

In the Privy Council.

No. 121 of 1928.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

IN THE MATTER of a Reference as to the meaning of the word "persons" in Section 24 of the British North America Act 1867.

BETWEEN

10 HENRIETTA MUIR EDWARDS, NELLIE L. McCLUNG,
LOUISE C. McKINNEY, EMILY F. MURPHY
and IRENE PARLBY - - - - - *Appellants*

AND

THE ATTORNEY-GENERAL FOR THE
DOMINION OF CANADA, THE ATTORNEY-
GENERAL FOR THE PROVINCE OF QUEBEC
and THE ATTORNEY-GENERAL FOR THE
PROVINCE OF ALBERTA - - - - - *Respondents.*

CASE OF THE RESPONDENT

THE ATTORNEY-GENERAL OF THE PROVINCE OF QUEBEC.

1. This is an appeal by special leave granted on the 20th day of
20 November 1928, from a judgment or opinion of the Supreme Court of
Canada, dated the 24th day of April 1928, answering a question referred
to the Court for hearing and consideration by the Governor-General of
Canada in Council under the provisions of the Supreme Court Act.

Record.

p. 60.

2. Section 24 of the British North America Act 1867, is as follows:—

“24. The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator.”

3. The question referred with the answer made by the Court is as follows :—

p. 38. Question : Does the word “Persons” in Section 24 of The British North America Act 1867 include female persons ?

p. 39. Answer : The question being understood to be “Are women eligible for appointment to the Senate of Canada,” the question is answered in the negative.

4. Other sections of The British North America Act 1867, which appear to be material to the question are set out in the Joint Appendix hereto at page 18. 10

p. 38. **5.** The question came before the Supreme Court for hearing on the 14th day of March 1928, the Court being composed of The Right Honourable F. A. Anglin, Chief Justice, The Right Honourable Mr. Justice Duff and Justices Mignault, Lamont and Smith, and the reference having stood over for consideration judgment was pronounced on the 24th day of April 1928.

p. 39.
p. 50.
p. 59. **6.** The judgment of the Court was unanimous, though for somewhat different reasons as indicated in those delivered by the Chief Justice with which Lamont and Smith, J.J., concurred and the separate reasons delivered by Mr. Justice Duff and Mr. Justice Mignault.

7. Section 33 is :— 20

“33. If any Question arises respecting the Qualification of a Senator or a Vacancy in the Senate the same shall be heard and determined by the Senate.”

p. 41, l. 38. The Chief Justice in his reasons points out—

That Section 33 only empowers the Senate to hear and determine any question respecting the qualification of a Senator after the person whose qualification is challenged has been appointed to the Senate.

p. 42, l. 5. That while the question submitted deals with the word “Persons,” Section 24 of The British North America Act speaks only of “qualified persons.” 30

p. 42, l. 23. That the provisions of The British North America Act bear to-day the same construction which the Courts would, if required to pass upon them, have given to them when they were first enacted.

The Chief Justice refers to a number of cases decided by the Courts in England and notably those of—

Chorlton v. Lings [1868] L.R. 4 C.P. 374, and

Nairn v. University of St. Andrews [1909] A.C., 147.

And he concludes: “In our opinion *Chorlton v. Lings* is conclusive p. 50, l. 7.
against the petitioners alike on the question of the common law incapacity of women to exercise such public functions as those of a member of the Senate of Canada and on that of their being expressly excluded from the class of ‘qualified persons’ within s. 24 of The B.N.A. Act by the terms
10 in which s. 23 is couched . . . ”

Section 23—

“23. The Qualifications of a Senator shall be as follows :

“ (1.) He shall be of the full age of Thirty Years ;

“ (2.) He shall be either a Natural-born Subject of the Queen, of a Subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of One of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of
20 Canada after the Union ;

“ (3.) He shall be legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in free and common Socage, or seised or possessed for his own Use and Benefit of Lands or Tenements held in Franc-alieu or in Roture, within the Province for which he is appointed, of the Value of Four Thousand Dollars, over and above all Rents, Dues, Debts, Charges, Mortgages, and Incumbrances due or payable out of or charged on or affecting the same ;

“ (4.) His Real and Personal Property shall be together
30 worth Four Thousand Dollars over and above his Debts and Liabilities ;

“ (5.) He shall be resident in the Province for which he is appointed ;

“ (6.) In the case of Quebec he shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division.”

p. 50, l. 21.

8. Mr. Justice Duff in his reasons for judgment maintains that the word “ ‘ Persons ’ in the ordinary sense of the word includes, of course, “ natural persons of both sexes ” and that the question is whether “ we “ are constrained in construing section 24 to read the word ‘ persons ’ in a restricted sense and to construe the section as authorising the summoning “ of male persons only.”

p. 52, l. 33.

That he was unable to accept the argument in support of the limited construction in so far as it rests upon the view that in construing the legislative and executive powers granted by The British North America Act, we must proceed upon a general presumption against the eligibility 10 of women for public office.

p. 53, l. 7.

He had no doubt that The British North America Act did, in Sections 41 and 84, recognise the authority of Parliament to deal with the disqualification of women to be elected, or sit or vote as members of the representative body, or to vote in an election of such members.

p. 53, l. 42.

But that the legislative authority of Parliament on the subject of qualification of members and voters was given under the general language of Section 91.

Sections 41 and 84 are :—

“ 41. Until the Parliament of Canada otherwise provides, all 20 Laws in force in the several Provinces at the Union relative to the following Matters or any of them, namely,—the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the House of Assembly or Legislative Assembly in the several Provinces, the Voters at Elections of such Members, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which Elections may be continued, the Trial of controverted Elections, and Proceedings incident thereto, the vacating of Seats of Members, and the Execution of new writs in case of Seats vacated otherwise than 30 by Dissolution,—shall respectively apply to Elections of Members to serve in the House of Commons for the same several Provinces.

“ Provided that, until the Parliament of Canada otherwise provides, at any Election for a Member of the House of Commons for the District of Algoma, in addition to Persons qualified by the Law of the Province of Canada to vote, every male British Subject, aged Twenty-one Years or upwards, being a Householder, shall have a Vote.”

“ 84. Until the Legislatures of Ontario and Quebec respectively otherwise provide, all Laws which at the Union are in force 40 in those Provinces respectively, relative to the following Matters,

or any of them, namely,—the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the Assembly of Canada, the Qualifications or Disqualifications of Voters, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which such Elections may be continued, and the Trial of controverted Elections and the Proceedings incident thereto, the vacating of the Seats of Members and the issuing and Execution of new Writs in case of Seats vacated otherwise than by Dissolution,—shall respectively apply to Elections of Members to serve in the respective Legislative Assemblies of Ontario and Quebec.

“ Provided that until the Legislature of Ontario otherwise provides, at any Election for a Member of the Legislative Assembly of Ontario for the District of Algoma, in addition to Persons qualified by the Law of the Province of Canada to vote, every male British Subject, aged Twenty-one Years or upwards, being a Householder, shall have a vote.”

The general powers of the Parliament under Section 91 are :—

“ 91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated, that is to say,—

* * * * *

That the word “ persons ” is employed in a number of sections of the Act (Sections 41, 83, 84 and 133) as designating members of the House of Commons, and though the word appears without an adjective, indubitably it is used in the unrestricted sense as embracing persons of both sexes. p. 55, l. 15.

That the reasoning based on the extraneous circumstances—the disabilities of women under the common law, and the law and practice of Parliament in respect of appointment to public place or office—was inconsiderable when compared with reasons deriving their force from the presumption that the Constitution in its executive branch was intended to be capable of adaptation to whatever changes in the law and practice relating to the election branch might be progressively required by changes in public opinion. p. 55, l. 24.

p. 57, l. 12.

The learned judge was however of opinion that there was no such consideration in relation to the Senate arising from the control vested in Parliament in respect of the Constitution of the House of Commons and affecting the question of the Constitution of the Privy Council, and that there was much to point to an intention that the constitution of the Senate should follow the lines of the Constitution of the old Legislative Councils under the Acts of 1791 (Appendix, p. 6), and 1840 (Appendix, p. 10) as amended by the Union Act Amendment Act, 17 and 18 Vic. c. 118, (Appendix, p. 16) to which he briefly refers.

p. 58, l. 20.

The learned judge was further of opinion that the Senate possesses 10 sole and exclusive jurisdiction to pass upon the claims of any person to sit and vote as a member thereof, and such jurisdiction is not confined to the right to pass upon questions as to qualification under Section 33, but extends to the question whether a person summoned is a person capable of being summoned under Section 24.

p. 59.

9. Mignault, J., in a concise judgment, gives as his reasons for concurring with the answer of the Court :—

l. 5.

That “ the expression ‘ persons ’ does not stand alone in section 24, nor is that section the only one to be considered . . .

l. 11.

It would be idle to enquire whether women are included within the 20 meaning of an expression which, in the question as framed, is divorced from its context.”

l. 21.

That the question was concluded by decisions by which the Court was bound, notably that in *Chorlton v. Lings* [1868] L.R. 4 C.P. 374.

l. 26.

l. 29.

That “ the word ‘ persons ’ is obviously a word of uncertain import ” and that “ the grave constitutional change which is involved in the contention submitted on behalf of the petitioners is not to be brought about by inferences drawn from expressions of such doubtful import, but should rest upon an unequivocal statement 30 of the intention of the Imperial Parliament . . . ”

10. The Province of Quebec has a special interest in the question above that of any other of the Provinces since by Section 73 “ the qualifications of the Legislative Councillors of Quebec shall be the same as those of the Senators for Quebec.”

Section 73 reads :—

“ 73. The Qualifications of the Legislative Councillors of Quebec shall be the same as those of the Senators for Quebec.”

Though not referred to in the reasons of the Judges of the Supreme Court this section may well assist in determining the construction to be put on Section 24. Inasmuch as it is only "qualified persons" who can be summoned to the Senate it would follow, if women are qualified to be summoned to the Senate, they would also be qualified for appointment to the Legislative Council of Quebec by the Lieutenant-Governor of the Province under Sections 72 and 75.

Sections 72 and 75 are :—

10 " 72. The Legislative Council of Quebec shall be composed of Twenty-four Members, to be appointed by the Lieutenant Governor, in the Queen's Name, by Instrument under the Great Seal of Quebec, one being appointed to represent each of the Twenty-four Electoral Divisions of Lower Canada in this Act referred to, and each holding Office for the Term of his Life, unless the Legislature of Quebec otherwise provides under the Provisions of this Act."

20 " 75. When a Vacancy happens in the Legislative Council of Quebec by Resignation, Death, or otherwise, the Lieutenant-Governor, in the Queen's Name, by Instrument under the Great Seal of Quebec, shall appoint a fit and qualified Person to fill the Vacancy."

The judgments both of the Chief Justice and of Mr. Justice Duff direct particular attention to the fact that the office of Senator was a new office first created by The British North America Act, which no one, apart from the enactments of the statute, has an inherent or common law right of holding, and the right of any one to hold the office must be found in the statute which creates it.

30 Notwithstanding this, Mr. Justice Duff considers that The British North America Act contemplated a second Chamber which was to be in principle the same, though not identical, with that of the second Chambers established by the earlier statutes providing the Constitution of the old Legislative Councils under the Acts of 1791, 31 George III, c. 31 (Appendix, p. 6) and 1840, 3 and 4 Vict., c. 35 (Appendix, p. 10).

40 If this conclusion is correct it applies with still further force to the case of the Province of Quebec for though the second Chamber in the province, that is the Legislative Council of Quebec, was created by Section 71 of the British North America Act, yet it was not like the Senate an entirely novel office, but was in effect, a continuation of the Legislative Councils under the Acts of 1791 and 1840. Each of the 24 members to be appointed to the Legislative Council was to be appointed for one of the 24 electoral divisions of Lower Canada specified in Schedule A to Chapter I of the Consolidated Statutes of Canada. .

Even if it had been intended to make a new departure as regards the Senate, a body created by the Act for the first time, it might well have been that a different provision from Section 73 would have been made for the Legislative Council of the Province of Quebec.

11. The Province of Quebec has the further interest which, indeed, it shares in common with the other Provinces that the Senate having been specially established for the safeguard of the rights of the Provinces, this Province is deeply concerned with any changes which might be made in the composition of that body.

12. There are differences in the legal position of men and women other than those of the incapacity of women for appointment to public place or office. The common law of property is in many respects different as regards men and women.

The Attorney-General of Quebec submits that the answer of the Supreme Court is right for the following, amongst other

REASONS.

- (1) Because the construction to be put on Section 24 of the Act must be governed by the intention of the Legislature in 1867, the time of the passing of the Act.
- (2) Because prior to that date women had ever been under a common law incapacity to perform the duties of public office or place and particularly were excluded from holding a place in Parliament or voting for the election of a member thereof.
- (3) Because Section 24 does not authorise the Governor-General to summon any persons to the Senate but only "qualified persons" and women were neither qualified by the common law or by the statutory provisions for the qualifications requisite for a Senator.
- (4) Because there is nothing in the Act which can suggest that the use of the word "persons" in providing for the Constitution could be held to include the appointment of women to either executive or legislative office.
- (5) Because the provisions of Section 73, providing that the qualifications of the Legislative Councillors of Quebec shall be the same as those of Senators for Quebec, would not be appropriate for the Legislative Council of Quebec if the Lieutenant-Governor could appoint women to the Legislative Council of the Province.

- (6) Because there are other differences in the legal position of men and women than the capacity for appointment to public place or office.
- (7) For the reasons appearing in the judgments of the Chief Justice concurred in by Lamont and Smith, JJ., and those of Duff and Mignault, JJ.

CHARLES LANCTOT.

AIME GEOFFRION.

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