British Columbia v. Homma

In re the Provincial Elections Act and
In re Tomey Homma, a Japanese

[1901] B.C.J. No. 20

8 B.C.R. 76

British Columbia Supreme Court
Vancouver, British Columbia

Walkem, Drake and Martin JJ.

Heard: March 8, 1901.
Judgment: March 9, 1901.
British Columbia Supreme Court - Full Court
Vancouver, British Columbia
McColl C.J., Walker, Irving
and Martin JJ.
March 21, 1901.

On 9th March, the Court [...] judgment dismissing the appeal with costs and subsequently written judgments were delivered as follows by

[Editor's note: [...] in this paragraph indicates places where the copy of this decision was missing one or more words.]

1 WALKEM J.:-- The facts which have given rise to this appeal are that Tomey Homma, a naturalized Japanese, applied to the Collector of Voters for Electoral District of Vancouver City, to have his name entered on the Register of Voters. The Collector refused to make the entry, as he considered that he was prohibited from doing so by section 8 of the Provincial Elections Act (hereafter referred to as the Franchise Act), which is as follows:

> "No Chinaman, Japanese, or Indian shall have his name placed on the Register of Voters for any Electoral District, or be entitled to vote at any election. Any Collector of Voters who shall insert the name of any Chinaman, Japanese, or Indian on any such Register shall, upon summary conviction thereof before any Justice of the Peace, be liable to a penalty not exceeding fifty dollars."

According to section 3, R.S.B.C. 1897, Cap. 67:

> "The expression 'Japanese' is to 'mean any native of the Japanese Empire or its dependencies not born of British parents and ... include any person of the Japanese race, naturalized or not.'"

2 Tomey Homma appealed to the County Court, with the result that the learned Chief Justice ordered his name to be placed on the Register on the ground that the above enactment, in so far as it purports to affect naturalized Japanese, was ultra vireo of the Provincial Legislature. From this order the Collector now appeals.

3 The question thus raised, is undoubtedly one of great constitutional importance; and whether the Legislature had the power to pass the enactment or not depends upon the meaning of sections 91 and 92 of the B.N.A. Act, as they are the respective sources of the separate legislative powers possessed by the Dominion and the Provinces. In apportioning those powers, section 91 has given the Dominion Parliament exclusive control of the several subjects enumerated in it, as well as of all others that are not specifically assigned to the Provincial Legislatures by section 92, and concludes with the following paragraph:

> "And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces."

4 This paragraph, when read in conjunction with the first part of section 91, is referred to in the judgment of Sir Montague Smith in the case of the Citizens and Queen Insurance Coq. v. Parsons (1881), 7 App. Cas. at p. 108, as an "endeavour to give preeminence to the Dominion Parliament in cases of a conflict of powers; but, as he has further observed, the Imperial "Legislature could not have intended that the powers assigned to the Provincial Legislatures should be absorbed in those given to the Dominion Parliament," and hence, it is for the Courts to decide as best they cannot upon any general principle, but on the facts of each case in which a conflict occurs - where the dividing line as to jurisdiction should be drawn. Again, it must be borne in mind that the above paragraph has been held to apply to all the subjects enumerated in section 92, and not merely, as has been contended by counsel for the appellant, to the local matters mentioned in clause 16 of that section. Attorney General far Ontario v. Attorney General far the Dominion (1896), A.C. 348 at pp. 359, 360.

5 Following the practice of the Privy Council in cases like the present one, one must ascertain, first, whether the subject-matter of the impeached enactment falls within any of the legislative powers of the Province enumerated in section 92, and, if it does, whether there is anything in section 91 which has the effect of virtually withdrawing it from the purview of section 92, or, in other words, of cutting down the full meaning of that section, and thereby invalidating the enactment.

6 The case on behalf of the appellant is, in effect, that as the enactment relates to the electoral franchise, and, hence, to the Constitution of the Province, it is intra vires by virtue of subsection (1) of section 92, which places "the amendment of the Constitution ... save as to the office of Lieutenant-Governor," under the exclusive control of the local Legislature; and, furthermore, that as the subject of Naturalization and Aliens is a matter that, in this instance, is incidental to the franchise, it has necessarily been dealt with in the enactment, but only in that limited sense. On the other hand, it is said that, as sub-section 25 of section 91 places the subject of Naturalization and Aliens under the exclusive authority of the Parliament of Canada, the enactment is invalid, as it trenches on that authority.

7 Much may be said in favour of its validity; for instance, that the real or primary object of the Legislature in passing the statute of which it forms part was not to deal with Naturalization and Aliens as a substantive question, but to establish such a system of franchise as would best subserve the interests of the Province - a matter that is obviously, one of a purely local nature. By section 15 of the Naturalization Act of Canada (R. S., Cap. 113):

> "An alien to whom a certificate of naturalization is granted shall, within Canada, be entitled to all political and other rights, powers and privileges, and be subject to all obligations to which a natural-born British subject is entitled or subject within Canada."

8 The term "political rights" is a very wide expression, and is defined as "being those rights which belong to a nation, or to a citizen, or to an individual member of a nation; as distinguished from civil rights, namely, local rights of a citizen." - (Ency. Dict.) But whatever the terms may mean, it cannot affect the question before us, for all that the section, in effect, says is that an alien, when naturalized, shall, within the several Provinces of Canada, have all the ordinary and inherent rights and privileges of a Canadian, or of a natural-born British subject. Now, no Canadian or natural-born British subject has an inherent right to the franchise, and, a fortiori, a naturalized alien can have none, for the franchise is not a matter of right, but is a statutory privilege which can only be acquired by such persons, and under such conditions as are mentioned in the Franchise Act. In other words, the power of acquiring the privilege is not extended to all classes of Canadians alike, for, after declaring who shall be entitled to it, the Act proceeds to name a number of classes, including the four following, from whom it shall be withheld, viz.: the Judges of the Supreme and County Courts, Sheriffs and their deputies employees of the Provincial Government in receipt of over $300.00 per annum, and officers and men of His Majesty's army and navy on full pay - all, or at least a large majority, of these classes being, it is safe to say, British subjects. No reason is assigned for their disfranchisement, nor is any needed in view of the well-understood constitutional rule that what a Legislature does in presumed to have been done in the best interests of the community it represents. It is manifest that these observations equally apply to the disfranchisement of the naturalized Chinese and Japanese. Moreover, it may be fairly inferred that they are not disfranchised on account of their being naturalized aliens, because, if that were so, it is only reasonable to suppose that the enactment would have included all aliens, of whatever nationality, who have been, or may hereafter be, naturalized in this country. As it seems to me, the Legislature was obliged to refer to them in the enactment as "naturalized aliens" for descriptive purposes as, apparently, there was no other means of describing them. Under the circumstances, I think it must be assumed that the Legislature has considered that these two particular classes of Canadians, for such they are when naturalized, ought not, on grounds of public policy, to be entrusted with the franchise.

9 Another point in favour of the enactment is that its validity is to be presumed until the contrary is clearly shewn. Furthermore, it must be so construed as to bring it within the legislative authority that is questioned - Macleod v. Attorney General for New South Wales (1891), A.C. 455.

10 I have thus endeavoured to state the case of the Province as fully as possible, but merely with a view of shewing that none of the points I have mentioned have been overlooked, for the Court is bound to disallow this appeal, as the Judicial Committee has held that "the Legislature of the Dominion is invested with exclusive authority in all matters which directly concern the rights, privileges, and disabilities" of aliens resident in Canada, whether naturalized or not - Union Colliery Company of British Columbia, Limited v. Bryden (1899), A.C. at p. 587.

11 There will be no order as to costs.

12 DRAKE J.:-- This is an appeal against the judgment of the Chief Justice allowing the name of Tomey Homma, a naturalized Canadian, to be placed on the list of voters for the Riding of Vancouver City Electoral District.

13 The appellant in this case is the Collector of Voters for the above district. He relies on Cap. 67, R.S.B.C. 1897. Section 7 of that Act says that, "Every male of full age not being disqualified by this Act, or by any other law in force in this Province, being entitled within the Province to the privileges of a natural-born British subject shall be entitled to vote." Section 8 says that, "No Chinaman, Japanese or Indian shall have his name placed on the Register of Voters for any Electoral District, or be entitled to vote at any election."

14 If these sections stood alone no question could be raised, as all persons entitled to the privileges of a natural-born British subject are entitled to vote; but in clause 3 of the Act the expression "Japanese" shall mean any native of the Japanese Empire or its dependencies not born of British parents, and shall include any person of the Japanese race whether naturalized or not - this, it is contended, excludes British subjects of Japanese origin, as well as all persons naturalized by the Dominion Legislature.

15 It is the latter part of this section which is objected to, and claimed to be ultra vires. Mr. Wilson on the part of the appellant, contends that under section 92 of the B.N.A. Act the Provincial Legislatures have exclusive right to make laws on the various subject-matters in that section contained, especially on the subject of the constitution of the Provinces; but that section is governed by the last few lines of section 91, which says any matter coming within any of the classes of subjects enumerated in section 91 shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects assigned exclusively to the Provincial Legislature by section 92. The meaning of this is that, where the subjects assigned to the Dominion Parliament in any way overlap or affect the subjects assigned to the Provincial Legislature, the right of the Dominion to legislate shall not be affected, and the Provincial rights shall be subject to such Dominion legislation as far as such legislation extends. Mr. Wilson relies on the right of the Provincial Legislature to establish, alter or amend the constitution, sub-section 1 of section 92.

16 The term "constitution" includes the persons who are entitled to seats in the Legislature; the mode of election; the formation of electoral districts; the right of voting, and the rules and regulations relating to the registration of voters; and all other matters of a similar nature; and the only limitation expressed is that the office of Lieutenant-Governor is excluded from the Provincial control. This exclusion, he contends, emphasises the otherwise absolute powers conferred on the Provincial Legislature. Notwithstanding the generality of the language thus used, if under section 91 there is any matter which the Dominion Parliament has under the powers conferred on them expressly legislated, and which thereby affects the Provincial constitution, the constitution must be held subject to such legislation.

17 We find that sub-section 24 of section 91 gives to the Dominion Government the subjects connected with naturalization and aliens, and they have legislated on this subject; and by section 15, an alien duly naturalized shall be entitled to all political and other rights, powers and privileges, and subject to all obligations to which a natural-born British subject is entitled. In other words, he is a British subject; and being a British subject, the Legislature cannot take away from him the rights

which the Naturalization Act has granted him, neither can they draw a distinction between one British subject and another. They can, and they do, say that British subjects holding certain offices shall not be placed on the voting list, but such officials have not had the political rights expressly conferred on them by a paramount authority. In the case of Union Colliery Company of British Columbia, Limited v. Bryden (1899), A.C. 587, the Privy Council say that the Dominion Legislature, by section 91, sub-section 25, is invested with exclusive authority in all matters which directly concern the rights, privileges and disabilities of the class of Chinamen who are resident in the Provinces of Canada, and a fortiori Japanese. They were also of opinion that the pith of the Coal Mines Regulation Act consisted in establishing a statutory prohibition which affected aliens or naturalized subjects, and therefore trenched on the exclusive authority of the Parliament of Canada. The subject of naturalization includes the power of enacting what shall be the consequences of naturalization, or, in other words, what shall be the rights and privileges pertaining to residents in Canada after they have been naturalized.

18 Every alien when naturalized becomes ipso facto a Canadian subject of the King. As regards aliens the Provincial Legislature can refuse them the franchise, as they have no status to claim political privileges; but when naturalized, section 15 gives to aliens naturalized all the political and other rights, powers and privileges, and subject to all the obligations to which a natural-born British subject is entitled or subject within Canada.

> "Political rights, powers and privileges" are very general terms, and import the right of exercising the franchise, and of representing the electors in Parliament - subject, of course, to fulfilling the statutory requirements as to registration, etc. The Dominion having granted political rights to naturalized aliens, the Provincial Legislature should not treat the Dominion Act as nugatory. The question is one of some difficulty. It has been held by the Privy Council that as regards those subject-matters which are under the sole control of the Province, the Province has sovereign rights; but, as I have pointed out, this question of political rights granted to aliens is within the scope of the powers of the Dominion Parliament, and as the Dominion has granted political rights to naturalized aliens, I think it is beyond the powers of the Provincial Legislature to say that these persons shall not exercise those rights.

19 For these reasons I think the appeal should be dismissed.

20 MARTIN, J., concurred with WALKEM, J.

On 21st March, 1901, Maclean, D.A.-G., applied to the Full Court consisting of McCOLL, C.J., WALKEM, IRVING and MARTIN, JJ., for leave to appeal direct to the Privy Council.

Harris, contra: No appeal is provided for by the Provincial Elections Act. Sub-section (a) of section 1 of the Privy Council Rules requires that the matter in dispute shall exceed 300 pounds. The importance of the case is not a ground for leave to appeal. This is not a "case" or "suit" - no suit was ever commenced and no pleadings ever issued. He cited Allan v. Pratt (1888), 13 App. Cas. 780; Canadian Land and Emigration Company v. The Municipality of Dysart et al (1885), 12 A.R. 80 and Attorney General of Nova Scotia v. Gregory (1886), 11 App. Cas. 229.

Maclean: No Act of the Provincial Legislature does contemplate an appeal to the Privy Council as it is a matter of prerogative. By section 2 of the rules there is even an appeal in interlocutory matters. Madden v. Nelson and Fort Sheppard Railway Company (1897), 5 B.C.R. 670 is an authority for allowing the appeal. In that case McCREIGHT, J., held that the expression "civil right" in the rules included a "franchise" and although he there may have had in contemplation another kind of franchise, still the franchise or right to vote is the highest, kind of franchise and may be considered of much greater value than 300 pounds. The Court should be guided by the same rules as would be followed by the Lords of the Privy Council if the application came before them.

21 PER CURIAM (IRVING, J., dubitante):-- The application is allowed. We think that Bryden v. Union Colliery Company of British Columbia, Limited (1899), A.C. 580, is sufficient authority that if this application was before the Judicial Committee the appeal would be allowed, and therefore we are of opinion that we should grant the leave asked.

22 Security should be given in the usual sum of 500 pounds as the Crown is not the appellant.