ELIGIBILITY OF WOMEN FOR THE SENATE.

Under ordinary circumstances, a criticism of a judgment of the Judicial Committee of the Privy Council is inadvisable, but a recent decision of that tribunal, in *Edwards et al* v. *The Attorney-General of Canada et al,* has attracted so much attention and has led to so much press criticism of the Supreme Court of Canada that proper respect for the administration of justice in Canada demands examination and comment.

Probably the first thought that will occur to one who makes a careful study of the two judgments is that while the Supreme Court, like the House of Lords, is a court of law, subject to all the restrictions which that fact implies[1] the Privy Council is a Committee advising the Sovereign, not bound to follow precedent nor to determine matters presented upon grounds of law alone, but entitled, if not obliged to advise on grounds of public policy, and to take into account matters of political expediency. Indeed, the Privy Council does not consider itself bound by its own previous decisions;[2] nor do English Courts regard judgments of the Privy Council as authoritative.[3]

It is not surprising therefore to find two fundamental differences between the judgment rendered in this matter by the Supreme Court of Canada and that of the Privy Council.

In the first place, the Supreme Court took the view that inasmuch as it was dealing with an Imperial statute passed in the year 1867, that fact necessarily afforded the basis of construction, following the line of cases of which *Sharp* v. *Wakefield,*[4] is perhaps that most frequently referred to.

The Privy Council judgment, however, says that:

> Their Lordships do not think it right to apply rigidly to Canada of today the decisions and the reasonings therefore 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.

[1] *London Street Tramways* v. *London County Council,* [1898] A.C. 375 at 381.

[2] *Tooth* v. *Power,* [1891] A.C. 284 at 292; *Re Transferred Civil Servants (Ireland) Compensation,* [1929] A.C. 242 at 247-252.

[3] *Abraham* v. *Deacon,* [1891] 1 Q.B. at 521; *G. N. Railway Company* v. *Swaffield* (1874), L.R. 9 Exch. 132 at 138.

[4] 23 Q.B.D. 239.

and again:

> The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits.

Again, the Supreme Court felt itself bound by a number of English decisions cited, some of them quite recent, to hold that the word "persons" is so ambiguous that, in using it, the Imperial Parliament could not be taken to have intended so distinct a departure from the common law as would be involved in making women eligible to appointment to the Senate of Canada. On the other hand, the Privy Council thinks that as a final Court of Appeal from all the different communities within the Brittanic System:

> This Board must take great care not to interpret legislation meant to apply to one community by a rigid adherence to the customs and traditions of another.

In other words, the doctrine of the English common law in regard to the ineligibility of women for public office must not be invoked in the construction of sec. 24 of the B.N.A. Act, although it is an enactment of the British Parliament, designed, as its preamble states, "to give to Canada a Constitution similar in principle to that of the United Kingdom."

The Lord Chancellor quotes with approval a passage from Clement's Canadian Constitution, 3rd Edition, at page 347:

> The Privy Council, indeed, has laid down that Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act to ensure the peace, order and good government of a British colony.

But it was in dealing with the British North America Act itself that the Privy Council said in the *Lambe* case,[5] that:

> Questions of this class have been left for the decision of the ordinary courts of law, which must treat the provisions of the Act in question by the same methods of construction and exposition which they apply to other statutes.

Moreover two cardinal rules of statutory interpretation applied by the Supreme Court precisely as they had been by the House of Lords when dealing, in the *Nairn* case,[6] with the right of women as

[5] 12 A.C. 575, at 579.
[6] [1909] A.C. 147.

"persons" to vote at a parliamentary election under an Act of 1868, are that where an affirmative statute is open to two constructions that construction ought to be preferred which is consonant with the common law,[7] and that the words of a statute must be construed as they would have been the day after the statute was passed.[8] These two rules of universal application have simply been brushed aside by the Privy Council.

It is true, as the judgment of the Privy Council points out, that in the *Lambe* case (*supra*) their Lordships were considering questions of legislative competence, either of the Dominion or its Provinces, which arise under sections 91 and 92; but it is difficult to understand why the provisions of the Act on which these questions arose should be subject to one rule of construction, and section 24 of the same Act to another; or why, for instance, in the one case the fact that the statute was enacted in 1867 must be borne in mind and effect given to the intent of the Parliament of that day, whereas, in the other, the Act must be considered in a broad and liberal spirit, and should (as a matter of political expediency?) be held to provide for the Canada of today, according to ideas now prevalent, however greatly they may differ from those which obtained when the statute was enacted. If, having regard to considerations of political expediency and the welfare of the State the statute can be construed in accordance with legal principles, so much the better; but, if not, those principles must yield to "the larger view" which political exigency dictates, the semblance of an observance of legal canons being given to the opinion delivered in order not too greatly to shock those who pin their faith to His Majesty The King in Council as the final Court of Appeal for all the countries of the British Commonwealth except England, Scotland and Northern Ireland.

The writers of the newspaper articles to which reference has been made appear to think that the Supreme Court had simply held that women are not "persons," and it is very unfortunate that this impression is not removed but rather strengthened by the phraseology of the judgment of the Privy Council. In point of fact, the Supreme Court made it abundantly plain that although the reference was as to the simple word "persons," it was impossible to deal satisfactorily with that word alone, in view of the fact that section 24 speaks of "qualified persons," and that section 32, which would have been much more apt as a subject matter for the reference, speaks of "a fit and qualified person" to fill a vacancy in the Senate. Incidentally, it may be remarked that up to the present

[7] *Rex* v. *Bishop of Salisbury* [1901] 1 Q.B. 573, 577.
[8] *Sharp* v. *Wakefield*, 23 Q.B.D. 239, at 243.

time it would seem to have escaped observation that section 24 deals only with original appointments to the Senate, all of which have been made for many years past, and that it is section 32 which provides for the filling of vacancies, and under which alone any practical question can now arise. It is not likely that this fact escaped the attention of the Supreme Court, which probably considered itself bound to answer the question as put, subject only to the modification of treating it as intended to ascertain whether women were "qualified persons" within the meaning of section 24, and as such eligible for appointment to the Senate. It is more than probable, however, that if women were "qualified persons" within section 24 they would be deemed to be "fit and qualified persons" within section 32.

But this is a digression, the point at the moment being that the Lord Chancellor says that:

> The Supreme Court was unanimously of opinion that the word "person" did not include female persons and that women are not eligible to be summoned to the Senate. Their Lordships are of the opinion that the word "persons" in section 24 *does* include women, and that women are eligible to be summoned to and become members of the Senate of Canada.

This is unfortunate, to say the least.

Not content with confining the subject of the reference, at page 281 of the report, so as to make it perfectly clear that the question answered related not to the word "persons" but to the words "qualified persons," the Chief Justice explicitly said at page 286:

> "Persons" is a word of equivocal significance, sometimes synonymous with human beings, sometimes including only men.

and he quoted from the judgment of Lord Ashbourne in *Nairn* v. *University of St. Andrews*:[9]

> It is an ambiguous word and must be examined and construed in the light of surrounding circumstances and constitutional principle and practice.

and, at page 288, he pointed out that "persons" is not a word importing the masculine gender, and that Lord Brougham's Act (the famous Interpretation Act) has no application to it. Again at page 285 he said that the word "persons" standing alone of course includes women, and at the very end of his judgment he stated that the Court was of opinion that women are not eligible for appointment to the Senate because they are not "qualified persons" within the meaning of section 24. It being so abundantly plain that the Supreme Court was dealing throughout with the phrase "qualified

[9] [1909] A.C. 147, at 162.

persons," it is indeed unfortunate that the suggestion should be once more made that it was interpreting the word "persons" only.

It may be well here to point out that the main judgment of the Supreme Court was written by the Chief Justice, with whom Mignault, J., Lamont, J., and Smith, J., concurred, Mr. Justice Mignault adding certain reasons of his own. These Judges held that the authority of *Chorlton* v. *Lings*,[10] and of a line of cases based upon it, is conclusive alike on the question of the common law incapacity of women to exercise such public functions as those of a member of the Senate of Canada, and on that of their being expressly excluded from the class of "qualified persons" within section 24 of the B.N.A. Act by the terms in which section 23 is couched, notwithstanding the provisions of Lord Brougham's Act. In reaching this conclusion they applied the rule already referred to, that the B.N.A. Act must bear today the same construction which the Courts would, if then required to pass upon it, have given to it when it was enacted. Mr. Justice Duff preferred to base his judgment upon the somewhat narrower position that the intrinsic evidence gathered from the Act itself showed that it contemplated a second chamber, the constitution of which should, in all respects, be fixed and determined by the Act itself, a constitution which was to be in principle the same as that of the Legislative Councils established by earlier statutes, although necessarily differing in details, and that under those statutes it was hardly susceptible of dispute that women were not eligible for appointment. It will thus be noted that the Judges of the Supreme Court were unanimous in answering the question put in the negative, that question being understood to mean—"Are women eligible for appointment to the Senate of Canada?"

We thus find that all the Judges of the Supreme Court are in accord with the Lord Chancellor when he states, as he does at the outset of his judgment, that two points to be considered in the interpretation of an Act of Parliament are (1) the external evidence derived from extraneous circumstances such as previous legislation and decided cases, and (2) the internal evidence derived from the Act itself.

Dealing first with external evidence, the Lord Chancellor points out that the exclusion of women from public office is a relic of barbarism, and quotes from Tacitus Germania to show that the reason of it was that women did not bear arms, whereas men attending deliberative Assemblies were obliged to do so. Yet he adds, again

[10] (1868) L.R. 4 C.P. 374.

quoting Tacitus Germania, that the tribes did not despise the advice of women. He proceeds to say that this exclusion of women from public affairs found its way into the opinion of Roman jurists, Ulpian (A.D. 211) laying it down "Feminae ad omnibus officiis civilibus vel publicis remotae sunt." The Chief Justice of Canada had used this same quotation in his judgment, at page 283, and like the Lord Chancellor, had referred to the historical genesis of the incapacity of women at common law to hold public office, although the Chief Justice had carried the matter to modern days by referring to such cases as *Beresford-Hope* v. *Lady Sandhurst*,[11] and the *Viscount Rhondda* case.[12] It is therefore difficult to understand why the Lord Chancellor should a little later have used this language:

> 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 B. N. A. Act of 1867. Their Lordships fully appreciate the learned arguments set out in his judgment, but prefer, etc.

It may perhaps be observed that a line of argument thought good and relevant by such an outstanding Judge as Willes, J., in considering the interpretation of an English statute of 1867, scarcely deserved a sneer when used by the Chief Justice in connection with another statute passed in the same year and by the same Parliament.

The Lord Chancellor then goes on to discuss the legal incapacity of women in England to serve in Parliament, citing the *Rhondda* case which held them excluded from the House of Lords, and quoting with approval an observation of Lord Esher in *De Souza* v. *Cobden*,[13] that by the common law of England women are not in general deemed capable of exercising public functions. He also refers to *Bebb* v. *The Law Society*,[14] where the Court of Appeal held women to be under a disability *by reason of their sex* to become attorneys or solicitors.

The Lord Chancellor next refers to *Chorlton* v. *Lings*,[15] where the question was as to the right of women to vote at a Town Councillor's election, and where, dealing with Lord Brougham's Interpretation Act of 1850, the Court of Common Pleas held it insufficient to bring women within the term "every man," having regard to the important departure from the common law involved. He then ad-

[11] [1889] 23 Q.B.D. 79 at 91.
[12] [1922] 2 A.C. at 389.
[13] [1891] 1 Q.B. 687, at 691
[14] [1914] 1 Ch. 286.
[15] 1868, L.R. 4 C.P. 374.

verts to *Nairn* v. *University of St. Andrews*'[16] where, in a statute of 1868, providing for voting at an election of a Member of Parliament to represent the University of St. Andrews, the House of Lords held that the word "person" did not include women. He pointedly alludes to the reference of Loreburn, L.C., to the "legal incapacity of women," the inference obviously intended being that the judgment of the House of Lords turned upon the presence in the statute then being dealt with of the words "not subject to any legal incapacity."

Lord Loreburn did refer to the words "not subject to any legal incapacity" at page 161, where he said of them that:

> . . . . by this limitation, if not otherwise, women are excluded. If the word "persons" in section 27 of the Act of 1868 is wide enough to comprise women, then they are shut out by the exception of those "subject to legal incapacity." If the word "persons" is not wide enough to include women, —*Cadit quaestio.*

Two of the other learned Lords, Lord Ashbourne and Lord Robertson, expressly state that their judgments in nowise depend upon the presence of the words "not subject to legal incapacity," the fourth member of the House, Lord Collins, merely concurring in the result.

The Lord Chancellor proceeds, however, to add, referring to the *Nairn* case (*supra*):

> Both in this case and in the case of Viscountess Rhondda, the various judgments emphasize the fact that the Legislature in dealing with the matter cannot be taken to have departed from the usage of centuries or to have employed loose and ambiguous words to carry out a so momentous and fundamental change. The judgment of the Chief Justice of the Supreme Court of Canada refers to and relies upon these cases, but their Lordships think that there is great force in the view taken by Mr. Justice Duff with regard to them, when he says that section 24 of the British North America Act, 1867, must not be treated as an independent enactment.

The inference obviously intended to be drawn is that section 24 had been treated as an independent enactment by the Chief Justice and those Judges who agreed with him, which is quite contrary to the fact. In several places in his judgment, and particularly at page 285, the Chief Justice makes it apparent that the Act was considered as a whole.

The Lord Chancellor then proceeds to discuss ante-confederation legislation throughout Canada and says that in none of the early statutes was there any adjectival qualification to warrant the in-

[16] [1909] A.C. 147.

ference that "persons" as used in these various Acts was meant to exclude females. But the Act of 1784, establishing a separate Government for New Brunswick, speaks of the Council "composed of certain named persons and other persons . . . required to be men of good life." Reference may also be made to Acts of Canada of 1834 and 1839 and of Nova Scotia of 1859.

The Lord Chancellor then quoted the judgment in *Herron* v. *Rathmines and Rathgar Improvement Commissioners*,[17] where Lord Halsbury said that:

> 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 in ascertaining what was the object and purpose of the Legislature in passing the Act.

Yet, notwithstanding this, the Lord Chancellor in the present judgment says:

> The communities included within the Britannic System embrace countries and peoples in every state of social, political and economic development and undergoing a continuous process of evolution.
>
> His Majesty the King in Council is the final Court of Appeal from all these communities and this Board must take great care therefore not to interpret legislation meant to apply to one community by a rigid adherence to the customs and traditions of another.
>
> 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.

and he again refers to Clement's Canadian Constitution, (Ed. 3) page 347, and the argument of Sir Oliver Mowat and Mr. Edward Blake before the Privy Council in the *St. Catharines Milling* case,[18] with which,

> their Lordships agree, but as was said by the Lord Chancellor in *Brophy* v. *The Attorney-General of Manitoba*,[19] the question is not what may be supposed to have been intended, but what has been said.

Passing over the apparent inconsistency of one of these paragraphs with recent pronouncements of the Imperial Conferences to the effect that Canada is a full partner in the British Commonwealth with the same standing and rights as Great Briain itself, and noting the suggestion that their Lordships are applying the canon of sound

[17] [1892] A.C. 498.
[18] 14 A.C. 46.
[19] [1895] A.C. 202, at 216.

legal construction that it is the expressed intention of Parliament and not the supposed intention which is to be considered, one wonders how this canon can be invoked in a judgment which avowedly proceeds on the view that to the Canada of today the English decisions and reasonings therefor are not to be rigidly applied in interpreting an Act which creates a constitution for that new country. It is quite obvious that His Lordship deals with the Act, not as one enacted in 1867 by the Imperial Parliament, but as if it had been passed in the light of developments since 1916 in regard to the status of women.

In that portion of the judgment of the Lord Chancellor which summarizes the provisions of the B.N.A. Act one is rather surprised to find this expression of opinion:

> 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.

One would have thought that the obvious answer to a legal mind would be to refer to the judgment of the House of Lords in the *Nairn* case,[20] where Lord Ashbourne said:

> The Parliamentary franchise has always been confined to men and the word "person" cannot by any reasonable construction be held to be prophetically used to support an argument founded on a statute passed many years later,

which rather suggests that the burden was upon those who affirmed an intention of the framer of the statute to depart from the well known doctrine of the common law. It was in the *Nairn* case also that Lord Loreburn said, in effect, that, inasmuch as it was notorious that the right of voting had been confined to men, it seemed to him incomprehensible that anybody should imagine that at common law women were not under the legal disability already referred to. He thinks that, if this legal disability is to be removed, it must be done by Act of Parliament, and, at page 161 of the report, he says:

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

Lord Robertson is equally strong in his expression of opinion and concludes by saying:

> I think that a judgment is wholesome . . . which puts forward subject matter and constitutional law as guides of construction never to be neglected in favour of verbal possibilities.

[20] [1909] A.C. 147.

One wonders if this judgment, delivered in 1909, is one of "the early English decisions" which the Lord Chancellor considers to be out of date.

It is rather remarkable that although the Lord Chancellor expresses concurrence with Mr. Justice Duff with reference to an incidental question arising out of the use of the masculine personal pronoun in section 23 of the B.N.A. Act, and again with another incidental reference to section 33 of the Act, no attempt is made to deal with the substance of the judgment of that learned Judge. It is well known that the Canadian Senate was designed for the protection of Provincial and minority rights. It is therefore easy to understand the reason why, while provision is made in the B.N.A. Act for alteration by the Parliament of Canada of the qualifications or disqualifications of persons entitled to be elected to the House of Commons, the Imperial Parliament alone is empowered to alter the Constitution of the Senate. If at the time of Confederation provision was made for a Senate which did not include women, the fact that women subsequently became eligible for membership in the House of Commons has no bearing whatever upon the question of their eligibility for membership in the Senate. The somewhat lengthy and learned argument as to whether or not their qualification for membership in the House of Commons carries with it the right to become members of the Privy Council is entirely academic if one realizes that it cannot have been the intention of the framers of the B.N.A. Act that the Constitution of the Senate might at any time become a football of politics in Canada. This idea is developed by Mr. Justice Duff in his judgment, and it is rather remarkable that no attempt has been made to displace his reasoning.

There is an incidental reference to the objection of Mr. Justice Duff based upon the ground that sub-section 2 of section 23 points to the exclusion of married women and would have been differently expressed had the presence of married women been contemplated, which the Lord Chancellor seeks to meet by section 1 of chapter 73 of the Consolidated Statutes of Upper Canada, 1859. It should be noted that this section is confined in its application to women married since 4th May, 1859, without any marriage contract or settlement. There must have been many thousands of married women in Upper Canada in 1867 who did not fulfil these requirements, and the section of course does not cover married women in Quebec, New Brunswick and Nova Scotia. Quebec may be a question. One naturally asks if some married women in Ontario were qualified and others not qualified and can it be that none

at all being qualified in the other Provinces, Ontario was the only Province from which married women were eligible for the Senate? The difficulty raised by Mr. Justice Duff seems hardly to be met by this section.

The Lord Chancellor concludes by summing up the grounds of the judgment as follows:

> . . . 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 section 24 includes members of both 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.

In regard to,

(1). Presumably this is the real basis of the judgment of the Privy Council and accounts for the consideration of extraneous matters not being confined to "the facts existing at the time" the statute was enacted,[21] but rather for the words of section 24 being treated, as put by Lord Ashbourne, "as prophetically used," anticipating developments in regard to the status and rights of women undreamt of in 1867, and of which no trace is to be found in Canadian legislation until 1916.

(2). This being the position taken in the Supreme Court, it scarcely affords a ground for the reversal of its unanimous judgment.

(3). The only section mentioned in the judgment, which can here be meant, is s. 11, dealing with appointments to the Canadian Privy Council. The situation on which this ground of judgment rests, viz., the presence of women in the House of Commons, did not arise until after 1916.

(4). With the utmost respect, the expression "male persons" is *nowhere* to be found in the B.N.A. Act. Allusion was made, in the preceding page of the judgment, to such an "express limitation"

[21] *Herron* v. *Rathmines and Rathgar Improvement Commissioners*, [1892] A.C. 498.

being found in ss. 41 and 84. Not only is there no such "express limitation" in either of those sections, but the inference is reasonably clear that the words, "persons qualified by law to vote," did not include women, as otherwise the special extension of the franchise for Algoma to every householder of the age of twenty-one years or upwards, who is a male British subject, would involve a most invidious limitation by excluding women from the extended franchise—something almost incredible. The words "male British subject" are not, therefore, used in contradistinction to "persons qualified" so as to imply in the latter the inclusion of women. On the contrary, as the judgment itself says, in a previous passage.

> . . . up to 1916 women were excluded from the class of persons entitled to vote in both Federal and Provincial elections.

(5). The word "persons" being admittedly equivocal, Lord Brougham's Act has no bearing upon it, inasmuch as its purview is confined to expressions connoting the male gender; *a fortiori*, is this so if there be a presumption that the word "persons" includes females. As to its bearing on the use of the masculine pronoun in s. 23, etc., *Chorlton v. Lings*,[22] above referred to, seems conclusive against giving any effect to it in the present case.

Going back to the original proposition, it must seem evident to one who carefully considers the judgment that it is not written in strict accordance with well understood legal principles, and can be explained only by bearing in mind the proposition firstly outlined that there is the outstanding difference between the Supreme Court of Canada and the Privy Council that the one is a Court of law, subject to all the restrictions of a Court of law, and that the other has no limitations at all, is not bound to follow precedent nor to determine matters upon grounds of law alone but is entitled, if not obliged, to advise His Majesty on grounds of public policy and to take into account matters of political expediency. It has been rather plainly suggested that those now in authority in Canada wished the judgment to be as it is, and it is not impossible that, if this is the fact, the learned Law Lords had knowledge of that fact; but one wonders if the average Canadian would care to think that judicial legislation has altered the constitution of the Senate of Canada.

Ottawa.

GEO. F. HENDERSON.

[22] (1868) L.R. 4 C.P. 374.