

Canadian Cases before the Judicial Committee of the Privy Council

Professor Catharine MacMillan*

Canadian jurists and scholars have long recognized the enduring legacy of the Judicial Committee of the Privy Council upon the development of Canadian law. The great Canadian judge, Bora Laskin, observed that there was a ‘long-time judicial ascendancy of the Privy Council’ upon the shaping of Canadian law.¹ An area of particular interest has been the Judicial Committee’s role in developing the cartography of the Canadian constitution. While the Dominion of Canada was created by the British North America Act 1867,² a British statute which unified the colonies of Canada, it was the Judicial Committee who gave shape to structure of the statute. As Dicey noted the Judicial Committee acted as the ‘true Supreme Court of the Dominion’ in the interpretation of the Canadian constitution.³ The history of this process is explored in Saywell’s superb work, *The Lawmakers*.⁴ The result of the Privy Council’s jurisprudence was not without controversy, particularly regarding the resolution of the relative competencies of the federal and provincial governments.

It is within this general context that one must consider the holdings of the library at the Institute of Advanced Legal Studies. The library contains not only a wide range of published Canadian legal reports and treatises pertaining to the early years of the Dominion, but also a strong collection of (unpublished) Cases – the materials filed by the Appellant and Respondent in appeals heard by the Judicial Committee. A record of the proceedings and materials submitted to the lower courts are generally within the Cases. These primary materials offer an excellent insight into the issues brought before the Judicial Committee and add to our understanding of how, and why, the cases were resolved. For lawyers and historians, particularly legal historians, the materials offer up the political, social, economic and cultural background to the legal dispute, allowing an assessment of the case in the context in which it was decided. The materials provide insights into the development of the law, particularly in relation to the often-changing role of legal argument and its acceptance (and rejection) by the Privy Council. The recent digitisation of these materials has expanded considerably the number of individuals who can avail themselves of these documents and facilitate their own insights and assessments. The materials are freely available online on the BAILII website at <http://www.bailii.org/uk/cases/UKPC/>.

A number of cases illustrate the possibilities afforded for a deeper and original understanding of the cases than the law reports reveal. One of Canada’s most important constitutional cases is that of *Edwards et al v Attorney-General of Canada et a* (the *Persons* case) [the materials can be found at http://www.bailii.org/uk/cases/UKPC/1929/1929_86.html], heard by the Judicial Committee in 1929. Canadians will remember the five Albertan women who brought

* Professor of Law and Legal History, University of Reading. Comments welcome: c.macmillan@reading.ac.uk.

¹ Bora Laskin, *The British Tradition in Canadian Law* (Stevens and Sons: London, 1969) 1.

² 30-31 Vict. c. 3. In 1982 the name ‘B.N.A. Act’ was replaced with that of the Constitution Act 1982 as a part of the patriation of the constitution. This commentary will continue to refer to it by the name the litigants knew it by: the British North America Act, 1867.

³ A.V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (London: Macmillan and Co., 1885) 155.

⁴ Below, n 15.

the legal challenge, the ‘Famous Five’, were commemorated on the fifty dollar bill in 2001. While the question referred to the courts by the Governor-General of Canada was a narrow one (‘does the word “persons” in section 24 of the British North America Act 1867 include female persons’) the significance of the case was enormous. Lord Sankey LC held that women were included within the provision and thus able to take up appointments to the Senate. In doing so the decision allowed women to participate fully in the Canadian political process, in the immediate years after female suffrage. In reaching this decision Lord Sankey gave Canada a broad and expansive approach to the interpretation of the constitution, declaring that ‘the British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits.’ While readers will find the excellent account of the challenge in Robert J Sharpe and Patricia I McMahon’s *The Persons Case*⁵ invaluable in understanding the case, the primary materials available online make for interesting and informative reading. These materials provide not so much the political or social context but the legal context in which the proceedings were brought and how counsel framed and argued this essential question about female civic participation. It is of more than passing interest that the first argument advanced by the Attorney-General of Canada to deny that women were included within s. 24 was that ‘the relevant provisions of the British North America Act 1867, ought to be construed to-day according to the intent of the Parliament which passed the Act’.⁶ Aware of this express argument, one can see that Lord Sankey’s ‘living tree’ was an express rejection of a form of original intent, a rejection which has continued to define the interpretation of the Canadian constitution.

The general concept of a living tree encompasses those instances in which scientific developments created change unseen by the Fathers of Confederation. In the *Radio Reference* case⁷ [http://www.bailii.org/uk/cases/UKPC/1932/1932_7.html] the Privy Council considered where to place the new technology of radio communication within the federal-provincial division of powers in the British North America Act, 1867. Considering the nature of the technology and reasoning by analogy with the enumerated competences given to the Dominion, Viscount Dunedin was of the opinion the Dominion had the exclusive competence to regulate radio communication. This was a conclusion that he also thought ‘a matter of congratulation that the result arrived at seems consonant with common sense’.⁸ Knowing how radio advanced, few in the modern world would disagree. The self-described ‘factum’ of the Attorney-General of Canada makes interesting reading for it not only indicates the state of knowledge about the operation of radio at that time but it also provides an indication of the lack of awareness of the potential of radio as a unifying national force. Radio, it was argued, needed to be a national matter because the transmitter and receiver had to be attuned to each other. That the control of broadcasts gave rise to the potential for national unity – what if there had been no Canadian Broadcasting Corporation? – had yet to be considered. The same concerns can be seen in the earlier case of *In Re the Regulation and Control of Aeronautics In Canada*,⁹ [http://www.bailii.org/uk/cases/UKPC/1931/1931_93.html] in which Lord Sankey

⁵ University of Toronto Press for the Osgoode Society, Toronto 2007.

⁶ Case of the Attorney-General of Canada, p 11.

⁷ *In re Regulation and Control of Radio Communication in Canada* [1932] AC 304.

⁸ 317.

⁹ [1932] AC 54.

held that the regulation of aviation fell within the sole competence of the Dominion. Reading through the Cases reveals significant information not available in the law reports. The Dominion's argument was drafted by Wilfrid Greene (later Baron Greene MR). While Greene did not argue the case (although a young A.T. Denning did appear as a junior counsel for the Dominion), it was Greene who presciently warned that 'unless steps are taken to place the Judicial Committee in a position of authority which will be accepted by the Dominions, the disappearance of its jurisdiction in Appeals from the Dominions in a comparatively short time is inevitable'.¹⁰ How did Greene's involvement in appeals such as this contribute to this opinion?

It is also significant to note that these materials contain information of interest not only to the lawyer and the legal historian but also to the historian. The record of proceedings submitted in each of these appeals contains scientific information providing an insight into the understandings of aviation and radio held in the 1930s. Lawyers and historians alike are able to gauge the way Canadians viewed themselves and their place in the world: an increasingly confident Dominion proudly within a British Empire.

A particularly Canadian concern¹¹ that appeared before the Privy Council on repeated occasions was the 'evil of intemperance'¹² and, in this context it is unsurprising that one of the first cases to come from Canada to Downing Street after the end of the Second World War was concerned with alcohol. *Attorney General of Ontario v Canada Temperance Foundation*¹³ [http://www.bailii.org/uk/cases/UKPC/1946/1946_2.html] had been held over for the duration of the war. The case was essentially a challenge to the Privy Council's 1882 decision in *Russell v The Queen* [http://www.bailii.org/uk/cases/UKPC/1882/1882_33.html] that the regulation of intoxicating liquor was a matter for the Dominion as a matter of peace, order and good government. While Viscount Haldane had cast doubt over the validity of *Russell's* case, Viscount Simon, after stating the Privy Council's ability to depart from its earlier decisions, held that 'the decision must be regarded as firmly embedded in the constitutional law of Canada, and it is impossible now to depart from it'.¹⁴ What the Cases filed reveal is of interest to lawyers, political scientists and historians. No less than seven temperance federations appeared as litigants, along with both the United Church of Canada and the Social Service League of the Church of England in Canada. The papers pertaining to this case greatly illuminate our understanding of the question of temperance and the legal environment in which its regulation occurred. Not only are the arguments of the various governments and federations set out but also the social views of the federations are presented. The information in the materials act as a starting point to further research into the regulation and control of intoxicating liquors, listing as they do the relevant

¹⁰ Robert Stevens, *The independence of the judiciary: the view from the lord chancellor's office* (Clarendon Press, Oxford 1993) 151.

¹¹ R.C.B. Risk, 'Canadian Courts under the Influence', (1990) 40 University of Toronto Law Journal 687 explains the particular context of this Canadian concern.

¹² *Toronto Electric Commissioners v Snider* [1925] AC 396, 412, per Viscount Haldane. The materials are available at: http://www.bailii.org/uk/cases/UKPC/1925/1925_2.html.

¹³ [1946] AC 193.

¹⁴ *Ibid*, 206.

committees and legislation. The *Canada Temperance Foundation* case materials within the Institute's collections further demonstrate a particular value of this collection: the materials contain handwritten observations. In this case the observations pertain to the order and delivery of the oral arguments before the Privy Council. In an area of judicial endeavor in which few transcripts exist, such notes provide invaluable insights into not only the case itself but the workings and processes of the Privy Council.

The materials held at the Institute include the line of 1930s appeals that revolved around Prime Minister Bennett's attempts to implement a Canadian 'New Deal' during the Great Depression. Ultimately, as Professor Saywell has observed, the failure of these attempts as a result of the Privy Council's decisions led Canadians to join 'forces to demand an end to judicial imperialism and the long reign of the Judicial Committee'.¹⁵ The papers for the case concerned with the abolition of this right of appeal, *Attorney General for Ontario v Attorney General for Canada*¹⁶ [http://www.bailii.org/uk/cases/UKPC/1947/1947_1.html] are also included in the Institute's collection. The materials are voluminous, containing as they do the Cases of seven governments. One of the many fascinations contained within these papers are the arguments concerned with the nature of government and of federalism. While the law reports record these points in brief, the materials reveal them in full. An exploration of these materials informs our understanding not only of Canadian federalism but also of federalism. The collection includes handwritten notes, in longhand and shorthand, taken during the appeal. The value to constitutional scholars is great. The Privy Council, sitting unusually as a panel of seven, held that it was *intra vires* the Dominion to remove appeals to the Privy Council. A revolutionary change had occurred peacefully.

Finally, the digitized records include one of the last Canadian appeals¹⁷ argued before the Privy Council. The contrast between distance and conformity in these Canadian appeals is apparent from the original source of the appeal. The appeal came to Downing Street from Victoria, the city named for the Queen Empress but also the Canadian city farthest from London. And the case itself concerned the regulation of employment within the grand hotel named for Queen Victoria, The Empress. Fittingly, the case concerned the division of powers under the British North America Act, 1867. The province succeeded in its arguments that the regulation of these employees was within the province's legislative competence rather than the Dominion's.

While the Canadian appeals ceased altogether in the early 1950s, the effect they left upon the development of Canadian law, particularly constitutional law, have been permanent. Your author invites her readers to acquire a greater understanding of how this process came about by probing for themselves within this unique digital archive.

¹⁵ John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (University of Toronto Press for the Osgoode Society, Toronto 2003), 203.

¹⁶ [1947] AC 127.

¹⁷ *Canadian Pacific Railway v Attorney-General for British Columbia (Empress Hotel)* [1950] AC 122 [http://www.bailii.org/uk/cases/UKPC/1949/1949_58.html].