

THE PRIVY COUNCIL AND THE CONSTITUTION

It has become the fashion in recent years to blame the Privy Council for giving through its decisions an interpretation of the Canadian Constitution quite different from that which was intended by the Fathers of Confederation and thereby greatly impairing the unity of Canada. It is contended that had the final decision rested with Courts in Canada whose members were familiar with conditions in this country, the constitution would have been interpreted in a way that would have greatly strengthened the powers of the Dominion. Two or three professors of law have been presenting this view frequently so that it has come to be widely accepted. Is the contention well founded? What are the facts? Is it true that the Privy Council has unduly favoured the provinces?

At a meeting of a study group in Winnipeg this view was presented by a well known and particularly well informed member of the Bar. I questioned the correctness of that view as a fact. In the discussion which followed it was agreed that there would be no value in examining all the decisions of the Privy Council in constitutional cases since many of them simply follow leading cases and also that the older cases were the more important since they established the precedents. Subsequently, I decided to investigate the record and find out what the facts were.

I took Lefroy's *Leading Cases in Canadian Constitutional Law*, published in 1915, as the fairest test of what should be considered leading cases. (There is a second edition but as I was the editor of that edition, I refrained from using it). The result of my investigation of the record was as follows :

Mr. Lefroy's book contains 25 cases which were decided by the Privy Council. Of these 12 came by way of appeal from the Supreme Court and 13 by way of appeal from Provincial Courts. The record is as follows:

Attorney General, Ontario, v. Attorney General, Dominion, [1912] A.C. 571. Privy Council confirmed Supreme Court majority (4-2) and sustained right of Dominion.

Attorney General of Canada v. Cain, [1906] A.C. 542. Privy Council over-ruled Ontario Judge and sustained Dominion claim.

Maritime Bank v. Receiver General New Brunswick, [1892] A.C. 437. Privy Council sustained Supreme Court and New Brunswick Court and upheld Provincial claim.

- Hodge v. The Queen* (1883) 9 App. Cas. 117. Privy Council sustained Ontario Court of Appeal which had over-ruled Court of Queen's Bench.
- Citizens Insurance Co. v. Parsons* (1881), 7 App. Cas. 96. Privy Council sustained Supreme Court (majority) which had sustained Ontario Court of Appeal and Court of Queen's Bench, in supporting Provincial legislation.
- Tennant v. Union Bank*, [1894] A.C. 31. Privy Council sustained Supreme Court and majority of Ontario Court of Appeal in upholding Dominion legislation.
- Attorney General, Ontario, v. Attorney General, Canada*, [1894] A.C. 189. Privy Council sustained Ontario legislation over-ruling majority of Ontario Court of Appeal.
- Attorney General, Ontario, v. Attorney General, Dominion*, (1896), A. C. 348. Privy Council sustained Ontario legislation and over-ruled Supreme Court (4-2).
- Attorney General, Dominion, v. Attorney General for Provinces*, [1898] A.C. 700. Privy Council held Ontario Act *ultra vires* over-ruling Supreme Court (4-1).
- Russell v. The Queen* (1882), 7 App. Cas. 829. Privy Council sustained Dominion legislation supporting the Supreme Court which had over-ruled New Brunswick Court.
- Valin v. Langlois* (1879), 5 App. Cas. 115. Privy Council sustained Supreme Court and Quebec Court upholding Dominion legislation.
- Bank of Toronto v. Lambe* (1887), 12 App. Cas. 575. Privy Council sustained Quebec Court of Queen's Bench in upholding Quebec legislation which the Superior Court had held invalid.
- Union Colliery v. Bryden*, [1899] A.C. 580. Privy Council over-ruled British Columbia Supreme Court and held Provincial legislation invalid.
- Cunningham v. Tomey Homma*, [1903] A.C. 151. Privy Council over-ruled British Columbia Supreme Court and held Provincial legislation valid.

- Attorney General for Ontario v. Hamilton Street Railway Co.*, [1903] A.C. 524. Privy Council over-ruled Ontario Court of Appeal and held Provincial legislation invalid.
- City of Toronto v. Bell Telephone Co.*, [1905] A.C. 52. Privy Council sustained Ontario Court of Appeal in holding Dominion legislation valid.
- Canadian Pacific Railway Co. v. Corporation of Bonsecours*, [1899] A.C. 367. Privy Council sustained Quebec Courts in holding Provincial legislation valid.
- Colonial Building & Investment Association v. Attorney General of Quebec* (1883), 9 App. Cas. 157. Privy Council over-ruled Quebec Court of Queen's Bench and restored Superior Court holding Dominion legislation valid.
- Dow v. Black* (1875), L.R. 6 P.C. 272. Privy Council over-ruled New Brunswick Supreme Court and upheld Provincial legislation.
- Woodruff v. Attorney General for Ontario*, [1908] A.C. 508. Privy Council upheld Ontario Court of Appeal in part and reversed in part sustaining trial Judge on both parts. Held Provincial Act invalid.
- In re Marriage Legislation in Canada*, [1912] A.C. 880. Privy Council sustained Supreme Court in holding Dominion legislation invalid.
- Royal Bank of Canada v. The King*, [1913] A.C. 283. Privy Council over-ruled Alberta Court of Appeal and held Provincial Act invalid.
- St. Catherine's Milling Co. v. The Queen* (1888), 14 App. Cas. 46. Privy Council sustained Supreme Court and Ontario Court in upholding Provincial claim.
- Attorney General of Ontario v. Mercer* (1883), 8 App. Cas. 767. Privy Council over-ruled Supreme Court (3-2) and restored Ontario Court of Appeal and upheld Provincial claim.
- Attorney General for Canada v. Attorney General for Ontario*, [1897] A.C. 199. Privy Council sustained Supreme Court in upholding Provincial claim.

SUMMARY

The 'score' may be summarized as follows :

Of the 12 cases which came to the Privy Council from the Supreme Court of Canada, the decision of the latter Court was sustained in 9 cases and over-ruled in 3 cases. In the cases sustained the Dominion claim was upheld in 4 cases and disallowed in 1 case. The Provincial claim was upheld in 4 cases and disallowed in none. Of the cases over-ruled all three were on Provincial claims and these were sustained in 2 out of 3 cases.

Of the 13 cases which came to the Privy Council from Provincial Courts, the lower courts were sustained in 5 cases and over-ruled in 8 cases. Of the cases sustained 1 upheld a Dominion right, 3 upheld a Provincial right, and 1 disallowed a Provincial claim. Of the 8 cases in which the Provincial Courts were over-ruled, 2 upheld Dominion claims, 3 upheld Provincial claims and 3 disallowed Provincial claims.

In face of the record it is hardly necessary to point out that the attacks made on the Privy Council are wholly without justification.

The record as to the earlier judgments might be supplemented by a reference to the judgments in the most important of the recent cases.

In the *Aeronautics Case*, 1932] A.C. 54, the Privy Council upheld the Dominion claim and reversed a judgment of the Supreme Court which was in part unanimous and in part by a majority of 6 to 1 against the Dominion jurisdiction.

In the *Radio Case*, [1932] A.C. 304 the Privy Council upheld the Dominion claim and sustained the majority (3-2) of the Supreme Court.

In the six cases arising out of the "New Deal" legislation—Unemployment Insurance, etc., [1937] A.C. 326 *et seq.*, the Privy Council upheld the Dominion claim in three cases and disallowed it in three cases but in every case sustained the judgment of the Supreme Court.

How can it be argued in the face of such a record that the Privy Council is responsible for whittling down the powers of the Dominion?

I am not at the present time arguing whether appeals to the Privy Council should be abolished or not. All that I am now concerned with is that the argument on that question should not proceed from a misrepresentation of the facts.