To commemorate the seventieth anniversary of the Person’s Case in October 1999, the National Archives of Canada is pleased to have prepared this article which will appear in the next issue of its periodical The Archivist.
THE "PERSONS" CASE

“‘Having done all – stand.’ We lose so much, both in private and public life, by receding from the ground we have won, either from indolence or some other cause.”

– Emily Murphy 1
October 18, 1999 marks the 70th anniversary of the “Famous Five” Alberta women who fought to have women constitutionally declared “persons” and therefore eligible to sit in the Canadian Senate.

In 1928, the Supreme Court of Canada had rejected their request, but a year later, the Judicial Committee of the British Privy Council granted their appeal and found in their favour. Thus can be read at the end of a formal 14-page decision “that the word ‘persons’ in section 24 [of the British North America Act] includes members both of the male and female sex... and that women are eligible to be summoned to and become members of the Senate of Canada.”

Emily Murphy, instigator and leader of the movement to have women admitted into the Senate, had stood firm, giving up not one inch of ground.

Emily Murphy had been a judge at the Edmonton Municipal Court since 1916. To support her in her battle, she chose four exceptional women on whom she could count at more than one level: Nellie McClung, Irene Parlby, Louise McKinney and Henrietta Muir Edwards. They were seasoned militants known for their political and social action, as members of the Alberta legislature and activists in the temperance, suffragette and
women's movements. Nellie McClung, like Emily Murphy, was also a writer. Henrietta Muir Edwards, editor-in-chief of a newspaper published for working women, had written a treatise on laws concerning women.

The Department of Justice file on this famous case, kept at the National Archives of Canada, is filed according to alphabetical order under the name of Henrietta Muir Edwards. But it was in fact Emily Murphy who spearheaded the process during the two years it took for the case to come to an end, keeping up the correspondence, digging up the information and recommending the attorney who would handle the case. Her letters, interspersed with the official documents, give us a glimpse of a tenacious, clever and diplomatic woman.

The issue of women's admission into the Senate was dear to Emily Murphy's heart for several reasons. First, in 1916, she became the first woman magistrate in the British Empire, sitting in the Women's Court in Edmonton. On her first day in court, a disgruntled lawyer challenged her ruling against his client on the grounds that Judge Murphy, a woman, was not a "person" and was therefore not able to perform the duties of a magistrate. He based his argument on a decision rendered in 1876 by an English court, a decision which by then had become obsolete but had never been overturned. It stated that "Women are persons in matters of pains and penalties, but are not persons in matters of rights and privileges." "Since the office of magistrate is a privilege, he added, the current magistrate sits illegally. No decision coming from her court may bind anyone."4

This oppressive taunt was overruled by the Supreme Court of Alberta, which confirmed Emily Murphy's appointment and the validity of her judgments. But, for the first female municipal judge in the British Empire, the story was far from over; in fact, the
disgruntled lawyer had unknowingly given a boost to the women’s cause. During the following years, women’s associations, newspapers, as well as men and women from all provinces, proposed and then demanded Emily Murphy’s appointment to the Senate. In 1921, Elizabeth B. Price, publicist for the Women’s Institute of Canada, reported that the National Council of Women, representing 450,000 women, unanimously supported their annual meeting’s resolution that a woman, namely Emily Murphy, be immediately appointed to the Senate of Canada.

But major obstacles had yet to be overcome. A handwritten note by Judge Newcombe in the margin of a brief intended to close the case and the subject stated that women were not qualified for the Senate because the word “senator” does not describe a woman. There was no Latin word to describe a female senator, he wrote, and the name of senator does not apply to a woman. On February 4, 1928, he refused to hear the “persons” case.

To Emily Murphy, the admission of women to the Senate was also the culmination of three decades of struggle for Alberta women to improve their lot. Working within women’s organizations, they had gained the right to vote, prohibition, and better economic conditions for farmers. In 1916, women had the right to vote and run for elected office in Manitoba and Alberta. In 1917, they voted at the federal level on behalf of men who were at war, and the following year, every Canadian woman could vote in her own name. After Agnes M. McPhail was elected to the House of Commons in 1921, becoming the first woman to sit as a Member of Parliament, admitting women to the Senate became once again a burning issue. The death of an Alberta senator in the following year revived the Alberta women’s militancy. They seized the opportunity and proposed that Emily Murphy be appointed to fill the vacant seat.

“The gentlemen would like nothing better than to have women in the Senate but the British North America Act made no provision for
women and the members feared that women could not be appointed to the Senate until this great foundation of our liberties was amended and that would take time and careful thought.” A few years later, Prime Minister Mackenzie King made a promising move and asked Senator McCaig from Chatham to propose an amendment to the BNA Act. The motion was duly recorded in the agenda of June 25, 1923 but, apparently due to lack of time, it was neither proposed that day nor reinstated later.

The BNA Act remained a convenient screen behind which the senators and the federal government could hide their refusal to take action. So much so that in 1927 Emily Murphy decided to test the strength of that screen. She had found a little-known section of the Supreme Court Act that allowed five persons to petition the government to obtain an interpretation on a point of law within the BNA Act. This section also provided that the government would bear the costs of the petition. And so, on August 27, 1927, Emily Murphy invited Nellie McClung, Irene Parlby, Louise McKinney and Henrietta Muir Edwards to cosign a letter addressed to the Governor General asking that the Supreme Court hear and rule on two constitutional questions: “1. Is power vested in the Governor-General in Council 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?”

With regard to appointments to the Senate, section 24 of the BNA Act provided that “The
Governor General shall from Time to Time... summon qualified persons to the Senate...”. Properly qualified persons had to be at least 30 years old, hold property, be worth at least four thousand dollars and reside within the province for which they were appointed. Numerous women met the requirements. It remained to be determined if they were “persons”.

The petition arrived at an opportune moment, because the 1927 Dominion-Provincial Conference had put Senate reform on its agenda and the women’s second question dealt indeed with procedures for amending the BNA Act. However, admission of women into the Senate was not on the Conference agenda.

Prime Minister Mackenzie King referred the petition to the Minister of Justice, Ernest Lapointe, who thought that, in spite of previous decisions, “it would be an act of justice to the women of Canada to obtain the opinion of the Supreme Court of Canada upon the point.” The Privy Council Committee accepted the Justice Minister’s recommendation and on October 19, 1927, referred the following question to the Supreme Court: “Does the word ‘Person’ in section 24 of the British North America Act, 1867, include female persons?” On October 29, the Supreme Court announced that the case would be heard on February 28, 1928, but the hearing was postponed to March 14 at the request of the Quebec Superior Court. The provinces were invited to provide their legal opinions on the appointment of women to the Senate, and they all declined except Quebec and Alberta. The case was heard in the presence of the Solicitor General for Canada, the Attorney General for the province of Quebec, and the petitioners. N.W. Roswell, Q.C., former Leader of the Opposition in Ontario, who favoured women’s suffrage, represented the petitioners as well as the Alberta Government.
In the meantime, Emily Murphy learned that the wording of the question submitted to the Supreme Court was different from what the petitioners had specified. Wasting no time, she wrote on November 9, 1927 to the Deputy Minister of Justice, W. Stuart Edwards, pointing out that the question referred to the Supreme Court was not the one submitted by the petitioners “either in word or meaning” and that it was “in consequence, a matter of amazement and perturbation” to the five petitioners. They had deliberately avoided using the word “persons” because, on several occasions, representatives of the Crown had declared publicly that, according to the BNA Act, women were not “persons”. She emphasized the omission of the second question that asked about a constitutional amendment if their case were not upheld. To clarify the situation even further and avoid more delays, she asked a third question: “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?”

On November 30, the Deputy Minister of Justice replied that the proposed questions were unacceptable. First, he said, the only power allowing admission into the Senate was conferred by the BNA Act upon the Governor General. It was evident that the exercise of that power rested on the interpretation of the word “persons” in section 24. Therefore, the only relevant question was to determine if this word included women. As for the other two questions, he explained, the BNA Act does not confer any power of amendment to the Parliament of Canada.

It was not until April 24, 1928 that the Supreme Court of Canada rendered its decision and declared that women were not persons. Yet, in spite of that decision, Minister of Justice Ernest Lapointe declared that women had a legal right to sit in the Senate and that measures would be taken to amend the BNA Act accordingly. But Emily Murphy was not going to wait for some hypothetical amendment.
In May 1928, undaunted, she resolved to appeal to the Judicial Committee of the Privy Council in London, England, which was, at that time, the final court of appeal for Canadians. “Nothing can stop us from winning”, she wrote to her colleagues in arms.11

A copy of her May 1928 letter and a copy of the petition were sent to the Deputy Minister of Justice on July 26, 1928. Emily Murphy explained in the letter the reasons for the appeal. In the Supreme Court, she said, discussion had been centered on the meaning of the word “qualified” (used in section 24 of the BNA Act) as it applied to the word “persons”. The true issue rested elsewhere and their question remained therefore unanswered. She added a few months later that by appealing to the British Privy Council she had wished to remove the issue from the political arena and have it addressed from a purely legal aspect.12

On November 16, 1928, she obtained permission to appeal to the Privy Council.13 The hearing on the “Persons” case, which was postponed several times, was finally set for July 18, 1929, and continued on July 23 and 25.

The appellants had argued before the Supreme Court that nothing in the BNA Act stated that the word “persons” did not apply to women. On the contrary, proof was that the right to vote given to women at the federal level stemmed from an interpretation of the word “persons” that included women. The Crown based its defence, however, on historical considerations and stated that, at the time when the BNA Act was drafted, women could not hold public positions. There had thus been no intention in the Act of admitting women into the Senate.14 The British Privy Council rejected this argument. According to the members, if in the past no women had acceded to such a position, it was because custom prevented it, and customs become traditions stronger than law and remain unchallenged long after having lost their raison d’être.
On October 18, 1929, the British Privy Council ruled in favour of women, declaring that they were indeed persons and therefore eligible to sit in the Senate of Canada. The "Persons" case cost a total of $23,368.47 in lawyers' fees, paid by the government of Canada; $21,000 was for the appeal to the Privy Council.

Four months later, in February 1930, Mackenzie King seized the opportunity to be the first leader of the Government to allow women into the Senate and appointed Canada's first woman senator, Cairine Reay Wilson. She had been active in the Victorian Order of Nurses, the Young Women's Christian Association, the Salvation Army, the Twentieth Century Liberal Association and the National Federation of Liberal Women of Canada. When she was appointed, she had just celebrated her 45th birthday.

Opening this male-dominated bastion to women was an investment in the future, for in 1930 their political role was still undefined. For many more years, women would be limited to voting, and few women would be elected to the Senate, the House of Commons and to provincial legislatures. The appointment of Cairine Wilson reassured the senators, one of whom said in a speech: "We of the humble and gentle sex were apprehensive that one of those strong-minded and determined women with a mission in life and a pair of horned rimmed spectacles would be appointed and we knew that if so she would immediately commence to reform a number of matters that we did not wish reformed..." Behind this humorous speech transpires the heartfelt sentiment of a senator from Edmonton: "Oh, we never could have had Mrs. Murphy in the Senate. She would have caused too much trouble." Newspapers echoed the senators' sentiments, noting how slim the new senator was, how youthful she looked in spite of having had eight children; in one word, they all emphasized her femininity.
Neither Emily Murphy, who had so wanted to become Canada's first female senator, nor Nellie McClung, nor any of the Famous Five ever got to sit in the Red Chamber. In King's opinion, Emily Murphy was “a little too masculine and perhaps a bit too flamboyant.” She died in 1933 without ever being appointed to the position for which she had fought so hard.

Today, a bronze plaque at the entrance to the Senate, inaugurated in 1938, recalls the victory of the Famous Five. Moreover, a Governor General's Commemorative Award, created in 1979, rewards exceptional contributions to the promotion of equality for women in Canada.

Begun as a battle to have women declared “persons” and admitted to the Senate, the victory of the Famous Five has now become a symbol for women's rights to participate as equals in all walks of life.

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Notes


2. English language newspapers from the 1920's called them the Famous Five.

3. National Archives of Canada, Department of Justice Fonds, RG 13, vol. 2524, 2525, file C-1044. Unless otherwise indicated, all letters and documents quoted are from this file.


6. RG 13, op. cit., letter from Elizabeth B. Price to the Hon. C.J. Doherty, June 18, 1921.

7. Ibid., Memorandum to the Deputy Minister, May 18, 1921.


9. Quebec withdrew from the case when it was appealed to London. Cleverdon, op. cit., p. 152.

10. National Archives of Canada, Supreme Court of Canada Fonds, RG 125, vol. 563, file 5426. This file contains mainly arguments from the defence, the Solicitor General for Canada, the Attorney General for Quebec, and the Privy Council Order no. 2034, dated October 19, 1927, referring the case to the Supreme Court.

11. RG 13, op.cit., attachment to Emily Murphy's letter to the Deputy Minister of Justice, July 26, 1928.

12. Ibid., letter from Emily Murphy to W.S. Edwards, October 17, 1928.


15. RG 13, op. cit., Judgment of the Lords of the Judicial Committee of the Privy Council, October 18, 1929.


18. Ibid., newspaper clippings album on Cairine Wilson's appointment to the Senate.

19. Craig Brown [under the direction of – J. Histoire générale du Canada, Boréal, 1988, p. 694. Also to be consulted for historical context.

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