

Edwards v. Canada (Attorney General)

In the Matter of a Reference as to the Meaning of the Word "Persons" in Section
24 of the British North America Act, 1867

The Supreme Court of Canada

Anglin C.J.C. and Duff, Mignault, Lamont and Smith JJ.

Judgment: March 14, 1928

Judgment: April 24, 1928

Anglin C.J.C.:

By Order of the 19th of October, 1927, made on a petition of five ladies, His Excellency the Governor in Council was pleased to refer to this court "for hearing and consideration" the question:

Does the word 'Persons' in section 24 of the *British North America Act*, 1867, include female persons?

.....

Section 24 is one of a group, or fasciculus of sections in the *British North America Act*, 1867, numbered 21 to 36, which provides for the constitution of the Senate of Canada. This group of sections (omitting three which are irrelevant to the question before us) reads as follows:

THE SENATE

21. The Senate shall, subject to the Provisions of this Act, consist of Seventy-two Members, who shall be styled Senators.

.....

23. The Qualification of a Senator shall be as follows:

(2) He shall be of the full age of Thirty Years;

(2) He shall be either a Natural-born Subject of the Queen, or 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 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 Francalleu 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 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.

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.

25. Such Persons shall be first summoned to the Senate as the Queen by Warrant under Her Majesty's Royal Sign Manual thinks fit to approve, and their Names shall be inserted in the Queen's Proclamation of Union.

26. If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Three or Six Members be added to the Senate, the Governor General may by Summons to Three or Six qualified Persons (as the Case may be), representing equally the Three Divisions of Canada, add to the Senate accordingly.

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32. When a Vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor General shall by summons to a fit and qualified Person fill the Vacancy.

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It should be observed that, while the question now submitted by His Excellency to the court deals with the word "Persons," section 24 of the B.N.A. Act speaks only of "qualified Persons"; and the other sections empowering the Governor General to make appointments to the Senate (26 and 32) speak, respectively, of "qualified Persons" and of "fit and qualified Persons." The question which we have to consider, therefore, is whether "female persons" are qualified to be summoned to the Senate by the Governor General; or, in other words – Are women eligible for appointment to the Senate of Canada? That

question it is the duty of the court to "answer" and to "certify to the Governor in Council for his information * * * its opinion * * * with the reasons for * * * such answer."
Supreme Court Act, R.S.C. [1927] c. 35, s. 55, subs. 2.

In considering this matter we are, of course, in no wise concerned with the desirability or the undesirability of the presence of women in the Senate, nor with any political aspect of the question submitted. Our whole duty is to construe, to the best of our ability, the relevant provisions of the B.N.A. Act, 1867, and upon that construction to base our answer.

Passed in the year 1867, the various provisions of the B.N.A. Act (as is the case with other statutes, *Bank of Toronto v. Lambe*) bear to-day the same construction which the courts would, if then required to pass upon them, have given to them when they were first enacted. If the phrase "qualified persons" in s. 24 includes women to-day, it has so included them since 1867.

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"In deciding the question before us", said Turner L.J., in *Hawkins v. Gathercole*, we have to construe not merely the words of the Act of Parliament but the intent of the Legislature as collected, from the cause and necessity of the Act being made, from a comparison of its several parts and from foreign (meaning extraneous) circumstances so far as they can be justly considered to throw light upon the subject.

Two well-known rules in the construction of statutes are that, where a statute is susceptible of more than one meaning, in the absence of express language an intention to abrogate the ordinary rules of law is not to be imputed to Parliament (*Wear Commissioners v. Adamson*); and, as they are framed for the guidance of the people, their language is to be considered in its ordinary and popular sense, per Byles J., in *Chorlton v. Lings*.

Two outstanding facts or circumstances of importance bearing upon the present reference appear to be

(a) that the office of Senator was a *new* office first created by the B.N.A. Act. It is an office, therefore, 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 within the four corners of the statute which creates the office, and enacts the conditions upon which it is to be held, and the persons who are entitled to hold it; (*Beresford-Hope v. Sandhurst* , per Lord Coleridge, C.J.);

(b) that by the common law of England (as also, speaking generally, by the civil and the canon law: *foeminae ab omnibus officiis civilibus vel publicis remotae sunt*) women were under a legal incapacity to hold public office, referable to the fact (as Willes J., said in *Chorlton v. Lings*, that in this country in modern times, chiefly out of respect to women, and a sense

of decorum, and not from their want of intellect, or their being for any other such reason unfit to take part in the government of the country, they have been excused from taking any share in this department of public affairs.

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While Willes, J., had spoken of "judicial and like public functions" at p. 388, the tenor of his judgment indicates unmistakably that it was his view that to the legal incapacity of women for public office there were few, if any, exceptions. See *De Sousa v. Cobden*.

The same idea is expressed by Viscount Birkenhead L.C., in rejecting The Viscountess Rhondda's Claim to a Writ of Summons to the House of Lords.

By her sex she is not -- except in a wholly loose and colloquial sense -- disqualified from the exercise of this right. In respect of her dignity she is a subject of rights which *ex vi termini* cannot include this right

Viscount Haldane, who dissented in the *Rhondda Case*, said, at p. 386:

The reason why peeresses were not entitled to it (the writ of summons) was simply that as women they could not exercise the public function. That appears to have been the considered conclusion of James Shaw Willes J., one of the most learned and accurate exponents of the law of England who ever sat on the Bench. He says in *Chorlton v. Lings* that the absence of all rights of this kind is referable to the fact that by the common law women have been excused from taking any part in public affairs.

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Moreover, paraphrasing an observation of Lord Coleridge C.J., in *Beresford-Hope v. Sandhurst*, it is not also perhaps to be entirely left out of sight, that in the sixty years which have run since 1867, the questions of the rights and privileges of women have not been, as in former times they were, asleep. On the contrary, we know as a matter of fact that the rights of women, and the privileges of women, have been much discussed, and able and acute minds have been much exercised as to what privileges ought to be conceded to women. That has been going on, and surely it is a significant fact, that never from 1867 to the present time has any woman ever sat in the Senate of Canada, nor has any suggestion of women's eligibility for appointment to that House until quite recently been publicly made.

Has the Imperial Parliament, in sections 23, 24, 25, 26 and 32 of the B.N.A. Act, read in the light of other provisions of the statute and of relevant circumstances proper to be considered, given to women the capacity to exercise the public functions of a Senator? Has it made clear its intent to effect, so far as the personnel of the Senate of Canada is concerned, the striking constitutional departure from the common law for which the petitioners contend, which would have rendered women eligible for appointment to the

Senate at a time when they were neither qualified to sit in the House of Commons nor to vote for candidates for membership in that House? Has it not rather by clear implication, if not expressly, excluded them from membership in the Senate? Such an extraordinary privilege is not conferred furtively, nor is the purpose to grant it to be gathered from remote conjectures deduced from a skilful piecing together of expressions in a statute which are more or less precisely accurate. (*Nairn v. University of St. Andrews*. When Parliament contemplates such a decided innovation it is never at a loss for language to make its intention unmistakable. "A judgment", said Lord Robertson in the case last mentioned, at pp. 165-6

is wholesome and of good example which puts forward subject-matter and fundamental constitutional law as guides of construction never to be neglected in favour of verbal possibilities.

There can be no doubt that the word "persons" when standing alone *prima facie* includes women. (Per Loreburn L.C., *Nairn v. University of St. Andrews*). It connotes human beings -- the criminal and the insane equally with the good and the wise citizen, the minor as well as the adult. Hence the propriety of the restriction placed upon it by the immediately preceding word "qualified" in ss. 24 and 26 and the words "fit and qualified" in s. 32, which exclude the criminal and the lunatic or imbecile as well as the minor, who is explicitly disqualified by s. 23 (1). Does this requirement of qualification also exclude women?

Ex facie, and apart from their designation as "Senators" (s. 21), the terms in which the qualifications of members of the Senate are specified in s. 23 (and it is to those terms that reference is made by the word "qualified" in s. 24) import that men only are eligible for appointment. In every clause of s. 23 the Senator is referred to by the masculine pronoun -- "he" and "his"; and the like observation applies to ss. 29 and 31. *Frost v. The King*. Moreover, clause 2 of section 23 includes only "natural-born" subjects and those "naturalized" under statutory authority and not those who become subjects by marriage -- a provision which one would have looked for had it been intended to include women as eligible.

Counsel for the petitioners sought to overcome the difficulty thus presented in two ways:

(a) by a comparison of s. 24 with other sections in the B.N.A. Act, in which, he contended, the word "persons" is obviously used in its more general signification as including women as well as men, notably ss. 11, 14 and 41.

(b) by invoking the aid of the statutory interpretation provision in force in England in 1867 -- 13-14 Vict., c. 21, s. 4, known as Lord Brougham's Act -- which reads as follows:

Be it enacted that in all Acts words importing the Masculine Gender shall be deemed and taken to include Females, and the Singular to include the

Plural, and the Plural the Singular, unless the contrary as to Gender or Number is expressly provided.

(a) A short but conclusive answer to the argument based on a comparison of s. 24 with other sections of the B.N.A. Act in which the word "persons" appears is that in none of them is its connotation restricted, as it is in s. 24, by the adjective "qualified." "Persons" is a word of equivocal signification, sometimes synonymous with human beings, sometimes including only men.

It is an ambiguous word, says Lord Ashbourne, and must be examined and construed in the light of surrounding circumstances and constitutional law *Nairn v. University of St. Andrews*.

In section 41 of the B.N.A. Act, which deals with the qualifications for membership of the House of Commons and of the voters at elections of such members, "persons" would seem to be used in its wider signification, since, while in both these matters the legislation affecting the former Provincial Houses of Assembly, or Legislative Assemblies, is thereby made applicable to the new House of Commons, it remains so only "until the Parliament of Canada otherwise provides." It seems reasonably clear that it was intended to confer on the Parliament of Canada an untrammelled discretion as to the personnel of the membership of the House of Commons and as to the conditions of and qualifications for the franchise of its electorate; and so the Canadian Parliament has assumed, as witness the *Dominion Elections Act*, R.S.C., 1927, c. 53, ss. 29 and 38. It would, therefore, seem necessary to give to the word "persons" in s. 41 of the B.N.A. Act the wider signification of which it is susceptible in the absence of adjectival restriction.

But, in s. 11, which provides for the constitution of the new Privy Council for Canada, the word "persons", though unqualified, is probably used in the more restricted sense of "male persons." For the public offices thereby created women were, by the common law, ineligible and it would be dangerous to assume that by the use of the ambiguous term "persons" the Imperial Parliament meant in 1867 to bring about so vast a constitutional change affecting Canadian women, as would be involved in making them eligible for selection as Privy Councillors. A similar comment may be made upon s. 14, which enables the Governor General to appoint a Deputy or Deputies.

As put by Lord Loreburn in *Nairn v. University of St. Andrews*:

It would require a convincing demonstration to satisfy me that Parliament intended to effect a constitutional change so momentous and far-reaching by so furtive a process.

With Lord Robertson (*ibid.* at pp. 165-6), to mere "verbal possibilities" we prefer "subject-matter and fundamental constitutional law as guides of construction." When Parliament intends to overcome a fundamental constitutional incapacity it does not employ such an equivocal expression as is the word "persons" when used in regard

to eligibility for a newly created public office. Neither from s. 11 or s. 14 nor from s. 41, therefore, can the petitioners derive support for their contention as to the construction of the phrase "qualified persons" in s. 24.

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We are, for these reasons, of the opinion that women are not eligible for appointment by the Governor General to the Senate of Canada under Section 24 of the British North America Act, 1867, because they are not "qualified persons" within the meaning of that section. The question submitted, understood as above indicated, will, accordingly, be answered in the negative.

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Reference Re a Reference as to Meaning of Word "Persons" in Section 24 of
British North America Act, 1867.

In The Matter of a Reference as to the Meaning of the Word "Persons" in Section
24 of The British North America Act, 1867.

Edwards et al (Plaintiffs) Appellants v. Attorney-General for Canada et al
(Defendants) Respondents

Judicial Committee of The Privy Council

Lords Sankey, L.C., Darling, Merrivale and Tomlin and Sir Lancelot Sanderson

Judgment: October 18, 1929

The judgment of their Lordships was delivered by *Lord Sankey, L.C.* :

By sec. 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.

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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.

As far back as *Stradling v. Morgan* (1560) 1 Plowd. 199, at 209, 75 E.R. 305, it was laid down that extraneous circumstances may be admitted as an aid to the interpretation of a statute and in *Herron v. Rathmines and Rathgar Improvement Commrs.*, [1892] A.C. 498, 67 L.T. 658, Lord Halsbury said:

The subject-matter with which the legislature was dealing, and the facts existing at the time with respect to which the legislature was legislating, are legitimate topics to consider in ascertaining what was the object and purpose of the legislature in passing the Act,

but the argument must not be pushed too far and their Lordships are disposed to agree with Farwell, L.J., in *Rex v. West Riding of Yorkshire County Council*, [1906] 2 K.B. 676, "although it may, perhaps, be legitimate to call history in aid to show what facts existed to bring about a statute the inferences to be drawn therefrom are exceedingly slight:" see *Craies Statute Law*, 3rd ed., p. 118.

Over and above that, their Lordships do not think it right to apply rigidly to Canada of to-day the decisions and the reasonings 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*.

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The Act consists of a number of separate heads.

The preamble states that the provinces of Canada, Nova Scotia and New Brunswick have expressed their desire to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland with a constitution similar in principle to that of the United Kingdom.

Head No. 2 refers to the Union; Head No. 3, secs. 9 to 16, to the executive power.

It is in sec. 11 that the word "persons" which is used repeatedly in the Act, occurs for the first time.

It provides that the persons who are members of the Privy Council shall be from time to time chosen and summoned by the Governor-General.

The word "person" as above mentioned may include members of both sexes, and to those who ask why the word should include females, the obvious answer is why should it not.

In these circumstances the burden is upon those who deny that the word includes women to make out their case.

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Such being the general analysis of the Act, their Lordships turn to the special sections dealing with the Senate.

It will be observed that sec. 21 provides that the Senate shall consist of 72 members who shall be styled senators. The word "member" is not in ordinary English confined to male persons. Sec. 24 provides that the Governor-General shall summon qualified persons to the Senate.

As already pointed out, "persons" is not confined to members of the male sex, but what effect does the adjective "qualified" before the word "persons" have?

In their Lordships' view it refers back to the previous section, which contains the qualifications of a senator. Subsecs. 2 and 3 appear to have given difficulties to the Supreme Court. Subsec. 2 provides that the qualification of a senator shall be that he shall be either a natural born subject of the Queen naturalized by an Act of Parliament of Great Britain or of one of the provincial Legislatures before the Union or of the Parliament of

Canada after the Union. The Chief Justice in dealing with this says that it does not include those who become subjects by marriage, a provision which one would have looked for had it been intended to include women as being eligible.

The attention of the Chief Justice, however, was not called to the *Aliens Act*, 1844 (7 and 8 Vict., ch. 66), sec. 16 of which provides that any woman married or who shall be married to a natural born subject or person naturalized shall be deemed and taken to be herself naturalized and have all the rights and privileges of a natural born subject. The Chief Justice assumed that by common law a wife took her husband's nationality on marriage, but by virtue of that section any woman who marries a natural born or naturalized British subject was deemed and taken to be herself naturalized. Accordingly, sec. 23, subsec. 2, uses language apt to cover the case of those who become British subjects by marriage.

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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, sec. 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 21 years 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 21 years or upwards shall have a vote.

Again in sec. 84 referring to Ontario and Quebec a similar proviso is found stating that every male British subject in contra-distinction to "person" shall have a vote.

Again in sec. 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 sec. 24 to male persons it would surely have manifested such intention by an express limitation as it has done in secs. 41 and 84. The fact that certain qualifications are set out in sec. 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 sec. 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.

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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 secs. 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. 187, column 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, viz., 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" is 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 sec. 24 includes members both of the male and female sex and that, therefore, the question propounded by the Governor-General must 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.