conservatism towards an increasingly pro-Labour outlook. His social and intellectual circle now included many who were sympathetic to the cause of Labour. Fabian socialists Sydney and Beatrice Webb often included Sankey in their dinner parties with another famous Fabian, George Bernard Shaw, and the left-leaning political scientist Harold Laski. In a letter to U.S. Supreme Court Justice Felix Frankfurter, Laski described Sankey as "our best judge, with insight, scholarship and exquisite taste. His one defect is keen churchmanship."[52]

Sankey was elevated to the Court of Appeal in 1928 and within a year he was appointed Lord Chancellor. In his speech at the annual Lord Mayor's Judge's Dinner at Mansion House in early July 1929, he announced an ambitious agenda of reform.[53] It was clear that Sankey was determined to leave his mark.

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[49] Diary (6 May 1919), Oxford, Bodleian Library (John Sankey Papers, MSS Eng hist, e273).

[50] Heuston, *supra* note 48 at 505.

[51] *Ibid.*

[52] Mark De Wolfe Howe, ed, *Holmes – Laski Letters* (New York: Atheneum,1963) at 383, quoted in Heuston, *supra* note 48 at 506.

[53] "The Law and the Public", *Times* (London) (6 July 1929).

AT THE PRIVY COUNCIL

The Persons Case was argued within a month of Sankey's appointment before a panel of five judges. The Privy Council was a very busy court and to meet the need, membership was expanded to include a long list of retired and colonial judges. The panel of five selected for the Persons Case was certainly not drawn from the Privy Council's "first team". Only one member of the panel, Thomas Tomlin, was a Lord of Appeal in ordinary. The only other sitting judge was Lord Merrivale, President of the Probate, Divorce and Admiralty division of the high court.

The final two members of the panel were retired judges. Charles John Darling was a popular figure in the legal community with a mixed reputation as a judge. He was a poet and a journalist, not a prominent member of the bar. His *Times* obituary notice later described his practice as "microscopic."[54] Rumours of his possible appointment to the bench in 1897 had provoked an uproar. A leader in the *Times* described him as a man of "acute intellect and considerable literary power," but asserted that he had "given no sign of legal eminence", and argued that his appointment was based solely on his political affiliation.[55] The Liberal *Daily Chronicle* was more scathing: "Mr. Darling… is an extreme partisan of the Government now in office…He has no serious knowledge of the law and has never handled any important practice at the Bar. The whole transaction is grossly scandalous."[56] Yet over the next twenty-six years, Darling presided over a number of difficult and sensational murder cases with considerable skill. His best-known trials are legendary[57] and include the trial of the notorious "Chicago May" for attempted murder in 1907, the 1911 trial of Stennie Morrison for murder, and the sensational 1922 trial of Herbert Armstrong, a Welsh solicitor, for poisoning his wife. Darling was not a profound legal thinker nor was he a great judge but he displayed common sense, sound judgment, and a good understanding of human nature. These were the qualities of a reliable trial judge but hardly what was required for service on the apex court for the British Empire.

The fifth judge was Sir Lancelot Sanderson, not a well-known legal figure. He was a keen sportsman who had studied at Harrow and Cambridge before practicing as a barrister on the Northern Circuit. Elected to the House of Commons in 1910 as a Unionist MP, Sanderson was appointed Chief Justice of Bengal in 1915, a post he filled for eleven years. As his Times obituary would later report, "his tenure

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[54] Obituary, *Times* (London) (30 May 1936).

[55] *Times* (London) (26 October 1897), quoted in LG Wickham Legg, ed, *Dictionary of National Biography (1931–1940)* (London: Oxford Univeristy Press, 1949) at 211.

[56] Derek Walker-Smith, *The Life of Lord Darling* (London: Cassell and Company, 1938) at 93-94.

[57] See Dudley Barker, *Lord Darling's Famous Cases* (London: Hutchinson, 1936).

of office [as Chief Justice of Bengal] left no permanent landmark in Indian legal history."[58] Sanderson returned to England following his retirement from the Indian Bench in 1926, and often sat in the Privy Council on appeal from India and occasionally from the Dominions.

THE LIVING TREE

We do not know what part, if any, the other four members of the panel took in the preparation of the Privy Council's reasons, but it is clear from his diary that Sankey undertook to do the work,[59] and it would seem that the final product was his alone. Two themes pervade the judgment.

The first is the recognition that legal rules or customs are the products of a particular social and historical context. Laws may outlive the customs and traditions that gave rise to them, and courts should take this into account when interpreting the law in a different context. Sankey carefully reviewed the legal authorities excluding women from public office. He acknowledged the centuries of legal discrimination against women, but refused to view the law in static terms or to be bound by the past. The word "persons" was "ambiguous, and in its original meaning would undoubtedly embrace members of either sex." If the original meaning of the word could include women, it was social tradition and custom, not the law, that excluded women. Sankey concluded: "The appeal to history therefore in this particular matter is not conclusive."[60] In Sankey's view, it was wrong "to apply rigidly to Canada of today the decisions and the reasons therefore which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries, to countries in different stages of development."[61] As the word "persons" could include both genders, Sankey wrote, "to those who ask why the word should include females, the obvious answer is why should it not?"[62]

Sankey's second theme was the difference between statutory interpretation and constitutional interpretation. He characterized the evolution of the *British North America Act, 1867* as an affirmation of Canadian unity and self-determination. Again, Sankey emphasized the importance of social tradition and custom in legal development. As the final court of appeal for "the Britannic system," which includes

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[58] *Times* (London) (11 March 1944).

[59] Diary, (18 October 1929), Oxford, Bodleian Library (John Sankey Papers, e 283).

[60] *Edwards, supra* note 1, at 134.

[61] *Ibid.*

[62] *Ibid* at 138.

"countries and peoples in every stage of social, political and economic development and undergoing a continuous process of evolution," the Privy Council "must take great care not to interpret legislation meant to apply to one community by a rigid adherence to the customs and traditions of another."[63] Ironically, the voice of supreme colonial power was insisting upon the very independence and legal maturity that Canada's own judges had refused to claim for themselves.

It is within this context that Lord Sankey presented what has come to be the most memorable phrase in modern Canadian constitutional law: "The *British North America Act* planted in Canada a living tree capable of growth and expansion within its natural limits."[64] The living tree metaphor described the constitution in the organic terms of growth and evolution. It was, wrote, Sankey, neither the duty nor the desire of the Privy Council "to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation" to allow the Dominion to be "mistress in her own house."[65]

The Canadian press applauded the decision.[66] The London dailies fastened on the phrase "a relic of an age more barbarous than ours" and warmly applauded the judgement. The *Evening Standard* proclaimed that the judgment "will have an indirect bearing on the political activities of women throughout the Empire."[67] The *Daily Telegraph*, which had given the case extensive coverage, called the decision "a significant advance towards the equality of political rights for both sexes."[68]

However, the idea that the constitution was a timeless document capable of adapting over time to meet the changing needs of Canadian society did not have immediate resonance in the staid Canadian legal community. An article in the Canadian Bar Review defended the Supreme Court of Canada for having applied the settled rules of statutory interpretation that Lord Sankey and his colleagues had "simply… brushed aside," ignoring points that were "obvious… to a legal mind."[69] The author, a senior practitioner, undoubtedly anxious to please Chief Justice Anglin, made the extraordinary accusation that the Privy Council had acted as the

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[63] *Ibid.*

[64] *Ibid* at 136.

[65] *Ibid.*

[66] *Toronto Daily Star* (18 October 1929); *Edmonton Journal* (19 October 1929); "Woman, As Person, May Sit in Senate Says Privy Council", *Globe* (19 October 1929).

[67] "A Woman's Big Victory in Privy Council", *Evening Standard* (London) (18 October 1929).

[68] Editorial, *Daily Telegraph* (19 October 1929).

[69] George Henderson, "Eligibility of Women for the Senate" (1929) , 7 Can Bar Rev 617 at 619.

willing tool of Mackenzie King, who he claimed had secretly invited the Privy Council to amend the constitution by judicial fiat.[70]

A SENATE SEAT FOR EMILY MURPHY?

For Emily Murphy and the Canadian feminist movement, the victory was gratifying but short-lived. A woman was appointed to the Senate by Mackenzie King in 1930, but that woman was not Emily Murphy.[71] Murphy retired from the bench on 11 November 1931, but she never gave up her desire for a seat in the Senate. In April 1931, the death of Senator Lessard of Alberta created just such an opportunity. However, Mackenzie King's Liberals had been defeated in the 1930 general election and Conservative leader R.B. Bennett was now Canada's prime minister. Murphy knew Bennett from his days as a member of the Alberta legislature when he had been her ally in the promotion of improved property rights for women. Having spent the past decade currying favour with King and the Liberals, Murphy set out to renew her ties with the Conservative Party. As with previous Senate vacancies, Murphy's supporters wrote to urge Murphy's appointment.[72]

Bennett was willing to disregard political affiliation but he could not ignore religion. He decided that tradition dictated that "as the sole representative of the Catholic minority in our province,"[73] Lessard should be replaced by a Catholic. Bennett appointed Pat Burns, a well-known Liberal and wealthy rancher. Murphy was not given serious consideration.[74]

THE LEGACY OF THE PERSONS CASE

The recognition of women as legal persons was a momentous legal achievement, but full personhood required more than an edict from the Privy Council at a time when that institution's authority was being questioned and in an era not yet ready to embrace women as true equals. The philosophy of Murphy and the other member of the Famous Five based on maternal feminism, social gospel and temperance was a spent force. Murphy and her colleagues had lost touch with the concerns of younger women and their fight to secure the appointment of women to the Senate simply

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[70] *Ibid* at 628.

[71] Carine Wilson was appointed to the Senate by Prime Minister King on 15 February 1930.

[72] Letter from Edwards/Gardiner Family Fonds [nd] Calgary, Glenbow Archives (M7 283, File 15).

[73] Sanders, *supra* note 8 at 258; "Five Are Mentioned by Rumors in City for Seat in Senate", *The Albertan* (4 May 1931).

[74] "Five Are Mentioned by Rumors in City for Seat in Senate", *supra* note 73, does not mention Murphy as a possible contender and suggests that women's groups were promoting the appointment of Mrs PJ Nolan.

failed in their attempts to rekindle the passions of the suffrage movement. The advancement of rights for women would take real social change that would not come until the 1970s.

Canadian lawyers and judges also essentially ignored the majestic language of Lord Sankey's living tree metaphor for over fifty years.[75] It was not until the era of the *Charter of Rights and Freedoms*, adopted in 1982, that the Persons Case came into its own. The Supreme Court of Canada of the 1980s, a very different institution than the Supreme Court of the 1920s, fully embraced the living tree metaphor as a guiding principle of constitutional interpretation.[76]

The Persons Case, the ideal of universal personhood and the living tree approach to constitutional interpretation are now recognized as cornerstones of the Canadian constitution. Persons Day celebrations are held every October 18 and the Governor General makes Persons Day awards to recognize contributions to the equality of women in Canada. A statue of the Famous Five sits on Parliament Hill amid various leading lights of Canadian political history and, until very recently, our $50 bills bore an inscription of that statue on the reverse.

I hope that my story has persuaded you of the advantages to taking a close look at the people and the politics behind a specific case. One sees that individuals do make a difference and that a landmark ruling can be driven by unpredictable personal and political combinations. In retrospect, we can agree that the Privy Council got it right, yet at the time, there was nothing inevitable about the result. But for the unlikely coincidence of Emily Murphy's unquenchable thirst for a Senate appointment, Mackenzie King's fondness for referring difficult questions to the courts, and John Sankey's determination to make his mark as a reforming Lord Chancellor, the result could easily have been quite different.

This case study also demonstrates that the law is necessarily constantly changing and that it does not and cannot operate in a vacuum isolated from political and social forces. In 1928, the Supreme Court, stuck in the mores of another age, had failed to move with the times. Women worked, voted and held public office, yet Canada's highest court refused to recognize them as persons. A year later, the Privy

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[75] Justice Ivan Rand referred approvingly to the living tree approach in *Winner v SMT (Eastern) Ltd,* [1951] SCR 922.

[76] *Quebec (Attorney General) v Blaikie*, [1979] 2 SCR 1029; *British Columbia (AG) v Ellett Estate*, [1980] 2 SCR 466 at 478; *Reference re: Residential Tenancies Act 1979(Ontario)*, [1981] 1 SCR 714 at 723 per Dickson J: *Hunter v Southam Inc*, [1984] 2 SCR 145 at 155-56; *Law Society of Upper Canada v Skapinker,* [1984] 1 SCR 357 at 365 per Estey J.

Council's decision broke the centuries-old mould of exclusion because John Sankey saw that a way had to be found to permit the law to accommodate the change that social forces demanded.

The Persons Case further reveals how the symbolic importance of a constitutional decision can transcend the specific issue it decides. Even her closest friends could not understand why Emily Murphy was fighting so hard to secure an appointment to a body that most Canadians regarded as outdated and irrelevant. Yet her fight produced a strong assertion of the principle of equality.

Finally, the Persons Case teaches us that equality is a constantly evolving ideal. Emily Murphy herself held racist and discriminatory beliefs towards those suffering from mental illness and disability. Modern feminists distance themselves from the views Murphy expressed. But Emily Murphy had the conviction, courage and determination to be recognized as a person and, almost a century later, we embrace the ideals proclaimed in the Persons Case as lying at the core of our idea of a just and democratic society.