Privy Council Appeal No. 41 *of* 1927.

The Attorney-General of Nova Scotia - - - - *Appellant*

v.

The Legislative Council of Nova Scotia - - - - *Respondents*

FROM

THE SUPREME COURT OF NOVA SCOTIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH OCTOBER, 1927.

Present at the Hearing:

THE LORD CHANCELLOR.
VISCOUNT HALDANE.
LORD WRENBURY.
LORD WARRINGTON OF CLYFFE.
MR. JUSTICE DUFF.

[*Delivered by* THE LORD CHANCELLOR.]

This appeal, which is brought by leave of the Supreme Court of Nova Scotia, raises some questions of great importance relating to the Constitution of that Province.

On the 14th May, 1926, the Lieutenant-Governor of Nova Scotia in Council, acting under section 226 of the Revised Statutes of the Province, referred to the Supreme Court of Nova Scotia for hearing and consideration the following matters :—

"1. Has the Lieutenant-Governor of Nova Scotia, acting by and with the advice of the Executive Council of Nova Scotia, power or authority to appoint in the name of the Crown by instrument under the Great Seal of the Province so many Members of the Legislative Council of Nova Scotia that the total number of the Members of such Council holding their offices or places as such members would

"(*a*) exceed twenty-one or

"(*b*) exceed the total number of the Members of said Council who held their offices or places as such Members at the Union mentioned in Section 88 of The British North America Act, 1867 ?

"2. Is the membership of the Legislative Council of Nova Scotia limited in number ?

"3. Is the tenure of office of Members of the said Council appointed thereto prior to the 7th day of May, A.D. 1925, during pleasure or during good behaviour or for life ?

"4. If such tenure is during pleasure, is it during the pleasure of His Majesty the King, or during the pleasure of His Majesty represented in that behalf by the Lieutenant-Governor of Nova Scotia acting by and with the advice of the Executive Council of Nova Scotia ? "

The matters so referred to the Supreme Court were heard and considered by a Court consisting of four Judges, who differed in opinion. The Chief Justice answered parts (*a*) and (*b*) of question No. 1 in the affirmative. His answer to question No. 2 was that at present a full house is 21 members, but the number can be increased at any time by the Lieutenant-Governor. His answer to question No. 3 was "during pleasure"; and his answer to question No. 4 was "during the pleasure of His Majesty represented in that behalf by the Lieutenant-Governor of Nova Scotia acting by and with the advice of the Executive Council for Nova Scotia." The opinion of Mr. Justice Chisholm was substantially in agreement with that of the Chief Justice; but Mr. Justice Mellish and Mr. Justice Carroll took other views. Thereupon the Supreme Court, in accordance with Rule 3 of the rules regulating appeals to His Majesty in Council from Nova Scotia, certified *pro forma* for all purposes of appeal to His Majesty in Council that its opinion on the matters referred to with the reasons therefor was according to the opinion of the Chief Justice and his reasons therefor, and ordered that final judgment be entered accordingly *pro forma* for all purposes of appeal to His Majesty in Council. It is from the judgment so pronounced that this appeal is brought.

In order to arrive at a decision on the matters in controversy, it is necessary to go some way back into the history of Nova Scotia. There had been for some time a Council with legislative and executive authority, when, on the 6th February, 1838, Her Majesty Queen Victoria issued her Commission to the Earl of Durham appointing him Captain-General and Governor-in-Chief of the Province, and directing that (in addition to the general Assembly of freeholders and settlers referred to in the Commission) there should be within the Province two distinct and separate councils to be respectively called the Legislative Council and the Executive Council and to have the powers therein mentioned; and the Commission proceeded as follows :—

"And we do hereby appoint and declare that the said Executive Council and the said Legislative Council respectively, shall hereafter consist of such and so many members, as shall from time to time for that purpose be nominated and appointed by us, under our Sign Manual and Signet, or as shall be provisionally appointed by you, the said John George, Earl of Durham, until our pleasure therein shall be known. Provided, nevertheless, and we do hereby declare our will and pleasure to be that the total number of the members for the time being of our said Executive Council, resident within our said Province, shall not at any time, by any provisional appointment, be raised to a greater number in the whole than nine, and that the

total number of members of the said Legislative Council, resident within our said Province, shall not at any time by any such provisional appointments be raised to a greater number in the whole than fifteen; and we do further direct and appoint that five members of our said Executive Council shall be a Quorum for the despatch of the business thereof, and that eight members of our said Legislative Council shall be a Quorum for the despatch of the business thereof; and we do further direct and appoint that the members of our said respective Councils shall hold their places therein during our pleasure and not otherwise."

The Commissions subsequently issued to Sir John Colburne (afterwards Lord Seaton) in December, 1838, to Mr. Charles Poulett Thomson (afterwards Lord Sydenham) in September, 1839, to Sir Charles Bagot in October, 1841, and to Sir Charles Theophilus Metcalfe in February, 1842, appointing them successively to be Captains-General and Governors-in-Chief of Nova Scotia, contained directions as to the constitution and appointment of the two Councils similar to those contained in Lord Durham's Commission. In the Commission issued to Earl Cathcart on his appointment to the Governorship in March, 1846, the same directions were repeated with the substitution of 21 for 15 as the maximum number of members of the Legislative Council who might be provisionally appointed by the Governor; and like directions were contained in the Commissions issued successively to the Earl of Elgin in October, 1846, to Sir Edmund Walker Head in September, 1854, and to Viscount Monck on the 2nd November, 1861. As the Commission to Viscount Monck remained in force until the Confederation of Canada in 1867, it is desirable to quote here the exact terms of the directions as to the number and constitution of the Legislative Council which were contained in that Commission. They ran as follows:—

"And we do hereby declare our pleasure to be that the said Legislative Council shall consist of such and so many members as have been or shall hereafter be from time to time for that purpose nominated and appointed by us under our Sign-Manual and Signet, or as shall be provisionally appointed by you until our will therein shall be known, all which members shall hold their places in the said Council during our pleasure: Provided, nevertheless, and we do hereby declare our pleasure to be that the total number of the members of the said Legislative Council for the time being resident within our said Province shall not at any time by any such provisional appointments be raised to a greater number in the whole than twenty-one."

This, then, was the position when the British North America Act of 1867 was passed. That Act provided (by section 88) as follows:—

"The constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the provisions of this Act, continue as it exists at the union, until altered under the authority of this Act; and the House of Assembly of New Brunswick existing at the passing of this Act shall, unless sooner dissolved, continue for the period for which it was elected."

By section 92 (i) of the same Act it was provided that in each Province the Legislature might exclusively make laws in relation

to " the amendment from time to time notwithstanding anything in this Act of the constitution of the Province except as regards the office of Lieutenant-Governor." By an Act of the Province of Nova Scotia passed on the 18th April, 1872, it was enacted as follows :—

> " After the passing of this Act the appointment of members of the Legislative Council in the Province of Nova Scotia shall be vested in the Lieutenant-Governor, who shall make such appointments in the Queen's name by instrument under the Great Seal of the Province."

In the Revised Statutes of Nova Scotia of 1923, cap. 2, the above enactment appeared in the following form :—

> " Section 1.—In this Chapter, unless the context otherwise requires, the expression ' Council ' means the Legislative Council.
>
> " Section 2.—The appointment of members of the Council is vested in the Governor-in-Council, who shall make such appointment in the name of the Crown by instrument under the Great Seal of the Province."

The word " Governor " in this enactment is defined as meaning the Lieutenant-Governor. Lastly, by an Act of the Province passed on the 7th May, 1925, the section last quoted of the Revised Statutes of 1923 was amended by adding thereto a provision that every member of the Council thereafter appointed should hold his seat in the Council for the term of ten years from the date of his appointment. It is by reason of this enactment that the third question referred to the Supreme Court was confined to members appointed before the 7th May, 1925.

These being the relevant statutes and documents, their Lordships proceed to consider the questions referred to the Supreme Court in their order.

The first and second questions may conveniently be dealt with together.

It is plain from the above statement that the Commissions issued to successive Governors from the year 1838 until the Union of Canada did not by their terms impose any limit upon the number of members of the Legislative Council of the Province who might be appointed by the Sovereign. There was indeed a limit —originally of 15 and afterwards of 21—upon the number of such members who might be provisionally appointed by the Governor subject to confirmation by the Queen ; but this provision in no way purported to restrict the power of the Queen herself to appoint " such and so many members " of the Council as she should from time to time think fit. In the year 1838, when the number of Legislative Councillors to be provisionally appointed by the Governor was limited by the Commission to 15, Queen Victoria, in fact, appointed 19 such Councillors ; and, although the number was never, in fact, raised above 21, there was nothing in the Commissions which would have prevented Her Majesty from so raising the number at any time during that period.

Then was there anything outside the Commissions to limit the number to 21 ? For this purpose stress was laid on behalf of the respondents on a correspondence which passed between the Lieutenant-Governor for the time being of the Province (Viscount

Falkland) and Lord Stanley as Colonial Secretary in the year 1845 ; and it is true that in a letter dated the 20th August, 1845, Lord Stanley seemed to concur in the view that, as a part of certain changes then contemplated, the number of Legislative Councillors might be fixed at 21. But in the Commission issued to Lord Cathcart shortly after the date of this correspondence, while the maximum number of provisional appointments to the Council was for the first time raised to 21, no limit was placed upon the number of members who might be permanently appointed by the Sovereign ; and the inference must be that it was the intention of Queen Victoria, while in practice confining her appointments to 21, not to impose any limit on her own power to make appointments exceeding that number. Similar observations apply to a letter of the 4th May, 1846, written by Mr. W. E. Gladstone as Secretary of State for the Colonies; and it is noticeable that in February, 1864, the Duke of Newcastle, while declining on grounds of policy to advise Her Majesty to increase the number of the Council above 21 for the mere purpose of giving a majority in that body to the Government of the day, expressed no doubt as to the power of the Queen to take that course if she had thought fit to do so. Their Lordships find nothing in this correspondence to limit the number of the Legislative Council.

But it was argued that section 88 of the British North America Act, which provided that the constitution of the Legislature of Nova Scotia should, subject to the provisions of that Act," continue as it existed at the union " until altered under the authority of the Act, had the effect of limiting the number of Legislative Councillors either to 18—the number of Councillors who were actually in office at the date of the union—or to 21, the number then ordinarily appointed. Their Lordships are unable to accept this contention. It is the constitution of the Legislature, and not the number of persons actually or usually holding office under that constitution, which was to continue until altered under the authority of the Act ; and the constitution then existing provided for the appointment of a Legislative Council not limited except by the decisions from time to time taken by the Sovereign under the advice of her Ministers.

It was further argued that, even assuming that before and at the date of the union the Sovereign had power on the advice of her Ministers in the United Kingdom to increase the membership of the Legislative Council of Nova Scotia, that power has not passed to the Lieutenant-Governor of the Province, but remains vested in the Sovereign in this country. Their Lordships cannot agree with that view. Whether on the passing of the British North America Act the power to appoint the members of the Legislative Council was delegated by virtue of that Act to the Lieutenant-Governor of Nova Scotia as the representative of the Crown for all purposes of provincial government, it is unnecessary to enquire ; for at all events that power has been vested in him since the passing of the Nova Scotia Act of 1872 and is now exercisable by him on the advice of his Executive Council. It has not been

suggested that either the Act of 1872, which vested the appointment of members of the Legislative Council in the Lieutenant-Governor, or the statute of 1923, which declares the appointment of such members to be vested in the Lieutenant-Governor in Council, was not within the powers conferred upon the provincial Legislature by section 92 (i) of the Act of 1867; and in their Lordships' opinion the right to increase the membership of the Council is not severable from the right to appoint new members. The power which was formerly reserved to the Sovereign was a power to appoint "such and so many members" of the Council as might from time to time appear expedient; and it is this power—which includes the power of increase—which has now become vested in the Lieutenant-Governor in Council. No doubt the exercise of the Lieutenant-Governor's power to increase the number of Legislative Councillors would be restrained by the considerations of policy set out in the letter of the Duke of Newcastle above referred to; but in law the membership of the Legislative Council is unlimited.

Their Lordships would therefore answer both parts of question 1 in the affirmative and question 2 in the negative.

The answer to the third question referred to the Supreme Court is dictated by similar considerations based on the history of the Province. It was expressly provided by Lord Durham's Commission of 1838 and by the Commissions issued to successive Governors after that time and before the Union that the members of the Legislative Council should hold their places therein during the Queen's pleasure; and, notwithstanding a suggestion made by the Council in the year 1846 that their tenure should be for life, no change was made in the form of the Commissions. It follows that according to the constitution of the Legislature as it existed at the time of the Union, the members of the Legislative Council were appointed during pleasure; and in this respect, as in others, the constitution was continued by section 88 of the Act of 1867.

With regard to the fourth question, their Lordships agree with the opinion of the Chief Justice and Mr. Justice Chisholm that the tenure is during the pleasure of the Sovereign represented in that behalf by the Lieutenant-Governor of Nova Scotia acting by and with the advice of the Executive Council of the Province. The effect of the Nova Scotia Act of 1872 as re-enacted in the Revised Statutes of 1923 is to vest in the Lieutenant-Governor in Council the appointment of members of the Legislative Council during pleasure; and in their Lordships' opinion this means that they are to be appointed during the pleasure of the appointing authority. It would be strange if the effect of the legislation of 1872 and 1923 were to enable the Lieutenant-Governor to make appointments which might be revoked by the Sovereign acting under the advice of His Ministers in this country; and in their Lordships' opinion this was not the intention or effect of the statutes in question. This view is supported by section 23,

sub-sections 37 and 39 of c. 1 of the Revised Statutes, which provide as follows :—

"(37) Words authorizing the appointment of any public officer or functionary, or any deputy, include the power of removing him, reappointing him, or appointing another in his stead, from time to time, in the discretion of the authority in whom the power of appointment is vested.

"(39) Every officer appointed by the Lieutenant-Governor, unless it is otherwise provided in the enactment under which the appointment is made, shall remain in office during pleasure only."

The result is that their Lordships find themselves substantially in agreement with the opinions of the Chief Justice and Mr. Justice Chisholm on every point; and they will humbly advise His Majesty that the questions referred to the Supreme Court should be answered as follows :—

Question 1 (*a*) and (*b*). Yes.

Question 2. At present a full house is 21, but the number can be increased by the Lieutenant-Governor in Council.

Question 3. During pleasure.

Question 4. During the pleasure of His Majesty represented in that behalf by the Lieutenant-Governor of Nova Scotia acting by and with the advice of the Executive Council of Nova Scotia.

No question arises as to costs.

In the Privy Council.

THE ATTORNEY-GENERAL OF NOVA SCOTIA

v.

THE LEGISLATIVE COUNCIL OF NOVA SCOTIA.

DELIVERED BY THE LORD CHANCELLOR.

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