EDWARDS ET AL. V. ATTORNEY-GENERAL FOR CANADA ET AL.

Judicial Committee of the Privy Council, [1930] *Appeal Case* 124

Rendered 18 October, 1929

Henrietta Muir Edwards and Others. Appellants;

and

Attorney-General for Canada and Others, Respondents.

ON APPEAL FROM THE SUPREME COURT OF CANADA ...

The word "persons" in s. 24 of the British North America Act, 1867, includes members of either sex; accordingly women having the qualifications enacted by s. 23, can be summoned by the Governor General to the Senate of Canada.

So *held* upon an examination of the Act, earlier Canadian legislation being inconclusive as to the intention of the Imperial Parliament in the matter, and decisions in England based upon the disability at common law of women to hold public office being inapplicable to the interpretation of the Act.

The provisions of the British North America Act, 1867, enacting a constitution for Canada should not be given a narrow and technical construction, but a large and liberal interpretation, so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs.

Judgment of the Supreme Court of Canada [1928] S.C.R. 276 reversed.

Appeal (No. 121 of 1928) by special leave from a judgment of the Supreme Court of Canada, dated April 24, 1928, in answer to a question referred to that Court by the Governor General under s. 60 of the Supreme Court Act.

The question referred was "Does the word 'persons' in s. 24 of the British North America Act, 1867, include female persons?" ...

The Supreme Court of Canada unanimously answered the question referred in the negative. Anglin CJ., whose judgment was concurred in by Lamont and Smith JJ., and substantially by Mignault J., came to the above conclusion because of the common law disability of women to hold public office. Duff J., while of opinion that that consideration should not be applied, came to the same conclusion upon an examination of the provisions of the Act ...

Oct. 18. The judgment of their Lordships was delivered by

Lord Sankey L.C. By s. 24 of the British North America Act, 1867, it is provided that "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."

The question at issue in this appeal is whether the words "qualified persons" in that section include a woman, and consequently whether women are eligible to be summoned to and become members of the Senate of Canada.

Of the appellants, Henrietta Muir Edwards is the Vice-President for the Province of Alberta of the National Council of Women for Canada; Nellie L. McClung and Louise C. McKinney were for several years members of the Legislative Assembly of the said Province; Emily F. Murphy is a police magistrate in and for the said Province; and Irene Parlby is a member of the Legislative Assembly of the said Province and a member of the Executive Council thereof ...

Their Lordships are of opinion that the word "persons" in s. 24 does include women, and that women are eligible to be summoned to and become members of the Senate of Canada ...

The exclusion of women from all public offices is a relic of days more barbarous than ours, but it must be remembered that the necessity of the times often forced on man customs which in later years were not necessary. Such exclusion is probably due to the fact that the deliberative assemblies of the early tribes were attended by men under arms, and women did not bear arms ... The likelihood of attack rendered such a proceeding unavoidable, and after all what is necessary at any period is a question for the times upon which opinion grounded on experience may move one way or another different circumstances. This exclusion of women found its way into the

opinions of the Roman jurists,. . . The barbarian tribes who settled in the Roman Empire, and were exposed to constant dangers, naturally preserved and continued the tradition.

In England no woman under the degree of a Queen or a Regent, married or unmarried, could take part in the government of the State. A woman was under a legal incapacity to be elected to serve in Parliament and even if a peeress in her own right she was not, nor is, entitled as an incident of peerage to receive a writ of summons to the House of Lords ...

No doubt in the course of centuries there may be found cases of exceptional women and exceptional instances, ...

Their Lordships now turn for a moment to the special history of the development of Canadian legislature as bearing upon the matter under discussion.

The Province of Canada was formed by the union under the Act of Union, 1840, of the two Provinces of Upper and Lower Canada respectively, into which the Province of Quebec as originally created by the royal proclamation of October 7, 1763, and enlarged by the Quebec Act, 1774, had been divided under the Constitutional Act of 1791. In the Province of Quebec from its establishment in 1763 until 1774, the Government was carried on by the Governor and the Council, composed of four named persons and eight other “persons” to be chosen by the Governor from amongst “the most considerable of the inhabitants or of other persons of property in Our said Province.”

The Quebec Act of 1774 entrusted the government of the Province to a Governor and Legislative Council of such “persons” resident there, not exceeding twenty-three, nor less than seventeen, as His Majesty shall be pleased to appoint.

The Constitutional Act of 1791 upon the division of the Province of Quebec into two separate Provinces to be called the Provinces of Upper and Lower Canada established for each Province a legislature composed of the three estates of Governor, Legislative Council and Assembly empowered to make laws for the peace, order and good government of the Provinces. The Legislative Council was to consist of a sufficient number of discreet and proper “persons” less than seven for Upper Canada and fifteen for Lower Canada.

Under the Act of Union, 1840, these two Provinces were reunited so as to constitute one Province under the name of the Province of Canada, and the Legislative Council was to be composed of such "persons" being not fewer than twenty as Her Majesty shall think fit.

In 1865 the Canadian legislature under the authority of the Imperial Act passed an Act which altered the constitution of the Legislative Council by rendering the same elective.

The new constitution as thus altered continued till the Union of 1867.

It will be noted that in all the Acts the word "persons" is used in respect of those to be elected members of the Legislative Council, and there are no adjectival phrases so qualifying the word as to make it necessarily refer to males only.

In Quebec, just as in England, there can be found cases of exceptional women amid exceptional instances. For example, in certain districts—namely, at Trois Rivières in 1820—women apparently voted, while in 1828 the returning officer in the constituency of the Upper Town of Quebec refused to receive the votes of women.

In 1834 the Canadian Parliament passed an Act of Parliament excluding women from the vote, but two years later the Act was disallowed because the Imperial Government objected to another section in it.

The matter, however, was not left there, and in 1849 by a statute of the Province of Canada (12 Vict. c. 27), s.46, it was declared and enacted that no woman is or shall be entitled to vote at any election, whether for any county or riding, city or town, of members to represent the people of this Province in the Legislative Assembly thereof.

The development of the maritime Provinces proceeded on rather different lines. From 1719 to 1758 the Provincial Government of Nova Scotia consisted of a Governor and a Council, which was both a legislative and an executive body composed of such fitting and discreet "persons," not exceeding twelve in number, as the Governor should nominate. A general assembly for the Province was called in 1757, and thereafter the legislature consisted of a Governor and Council and General Assembly. In 1838 the executive authority was separated from the Legislative Council, which became a distinct legislative branch only.

In 1784 a part of the territory of the Province of Nova Scotia was erected into a separate Province to be called New Brunswick, and a separate government was established for the Province, consisting of a Governor and Council composed of certain named persons and other persons "to be chosen by you from amongst the most considerable of the inhabitants of or persons of property," but required to be men of good life and of ability suitable to their employment. In 1832 the executive authority was separated and made distinct from the Legislative Council. In the Province of Nova Scotia there was in the early Acts governing the election of members of the General Assembly no express disqualification of women from voting, but by the revised statutes of Nova Scotia (second series) in 1859 the exercise of the franchise was confined to male subjects over twenty-one years of age; and a candidate for election was required to have the qualification which would enable him to vote.

In the Province of New Brunswick by the Provincial Act (11 Vict. c. 65), s. 17, the Parliamentary franchise was confined to male persons of the full age of twenty-one years who possessed certain property qualifications.

It must, however, be pointed out that a careful examination has been made by the assistant keeper of public records of Canada of the list containing the names of the Executive and Legislative Councils and Houses of Assembly in Quebec (including those of Upper and Lower Canada), of the Province of Canada, of the Province of Nova Scotia and of the Province of New Brunswick down in 1867, and on none of the lists did he find the name of a person of the female sex.

Such briefly is the history and such are the decisions in reference to the matter under discussion.

No doubt in any code where women were expressly excluded from public office the problem would present no difficulty, but where instead of such exclusion those entitled to be summoned to or placed in public office are described under the word "person" different considerations arise.

The word is ambiguous, and in its original meaning would undoubtedly embrace members of either sex. On the other hand, supposing in an Act of Parliament several centuries ago it had been enacted that any person should be entitled to be elected to a particular office it would have been understood that the word only referred to males, but the cause of this was not because the word

“person” could not include females but because at common law a woman was incapable of serving a public office. 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 being contested.

Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared.

The appeal to history therefore in this particular matter is not conclusive ...

... their Lordships do not think it right to apply rigidly to Canada of to-day the decisions and the reasons therefor which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries, to countries in different stages of development. 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 of 1867 ...

Their Lordships now turn to the second point—namely, (ii.) the internal evidence derived from the Act itself ...

The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. Like all written constitutions it has been subject to development through usage and convention”: Canadian Constitutional Studies, Sir Robert Borden (1922), p. 55.

Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent but within certain fixed limits may be mistress in her own house as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs ...

Looking at the sections which deal with the Senate as a whole (ss. 21–36) their Lordships are unable to say that there is anything in those sections themselves upon which the Court could come to a definite conclusion that women are to be excluded from the Senate.

So far with regard to the sections dealing especially with the Senate—are there any other sections in the Act which shed light upon the meaning of the word "persons"?

Their Lordships think that there are. For example, s. 41 refers to the qualifications and disqualifications of persons to be elected or to sit or vote as members of the House of Assembly or Legislative Assembly and by a proviso it is said 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 or upwards being a householder shall have a vote. This section shows a distinction between "persons" and "males." If persons excluded females it would only have been necessary to say every person who is a British subject aged twenty-one years or upwards shall have a vote.

Again in s. 84, referring to Ontario and Quebec, a similar proviso is found stating that every male British subject in contradistinction to "person" shall have a vote.

Again in s. 133 it is provided that either the English or the French language may be used by any person or in any pleadings in or issuing from any court of Canada established under this Act and in or from all of any of the courts of Quebec. The word "person" there must include females, as it can hardly have been supposed that a man might use either the English or the French language but a woman might not.

If Parliament had intended to limit the word "persons" in s. 24 to male persons it would surely have manifested such intention by an express limitation, as it has done in ss. 41 and 84. The fact that certain qualifications are set out in s. 23 is not an argument in favour of further limiting the class, but is an argument to the contrary, because it must be presumed that Parliament has set out in s. 23 all the qualifications deemed necessary for a senator, and it does not state that one of the qualifications is that he must be a member of the male sex.

Finally, with regard to s. 33, which provides that if any question arises respecting the qualifications of a senator or a vacancy in the Senate the same shall be heard and determined by the Senate that section must be supplemented by s. 1 of the Parliament of Canada Act, 1875, and by s. 4 of c. 10 of R.S. Can., and their Lordships agree with Duff J. when he says, "as yet, no concrete case has arisen to which the jurisdiction of the Senate could attach. We are asked for advice on the general question, and that, I think, we are bound to give. It has, of course, only the force of an advisory opinion. The existence of this jurisdiction of the Senate does not, I think, affect the question of substance. We must assume that the Senate would decide in accordance with the law."

The history of these sections and their interpretation in Canada is not without interest and significance.

From confederation to date both the Dominion Parliament and the Provincial legislatures have interpreted the word "persons" in ss. 41 and 84 of the British North America Act as including female persons, and have legislated either for the inclusion or exclusion of women from the class of persons entitled to vote and to sit in the Parliament and Legislature respectively and this interpretation has never been questioned.

From confederation up to 1916 women were excluded from the class of persons entitled to vote in both Federal and Provincial elections. From 1916 to 1922 various Dominion and Provincial Acts were passed to admit women to the franchise and to the right to sit as members in both Dominion and Provincial legislative bodies. At the present time women are entitled to vote and to be candidates (1.) At all Dominion elections on the same basis as men (2.) At all Provincial elections save in the Province of Quebec.

From the date of the enactment of the Interpretation Acts in the Province of Canada, Nova Scotia, and New Brunswick prior to confederation and in the Dominion of Canada since confederation and until the franchise was extended, women have been excluded by express enactment from the right to vote.

Neither is it without interest to record that when upon May 20, 1867, the Representation of the People Bill came before a Committee of the House of Commons, John Stuart Mill moved an

amendment to secure women's suffrage, and the amendment proposed was to leave out the word man in order to insert the word person instead thereof, see Hansard 3rd series vol. clxxxvii., col. 817.

A heavy burden lies on an appellant who seeks to set aside a unanimous judgment of the Supreme Court and this Board will only set aside such a decision after convincing argument and anxious consideration but having regard: (1.) To the object of the Act—namely to provide a constitution for Canada, a responsible and developing State (2.) that the word "person" is ambiguous and may include members of either sex (3.) that there are sections in the Act above referred to which show that in some cases the word person must include females (4.) that in some sections the words "male persons" are expressly used when it is desired to confine the matter in issue to males; and (5.) to the provisions of the Interpretation Act; their Lordships have come to the conclusion that the word "persons" in s. 24 includes members both of the male and female sex, and that, therefore, the question propounded by the Governor General should be answered in the affirmative, and that women are eligible to be summoned to and become members of the Senate of Canada, and they will humbly advise His Majesty accordingly ...

Source: Judicial Committee of the Privy Council, 1930, Appeal Cases 124. Rendered October 18, 1929.