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## Historical Sketch of the Supreme Court of Canada

## HISTORICAL SKETCH OF THE SUPREME COURT OF CANADA

The British North America Act gave to the Parliament of Canada the power to provide for "the Constitution, Maintenance and Organization of a General Court of Appeal for Canada and for the Establishment of any additional Courts for the better Administration of the laws of Canada".<sup>1</sup> In 1875 the Supreme Court Act<sup>2</sup> established the Supreme Court of Canada. It had taken six years from the time of the first Bill introduced into Parliament to establish a Canadian Supreme Court. There was much opposition to it throughout this period and for a number of years after its establishment. The greatest objection to the Court, was the reluctance to see appeals to the United Kingdom Courts abolished. This was attempted by s. 47 of the Supreme Court Act,<sup>2</sup> which said that no appeals would lie from the Canadian Supreme Court, to any Court of Appellate jurisdiction in the United Kingdom. This section was found to be of no avail<sup>3</sup> because appeals could be taken to the Privy Council which was not a court but an advisory board to the monarch and therefore did not fall within s. 47 of the Supreme Court Act.

Thus, from the beginning, the Supreme Court of Canada was overshadowed by the right of Appeal to the Privy Council due to the inability of the Mackenzie Government to secure its abolition. Although the right of appeal directly from the Supreme Court to the Privy Council was to be limited, it remained in the case of appeals directly from the courts of last resort in the provinces. The losing parties in the provincial courts were to have the option of proceeding to the Supreme Court or directly to the Privy Council. This was provided for in the Supreme Court of Canada Act, s. 4, 1875. S. 47 stated that "the judgment of the Supreme Court should be in all cases final and conclusive . . . saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal Prerogative."<sup>4</sup>

In 1888 an amendment to the Criminal Code attempted to abolish Criminal appeals to the Privy Council, but in 1926 in the case of *Nadan v. The King*<sup>5</sup> it was decided this Section was invalid and *ultra vires* because the Lords said that the British North America Act did not authorize the Dominion Parliament to annul the *prerogative* right of the King-in-Council to grant special leave to appeal. Also, the Lords pointed out that this amendment would be repugnant to s. 2 of the Colonial Laws Validity Act, 1865. Hence it was void and inoperative.

In 1931 the Statute of Westminster was passed, removing certain fetters that affected the legislative competence of Canada, and with these fetters removed, the provisions of the B.N.A. Act of 1867 had

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<sup>1</sup> 30-31 Vict. c. 3 (B.N.A. Act 1867), s. 101.

<sup>2</sup> S.C.C. Act, 1875.

<sup>3</sup> Canadian Historical Review, v. 27, p. 267.

<sup>4</sup> S.C.C. Act 1875, s. 47.

<sup>5</sup> [1926] A.C. 482, 492, 495.

full effect to invest in the Parliament of Canada a complete legislative authority throughout the Dominion.

Thus in 1933, our Supreme Court took a forward step to becoming a court of final appellate jurisdiction as a result of the amendment of section 1024(4) of the Criminal Code.<sup>6</sup> The amendment said that notwithstanding any royal prerogative no appeal shall be brought in any criminal case from a judgment or order of any court in Canada to his Majesty in Council.

This amendment was challenged in the case of *British Coal Corporation v. The King*<sup>7</sup> in which the Privy Council held that since the passing of the Statute of Westminster, the limitations of the Colonial Laws Validity Act were abrogated and the Dominion was competent to limit appeals on criminal matters to the Supreme Court of Canada. [The Appeal to the King-in-Council is prohibited in precise words by s. 17 of the Canadian Statute 23 and 24 Geo. V., c. 53].

In 1940 Bill 9 was introduced into the House of Commons to repeal section 54 of the Supreme Court Act and to amend it by giving the Supreme Court of Canada "exclusive ultimate, civil and criminal jurisdiction within Canada and the judgment of the Court, shall in all cases, be final and conclusive." This Bill also abolished appeals to the Privy Council and abolished the Judicial Committee Acts 1833 and 1844, as part of the law of Canada.

On a reference to the Supreme Court of Canada the Bill was held to be within the competence of the Canadian Parliament.<sup>8</sup> On appeal to the Privy Council<sup>9</sup> in the case *Attorney-General for Ontario v. The Attorney-General for Canada*, the Bill was held to be wholly *intra vires* the Parliament of Canada. As to appeals from the Supreme Court itself before the 1931 Statute of Westminster the Court was subject to the Prerogative of the King but this was removed by the Statute of Westminster as was the right to appeal directly from the provincial courts. The authority conferred on the Dominion Parliament in Section 101 of the B.N.A. Act to legislate within its assigned field was unqualified, and absolute.

Therefore in 1949, Section 54 of the Supreme Court Act<sup>10</sup> was accordingly amended to make the Supreme Court of Canada the final appellate court for all Canada.

Thus what the Mackenzie government failed to accomplish in 1875, i.e., to make the Supreme Court a final and conclusive tribunal, the Parliament of Canada finally accomplished seventy-four years later.

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<sup>6</sup> 23-24 Geo. V. 1933, c. 53, s. 17.

<sup>7</sup> [1935] A.C. 500.

<sup>8</sup> S.C. Act 1927, R.S.C., c. 35.

<sup>9</sup> [1947] A.C. 127.

<sup>10</sup> 1949, 13 Geo. VI, c. 37, s. 3.

In 1875 the court was composed of six judges of whom two had to be from Quebec. The first panel of judges was appointed on October 8, 1875. Until 1887 the judges of the Supreme Court constituted the Exchequer Court when in that year a separate Exchequer Court was created.

In 1927 provision was made for a seventh judge and later in 1949 with the abolition of appeals to the Privy Council the court was increased to nine Members.

The Supreme Court of Canada is a statutory creation and now has only such jurisdiction and constitution as are provided by the present Supreme Court of Canada Act.<sup>11</sup>

The jurisdiction of the court is dealt with in ss. 35-62 of the Supreme Court Act. Apart from its appellate jurisdiction, the Court has original jurisdiction in *Habeas Corpus* proceedings under ss. 57-60 and may be said to have original jurisdiction for references under s. 55 and s. 56. In addition the Court has jurisdiction conferred on it by other Statutes: e.g. Railway Act, etc.

As the Court is purely statutory the Supreme Court Act provides in detail for its constitution, powers and in every respect for the operation of the Court. In addition it provides for the making of rules of the court which will be found in the Rules of the Supreme Court of Canada.