

HOW THE FAMOUS FIVE IN CANADA WON PERSONHOOD FOR WOMEN

Vivien Hughes

Academic Relations, Canadian High Commission, London, UK.

Abstract

In 1929, five Canadian women won a ruling by the Judicial Committee of the British Privy Council that women were persons in law. The five women, known as the Famous 5, had sought in the 1920s to have women appointed to the Canadian Senate, but were denied by the Supreme Court of Canada on the grounds that women did not qualify as 'persons' under Section 24 of the British North America Act 1867. The Famous 5 appealed to the Privy Council in London, who ruled that the word 'persons' in Section 24 included members both of the male and female sex, and that women were eligible to be summoned to and become members of the Senate of Canada. The Privy Council ruling overturned arguments dating back to Roman times that were still being used by lawyers and legislators in the 20th century to keep women out of public life.

In 1929, five Canadian women, known as the Famous 5, won a ruling from the Judicial Committee of the British Privy Council that women were persons in law.¹ The ruling was one of the most important milestones in the history of women's struggle for equality. It has been described as the event that marked formal sexual emancipation.² When Isabella Scott of Montreal heard the news that she was a person, she wrote to one of the Famous 5:

O, the joy of being a person, a qualified person ... think of it. Nothing so important and far reaching has happened since that famous convention in the sixth century where it was decided that women had souls ... your names should go down in the history of Canada as the liberators of your sex.³

What the Famous 5 had been seeking was a determination that women could be appointed to the Canadian Senate. This had been denied them on the grounds that women were not 'qualified persons' under Section 24 of the British North America Act 1867, the Act of the British Parliament that gave Canada self-government and which enshrined the Constitution of the new Dominion. What they achieved was a ruling that overturned arguments going back centuries that were still being used by lawyers and legislators in the 20th century in Britain as well as in Canada to keep

women out of public life; a ruling that became the new landmark interpretation of women's status in English common law throughout the Empire. Before the Privy Council ruling in 1929, women were defined in English common law as 'persons in matters of pains and penalties, but not in matters of rights and privileges'.⁴ In other words, women were persons when it came to paying taxes and being punished, but notwithstanding advances that had been made in women's status in the late 19th and early 20th centuries, the law was ambiguous and lawyers and judges could still declare that women were not persons for the purpose of having the right to participate in public and professional life.

The Persons Case, as it is known, vindicated earlier cases in Britain and in Canada through which women had been seeking since the 1860s for a determination by the courts that women were entitled to participate in public life, from which they had consistently been debarred simply because they were women, even though they otherwise had all the necessary qualifications. At issue in many of these cases was whether women were included in the word 'persons' in the statutes and charters pertaining to the right to hold public office, to be admitted to the professions, and to vote, or whether they were excluded by virtue of the fact that only male pronouns were used in these statutes and charters.⁵ In this article, I will describe the Persons Case appeal and ruling, and its significance in the wider campaign for the right for women to participate in public life.

The first cases in Britain were prompted by the passing of the Second Reform Act in 1867 in which John Stuart Mill had tried unsuccessfully to have the word 'person' substituted for 'man'. Prime Minister Benjamin Disraeli ducked the issue by saying that it would be for the 'gentlemen of the long robe' [the judges] to decide. So supporters of votes for women decided to test the issue.⁶ The first case was brought by a group of women in Manchester who had succeeded in getting their names placed on the electoral roll, only to have them struck off by the revising officer - which he was legally not allowed to do. In another case in 1889, Lady Sandhurst, who had been elected to the London County Council, was disqualified by the courts after a challenge by her defeated male opponent who successfully argued that because she was a woman she did not come within the expression 'fit person'.⁷ In 1908, Margaret Nairn, a graduate of Edinburgh University, brought an action against the Universities of Edinburgh and St Andrews which had refused women graduates voting papers for the general election. The court concluded that 'person' in the Representation of the People (Scotland) Act 1868 did not include women.⁸

Three of the four Canadian cases were brought by women wanting to

become lawyers. Mabel Penery French initiated the first case in New Brunswick in 1905 and the second in British Columbia, where she had moved, in 1911. In both provinces, the courts rejected her application, but the provincial law was changed and she was allowed to practice law. Annie Macdonald Langstaff was not so lucky in Quebec province, where both courts and governments refused her request. In the fourth case, in an ironic reversal of the argument, a prostitute named Lizzie Cyr challenged her conviction for being a vagrant on the grounds that only male pronouns were used in the laws pertaining to vagrancy and therefore as a woman she could not be convicted. She lost.⁹

Professional societies agreed with the courts. In 1902, the Royal Society refused the candidature for a Fellowship of Hertha Ayrton, a highly distinguished physicist, on the grounds that she was a married woman and therefore not a person.¹⁰ In 1888, Mary Harris Smith, a brilliant mathematician and accountant, was refused membership of the Institute of Chartered Accountants on the grounds that the words 'he' and 'his' in the charter did not encompass 'she' or 'her'.¹¹ Universities at first refused to admit women on the grounds that they had been established for men only. In 1869, seven women managed to gain admission to Edinburgh University Medical School - the first women in Britain to be admitted to medical school - but such was the uproar as professors and townsfolk rioted to prevent them from entering the university, that the university reneged on its decision and cancelled their courses. The Edinburgh Seven, as they are known, took the university to court - and lost.¹²

How was it, then, that the Famous 5 were able to achieve what had eluded all those other women in Canada and in Britain over the previous sixty years? The Famous 5, all from Alberta, were remarkable women who had for many years been active social reformers and equal rights campaigners and were among the first women in the Empire to hold public office. Emily Murphy was a prominent suffragist and reformer, a best-selling author and journalist, and the first woman police magistrate in the Empire. Nellie McClung was a novelist, social reformer, and journalist, who had led the fight for the franchise for women in Western Canada. She later became a member of the Alberta Legislative Assembly, the first woman Director of the Board of Governors of the Canadian Broadcasting Corporation, and a delegate to the League of Nations in 1938. Louise McKinney was the first woman to serve as a Member of a Legislative Assembly in the Empire when she was elected in Alberta in 1917, the first election in Canada in which women could vote or run for office. She fought for and won the first Dower Act in Alberta, and was one of four women to sign the document which set up the United Church of Canada. Henrietta Muir Edwards was

the Convenor of Laws of the National Council of Women of Canada for 35 years. She also published Canada's first women's magazine, established the prototype of the Canadian YWCA, and created the Victorian Order of Nurses. Henrietta was 80 years old when she signed the petition on the Persons Case. Irene Parlby was the first woman cabinet minister in Alberta. She was a champion of rural women through the United Farm Women of Alberta, and she also represented Canada at the League of Nations in 1930.¹³

Emily Murphy first discovered that she was not a person on her first day in court in 1916 when the defendant's lawyer challenged her appointment on the grounds that she was not a person and therefore "No decision of her court can be binding."¹⁴ Emily ruled him out of order, and continued, but she was regularly challenged by lawyers on the same grounds. The matter seemed to be settled in 1917, when the authority of another Alberta woman magistrate, Alice Jamieson, was similarly challenged, and appealed to the Supreme Court of Alberta which ruled on the grounds of "reason and good sense" that "there is ... no legal disqualification for holding public office in the government of this country on the basis of sex."¹⁵

1916 was also the year in which Emily Murphy began to campaign for women to be appointed to the Senate, now that she and Nellie McClung and others had won the right for women to vote in Manitoba, Saskatchewan and Alberta. Many women in Canada agreed with her, and petitions were presented to the federal government. Between 1917 and 1927 five governments expressed their support but said their hands were tied by the fact that women were not 'qualified persons' under the British North America Act 1867. Two federal governments promised to change the law but did nothing. Emily Murphy got tired of waiting. She is famously remembered for saying, "Whenever I don't know whether to fight or not, I fight!"¹⁶

Under Section 60 of the Supreme Court Act of Canada, any five citizens acting as a unit can ask for clarification of a constitutional point. Furthermore, such an appeal is to be funded by the Federal Government if it is deemed to be of sufficient national importance. So, Emily invited Henrietta, Nellie, Louise and Irene to join her in petitioning Prime Minister MacKenzie King's government. They knew that officers of the Crown had already declared that women were not 'qualified persons', so they framed their questions with the intention of finding out how women could be appointed to the Senate:

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 BNA Act, or otherwise, to make provision for the appointment of a female to the Senate of Canada?¹⁷

Notwithstanding the Federal Government's position, the Minister of Justice decided that the question was "one of great public importance", and "that it would be an Act of justice to the women of Canada" to obtain the opinion of the Supreme Court of Canada thereon. But, to the "amazement and perturbation" of Emily and the others, he decided that the question to be put to the Supreme Court would be:

Does the word 'Persons' in section 24 of the British North America Act, 1867, include female persons?¹⁸

Emily wrote to the Minister of Justice proposing a third question for referral to the Supreme Court aimed at establishing how women could be appointed to the Senate:

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 (the Parliament of England) or does power lie with the Parliament of Canada, or the Senate of Canada?¹⁹

This question also was ignored, and so is history made.

The case was argued before the Supreme Court on 14 March 1928. All the provinces had been notified officially of the case, but only two submitted factums: Alberta, which supported the five petitioners; and Quebec, which supported the federal Attorney General in opposing them. The factum submitted by the Counsel for the Famous 5 was just three pages long, with a 33-page annex listing relevant precedents and laws. It argued simply that there was nothing in the word 'persons' to suggest that it was limited to male persons; that the only limitation on the word 'persons' in Section 24 was the word 'qualified' as used in Section 23 to define the qualifications of a Senator; that because an Act of the Imperial Parliament of 1850 had provided that "in all Acts words importing the Masculine Gender shall be deemed and taken to include Femalesunless the contrary as to Gender.... is expressly provided....",²⁰ by express statutory enactment Section 23 included females, as there was nothing in the BNA Act expressly providing the contrary; and that the Dominions Elections Act had already changed the

word 'persons' in Section 41, which defined the qualifications of Members of the House of Commons, to include women, and what was good for one Section was good for another.²¹

The Attorney General of Canada countered this with a 24-page Factum and a 65 page appendix, in which he argued that the meaning of the word 'persons' in Section 24 of the British North America Act 1867 should be interpreted according to the intention of the legislature when it was enacted. It could not be changed just because the status of women had changed since then. Even though women could now vote, hold public office, and own property, none of which they could do in 1867, rules had to be maintained as written. Under the common law of England, which could be traced historically back to Roman times, women were under a legal incapacity to hold public office. The Attorney General argued that the more qualified wording of the Interpretation Act 1889 negated the 'unless expressly provided' in the Act of 1850.²²

Lord Brougham's Act of 1850 and its later modification, the Interpretation Act 1889, were central to the 1929 Persons Case and to earlier persons cases, in particular whether or not it was 'expressly provided' that women were included or excluded. Women and their supporters argued that they were included; their opponents that they were not. The Attorney General of Canada in 1928 echoed earlier judges, including the Lord Chancellor of England in 1922, in declaring that Parliament could not possibly have "intended to effect a constitutional change so momentous and far-reaching by so furtive a process."²³

The purpose of the 1850 Act was declared in its short title to be for the shortening of acts of Parliament. However, a reading of Section IV in full makes the underlying intention clear:

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; and the Word "Month" to mean Calendar Month, unless Words be added showing Lunar Month to be intended; and "County" shall be held to mean also County of a Town or of a City, unless such extended Meaning is expressly excluded by Words; and the Word "Land" shall include Messuages, Tenements, and Hereditaments, Houses and Buildings, of any Tenure, unless there are Words to exclude Houses and Buildings, or to restrict the Meaning to Tenements of some particular Tenure; and the

Words "Oath," "swear," and "Affidavit" shall include Affirmation, Declaration, affirming, and declaring, in the Case of Persons by Law allowed to declare or affirm instead of swearing."

It was, as Dale Spender has shown, the deliberate and conscious legitimization of male superiority and male social power. While the masculine gender was deemed to include females, there was no provision that the feminine gender would be deemed to include males - in contrast to the balanced provision regarding numbers. Women were to be tidied up along with all those other objects that were messing up men's worlds, including our lunar menstrual months.²⁴

On 24 April 1928, the Supreme Court of Canada unanimously rejected the Famous 5's claim. They upheld the common law disability of women to hold public office. They agreed with the Attorney General that the British North America Act had to be interpreted in the light of the times it was written, when women did not vote, run for office, or serve as elected officials. They declared that only male nouns and pronouns were used in the Act, and that the word 'persons' in Section 24 was restricted to male persons. Furthermore, the British House of Lords did not have a woman member, and the justices concluded that Canada should not change this tradition.²⁵ Mary Ellen Smith from British Columbia said, "The iron dropped into the souls of women in Canada when we heard that it took a man to decree that his mother was not a person."²⁶

Emily Murphy herself initiated the appeal to the British Privy Council. Even though Minister of Justice Ernest Lapointe had promised measures to amend the BNA Act to allow women to be appointed to the Senate, she was not prepared to wait for what might or might not come about. On 18 October 1929, the Judicial Committee gave their ruling. The courtroom was packed with representatives of women's organisations, though none of the Famous 5 was there.

The Lord Chancellor said that:

The exclusion of women from all public offices is a relic of days more barbarous than ours....Their Lordships are of 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.²⁷

Giving their reasons, the Lord Chancellor said:

The word 'persons' may include members of both sexes, and to those who ask why the word should include females, the obvious answer is why should it not? In these circumstances, the burden is upon those who deny that the word includes women to make their case....the word [persons] is ambiguous and in its original meaning would undoubtedly embrace members of either sex....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 contested. Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared....Over and above that, their Lordships do not think it right to apply rigidly to Canada of to-day the decisions and the reasonings therefor which commended themselves, probably rightly, to those who had to apply the law in different circumstances. Referring therefore to the judgment of the Chief Justice and those who agreed with him, their Lordships think that the appeal to Roman Law and to early English decisions is not of itself a secure foundation on which to build the interpretation of the British North America Act 1867.

Then, in one of the most famous utterances in Canadian legal history, the Lord Chancellor said:

The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits.

This declaration established in Canadian law the principle of constitutional evolution. Instead of adherence to the principle that laws should be interpreted according to the intention of those who framed them, henceforward, laws should be interpreted according to contemporary understanding and conditions.

British newspapers hailed the judgment as "the Canadian women's triumph". The "Canadian women's triumph" was important for women in Britain in 1929 because they believed that the ruling would at last mean that British women would be admitted to the House of Lords, for which they had been campaigning since women had won the right to vote and stand for election to the House of Commons in 1918. After the Persons Case ruling, only Britain and South Africa out of all the countries in the British Empire, excluded women from the Upper House. The British suffragist paper, "The Vote", carried an article on 15 November 1929 entitled "Women in the House of Lords - the home country lags behind!"²⁸

In 1919, the British Parliament had passed the Sex Disqualification (Removal) Act which stated that “a person shall not be disqualified by sex or marriage from the exercise of any public function, or from being appointed to or holding any civil or judicial office or post.” This had prompted Viscountess Rhondda to lay claim to her hereditary seat in the House of Lords, but she was blocked by the then Lord Chancellor, Lord Birkenhead, who was a leading opponent of women’s suffrage in the Conservative Party. The House of Lords Committee of Privileges had declared in Lady Rhondda’s favour, but Lord Birkenhead effectively overruled them by referring the matter to a larger Committee weighted with opponents to the admission of women to the House of Lords.²⁹

By the time the Persons Case came before the Privy Council, there was a new Lord Chancellor, Lord Sankey, who had been appointed by Prime Minister Ramsay Macdonald in an attempt to liberalise the judiciary.³⁰ Even if Lord Sankey had not been disposed to declare that women were persons, it would have been hard for him to find credible reasons for refusing the appeal of the Famous 5. By 1929, women were Members of the House of Commons in both Canada and the UK, and women had got full voting rights in both countries. In May 1929, just two months before the Privy Council heard the appeal, 14 women (up from 4) had been elected in Ramsay Macdonald’s second government. And Lord Sankey had a new colleague in Cabinet - Margaret Bondfield, the first British woman Cabinet Minister, and first woman Privy Councillor.³¹

The judgment of the Privy Council, combined with the change in political circumstances, meant that there could be no going back. For the first time in history, women were declared to be fully persons, and never again could anyone argue that women were not persons or could not play their full part in the public life of Britain, Canada, or any other country of the Empire. The Privy Council judgment would stand as the highest legal pronouncement on the matter in all the countries of the Empire - except, curiously enough, in Britain, as appeals to the Privy Council from within the realm had been abolished in the 17th century. Nevertheless, as the Registrar of the Privy Council told me, the ruling would have had “immense persuasive authority” in Britain! Lord Browne-Wilkinson, the Senior Lord of Appeal in Ordinary, who represented the Judicial Committee of the Privy Council at a conference at Canada House in October 1999 celebrating the 70th anniversary of the Persons Case, said: “I think we got that one right!”

It was not hard however for those professional men who ran the government, the civil service, the law, the universities, and the professions,

to find the regulatory equivalent of bouncers to keep women out of their exclusive clubs.³² And it seems that the more exalted the club, the longer it took for the citadel to yield. While some professional societies admitted women by the early 1920s, it was 1945 before a woman became a Fellow of the Royal Society.³³ The Foreign Service in both Britain and Canada refused to allow women to take the examinations for the officer grade until 1947, and Cambridge University held out against giving women degrees until 1949. It was 1958 before women could become Life Peers, and 1963 before hereditary peeresses could sit in the House of Lords.

Cairine Wilson was appointed as Canada's first woman Senator in 1930. There have been altogether 59 women Senators in the 70 years since then, and today women make up 30% of the Senate. However, Alberta did not get a female senator until 1979 when Prime Minister Joe Clark appointed Martha Bielish from Warspite. Alas, there are only 111 women out of 690 peers in the newly reformed House of Lords. The home country still lags behind.

There are still no female Law Lords in Britain, but at the time of giving this paper, the first woman judge ever was sitting as a member of the Judicial Committee of the Privy Council. Not from Canada, although Canada's Chief Justice is currently a woman (Chief Justice Beverley McLachlin), because Canada no longer has the appeal to the Privy Council. But Chief Justice Sian Elias from New Zealand, the country which has the distinction of being the first to have given women the vote, in 1893.

As the present Canadian Minister of Justice, A. Anne McLellan, said in an address to the University of Alberta in 1989, the Persons Case has an enormous symbolic importance beyond its purely legal significance. "Five courageous women," she said, "had fought the apathy and timidity of the federal government as well as the conservatism of the Supreme Court of Canada and won. This provided a much needed 'shot in the arm' for the still relatively small 'women's movement' in Canada."³⁴ For so long women were denied the basic human right to exist and were non-persons under English common law. "In law husband and wife are one person, and the husband is that person," ruled the authoritative 18th century lawyer, Sir William Blackstone. In Victorian England and Victorian Canada, a woman had no right to her children, to the money she earned, to defend herself in court, or to have any say in the affairs of the state. While women had some attributes of personhood before 1929, the Privy Council ruling finally put women on equal legal footing with men.

In recent years, the Persons Case has come to be regarded in Canada as a

major democratic achievement, as the concept of ‘personhood’ is one which touches people of all genders, faiths, races, ages, and economic standing who have been denied the basic rights of citizenship. Maclean’s magazine of 1st July 1999 included it among the 25 events that shaped Canada in the 20th century; and in October 2000, a monument of the Famous 5 was unveiled on Parliament Hill in Ottawa, the first statues of women other than Queen Victoria and Queen Elizabeth ever to be placed there. The Famous 5 are today celebrated both as liberators of the female sex and as builders of the Canadian nation.

Endnotes

¹ Judgment of the Lords of the Judicial Committee of the Privy Council, delivered the 18th October 1929, on Privy Council Appeal No. 121 of 1928

² Albie Sachs and Joan Hoff Wilson, *Sexism and the Law: A Study of Male Beliefs and Legal Bias in Britain and the United States* (Martin Robertson: Oxford, 1978) p.40

³ Nancy Millar: *The Famous Five: Emily Murphy and the Case of the Missing Persons* (Western Heritage Centre, Cochrane, Alberta: 1999), p.59

⁴ Monique Benoit: “Are Women Persons? The ‘Persons’ Case”, in *The Archivist/L’Archiviste*, the Magazine of the National Archives of Canada, No.199, 2000, p.2.

⁵ (i) Sachs & Wilson, *ibid.* Ch.1. (ii) Beverley Baines: “Law, Gender, Equality” in Sandra Burt, Lorraine Code, Lindsay Dorney eds, *Changing Patterns: Women in Canada* second edition (McClelland & Stewart: Toronto, 1993) pp.243-258

⁶ Sachs & Wilson, *ibid.* p.23

⁷ Sachs & Wilson, *ibid.* p.26

⁸ Gordon Donaldson, Historiographer Royal for Scotland, ed: *Four Centuries: Edinburgh University Life 1583-1983*. (University of Edinburgh 1983)

⁹ Baines, *ibid.* pp.251-252

¹⁰ Joan Mason: ‘Hertha Ayrton (1854-1923) and the admission of women to the Royal Society of London’, *Notes.Rec.R.Soc.London*.45(2), 201-220

(1991)

¹¹ Europa Biographical Dictionary of British Women (Europa Publications: London, 1983), p.370

¹² Sachs & Wilson, *ibid.* pp 4-22

¹³ (i) Nancy Millar: *ibid.*; (ii) Famous 5 Foundation web site: www.famous5.org/bio.html

¹⁴ Millar, *ibid.* p.16; Benoit, *ibid.* p.2.

¹⁵ Millar, *ibid.* p.18; Baines, *ibid.* p.253

¹⁶ Millar, *ibid.* p.9

¹⁷ Millar, *ibid.* p.45

¹⁸ No.1 Order of Reference by the Governor General in Council, PC 2034, 19 October 1927.

¹⁹ Millar, *ibid.* p.47

²⁰ Lord Brougham's Act 1850

²¹ Factum of the Appellants in the Supreme Court of Canada, 1928

²² Factum of the Attorney General of Canada in the Supreme Court of Canada 1928

²³ *ibid.*

²⁴ Dale Spender: *Man Made Language* (Pandora: London and New York) 1998 edition pp 157-150.

²⁵ Millar, *ibid.* pp.49-51

²⁶ Millar, *ibid.* p.49

²⁷ Judgment of the Lords of the Judicial Committee of the Privy Council, delivered the 18th October 1929, on Privy Council Appeal No. 121 of 1928

²⁸ *The Vote*, 15 November 1929. Similar comments appeared in *The*

Guardian 19 October 1929; *The Scotsman* 19 October 1929; and *The Vote* 27 December 1929.

²⁹ (i) Richard Symonds *Inside the Citadel*; (ii) Sachs & Wilson, *ibid.* p.33; (iii) *The Vote* 15 November 1929.

³⁰ Sachs & Wilson, *ibid.* p.42

³¹ House of Commons Fact Sheet No.5 Ed24 Pr3 150 August 1999 ISSN 0144-4689; Europa Biographical Dictionary of British Women

³² For example, a memorandum in the file of the Lord Chancellor's Office for 1919 considering the effect of the Sex Disqualification (Removal) Bill says: "In fact, women cannot obtain admission to many classes and grades in the Civil Service not by reason of any legal disqualification but by administrative action, that is by regulations made with respect to the Civil Service examinations." (Public Record Office: LCO 2/388 1694/16). It was by such regulations made at the time that women were barred from the administrative grades of my own profession, the Diplomatic Service.

³³ Mason, *ibid.* p.59

³⁴ Talk delivered on October 18, 1989, at the University of Alberta, as part of the celebration of the 60th anniversary of the Persons Case, when A. Anne McLellan was Professor of Law at the University of Alberta.