1955
*Oct. 6
1956
*Jan. 24

GEORGE ROSS DAVIDSON .....APPELLANT;

AND

HER MAJESTY THE QUEEN .....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Pension—Whether appellant entitled to benefits of Part V of the Militia Pension Act, S. of C. 1946, c. 59.

Section 43 of the *Militia Pension Act* (S. of C. 1946, c. 59), provides that Part V therein "applies to every member of the forces (*a*) who was not a member . . . on March 31, 1946, and who was or is appointed to or enlisted in . . . after the said day" or (*b*) "who was appointed to or enlisted in . . . on or before the said day and was still in the forces on the said day and who elects to become a contributor . . . on or before March 31, 1948".

Held (affirming the judgment appealed from): That the appellant, who served in the forces from 1935 to July 20, 1946, and who made his election in 1947, was not entitled to the benefits of Part V of the Act.

Per Rand, Kellock, Fauteux and Abbott JJ.: March 31, 1946, is specified as the day upon which a claimant was either not then in the forces, never having been in, but who joined subsequently, or as having enlisted on or before that day, and if before, then as having been still in on that day.

*PRESENT: Rand, Kellock, Locke, Fauteux and Abbott JJ.

Per Locke J.: Para. (*a*) refers to members who were appointed or enlisted after March 31, 1946, whether or not they had, prior to that date, been members whose services had terminated, and para. (*b*) refers to those who were appointed or enlisted prior to March 31, 1946, were in the forces as of that date and were members when the amendment became effective. To construe the section otherwise would make it and the Part retrospective, an interpretation which is not warranted.

APPEAL from the judgment of the Exchequer Court of Canada, Cameron J., holding that the appellant was not entitled to the benefits of Part V of the *Militia Pension Act*.

G. E. Beament, Q.C. and *S. A. Gillies* for the appellant.

K. E. Eaton and *R. W. McKimm* for the respondent.

The judgment of Rand, Kellock, Fauteux and Abbott JJ. was delivered by:—

KELLOCK J.:—The appellant, who served in the armed forces from the 13th of June, 1935, to the 20th day of July, 1946, on which date he was retired on medical grounds, claims to be entitled to the benefits provided for by Part V of *The Militia Pension Act* enacted on the 31st of August, 1946. As to whether he is so entitled depends, in the first instance, upon a proper construction of s. 43, which is as follows:

> 43. This Part applies to every member of the forces
>
> (*a*) who was not a member of the forces on the thirty-first day of March, 1946, and who was or is appointed to or enlisted in the forces after the said day, or
>
> (*b*) who was appointed to or enlisted in the forces on or before the said day and was still in the forces on the said day and who elects to become a contributor under this Part on or before the thirty-first day of March, 1948.

S. 42(1)(*f*), speaking in the present, defines "member of the forces" (unless the context otherwise requires) "as any officer, warrant officer, non-commissioned officer or man of the forces, excluding an officer appointed temporarily or under a commission for a fixed term."

It is the contention of the Crown, and this was given effect to in the court below, that as the appellant was not a member of the forces at the date of the passing of the Act, he is not entitled to claim under it. For the appellant, it is contended that it is sufficient that he was a member on the 31st day of March, 1946.

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Kellock J.

Appellant contends that if the words "every member of the forces" in the opening line of the section are construed as meaning "every member of the forces on or after the effective date of this Part", then the phrase "and was still in the forces on the said day" (i.e., March 31, 1946) is superfluous, whereas if no such qualification is implied in the quoted words in the first line, the quoted words from para. (*b*) are meaningful as defining a class by reference to circumstances antecedent to the date upon which Part V came into force. It is also contended that even if the quoted words in para. (*b*) are not to be considered as superfluous, the word "still" indicates the continuance of the condition of being in the forces existing prior to March 31, 1946, in contrast to a future continuance beyond that day, and indicates that any continuance beyond that day is not a requirement of the statute.

I am unable to accept these contentions. Para. (*a*), which deals with persons who are compulsorily subject to Part V, is, of course, by itself, entirely unambiguous. It specifies a person who enters the forces after March 31, 1946, not having been in the forces on that day, and is not concerned with whether or not such person was or was not a member of the forces prior to that day. Apart from para. (*b*), therefore, this paragraph would include an officer who was in the forces both before and after the day specified, so long as he was not a member on that day.

Para. (*b*), however, which deals with persons who may be subject to Part V if they elect to do so, refers specifically to a person who was in the forces prior to the day named. Para. (*a*), therefore, must be taken as dealing only with persons who entered the forces after that day.

In this view it cannot be said that the words "and was still in the forces on the said day" are surplusage, or otherwise, a person who was a member of the forces before the day mentioned but was not a member on that day, would be included. This is clearly contrary to the intention of the statute as the very words said to be superfluous require that such a person must have continued a member down to and including the named day. These words, of course, have no function with respect to one who entered the forces on the named day.

The clear intention of both paragraphs read together, in my view, is to specify the 31st day of March, 1946, as the day upon which the person claiming was either not then in the forces, never having been in the forces, but who joined subsequently, or as having enlisted "on or before the said day", and if before, then as having been "still in the forces on the said day".

There is nothing, therefore, to exclude the operation of the words in the first line of the section in that, whether para. (*a*) or (*b*) applies, the person in question must be a "member of the forces" in order that Part V may have any application to him. Accordingly, as the appellant did not qualify at the time he sought to elect, he was not entitled to do so. In this view it is not necessary to consider the other points argued.

The appeal should be dismissed with costs.

LOCKE J.:—The facts, in so far as they affect the claim advanced by the appellant, are stated in the judgment from which this appeal is taken.

Part V of the *Militia Pension Act* (c. 133, R.S.C. 1927) is stated by s. 43 to apply to every member of the Forces. The appellant was not a member of the Forces on August 31, 1946, when the amendment came into force.

S. 44 provides that every person to whom Part V applies shall, by reservation from his pay and allowances, contribute to the Consolidated Revenue Fund. The word "contributor" is defined by s. 42 to mean a member of the Forces who contributes under the Part to the Consolidated Revenue Fund. The appellant was not and could not at any time become a contributor since he was not a member of the Forces on August 31, 1946, or thereafter.

These considerations, in my opinion, are sufficient to make it clear that para. (*a*) of s. 43 refers to members of the Forces who were appointed or enlisted after March 31, 1946, whether or not they had, prior to that date, been members of the Forces whose services had terminated, and that para. (*b*) refers to those who were appointed or enlisted prior to March 31, 1946, were in the Forces as of that date and were members when the amendment became effective. None of the language of the latter paragraph appears to me to be superfluous.

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Locke J.

I respectfully agree with Mr. Justice Cameron that to construe s. 43 otherwise would be to interpret the section and the Part retrospectively. I see no warrant for any such interpretation.

I would accordingly dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Beament, Fyfe & Ault.*

Solicitor for the respondent: *F. P. Varcoe.*