



The Judicial Committee of the Privy Council

The Canadian Constitution is not just made up of acts and statutes; it is also shaped by the decisions of courts which interpret those documents. This page discusses the role and the history of the British Judicial Committee of the Privy Council (JCPC) in Canadian law and on the Canadian Constitution.

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Description and Role in Canadian Law

The Judicial Committee of the Privy Council (JCPC) is a board of the British Privy Council made up of prominent jurists in Britain. It had jurisdiction over all colonial courts, including the province of Canada and the Dominion of Canada until 1949. Thus, the Supreme Court of Canada (created in 1875) was not in fact the highest court.

History in Canadian Law

When the Supreme Court of Canada was established in 1875, Justice Minister Edward Blake tried to abolish appeals to the JCPC. This was resisted by the Lord Chancellor, Lord Cairns, and ultimately the effort failed on the grounds that the clause abolishing appeals was inoperative. Canada was, however, allowed to decide what kinds of cases could be appealed. It banned criminal appeals to the JCPC in 1888.

In 1926 criminal appeals were again allowed as the JCPC ruled that the Canadian law which prevented those appeals conflicted with the JCPC's jurisdiction in Canada. This was again reversed in 1933 after the Statute of Westminster gave Canada equality with Britain.

In 1947 the JCPC ruled that the Parliament of Canada could abolish civil appeals to the JCPC. This was done in 1949, at which time the Supreme Court of Canada became the last court of appeal for all cases originating in Canada.

Key Judgments

The JCPC made 173 major judgments interpreting the *British North America Act, 1867* (now renamed the *Constitution Act, 1867*). The decisions of the first 50 years tended to weaken the central powers of the federal government and strengthen provincial power. This was especially true for the federal power to regulate trade and commerce and in the residual powers of Section 91 to legislate for the “peace, order and good government of Canada.” Some important cases are listed below:

Maher v. Town Council of Portland (1875)

The JCPC held that although denominational schools in New Brunswick had been publicly supported in the past, there was no law guaranteeing this. Therefore, the government of New Brunswick could end this funding.

To learn more about the New Brunswick School Question:

- [Visit the Canadian Encyclopedia.](http://www.thecanadianencyclopedia.com/index.cfm?TCE_Version=A)
[link: http://www.thecanadianencyclopedia.com/index.cfm?TCE_Version=A]

The Guibord Affair (1875)

Joseph Guibord, a member of the *Institut canadien* in Montreal, died and was refused burial on church (consecrated) ground by the Catholic Bishop of Montreal, who was trying to suppress the Institut. The case went to the JCPC, which ruled that the Catholic church would have to bury him and pay the expenses.

After an ugly street scene in which one attempt to bury him was prevented by protesters, he was eventually buried at the Côte des Neiges cemetery. His grave was filled with cement and scrap iron to prevent its disinterment. The Bishop, however, de-consecrated the grave when the ceremony was finished.

To learn more about the Guibord Affair:

- [Visit the Canada’s Digital Collections Guibord Affair site.](http://collections.ic.gc.ca/icma/en/documents/guiborddocs.html)
[link: <http://collections.ic.gc.ca/icma/en/documents/guiborddocs.html>]
- [Visit the Canadian Encyclopedia.](http://www.thecanadianencyclopedia.com/index.cfm?TCE_Version=A)
[link: http://www.thecanadianencyclopedia.com/index.cfm?TCE_Version=A]

McLaren v. Caldwell (1883)

Peter McLaren improved a river near Ottawa, called the Mississippi, for logging and attempted to prevent another mill owner, Boyd Caldwell, from moving logs without paying. The JCPC ruled in Caldwell’s favour. The Ontario government passed the *Rivers and Streams Act* in 1881 before this judgment, which caused friction with the federal government. The Act was disallowed by the federal government, and disallowed again in 1882 and 1883, before it was finally passed in 1884. This increased tensions between the Ontario and federal government.

The Ontario Boundary Case

Ontario argued that its boundary should be west of Lake Superior and on the Lake of the Woods. The federal government disagreed and in 1878 a commission was held to decide the issue. It gave Ontario nearly all it wanted.

Later that year, however, Macdonald returned to power and he passed legislation that moved Manitoba's eastern border to meet Ontario's western border. This drew Manitoba into the conflict, and by 1883 both Ontario and Manitoba had constables in Rat Portage (Kenora). The matter had to be referred to the JCPC, which ruled in Ontario's favour in 1884.

Citizen's Insurance Co. v. Parsons (1880)

In this case, the JCPC placed strong restrictions on the federal government's powers over trade and commerce.

Hodge v. the Queen (1883)

Archibald Hodge, a tavern owner, broke Ontario law by allowing a billiard game after the tavern had closed for drinking. He challenged the right of the Ontario government to pass laws on the matter. Lord Watson of the JCPC stated that "the Dominion Parliament has no authority to encroach upon any class of subjects which is exclusively assigned to provincial legislatures by section 92 [of the *British North America Act, 1867*]...."

The "Persons" Case (1928)

In the 1920s, five women demanded the right to hold a seat in the Senate. The *British North America Act, 1867* stated that only "qualified persons" could hold office, which had previously been interpreted to mean only men. In 1928, the Supreme Court ruled that women were not persons, but this was overturned by the JCPC. The women involved were Emily Murphy, Henrietta Muir Edwards, Nellie McClung, Louise McKinney, and Irene Parlby.

To learn more about the "Persons" case:

- Visit the National Archives of Canada site.
[link: http://www.archives.ca/05/0530_e.html]

Supporting documents in Early Canadiana Online:

Judgment of the Judicial Committee of the Privy Council in the Manitoba school case: with factums and other documents in connection therewith

The "New Deal" Legislation (1935)

During the depths of the Great Depression, Prime Minister R.B. Bennett passed legislation to provide unemployment insurance and other relief measures for the poor. This was upheld by the

Supreme Court of Canada, but was then referred to the JCPC. The JCPC rejected the legislation on the grounds that the “peace, order and good government” clause of Section 91 was only to be used in dire circumstances.

To learn more about Bennett’s New Deal:

- Visit the Canadian Encyclopedia.

[link: http://www.thecanadianencyclopedia.com/index.cfm?TCE_Version=A]

Criticisms

Many of the decisions made by the JCPC have been interpreted as contradicting the intentions of the Fathers of Confederation. Critics argue that the JCPC was unfamiliar with the conditions and circumstances in Canada. They have also been criticized because it has been seen by some as demeaning to have a foreign court decide Canadian issues.

It has also been argued that the JCPC seriously limited the federal government’s ability to deal with serious national economic and social problems, such as the Great Depression.

A complete set of JCPC constitutional cases for Canada can be found in *Canadian Constitutional Decisions of the Judicial Committee of the Privy Council, 1867-1949*, (3 vols.).

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