

49, 1897

UNIVERSITY OF LONDON
W.C.1.
24 OCT 1956
INSTITUTE OF ADVANCED
LEGAL STUDIES

APPELLANT'S CASE

In the Privy Council

No. 3 of 1897.

29479

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

BETWEEN

THE ATTORNEY-GENERAL FOR THE
DOMINION OF CANADA *Appellant,*

AND

THE ATTORNEY-GENERAL FOR THE
PROVINCE OF ONTARIO. *Respondent,*

IN THE MATTER OF CERTAIN QUESTIONS RELATIVE TO
QUEEN'S COUNSEL AND PRECEDENCE AT THE BAR,
REFERRED TO THE COURT OF APPEAL FOR
ONTARIO BY HIS HONOUR THE LIEUTENANT-
GOVERNOR OF ONTARIO.

CASE OF THE APPELLANT.

1. This is an appeal from the judgment of the Court of Appeal for Ontario, given on the 10th day of November, 1896, which answered, adversely to the claim of the Dominion, certain questions referred by the Lieutenant-Governor of Ontario to the Court of Appeal for Ontario for hearing and consideration, pursuant to 53 Vic., Chapter 13 of Ontario, 1890.

2. The questions referred are as follows :—

10 (1) Whether since the 29th of March, 1873, it has been and is lawful for the Lieutenant-Governor of Ontario, by Letters Patent in the name of Her Majesty under the Great Seal of Ontario,

(a) To appoint from among the members of the Bar of Ontario such persons as he deems right to be during pleasure Her Majesty's Counsel for Ontario.

(b) To grant to any member or members of the Bar of Ontario a patent or patents of precedence in the Courts of Ontario.

20 (2) Whether appointments of Queen's Counsel and grants of precedence, such as are in the case stated to have been made by the Lieutenant-Governor of Ontario since the said date, Record,
pp. 13, 15, 39.

are and would be valid and effectual to confer on the holders thereof the office and precedence thereby purported to be granted.

(3) Whether members of the Bar of Ontario from time to time appointed, or to be appointed, as aforesaid by the Lieutenant-Governor of Ontario, by Letters Patent in Her Majesty's name under the Great Seal of Ontario, to be Her Majesty's Counsel for Ontario, and members of the Bar of Ontario, to whom from time to time patents of precedence in the Courts of Ontario have been or may be granted by the Lieutenant-Governor of Ontario as aforesaid, in conformity with the limitations of the 10 Revised Statute of Ontario, Ch. 139, have or shall become entitled to such precedence in the Courts of Ontario as have been or may be assigned to them by such Letters Patent after the several persons or classes referred to in the 3rd, 5th and 7th, sections of the said Revised Statute of Ontario.

Record, p. 11.

Record,
pp. 12 & 13.

(4) Whether the position as to precedence in the Courts of Ontario of the remaining members of the Bar of Ontario not comprised within the classes referred to in the said 3rd, 5th and 7th sections, and not holding patents issued by the Lieutenant-Governor of Ontario, conferring on them the Office of Queen's 20 Counsel for Ontario, or granting to them precedence in the Courts of Ontario is, as between them and those holding such patents as aforesaid, subsequent to those holding such patents, and, as between themselves, in the order of their call to the Bar of Ontario.

Record,
pp. 12 & 13.

(5) In case the answer to any of the said questions be in the whole or in part negative, or in case an affirmative answer shall appear to the Court not to be a complete exposition of the matters involved, then what is the true state and condition of the matters involved in such questions. 30

3. At the hearing of the case before the Court of Appeal for Ontario composed of the Honourable Chief Justice Hagarty, the Honourable Mr. Justice Burton, the Honourable Mr. Justice MacLennan, and the Honourable Mr. Justice Street, Counsel appeared for the Dominion and the province of Ontario respectively.

Record, p. 50.

4. By the judgment of the Court of Appeal for Ontario, dated the 10th day of November, 1896, it was ordered and adjudged that each of the first four questions should be answered in the affirmative.

5. The Judges who heard the case delivered unanimous opinions. No answer to the 5th question was given except by the Honourable Mr. 40 Justice Burton, who expressed his opinion that the right of appointment of Queen's Counsel in the Courts of the Province of Ontario is vested exclusively in the Lieutenant-Governor of that Province.

Record,
pp. 41—50.

The opinions of the Judges are to be found in the Record at pages 41. to 50.

6. The opinions of the Judges were to the effect that:—

(a) The power of appointing Queen's Counsel for Ontario

and of granting patents of precedence in the Courts of Ontario is (together with other prerogatives of the Crown) reserved to the Lieutenant-Governor for Ontario by the British North America Act, 1867.

10 (b) That the appointment of Queen's Counsel for Ontario and the grant of patents of precedence in the Courts of Ontario are matters which come within the classes of subjects enumerated in subsections (4), (13), (14) and (16) of Sec. 92 of the British North America Act, 1867; and that the Legislature of Ontario had power to deal with and did validly and effectually deal with the same matters by the Statutes of the Ontario Legislature, 36 Vic. Ch. 3, 36 Vic. Ch. 4, and the Revised Statutes of Ontario, Ch. 139.

Record,
pp. 10 & 11.

7. It is submitted on behalf of the Dominion that the Lieutenant-Governor for Ontario has no power either to appoint Queen's Counsel for Ontario or to grant patents of precedence in the Courts of Ontario; that the Province of Ontario has no power to make laws in respect of the appointment of such Queen's Counsel or the grants of such patents; that the Statutes 36 Vic., Ch. 3; 36 Vic., Ch. 4, and the Revised
20 Statutes of Ontario, Ch. 139, were and are unconstitutional *ultra vires* and of no effect; that the answers of the Judges to questions 1, 2, 3, and 4 are wrong in law; that such questions should be answered in the negative; and that this appeal should be allowed for the following (amongst other)

REASONS.

30 (i.) Because the Lieutenant-Governor of Ontario does not entirely represent the Crown in respect of the prerogative rights of the Crown; and in particular does not represent the Crown in respect of the prerogative right or power of appointing Queen's Counsel for Ontario or granting patents of precedence in the Courts of Ontario.

(ii.) Because the power of appointing Queen's Counsel for Ontario and granting patents of precedence in the Courts of Ontario is a prerogative power or right of the Crown which the British North America Act, 1867, has not, either expressly under Section 65 or otherwise, vested in the Lieutenant-Governor of Ontario.

40 (iii.) Because the executive power is, in the absence of express enactment, co-extensive with the legislative power, and the Legislature for Ontario has not, but the Parliament of Canada has, power to legislate concerning the appointment of Queen's Counsel and the granting of patents of precedence in the Courts.

(iv.) Because prior to the Ontario Statutes above referred to, the Governor-General was entitled, under the terms of his patent, to appoint Queen's Counsel and grant patents of precedence in the Courts, and the said Statutes are ineffectual to

deprive, and the Legislature for Ontario has no power to deprive the Governor-General of his power in this behalf.

(v.) Because no prerogative right of the Crown can, under the British North America Act, 1867, or otherwise, be invoked or exercised by a Lieutenant-Governor in any case where such invocation or exercise is or would be inconsistent, or in conflict with the invocation or exercise of such prerogative right by the Governor-General.

(vi.) Because the Ontario Statutes above referred to do not relate to matters coming within any of the classes of subjects 10 enumerated in Section 92 of the British North America Act, 1867, and are unconstitutional and *ultra vires*.

(vii.) Because according to the true intent and meaning, and upon the true construction of the British North America Act, 1867 (and in particular sections 9, 58, 59, 65, 91, 92, and 94 thereof) the judgment appealed from is wrong in law and ought to be reversed.

CHARLES FITZPATRICK.
FRANK RUSSELL.

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