

Laws of Her Majesty's Province of Upper Canada, passed in the year 1849. Montreal: Stewart Derbshire & George Desbarats, 1849.

12 Victoria – Chapter 41

An Act to define the mode of proceeding before the Courts of Justice in Lower-Canada, in matters relating to the protection and regulation of Corporate rights and to Writs of Prerogative, and for other purposes therein mentioned. 30th May, 1849.

Whereas it is expedient to provide an easy and expeditious mode of proceeding before the Courts of Justice in Lower-Canada for the protection of Corporate rights, and for regulating the use and preventing the abuse of the same, and for preventing the usurpation of Corporate Offices, and for enforcing the performance of duties devolving upon persons holding such offices and upon Public Trustees and other Public Officers, Bodies and Boards, and in matters relating to Writs of Prerogative and other Writs: Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and of the Legislative Assembly of the Province of Canada, constituted and assembled by virtue of and under the authority of an Act passed in the Parliament of the United Kingdom of Great Britain and Ireland, intituled, *An Act to reunite the Provinces of Upper and Lower-Canada, and for the Government of Canada*, and it is hereby enacted by the authority of the same, That after this Act shall come into force, whenever any person shall usurp, intrude into or unlawfully hold or exercise any public office or any franchise within that part of this Province formerly constituting the Province of Lower-Canada, or any Office in any Corporation or other Public Body or Board, whether the same shall have been created or shall exist under or by virtue of any Statute or Ordinance, or under the Common Law of Lower-Canada, it shall be lawful for the Superior Court sitting in the District in which such usurpation or unlawful detention shall have occurred, or for any two or more Judges of such Court in vacation, upon a declaration or petition (*requête libellée*) presented by or in the name of any person who may be interested in such public office or franchise, or in such Corporation, Public Body or Board, supported by affidavit to the satisfaction of such Court or of such Judges, and complaining of such usurpation, intrusion or unlawful detention, to order the issuing of a Writ commanding the person complained of to be summoned to appear before the said Court, or the said Judges, to answer such declaration or petition (*requête libellée*,) upon such day as the said Court or the said Judges may think proper to fix: Provided however, that in all such cases the Writ of Summons shall be served on the person so complained of, by leaving a copy thereof and of the said declaration or petition (*requête libellée*,) either with himself in person or at his domicile, in the manner practised in ordinary actions, and that three full days at least shall intervene between the service of such Writ and the return of the same, if such service shall be made within five leagues from the Court House or other building where the party shall be so summoned to appear, and that not less than three days and an additional day for each five leagues which shall be found between the place where such service shall be made and such Court House or other building, shall intervene between such service and return.

II. And be it enacted, That if the person so complained of, defendant in such cause, shall appear on the day so fixed, he shall be held to plead specially to such declaration or petition (*requête*

libellée) stating the authority under which he assumes to hold or exercise such office or franchise within four days from the day on which he shall so appear, and the Plaintiff shall be allowed three full days to answer or reply to such plea.

III. And be it enacted, That within three days from the filing of such answer or replication, the Plaintiff shall proceed to adduce evidence in support of the allegations contained in the said declaration or petition (*requête libellée*,) which evidence or such part thereof as may consist of oral or parole testimony, shall be taken down in writing either before the said Court, or in the presence of any one of the Judges thereof (whether the proceedings be had in Term time or in Vacation,) in the manner in which evidence is now taken in ordinary cases at the *Enquête* Sittings of the Courts of Queen's Bench in Lower-Canada, and when the Plaintiff shall have declared his evidence (*Enquête*) closed, the defendant shall, after a delay of two days, if any such delay be by him required or asked for, proceed to adduce such evidence as he may offer, and as may be admissible in support of his plea.

IV. And be it enacted, That so soon as the defendant shall have declared his *Enquête* closed, the plaintiff may, if allowed by the said Court or the said Judges, adduce evidence in rebuttal, or if he do not adduce any such evidence in rebuttal, it shall be lawful either for such plaintiff or for such defendant, to inscribe the cause for hearing on any day he may think proper to fix; of which inscription the opposite party shall have notice one full day at least previous to the day so fixed for such hearing, and the said Court or the said Judges shall after such hearing proceed with the least possible delay to render judgment in the premises; Provided however, that, nothing hereinbefore contained shall prevent or be so construed as to prevent the defendant from acknowledging the usurpation complained of by a confession to be taken in the presence of the Court or of the said Judges, or either of the parties from demurring specially to the declaration or to the plea or to the answer of his adversary, or from demanding a decision upon any objections as to any deficiency, insufficiency or informality, which he may have been advised to urge against the same or against any of the proceedings in such case, or the said Court or the said Judges from enlarging the time to plead or to adduce evidence in any such case, whenever the said Court or the said Judges may deem it advisable so to do for the more sure attainment of the ends of justice.

V. And be it enacted, That whenever the Defendant in any such case shall not appear upon the Day fixed as aforesaid, for the return of the said Writ of Summons, after having been duly called, a default shall be entered against him, and it shall be lawful for the Plaintiff on the following day to proceed to prove the allegations contained in his declaration or petition, (*requête libellée*,) in the manner hereinbefore provided, and to inscribe the case without further delay for judgment by default.

VI. And be it enacted, That in addition to the matters required to be set forth against the party who shall have so usurped, intruded into, or unlawfully detained any such office or franchise, the Plaintiff may also set forth in any such declaration or petition, (*requête libellée*,) the name of the person rightfully entitled to such office or franchise, with such averments as may be required to show his right thereto, and in every such case judgment shall be rendered upon the claim of the

Defendant, and also upon the right of the party so averred to be entitled to such office or franchise, or only upon the claim of the Defendant, as justice shall require.

VII. And be it enacted, That whenever judgment shall be rendered in any such case, upon the right of the person so averred to be entitled to such office or franchise, and the same be in favour of such person, he shall be entitled, after taking the oath of office, and executing any official bond which may be required by law, to take upon himself the execution of such office, or the exercise of such franchise; and it shall be his duty immediately thereafter to demand of the Defendant in such case, all the keys, books, papers and insignia in the custody or within the power of such Defendant, belonging to the office or franchise from which he shall have been ousted, and if such Defendant shall refuse or neglect to deliver over any such keys, books, papers and insignia pursuant to such demand, or shall in any other way or manner wilfully obstruct such person so adjudged to be entitled to such office or franchise as aforesaid, with a view to prevent such person from taking upon him the execution of such office, or the exercise of such franchise, he shall be deemed guilty of a misdemeanor; and whenever such refusal or neglect shall occur in any such case, it shall be lawful for the said Court or the said Judges to order the Sheriff of the District to take possession of such keys, books, papers and insignia, and to deliver up the same so taken possession of, to the party entitled or adjudged to be entitled to such office or franchise as aforesaid.

VIII. And be it enacted, That after the time this Act shall come into force, whenever any Association or number of persons shall act within Lower-Canada as a Corporation, without having been legally incorporated, or without being recognized as such Corporation by the Common Law of Lower-Canada, and whenever any Corporation, Public Body or Board shall offend against, any of the provisions of the Act or Acts creating, altering, renewing, or re-organizing such Corporation, Public Body or Board, or shall violate the provisions of any law in such manner as to forfeit its charter by mis-user,—and whenever any such Corporation, Public Body or Board shall have done or omitted any Act or Acts, the doing or omitting of which shall amount to a surrender of its corporate rights, privileges and franchises,—and whenever any such Corporation, Public Body or Board shall exercise any franchise or privilege not conferred on it by law, it shall be the duty of Her Majesty's Attorney-General in and for Lower-Canada for the time being, whenever he shall have good reason to believe that the same canoe established by proof, in every case of public interest, and also in every other such case in which satisfactory security shall be given to indemnify the Government of this Province against all costs and expenses to be incurred by such proceeding, to apply for and on behalf of Her Majesty to the Superior Court sitting in the District in which the principal office or place of business of such persons so unlawfully associated together, or of such Corporation, Public Body or Board shall be, or to any two or more of the Judges of such Court in vacation, by an information, declaration or petition, (*requête libellée*,) supported by affidavit to the satisfaction of such Court or of such Judges, complaining of such contravention of the law, and praying for such order or judgment thereon as may be allowed or authorized by law, whereupon it shall be lawful for such Court or for such Judges, to order the issue of a Writ commanding the persons, Corporation, Public Body or Board so complained of, to be summoned to appear before the said Court or the said Judges, to answer such declaration or petition, (*requête libellée*,) upon such day as the said Court or the said Judges may think proper to fix, and the like proceedings shall be had upon such declaration or petition, (*requête libellée*,) and Writ of Summons, as to service,

appearance, entering default, pleading, proof and all other matters, as are hereinbefore provided for the determination of cases in which any person shall have usurped, intruded into or unlawfully detained any public office or franchise; Provided nevertheless, that the service of any such Writ of Summons and of any such declaration of petition, (*requête libellée*,) may be made by serving the same on such persons so unlawfully associated together, or on such Corporation, Public Body or Board, by leaving true copies of such Writ of Summons, and of such declaration or petition (*requête libellée*,) either with the Mayor, Chairman or other Chief Officer, or with the Secretary or Treasurer of such Association, Corporation, Public Body or Board, or in the case of a pretended Corporation with some one of the persons assuming to hold such office, or with any person of reasonable age, at the principal office or place of business of such (or of such pretended) Association, Corporation, Public Body or Board, and the said Court or the said Judges shall make and pronounce such orders, judgments and decisions in all such cases as to law and justice may appertain.

IX. And be it enacted, That whenever any Defendant shall be found or adjudged guilty of usurping or intruding into or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that such Defendant be ousted and altogether excluded from such office, franchise or privilege, and also that the Plaintiff or party complaining of such usurpation recover his costs against such Defendant: And it shall be lawful for the Court or the Judges rendering such judgment in its or their discretion to condemn such Defendant to pay a fine or penalty not exceeding one hundred pounds, which fine or penalty, when collected, shall be paid over to Her Majesty's Receiver-General of this Province for the time being: and whenever an action or complaint for any such alleged usurpation, intrusion or detention as aforesaid, shall be dismissed, the Defendant shall be entitled to recover costs against the Plaintiff or party so complaining.

X. And be it enacted, That whenever it shall be found or adjudged, that any Corporation, Public Body or Board has, by any mis-user, non-user or surrender, forfeited its corporate rights, privileges and franchises, judgment shall be rendered that such Corporation be ousted and altogether excluded from such corporate rights, privileges and franchises, and that the said Corporation, Public Body or Board be dissolved; and the Court or the Judges rendering such judgment shall thereupon appoint a Curator to and of the property and effects of such Corporation, Public Body or Board, whose duty it shall be, after having given security to the satisfaction of the said Court or of the said Judges for the due discharge thereof, to take possession of the said property and effects, to cause an Inventory thereof to be made in due form of law in the presence of one or more of the Members of such Corporation, Public Body or Board, and after having made such Inventory, to dispose, to the best advantage, of all the personal property which he may have so possessed himself of, and, after realizing the proceeds thereof, to cause the same to be distributed amongst the creditors of such Corporation, Public Body or Board, by the Superior Court sitting in the District in which the principal office or place of business of such Corporation, Public Body or Board shall have been at the time of the rendering of such Judgment: Provided that due notice be given to such creditors by at least three advertisements to be printed in at least two such public newspapers as the said Court may direct, of which advertisements the first, shall be published at least two months previous to the day fixed and therein mentioned as the day on which such

Curator shall apply to the said Court for the purpose of effecting such distribution: And provided also, that if there be any debts remaining due by such Corporation, Public Body or Board, the like proceedings shall be had for the discussion of the immoveable property belonging to such Corporation, Public Body or Board, and for the distribution of the proceeds thereof amongst its creditors, or for dividing the same amongst the parties entitled thereto, as may now by law be had and adopted in Lower-Canada, for the discussion, distribution or division of a vacant estate, or of the estate of an absentee to which a Curator has, or Curators have been appointed; and if there be no debts due by such Corporation, Public Body or Board, or if such debts be unknown to Or be beyond the control of the Curator, then the Curator shall proceed to the sale of the immoveable property held by him in his said capacity, to the best and highest bidder, after having given due notice of such sale and of the time and place thereof, by three advertisements in English and French in the Canada Gazette, the first of which shall be published at least four, and not more than five months before such sale; and all sales of immoveable property made by any such Curator, after such notice duly given, shall have the same effect to all intents and purposes as sales made by Sheriffs or by *décrêt force*; And provided also, that whenever judgment shall be rendered in any such case against any Corporation, Public Body or Board, or against any persons claiming to be a Corporation, the costs awarded by such judgment may be collected by execution, directed either against the property and effects of such Corporation, Public Body or Board, or of such persons claiming to be a Corporation, or against the private property of the Directors or other Officers of any such Corporation, Public Body or Board, or of such persons so claiming to be a Corporation aforesaid.

XI. And be it enacted, That after this Act shall come into force, whenever any Corporation, Public Body or Board shall refuse or neglect to make any election, which by law such Corporation, Public Body or Board is or shall be required to make, or to receive to their functions such of its Members as shall have been legally chosen or elected, or restore to their functions such of its Members as shall have been removed without sufficient cause; and, whenever any person holding any office in any Corporation Public Body or Board, or any public body whatsoever, or any Court of Inferior Jurisdiction, shall omit, neglect or refuse to perform any act or duty belonging to such office, or to such Court, or which the persons holding such office, is or shall be by law required or bound to perform; and, whenever any heir or representative of any Public Officer shall omit, neglect or refuse to do or perform any act which, by law, he may or shall be bound or required to do or perform as such heir or representative of such Public Officer; and in all cases in which a Writ of *Mandamus* will lie and may be legally issued in England, it shall be lawful for any person interested in such Corporation, Public Body or Board, or in the performance of any such act or duty, to apply to the Superior Court sitting in the District in which such Public Officer, heir or representative of a Public Officer, or Inferior Court shall be, or to two or more Judges of the said Court in vacation, for a Writ of *Mandamus* requiring and directing the Defendant, whether such Defendant be a natural person or a Corporation, Public Body or Board, to do and perform the act or duty which such Defendant may have so neglected or refused to do or perform, Or show cause to the contrary on a day certain to be fixed for that purpose by such Court or by such Judges.

XII. And be it enacted, That every such application for any such Writ of *Mandamus* shall be made by a declaration or petition (*requête libellée*) supported by affidavit to the satisfaction of such

Court or Justices, setting forth the facts of the case, whereupon it shall be lawful for the said Court or the said Judges to issue such Writ of *Mandamus*, and the Defendant in any such case, whether such Defendant be a natural person, a Corporation or an Inferior Court, shall not be allowed to shew cause to such Writ of *Mandamus*, otherwise than by answering or pleading to such declaration or petition, (*requête libellée*) and such Defendant shall not be required to make any return of or upon any such Writ of *Mandamus*, but the same shall be returned by the Bailiff or other Officer who shall have served it upon such Defendant, with a Certificate under his oath of the time and place of service; and the like proceedings shall be had on all such applications for Writs of *Mandamus*, relative to service, appearance, entering of default, pleading, proof and all other matters, for the determination thereof, as are hereinbefore provided for the determination of cases in which any person shall have usurped, intruded into or unlawfully detained any public office or franchise, or in which any Corporation, Public Body or Board, shall have forfeited its Charter as aforesaid.

XIII. And be it enacted, That if such Defendant shall answer or plead to such declaration or petition, (*requête libellée*) in such manner as to justify his conduct, the action or complaint shall be dismissed, and the Plaintiff shall be sentenced to pay costs, but if the answer shall be considered insufficient, either in law or in fact, or if the Defendant shall fail to appear, and the Plaintiff shall make due proof of the facts alleged by him, and the same shall be deemed sufficient, then the said Court or the said Judges shall issue a Peremptory Mandate, ordering and commanding the Defendant to do that which shall have been so demanded of him, and if such Defendant being a natural person do not obey such Peremptory Mandate of the said Court or the said Judges, a Warrant of Commitment shall issue, under which he shall be imprisoned in the Common Gaol of such District, there to remain until he shall have rendered obedience to and fulfilled the requirements of such Peremptory Mandate, and if such Defendant, being a Corporation, Public Body or Board, refuse to obey such Peremptory Mandate, it shall be lawful for the said Court or the said Judges to sentence such Corporation, Public Body or Board to pay a penalty not exceeding five hundred pounds, which penalty may be levied in the ordinary course of Law, out of the property, real and personal, of such Corporation, Public Body or Board.

XIV. And be it enacted, That if it shall happen that in any Corporation, Public Body or Board within Lower-Canada, no election shall be made of the Mayor, Aldermen, Councillors, Assessors, Trustees, Directors or other Officers of such Corporation, Public Body or Board, or if any such office or offices is or are now remaining vacant in consequence of such election not having taken place upon the day or within the time appointed by charter, law or usage for that purpose, or if such election being made, the same is or shall be void, or shall hereafter or afterwards be declared void by a competent Tribunal, such Corporation, Public Body or Board shall not thereby be, or be deemed or taken to be, dissolved or disabled from electing such Mayor, Aldermen, Councillors, Assessors, Trustees, Directors or other Officers for the future, but every such Corporation shall be adjudged, deemed and taken to be, and to have been, subsisting, and capable of electing such Officer or Officers to all intents and purposes; and in every such case it shall and may be lawful for the Superior Court sitting in the District in which the principal office or place of business of such Corporation, Public Body or Board shall be, or for two or more of the Judges of the said Court in vacation, to issue a Writ of *Mandamus* requiring the proper Officer, or in his absence such person

as the said Court or the said Judges may please to appoint, to proceed to the election of such Mayor, Aldermen, Councillors, Assessors, Trustees, Directors or other Officers, upon a day and hour, and at a place to be prescribed in such Writ of *Mandamus*, and to do every act to be done in order to such election, or to signify to the said Court or to the said Judges good cause to the contrary; and such Writ of *Mandamus* shall be applied for, and the like proceedings shall be had thereon, and for the determination thereof, as in the other cases provided for by this Act; and of the day and time appointed in and by such Writ of *Mandamus*, (if the same be obeyed without cause being shown against it, or in and by the Peremptory Mandate, if any such mandate shall have issued) for proceeding to such election, public notice in writing both in the French and English languages shall, by such person as the said Court or the said Judges shall appoint, be affixed at the door of at least one church in the City, Town, Village, Borough, Parish or Township in which the principal office or place of business of such Corporation shall be, or if there be no church, at one of the most public places therein, for the space of at least ten days before the day so prescribed, and in every such case, any other act or acts necessary to be done in order to such election shall be had, made and done at the time appointed in such Writ of *Mandamus* or in such Peremptory Mandate, and in such manner and form as the same ought to have been made upon the day, or within the time prescribed by the Charter, Act or Acts of Incorporation, or usage of such Corporation, Public Body or Board; and the Mayor, Aldermen, Councillors, Assessors, Trustees, Directors, or other Officers, so elected, shall have the same privileges, precedence, powers and authority in all respects, as if such Mayor, Aldermen, Councillors, Assessors, Trustees, Directors or other Officers had been elected on the day or within the time prescribed for such election by the Charter, Act or Acts of Incorporation, or usage of such Corporation, Public Body or Board: Provided always, that no such, election, nor any act done in order thereunto, shall be valid unless as great a number of persons having right to be present at and vote therein, shall be present at the assembly holden for such purpose and concur therein, as would have been necessary to be present and concur in such election or act, in case the same had been made or done upon the day, or within the time appointed for that purpose by the Charter, Act or Acts of Incorporation or usage of such Corporation, Public Body or Board; saving only that the presence of the Officer, who, under such Charter, Act or Acts of Incorporation or usage, ought to preside at such election shall not be necessary; And provided also, that any Mayor, Alderman, Councillor, Assessor, Trustee, Director or other Officer of any such Corporation in which the election of a successor or successors to any such office or offices shall not have taken place at the time appointed by Charter, law or usage for that purpose, shall hold over and continue to act as such officer or officers until a successor or successors of such officer or officers shall have been duly elected under the authority of this Act.

XV. And be it enacted, That in no case in which the rights of any Municipal Corporation are involved shall any witness be inadmissible from the fact of his being an elector entitled to vote in such Municipal Corporation.

XVI. And be it enacted, That all Writs of *Certiorari* and of prohibition shall issue out of the Superior Court, and shall be applied for in the like manner as Writs of *Mandamus*, and the like proceedings shall be had thereon as to service, appearance, entering of default, pleading, proof and all other matters for the determination thereof, as on applications for Writs of *Mandamus*; Provided always, that it shall not in any case be requisite to issue any alias Writ of *Certiorari*, but all orders

which for the attainment of the ends of justice it may become necessary for the Court, or any two of the Judges thereof, to make subsequently to the issuing of the first Writ, shall be made by interlocutory or final judgment, as in ordinary cases; And provided also, that no special affidavit shall be required to establish the service of any writ, order, rule or judgment connected with any of the proceedings provided for by this Act, but the return of service made in due form by the Bailiff under his oath of office, shall in all cases be considered as evidence of the facts therein stated, unless the same be controverted in due course of law; nor shall it be requisite for the party applying for any such Writ to give security either for costs or otherwise.

XVII. And be it enacted, That all Writs of Error and of Appeal may be brought either by the party against whom the judgment complained of was rendered, or, in case of his death, by his executors or administrators, if the judgment was to recover any debt, damages or personal property, or by his heirs, devisees or assigns, (*Certiorari*) if the judgment was for the recovery of real estate or the possession thereof, or if the title to real estate was determined thereby.

XVIII. And be it enacted, That if a judgment be recovered against an unmarried woman or a widow, and she afterwards marry, a Writ of Error or of Appeal may be brought thereon by her and her husband jointly; and if a judgment, shall have been obtained against several persons and one or more of them die, a Writ of Error or of Appeal may be brought thereon by the survivor or survivors; and if, after the issuing of any Writ of Error or of Appeal, whether the same shall have been issued before or after the passing of this Act, any of the parties to the judgment complained of die, or shall have died, the proceedings on such Writ of Error or Appeal may be continued by and between the survivors alone.

XIX. And be it enacted, That all Writs of *scire facias* shall issue out of the Superior Court, and it shall be lawful for the said Court to allow any such Writs to issue upon the information or petition of Her Majesty's Attorney-General or Solicitor-General or other Officer duly authorized in that behalf, for the purpose of vacating or annulling any Letters Patent granted by the Crown in the following cases:

Firstly. Where it shall be alleged that such Letters were obtained by means of some fraudulent suggestion or concealment of a material fact, made by the person to whom the same were issued or made with his consent or knowledge.

Secondly. Where it shall be alleged that such Letters Patent were issued through mistake, and in ignorance of some material fact.

Thirdly. When the patentee or those lawfully claiming under him shall have done or omitted any act, in violation of the terms and conditions upon which such Letters Patent were granted, or shall by any other means have forfeited the interest acquired under the same.

And all such informations or petitions shall be heard, tried and determined in the same manner as ordinary civil suits.

XX. And be it enacted, That an appeal shall lie to the Court of Queen's Bench sitting in appeal from all final judgments rendered by the Superior Court, in all cases provided for by this Act except in cases of *certiorari*.

XXI. And be it enacted, That all Acts and parts of Acts or provisions of law repugnant to or inconsistent with this Act, or which make any provision in any matter provided for by this Act other than such as is made by this Act, shall be and are hereby repealed.

XXII. And be it enacted, That the foregoing sections of this Act shall come into force and effect upon, from and after the day which shall be appointed for that purpose in any Proclamation to be issued by the Governor of this Province by and with the advice of the Executive Council thereof, and not before.