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No. 26 of 1940.

In the Privy Council.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

IN THE MATTER of a Reference as to the legislative competence of the Parliament of Canada to enact Bill No. 9 of the Fourth Session Eighteenth Parliament of Canada entitled "An Act to amend the Supreme Court Act."

BETWEEN

THE ATTORNEY-GENERAL OF ONTARIO
THE ATTORNEY-GENERAL OF BRITISH COLUMBIA
THE ATTORNEY-GENERAL OF NEW BRUNSWICK and
THE ATTORNEY-GENERAL OF NOVA SCOTIA ... *Appellants*

AND

THE ATTORNEY-GENERAL OF CANADA
THE ATTORNEY-GENERAL OF MANITOBA and
THE ATTORNEY-GENERAL OF SASKATCHEWAN ... *Respondents.*

CASE FOR THE APPELLANT

THE ATTORNEY-GENERAL OF NEW BRUNSWICK.

RECORD

1.—This is an appeal by special leave from a judgment of the Supreme Court of Canada dated the 19th January, 1940, whereby the Court (Duff C.J., Rinfret, Kerwin and Hudson JJ.; Crocket and Davis JJ. dissenting) gave its opinion, in answer to a question submitted to the Court by the Governor General in Council pursuant to Section 55 of the Supreme Court Act (Revised Statutes of Canada 1927, Chapter 35), that the Parliament of Canada is competent to enact in its entirety a Bill described as Bill No. 9 of the 4th Session of the Eighteenth Parliament of Canada and hereinafter called "the bill," to prohibit appeals from any court in Canada to His Majesty in Council.

p. 123

p. 6, ll. 12–19

p. 6, l. 23 to p. 7, l. 20

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p. 186, ll. 34–38

2.—The Supreme Court of Canada was established by the Parliament of Canada pursuant to Section 101 of the British North America Act, 1867 (30 & 31 Vict. c. 3) by the Supreme Court Act, 1875 (38 Vict. c. 11), and now exercises a general appellate civil and criminal jurisdiction (R.S.C. 1927, c. 35, s. 35). Section 54 of the revised statute at present in force is as follows :

p. 62, ll. 34–41

Judgment Final and Conclusive.

54. The judgment of the Court shall, in all cases, be final and conclusive, and no appeal shall be brought from any judgment or order of the Court to any court of appeal established by the Parliament of Great Britain and Ireland, by which appeals or petitions to His Majesty in Council may be ordered to be heard, saving any right which His Majesty may be graciously pleased to exercise by virtue of his royal prerogative.

p. 6, l. 34 to p. 7, l. 15

The Bill proposes to repeal this section and to substitute therefore the following :

" 54. (1) The Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada ; and the judgment of the Court shall, in all cases, be final and conclusive.

" (2) Notwithstanding any royal prerogative or anything contained in any Act of the Parliament of the United Kingdom or any Act of the Parliament of Canada or any Act of the legislature of any province of Canada or any other statute or law, no appeal shall lie or be brought from any court now or hereafter established within Canada to any court of appeal, tribunal or authority by which, in the United Kingdom, appeals or petitions to His Majesty in Council may be ordered to be heard.

" (3) The Judicial Committee Act, 1833, chapter forty-one of the statutes of the United Kingdom of Great Britain and Ireland, 1833, and The Judicial Committee Act, 1844, chapter sixty-nine of the statutes of the United Kingdom of Great Britain and Ireland, 1844, and all orders, rules or regulations made under the said Acts are hereby repealed in so far as the same are part of the law of Canada."

p. 7, ll. 16–21

The Bill further provides that no appeal or application for special leave to appeal pending upon the date fixed by the Governor in Council for the coming into force of the Bill when enacted shall be affected.

p. 6, ll. 1–11

3.—The Bill was introduced and received its first reading in the House of Commons on the 23rd January, 1939, but on the 14th April, 1939, the debate on the motion for the second reading was adjourned for a judicial determination of the competence of the Parliament of Canada to enact the Bill in whole or in part.

p. 9, l. 29 to p. 35, l. 27

4.—The Attorney-General of Canada filed a factum in the Supreme Court contending that the provisions of the Bill are, in their entirety,

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intra vires of the Parliament of Canada in virtue of its power under Section 91 of the British North America Act, 1867, to make laws for the peace, order and good government of Canada, or alternatively in virtue of its paramount power under Section 101 of the Act 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. The Attorneys-General of Manitoba and Saskatchewan supported these contentions of the Attorney-General of Canada. The Attorneys-General of Quebec, Prince Edward Island and Alberta did not file factums. The Attorneys-General of Ontario, Nova Scotia, New Brunswick and British Columbia each filed a factum and each contended that the Bill was *ultra vires* the Parliament of Canada.

p. 107, l. 1 ; p. 122, l. 23

p. 35, l. 29 to p. 69, l. 21 ; p. 69, l. 23 to p. 92, l. 7 ; p. 92, l. 9 to p. 106 ; p. 107, l. 9

5.—At the time of the union of the provinces of Canada, Nova Scotia and New Brunswick into one Dominion by the British North America Act, rights of appeal to Her Majesty in Council existed in each of the provinces then united, in provinces which have since been admitted into the Union, and in territories acquired by Canada. In the old province of Canada the local legislatures had power under Sections 2 and 34 of the Constitutional Act, 1791 (31 Geo. 3, c. 31), to regulate appeals to His Majesty in Council. This power was exercised in Lower Canada by the Judicature Act, 1794 (34 Geo. 3, c. 6), and in Upper Canada by an Act to Establish a Superior Court of Civil and Criminal Jurisdiction and to regulate the Court of Appeal (34 Geo. 3, c. 2). In 1833 the Imperial Parliament by the Judicial Committee Act (3 & 4 Wm., 4 c. 41) established the Judicial Committee of the Privy Council and provided for its hearing appeals. By Section 21 any order or decree of His Majesty in Council on any appeal from any court in His Dominions was to be carried into effect as His Majesty in Council should on the recommendation of the Judicial Committee direct, and the court from which the appeal was brought might be directed to enforce such order or decree. The jurisdiction and powers of the Judicial Committee were extended by the Judicial Committee Act, 1844 (7 & 8 Vict. c. 69) and Her Majesty was thereby authorized by Order-in-Council to regulate appeals. After the union of Upper and Lower Canada by the Act of Union, 1840, legislation was passed regulating appeals as of right to Her Majesty in Council both from Upper Canada (12 Vict. c. 63, s. 46) and from Lower Canada (12 Vict. c. 37, s. 19, and Article 1178 of the Code of Civil Procedure, 1867) and such appeals are now governed by existing legislation in Ontario (The Privy Council Appeals Act, R.S.O. 1937 c. 98, and The Constitutional Questions Act, R.S.O. c. 130, s. 8), and in Quebec (Court of King's Bench Reference Act, R.S.Q. 1925, c. 7, amended by Statutes of Quebec, 1928, c. 13 and Articles 68 and 1249 to 1252 of the Code of Civil Procedure). In Nova Scotia and New Brunswick appeals to Her Majesty in Council were at the time of Confederation governed by Imperial Orders-in-Council made under the Judicial Committee Act, 1844.

p. 218

pp. 219–220

pp. 221–222

pp. 203–205

p. 205, ll. 1–18

pp. 206–207

p. 222, l. 30 to p. 227, l. 19

p. 227, ll. 25–34

p. 228

p. 229, ll. 1–13

pp. 32–34

p. 230, ll. 1–11

p. 230, ll. 15–33

p. 231 ; p. 34, l. 23 to p. 35, l. 27

p. 83, l. 20 to p. 86, l. 4 ; pp. 98–100

6.—In New Brunswick at the time of Confederation appeals to Her Majesty in Council were, apart from the prerogative, regulated by an

pp. 98–100
pp. 101–106

Order-in-Council dated the 27th November, 1852, which continued in force until revoked by an Order-in-Council dated the 7th November, 1910. The latter Order-in-Council prescribed rules which had previously been submitted to and approved by the Lieutenant Governor of New Brunswick in Council. A similar Order-in-Council dated 5th July, 1911, was made in respect of appeals from Nova Scotia.

p. 106, ll. 20–37
pp. 86–92

7.—Under the above-mentioned legislation and Orders-in-Council and by virtue of the royal prerogative appeals to Her Majesty in Council continued after the British North America Act, 1867, from courts in the provinces then united to form the Dominion of Canada. In 1875 by 38 Vic. c. 11, the Parliament of Canada under Section 101 of the British North America Act established the Supreme Court of Canada. Alternative rights of appeal from provincial courts to Her Majesty in Council or to the Supreme Court of Canada thus came into being. In criminal causes and matters rights of appeal to His Majesty in Council including appeals by virtue of the royal prerogative were taken away by the Parliament of Canada by an Act to amend the Criminal Code (23 & 24 Geo. 5, c. 53).

p. 122, ll. 16–21
pp. 200–202

The amended provision is now contained in Section 1024 (4) of the Criminal Code, and by reason of the Statute of Westminster, 1931 (22 Geo. 5, c. 4) and of the exclusive legislative jurisdiction of the Parliament of Canada over criminal law including the procedure in criminal matters under Head 27 of Section 91 of the British North America Act the amendment has been held to be within the competence of the Parliament of Canada : *British Coal Corporation* v. *The King* [1935] A.C. 500. Appeals in civil matters are therefore alone in question in the present appeal.

p. 185, l. 12

pp. 208–211
p. 210, l. 11

8.—Courts in New Brunswick also exercised admiralty jurisdiction which since 1890 was regulated by the Colonial Courts of Admiralty Act (53 & 54 Vict. c. 27). Section 6 of the Act provided for appeals to Her Majesty in Council. The Parliament of Canada, which under Head 10 of Section 91 of the British North America Act has exclusive legislative competence in respect of navigation and shipping, has exercised its power under the Statute of Westminster, 1931 (22 Geo. 5, c. 4), and has repealed the Colonial Courts of Admiralty Act so far as the Act was part of the law of Canada, save that the provisions for an appeal to His Majesty in Council in admiralty matters is left unrepealed. The Canadian legislation is the Admiralty Act, 1934 (Statutes of Canada, 1934, c. 31).

p. 184, l. 28

pp. 200–202

p. 216, l. 33 to
p. 217, l. 9

9.—The validity of the Bill depends on the provisions of the British North America Act, 1867, and on the effect of the Statute of Westminster, 1931.

10.—The effect of the sections of the British North America Act which are most directly relevant is as follows :

pp. 184–185

Section 91—which gives the Parliament of Canada power to make laws for the peace order and good government of Canada except

in matters within the exclusive powers of the provincial legislatures and which specifically assigns to the Parliament of Canada 30 enumerated classes of subjects, 29 of which were in the Act when passed, and 1 (unemployment insurance, Head 2A) was added by the British North America Act, 1940 (3 & 4 Geo. 6, c. 36).

Head 27 is "the criminal law, except the constitution of "courts of criminal jurisdiction, but including procedure in "criminal matters." p. 185, l. 12

Section 92—which gives the provincial legislature in each province exclusive power to make laws in relation to 16 classes of subject, which include : p. 185, l. 25 to p. 186, l. 33

Head 1—the amendment of the constitution of the province except as regards the office of Lieutenant-Governor. p. 185, l. 29

Head 13—property and civil rights in the province. p. 186, l. 23

Head 14—the administration of justice in the province, including the constitution, maintenance and organization of provincial courts both of civil and criminal jurisdiction, including civil procedure in those courts. p. 186, l. 24

Head 15—the imposition of punishment as a sanction for provincial laws. p. 186, l. 28

Section 94—which, while empowering the Parliament of Canada to make the laws of Ontario, Nova Scotia and New Brunswick uniform in respect of property and civil rights and the procedure of the courts of those provinces, enacts that the Dominion legislation shall not have effect in any province until adopted and enacted by the provincial legislature. p. 60, ll. 4–16

Section 101—which enables the Parliament of Canada to set up a general court of appeal and additional courts for administering the laws of Canada, and p. 186, ll. 34–38

Section 129—which continues in each of the provinces the laws existing at the union subject (except in the case of Imperial legislation) to repeal or alteration by the legislature having jurisdiction under the Act in relation to the subject-matter. p. 186, l. 39 to p. 187, l. 8

11.—The Statute of Westminster, 1931 (22 Geo. 5, c. 4) includes provisions which empowered the Parliament of Canada or a provincial legislature, according to their respective jurisdiction over classes of subjects, to pass legislation repugnant to English law or Imperial legislation or repealing or amending such legislation in so far as it is part of the local law (Sections 2 and 7 (2)). The Statute of Westminster, however, not only expressly leaves undisturbed the distribution of legislative powers made by the British North America Act (Section 7 (3)), but provides that nothing in the Statute of Westminster shall be deemed to apply to the repeal, amendment, or alteration of the British North America Act pp. 200–202 p. 201, ll. 3–14, ll. 39–41 p. 201, ll. 42–46 p. 201, ll. 36–38 p. 186, l. 39 to p. 187, l. 8

RECORD

(Section 7 (1)). Consequently Section 129 of the British North America Act, it is submitted, remains in force and debars the Parliament of Canada from legislating in respect of any right of appeal created by or under the authority of Imperial legislation which was in force at the Union.

12.—The Attorney-General of New Brunswick contends that under the relevant legislation the Parliament of Canada is competent to prohibit or restrict appeals to His Majesty in Council in criminal cases only, and that in civil cases, whether the appeal be from a provincial court or by special leave from the Supreme Court of Canada, the Parliament of Canada has no power to prohibit or restrict such appeals.

p. 123, l. 25 — 13.—The Supreme Court of Canada heard argument on the question referred to it on the 19th, 20th and 21st June, 1939, and reserved judgment until the 19th January, 1940, when the opinion of the court was certified p. 124, ll. 1–19 to the Governor in Council, and when each of the judges gave his reasons for judgment.

pp. 124–137 — 14.—The Chief Justice of Canada in considering the royal prerogative to grant leave to appeal to His Majesty in Council held that the Judicial Committee is a statutory appellate Court the constitution and organization of which in every respect is exclusively subject to the Parliament of the United Kingdom ; and that accordingly appeals to the Judicial Committee fall outside the matters of a local or private nature assigned exclusively to the legislatures of the provinces by Section 92 of the British North America Act. The result is, in the opinion of the Chief Justice, that the Parliament of Canada can, since the Statute of Westminster, legislate in respect of such appeals under the general power to make laws for the peace, p. 131, l. 20 to p. 133, l. 37 order and good government of Canada. The Chief Justice reached the same result from a consideration of Section 101 of the British North America Act. On like grounds the Chief Justice considered that the Parliament of p. 133, l. 38 to p. 137, l. 2 Canada could abolish the rights of appeal to His Majesty in Council existing in the several provinces.

15.—Rinfret J. was of opinion that in the cases of *Nadan* v. *The King* p. 137, l. 22 to p. 140, l. 18 [1926] A.C. 482 and *British Coal Corporation* v. *The King* [1935] A.C. 500 the question of appeals to the Privy Council was considered by the Judicial Committee to be a matter of extra-territorial operation with which the Parliament of Canada could not effectively deal until the Statute of Westminster. The result, in his opinion, is that the provincial legislature could not deal with the matter either before or after the Statute of Westminster, and consequently the Parliament of Canada has full legislative competence to pass the Bill. This result was supported, in the p. 139, l. 40 to p. 140, l. 18 view of Rinfret J., by Section 101 of the British North America Act, and a consideration of the functions of a general court of appeal.

p. 140, l. 20 to p. 158, l. 28 — 16.—Crocket J. was of opinion that the Bill is wholly *ultra vires* of the Parliament of Canada. The Bill, in his view, goes far beyond

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eliminating from the Supreme Court Act the recognition of the royal prerogative to grant leave to appeal, and seeks to give the Supreme Court exclusive ultimate appellate jurisdiction in and for Canada. For this purpose the Bill seeks to annul every law in every province under which appeals may be taken directly as of right to His Majesty in Council. The Bill is accordingly an attempt by the Parliament of Canada to abrogate to itself in respect of the finality of judgments the complete control of the administration of justice in all the provinces, thus striking at the integrity of all the provinces as self-governing entities under the British Crown.

Crocket J. then considered whether the Bill had any warrant in the Statute of Westminster, 1931, or in the British North America Act. The conferring on the Parliament of Canada of extra-territorial jurisdiction could not bear upon legislation dealing with the direct right of appeal under provincial law, nor, Crocket J. thought, to appeals by special leave from the Supreme Court. Authority showed that what takes place outside Canada is only ancillary to the administration of justice in Canada, and that appeals by special leave are within the control of the Parliament of Canada or of the provincial legislatures according to the division of powers in the British North America Act. Crocket, J., was further of opinion that Sections 2, 3 and 7 of the Statute of Westminster show that the power of extra-territorial legislation thereby given does not apply to the royal prerogative to grant leave to appeal to His Majesty in Council, or confer upon the Parliament of Canada any power to make laws in relation to matters not already within its competence. Indeed, the statute explicitly restricts the Dominion and provincial legislatures to their respective fields under the British North America Act. Crocket J. then examined the British North America Act and found it self-evident that the Bill directly concerns the administration of justice in every province (Head 14 of Section 92), and therefore was not within the competence of the Parliament of Canada under the general words of Section 91. Neither, in the opinion of Crocket J., was the Bill in relation to any of the enumerated heads of Section 91 other than the criminal law (Head 27) where the Bill would have no operation because the Parliament of Canada had already prohibited appeals to His Majesty in Council in criminal cases. Crocket J. then turned to Section 101 of the British North America Act, which was to be construed so as to interfere as little as possible with the scheme for the distribution of legislative powers. Power in respect of " the constitution, maintenance and organization " of courts bears the same meaning in Section 101 and Section 92, Head 14. In his view the effect of the relevant sections is, except in criminal cases, to vest in the provincial legislatures power to allow or prohibit appeals, subject only to the right of the Parliament of Canada under Section 101 to encroach on the administration of justice so far as necessary to enable the Supreme Court fully to function as a general court of appeal. Thus appeals to but not from the Supreme Court could be regulated under Section 101. Crocket J. then pointed out that the valid and invalid parts of the Bill could not be separated. Accordingly he considered the Bill to be wholly *ultra vires*.

p. 142, ll. 1–21

p. 142, l. 21 to p. 144, l. 6

p. 144, l. 7 to p. 146, l. 5

p. 146, l. 7 to p. 148, l. 42

p. 148, l. 43 to p. 150, l. 17

p. 150, l. 18 to p. 158, l. 15

p. 158, ll. 16–28

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p. 158, l. 30 to p. 161, l. 26

17.—Davis J. also thought the Bill to be beyond the powers of the Parliament of Canada unless it is amended. *British Coal Corporation* v. *The King* [1935] A.C. 500, turned on the criminal law being an enumerated head of Section 91 of the British North America Act. In his opinion the same result followed as regard every other subject within the competence of the Parliament of Canada ; and he did not think appeals to the Privy Council were included in Heads 13 or 14 of Section 92. In civil cases commenced in a provincial court and solely concerned with some subject-matter within the competence of the provincial legislatures, the rights of a province could not validly be altered or affected by the Parliament of Canada.

p. 161, l. 28 to p. 174, l. 26

18.—Kerwin J. described the question as in substance whether in civil cases a similar power to abolish appeals to His Majesty in Council exists as in criminal cases. Examining the position of appeals from Dominion courts, Kerwin J. held that the Parliament of Canada had the power to abolish appeals governed by the prerogative, and also appeals as of right, including appeals in admiralty cases. Kerwin J. then dealt with appeals direct to His Majesty in Council from provincial courts, and summarised the law in each province which was continued by Section 129 of the British North America Act.

p. 165, l. 33 to p. 168, l. 32

p. 168, l. 40 to p. 172, l. 25

In his view the provincial legislatures had no jurisdiction in the matter under Section 92, with the result that the power must be in the Parliament of Canada, the restrictions upon which had been removed by the Statute of Westminster. Ontario, Quebec and possibly British Columbia are, he thought, in a special position, but Section 101 is overriding and it could not have been intended that these provinces should have a power denied to other provinces. Accordingly, he held the Bill to be good in its entirety.

p. 172, l. 26 to p. 174, l. 26

p. 174, l. 28 to p. 182, l. 16

19.—Hudson J. also upheld the validity of the Bill. He outlined the position as regards the administration of justice, and found that the reasons for the judgment in *British Coal Corporation* v. *The King* [1935] A.C. 500, lead inevitably to the conclusion that the Parliament of Canada can abolish any right of appeal to the Judicial Committee in any matter within its jurisdiction, including an appeal from any decision whatsoever of the Supreme Court. Hudson J. then considered appeals from provincial courts where the law involved is within the exclusive legislative jurisdiction of the province. With the broadening of Dominion status " Imperial prerogatives " had passed progressively under Dominion control, and the last obstacles to the Parliament of Canada abrogating the prerogative of appeal were removed by the Statute of Westminster. Hudson J. was of opinion that the right to control this prerogative is not given to the provincial legislatures, and that therefore it must be in the Parliament of Canada under the general words of Section 91. Section 101 confirmed him in his view, and admiralty appeals came within the control of the Parliament of

p. 176, l. 33 to p. 178, l. 13

p. 178, l. 14 to p. 180, l. 41

p. 180, l. 42 to p. 182, l. 16

Canada over navigation and shipping. He therefore thought the Bill *intra vires* the Parliament of Canada.

20.—The Attorney-General of New Brunswick submits that the reasoning of Crocket J. is to be preferred to that of the other members of the Court, and he seeks to support in its entirety the judgment of Crocket J. The Attorney-General of New Brunswick also relies upon the arguments which have been advanced by the other Attorneys-General who contend that the Bill is *ultra vires* of the Parliament of Canada.

21.—Accordingly the Attorney-General of New Brunswick submits that the opinion given by the Supreme Court of Canada on the 19th January, 1940, on the question referred to the Court was wrong and should be reversed, and that the question should be answered by declaring that the Bill is not either in whole or in part within the legislative competence of the Parliament of Canada for the following amongst other

REASONS.

1. Because persons resorting to or subject to the courts of New Brunswick have constitutional rights of appeal in civil cases to His Majesty in Council in relation to which only the legislature of New Brunswick can validly pass laws.
2. Because the Bill is in relation to property and civil rights in each province.
3. Because the Bill is in relation to the administration of justice in each province.
4. Because Section 101 of the British North America Act gives no power to the Parliament of Canada to legislate in relation to appeals to His Majesty in Council.
5. Because the Statute of Westminster, 1931, does not affect the division of legislative powers between the Parliament of Canada and the provincial legislatures.
6. Because by virtue of Section 129 of the British North America Act the Parliament of Canada has no power to pass an Act affecting rights of appeal which exist pursuant to Imperial legislation which was in force at the Union.
7. Because of the other reasons for judgment of Mr. Justice Crocket.

E. B. MACLATCHY
FRANK GAHAN.

No. 26 of 1940.

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CASE FOR THE APPELLANT

THE ATTORNEY-GENERAL OF NEW BRUNSWICK.

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