The Privy Council is one of the oldest surviving emblems of royal prerogative in Canada. It represents a legislative model by which the British monarch serves as the figurehead of a central executive, guided by a small group of knowledgeable ministers and advisors. The Judicial Committee of the Privy Council was created through the Judicial Committee Act 1833. This Act was designed to rectify deficiencies identified by Lord Chancellor, Henry Brougham, when it came to the Privy Council's role as a court of final appeal in both Britain and its colonies.

Today, the Judicial Committee of the Privy Council remains the highest court of appeal in Great Britain, as well as for a number of Commonwealth countries, crown dependencies and overseas territories. It was once the highest court of appeal for all overseas countries in the British Empire, including nations such as Canada, Australia, New Zealand and India. At the height of the British Empire, the Judicial Committee served as the final court of appeal for more than a quarter of the world's population.

This article analyzes the path towards Canada's abolition of appeals to the Judicial Committee of the Privy Council. It also explores the genesis of the Supreme Court of Canada, and its
function as the country’s highest court. In addition, it examines the
evolution of the Supreme Court’s role over the years, and its impact
on Canada’s right to manage its own affairs.

1867–1875: ESTABLISHMENT OF AN INSTITUTION

As Canada grew and matured, its dependence on Britain began to
weaken. In 1865, Britain had passed the Colonial Laws Validity Act
1865, effectively making it impossible for colonies to pass laws that
were ‘repugnant to’ — in other words, laws that either
contradicted or acted against — British laws affecting the colonies.

Section 2 of the Colonial Laws Validity Act 1865 provided that:

Any colonial law which is or shall be in any respect repugnant to the
provisions of any Act of Parliament extending to the colony to
which such law may relate, or repugnant to any order or regulation
made under authority of such Act of Parliament, or having in the
colony the force and effect of such Act, shall be read subject to such
Act, order or regulation, and shall, to the extent of such repugnancy,
but not otherwise, he and remain absolutely void and inoperative.

The British North America Act, 1867 (now the Constitution Act,
1867) was aimed at balancing the forces tearing apart the old
Province of Canada against the forces that had brought all the
provinces together. Important aspects included:

• Giving the Governor General power to veto any provincial
  law, within a year of receiving a copy of said legislation.
• The division of powers between the federal government and
  provincial legislatures.
• Allowing Canada’s federal government to assume any and all
  powers not specifically allocated, under its power to act for
  ‘Peace, Order and good Government’.

This gave the provinces power over certain areas, such as
education. In addition, Quebec was allowed to maintain its system
of civil law, along with tacit recognition of its cultural reality.

Part VII of the British North America Act, 1867 (ss. 96 to 101)
established a Canadian judiciary. These sections gave Canadian
courts the power to determine whether or not institutions and all
levels of government were following the rules and acting within
their constitutional authority (intra vires), or overstepping their
authority and acting beyond their powers (ultra vires), thus invalidating their actions within a legal context.

The *British North America Act, 1867* did not establish specific courts, although section 101 authorized Canada’s Parliament (Parliament) to create a ‘General Court of Appeal for Canada’ and ‘any additional Courts for the better Administration of the Laws of Canada’.

More specifically, section 101 of the *British North America Act, 1867* reads as follows: ‘The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time 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’.

An Act establishing both the Supreme Court of Canada and the Exchequer Court of Canada was accordingly passed by Parliament in 1875.

*The Genesis of Canada’s Final Court of Appeal*

The *British North America Act, 1867* appeared to give Canada’s Parliament authority to establish the Supreme Court of Canada. Section 101 expressly allowed ‘for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada’. Section 101, which was based on section 31 of the Quebec Resolutions, came in for very little debate during the pre-Confederation conferences. Despite this apparent lack of controversy, the Supreme Court was not established until nearly eight years after July 1, 1867.

On May 21, 1869, Conservative Prime Minister John A. Macdonald introduced a ‘Bill for the establishment of the Supreme Court of Canada’ in the House of Commons, withdrawing it before its second reading. Macdonald later said that the bill was a think piece aimed at prompting discussion of a Supreme Court in Canada, rather than an official piece of draft legislation.

Macdonald’s government introduced a second Supreme Court bill on March 18, 1870. This, too, was withdrawn. The Speech from the Throne for the second session of Parliament in 1873 again proposed a federal court of appeal. Unfortunately, Macdonald’s government resigned shortly thereafter, and no further action was taken. The incoming Liberal government, under Alexander Mackenzie, announced its intention of pushing for a federal court of
appeal. Despite this determination, however, it was not until the following session of Parliament that Justice Minister Télesphore Fournier finally introduced the *Supreme and Exchequer Courts Act* (hereinafter, *Supreme Court Act, 1875*).

Fournier’s bill was similar to those introduced by Macdonald’s government and, like them, was hotly debated. Professor Barry L. Strayer has suggested that Attorneys General Macdonald and Cartier were aware of the controversies inherent in section 101 during the pre-Confederation debates, and that they had attempted to avoid confrontation at the time by glossing over the section’s significance and ultimate impact.¹ There were three issues in section 101, however, that could not be ignored indefinitely.

Firstly, did authority over ‘the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada’ give the Supreme Court of Canada power to decide whether legislative exercises were constitutionally sound?

Secondly, as a federal court, would the Supreme Court of Canada reflect the American model (possibly with power to review the Constitution), or was it meant to serve simply as a final appellate court, hearing appeals from provincial courts on provincial matters?

And, finally, how would this new Court relate to the Judicial Committee? Specifically, could Canada’s Parliament regulate or abrogate a Canadian’s right to appeal to the British monarch?

Unresolved issues like these made it somewhat risky to introduce a bill establishing a Canadian Supreme Court, which may explain some of Macdonald’s hesitation. The net result was a delay in the legislation’s final introduction and passage, coupled with the spectre of the Act being overturned by Britain. This detracted, to a certain extent, from the Supreme Court’s impact and prestige during its early years and, on more than one occasion, almost succeeded in sinking it altogether.

The easiest issue to resolve was judicial review of the legislative division of power between federal and provincial governments. There had been little discussion of judicial review during the pre-Confederation debates. As Macdonald had done before him, Mackenzie simply assumed that the new Supreme Court would review the division of legislative powers under the *British North America Act, 1867*. When pushing for the Supreme Court, however, Fournier emphasized its potential role as constitutional arbitrator.

Why was there no opposition to this aspect of Supreme Court jurisdiction? The simple answer is that the concept of judicial
Evolution of Supreme Court in Canada

Review was already well established in Canada, as historically exercised by the Privy Council and colonial courts. Prior to Confederation, colonial legislation was routinely examined by the Judicial Committee to ensure that it did not contravene any Imperial legislation, charter or commission. The Privy Council implicitly recognized this power. Section 2 of the Colonial Laws Validity Act 1865 affirmed the principle of colonial judicial review.

Section 5 of the same Act allowed ‘[e]very colonial legislature . . . to establish courts of judicature . . . for the administration of justice therein . . .’. As a result, Canada’s colonial courts, under the aegis of the Judicial Committee, reviewed colonial legislation to ensure that it was not ‘repugnant to’ Imperial laws. Even today, when a Canadian court declares provincial or federal legislation unconstitutional, the court is, in theory, stating that said legislation is repugnant to provisions of the applicable statute, which is the British North America Act, 1867 or, as it is called today, the Constitution Act, 1867.

It is not surprising that the issue of judicial review went unnoticed during pre-Confederation debates. While arguing against some aspects of the Supreme Court’s jurisdiction, the Privy Council automatically assumed that the Supreme Court would be responsible for constitutional review. Macdonald sought, however, to strip provinces of their ability to judicially review the constitutional separation of powers. His 1869 bill had, in fact, given the Supreme Court entire jurisdiction over the constitutional validity of all provincial laws. At the same time, Macdonald appeared to accept that the Supreme Court could not expect sole jurisdiction over constitutional disputes, and dropped this provision from his 1870 bill.

In his second bill, Macdonald did, however, include a reference power entitling the federal government to submit constitutional questions to the Supreme Court for a legal opinion. These advisory opinions were not intended as binding judicial decisions, but were instead meant to guide the Canadian government in creating policy and exercising its ability to disallow certain legislation. Macdonald was trying, indirectly, to give the Supreme Court the powers he had originally envisaged. In effect, he hoped that this particular reference power would pre-empt provincial laws when necessary and, in practical terms, give the Supreme Court final jurisdiction. This reference power was also contained in Mackenzie’s 1875 bill, and remains on the books today. It has not, however, dissuaded
provincial courts from ruling on the validity of provincial and federal legislation.

Prior to the Irving amendment (discussed below) to the *Supreme Court Act, 1875*, controversy originally centred on whether section 101, authorizing 'a General Court of Appeal for Canada,' even allowed the federal government to establish a federal court to hear appeals from provincial courts on provincial matters. Macdonald had delayed passage of the requisite legislation, primarily because the province of Quebec was hostile to the creation of a new federal court with the power to review provincial decisions — particularly those dealing with Quebec's Civil Code.

Macdonald and Georges-Étienne Cartier had been clear, at the time of Confederation, that appeals from provincial courts would fall under section 101.2 As Macdonald later admitted, however, early supporters of a federal Supreme Court were more interested in its ability to rule on federal and constitutional issues than in its possible role when it came to appeals from provincial courts. In addition, it was unusual to give a single judicial entity final scrutiny over a dual executive and legislative system. It was argued that the words 'a General Court of Appeal for Canada' should limit the Supreme Court's jurisdiction to federal matters, similar to the U.S. Supreme Court. This federalist approach to jurisdiction was ultimately invalidated by the Privy Council.

Quebec's objections were not rooted in political and legal theory alone. Quebec's fundamental objection to the Supreme Court of Canada — which remains its primary objection to this day — was that Quebec's legal system, like its culture, was different from the rest of Canada, and could only be developed by those who understood it. Quebec's concern was that its legal system would be laid open to interpretation by people who didn't understand it, while also raising the possibility of English jurisprudence being grafted onto Quebec's Civil Code.

French Canadians also considered the Judicial Committee the preferred authority when it came to any review of provincial jurisprudence. Although this may seem strange, at the time Quebec had great respect for the Judicial Committee. The Committee was viewed as having broad judicial experience, linguistic fluency, and an awareness of Roman law. The Judicial Committee was accordingly trusted within Quebec, at least in the early days. Parliament gave Quebec at least two of the Supreme Court's six seats, as a way of guaranteeing that Quebec law was appropriately
interpreted. Despite the amendment, Quebec remained firmly opposed to the Supreme Court.

Changing the Appeal Process

The most immediate controversy centred around an amendment to the 1875 bill. Proposed by Hamilton M.P. Aemilius Irving, the amendment — often referred to as ‘clause 47’ during the ensuing dispute — stated that:

The judgment of the Supreme Court shall in all cases be final and conclusive, and no error or appeal shall be brought from any judgment or order of the Supreme Court to any court of appeal established by the parliament of Great Britain and Ireland, to which appeals or petitions to Her Majesty in Council may be ordered to be heard, saving any right which Her Majesty may be graciously pleased to exercise as her royal prerogative.3

The bill had received royal assent from Governor General Lord Dufferin on April 8, 1875, and the Supreme Court Act, 1875 was already law at the time of Irving’s proposal.4 The Irving amendment was troubling, however, to Imperial authorities who, as Macdonald had predicted, now considered disallowing the entire bill. This would have effectively killed the Supreme Court before it could hear a single appeal.

It soon became clear that someone would have to tackle the Colonial Office. The task fell to Edward Blake, a brilliant lawyer who was also the Mackenzie government’s Justice Minister, and President of the Queen’s Privy Council for Canada. On October 6, 1875, Blake drafted a memorandum to the Colonial Office in London, cogently arguing that there was no legal basis to disallow the Supreme Court Act, 1875 or, for that matter, clause 47.

On August 29, 1876, the British government responded. Its first dispatch was aimed at Canadians in general, and announced that Her Majesty would not be exercising her power of disallowance. The second dispatch was sent to Mackenzie’s government, and stated that Britain considered it safe to allow the bill, because clause 47 was wholly inoperative and, even if it were operative, did not in any way prevent Supreme Court appeals to the Privy Council. The decision by British authorities that the clause was both inoperative and ineffectual was based on their understanding of the appeal process in relation to the Judicial Committee of the Privy Council.
There were historical precedents for bills designed to standardize and enhance the efficiency of colonial appeals to the Privy Council. The most important of these were the Judicial Committee Act 1833, and the Judicial Committee Act 1844. The 1833 Act led to the creation of the Judicial Committee of the Privy Council, redirecting all appeals previously heard by the King-in-Council to the Judicial Committee. Appeals as of right, as well as those under royal prerogative, would now be heard by a select group of legal professionals. In addition to some procedural changes, the 1844 Act contained two important new provisions. One of these authorized Her Majesty to refer appeals as of right to the Judicial Committee via Orders in Council. The other — based on an awareness that colonial laws were often intended to prevent any appeal to the Crown, other than from a final colonial court of appeal — reaffirmed the royal prerogative to hear an appeal from any court within a British colony or possession.

When it came to the Supreme Court of Canada, there was no appeal as of right. The only basis for review was an appeal by special leave of the sovereign, a remnant of royal prerogative. As Blake told the Lord Chancellor on July 5, 1876, in his opinion, Canada's Parliament was perfectly able to regulate appeals as of right. Blake undoubtedly relied on two arguments he had advanced in his October 6, 1876 memorandum.

The first of these cited Cuvillier v. Aylwin, which suggested that, by giving royal assent to a provincial statute that limited appeals to the King-in-Council, the monarch was participating with other legislative branches, thus circumscribing royal prerogative. The argument appears to have been that a colonial legislature, with the agreement of the Crown, could thus curtail royal prerogative. In 1862 and 1880, the Privy Council disapproved of Cuvillier v. Aylwin, declaring that limitation of royal prerogative was expressly authorized only for Lower Canada, in the Constitutional Act 1791. In its March 9, 1876 memorandum, the Privy Council chose simply to refine its opinion by pointing out that, while in Cuvillier v. Aylwin Crown assent was given and maintained, the actual question before Imperial authorities was whether or not this assent should be withdrawn.

Blake’s other key argument was that the British North America Act, 1867 — an Imperial statute — had essentially empowered Canada's federal government to restrict or abolish appeals to the Judicial Committee with these words in section 91: ‘to make Laws for the Peace, Order, and good Government of Canada’. Blake
argued that the federal government’s judicial power was further cemented in section 101, which authorized the Dominion Parliament to establish ‘a General Court of Appeal for Canada’. To Blake, this ultimately meant that Canada had the authority to modify royal prerogative. His second argument was particularly clever, and points to the nimbleness of Blake’s intellect.

The latter was precisely the argument advanced in *Nadan v. The King* — a dispute over the validity of the federal government’s attempt to abolish all criminal appeals to the Judicial Committee. On that occasion, however, the Privy Council determined that the powers granted under section 91 were not explicit enough.

### 1876–1932: MAKING CHANGES

**The Abolition of Appeals**

Canada was the first Dominion in the British Empire to challenge the power of the Privy Council to hear appeals from Canadian courts. As Canada’s self-confidence grew and it began loosening the colonial apron strings, Canadians began questioning the principle of Britain’s Privy Council serving as Canada’s final court of appeal. It was even alleged, in some quarters, that the Judicial Committee of the Privy Council was trying to weaken Canada’s Constitution, then enshrined in the *British North America Act, 1867*.

Prime Minister Macdonald was not the only one to accuse the Judicial Committee of deliberately fostering provincial autonomy at the expense of federal unity. Others, however, felt that the Judicial Committee respected the wording of the Act, and the intentions of those who had framed it. The Committee’s preference for provincial autonomy, however, did not earn it Quebec’s unqualified support in the battle to retain final right of appeal within the Dominion.

Throughout the 1870s and 1880s, the Privy Council had been admired and respected in Canada. It featured eminent jurists and enjoyed very broad powers. However, by 1949, however, Quebec had become deeply disenchanted with the Judicial Committee, pointing to uneven knowledge of the province’s Civil Code and a lack of linguistic parity. Quebec felt that, although the *British North America Act, 1867* was generally interpreted in its favour, the Civil Code was not receiving the respect it deserved from an increasingly unilingual English tribunal.
To some, the fundamental issue was that the Privy Council refused to adjust the constitutional division of powers to accommodate the country’s current reality. The situation is neatly summed up by Ivor Jennings, who notes that the Judicial Committee of the Privy Council ‘never seriously wavered from the principle that it was [its] function to interpret the ‘intention of Parliament’ as laid down in the Act and not to fit the Constitution to the changing conditions of social life’. It is intriguing to speculate on whether or not the Privy Council’s efforts can be defended by suggesting that many important adjudications derived from previous federal or provincial government decisions.

The issue with the most impact on the Supreme Court was the question of who should be responsible for final appeals. Without having the authority to hear and decide on such appeals, the Supreme Court’s stature as a viable and uniquely Canadian legal entity was clearly in jeopardy.

This particular issue had loomed large from the very beginning. Although the Supreme Court Act, 1875 had become law on April 8, 1875, the possibility of disallowance dogged the bill for more than sixteen months, until August 29, 1876. Further, although a proclamation enabling the appointment of Supreme Court Justices was issued on September 17, 1875, Sir William O’Grady Haly, administrator in the Governor General’s absence, showed little inclination to travel from Halifax to Ottawa to swear them in.

On October 1, 1875, after Lord Carnarvon indicated that the Supreme Court Act could be enacted — despite the fact that the issue of disallowance had not yet been settled — the Justices were finally sworn in. The Supreme Court now had an official mandate to carry out its judicial functions, effective January 11, 1876. The Supreme Court’s first formal sitting was on January 17, 1876, and its first case was heard on June 5, 1876, nearly three months before the issue of disallowance was finally resolved.

By 1885, it was clear that the worst was over, and that the Supreme Court was going to survive. The reason that the Court remained so vulnerable until 1885 — and perhaps why it did not command any real respect before 1949 — may have been because it remained, for a time, in the shadows of the Judicial Committee. The Supreme Court was still bound by Privy Council decisions, making it impossible for the Court to develop its own jurisprudence and judicial methodology.

By now, Irving had realized that even his amendment could not solve the problem. Given that provincial appeals could be heard by
either the Supreme Court or the Privy Council, the federal
government was faced with the depressing prospect of a group of
judges sitting on their hands, hoping for an opportunity to hear an
appeal that could just easily have been heard in England. As we
have already seen, however, the Irving amendment was ultimately
inoperative and ineffectual, and appeals from the Supreme Court of
Canada to the Privy Council remained unregulated. As Supreme
Court Justice Bora Laskin put it, ‘The Supreme Court... was left in
the ambiguous position where it could not command appeals to it
nor effectively control appeals from it’? Despite widespread
dissatisfaction, it would be many years before appeals to the Privy
Council were finally abolished in Canada.

The 1926 and 1930 Imperial Conferences

Held in London, England from October 19 to November 22, the
1926 Imperial Conference brought together Prime Ministers from
every Dominion in the British Empire. The Conference is
particularly memorable for the Balfour Declaration, which held
that all Dominions were equal in status, and that ‘autonomous
communities within the British Empire’ were not subordinate to
the United Kingdom. The word ‘Commonwealth’ was now formally
adopted to describe the group.

The Inter-Imperial Relations Committee, chaired by Arthur
Balfour, was created at the Conference to explore future
constitutional arrangements for Commonwealth nations. The
Committee ultimately rejected the idea of a codified constitution, as
proposed by South Africa’s former Prime Minister, Jan Smuts. It
also rejected the ‘end of empire’ approach proposed by Smuts’
arch-rival, Barry Hertzog. The Committee’s other
recommendations were adopted unanimously on November 15,
and were described by the press in glowing terms.

The 1930 Imperial Conference, also in London, brought the
Dominion Prime Ministers together again. The primary legislation
resulting from this conference was the Statute of Westminster,
1931, which gave legislative equality to self-governing Dominions
of the British Empire. This effectively gave the Dominions
legislative independence, either immediately, or upon
ratification.

Economic relations within the British Empire were discussed as
well, including proposals for a system of Empire-wide trade
barriers against foreign goods. This would be pursued further at
the 1932 British Empire Economic Conference.
The Statute of Westminster, 1931

The Statute of Westminster, 1931 enacted some of the political resolutions from the Imperial Conferences of 1926 and 1930 — in particular, the 1926 Balfour Declaration. Britain’s Parliament could no longer legislate on behalf of the Dominions, and the Colonial Laws Validity Act 1865 was repealed. Once the Statute of Westminster, 1931 had been passed, the only way the British government could make ordinary laws for any of the Dominions was with a Dominion’s express consent.

The Statute’s preamble alluded to the Imperial Conferences of 1926 and 1930, and confirmed the Dominions as Members of the British Commonwealth of Nations. The Judicial Committee of the Privy Council conceded that this change in status affected the true construction of the authority conferred in section 91, and that Dominion governments now had legislative power that was free of both Imperial statutes and royal prerogative. Confirming the new sovereignty of the Dominions, section 2 of the Statute stated that:

(1) The Colonial Laws Validity Act 1865 shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

By virtue of section 7 of the Statute, however, the Statute did not ‘apply to the repeal, amendment or alteration of the British North America Acts 1867 to 1930 or any order, rule or regulation made thereunder’.
1933–1949: THE SUPREME COURT OF CANADA:
CANADA’S FINAL COURT OF APPEAL

The Abolition of Appeals to the Privy Council for Criminal Matters, 1933

The Supreme Court of Canada was established by the federal government in 1875 as a general court of appeal. This did not prevent provincial courts of appeal from applying directly to the Judicial Committee of the Privy Council.

Despite widespread dissatisfaction with any process that allowed for appeal to the Privy Council, it would be many years before Privy Council appeals were finally done away with. In 1888, Macdonald pushed for passage of section 1025 of the Criminal Code, which read: ‘Notwithstanding any royal prerogative, or anything contained in the Interpretation Act or in the Supreme Court Act, no appeal shall be brought in any criminal cases from any judgment or order of any Court in Canada to any court of appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard’.

In Nadan v The King, it was argued that, when it came to criminal cases, the federal government had no authority to enact a law abolishing appeals to the Privy Council by leave of the King-in-Council, because Parliament did not have the necessary extraterritorial power to pass such a law. In addition, it was maintained that the Colonial Laws Validity Act 1865 nullified the law. And finally, it was suggested that specific authority to interfere with the Crown’s power to allow appeals would have needed to be enshrined in the British North America Act 1867, and it was not:

Under what authority, then, can a right so established and confirmed be abrogated by the Parliament of Canada? [...] But however widely these powers are construed they are confined to action to be taken in the Dominion; and they do not appear to their Lordships to authorize the Dominion Parliament to annul the prerogative right of the King in Council to grant special leave to appeal. Further, by s. 2 of the Colonial Laws Validity Act, 1865, it is enacted that ‘any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any order or regulation made under the authority of such Act of Parliament or having in the Colony the force and effect of such Act, shall be read subject to such Act, order or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void
and inoperative'. In their Lordships' opinion, s. 1025 of the Canadian Criminal Code, if and so far as it is intended to prevent the Sovereign in Council from giving effective leave to appeal against an order of a Canadian Court, is repugnant to the Acts of 1833 and 1844 which have been cited, and is therefore void and inoperative by virtue of the Act of 1865. It is true that the Code has received the Royal Assent, but that Assent cannot give validity to an enactment, which is void by Imperial statute. If the Prerogative is to be excluded, this must be accomplished by an Imperial statute [...].

The end result was that the Judicial Committee rendered ultra vires any provision in the Criminal Code aimed at abolishing appeals to the Privy Council. The Judicial Committee considered this measure outside the authority of Canada's Parliament, because it attempted, in effect, to control the exercise of prerogative power in Britain, and to diminish the power of the Judicial Committee with respect to Canada. Since Canada's Parliament could neither make laws that would operate outside of Canada, nor amend or repeal Imperial legislation, appeals to the Judicial Committee could accordingly not be abolished by Canadian statutes.

With passage of the Statute of Westminster, 1931, however, Canada's Parliament acquired the necessary legislative powers. This time, the provision was upheld by the Judicial Committee, on the grounds that the Statute of Westminster, 1931 conferred an authority that had been lacking for Nadan.

Canada's Parliament now had 'full power to make laws of extra-territorial operation' through section 3 of the Statute. This provision did not, however, apply to provincial legislatures — which still lack that power today. In 1933, the Canadian Parliament passed an Act further stating that all federal Acts already in force had the same extra-territorial power, as though they had been passed after the Statute of Westminster, 1931.

With regard to Privy Council appeals, criminal cases were addressed first. On March 28, 1933, Quebec politician Ernest Lapointe introduced a bill for the abolition of Privy Council appeals in criminal matters. Canada's House of Commons responded by passing an amendment to the Criminal Code, abolishing the appeal of criminal cases to the Privy Council in England. In effect, Canada's Parliament had just revived Macdonald's proposed 1888 revision to section 1025 of the Criminal Code.

By 1935, in relation to British Coal Corp. v. The King, the Judicial Committee was able to rule that the authority that had been disallowed for the Nadan case was now valid. Enactment of the
Statute of Westminster, 1931 had given Canada’s Parliament the requisite extra-territorial power — amounting, as well, to a repeal of the Colonial Laws Validity Act 1865.

The Judicial Committee now determined that this new authority successfully prevented all criminal appeals from Canada to the Privy Council. Section 91 of the British North America Act, 1867 accordingly gave the Parliament of Canada the power to regulate or prohibit appeals to the King-in-Council in criminal matters.

The Abolition of All Appeals to the Judicial Committee of the Privy Council, 1949

By 1947, in relation to the case A.-G. for Ontario v. A.-G. for Canada, the Privy Council had determined that Canada’s Parliament was competent enough to abolish appeals to the Privy Council in civil matters as well. This applied both to appeals from the Supreme Court of Canada, and to appeals from provincial courts. The words in section 101, ‘notwithstanding anything in this Act,’ gave Canada’s Parliament an authority that overrode any power conferred upon provincial legislatures by section 92. The problem raised in this particular appeal involved choosing between two alternative meanings within the British North America Act, 1867, neither of which had been contemplated by its authors.

The principal question when it came to final appeals was whether or not Canada’s Parliament had the authority to abolish provincial appeals to the Privy Council. Such appeals were often regulated by provincial statutes, or orders of the King-in-Council made under British legislation. The provinces relied heavily on their power to legislate when it came to provincial matters.

A 1947 Privy Council opinion favoured the federal government. The Judicial Committee of the Privy Council determined that section 101 — particularly in light of the Statute of Westminster, 1931 — expressly directed all appeals in Canada to the Supreme Court. Their reasoning was precisely the same as it had been for the British Coal case, based this time not on section 91(27), which was limited to criminal cases, but on section 101. It was more problematic to abolish provincial appeals to the Privy Council, given the provincial argument that British Coal had accepted the federal ruling only because the subject matter fell specifically under section 91(27).

Under section 92(14), civil procedures remained in the provincial arena. The Privy Council, however, held that the British
Coal ruling had broader implications, and that federal power to establish a ‘General Court of Appeal for Canada’ — particularly in light of the Statute of Westminster, 1931 — must be exercised.

In 1949, through the adoption of an Act to amend the Supreme Court Act, Parliament abolished appeals from Canada to the Judicial Committee of the Privy Council, finally transforming the Supreme Court into Canada’s final legislative authority. This decisive abolition of legal appeals to an outside body was seen as a mark of Canada’s maturity.

The final Canadian case to be heard by the Privy Council occurred in 1958. Although the Supreme Court had become the court of last resort for Canadian civil matters in 1949, appeals resulting from pre-existing legal decisions were still heard by the Privy Council. This final case was Earl F. Wakefield Company v. Oil City Petroleum (Leduc) Ltd. et al., [1958] S.C.R. 361. The Judicial Committee upheld the decision of Canada’s Supreme Court justices, and the appeal was dismissed.

**THE EVOLUTION OF THE ROLE OF THE SUPREME COURT OF CANADA**

*From Appellate Tribunal to Final Court of Appeal*

As we have already seen, the Supreme Court of Canada had been established in 1875 as a traditional appellate tribunal. At the time, however, it was not yet Canada’s court of last resort. People could, and did, appeal to the Judicial Committee of the Privy Council in London. Provincial cases could also bypass the Supreme Court to be heard by the Privy Council.

By the early 1930s, this had finally begun to change. As we have already seen, in 1933, Canada’s Parliament decreed that criminal appeals would no longer be heard by the Privy Council (An Act to amend the Criminal Code, S.C. 1932-33, c. 53, s. 17). By the end of 1949, this had been extended to include appeals of any kind (An Act to amend the Supreme Court Act, S.C. 1949 (2nd Sess.), c. 37, s. 3). Canada’s highest court now had sweeping new powers, as well as a monumental purpose-built courthouse on Wellington Street in Ottawa.

During its first incarnation, from 1875 to 1949, private law dominated the Court’s docket. Almost a third of its 4,000 or so cases were related to tort, contract or real property. In addition,
approximately two-thirds of the cases reaching the Court were automatic appeals of all civil cases over a specific dollar amount. Following 1949 and the abolition of appeals to the Privy Council, the Court’s docket swung towards an emphasis on public law. Prior to 1950, the combined number of criminal and tax cases accounted for about 9 per cent of the Court’s caseload. After 1950, these types of cases increased exponentially, comprising about 27 per cent of the approximately 1,500 Supreme Court decisions from 1950 to 1969. Private law also continued to take up a significant portion of the Court’s time, with tort, contract, and real property cases comprising about 23 per cent of the caseload. In addition, railway litigation gave way to motor vehicle litigation, and labour law emerged as an important new category.

Once appeals to the Privy Council were abolished, the Supreme Court of Canada truly became Canada’s final court of appeal. This effectively marked the end of judicial colonialism, and the prospect of a genuinely Canadian jurisprudence — to a certain extent reflecting seismic changes in Canadian society during the post-war period. It would be up to the Court to use its new position to earn the respect and trust of Canadians.

The Supreme Court now had greater responsibility than ever before in matters related to public law. Although Supreme Court justices were initially slow to recognize and respond to their changing position, it quickly became clear that they could not avoid their new responsibilities. The post-1949 Supreme Court could not return to the good old days of anonymous judgments. Nor could it rely upon the Judicial Committee of the Privy Council for instruction. Supreme Court justices now began to develop their own resources and assert their independence — proving, both to themselves and Canadians, that they were now the country’s dominant judicial entity.

By the end of the 1950s, the Court’s determination to express and establish judicial independence had begun to weaken, and the inherent conservatism of Canada’s judiciary began to reassert itself. In some ways, the judicial innovation of the 1950s can be viewed as an expression of growing self-confidence among the justices.

In the 1960s, the federal government began to reassess the Supreme Court and its justices, and the role of Canada’s highest court changed yet again. After 1966, the federal government began to distance itself from the Supreme Court, and Supreme Court justices were accorded even greater independence.
By the early 1970s, the number of cases heard by the Supreme Court had become overwhelming. Judgments were handed down in 137 cases (compared with 62 in 1950), and the increase showed no sign of letting up. In the fall of 1971, it was announced that a record-breaking 115 cases were on the Supreme Court docket, many of which could not be heard until the following year. A number of these cases came before the Court as a matter of course — although they did not involve an important issue of law, they did meet the basic financial threshold.

No statutory considerations, however, had more impact on the development of the Supreme Court than those that occurred between 1975 and 1982. In 1975, a long series of amendments to the Supreme Court Act were enshrined in law, eliminating any inherent right to an appeal in civil cases, while granting the Court significant control over its docket. And in 1982, Canada adopted a new Constitution, giving the Supreme Court a vital new mandate.

A New Beginning: The Constitution Act, 1982

It is no exaggeration to suggest that the Constitution Act, 1982 has been the most significant development in the history of the Supreme Court of Canada. It amounted to a sea change in the way Canadians were governed. Not only did the Act retreat from traditional reliance on the political process and politicians, it also gave Canadian courts — and especially the Supreme Court — a policy-making role when it came to issues such as social justice and language rights.

Under the Canadian Charter of Rights and Freedoms — Part I of the Constitution Act, 1982 — the Supreme Court must supervise any action by federal and provincial governments that would restrict basic rights and freedoms. In addition, any such restrictions must be deemed by the Supreme Court to be ‘reasonable’ and ‘demonstrably justified in a free and democratic society’.

Given that the written constitution (including the Constitution Act, 1867) now includes such significant portions of the law of the land, the Supreme Court has a greater responsibility to ensure that the law is upheld. No previous constitutional act has given such sweeping powers to the judiciary. As a result, within the first fifteen months of the Charter alone, more than 600 lower-court cases related to Charter provisions.

Since 1982, the Supreme Court has essentially been tasked with determining the contours of values enshrined in the Canadian
Charter of Rights and Freedoms. The Court is required to examine the work of governments and legislatures within a wide range of controversial policy areas, including abortion, racial and ethnic discrimination, gay rights, employment equity, affirmative action, and so forth.

Oddly enough, the Charter actually increases the need for litigation, at a time when governments are attempting to avoid court cases related to social issues such as labour relations and human rights. As a result, Canadians now run the risk of becoming as litigious as Americans.

The primary challenge for the Supreme Court involves carrying out its new ‘political’ responsibilities in a way that balances the role of the judiciary against the roles of other branches of government. Most Canadians would agree that the Charter has been a positive development for Canadian democracy; however, in an era of increased activism, debate continues regarding the Court’s role in relation to Charter rights.

Because the Charter has now made numerous issues grounds for litigation, there is increased pressure on Canadian courts to provide legally enforceable judgments in matters that don’t necessarily lend themselves to such enforcement. The Supreme Court is also required, under the Constitution Act, 1982, to take a greater role in determining the content of public policy. To complicate matters further, many private issues have now become public. Perhaps more disturbingly, since many of the most contentious issues in the Canadian Charter of Rights and Freedoms have already been pursued all the way to the U.S. Supreme Court, Canadians are likely to see an increased incidence of decisions based on American civil liberties in the Canadian legal system.

If a system based on the rule of law is firmly rooted in the fundamental principles of human rights, protecting those rights becomes key when defining the judicial structure of a democracy. In other words, issues related to human rights become integral to the building of a constitutional system, since they help establish, along with other high-ranking principles, the constitutional values of a democratic country.

Modern legal bodies are aware that today’s societies abound in economic, social, and political differences. Today’s societies are also more multicultural. This makes acknowledging existing differences more important than ever. Given that a charter is essentially a social contract between citizens and governments, it must represent a common set of values, and nurture a sense of
belonging. In pluralistic and multicultural societies, this can only be achieved by acknowledging traditional values related to individual freedom, while respecting the diversity inherent in a multicultural country.

It has now been 33 years since adoption of the Canadian Charter of Rights and Freedoms. The role it has played in the democratic development of Canadian society cannot be fully understood, however, without taking various Supreme Court rulings into consideration. Over the past three decades, the Supreme Court has liberaly interpreted and enthusiastically applied the Charter. This has transformed the Supreme Court into a living tree, 'capable of growth and development over time to meet new social, political and historical realities'.

Today, the Supreme Court continues to guide the development of Canadian society and its institutions. By navigating the tricky waters between personal autonomy, cultural plurality and human dignity on the one hand, and mutual respect on the other, the Supreme Court has ensured that Canada truly reflects the values of a modern, liberal and democratic society. Along the way, the Supreme Court has also created its own corpus of jurisprudence, while reinforcing Canada's right to govern its own affairs.

Over the years, the Supreme Court of Canada has transformed itself from a traditional appellate tribunal to an entity with broad supervisory powers over the interpretation and application of Canadian law. Debate continues over the legitimacy of judicial review under the Charter, but the Supreme Court has been largely successful in balancing its own role against those of the legislative and executive branches — and the people they represent.

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NOTES ON CONTRIBUTOR

Admitted to the Quebec Bar in 1982, Benoît Pelletier joined the faculty at the Law Faculty of the University of Ottawa in 1990, and is a full professor. He was Assistant Dean from 1996 to 1998. He was minister of the Quebec government for nearly six years, responsible for Canadian Intergovernmental Affairs, Francophones within Canada, Aboriginal Affairs and the Reform of Democratic Institutions. He holds a law degree from Laval University, a Masters in Law from the University of Ottawa and two doctorates in law, one of the University of Paris I (Panthéon-Sorbonne) the other from the University of Aix-Marseille III. He holds more an honorary doctorate in law from the University of Moncton. In 1989, Benoît Pelletier was awarded the Medal of the Bar of Paris, as the best student programs Graduate Studies in Law at the University of Ottawa. In 1998 he was awarded the Excellence in Teaching Award from the University of Ottawa. In 2011, he received the medal of Glory Escolle as Grand graduated from Laval University and the Quebec Bar Association awarded him the title of Emeritus Lawyer. In 2012 he was the recipient of the Merit of the Ottawa Bar. He is an Officer of the Ordre national du Québec. Over the years he has received numerous other awards and honors. Benoît Pelletier is the author of numerous publications and has lectured extensively in Canada and abroad. He was also twice received, in 2007 and 2009 as a Public Policy Scholar of the Woodrow Wilson International Center for Scholars in Washington.

NOTES


3 Télesphore Fournier was personally in favour of the abolition of appeals, but was reluctant to insert such a clause into his bill. The Liberals, however, were quick to support the amendment.

4 The Supreme Court Act, 1875 is an Act passed by the Parliament of Canada, by virtue of section 101 of the British North America Act, 1867, and established the Supreme Court of Canada. At the time, the Supreme Court was not the supreme authority on Canadian law, as Supreme Court cases could still be appealed to the Judicial Committee of the Privy Council. In Reference Re Supreme Court Act, ss. 5 and 6, [2014] 1 S.C.R. 433, the Court declared that Parliament’s authority to amend the Act is now limited by the Constitution of Canada. More precisely, the Constitution Act, 1982, makes modifications of the Court’s composition, and other essential features, subject to stringent amending procedures.

5 Nadan v. The King, [1926] A.C. 482.


See Nadan v. The King, supra, note 5, p. 492-493.
