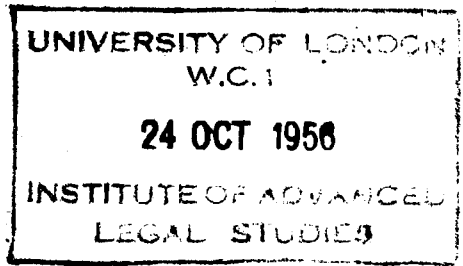


49, 1897



In the Privy Council.

No. 3 of 1897.

29780

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.

RESPONDENT'S CASE.

In the matter of certain questions referred to the Court of Appeal for Ontario by His Honour the Lieutenant-Governor of Ontario.

Subject.

Provincial Jurisdiction.

Queen's Counsel.

CASE OF THE RESPONDENT,

THE ATTORNEY-GENERAL FOR ONTARIO.

1. This is an appeal from the decision of the Court of Appeal for Ontario on a reference of certain questions in a Case stated by the Lieutenant-Governor of Ontario under the Provincial Statute, Chapter 13 of 53 Victoria, 1890.

2. The questions are as follows:—

“ Questions.

“ The matters and questions arising on the foregoing case and which are R., p. 40. to be referred for hearing and consideration by the Court of Appeal for

R., p. 40.

Ontario, pursuant to Chapter 13 of 53 Victoria, Ontario, 1890, are the following:—

(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. 10

(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 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 20 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 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.

(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 30 not holding patents issued by the Lieutenant-Governor of Ontario conferring on them the office of Queen's 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 order of their call to the Bar of Ontario.

(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 40 questions."

The main relevant considerations may be summarized as follows:

3. Prior to 1840, the Lieutenant-Governor of the old Province of Upper Canada had and exercised the power of appointing Queen's Counsel from amongst the bar of the Province, and of conferring precedence or preaudience in the Courts of the Province.

4. After the Union of 1840 the Governor-General of the late Province of Canada had and exercised the like powers for Upper Canada and Lower Canada respectively.

5. Under the scheme of the B. N. A. Act the Legislative and Executive Powers vested in the Provincial authorities are complementary to and co-extensive with each other, and are, within the Provincial sphere, sovereign powers.

6. Under that scheme such portions of the prerogative power of the Crown as relate to matters within the Provincial sphere are vested in the Provincial Lieutenant-Governor subject to regulation by the Provincial Legislature.

7. Under the B. N. A. Act Section 92 the Provincial Legislature has the power of making laws in relation to,—

“ (4) The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.

(13) Property and Civil Rights in the Province.

(14) The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

20 (16) Generally all Matters of a merely local or private Nature in the Province.”

8. These legislative powers include provision for the creation, abolition, and regulation of a Provincial Bar; for the appointment of Provincial Officers such as Queen's Counsel; and for the determination of the status, and of the rights of precedence of Members of the Bar in the Courts of the Province.

9. It follows that, subject to regulation by the Provincial Legislature, the Lieutenant-Governor is invested with the prerogative of appointing Queen's Counsel, and of settling the order of precedence of the Bar in the Provincial Courts.

30 10. It follows, at any rate, that the Provincial Legislature, has the power of regulating or providing for the regulation of these matters, and of investing the Lieutenant-Governor with authority to act executively therein.

11. The Lieutenant-Governor of Ontario, acting by advice on the above view of his power appointed certain members of the Bar of Ontario to be Provincial Queen's Counsel on the 16th. day of March, 1872. R., p. 5, l. 20, *et seq.*

12. It becoming known shortly thereafter that it was claimed that, in the absence of Provincial Legislation, the power did not reside in the Lieutenant-Governor, the Legislature of Ontario, for the avoidance of doubt, on the 29th. of March, 1873, (the date referred to in the questions) passed two acts as follows:

(A)

40 “ An Act respecting the Appointment of Queen's Counsel.

(Assented to 29th. March, 1873). R., p. 10, l. 4, *et seq.*

Whereas in the course of the administration of justice matters between the Crown and the subject are brought, some in Her Majesty's name and some in the name of the Attorney-General for Ontario, before Her Majesty's Courts in Ontario by the direction and under the control and management of the Provincial Government; And whereas the Lieutenant-Governor of right ought to have the power to appoint from among the members of the Bar of

Ontario, provincial officers who may assist in the conduct of such matters on behalf of the Crown, under the name of Her Majesty's Counsel learned in the law, for the said Province; And whereas doubts have been cast on the power of the Lieutenant-Governor to make such appointments; and it is expedient to remove such doubts:

Therefore Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. It was and is lawful for the Lieutenant-Governor by letters patent, under the great seal of the Province of Ontario, to appoint from among the members of the Bar of Ontario, such persons as he may deem right to be, during pleasure, provincial officers under the names of Her Majesty's Counsel learned in the law for the Province of Ontario.”

## (B)

“ An Act to regulate the Precedence of the Bar of Ontario.

(Assented to 29th March, 1873).

Whereas the regulation of the Bar of Ontario is vested in the Provincial Legislature, and it is expedient for the orderly conduct of business before the Provincial Courts that provision be made for the order of precedence of the members of the said Bar in the said Courts:

Therefore Her Majesty, by and with the advice and consent of the 20 Legislative Assembly of the Province of Ontario, enacts as follows:—

1. The following members of the Bar of this Province shall have precedence in the said Courts in the following order:

(1) The Attorney-General of the Dominion for the time being;

(2) The Attorney-General of the Province for the time being;

(3) The members of the said Bar, who shall have filled the offices of Attorney-General of the late Province of Canada, or Attorney-General of the Dominion of Canada, or Attorney-General of this Province according to seniority of appointment as such Attorney-General.

(4) The members of the said bar who have filled the office of 30 Solicitor-General of Upper Canada, according to seniority of appointment as such Solicitor-General; and

(5) The members of the Bar, who were before the first day of July, in the year of Our Lord one thousand eight hundred and sixty-seven, appointed Her Majesty's Counsel for Upper Canada, so long as they are such counsel, according to seniority of appointment as such counsel.

2. It is lawful for the Lieutenant-Governor by letters patent under the great seal of Ontario to grant to any member of the Bar, a patent of precedence in said Courts.

3. Members of the Bar from time to time appointed after the first day of July, in the year of Our Lord one thousand eight hundred and sixty-seven, to be Her Majesty's Counsel for the Province, and members of the Bar, to whom, from time to time, patents of precedence are granted, shall severally have such precedence in the said Courts, as may be assigned to them by letters patent which may be issued by the Lieutenant-Governor under the great seal.

4. The remaining members of the Bar, shall as between themselves have precedence in the Courts in the order of their call to the Bar.

5. Nothing in this Act contained shall in any wise affect or alter any rights of precedence which may appertain to any member of the Bar, when acting as counsel for Her Majesty, or for any Attorney-General of Her Majesty, in any matter depending in the name of Her Majesty or of the Attorney-General before the said Courts, but such right and precedence shall remain as if this Act had not passed."

13. These Acts were afterwards consolidated in the Revised Statutes of 10 Ontario. R., p. 11, l. 25.

14. Since the said 29th of March, 1873, the Lieutenant-Governor has appointed many members of the Provincial Bar to be Provincial Queen's Counsel, with rights of precedence in the Provincial Courts. R., p. 13, l. 18, *et seq.*  
R., p. 15, l. 30, *et seq.*  
R., p. 39, l. 1, *et seq.*

15. The Governor-General of Canada has also since that date assumed to appoint many members of the Provincial Bar to be Queen's Counsel, with rights of precedence. R., p. 14, l. 34, *et seq.*  
R., p. 17, l. 14, *et seq.*  
R., p. 38, l. 22, *et seq.*  
R., p. 39, l. 25, *et seq.*

16. It is claimed by the Attorney-General for Canada that the power of appointing Provincial Queen's Counsel from amongst the Provincial Bar and of giving members of that Bar precedence in the Provincial Courts is a prerogative 20 of the Crown, not vested and incapable of being, by Provincial legislation, vested in the Lieutenant-Governor; but vested in the Governor-General of Canada as the representative of the Queen; and that for these reasons the appointments and status so professed to be conferred by the Lieutenant-Governor have not been validly conferred; and that the appointments and status professed to be conferred by the Governor-General of Canada are valid and have operation and confer precedence generally and over the Provincial appointees in the Provincial Courts.

17. Confusion, uncertainty and inconvenience having been thus occasioned, the questions set out were referred in order to a determination of the whole matter; and they were argued by Counsel for the respective Attorneys-General 30 before the Court of Appeal for Ontario on the 8th and 9th days of September, 1896. R., p. 2, l. 26.  
R., p. 51, l. 10.

18. On the 10th. day of November, 1896, Judgment was given by that Court unanimously in favour of the Provincial view; and each Question was answered in the affirmative. R., p. 41, l. 1, *et seq.*

19. Hagarty, C. J., pointed out that the Judicial Committee of the Privy Council had decided that a Lieutenant-Governor was the representative of the Queen for all purposes of Provincial Government; he held that the Lieutenant-Governor had therefore, apart from Provincial legislation, the right to appoint and to grant precedence, subject to regulation by the Provincial Legislature, under the 14th. enumeration of Section 92; and also that the Legislation was valid; and 40 he decided that the four Questions must be answered in the affirmative. R., p. 41, l. 1, *et seq.*

R., p. 42,  
l. 2, *et seq.* Burton, J. A., reached the same conclusion; adding that the matter came within the 4th., 13th., and 14th. and perhaps within the 16th. of the enumerations.

R., p. 45,  
l. 15, *et seq.* Maclellan, J. A., held substantially the same view as Burton, J. A.

R., p. 49,  
l. 30, *et seq.* Street, J., concurred in the conclusions of the other members of the Court.

R., p. 11,  
l. 19, *et seq.* 20. It is to be observed that the Provincial Laws expressly leave untouched any rights of precedence which may attach to any member of the Bar when acting as Counsel for Her Majesty or for any Attorney-General of Her Majesty.

R., p. 40. 21. It is also to be observed that the Questions do not invite any answer as to the right of the Governor-General of Canada to appoint Queen's Counsel for, or to grant precedence in Dominion Courts; though the question of his right with regard to Provincial Courts is involved.

22. It is submitted that the decision of the Court of Appeal is right and should be affirmed and that this appeal should be dismissed for the following among other

## REASONS.

1. On the true construction of the B. N. A. Act as above stated.
2. On the grounds appearing in the judgments of the Judges in the Court of Appeal.
3. Because the Legislative and Executive powers of the Province are complementary and co-extensive; the Lieutenant-Governor is, for all Provincial purposes, the representative of the Queen, and invested (subject to Legislative regulation) with the relative parts of Her prerogative; the whole matter in question is, in both the Legislative and the Executive departments, Provincial; the Provincial Legislature can repeal all Laws creating a Provincial Bar or giving status in the Courts to the Members of such Bar; and can *a fortiori* provide for the regulation of such Bar; the Provincial jurisdiction is, within the limits set, exclusive; the Provincial Acts were valid; and the Acts, Commissions and Grants in question had the suggested operation, and created the Appointments, status and precedence resulting from affirmative answers to the several questions, as respects all persons, and therefore as against those claiming under any Commissions of the Governor-General of Canada.

EDWARD BLAKE.



In the Privy Council.

No. 3 of 1897.

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*On Appeal from the Court of Appeal  
for Ontario.*

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BETWEEN

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

AND

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

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RESPONDENT'S CASE.

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