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## Canada's Legal Pasts: Looking Forward, Looking Back

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Campbell, L., McCoy, T., & Méthot, M. (2020). Canada's Legal Pasts: Looking Forward, Looking Back. University of Calgary Press, University of Calgary, Calgary, AB.

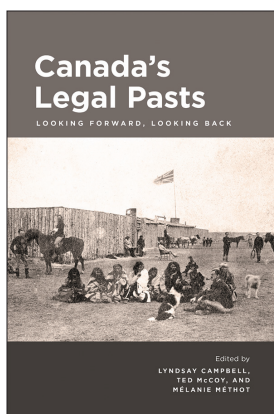
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**CANADA'S LEGAL PASTS:  
Looking Forward, Looking Back**  
Edited by Lyndsay Campbell, Ted McCoy, and  
Mélanie Méthot

ISBN 978-1-77385-117-4

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## Empire's Law: Archives and the Judicial Committee of the Privy Council

*Catharine MacMillan*

Canada, as an independent political nation, was largely a product of evolution, rather than revolution, from its British colonial origins. Nowhere is the nature of this evolutionary process clearer than in the development of Canadian law and legal institutions. While the Dominion created by the 1867 *British North America Act*<sup>1</sup> soon had its own Supreme Court sitting in Ottawa, the final appellate court was the Judicial Committee of the Privy Council sitting in London, England. As the British constitutional theorist A.V. Dicey drily observed, the Judicial Committee was the “true Supreme Court of the Dominion.”<sup>2</sup> While Canadian scholars have long studied the decisions of the Judicial Committee in relation to the Canadian constitutional structure, legal historians have examined the role of the Judicial Committee in relation to particular cases. However, there has been little systematic study of the broader impact of the Judicial Committee on the development of Canadian law beyond constitutional law. This fits into what could be seen as an even broader pattern of neglect, for there has been little detailed consideration of the functioning of the Judicial Committee as a whole.<sup>3</sup> There are many reasons for this, a prominent one being the physical disconnection between prospective scholars (generally located outside London) and the historical records (generally located in

London) which would form the basis for their study. This chapter attempts to bridge this disconnection by describing the records available in London and shedding light on how they may be approached from a distance. It presents an explanation of what the Judicial Committee was (and to some extent still is), how it functioned, and where scholars can locate its records in public archives in London. As will become apparent, these records are important for a range of different research projects: while some may be interested in the functioning of the Judicial Committee, which ran as a form of global court, others will be interested in how the Judicial Committee shaped the law of particular jurisdictions. The records also contain material of use to political, social, economic, and cultural historians.

## What was the Judicial Committee of the Privy Council?

While the jurisdiction of the Judicial Committee is originally derived from medieval custom with the *Curia Regis* (the court of the king's counsellors who did the business of state of whatever kind), the Judicial Committee was created in the modern period by the Judicial Committee Act, 1833.<sup>4</sup> That this fount of colonial justice grew from an ancient crown prerogative is only one of the many oddities of the Judicial Committee. The 1833 Act came about as a result of the work of the reforming Whig Henry Brougham as a part of his much more wide-ranging plans in 1828 to reform the administration of justice. By that point the Judicial Committee was struggling to make its way through the growing numbers of colonial appeals. This growth in numbers was exacerbated by imperial expansion, which produced a greater and increasing range of legal systems, both European and non-European, which required adjudication—and also only a modicum of suitable legal talent in London to decide these appeals.<sup>5</sup> The Judicial Committee was given appellate jurisdiction over all of the colonies in the British Empire, along with consular courts and protectorates. It was, in short, the world's first global court. It adjudicated these appeals according to the legal system of the jurisdiction from which the appeal came, a development that gave it a unique diversity in its jurisprudence. The judges of this court were privy counsellors; in 1871 legislation allowed

the appointment of two former Indian judges and two former judges of English superior courts.<sup>6</sup> The 1871 Act was designed to overcome the backlog of Indian appeals. Indian appeals presented their own complexity in that they were decided according to the legal system of the litigant. In 1876 the *Appellate Jurisdiction Act* authorized the appointment of the first Lords of Appeal in Ordinary and, for the first time, requirements for legal qualifications were put in place.<sup>7</sup> The *Judicial Committee Amendment Act, 1895* permitted a select group of judges from dominions and colonies to sit as members of the Judicial Committee<sup>8</sup>: eventually Canada sent more judges than did any other colony or dominion. In addition to what was referred to as Indian and colonial appeals, the Judicial Committee also had a domestic jurisdiction. As envisioned by Brougham, this encompassed ecclesiastical cases, admiralty,<sup>9</sup> and appeals from the Prize Court. To Brougham's vision was added (until 1907) the power to extend the life of a patent, a more limited role in copyright, and appeals under the *Endowed Schools Amendment Act, 1873*.<sup>10</sup> In short, this was a court that heard cases without a natural home elsewhere in English courts. The homeless nature of the Judicial Committee is also apparent in the fact that its imperial functioning was largely ignored by English contemporaries. The little public awareness that arose in England regarding the court was in relation to its ecclesiastical jurisdiction which involved the Church of England. The contemporary view of the relative importance of ecclesiastical cases and the colonial litigants before the Judicial Committee is summed up by a "correspondent" to the satirical weekly *Punch* in a "letter" to the editor:

SIR,

Why can't the Judicial Committee of the Privy Council stick to one thing at a time, and finish that off, instead of muddling themselves with all sorts of cases, running into one another?

For instance, I am fond of Ecclesiastical squabbles, and therefore I look with pleasure for the continuation of those Ritualistic Causes which were only partly heard.

Well, Sir, say on Monday I read MARTIN v MACHONCHIE, it reaches an interesting point, and is to be continued in to-morrow's paper.

I take up to-morrow's paper, and turn to Judicial Committee Privy Council. Instead of MARTIN v MACHONCHIE, I find EMILY ANNE v AMELIA JANE, which turns out to be not a question of people utterly at sea about lights, but of people not having lights at sea. After this is THE BOOMERSUND V ALLEN BAY, a dispute about a collision, unworthy of the Great Judicial Privy Council! The next day I again turn to the Judicial Committee and expect MARTIN v MACHONCHIE or some such serious ecclesiastical trial, which is more befitting the J.C.P.C.'s consideration than the horrid swearings and counter-swearings of a lot of reckless mariners. No, Sir, I read that the Court was occupied in investigating whether RUMTUM JELLY BAG of Badhapoorlooror was right in appealing against a decision of a Judge in Calcutta who had directed a verdict in favour of BABOO BRODLECURT TUBAHOY BHOY. A thoroughly heathen case is allowed to put the Christian out of Court. Collisions are taken the next day, and BARRY LULLABY LALLA RHOO has his turn next day. I believe they've forgotten all about the important Ecclesiastical questions awaiting their Lordships' final decision.

I am, Sir, your obedient servant,

A MAN

*(Clerk to St. Simon's Without.)*<sup>11</sup>

Since 1833, a number of procedural treatises have been written which have explained to contemporary lawyers the functioning of the Judicial Committee.<sup>12</sup> Inevitably, these have become useful guides to the legal historian. We are not concerned here with an examination of the different rules applicable to different jurisdictions as to how an appeal could be brought before the Judicial Committee of the Privy Council, but with the procedural requirements applicable once the appeal was brought, for these tell us what can be found in the archives. The appellant and respondent

were required to agree upon a record, an inclusion of all that was necessary to consider the disputed question before the Judicial Committee. This could include not only procedural records but also transcripts of lower court proceedings and judgments, copies of exhibits given in evidence in the lower courts, and documents filed before these lower courts. For some appeals copious materials went into the record. Each party also submitted a case as a pre-condition to the hearing of the appeal. The case was to consist of numbered paragraphs stating concisely the circumstances out of which the appeal arose, the contentions to be urged by the particular party, and the reasons for appeal. While similar to a Canadian *factum*, the case rarely contained extensive legal arguments or many references to law for this was not the practice of the Judicial Committee. The cases, of course, provide insight into how the litigants, or more aptly the litigants' counsel, saw their cases. It was the appellant's responsibility to bind together, "in cloth or half leather," ten copies<sup>13</sup> of both parties' cases, the record, and any supplemental record for the use of the Judicial Committee at the hearing.<sup>14</sup> It is undoubtedly the production of such a comparatively large number of copies of the cases and records which ensured the survival of so many of these into the twenty-first century.

The records form a rich trove of information about each case.<sup>15</sup> Few Canadian lawyers or political scientists are unaware that Canada's constitution is a "living tree" and that women are persons; the papers filed before the Judicial Committee provide a unique understanding of the arguments of counsel in the "Persons Case."<sup>16</sup> Taken as a whole, these records explain the workings of the Judicial Committee and its role in the development of Canadian law, both common law and civil law. The records give the best available knowledge of the workings of this global, imperial court. And the materials contained within the reports provide a rich source of information not easily available elsewhere for historians concerned with matters beyond legal history. Within the records of the proceedings, one finds copies of the sworn testimony of witnesses and the documentary exhibits produced at trial, and these give insights into a huge range of areas: cultural and familial practices of birth, death, marriage, and inheritance. Corporate records provide information into the business and mercantile practices across the centuries and around the globe. Scientific reports and testimony furnish fascinating insights into the state of knowledge

employed in particular cases. That they are largely unstudied makes them all the more alluring. We turn now to consider where the records of the Judicial Committee can be found, both in their original sources and in online digitizations.

## The London Records

A number of publicly accessible sources in London hold records from the Judicial Committee. Because our focus is on Canadian legal history, this chapter will consider the Indian and colonial appeals to the Judicial Committee. At the time of writing, none of these archives held a complete set of the records available to the public. The records of the Judicial Committee of the Privy Council were kept onsite at 12 Downing Street, where the Judicial Committee sat, as a part of its registry until the Judicial Committee was moved to the Middlesex Guildhall in 2009, the result of a wider program of constitutional and judicial reform in the United Kingdom. Since that time the records have been held in storage controlled by the Ministry of Justice; some of these records have been released to the National Archives in London, where they are available for research. While there are plans to transfer the entirety of the records to the National Archives, the time line for this transfer remains uncertain.

At present, the National Archives have only a small number of the total records available for public use, but these are unique because the Judicial Committee itself created them. The most significant of these records—the minutes of its proceedings between 1830 and 2005—became available in September 2016.<sup>17</sup> These are an invaluable starting point for anyone concerned to gain an overview of the functioning of the Judicial Committee. The minutes contain a day-by-day record of when the Judicial Committee sat, the judges who made up the panels, the parties' names, the origins of the cases, and the cases the panels heard. Announcements made to the Judicial Committee were also recorded and it is in this way that one learns of the appointment of new members to the panel, the death of previous members and counsel, the appointment of new registrars, new procedural announcements, and so forth. While there is much one would have liked to see in the minutes, such as the names of counsel, information that was only introduced well into the twentieth century, there is no other



overall record of such detail currently available. An index exists at the front of each volume listing appeals according to jurisdiction and, within each jurisdiction, in the chronological order by which each appeal or petition was first heard.

The National Archives also contain a record of the petitions brought to the Judicial Committee for leave to appeal since 1917. These petition books record a summary of the details of applications to process appeal actions. From these records one can ascertain the year of the petition, the identity of the petitioner, the respondent and their solicitors, the subject of the petition, and various related observations.

What was not available at the National Archives at the time of writing were the printed cases and records from the appeals to the Judicial Committee.<sup>18</sup> The printed cases and records make up the materials filed by the parties in their presentation of the appeal. As noted earlier, they generally contain a wealth of material not readily available elsewhere and form a significant source of information not only for legal historians but also for economic, social, and political historians. While the broad overview of the proceedings before the Judicial Committee can be ascertained from the holdings at the National Archives, a detailed study of particular case papers and judgments currently needs to be undertaken in other archives. To undertake that study, the researcher needs to board the Tube and travel from leafy Kew in southwest suburbia to the bustle of Russell Square and Euston Road in central London.

Because multiple copies of cases had to be filed with the Judicial Committee's registry, multiple copies continue to exist: another important archive for these records is the British Library on Euston Road in London. The British Library holds the printed cases of appellants and respondents from 1861–2009.<sup>19</sup> Also included in these holdings are the judgments and associated orders in council, combined with the printed records of the proceedings in the courts in which the case originated. Privy Council Registers from the sixteenth to the eighteenth centuries can be consulted electronically from the Reading Rooms (but not yet online). The British Library also holds the records of the India Office and thus, the detailed background to the numerous Indian Appeals to the Judicial Committee.

The Institute for Advanced Legal Studies on Russell Square—part of the University of London—holds a partial set of printed cases and related

materials filed by litigants between 1866 and 2008. These materials are to be found in its library. By a happy accident the founding of the Institute coincided with the end of Canadian appeals to the Judicial Committee in 1949 and the Institute purchased a Canadian law library in London which was no longer needed by Canadians. The result is that the holdings of Canadian materials are particularly strong, including not only the materials filed by litigants but also the treatises and legal authorities consulted by the Canadian barristers who travelled to London as they prepared to argue their cases. Intriguingly, the annotations within some of the printed cases appear to be those of the judges who heard the appeals, a matter which provides a unique insight into the basis of the resulting judgments.<sup>20</sup>

## Online Resources

Few online sources of Judicial Committee material exist. A prominent exception, though, is the Institute for Advanced Legal Studies' digitization project. The Institute has digitized many of the materials it holds and made these available on the British and Irish Legal Information Institute (BAILLI).<sup>21</sup> Thousands of searchable PDFs of case papers have thus been made available online. In addition, BAILLI contains a complete set of judgments for the Judicial Committee taken from the original records.<sup>22</sup> A number of online articles on the website explain the significance of the Institute's records to the history of the Judicial Committee.

The Privy Council Papers, a research project undertaken by Dr. Nandini Chatterjee and Dr. Charlotte Smith, consists of the case papers for six cases decided between 1869 and 1939.<sup>23</sup> Also included on their online website is a catalogue of metadata for appeals decided between 1792 and 1998. As well, the site comprises a number of significant research articles concerned with the Judicial Committee and its records.

Various other websites offer smaller "snapshots" of portions of the records. These include the first fifty appeals from the East India Company Territories to the Privy Council (1679–1774).<sup>24</sup> In addition, McQuarrie University has posted material pertaining to Australian appeals to the Judicial Committee between 1809 and 1850.<sup>25</sup> Materials regarding the appeals from the thirteen colonies which became the United States are available through the Ames Foundation at Harvard University.<sup>26</sup> The website

also contains a wealth of information about the functioning of the Judicial Committee with regard to pre-revolutionary America.

The current state of online sources provides a useful and productive starting point for scholars interested in both the functioning of the Judicial Committee of the Privy Council and the individual cases which appeared before the Judicial Committee. The high quality PDFs of documents available on BAILLI through the Institute of Advanced Legal Studies' digitization project are particularly significant. And there is every indication that the online sources will continue to expand in the next few years. For the impatient, though, the temptation of archival research in London beckons. The records that await her will more than compensate for the length of the journey.

#### NOTES

- 1 *British North America Act*, 1867 (UK), 30–31 Vict c 3. In 1982, as a part of the patriation of the constitution, the *British North America Act* was renamed the *Constitution Act*, 1867.
- 2 A.V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (London: Macmillan and Co, 1885), 155.
- 3 Two prominent exceptions to this pattern of neglect are P.A. Howell, *The Judicial Committee of the Privy Council 1833–1876: Its Origins, Structure, and Development* (Cambridge: Cambridge University Press, 1979), and D.B. Swinfen, *Imperial Appeal: The Debate on the Appeal to the Privy Council, 1833–1986* (Manchester: Manchester University Press, 1987). On the functioning of the modern Judicial Committee, see Jonathan Mance and Jacob Turner, *Privy Council Practice* (Oxford: Oxford University Press, 2017).
- 4 *Act for the Better Administration of Justice in His Majesty's Privy Council*, 1833 (UK), 3 & 4 Wm IV, c 41.
- 5 Howell, *Judicial Committee of the Privy Council 1833–1876*, 9–12.
- 6 *Judicial Committee Act*, 1871 (UK), 34 & 35 Vict, c 91.
- 7 *Appellate Jurisdiction Act*, 1876, 1876 (UK), 39 & 40 Vict, c 59.
- 8 *Judicial Committee Amendment Act*, 1895, 1895 (UK), 58 & 59 Vict, c 44.
- 9 Admiralty was removed in 1876.
- 10 *Endowed Schools Act*, 1873, 1873 (UK), 36 & 37 Vict, c 87.
- 11 A Man [F.C. Burnand], "The Judicial Committee," *Punch*, 19 December 1868, 259.
- 12 Prominent examples are: John Macqueen, *A Practical Treatise on the Appellate Jurisdiction of the House of Lords and the Privy Council* (London: A. Maxwell & Son,

- 1842); William Macpherson, *The Practice of the Judicial Committee of Her Majesty's Most Honorable Privy Council* (London: Henry Sweet, 1860); William Macpherson, *The Practice of the Judicial Committee of Her Majesty's Most Honorable Privy Council*, 2<sup>nd</sup> ed (London: Henry Sweet, 1873, available on [hathitrust.org](http://hathitrust.org)); Frank Safford and George Wheeler, *The Practice of the Privy Council in Judicial Matters* [etc.] (London: Sweet and Maxwell, 1901, available on [hathitrust.org](http://hathitrust.org)); Norman Bentwich, *The Practice of the Privy Council in Judicial Matters* [etc.] (London: Sweet & Maxwell, 1912, available on [hathitrust.org](http://hathitrust.org)).
- 13 The number was reduced to ten after 1908, while it had been greater earlier. Macqueen reports that forty copies had been required for the use of the Judicial Committee in the nineteenth century: Macqueen, *Practical Treatise on the Appellate Jurisdiction of the House of Lords and the Privy Council*, 712.
- 14 Rule 68, the Judicial Committee Rules 1908, a copy of which can be found in Bentwich, *Practice of the Privy Council*, n. 11.
- 15 See Catharine MacMillan, "Canadian Cases before the Judicial Committee of the Privy Council," Institute of Advanced Legal Studies, School of Advanced Study, University of London, [http://ials.sas.ac.uk/sites/default/files/files/IALS%20Digital/Digitisation%20projects/JCPC/Canadian\\_Constitutional\\_Cases\\_Comment.pdf](http://ials.sas.ac.uk/sites/default/files/files/IALS%20Digital/Digitisation%20projects/JCPC/Canadian_Constitutional_Cases_Comment.pdf).
- 16 *Edwards v AG of Canada*, [1930] AC 124 (JCPC). The Judicial Committee materials can be viewed on the Judicial Committee of the Privy Council (JCPC) database on BAILII, at [http://www.bailii.org/uk/cases/UKPC/1929/1929\\_86.html](http://www.bailii.org/uk/cases/UKPC/1929/1929_86.html).
- 17 Judicial Committee of the Privy Council, Minutes, PCAP 9, National Archives.
- 18 Once released, these records will be within the National Archives in Judicial Committee of the Privy Council, Printed Cases in Indian and Colonial Appeals, and Printed Papers in Appeals, PCAP 6. At present, they are held in storage by the Ministry of Justice, following their removal from the original Downing Street registry and are not available for public inspection (if at all).
- 19 Judicial Committee of the Privy Council Appeal Cases, British Library website, at <https://www.bl.uk/collection-guides/judicial-committee-of-the-privy-council-appeal-cases>.
- 20 The annotations thus explain what appears inexplicable in the law reports. See, for example, MacMillan, "The Mystery of Privy: *Grand Trunk Railway Company of Canada v Robinson* (1915)," *University of Toronto Law Journal* 65, no. 2 (2015): 1–36. In this case it would appear from the notations and marginal characters that the writer (presumably a panel member) was sufficiently impressed with the importance of Canadian railway capitalism to disregard the rules of privity of contract.
- 21 See <http://ials.sas.ac.uk/digital/digitisation-projects/judicial-committee-privy-council-case-papers/advanced-search> and <http://www.bailii.org>. The Institute has also begun creating a searchable database of the cases it holds—the Privy Council Decisions Documents Directory—available at <http://193.62.18.232/dbtw-wpd/textbase/PCDDDsearch.htm>.
- 22 The actual cases were often reported, through the nineteenth century, under titles that vary somewhat, but of which the first volume is *Reports of Cases Argued and*

*Determined before the Committees of His Majesty's Most Honourable Privy Council, Appointed to Hear Appeals and Petitions.* The first two volumes were compiled by Jerome William Knapp, who was succeeded by Edmund F. Moore after whom the colloquial name, Moore's Privy Council Reports, began to be applied to the series. The Indian cases had their own series, known by titles such as *Reports of Cases Heard and Determined by the Judicial Committee and the Lords of Her Majesty's Most Honourable Privy Council, on Appeal from the Sudder Dewanny Adawlut and High Courts of Judicature in the East Indies.* These volumes, or most of them, can be found online, if enough energy is employed in the hunt, through [archive.org](http://archive.org), [hathitrust.org](http://hathitrust.org) and Googlebooks. As well, various authors have published collections of JCPC cases from Canada.

- 23 Privy Council Papers, <http://privycouncilpapers.exeter.ac.uk> .
- 24 Privy Council Appeals Data, Anglo-Indian Legal History website, <http://angloindianlaw.blogspot.com/p/privy-council-cases-from-india-before.html#data>.
- 25 Decisions of the Superior Courts of New South Wales, 1788–1899, Macquarrie University website, [http://www.law.mq.edu.au/research/colonial\\_case\\_law/nsw/site/scnsw\\_home/](http://www.law.mq.edu.au/research/colonial_case_law/nsw/site/scnsw_home/).
- 26 Appeals to the Privy Council from the American Colonies: An Annotated Digital Catalogue: Part 1, Ames Foundation, Harvard University, at <http://amesfoundation.law.harvard.edu/ColonialAppeals/index.php>.

