Privy Council Appeal No. 76 *of* 1922.

The Honourable David Lynch Scott - - - - *Appellant*

v.

The Attorney-General of Canada and others - - - *Respondents.*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH OCTOBER, 1923.

Present at the Hearing :

VISCOUNT HALDANE.
LORD BUCKMASTER.
LORD ATKINSON.
LORD SHAW.
LORD SUMNER.

[*Delivered by* LORD ATKINSON.]

This is an appeal by special leave from a judgment of the Supreme Court of Canada, dated the 2nd May, 1922, on a reference by the Governor-General in Council under Section 60 of the Supreme Court Act (R.S.C. 1906, c. 139) of certain questions touching the right of the Honourable Horace Harvey, notwithstanding the statutes passed by the legislature of Alberta in the years 1919 and 1920, to continue to hold the office of Chief Justice of the Supreme Court of Alberta. And also touching the validity and effectiveness of certain letters patent dated the 15th September, 1921, issued under the Great Seal of Canada, nominating him to the office and to the style and title of Chief Justice of the Trial Division of the Supreme Court of Alberta.

The questions referred to the Supreme Court by the Governor-General in Council, five in number, run as follows :—

> "1. Are the aforesaid Letters Patent of 15th September, 1921, nominating the said David Lynch Scott, effective to constitute and appoint him to be the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta as constituted under the Judicature Act

of Alberta, Chap. 3, 9 George V., as amended, and to be styled the Chief Justice of Alberta, and to be ex-officio a Judge of the Trial Division of the said Court ?

" 2. If the last-mentioned Letters Patent be not effective for all the purposes therein expressed, in what particular or particulars, or to what extent, are they ineffective ?

" 3. Are the said Letters Patent of 15th September, 1921, nominating the said Horace Harvey, effective to constitute and appoint him to be the Chief Justice of the Trial Division of the Supreme Court of Alberta, and ex-officio a Judge of the Appellate Division of the said Court ?

" 4. If the last-mentioned Letters Patent be not effective for all the purposes therein expressed, in what particular or particulars, or to what extent, are they ineffective ?

" 5. Is the said Horace Harvey by virtue of the aforesaid Letters Patent of 12th October, 1910, or otherwise, constituted and appointed to be, or does he by law hold the said office of, or is he by law entitled to exercise and perform the jurisdiction, office and functions of the Chief Justice and President of the Appellate Division of the Supreme Court of Alberta, as constituted under the Judicature Act of Alberta, Chapter 3, 9 George V., as amended, and what judicial office or offices does he hold other than as provided by his said Letters Patent of 15th September, 1921 ? "

The judgment of the Supreme Court of Canada, answering these questions, was delivered on the 2nd May, 1922. The answers of the majority of the Court were in favour of the respondent, the Honourable Horace Harvey, and ran as follows :—

To the first question : they answered No.

To the second : Wholly.

To the third : No.

To the fourth : Wholly.

To the fifth : The majority of the Supreme Court in effect answered that the said Honourable Horace Harvey held and still holds the office of Chief Justice of the Supreme Court of Alberta with the style and title of Chief Justice of Alberta, and is by law entitled to exercise the jurisdiction, office and function of such Chief Justice and of President of the Appellate Division of the Supreme Court of Alberta.

The appellant, the Honourable David Lynch Scott, contests the conclusion at which the majority of the Supreme Court of Canada have arrived and contends that the answers so given by them and the reasoning upon which those answers are based are erroneous.

The question for decision by this Board mainly turns upon the construction of a modern Canadian Act passed in the year 1919 (9 Geo. V, c. 3) by the legislature of the Province of Alberta, amended before its proclamation, and therefore before it became operative, by two statutes of the Parliament of Alberta passed in the year 1920. The first is c. 3, Section 2 of the statutes of that year and the second c. 43, Section 3, of the same year. The Provinces of Alberta and Saskatchewan were in the year 1905

carved out of the North-West Territories, and created into Provinces of the Dominion of Canada. The legislatures of each of them thereupon became empowered under Section 92, Sub-section 14, of the British North America Act of 1867 to pass for their province statutes dealing with the constitution, maintenance and organisation of Courts of both Civil and Criminal Jurisdiction within it.

That right and power was qualified to this extent that the Dominion Parliament by Section 91, Sub-section 27, of this same statute of 1867, retained the power of passing laws dealing with the criminal law, and procedure in criminal matters, though not with the constitution of Courts of Criminal Jurisdiction.

This appeal only deals with the Province of Alberta, and its legislative history. The power of appointing judges to any Courts the Province of Alberta might establish was, under Section 96 of the same Act of 1867, vested in the Governor-General. While by Section 100 of the Act of 1867, the salaries, allowances and pensions of the Judges of these Provincial Courts were to be fixed and provided by the Parliament of Canada. By Section 99 of this same statute of 1867 it was enacted that Judges of the Superior Courts should hold office during good behaviour, but should be removable by the Governor-General on address of the Senate and House of Commons. This Section provides the well-known and historic protection of Judges against the unjust and oppressive or arbitrary action by the Executive of a State or Province. But it is obvious that it has no application whatsoever to the legislative action of such a State or of a Province.

In the year 1907 the legislature of the Province of Alberta passed an Act (7 Ed. 7, c. 3) creating a Superior Court of Civil and Criminal Jurisdiction for their Province styled the Supreme Court of Alberta (but for purpose of reference styled merely the Supreme Court). This Court, when established, was to consist of a Chief Justice, who should be styled the Chief Justice of Alberta, and four pusine judges to be called the Justices of the Court, who, with the Chief Justice, were empowered to use, exercise and enjoy all the powers, rights, incidents, privileges and immunities of, amongst other things, a Superior Court of Record.

In the interpretation clause, Section 2, the expression "Judge" is defined to mean a Judge of the Court created by this statute, and to include the Chief Justice.

By the 6th section of this Act it is provided that the Chief Justice shall have rank and precedence over all Judges of any other Court in the Province and that the pusine Judges shall have rank and precedence over all Judges of any other Court in the Province, and between themselves shall rank according to their seniority of appointment. By Section 29 it was enacted that the Court should hold its sittings, and the Judges thereof should sit in chambers at such times and places as the Lieutenant-Governor in Council should appoint. Section 30 similarly only provides that the Court shall set *en banc* at such times and places

as the Lieutenant-Governor in Council shall, by order, from time to time appoint, and that three Judges shall constitute a quorum

Section 31 provides that the Chief Justice of the Court, when sitting, shall preside over the Court *en banc* and in his absence the senior Judge sitting shall preside. It is obvious from this latter provision that the Chief Justice is not a necessary member of the Court *en banc*, and that a Court *en banc* may be validly constituted in his absence.

The 32nd section of this same statute sets out at length what is the varied and rather composite jurisdiction of the Court in *en banc*. It embraces (1) all the jurisdiction and power possessed by the Supreme Court of the North West Territories *en banc* immediately prior to the coming into force of this Act of 1907; (2) jurisdiction and power subject to the provisions of the rules to hear and determine all applications for new trials (3); all questions or issues of law; (4) all questions of points in civil or criminal cases reserved for the opinion of the Court; (5) all appeals or motions in the nature of appeals respecting any judgment, order or decision of any Judge of the Supreme Court (provided the same shall not have been made as the judgment or decision of the court *en banc*) or respecting any judgment, order or decision of a Court of inferior jurisdiction where an appeal is given by any other Act; (6) and all petitions, motions, matters or things whatsoever which might lawfully be brought before any Divisional Court of Justice or the Court of Appeal in England.

It will be observed that much of the litigation thus assigned to the Supreme Court *en banc* is by no means of an appellate character, and is so varied and copious that if the Province of Alberta should progress and become more populous the division of the Supreme Court into two or more branches, each dealing with its own share of the whole of the business assigned to the Court *en banc*, would probably become a matter of necessity. It was while this statute of 1907 was in force and the judicial system created by it in operation that the respondent was raised from the position of a puisne Judge of the Supreme Court of Alberta to that of its Chief Justice. His commission appointing him to the latter office bears date the 12th of October, 1910. By it he was appointed to have, hold, exercise and enjoy the office of Chief Justice of the Supreme Court of Alberta, with all and every the powers, rights, authority, privileges, profits, emoluments and advantages unto the said office of right and by law appertaining, during good behaviour. Three years after the date of this commission the Act of 1907 was amended. By an Act of 1913 (4 George V, c. 3) the thirtieth section of the former Act dealing with the Court *en banc* was repealed, and there was substituted for it a section to the following effect:—

> "30. The Court *en banc* shall be known as the Appellate Division of the Supreme Court and shall sit at such times and places as the judges of the Court shall determine and three Judges shall constitute a quorum.
>
> "(2) The Judges of the Supreme Court shall, during the month of December, or at such other time as may be convenient, select four of their number to constitute the Appellate Division for the next ensuing calendar

year, but every other Judge of the said Court shall be *ex-officio* a member of the Appellate Division.

"(3) The terms 'Court *en banc*' or 'Court sitting *en banc*' and 'Appellate Division' wherever used in this or any other Act or in any rules made thereunder, shall be deemed to be interchangeable and to have the same meaning."

It is perfectly plain from the terms of this amendment that the Chief Justice so far from being a necessary member of the Court sitting *en banc*, might from December to December each year, neither be elected to sit or sit in the Court *en banc*. His title of Chief Justice from thenceforth did not *per se* give him any right or title without election to sit or be an active sitting member of the Court *en banc*. For six years from this date the Supreme Court of Alberta exercised its jurisdiction and disposed of its business under the provisions of the two abovementioned statutes of 1907 and 1913. Then was introduced the statute on the construction of some of the provisions of which the questions for decision in this appeal depend, namely, the Act of 1919, to be cited as the Judicature Act (9 Geo. V, c. 3, Alberta). By its 59th section, the Supreme Court Act of 1907 and all amendments of it, which would include this Act of 1913, were repealed, and the Act was to come into force upon a day to be named by proclamation of the Lieutenant-Governor in Council. In fact it was only declared by proclamation on the 18th of August, 1921, 16 months after it had received the Royal Assent, and some months after it had been amended. In its unamended form it never came into force.

The material sections of this statute run as follows:—

"3. There shall continue to be in and for the province a superior Court of civil and criminal jurisdiction known as 'The Supreme Court of Alberta.'

"4. The Court shall have and use as occasion may require such seal as is authorised to be used by the Lieutenant-Governor in Council; and any seal so authorised may afterwards be changed by the Lieutenant-Governor in Council.

"5. The Court shall continue to consist of two branches or divisions which shall be designated respectively 'The Appellate Division of the Supreme Court of Alberta' and 'The Trial Division of the Supreme Court of Alberta.'

"6. The Appellate Division shall continue to be presided over by the Chief Justice of the Court, who shall continue to be styled the Chief Justice of Alberta, and shall consist of the said Chief Justice and four other Judges of the Court to be assigned to it by His Excellency the Governor-General in Council and to be called Justices of Appeal, and three Judges shall constitute a quorum.

"7. The Trial Division shall consist of a Chief Justice, who shall be styled the Chief Justice of the Trial Division of the Supreme Court of Alberta, and five other Judges who shall be called and be Justices of the Supreme Court of Alberta.

"9. The Chief Justice of the Court shall have rank and precedence over all other Judges of any Court in the Province.

"(2) The Chief Justice of the Trial Division shall have rank and precedence next after the Chief Justice of the Court.

"(3) The other Judges of the Court shall have rank and precedence over the Judges of any other Court in the Province and among themselves according to seniority of appointment.

"10. Every Judge, whether of the Appellate Division or of the Trial Division, shall be a judge of the Supreme Court and shall be *ex-officio* a Judge of the division of which he is not a member, and, except where it is otherwise expressly provided, all the Judges of the Supreme Court shall have in all respects equal jurisdiction, power and authority.

"28. The terms 'Court *en banc*' or 'Court sitting *en banc*' and 'Appellate Division' wherever used in any Act or Ordinance, or in any rules made thereunder, shall be deemed to be interchangeable and to have the same meaning."

The amendments made in Section 6 of the Act of 1919 by the Statute C. 3 of 1920 were as follows:—

"(A) By striking out the words 'continue to' where the same occur in lines one, two and three thereof, and by striking out the expression 'of the Court' where the same occurs in line two thereof, and by striking out the first 'the' in the second line thereof, and substituting in lieu thereof the article '*a*.'

"(B) By striking out the words 'three Judges shall constitute a quorum' where the same occur in the seventh line thereof, and substituting the following in lieu thereof:—

"'Three Judges shall constitute a quorum for the hearing of appeals from any District Court, but the Appellate Division, when hearing such appeals, may be composed of five Judges.

"'The Appellate Division shall be composed of five Judges when hearing appeals from the Trial Division of the Supreme Court of Alberta, and in no case shall an appeal be heard by the Appellate Division of the Supreme Court of Alberta when composed of four or an even number of Judges.'"

and the amendments made by C. 4 of the Statute of 1920 ran as follows:—

"43. An Act to amend the Judicature Ordinance, the Judicature Act and the Land Titles Act, passed in the year 1920, is amended as follows:—

"I. By adding after the article '*a*' in the sixth line of Subsection (A) of Section 2, the following: 'and by adding thereto after the words "Chief Justice" in the second line thereof, the expression "'who shall be Chief Justice of the Court and."'"

With the result that after both amendments, the sixth section of the Act of 1919 ran as follows:—

"The Appellate Division shall be presided over by a Chief Justice, who shall be Chief Justice of the Court and who shall be styled the Chief Justice of Alberta, and shall consist of the said Chief Justice and four other Judges of the Court to be assigned to it by His Excellency the Governor-General in Council and to be called Justices of Appeal, and three Judges shall constitute a quorum for the hearing of appeals from any District Court, but the Appellate Division, when hearing such appeals, may be composed of five Judges. The Appellate Division shall be composed of five Judges when hearing appeals from the Trial Division of the Supreme Court of Alberta, and in no case shall an appeal be heard by the Appellate Division of the Supreme Court of Alberta when composed of four or an even number of Judges."

The Governor-General in the alleged discharge of the duty imposed upon him by the 96th section of the British North America Act of 1867, on the 15th of September, 1921, by Letters Patent of that date, appointed the appellant, described as one of the Judges of the Superior Court of Alberta, as hitherto established, to be Chief Justice and President of the Appellate Division of the said Supreme Court as constituted under the Judicature Act of Alberta (9 Geo. V, c. 3) as amended and to be styled the Chief Justice of Alberta and to be an *ex-officio* Judge of the Trial Division of the said Court. On the same day the Governor-General, by additional Letters Patent appointed the Honourable Horace Harvey, described as Chief Justice of the Supreme Court of Alberta, as hitherto established, to be the Chief Justice of the Trial Division of the Supreme Court of Alberta and *ex-officio* Judge of the Appellate Division of the said Court. The salaries of the two Chief Justices are precisely equal.

Much reliance was placed in the Supreme Court of Canada, and an argument before their Lordships on the use of the word "continue" in the 3rd and 5th sections of the Act of 1919 and also upon the absence of any provision for the transfer of pending litigation to the new Court created by this statute of 1919 as amended. As used in Section 5, the word "continue" is rather meaningless, since the Appellate and Trial Divisions do not seem to have had any previous existence; but even if it be assumed that the use of the word continue in Section 3 preserves the existence of the old Supreme Court, their Lordships fail to see how that fact could disentitle the legislature of the Province of Alberta, endowed, as it is, with the power and charged with the duty of constituting, maintaining and organising the provincial Courts, both civil and criminal, including procedure in civil matters, from enacting that this Court shall consist of two branches or divisions and assigning to each branch certain portions of the business. The more so because each one of the Judges is a Judge of the Supreme Court, and each Judge is an *ex-officio* member of the Division to which he is not attached. In addition, the term Judge is in the definition clause (Section 2 of the Act of 1919) defined to be a Judge of the Supreme Court and to include a Chief Justice, so that apparently the Chief Justice of one Division may be an *ex-officio* Judge of the other Division. The words in Section 6," Four other Judges of the Court to be assigned to it by His Excellency," are not happily chosen; but the provision of Section 10 clearly shows this assignment of His Excellency does not involve in any way a withdrawal of a Judge assigned from his membership of both branches of the Supreme Court.

In their Lordships' view the scheme embodied in this sixth section of the Act of 1919, as amended, contemplates and for its working requires the appointment of two Chief Justices, one for each of the two indicated branches or divisions. They do not think that the fact that before this Act of 1919 was passed the Chief

Justice was Chief Justice of the Supreme Court prevented the legislature of Alberta from dividing the business of that Court into two branches, or necessarily entitled him to be or to be appointed Chief Justice of the Appellate Division, nor are they of opinion that his non-appointment to that office, or the appointment to it of the appellant, constituted an infringement or evasion of any legal right which he possessed, or to which he was entitled.

In their Lordships' view, therefore, the appeal succeeds. The questions put to the Supreme Court of Canada were not correctly answered. They think those questions should have been and should be now answered as follows :—

The first question should be answered yes.

The second by the words wholly effective.

The third, yes.

The fourth by the words " wholly effective."

The fifth, by the statement the said Horace Harvey is not entitled to hold the office or to exercise the functions of Chief Justice and President of the Appellate Division of the Supreme Court of Alberta, and that he is only entitled to hold the office on the Letters Patent dated the 15th September, 1921.

Their Lordships will humbly advise His Majesty accordingly.

There will be no order as to costs.

In the Privy Council.

THE HONOURABLE DAVID LYNCH SCOTT

v.

THE ATTORNEY-GENERAL OF CANADA AND OTHERS.

DELIVERED BY LORD ATKINSON.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C. 2,

1923.