

**Robert J. Sharpe and Patricia I. McMahon, *The Persons Case: The Origins and Legacy of the Fight for Legal Personhood* (Toronto: University of Toronto Press, 2007). Pp. xi, 269.**

In their book, *The Persons Case: The Origins and Legacy of the Fight for Legal Personhood*,<sup>1</sup> Robert J. Sharpe and Patricia I. McMahon provide a rich and detailed account of the individuals, social forces and ideologies behind one of Canada's most important constitutional decisions, *Edwards v. Canada*.<sup>2</sup> Their book tells us the remarkable story of how Emily Murphy, the leading protagonist, along with Nellie McClung, Henrietta Edwards, Louise McKinney and Irene Parlby—five prominent Canadian women's rights advocates from Western Canada, referred to as the Famous Five—advocated for the advancement of the rights of women throughout World War I and during the 1920s. Their engagement with women's rights included the struggle for women's suffrage, married women's property rights, female factory workers' rights, temperance, and children's rights. These struggles culminated in the historic effort to seek affirmation of women's entitlement to hold public office, specifically as members of the Senate of Canada. Against significant odds, they succeeded in convincing the Judicial Committee of the Privy Council, the highest appellate court on constitutional questions at the time, to declare that women were "qualified persons" for the purposes of appointment to the Senate. Affirming a purposive "living tree" approach to constitutional interpretation, Lord Sankey concluded that women are eligible for Senate appointments, despite the fact that the drafters of the *British North America Act, 1867*, now the *Constitution Act, 1867*,<sup>3</sup> did not believe that women should be eligible for public office.<sup>4</sup>

To unravel the legacy of the *Persons Case*, the book begins by examining the life of Emily Murphy, who played the primary role in advancing the struggle for the inclusion of women in the Senate both politically and in the courts. The first chapter of the book reviews her life, appointment as a magistrate in Alberta, and controversial views on immigration, race and eugenics. The second chapter discusses the background and contributions of the other four members of the Famous Five. The book then examines a range of legal contexts in which women's legal capacities and personhood were debated, such as women's entitlements to judicial appointment, women's suffrage, and criminal liability. Turning to the specific history of the *Persons Case*, the book assesses Emily Murphy's efforts to secure access for women to the Senate by using political channels. Despite extensive political connections, Murphy's attempts to reform access to the Senate through political means ultimately failed, prompting her to turn to the courts. Over the next five chapters in the book, the authors outline the legal arguments advanced by the Famous Five, the counter-arguments put forward by the Canadian government, the Supreme Court of Canada's

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<sup>1</sup> (Toronto: University of Toronto Press, 2007).

<sup>2</sup> [1930] A.C. 124, [1930] 1 D.L.R. 98 (P.C.) [*Persons Case* cited to D.L.R.].

<sup>3</sup> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution*].

<sup>4</sup> *Ibid.* at paras. 44, 66, 71-78.

decision against the women, and the processes and outcome of the appeal to the Judicial Committee of the Privy Council. The book concludes by reviewing the legacy of the case, most notably the affirmation of women's legal personhood and the "living tree" approach to constitutional interpretation, reminding us that "equality is an evolving concept" and that the Famous Five "created a legacy that transcends their own shortcomings."<sup>5</sup>

As in most legal cases, the stories, ideas and people behind the decision reveal a host of contradictions and complexities that are often forgotten with the passage of time or perhaps never explored within the traditional confines of the study of legal doctrine and precedent. The authors reveal a clear sensitivity to this feature of legal history. And the contradictions of the *Persons Case* are manifold. The decision remains a powerful symbol of equality rights and inclusion of women in Canada, yet three of the five women behind the case endorsed anti-immigrant, racist public policies and—or eugenics policies for persons with disabilities.<sup>6</sup> The Famous Five advanced maternal feminism, which celebrates women's familial contributions, yet their lives and commitments were directed toward securing a place for women in the public sphere. The decision opened up the doors of the Senate to women, but did not challenge the undemocratic appointment process for accessing the Senate, or the requirements for property ownership as a criterion for inclusion.<sup>7</sup> It affirmed the legal personhood of women, but endorsed the notion that a judicial decision from the Judicial Committee of the Privy Council was somehow needed to confirm women's personhood—a powerful endorsement of the hegemony of law and judicial power.<sup>8</sup> And though it attested to the significance of the rule of law, it also revealed how deeply law and politics are intertwined. Finally, though its substance concerned access of propertied women to the Senate, it is most often cited for its affirmation of a 'living tree' approach to constitutional interpretation.

As Sharpe and McMahon carefully document, the contributions of the Famous Five were deeply tied to the women's movement in Western Canada prior to and during World War I and continuing through the 1920s (when the *Persons Case* unfolded). Emily Murphy, perhaps the most controversial of the Famous Five and the driving force behind the *Persons Case*, was an active participant in the Western Canadian women's movement. In 1916, she was appointed as a magistrate to preside over cases involving women and children in Alberta, despite her lack of legal training. Her vision of the role of the judge embodied a traditional social-work

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<sup>5</sup> *Supra* note 1 at 206.

<sup>6</sup> Emily Murphy's views on race and eugenics have been widely condemned (*ibid.*, chapter 1). Concern has also been raised about Nellie McClung's initial support of the Conservative proposal to accord the suffrage only to British or Canadian-born women and to exclude foreign-born women (*ibid.* at 44-45). In addition, Murphy, McClung, and Irene Parlby have been criticized for supporting eugenics and forced sterilization of persons with mental disabilities (*ibid.* at 34-36, 46-47, 55).

<sup>7</sup> To this day property ownership is a necessary qualification for Senate membership. See *Constitution*, *supra* note 3, s. 23(3).

<sup>8</sup> See Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989).

orientation—a therapeutic vision that sought to reform women and children to conform to her moralistic, white, protestant, middle-class, familial, and maternal beliefs about the world. She was not only a vocal proponent of temperance, but wrote an extensive book on the perils of the drug trade. Her book, *The Black Candle*, contained deeply offensive racial stereotypes and expressed anti-immigrant sentiments.<sup>9</sup> Racism in the struggle for suffrage also emerged as an issue, with some participants in the women's movement endorsing a suffrage plan for women that excluded foreign-born women.<sup>10</sup> Murphy, along with Nellie McClung and Irene Parlby, also supported eugenics, including legislation in Alberta to require the sterilization of 'mentally defective' children.<sup>11</sup> Although they do not explore this debate in great detail, Sharpe and McMahon note how adherence to these discriminatory beliefs has prompted significant outcry about celebrating the accomplishments of the Famous Five in the domain of women's rights.

In addition to the introductory profiles of the women behind the case, the book reviews other legal cases where women's legal capacities were challenged. One very significant Canadian decision that the authors review is the relatively unknown Alberta case *R. v. Cyr*.<sup>12</sup> Lizzie Cyr was charged with violating vagrancy laws.<sup>13</sup> In appealing her conviction by magistrate Alice Jamieson, it was argued that the vagrancy laws (which were framed using male pronouns and in connection to employment) applied to men only. Additionally, Cyr's lawyer maintained that she should not be convicted by a female magistrate, since women were incompetent and incapable of holding such a position. Justice Scott of the Alberta Supreme Court focused on women's potential liability under the vagrancy provisions and concluded on the basis of the Interpretation Act that "words imputing ma[sc]uline gender include females," meaning the ordinary meaning of vagrant was applicable to both sexes.<sup>14</sup> Justice Scott refrained from responding to the issue of whether a woman could be a magistrate, noting nonetheless that he entertained "serious doubt whether a woman is qualified to be appointed to that office."<sup>15</sup> On appeal, Justice Stuart directly addressed the "general question of the capacity of a woman to hold a public office" and proceeded to conduct an extensive review of legal precedents from the United

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<sup>9</sup> (Toronto: Thomas Allen, 1922), online: Free World News <<http://www.freeworldnews.com/frontmatter.html>> (associating the social problem of drug use with the arrival of immigrants in Western Canada).

<sup>10</sup> For a general discussion of racism in the women's movement, see e.g. Mariana Valverde, "When the Mother of the Race is Free": Race, Reproduction, and Sexuality in First Wave Feminism" in Franca Iacovetta & Mariana Valverde, eds., *Gender Conflicts: New Essays in Women's History* (Toronto: University of Toronto Press, 1992).

<sup>11</sup> Sharpe & McMahon, *supra* note 1 at 55, citing *Sexual Sterilization Act*, S.A. 1928, c. 37 (establishing the Alberta Eugenics Board to examine and subsequently authorize sterilization of "mentally defective" persons).

<sup>12</sup> [1917] 2 W.W.R. 1185 (Alta. S.C.).

<sup>13</sup> See *Criminal Code*, R.S.C. 1906, c. 146, s. 238(a).

<sup>14</sup> *Supra* note 12 at 1186.

<sup>15</sup> *Ibid.* at para. 9.

States and England.<sup>16</sup> Justice Stuart concluded that the English cases “are neither clear nor unequivocal.”<sup>17</sup> Moreover, in recognition of the specificity of legal interpretation in different political and social contexts, he wrote:

In my opinion in a matter of this kind the Courts of this province are not in every case to be held strictly bound by the decisions of the English Courts as to the state of the common law of England in 1870. We are at liberty to take cognizance of the different conditions here, not merely physical conditions, but the general conditions of our public affairs and the general attitude of the community in regard to the particular matter in question.<sup>18</sup>

He then proceeded to affirm women’s legal capacity to be appointed as magistrates. As Sharpe and McMahon note, the *Cyr* case was however exceptional and stood in direct contrast to the large number of decisions denying women the right to participate in the political and professional domains of public life in Canada, the United States, and England.<sup>19</sup> Women’s legal capacity was often affirmed in terms of their liability for wrongful conduct, but denied with respect to legal privileges and their eligibility to hold public office and engage in certain professions. It is significant that neither the Supreme Court of Canada nor the Judicial Committee of the Privy Council referred to Justice Stuart’s decision in *Cyr*—a decision clearly ahead of its time that resonates with the celebrated judgment of Lord Sankey in the *Persons Case*.

Another aspect of the story behind the case that the book examines in significant detail is the politics of constitutional reform, interpretation, and litigation. It was following the death of a senator from Alberta in 1919 that Emily Murphy began actively seeking a senate appointment. Numerous women’s rights activists began lobbying to have Murphy appointed as the first woman senator, and these lobbying efforts continued over the next eight years, before the court action was finally initiated. Drawing extensively on archival research, Sharpe and McMahon provide an extensive review of the divergent legal opinions about whether the *Constitution* allowed for the appointment of women as senators. The *Constitution* simply stated that “qualified persons” were to be appointed.<sup>20</sup> The qualifications were nonetheless framed using the male pronoun: “He shall be the full age of Thirty years” or “His real and Personal Property shall be together worth Four Thousand Dollars over and above his Debts and Liabilities.” The language of the constitutional provisions therefore could have simply been interpreted to allow women to be appointed provided they met the specific qualifications, such as age and property ownership. Such was not to be the case. Instead, lawyers advising successive federal governments took the position that the *Constitution* prohibited the appointment of women. Their legal arguments were based largely on the conclusions regarding women’s incapacities in

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<sup>16</sup> *R. v. Cyr*, [1917] 3 W.W.R. 849 (Alta. S.C. (A.D.)) at 850 [*Cyr*].

<sup>17</sup> *Ibid.* at 858.

<sup>18</sup> *Ibid.* at 857.

<sup>19</sup> See e.g. *Chorlton v. Lings* (1868), 4 L.R. C.P. 374; *Viscountess Rhondda’s Claim*, [1922] 2 A.C. 339; *Langstaff v. Bar of Quebec* (1915), 47 R.J.Q. 131 (Sup. Ct.), aff’d (1916), 25 R.J.Q. 11. (Q.B.).

<sup>20</sup> *Supra* note 2, s. 91.

the British common law, which meant that unless the *Constitution* itself was amended, women were not eligible for appointment.<sup>21</sup> Given the complexities of amending the *Constitution* and the controversies even in the 1920s about the Senate itself,<sup>22</sup> obtaining a constitutional amendment remained mired in political stalemate.

With the continued advice of her brother, Justice William Ferguson of the Supreme Court of Ontario, Murphy, along with the four other women of the Famous Five, petitioned the federal government to initiate a reference to the Supreme Court of Canada on the question of women's eligibility for Senate appointment. Sharpe and McMahon clarify that it was the federal Cabinet that referred the question to the Supreme Court of Canada, perhaps persuaded that it would be best to divert this question out of the political arena and into the courts.<sup>23</sup> The reference question stated the matter directly: "Does the word 'persons' in section 24 of the *British North America Act, 1867*, include female persons?"<sup>24</sup> Of significance was the government's agreement to pay for counsel for the five petitioners so that this view could be effectively represented. Indeed, the federal government also funded the appeal to the Judicial Committee of the Privy Council.<sup>25</sup> Based on the legal opinions of Department of Justice lawyers, the government intended to argue that women should not be considered "qualified persons" for the purposes of appointment to the Senate. They were supported in this position by the government of Quebec. Notably, Alberta intervened in support of the women petitioners.<sup>26</sup>

After clarifying how the Reference Procedure was invoked to bring the issue into the judicial arena, Sharpe and McMahon examine the legal arguments advanced regarding the interpretation of "qualified persons" before the Supreme Court of Canada and the Judicial Committee of the Privy Council. Here, the reader begins to recognize familiar territory as the content of the arguments and the judgments is reviewed. Yet, the reader is also left feeling a much deeper appreciation for the legal texts, armed with the broader knowledge of the people and politics behind the case that Sharpe and McMahon have so skillfully provided. On behalf of the Famous Five,

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<sup>21</sup> Sharpe & McMahon, *supra* note 1.

<sup>22</sup> *The Grain Growers' Guide*, described by Sharpe & McMahon as a "pro-farmer, progressive Winnipeg publication" (*supra* note 1 at 80), considered the Senate to be "an anachronism", and disapproved of the very project of women pursuing Senate membership "directly [after] they become enfranchised, playing the game just as men played it" (1921, cited in Sharpe & McMahon, *supra* note 1 at 80).

<sup>23</sup> It is often suggested that Murphy found an obscure provision in the *Supreme Court Act* that allowed five interested citizens to petition the court. See e.g. Joel Bakan *et al.*, *Canadian Constitutional Law*, 3d ed. (Toronto: Emond Montgomery, 2003) at 36. But see Sharpe & McMahon, *supra* note 1 at 106 (clarifying that the Governor General in Council referred the question directly to the Court).

<sup>24</sup> Sharpe & McMahon, *ibid.* at 115.

<sup>25</sup> The government paid Newton Rowell \$10,000 to plead against the Department of Justice in front of the Judicial Committee of the Privy Council in England. It is notable that this is the current equivalent of more than \$124,000 (*ibid.* at 186).

<sup>26</sup> *Ibid.* at chapter 6.

lawyer Newton Rowell focused on how a literal interpretation of “qualified persons” includes women. Sharpe and McMahon highlight how his oral argument also raised considerations of public policy in support of inclusion of women as senators. On behalf of the government, Department of Justice lawyers argued that common law disabilities existing at the time the constitution was drafted affirm that women were never intended to be included as “qualified persons” for the purposes of eligibility for the Senate. As countless students of Canadian constitutional law have learned, the Supreme Court of Canada accepted the frozen-rights and drafters’-intent arguments of the government and concluded that women were not “qualified persons” for the purposes of appointment to the Senate.<sup>27</sup> Rejecting this approach, the Judicial Committee of the Privy Council, in a decision written by the recently appointed Lord Sankey, concluded unanimously that constitutions should be interpreted in light of changing circumstances over time—as living trees, rooted in the traditions and values of a nation, but capable of growth and renewal. Recognition of women’s legal capacities as “qualified persons” was consistent with a living-tree approach to constitutional adjudication cognizant of the changing role of women since 1867.<sup>28</sup> It was with this judicial pronouncement of 1929 that women were proclaimed to be persons in Canadian constitutional law.

Sharpe and McMahon do not end their book with Lord Sankey’s pronouncement, but go on to examine the aftermath of the decision. Emily Murphy, despite all of her efforts, was never appointed to the Senate.<sup>29</sup> Although the federal government did appoint Carine Wilson as the first woman to the Senate in 1930, Sharpe and McMahon explain that even after the decision of the Judicial Committee of the Privy Council, women were not appointed in equal numbers.<sup>30</sup> They further conclude:

The recognition of women as legal persons was a momentous legal achievement, but full personhood required more than an edict from the Judicial Committee of the Privy Council in London at a time when that institution’s authority was being questioned and in an era not yet ready to embrace women as true equals.<sup>31</sup>

This important insight reminds us of the way in which law and judicial decisions constitute just one small part of the social, economic, and political fabric of equality and inequality. A decision of the Judicial Committee of the Privy Council was clearly not enough to secure substantive equality for women in Canada. Nor should a court decision in England be necessary to affirm women’s inclusion in humanity.<sup>32</sup> Still, the

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<sup>27</sup> *Reference Re Meaning of Word “Persons” in s. 24 of the B.N.A. Act*, [1928] S.C.R. 276, [1928] 4 D.L.R. 98.

<sup>28</sup> *Persons Case*, *supra* note 2 at paras. 7, 44-45.

<sup>29</sup> Sharpe & McMahon, *supra* note 1 at 190.

<sup>30</sup> *Ibid.* at 200-01.

<sup>31</sup> *Ibid.* at 205.

<sup>32</sup> See Martha Minow, “‘Forming Underneath Everything That Grows’: Toward a History of Family Law” [1985] Wis. L. Rev. 819 (highlighting how formal law is not the only source of knowledge about legal and social relations).

*Persons Case* remains a powerful historic and symbolic marker of the struggle for women's equality in Canada. Through their comprehensive archival research and careful analysis of the women, men, politics, law, and legacy of the *Persons Case*, Sharpe and McMahon have contributed significantly to our understanding and knowledge of this important chapter in Canadian legal history.

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