BETWEEN:

ERNEST SMITH MARTINDALE .....SUPPLIANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

1956
May 28-29
1957
June 27

Crown—Petition of Right—Civil Service Superannuation and Retirement Act, R.S.C. 1906, c. 17, s. 2(a)—Civil Service Act, 1918, S. of C. 1918, c. 12, ss. 9(2), 45B(1)—Civil Service Superannuation Act, S. of C. 1924, c. 69, s. 2(b)—Civil Service Superannuation Act, R.S.C. 1927, c. 24, ss. 2(b), 15, 16, 20—Public Service Superannuation Act, S. of C. 1952-53, c. 47, ss. 9(1), 24(2)—Order in Council P.C. 2958, dated December 16, 1920—Order in Council P.C. 208/1426, dated June 30, 1922—Order in Council P.C. 52/517, dated April 6, 1925—Statutory right to superannuation annuity or allowance—Per diem rate of pay not a yearly salary or stated annual salary—Presumption against retrospective operation of statute—Order in Council no effect beyond that authorized by empowering Act.

The suppliant, a retired civil servant, became in 1909 a temporary employee in the Topographical Surveys Branch of the Department of the Interior on a per diem wage. As from April 17, 1919, his position

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was that of Chief of Survey Party at $9.00 per day. Under the authority of Order in Council P.C. 2958, dated December 16, 1920, the Civil Service Commission approved a recommendation from the Deputy Minister of the Interior that certain temporary employees of the Department, including the suppliant, be granted permanent status. The recommendation was concurred in by the Treasury Board and approved by Order-in-Council P.C. 208/1426, dated June 30, 1922, pursuant to which the suppliant became a permanent official of the Department of the Interior as from April 1, 1921. The *Civil Service Superannuation Act* came into force on July 19, 1924, at which time the suppliant, although he had been granted the status of permanency, was still on a per diem rate of pay. Subsequently, Order in Council P.C. 52/517, dated April 6, 1925, was enacted pursuant to which certain officials of the Topographical Surveys Branch of the Department of the Interior, including the suppliant, were reclassified on an annual salary basis with effect from April 1, 1924. On the assumption that this Order in Council had the retroactive effect of putting him in the same position as if he had been in receipt of an annual stated salary on April 1, 1924, the suppliant elected to become subject to the *Civil Service Superannuation Act*.

On May 20, 1953, the suppliant was retired and his superannuation was calculated on the basis of the average of the salary received by him during the last ten years of his service on the ground that he did not become a civil servant until after July 19, 1924, and that Part I of the *Civil Service Superannuation Act*, and not Part II or Part IV, applied to him. The suppliant protested and brought a petition of right seeking a declaration that he is entitled to the benefit of Part II of the *Civil Service Superannuation Act* and section 24(2) of the *Public Service Superannuation Act* and that his superannuation annuity or allowance should be calculated on the basis of the average of the salary received by him during the last five years of his service.

Held: That a person who has complied with the requirements of the *Public Service Superannuation Act* has a statutory right to the superannuation annuity or allowance under it and that if it is wrongfully withheld from him a petition of right lies for its recovery.

2. That in order that a person should be held entitled to the said superannuation annuity or allowance it must be shown that every condition prescribed by the statute that created it has been complied with and the onus of proof of such compliance lies on the person who asserts the right.

3. That a per diem rate of pay is not a "yearly salary" or a stated annual salary: *Naylor v. Peacehaven Electric Light and Power Company, Limited* (1930-31) 47 T.L.R. 535 at 537 followed.

4. That at the date of the coming into force of the *Civil Service Superannuation Act*, namely, July 19, 1924, the suppliant was not subject to the provisions of the *Retirement Act* in that, at such date, he was not being paid a "yearly salary" and was not, therefore, a member of the Civil Service for the purposes of the *Civil Service Superannuation and Retirement Act*, within the meaning of section 2(*a*) of that Act, and that, consequently, he did not come within the ambit of section 15 of the *Civil Service Superannuation Act* and Part II of that Act did not apply to him.

5. That on July 19, 1924, the suppliant was not a civil servant within the meaning of section 2(*b*) of the *Civil Service Superannuation Act* in

that, at such date, he was not in receipt of "a stated annual salary", as required by the section, and that, consequently, he did not come within the ambit of section 20 of the Act and Part IV of the Act did not apply to him.

6. That it is a fundamental rule that, except in respect of procedure, a statute shall not be construed as having a retrospective operation unless the intention that it shall have such operation clearly appears in it, either in express terms or by necessary implication.

7. That an Order in Council, being delegated legislation, cannot have an effect beyond that which is authorized by the Act which empowers its enactment.

8. That the Governor in Council does not have authority to pass an Order in Council unless the Act of Parliament under the authority of which it is passed, either expressly or by necessary implication, empowers its passing.

9. That Order in Council P.C. 52/517 of April 6, 1925, was passed under the authority of section 9(2) and 45B(1) of the *Civil Service Act,* 1918, and there is no indication in that Act or in any Act empowering the Governor in Council to pass an Order in Council having the retroactive effect expressed in the Order in Council.

10. That the Governor in Council did not have authority to make Order in Council P.C. 52/517 of April 6, 1925, retroactively effective to put the suppliant in the position of being in receipt of a stated salary as at April 1, 1924, as it purported to do.

11. That Order in Council P.C. 52/517 of April 6, 1925, was not effective to entitle the suppliant to have his superannuation calculated on the basis of the average of the salary received by him during the last five years of his service.

12. That the suppliant is not entitled to any of the relief sought by him.

PETITION OF RIGHT.

The petition was heard by the President of the Court at Ottawa.

J. C. Osborne, Q.C., and *Paul P. Hewitt* for suppliant.

D. H. W. Henry, Q.C., for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT now (June 27, 1957) delivered the following judgment:

In his petition of right the suppliant, a retired civil servant, prays for a declaration that he is entitled to the benefit of Part II of the *Civil Service Superannuation Act,* R.S.C. 1927, Chapter 24, and section 24(2) of the *Public Service Superannuation Act,* Statutes of Canada, 1952-53, Chapter 47, and that his superannuation annuity or allowance should be calculated on the basis of the average of the

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salary received by him during the last five years of his service and be paid to him on such basis retroactively to May 20, 1953, the date of his retirement.

When the suppliant retired his superannuation was calculated on the basis of the average of the salary received by him during the last ten years of his service but he contended that he was entitled to the benefit of having it calculated on the five year average salary basis and this petition was brought for a declaration of his right.

This is the first action under the *Public Service Superannuation Act*. It raises an issue of great importance, not only to the suppliant and other persons whose positions are similar to his, but also to the public at large.

The issue depends on whether the suppliant was a civil servant to whom Part II of the *Civil Service Superannuation Act* applied. And this, in turn, depends on the validity of the purported retrospective operation of Order in Council P.C. 52/517 of April 6, 1925.

I shall deal first with the relevant provisions of the *Civil Service Superannuation Act*. Section 2(*b*) of that Act defined "civil servant" as follows:

> 2. In this Act, unless the context otherwise requires,
>
> (*b*) "civil servant" means and includes any permanent officer, clerk or employee in the Civil Service as herein defined,
>
> (i) who is in receipt of a stated annual salary of at least six hundred dollars, and
>
> (ii) who is required, during the hours or period of his active employment, to devote his constant attention to the performance of the duties of his position and the conditions of whose employment for the period or periods of the year over which such employment extends preclude his engaging in any other substantial gainful service or occupation;

and sections 15 and 16, under the heading "Part II", provided:

> 15. This Part applies to civil servants who on the nineteenth day of July, one thousand nine hundred and twenty-four, are subject to the provisions of the Retirement Act.
>
> 16. Any such civil servant who, within three years after the nineteenth day of July, one thousand nine hundred and twenty-four, elects to become a contributor under this Act, shall have transferred to the Fund created under this Act the amount standing to his credit in the Retirement Fund, which amount shall thereupon be deemed to be a contribution under this Act, and such contributor shall, as from the date of such election, be deemed to have waived his right to any payment or benefit under the provisions of the Retirement Act and shall be subject to the provisions of,

and entitled to all the benefits and privileges under, Part I of this Act to the same extent as if he had been appointed after the nineteenth day of July, one thousand nine hundred and twenty-four, and had been a contributor for the period in respect of which he contributed to the Retirement Fund: Provided, however, that in computing the superannuation allowance of any such contributor, the average salary shall be based upon the salary received by the contributor during the last five years of his service.

If the suppliant was a civil servant to whom Part II of the *Civil Service Superannuation Act* applied he is entitled to the computation of his Superannuation under the *Public Service Superannuation Act* on the basis of the average of the salary received by him during the last five years of his service pursuant to section 24(2) of that Act. Section 9(1) of the said Act provides:

9. (1) The amount of any annuity to which a contributor may become entitled under this Act is an amount equal to

(*a*) the number of years of pensionable service to the credit of the contributor, not exceeding thirty-five, divided by fifty,

multiplied by

(*b*) the average annual salary received by the contributor during any ten year period of pensionable service selected by or on behalf of the contributor, or during any period so selected consisting of consecutive periods of pensionable service totalling ten years, or

and section 24 (2) is in these terms:

24. (2) For the purposes of paragraph (*b*) of subsection (1) of section 9, the average annual salary received by a contributor who, on or before the 19th day of July, 1927, elected under Part II or IV of the *Superannuation Act* to become a contributor under Part I of that Act and who has not, at any time since so electing, received any amount by way of a return of contributions or other lump sum payment under this Act or under Part I of the *Superannuation Act*, is the average annual salary received by him during either period specified in paragraph (*b*) of subsection (1) of section 9 or the average annual salary received by him during the last five years of his employment in the Public Service, whichever is the greater.

It is clear that a person who has complied with the requirements of the *Public Service Superannuation Act* has a statutory right to the superannuation annuity or allowance under it and that if it is wrongfully withheld from him a petition of right lies for its recovery. But it must be kept in mind that this statutory right resembles every other statutory right in an important respect, namely, that in order that a person should be held entitled to it it must be shown that every condition prescribed by the statute that created it has been complied with. The onus of proof of such compliance lies on the person who asserts the right.

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Consequently, to establish his right under section 24(2) of the *Public Service Superannuation Act* the suppliant must show, *inter alia,* that on or before July 19, 1927, he had elected under Part II of the *Civil Service Superannuation Act*. To do so he must show that he was a civil servant to whom Part II of that Act applied and this means that on July 19, 1924, he was a civil servant within the meaning of the definition in section 2(*b*) of the Act and subject to the *Civil Service Superannuation and Retirement Act* R.S.C. 1906, Chapter 17. In order to show that he was a civil servant within the meaning of the statutory definition he must show, not only that he was a permanent officer, clerk or employee in the Civil Service, but also that he was in receipt of "a stated annual salary" of at least six hundred dollars.

I now come to the facts and Orders in Council on which the suppliant relies. The facts are not in dispute. A statement of agreed facts was filed as an exhibit and this was supplemented by evidence. The suppliant is a retired civil servant. Commencing on or about 1909 he was a temporary employee in the Topographical Surveys Branch of the Department of the Interior and received a per diem wage for his employment. As from April 17, 1919, his position was that of Chief of Survey Party and he was paid $9.00 per day.

By Order in Council P.C. 1958, dated December 16, 1920, the Civil Service Commission was instructed and directed to submit to His Excellency in Council lists showing the temporary employees who were then regarded by the Commission and by the Department concerned as of a permanent nature, whose services were certified as satisfactory by the Department and approved as such by the Commission and who conformed to the regulations set out in the Order in Council, and it was provided that such of the temporary employees as might be granted permanent status by the Governor in Council should have their rates of pay determined as provided in the Order in Council.

Under the authority of this Order in Council the Civil Service Commission approved a recommendation from the Deputy Minister of the Interior that certain temporary employees of the Department, including the suppliant, be granted permanent status under the terms of the said Order

in Council and that their rates of pay be determined in accordance with the regulations under it. This recommendation was concurred in by the Treasury Board and approved by His Excellency the Governor General in Council on June 30, 1922, as Order in Council P.C. 208/1426, the permanency to be dated from April 1, 1921, and the rates of pay to be adjusted accordingly.

The suppliant thus became a permanent official of the Department of the Interior. On August 23, 1922, the Department notified him to this effect and informed him that he must now contribute 5 per cent of his salary to the Retirement Fund and make a back payment of $171.23 to cover arrears for the period from April 1, 1921 to June 30, 1922. The suppliant made the contributions to the Retirement Fund that he was thus directed to make. It was apparently assumed that he was subject to the *Civil Service Superannuation and Retirement Act* under which the compulsory payments, which are deducted from his salary, were made.

The next event in chronological order was the enactment of the *Civil Service Superannuation Act,* Statutes of Canada, 1924, Chapter 69, which came into force on July 19, 1924.

At that date the suppliant, although he had been granted the status of permanency, was still on a per diem rate of pay. He was, therefore, at that date, not in receipt of a stated annual salary and, consequently, he was not a civil servant within the meaning of the definition in section 2(*b*) of the Act. It follows that he was not then a person to whom Part II of the Act applied. If there were no more to be said this would be the end of his case.

But it was contended that by virtue of Order in Council P.C. 52/517 of April 6, 1925, to which I shall refer later, the suppliant was put in the position of being a civil servant within the meaning of the statutory definition retroactively to April 1, 1924, and that, consequently, Part II of the Act did apply to him, as stated in section 15, and that since he had made an election pursuant to section 16 he was entitled to have his superannuation calculated on the basis of the average of his salary during the last five years of his service.

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Thus the basic issue in the case is whether the said Order in Council had the effect for which the suppliant contended. If it did he is entitled to the relief sought by him.

It is desirable to set out the circumstances under which the said Order in Council was passed. At and following the date of Order in Council P.C. 208/1426, of June 30, 1922, the Civil Service Commission and the Department of the Interior were engaged in a re-organization of the Topographical Surveys Branch of that Department and in a re-classification of positions therein and at the date of the coming into force of the *Civil Service Superannuation Act* the said re-organization and re-classification was still going on. It was intended that the officials of the Branch should be re-classified so as to give them a minimum and maximum yearly salary. On November 21, 1924, the Deputy Minister of the Department in a letter to the Secretary of the Civil Service Commission urged that the re-classification should be hastened and be dated from April 1, 1924, so that the officials covered by it might make application under the *Civil Service Superannuation Act,* which had recently been enacted. And it appears from a letter, dated January 28, 1925, from the Topographical Surveyors' Society to the Chairman of the Civil Service Commission that the re-organization was almost completed and that it was intended by the Commission that the Order in Council putting the re-organization into effect would be retroactive to April 1, 1924. But when the Commission's report was prepared it was stated in it that the re-organization was to become effective on April 1, 1925. This provoked a strong protest from the Director of the Topographical Survey of Canada, as appears from a memorandum to the Deputy Minister of the Interior, dated March 27, 1925. On the same date the Deputy Minister sent the memorandum to the Secretary of the Civil Service Commission and returned the re-organization recommendation to him with the statement that his Minister felt that he would not be justified in joining in the recommendation as made and expressed the hope that the Commission would see its way clear to implement the undertaking given by the Chairman of the Commission that the recommendation should be retroactive to April 1, 1924.

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As a result, Order in Council P.C. 52/517 of April 6, 1925, came into existence. The report of the Civil Service Commission on the organization of the Topographical Surveys Branch of the Department, as modified by the Department, was concurred in. This included a re-classification of certain officials, of whom the suppliant was one, on an annual salary basis and it was provided that the effective date of the recommendations should be April 1, 1924.

It is contended on behalf of the suppliant that this Order in Council had the retroactive effect of putting him in the same position as if he had been in receipt of an annual stated salary on April 1, 1924, and that, consequently, Part II of the *Civil Service Superannuation Act* applied to him.

On this assumption the suppliant, on April 16, 1925, signed an election form in which he made application to become subject to the *Civil Service Superannuation Act*. On May 16, 1925, the Department of Finance acknowledged receipt of his election. Subsequently, the contributions to his credit in the Retirement Fund established pursuant to the *Civil Service Superannuation and Retirement Act* were transferred to the Fund established pursuant to the *Civil Service Superannuation Act*.

On May 20, 1953, the suppliant was retired and his superannuation was calculated on the basis of the average of the salary received by him during the last ten years of his service on the ground that he did not become a civil servant until after July 19, 1924, and that Part I of the *Civil Service Superannuation Act,* and not Part II or Part IV, applied to him. The suppliant protested and brought this petition of right for a declaration of his right.

After consideration of the careful arguments submitted by counsel I have come to the conclusion, without doubt, that the issue in this case must be resolved against the suppliant. My reason for this conclusion, put briefly, is that at the date of the coming into force of the *Civil Service Superannuation Act,* namely, July 19, 1924, Part II of the said Act did not apply to him for the reason that, at that date, he was not a civil servant within the meaning of the statutory definition in section 2(*b*) of the Act in that, at such date, he was not in receipt of "a stated annual salary" of at least six hundred dollars, and that Order in

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Council P.C. 52/517 of April 6, 1925, was not effective in law to remedy his inability to meet this essential requirement.

I now set out the steps that have led me to this conclusion. In the first place, it is clear, according to section 15 of the Act, that Part II of the Act applied to civil servants who, on July 19, 1924, were subject to the provisions of the *Retirement Act*. On that date, the suppliant was not so subject. When he was granted permanent status by Order-in-Council P.C. 208/1426, of June 30, 1922, he was not being paid a yearly salary. He was being paid on a per diem basis. He was, therefore, not a member of the Civil Service, *for the purposes of the Civil Service Superannuation and Retirement Act,* within the meaning of section 2(*a*) of that Act which provided, in part:

> 2. The Civil Service, for the purposes of this Act, includes and consists of,—
>
> (*a*) all officers, clerks and employees in or under the several departments of the Executive Government who are paid a *yearly salary,* and to whom the Civil Service Act applies;

Consequently, one of the conditions required before Part II could apply to the suppliant, namely, that he should be subject to the provisions of the *Civil Service Superannuation and Retirement Act* was not met. The fact that he was informed on behalf of the Department of the Interior that he had to contribute to the Retirement Fund did not make him subject to the Act if in fact and in law, as was the case, he was not so subject. The assumption that he was subject to the Act was erroneous.

But this non-compliance with one of the requirements of section 15 would not, of itself, disentitle him to the computation of his superannuation allowance on the five year average salary basis, for he became entitled to a yearly salary on April 1, 1925, and would, therefore, if otherwise qualified, come under Part IV of the Act, pursuant to section 20, which provided:

> 20. This Part applies to civil servants who on the nineteenth day of July, one thousand nine hundred and twenty-four, are not subject to the provisions of the Retirement Act or the Superannuation Act.

in which case he would still be entitled to the five year average salary basis for the calculation of his superannuation.

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But the serious bar to the suppliant's success is that on July 19, 1924, he was not a civil servant within the meaning of section 2(*b*) of the Act, in that, while he was a permanent officer, clerk, or employee in the Civil Service, he was not in receipt of a "stated annual salary". Of that fact there can be no dispute. The records show conclusively that up to April 30, 1925, he was paid at the rate of $9.00 per day.

If any authority is required for the statement that a per diem rate of pay is not a stated annual salary it may be found in the judgment of Rowlatt J. in *Naylor v. Peacehaven Electric Light and Power Company, Limited*[1] where he said:

> I can only say that where a person is paid £5 or £6 a week it is not possible to say that he is engaged at an annual salary.

and later,

> What is the salary? It is £5 or £6 a week, and I can only think that those who appeared before Sir Harold Morris forgot to point out to him that after all an annual salary is not 52 times a weekly salary. This is a weekly salary. They are two entirely different and distinct things. If anything turns on the words "annual salary", as it does, you cannot say that a weekly salary paid 52 times a year with one day over or two days over is an annual salary. It is not.

A fortiori a per diem rate of pay is not a stated annual salary.

Consequently, the suppliant's case depends on whether Order in Council P.C. 52/517 of April 6, 1925, had the retroactive effect of making him in receipt of a stated annual salary on July 19, 1924, when in fact he was then being paid on a per diem basis. The Order-in-Council is expressed to be retroactive to April 1, 1924, and it was intended that it should have the effect for which the suppliant contends. And it is clear that if it did have such effect the suppliant would be entitled to the relief sought in his petition.

The question whether the Governor in Council could validly give the Order in Council the retroactive effect claimed for it raises an issue that transcends the personal interests of the suppliant and the other civil servants whose positions are similar to his and in resolving it considerations of personal sentiment must not be allowed to intrude on the important legal principle involved.

[1] (1930-31) 47 T.L.R. 535 at 537.

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Where a substantive right is involved the law leans against giving a statute a retrospective operation. It is a fundamental rule that, except in respect of procedure, a statute shall not be construed as having a retrospective operation unless the intention that it shall have such operation clearly appears in it, either in express terms or by necessary implication: *Vide* Maxwell on Interpretation of Statutes, 10th Edition, page 213, and the cases there cited; Craies on Statute Law, 5th Edition, page 360, and the cases there cited. It is important to keep this fundamental rule in mind in considering the validity of Order in Council P.C. 52/517 of April 6, 1925, on which the suppliant relies. But it was strongly urged before me that, in view of the clearly expressed intention that it should have retrospective operation, it should be construed as having such operation on the ground that its validity should be assumed unless it is shown that its retrospective operation was prohibited by the Act under the authority of which it was passed.

Since the close of the argument I have given careful consideration to this submission and am clearly of the opinion that it would be highly dangerous and contrary to principle to accept it. Why should the Court assume that the Governor in Council, that is to say, the Government, should have power to enact delegated legislation, for that is what Order in Council P.C. 52/517 of April 6, 1925, was, enlarging the scope of the existing law, for that is what the Order in Council purported to do? It sought to make Part II of the *Civil Service Superannuation Act* apply to persons to whom it did not in fact apply.

In my opinion, the law does not sanction the assumption referred to. The delegated legislation enacted by the Governor-in-Council, that is to say, the Government, cannot have an effect beyond that which is authorized by the empowering Act. Thus it would be sound to state as a fundamental principle that the Governor-in-Council does not have authority to pass an Order in Council having retrospective operation unless the Act of Parliament under the authority of which it is passed, either expressly or by necessary implication, empowers its passing.

Order in Council P.C. 52/517 of April 6, 1925, was passed under the authority of section 9 (2) and 45B (1) of the *Civil Service Act*, 1918, Statutes of Canada, 1918, Chapter

12, as amended. I have not been able to find any indication in that Act or, indeed, in any Act empowering the Governor in Council to pass an Order in Council having retroactive effect such as that expressed in the Order in Council under review.

I am, therefore, of the opinion that the Governor in Council did not have authority to make Order in Council P.C. 52/517 of April 6, 1925, retroactively effective to put the suppliant in the position of being in receipt of a stated annual salary as at April 1, 1924, as it purported to do. The result is that Part II of the *Civil Service Superannuation Act* did not apply to him and he is not entitled to have his superannuation calculated on the basis of the average of the salary received by him during the last five years of his service. He must content himself with the ten year average salary basis.

I should perhaps make it clear, although the matter is not before me, that this decision is not to be taken as necessarily meaning that increases of salary may not be made retroactive.

The fact that the responsible administrative officers of the various government departments treated the suppliant first as being subject to the *Civil Service Superannuation and Retirement Act* and later as being a civil servant to whom Part II of the *Civil Service Superannuation Act* applied cannot help him. The assumption of the various departmental officers charged with the administration of superannuation that Order in Council P.C. 52/517 of April 6, 1925, had the effect claimed for it did not give it such effect. The suppliant's right or lack of right is a matter of law.

I should add briefly that I am not able to accept the submissions of counsel for the suppliant that the combined effect of Orders in Council P.C. 2958 of December 16, 1920, and P.C. 208/1426 of June 30, 1922, was to make the suppliant a permanent civil servant on a yearly salary as of April 1, 1921, or that section 24 (2) of the *Public Service Superannuation Act* gave the suppliant any greater right than he previously had.

Nor need I consider the submission of counsel for the respondent that since the Governor in Council's authority was mererly to approve what was done by the Civil Service

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Commission and the Commission did not fix the retroactive date of Order in Council P.C. 52/517, it was outside the authority of the Governor in Council to approve it.

For the reasons given the judgment of the Court must be that the suppliant is not entitled to any of the relief sought by him in his petition of right and that the respondent is entitled to costs.

Judgment accordingly.