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**THE POLITICAL AND LEGAL USES OF REFERENCE CASES  
BY THE MACKENZIE KING GOVERNMENT:  
1935-1940**

by

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## **Abstract**

This thesis provides an examination of both the political and legal uses of reference cases to the Supreme Court of Canada by the Mackenzie King government. Attention is devoted to the five-year-period, 1935-1940, in which the King administration submitted several politically motivated references to the Supreme Court. This political use of reference cases to the Supreme Court began immediately after the Liberals returned to power in October 1935 when the government submitted the Bennett government's New Deal legislation for judicial scrutiny. Within the five-year-period the government forwarded two other references to the Supreme Court, again where highly controversial legislation was involved: the Alberta Social Credit statutes passed in 1937 and the private member's bill sponsored by C.H. Cahan in 1939 to abolish overseas appeals to the Judicial Committee of the Privy Council, then the final court of appeal for Canada.

The underlying premise of this thesis is that in each of the above instances the King government found it politically expedient to involve the Supreme Court in issues where questions of law were clearly subordinate to the political concerns of the federal government. Furthermore, in each instance, avenues of action, other than a reference case to the Supreme Court, were available to the federal government but were rejected by cabinet. Only in one instance, when Quebec's controversial 1937 Padlock Act was under close scrutiny, did the federal government avoid submitting a patently political issue to the Supreme Court, apprehensive of the consequences of such action. The federal government's reluctance to forward a reference to the Supreme Court in the case of Quebec's Padlock Act thus provides a revealing contrast to both the New Deal and the situation in Alberta where reference cases were initiated almost immediately. The federal government's marked reluctance to deal with Quebec in a comparable manner therefore merits close attention and as such is an important element of this thesis.

The background to each reference case, its political origins, the reasons for the federal government's insistence on a reference--or in the case of Quebec, the reasons for

avoidance of a reference--are the central issues addressed in this thesis. The cases are examined from another viewpoint as well. Once before the Court, the political issues gave way as the Court focused primarily upon the legal issues involved. The Court's decisions thereby provide another important vantage point from which to view the implications of the federal government's actions. For example, an assessment of the legal argument and judicial reasoning in the New Deal cases helps one answer these questions: First, did King's lawyers really try to win? Second, did the courts (both the Supreme Court of Canada and the Judicial Committee of the Privy Council) simply bow to King's obvious desire that the legislation be declared *ultra vires*? Third, did the courts, as some have alleged, decide that the depression was not an emergency?

Although the King government may have found it preferable for short-term considerations to submit contentious political issues involving questions of law to the Supreme Court for its legal opinion, in the long-term it found itself dealing with unexpected complications arising from the very decisions it sought. Even if the government successfully predicts the legal outcome of a court case, it may find itself dealing with a political outcome it had not anticipated. Certainly if the actions of the King government are any indication in the five-year-period under discussion, this is a complication a government seldom expects, although one as I argue, that it should prepare itself for.

This thesis also demonstrates that when reference cases are employed by the federal government, politicians, constitutional scholars, political journalists and other concerned citizens should ask two important questions: First, is the reference being initiated to avoid or delay assuming political responsibility in a given situation? Second, are like situations indeed receiving like treatment? As indicated throughout this thesis, such questions are of great importance. Indeed, this thesis demonstrates that in the period between 1935 and 1940 the King administration initiated not only the New Deal reference, but forwarded C.H. Cahan's private member's bill to the courts as well, in order to avoid dealing with a controversial political issue. So, too, the period provides a telling example of an in-



stance where like situations were not treated alike as the striking similarities between the situation in Alberta and Quebec indicates. Clearly, a failure to ask questions such as the ones posed above leads to the possibility that the full meaning of the reference cases themselves, their origins and their implications, will not be realized by the interested onlooker.

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## Introduction

October 1935 marked the return of William Lyon Mackenzie King to power after having sat in opposition ranks for the previous five years watching the Conservative government of R.B. Bennett struggle to cope with the depression. The new King administration inherited the predicament of coaxing the B.N.A. Act to meet the never-ending needs of a country struggling in peacetime depression, a dilemma that Bennett had proven incapable of solving despite his New Deal legislative efforts. Like Bennett before him, King, too, found himself hampered by the terms of the B.N.A. Act; clearly, the federal government's inability to deal effectively with the on-going economic crisis was the central issue facing the King administration during the period before Canada's involvement with war in Europe. Ironically, the European war would not only bring an end to Canada's depression, it would have an irreversible centralizing effect upon the B.N.A. Act as well--a task which neither King, nor Bennett before him, had been able to accomplish. In retrospect, then, the period between 1935 and 1940 is unique, illustrative of the King government's endeavors to find the means within the B.N.A. Act to allow the federal government to deal effectively with peacetime depression, a purpose that after 1940 would cease to exist. It is against this background that the King government's use of the Supreme Court of Canada for political purposes must be examined.

Immediately after the Liberals returned to power, King's influential and powerful Quebec Lieutenant, Ernest Lapointe, Minister of Justice until his death in 1941, submitted a number of questions to the Supreme Court concerning the constitutionality of the Bennett government's New Deal legislation. Within a five-year-period the Minister, again acting on the government's behalf, submitted two other references to the Supreme Court, again where highly controversial legislation was involved: the Alberta Social Credit

statutes passed in 1937 and the private member's bill sponsored by C.H. Cahan in 1939 to abolish overseas appeals to the Judicial Committee of the Privy Council, then the final court of appeal for Canada. In each of these instances the King government found it politically expedient to involve the Supreme Court in issues where questions of law were clearly subordinate to the political concerns of the federal government. Furthermore, in each instance avenues of action--other than a reference case to the Supreme Court--were available to the federal government but were rejected by cabinet.<sup>1</sup> Only where Quebec's provocative 1937 Padlock Act was concerned, did the federal government avoid submitting a patently political issue to the Supreme Court, apprehensive of the consequences of such action.

Unlike ordinary litigation based on concrete fact-finding, reference cases deal with questions submitted by a government to the courts for an opinion on a point of law, abstracted from any specific fact situation. Most often, the question (or questions) concern whether or not a given law is within the legislative competence of the enacting body. According to section 55 of the *Supreme Court Act*,<sup>2</sup> the Governor in Council may submit questions of law to the Supreme Court of Canada concerning the interpretation of the British North America Act or the constitutionality or interpretation of any Dominion or provincial legislation. In practice this has meant that the Governor in Council has invoked section 55 when instructed to do so by a decision of the federal cabinet. The duty of the Supreme Court judges in such instances is to hear and consider such questions before them and to

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<sup>1</sup>In the period between 1935 and 1940 not every reference submitted to the Supreme Court of Canada by the King government was politically motivated. See *Authority to Perform Functions, Ref. re.* [1938] S.C.R. 398, where the Court was asked to determine the validity of judicial powers conferred by the Ontario legislature upon officials of several provincial tribunals; *Whether "Indians" includes Eskimo Inhabitants of the Province of Quebec, Ref. re* [1939] S.C.R. 104, the issue being whether the term "Indians" in section 91(24) of the B.N.A. Act included Eskimo inhabitants in Quebec. While both cases involved questions of jurisdiction between Ottawa and certain provinces, neither case represented a political controversy *per se*. Furthermore, neither case was heard on appeal by the Privy Council, the provinces and the federal government being satisfied with the outcome in both instances.

<sup>2</sup>R.S.C. 1927, c. 35.

submit an answer to each question posed. The opinion of the Court in such reference cases is technically considered mere advice; in practice, such opinions have been viewed quite differently by most legal practitioners.

In 1912 the issue of reference cases came before the Judicial Committee of the Privy Council where Lord Loreburn declared that the answers of the Supreme Court to questions posed in such cases were "only advisory," having "no more effect than the opinions of law officers."<sup>3</sup> However, as Gerald Rubin has noted in his much-cited article on reference cases, "After 1912 virtually nothing more is heard of the 'advisory only' approach and *in practice* the opinions rendered were regarded as binding,"<sup>4</sup> both by courts and governments. As a result, this has led the federal government to submit questions to the Supreme Court in circumstances where it has wanted a conclusive legal opinion on a given subject. In most instances, prior to the abolition of appeals, including the period between 1935 and 1940, the decision of the Supreme Court was then heard on appeal by the Judicial Committee of the Privy Council.

The use of reference cases is subject to no restrictions, save those expressly mentioned in section 55 of the *Supreme Court Act*. This has meant that the federal government has had unfettered discretion in deciding when to submit questions to the Supreme Court for judicial consideration. In a sense, then, it can be argued that in such circumstances the Supreme Court becomes an instrument of the federal government. This is in contrast to the situation in the United States and Australia, for example, where a strict separation of powers between the executive and judicial branches is maintained. In neither of these countries can the executive submit to the judiciary questions of law for judicial consideration, the assumption being that such questions represent a non-judicial function.<sup>5</sup> In

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<sup>3</sup>*A.G. Ont. v. A.G. Can. (Reference Appeal)* [1912] A.C. 571 at 589.

<sup>4</sup>Gerald Rubin, "The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law," *McGill Law Journal* 6 (1960): 176.

<sup>5</sup>Peter Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: The Carswell Company Limited, 1985), 178-79; Barry L. Strayer, *The Canadian Constitution and the Courts*, 3rd ed. Toronto: Butterworths, 1988), 140-42.

Canada, such objections have never been expressed by the Supreme Court. As a result, circumstances may arise, such as those in the period under discussion, where the federal government finds it politically advantageous to submit reference cases to the Supreme Court. In such circumstances, what is law and what is politics become blurred as the Court--like it or not--becomes involved in a political controversy involving the federal government.

Although the King government may have found it preferable for short-term considerations to submit contentious political issues involving questions of law to the Supreme Court for its legal opinion, in the long-term it found itself dealing with unexpected complications arising from the very decisions it sought. Under such circumstances, it is questionable whether the actions of the King government had their desired effect--even when the Supreme Court and Privy Council seemingly upheld the federal government's interests. Very rarely, if at all, can the federal government predict with certainty the exact outcome of an advisory opinion it seeks. In the period under consideration only once, when C.H. Cahan's private member's bill was submitted to the Supreme Court, could the King government be confident of the outcome. In each of the other references under discussion, this was certainly not the case as the chapters on the New Deal and Alberta references will demonstrate.

Examined from another perspective, this five-year-period provides an interesting case study of the relationship between the executive and judicial branches of government on the federal level in Canada: It is my submission that beginning with its reference of the New Deal, the King government embarked upon a course of action involving the Supreme Court which would have long-term implications for Canada--actions which raise serious questions regarding the political motives of the government. Bearing this in mind, it will be the purpose of my thesis to examine the various political factors leading the federal government to decide the instances where it would--or would not--submit a reference case to the Supreme Court of Canada within the five-year-period under discussion. The utility

of politically motivated reference cases naturally comes into question within such a framework and will be discussed as appropriate; as well, the implications of the legal decisions stemming from these reference cases naturally merits close attention. Reference cases, especially those politically motivated, continue to be seen by the federal government as useful tools in solving political issues despite the uncertainties involved.<sup>6</sup> It is my hope that this thesis will provide an understanding as to some of the reasons why.

### A Note on Primary Sources

The Mackenzie King Papers and Diaries (NAC) have proven to be two invaluable sources. King's diary, as any Canadian historian knows, is both a gift and an anathema to the researcher of twentieth-century Canadian politics. Fortunately, in this case the diary provided the opportunity to explore the various motivations his government had for deciding upon the use of reference cases to the Supreme Court; as well, to discover what King's personal feelings were towards his political adversaries, such as Bennett and Aberhart, and how such feelings may have motivated him politically. The King Papers also contain voluminous correspondence and numerous memoranda dealing with political issues under discussion at the time--this is particularly true with regard to the New Deal, the Alberta legislation and the Padlock Act. However, if an issue did not capture King's personal interest (i.e., where the abolition of appeals to the Privy Council was concerned), there is practically no information to be found on the subject in his Papers.

Another source of great import are the Ernest Lapointe Papers (NAC). Lapointe often confirms in his Papers the underlying strategy of the King government concerning the use of reference cases to the Supreme Court. Lapointe's Papers are, moreover, of

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<sup>6</sup>In more recent times one need only consider the Trudeau government's reference to the Supreme Court concerning whether or not Ottawa could seek amendment to the constitution without the provinces. See, *Re Resolution to Amend the Constitution* [1981] 1 S.C.R. 753. More recently, there is the example of the Mulroney government's last-ditch attempt to save the Meech Lake Accord by suggesting a reference to the Supreme Court regarding the legitimacy of the Accord's expiry date.



great value in understanding how the Department of Justice viewed the legal issues at stake. Used in conjunction with the King Diaries and Papers, one can develop an understanding of the interaction between the political issues involved in each of the reference cases and how such factors came to shape the legal issues ultimately submitted to the Supreme Court for consideration.

The R.B. Bennett Papers (NAC) are illuminating in part for what they do not say: nowhere in Bennett's Papers can one find any information at all regarding Bennett's own personal attitude towards the New Deal which he promoted so vigorously in January 1935. What the researcher does find, however, are a series of memoranda from W.D. Herridge, Bennett's brother-in-law and his Canadian Minister to Washington, advocating the need for a New Deal in Canada. To understand the inner workings of the Bennett administration, the Robert Manion Papers (NAC) are an invaluable source. Manion, Minister of Railways and Canals in the Bennett government, left behind his impressions of Bennett as Prime Minister and shared Herridge's enthusiasm in having a New Deal for Canada. Examined together, the Bennett and Manion Papers provide many useful insights into the final months of the Bennett administration where the New Deal was a flame which flickered brightly, but quickly dimmed.

The F.R. Scott Papers (NAC) contain interesting insights into the role of the Canadian Civil Liberties Union in fighting the Padlock Act. Frank Scott was an outspoken critic of the Act and a driving force in the Union. Material found in the Scott Papers provides an illuminating contrast to the arguments for federal inaction found in both the King and Lapointe Papers. Also, Scott's Papers are useful for information they contain regarding his role in assisting C.H. Cahan formulate his private member's bill.

The C.H. Cahan Papers (NAC) were useful as well. Cahan played an interesting role in the period under discussion: a member of the Bennett cabinet, Cahan, as Secretary of State, declared openly in the House of Commons his concerns regarding the constitutionality of the New Deal legislation; he was the only Conservative to have done so. Two

years later, his dissatisfaction with the Privy Council's New Deal rulings led him to promote a private member's bill in the House of Commons calling for the abolition of overseas appeals. His Papers, containing letters to Frank Scott and others, make it clear in no uncertain terms that he was acting with the tacit approval of the King government at the time.

Another source I have found to be of particular value were *factums* presented to the Supreme Court of Canada and, to a lesser degree, those *factums* presented to the Judicial Committee of the Privy Council for each of the reference cases. If one is to truly understand a legal decision, it is essential to have access to counsels' arguments before the courts. Fortunately all relevant *factums* exist and are located at two institutions: the Supreme Court of Canada Library and the University of British Columbia Law Library.<sup>7</sup> The availability of these *factums* has made it possible to appreciate more fully the interplay between law and politics at the Supreme Court and Privy Council level. Particularly in the case of the federal government, the legal arguments forwarded by counsel often indicate not only the legal justifications for a point of view, but the political concerns of the government as well. Examined in conjunction with the legal decisions themselves--obviously another invaluable source of information--much of the federal government's strategy can be deduced. The reaction of the courts to such strategy may in some instances be discerned as well.

Lastly it should be noted, that for the purposes of my thesis, secondary sources written between 1935 and 1940, as well as some earlier sources, have been treated as primary sources. These have been used primarily to illustrate the thoughts of political and legal commentators at the time on a given subject relevant to my thesis. This is particularly true of articles written in the *Canadian Bar Review* and other journals. Other

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<sup>7</sup>The *factums* located at the Supreme Court of Canada Library did not contain copies of the *factums* later presented to the Judicial Committee of the Privy Council. Interesting, the UBC collection, while not entirely complete, contains in most instances *factums* presented to both the Supreme Court of Canada and the Privy Council.

sources, such as newspapers and House of Commons *Debates*, have been useful in select instances only.

## Chapter 1

### A New Deal for Canada

The New Deal was the first progressive social reform package ever to be introduced by the federal government. Announced near the end of the Conservative government's term in office in 1935, it consisted of eight statutes which, despite their flaws and shortcomings, could potentially have alleviated much of the suffering prevalent during the depression. This chapter will examine the evolution of the New Deal, canvassing the various themes--be they political, legal or otherwise--which ultimately were to shape the fate of the New Deal.

In particular, attention will be paid to the correspondence between W.D. Herridge, Canadian Minister to Washington, and his brother-in-law, Prime Minister R.B. Bennett. Herridge, a long-time advocate of a 'Bennett Recovery Programme,' was directly responsible for persuading the Prime Minister that some form of social reform package was desperately needed by the Conservatives to battle the ravages of the depression and to maintain political power in the process. Herridge's twin motives in promoting a Canadian version of F.D. Roosevelt's New Deal therefore merit close examination.

Similarly, attention must be paid to the underlying objectives of William Lyon Mackenzie King who, as Leader of the Opposition, devised Liberal strategy to combat the proposed New Deal in the House of Commons, where the Liberals raised serious concerns regarding the constitutional validity of the government's reform program. These debates are crucial; they clearly prove that the Conservatives knew they were promoting legislation which rested upon a dubious legal footing. Examined from this viewpoint, the court decisions handed down in later years come as no surprise as, the Rowell-Sirois commis-

sioners, among others, stated.<sup>1</sup> In a sense, the rulings of the Supreme Court and the Privy Council are of secondary importance for they merely confirmed what was an almost foregone conclusion in 1935: the Bennett New Deal was constitutionally unsound.

### The Evolution of the New Deal

In a series of memoranda to R.B. Bennett, W.D. Herridge repeatedly stressed the need of a comprehensive plan for national recovery, necessary, he believed, if Canada was to break free from the effects of depression and return to prosperity. From his vantage point in Washington, Herridge was undoubtedly influenced by the activist policies of Roosevelt in crafting the New Deal, an attitude clearly reflected in his writings to Bennett. For Herridge, the years of depression had been a time of profound crisis for the capitalist system, illustrative of "a period of adjustment and reform in the social and economic life of North America."<sup>2</sup> By early 1934 Herridge was convinced that the worst of the depression had passed; he commented that while "the intensity of the depression gale lasted, all the efforts of the government had to be directed to keeping the Ship of State off the rocks. But the gale has now subsided, the ship is steadied."<sup>3</sup> The time was ripe for government intervention: "When before, to embark upon a programme of development, would have been merely to change our course into a more dangerous one, now such a programme is needed to hasten the country toward complete recovery."<sup>4</sup>

Writing to Robert Manion, Minister of Railways and Canals, Herridge described his plan:

Our great, big recovery programme naturally divides itself into four phases: agricultural relief, unemployment relief, tariffs and international trade, and the financial programme. Unless our scheme embraces these

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<sup>1</sup>*Report of the Royal Commission on Dominion-Provincial Relations (Rowell Sirois Report)*. Book 1. (Ottawa: King's Printer, 1940), 193.

<sup>2</sup>National Archives of Canada (hereafter NAC), Bennett Papers, Herridge to Bennett, 16 January 1934.

<sup>3</sup>*Ibid.*

<sup>4</sup>*Ibid.*

four elements, it must be out of balance, and, if it is out of balance, it cannot go straight and it won't go far.<sup>5</sup>

Herridge, surprisingly, preferred to leave the more mundane details to others, suggesting to Bennett that a committee of experts be formed to gather together various proposals and formulate a comprehensive plan for recovery to be called the 'Bennett Recovery Programme.' Herridge, as Professor W.H. McConnell has established, preferred to think of himself as an instigator of action rather than a legislative planner.<sup>6</sup> Details, including constitutional ones, clearly did not interest him.

Key to Herridge's argument was the belief that a reform programme would benefit the Canadian people, and the Conservative Party in an election campaign. In one letter, Herridge commented that should the government "expound such a programme of constructive reform, I have no doubt whatever but that we can carry the country once again."<sup>7</sup> This theme would be consistently repeated in subsequent memoranda. On 20 November 1934, for example, he commented, "I have said before--and I wish to say again--that in my opinion, if the Conservative party fails in its obvious duty to attune itself to the times and to equip itself for the kind of service the times demand of some party, it will fall off in usefulness and power."<sup>8</sup> With an election looming, it is not difficult to imagine how such an argument, when delivered repeatedly and with such force, could become very persuasive indeed.

Herridge believed that the American New Deal offered several valuable lessons for Canada. What impressed him most about the American New Deal were not the actual results achieved, which he conceded had fallen far short of expectations but, instead, the psychological effect upon the American people of the promise that conditions would improve. The fact that action was being taken by the American government was the crucial

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<sup>5</sup>NAC, Manion Papers, Herridge to Manion, 26 January 1934.

<sup>6</sup>W.H. McConnell, "The genesis of the Canadian 'New Deal,'" *Journal of Canadian Studies* 4 (May 1969): 34.

<sup>7</sup>Bennett Papers, Herridge to Bennett, 16 January, 1934.

<sup>8</sup>*Ibid.*, Herridge to Bennett, 20 November 1934.

factor, according to Herridge. "The instruments by which were to be fashioned a new heaven and a new earth have many of them proved useless, and those which were in themselves good, have been sometimes clumsily handled."<sup>9</sup> Significantly, he maintained, "perhaps the really important thing is that the hope and promise of a new heaven and a new earth remain."<sup>10</sup> To Bennett he petitioned: "We need a Pandora's box. We need some means by which the people can be persuaded that they also have a New Deal, and that that New Deal will do everything for them *in fact* which the New Deal here has done *in fancy*."<sup>11</sup> A Canadian New Deal would similarly capture the imagination of the people and would "contain the elements which are the seeds of a new order of prosperity."<sup>12</sup> Near the end of his memorandum he remarked "[s]ometimes a promise is of more value than its fulfillment," concluding with "[t]he belief that something good is going to happen more than once has made the actual happening quite unimportant." Afterward, he reflected, "The Joker, of course, is that the people, however complacent they may be, cannot forever be sustained on hope and love."<sup>13</sup> Interesting thoughts from a man who was the architect of Canada's version of the New Deal.

In subsequent memoranda, Herridge continued to offer advice to Bennett. According to Herridge, "the days of *laissez-faire* are over," from now on "government is in business to stay."<sup>14</sup> In his opinion, "government in business means that the State will come to the assistance of private enterprise to just the extent that the failure of private enterprise makes necessary."<sup>15</sup> Convinced that both the Liberals and even the C.C.F. remained staunch advocates of old-fashioned *laissez-faire*, Herridge argued that it was the task of the Tory Party--a refurbished Tory Party--to maintain and promote government intervention into the affairs of business. What Herridge was clearly advocating was a change in the

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<sup>9</sup>*Ibid.*, Herridge to Bennett, 12 April 1934.

<sup>10</sup>*Ibid.*

<sup>11</sup>*Ibid.*

<sup>12</sup>*Ibid.*

<sup>13</sup>*Ibid.*

<sup>14</sup>*Ibid.*, Herridge to Bennett, 18 July 1934.

<sup>15</sup>*Ibid.*, Herridge to Bennett, 20 August 1934.

style of government from the traditional 'night watchman' to a more direct role which would require active government intervention, with the aim, though, of preserving capitalism.

In January 1935, Bennett set out to carry the torch of the new Toryism, a torch ignited by the inflamed writings of W.D. Herridge. Had Bennett adopted Herridge's idea of creating a Canadian version of FDR's New Deal as an electoral device? Evidence strongly suggests this. The Bennett government was entering an election year in 1935 when it introduced the New Deal; its chances were widely perceived to be dim at best, after four years of struggling to cope with the depression. In his writings, Herridge had repeatedly contended that the political bounty to be gained from a New Deal reform package could potentially sweep the Conservatives back into office; in many ways, Bennett had nothing to lose by taking such a gamble. Yet the question of Bennett's sincerity remains controversial. It is asking too much to believe that Bennett, the constitutional lawyer and millionaire, had overnight become a social reformer. In his *Papers*, Bennett leaves behind no clues as to what he thought of Herridge's advice; as a result, we are left for ourselves to discern his motives in embarking upon the New Deal.<sup>16</sup> To aid in our assessment we must examine his January radio speeches, where for the first time he made public his policy of reform.

Having accepted Herridge's counsel, Bennett worked closely with him and his Private Secretary, R.K. Finlayson, in formulating his New Deal speeches. Unfortunately, substance took a backseat to style and little attempt was made to define the details of the government's proposed reform package. Acting without even the knowledge of his Cabinet, Bennett delivered the first of five radio speeches on 2 January 1935, promising

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<sup>16</sup>I disagree with Eugene Forsey's analysis of Bennett's attitude toward the New Deal. In his recent memoirs Forsey writes: "It has been alleged that Bennett himself did not believe in his New Deal. I am convinced this is wrong, and for a very simple reason: Bennett was a Methodist. He had been brought up, as I was and as all Methodists were, to believe in conversion. On the subject of the New Deal he was converted." Eugene Forsey, *A Life on the Fringe: The Memoirs of Eugene Forsey* (Toronto: Oxford University Press, 1990), 111.



widespread reforms to the capitalist system. The Prime Minister's radio speeches clearly caught the country by surprise. He opened his first address stating that profound changes had occurred during his four years in office. "The old order is gone. It will not return. We are living amidst conditions which are new and strange to us."<sup>17</sup> Changes to the economic system would be required to meet these new conditions and Bennett had taken to the radio waves to inform the Canadian people that he was willing to assume the responsibility for bringing about the needed reforms. "Your prosperity demands corrections in the old system," he argued, "so that, in these new conditions, that old system may adequately serve you."<sup>18</sup> The time was now right for bringing about such change. Reform would mean an end to the era of *laissez-faire*; it would mean government regulations and intervention into the affairs of business. In short, it would mean a complete restructuring of the old order.

Bennett's second address was devoted to the industrial worker. He opened this speech by calling for a uniform minimum wage and a maximum working week. But, more importantly, he spoke of appalling working conditions which labour should no longer have to tolerate:

There must be an end to child labour. There must be an end to sweat shop conditions. There must be an end to the reckless exploitation of human resources and the trafficking in the health and happiness of Canadian citizens. There must be an end to the idea that a workman should be held to his labour throughout the daylight hours of every day.<sup>19</sup>

What working man could not but agree with such convictions? And for those unemployed, Bennett also had a vision of hope to share: "However few or many unemployed we normally may have, no man must be left to the uncertainties of private charity or to the humiliation of government gratuity."<sup>20</sup> The unemployed deserved to be treated decently by

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<sup>17</sup>R.B. Bennett, *The Premier Speaks to the People* (Ottawa: Dominion Conservative Headquarters, 1935), The First Address, 2 January 1935.

<sup>18</sup>*Ibid.*

<sup>19</sup>*Ibid.*, The Second Address, 4 January 1935

<sup>20</sup>*Ibid.*

society; equally important, they deserved a degree of economic security during their time of hardship. Such security, Bennett promised, would be realized with the introduction of an unemployment insurance plan.

In subsequent speeches, Bennett maintained a like tone in addressing the needs of farmers and other primary producers as well as those of consumers. Clearly, the speeches were designed to have a little something for everyone. Logistical problems were largely ignored. Bennett admitted that most of the particulars of his reform program had yet to be defined in detail. Trying to determine exactly what needed to be done at this stage, he suggested, would only be "ill-advised and reckless."<sup>21</sup>

The tone in the last two addresses was somewhat more cautious. The Prime Minister explained that "Our task--simple in theory, difficult in performance--is to replace in the old system those elements which are worn out, broken down, obsolete, and without further utility, so that the system may work."<sup>22</sup> Such an undertaking would be difficult, he warned, because business interests would fight against any reforms to the economic system that had served them so well in the past. Yet if the established business community was seen as a potential threat, it was clear that the larger threat loomed in the form of the Liberal Party. The voters would have to make a choice in the upcoming election and Bennett put the issue squarely before them in his closing speech: "Do you want reform, or do you not want reform? If you do not want it, back the Liberal Party. If you do want it, back my party."<sup>23</sup>

Newspaper reaction to the radio speeches spanned the spectrum of public opinion, ranging from cautious approval to outright disbelief. The traditionally conservative *Toronto Globe and Mail*, for example, believed the Prime Minister when he said he knew how to reform 'the system,' willing to concede that "he knows its weakness--and he states

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<sup>21</sup>*Ibid.*, The Fourth Address, 9 January 1935.

<sup>22</sup>*Ibid.*

<sup>23</sup>*Ibid.*, The Fifth Address, 11 January 1935.

he has learned them from thirty years experience--is not to be doubted."<sup>24</sup> In marked contrast, another conservative paper, the *Montreal Gazette*, labelled it all "very strange talk from a Conservative Prime Minister, strange because it does violence to every Conservative principle, and strange because it is glaringly illogical."<sup>25</sup> Noting the lack of substance in the radio broadcasts, the *Winnipeg Free Press* concluded "Mr. Bennett hasn't more than the sketchiest designs on capitalism," theorizing that his "conversion from the economic philosophy which has guided him through all his public life, including his term as prime minister, is too sudden and happens too close to an election not to be regarded as an improvised election plank and a piece of opportunism."<sup>26</sup> Further west, the *Vancouver Sun* surmised: "Ringling up the curtain on the 1935 general election campaign, Prime Minister R.B. Bennett last night announced his government would go to the people on a program of reform . . . ." <sup>27</sup>

At Laurier House, Mackenzie King had listened to the radio speeches with rapt attention, all the while formulating Liberal strategy to deal with the proposed reform package. King remarked in his diary "they have taken my Industry & Humanity and sought to take the essence of social insurance from that and from what I have said at diff. times in H. of C.," adding "it is plagiarism of the most obvious kind."<sup>28</sup> For King, the radio speeches were not only a personal affront, but an affront to the Liberal Party as well:

[I]t is an effort to carry his fight into our camp--to attack Liberals and their policy to avoid defending his own; having stolen Liberal policy, he then begins to fight Liberals as if they were Tories. While it is discouraging to read this kind of stuff wholly false and untrue, I believe it may not be difficult to answer most of it. What is needed is an exposure of his tactics, then a reply to his own boastings, and finally a statement of Liberal position. <sup>29</sup>

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<sup>24</sup>The *Toronto Globe and Mail*, Saturday, 5 January 1935, 6.

<sup>25</sup>The *Montreal Gazette*, Friday, 4 January 1935, 10.

<sup>26</sup>The *Winnipeg Free Press*, Saturday, 5 January 1935, 17; Monday, 7 January 1935, 11.

<sup>27</sup>The *Vancouver Sun*, Thursday, 3 January 1935, 1.

<sup>28</sup>NAC, King Diary, entry of 4 January 1935.

<sup>29</sup>*Ibid.*, entry of 11 January 1935. King's comments were not unfounded. As early as 1919 the Liberal Party had adopted proposals calling for a minimum wage, mini-

During the coming weeks, a strategy emerged which would highlight the frailty of the Conservative government's reform package, a package "introduced at the last minute, and as near the election date as possible, in order that they might be fresh in the minds of the voters."<sup>30</sup> For King the stage had been set; it would be the House of Commons.<sup>31</sup>

Liberal strategy was simple and would prove very effective. King believed "the thing to do would be to 'call his bluff' on the address to vote on it at once so that we can use the program of Reform before us and pass it--debate its merits, not let Bennett get away with promises this time--demand performance, & at once."<sup>32</sup> The objective was to put the government on the defensive by forcing it to table immediately its proposed reforms. In response, the Liberals would not oppose any of the legislation--on the contrary--they would show willingness to give it precedence over all other business in Parliament. However, the Liberals would express concern over the constitutional validity of such legislation and would point out that "measures of the kind now being proposed are wholly impossible under the British North America Act,"<sup>33</sup> without either provincial consent or constitutional amendment. The last component of Liberal strategy would call for the government to submit the program to the Supreme Court to test its constitutional validity, something the Liberals insisted they would do once returned to power.

With the radio speeches the Prime Minister had attempted to portray himself as a social reformer who had not only the vision, but also the prescription, to lead the country out of the depression. How well he maintained this role in the following months would undoubtedly shape his political future, as several newspapers commented in their editorials. But after the radio addresses came the true test: designing a legislative package upon which Canada's New Deal would be based. In truth, there weren't many details defined

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mun hours of labour and a weekly day of rest. See *Resolutions Adopted by the National Liberal Convention in Ottawa on August 5, 6, and 7 1919* (Ottawa: n.p., 1919)

<sup>30</sup>NAC, King Papers, memorandum, n.d.

<sup>31</sup>In one letter King wrote: "The campaign is now on and Parliament is simply being made an instrument to serve its ends." King to A.C. Hardy, 11 January 1935.

<sup>32</sup>King Diary, entry of 15 January 1935.

<sup>33</sup>King Papers, Memorandum on New Deal Legislation, n.d.

even during this period as the reform package remained in a most rudimentary state. Furthermore, circumstances completely unexpected by both Herridge and Bennett played a role in immediately crippling the political momentum of the radio broadcasts. As a result of Liberal strategy, the Speech from the Throne was dealt with in only three days; except for an unemployment insurance act, the government had no other legislation to introduce to Parliament. To make matters worse, when legislation was finally ready, Bennett was unable to guide it through the House due to illness. This responsibility was cast upon the Acting Prime Minister, Sir George Perley, who was completely unprepared for the task.

The eight statutes the government ultimately introduced in the House of Commons that spring as the basis of its New Deal were a far cry from the visionary legislation Bennett had promised in early January. Generally speaking, the legislation fell into three categories:

(i) Treaty legislation. The three most controversial statutes were those based on draft conventions Canada ratified in 1935 in accordance with provisions set forth by the International Labour Organization. These statutes included the *Weekly Rest in Industrial Undertakings Act*,<sup>34</sup> the *Minimum Wages Act*<sup>35</sup> and the *Limitation of Hours of Work Act*.<sup>36</sup> Also included in this category was the *Employment and Social Insurance Act*.<sup>37</sup> Although framed in response to an I.L.O. draft convention, the Act did not implement this convention which Canada never ratified.

(ii) Two statutes based loosely upon recommendations from H.H. Stevens' Royal Commission on Price Spreads<sup>38</sup>: the *Dominion Trade and Industry Commission Act*<sup>39</sup> and

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<sup>34</sup>*Statutes of Canada*, 25-26 Geo. V, 1935, c. 14.

<sup>35</sup>*Ibid.*, c. 44.

<sup>36</sup>*Ibid.*, c. 63.

<sup>37</sup>*Ibid.*, c. 38

<sup>38</sup>*Report of the Royal Commission on Price Spreads*, (Ottawa: King's Printer, 1937).

<sup>39</sup>*Statutes of Canada*, 1935, c. 59.

section 498A of the *Criminal Code*<sup>40</sup> which applied criminal penalties for unfair trade practices.

(iii) Lastly, amendments to two statutes, the *Natural Products Marketing Act*<sup>41</sup> and the *Farmers' Creditors Arrangement Act*<sup>42</sup> which had been passed during the previous session of Parliament but which Bennett claimed as part of his overall reform program, both of which had been introduced to offer protection to Canada's primary producers.

Before discussing the specific constitutional difficulties inherent in Parliament enacting these statutes, it is worthwhile to outline briefly their intended purposes.

The first three treaty statutes, the *Weekly Rest in Industrial Undertakings Act*, the *Minimum Wages Act* and the *Limitation of Hours of Work Act* represented an attempt to establish improved, uniform working conditions throughout the country. In the past, individual provinces had been expected to bear the responsibility for establishing minimum labour standards. The difficulty with such an arrangement was that there was no way of ensuring that neighboring provinces maintained relatively uniform labour laws in relation to each other. The danger for provinces with more progressive labour codes was not only that the higher costs that these codes entailed would drive industry to provinces with looser--and less expensive--regulations, but would perhaps attract 'hordes' of unwanted workers because of the better working conditions. It was hoped that federal legislation in this field would alleviate such concerns.

The *Employment and Social Insurance Act* established an unemployment insurance fund from which benefits would be paid during periods of unemployment to those sixteen and over who had contributed to the fund. The money for this fund would come from the federal government as well as from employers and employees. Individuals were required to have contributed 25 cents a week for forty weeks in order to receive benefits from the fund. People on the dole were clearly not eligible.

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<sup>40</sup>*Ibid.*, c. 56, s. 9.

<sup>41</sup>*Ibid.*, 24-25, Geo. 5, 1934, c. 53, amended 1935, c. 20.

<sup>42</sup>*Ibid.*, 1934, c. 57, amended 1935, c. 64.

The *Dominion Trade and Industry Act* does not lend itself to an easy definition. Through its many provisions, the Act was intended to serve as a master statute using all of the federal government's powers to eliminate unfair trade practices while promoting fair merchandising and high commodity standards. In a similar vein, section 498A, a new addition to the *Criminal Code*, would punish anyone who gave a discount, rebate or allowance to a purchaser in a sale of goods without making the same concession to the purchaser's competitors. Anyone caught a party to such a transaction would suffer under pain of fine or imprisonment. Corporations were not excluded from this amendment.

Clearly compassionate in nature, the *Farmers' Creditors Arrangement Act* was introduced to help farmers who had been unable to meet their debt obligations because of the depressed state of agriculture. The Act provided a procedure whereby a farmer could make a proposal to his creditors for an extension in time or some more workable scheme which would allow him to pay off his debts. If such an arrangement was accepted by his creditors, it would be submitted to the courts for approval. If no agreement could be reached, a board of review would step in and make a proposal which would be binding on both the debtor and his creditors.

The *Natural Products Marketing Act* set up a Dominion Marketing Board for the regulation of a wide variety of natural products in Canada. Among the regulated items were grain products, fruit and vegetables, fish, poultry and even lumber--almost any item from the land, forest or sea could come under the Act's provisions. The goal of the Board was to assist primary producers receive a greater financial reward from the sale of their products. This was to be achieved by the introduction of more efficient marketing schemes across the country. Under the provisions of the Act, the federal government would promote national marketing schemes and the individual provinces, through complementary legislation, would regulate the marketing of goods within the provinces.

These eight statutes, which formed the bedrock of Bennett's recovery program, were a far cry from the promised New Deal which supposedly would have reshaped the

capitalist system in its entirety. Not only was this legislation somewhat mundane and quite technical, most of it was based upon a dubious constitutional footing. The legal arguments the Prime Minister advocated in support of the statutes never received the support of the legal profession and were completely rejected by the Liberals in the House of Commons. And as the following analysis of the debates in the House of Commons will show, Bennett, from the start, had gambled that his New Deal legislation would be accepted as constitutionally sound. Not surprisingly, when the Liberals deftly challenged his reasoning, the Prime Minister refused to budge. To do otherwise would have been to admit defeat.

### **The Debate in the House of Commons**

The challenge for the Conservatives was to prove that the legislation in question could be validly enacted by Parliament. It was one thing to say that these statutes were valid--something Bennett was clearly willing to do--but it was another thing to have the courts agree by actually sustaining them. The difficulty for the government was finding some way to argue that these statutes, which heralded in a wide variety of social and economic reforms, could be found to be within the legislative competence of Parliament. Examined in another light, the problem was finding a way to circumvent over fifty years of Privy Council decisions which laid down an interpretation of the B.N.A. Act unfavorable to this type of national legislative program. The question, in short, came down to one of legislative competence: which level of government had the jurisdiction to enact these statutes?

Sections 91 and 92 of the B.N.A. Act divide the legislative powers between the federal government and the provinces. Each section contains a list of items over which the particular legislature will have jurisdiction. In section 91(2) the federal government is permitted to make laws for "The Regulation of Trade and Commerce." By contrast, the provinces under section 92(13) are allowed to make laws pertaining to "Property and Civil



Rights in the Province." Residuary power is granted to the federal government allowing it "to make Laws for the Peace, Order, and good Government of Canada." Legal interpretation by the Privy Council, however, had greatly altered the meaning of such phrases. Over the years, the Privy Council gave a wide interpretation of provincial powers, most notably section 92(13). At the same time, the Privy Council had narrowed the federal power by restricting the federal government's ability to legislate under its residuary clause or under the widely phrased section 91(2). One writer summed up the situation quite well when he wrote:

The specific powers enunciated in section 91 are to be treated as exceptions to the general jurisdiction of the provinces to legislate upon property and civil rights. . . . Since it is obvious that all legislation outside the area of pure criminal law must deal with questions of property and civil rights it follows that the words in section 92 give a *prima facie* authority to the provinces to cover the whole field of civil law, this general authority being only abridged in special cases by the exceptions specifically enumerated in section 91.<sup>43</sup>

It was under these circumstances that Bennett was trying to convince Parliament that his New Deal statutes could be found to be within the federal government's competence. The underlying difficulty, however, was that practically all of the legislation in some way affected provincial property and civil rights.

The three draft conventions from the International Labour Office regulating hours of labour, minimum wages and weekly rest all fell *prima facie* under provincial jurisdiction. The government hoped to be able to remove them from the provincial sphere by ratifying the draft conventions under its treaty-making power, section 132,<sup>44</sup> and then passing legislation to carry out their provisions. If this gambit was successful, the federal government would perhaps be able to legislate legitimately in regards to such matters. Still,

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<sup>43</sup>Herbert A. Smith, "The Residue of Power in Canada," *Canadian Bar Review* 4 (September 1926): 433-434.

<sup>44</sup>Section 132 reads "The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries."

there were potential snags. Firstly, section 132 mentions nothing about draft conventions. In terms of international law, not to mention the B.N.A. Act itself, could draft conventions and treaties be considered as one and the same? Arguments could be made supporting either position. Secondly, Canada was ratifying these conventions as an independent nation, not as a member of the British Empire: section 132 made no provisions for Canada to enter into such agreements alone. The question to be decided was whether section 132 could be 'stretched' to include treaties Canada entered into independently of the British Empire, or alternately that the implementation of national treaties, whatever their subject matter, fell within Peace, Order and good Government. Thirdly, the government had to show that the legal climate had changed since a 1925 reference to the Supreme Court<sup>45</sup> on a similar I.L.O. convention where Justice Duff (as he was then) had held that the enactment of such a draft convention fell under provincial jurisdiction.

Again, it is necessary to emphasize the fact that the government had to envision how the Judicial Committee would react to this kind of use of the treaty-making power. It was obvious that the government was only using section 132 because it could conceive of no other way to effectively to transfer jurisdiction to the federal level. If recent decisions of the Privy Council were any indication, there was the possibility that the government just might succeed. After the death of the decentralizing Lord Haldane in 1928 the makeup of the Board began to change dramatically. By the early 1930's it seemed the Privy Council was handing down more centralist decisions in its interpretation of the B.N.A. Act.<sup>46</sup> It is in this regard that two decisions are of particular importance, the *Aeronautics* case<sup>47</sup> and the *Radio* case.<sup>48</sup>

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<sup>45</sup>*Hours of Labour Reference*, [1925] S.C.R. 505.

<sup>46</sup>In the period after Haldane's death and before Bennett's New Deal legislation came before the Board, twenty-three Canadian appeals were heard. Fourteen of these decisions can be classified as being centralist in nature. Of the remaining decisions, only six favoured the provinces. Only three cases could not be properly classified using these criteria. See Richard A. Olmsted, ed., *Decisions of the Judicial Committee of the Privy Council relating to the British North America Act, 1867 and the Canadian Constitution 1867-1954*, 3 vols. (Ottawa: Department of Justice, 1954).

<sup>47</sup>*In re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54.

In the *Aeronautics* case, Lord Sankey held that the federal government had acted correctly in enacting legislation to assume obligations arising from a 1922 British Empire Treaty which Parliament had ratified under section 132. Moreover, he indicated that he was not willing to accept counsel's suggestions that provincial powers over the control of aeronautics could be pieced together by using various headings from section 92, thus superseding the federal government's claim to jurisdiction. But what is more interesting for our purposes is Lord Sankey's *dictum* in the case where he stated that "the real object of the [B.N.A.] Act was to give the central Government those high functions and almost sovereign powers by which uniformity of legislation might be secured on all questions which were of common concern to the Provinces as members of a constituent whole."<sup>49</sup> Stated Sankey:

There may be a small portion of the field which is not by virtue of specific words in the British North America Act vested in the Dominion; but neither is it vested by specific words in the Provinces. As to that small portion it appears to the Board that it must necessarily belong to the Dominion under its power to make laws for the peace, order and good government of Canada. Further, their Lordships are influenced by the facts that the subject of aerial navigation and the fulfillment of Canadian obligations under s. 132 are matters of national interest and importance; and that aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion.<sup>50</sup>

While this type of reasoning on the part of the Privy Council was very refreshing indeed, and would be carried forward in its handling of the *Radio* case, there remained the nagging doubt that this kind of constitutional interpretation by the Board might not last indefinitely. Ottawa lawyer John S. Ewart, who often appeared before the Supreme Court and the Privy Council in constitutional cases, remarked in the *Canadian Bar Review* shortly after the decision was handed down that "one striking success in the handling of our consti-

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304. <sup>48</sup>*In re Regulation and Control of Radio Communication in Canada*, [1932] A.C.

<sup>49</sup>[1932] A.C. 54 at 70.

<sup>50</sup>*Ibid.*, at 77.

tution by the Judicial Committee is no guarantee that it will not be followed, perhaps immediately, by striking and bothersome failure."<sup>51</sup>

The facts in the *Radio* reference were not as straightforward as those in the *Aeronautics* case; as a result, the implications to be drawn from Viscount Dunedin's decision were far greater. In 1927 Canada had signed the international Radio Telegraph Convention and had subsequently ratified it without making any mention of the British Empire. The question, then, before the Privy Council was whether or not the federal government had the jurisdiction to regulate and control radio communication throughout Canada as a result of the treaty it ratified. Counsel for Quebec argued that this was not possible since the matter affected property and civil rights within the provinces. Counsel for the federal government held a contrasting view, arguing that radio communication was a subject "which affects the body politic of the Dominion; it is moreover a matter as to which there must be a single legislative authority throughout Canada."<sup>52</sup> Additionally, the federal counsel maintained that this treaty, while not one ratified by the British Empire, should be accepted as coming within the jurisdiction of section 132 thus permitting the federal government to perform the obligations arising thereunder. Alternately, federal counsel suggested that the treaty-making power was a distinct legislative head coming under the federal government's power to legislate for the peace, order and good government of Canada.

In his decision, Viscount Dunedin explained that the idea of Canada "being bound by a convention equivalent to a treaty with foreign powers was quite unthought of in 1867"<sup>53</sup> since the framers of the B.N.A. Act could not have envisioned Canada entering treaties independently of the British Empire. Strictly speaking, section 132 would not apply in such an instance although in spirit it would. In this new situation, reflecting

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<sup>51</sup>John S. Ewart, "The Aeronautics Case," *Canadian Bar Review* 9 (December 1931): 728.

<sup>52</sup>[1932] A.C. 304 at 308.

<sup>53</sup>*Ibid.*, at 312

Canada's evolution in political status, their Lordships felt that Canadian treaties implemented regardless of subject matter fell under the federal government's residuary power. In other words, Dunedin had rejected Quebec's argument "that the power to implement international agreements . . . must be subject to the division of powers as provided for in sections 91 and 92 of the B.N.A. Act."<sup>54</sup> Dunedin, it should be noted, also supported the federal government's right to regulate radio communication under section 91(29) and 92(10)(a) which allowed it to legislate in relation to works or undertakings which extended beyond a single province. In other words, in the actual case, the subject matter of the treaty fell within the federal Parliament's enumerated powers.

The potential implications within Dunedin's declaration that the federal government could enact treaties under its residuary clause were noted long before Bennett announced his New Deal. From the start, John S. Ewart was critical of the Privy Council's holding in the *Radio* case and he stated his position bluntly: "No Canadian lawyer, and probably no intelligent Canadian layman, could be induced to believe that if the Dominion Parliament had no power to enact certain legislation, it could acquire the power by promising a foreign state that it would enact it. The committee held that that could be done."<sup>55</sup> Under section 132, the question of the division of powers between the provinces and the federal government did not arise. British Empire treaties, it had always been assumed, would take precedence regardless of whatever level of government would have normally claimed jurisdiction. After the decision in the *Radio* case, it remained to be seen whether the federal government would be able to increase successfully its jurisdiction by ratifying treaties concerning matters within provincial jurisdiction.<sup>56</sup> Bennett's ratification

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<sup>54</sup>Peter H. Russell, *Leading Constitutional Decisions* 4th ed. (Ottawa: Carleton University Press, 1987), 107.

<sup>55</sup>John S. Ewart, "The Radio Case," *Canadian Bar Review* 10 (May 1932): 299.

<sup>56</sup>The decision in the *Radio* case was based upon two grounds. First, it was held that the federal government could independently enact any treaty under its residuary clause. Second, it was held that radio communication was a subject which fell under 92(10)(a). The Privy Council *had not* specified which of these two grounds, if either, was to take precedence.

of the three I.L.O. draft conventions would be the first test to determine if the federal government did indeed have this power.

In Parliament, the Liberals were skeptical of the government's plans to ratify the three draft conventions. If the government's ploy was to be successful at all, the draft conventions would have to be followed with legislation painstakingly designed to carry out their exact provisions. As Ernest Lapointe, former Minister of Justice, commented, the draft convention for the eight hour day was "the only thing that might give an appearance of right to parliament to enact this law, which is, as everyone will agree with me, primarily under provincial jurisdiction."<sup>57</sup> To overstep this narrow boundary would be to seriously undermine the federal government's position. Mackenzie King, building on Lapointe's groundwork, stressed that this kind of legislation could "be made generally applicable from one end of this country to the other by agreement between the provinces with respect to it."<sup>58</sup> He also contended that such legislation "could be made generally applicable by the British North America Act being amended so as to give this parliament power to pass legislation of this kind . . ."<sup>59</sup> What the government was doing, in King's opinion, was proceeding "to build its house on the sands of controversy and dissension, instead of seeking to construct it upon the rock of constitutional authority, right and power, which admits of no uncertainty."<sup>60</sup> Considering that until 1935 it had been commonly assumed that only the provinces had the jurisdiction to enact such legislation, King's allegations were not unfounded.

What the Liberals honestly believed should be done--and what the Conservatives were staunchly opposed to--was submitting the question to the Supreme Court for an advisory opinion. They did not share the government's confidence that the *Aeronautics* and *Radio* cases had given the government the jurisdiction it claimed. According to Lapointe,

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<sup>57</sup>Canada, House of Commons, *Debates*, 1935, Vol. II, 2052.

<sup>58</sup>*Ibid.*, 2056.

<sup>59</sup>*Ibid.*

<sup>60</sup>*Ibid.*, 1752-53.

these cases in no way applied to I.L.O. draft conventions. These judgments, he insisted, had been "based on special treaties which were entered into with various other nations."<sup>61</sup> Even the Secretary of State, C.H. Cahan, realized the difficulties inherent in a policy based entirely upon Bennett's interpretation of these two decisions. Remarking that while the pendulum of judicial decisions had swung recently from provincial rights to decisions favouring the central government, he conceded that the prospect remained that the Privy Council would not uphold the government's scheme. Still, there was no way of being certain this would be the case: "Neither you nor I nor the speaker may now make a final prediction in regard to that decision,"<sup>62</sup> he predicted. This was the risk that the government simply could not take. Instead of clearing the air as the Liberals were suggesting should be done, the Conservatives were afraid to give the courts any opportunity to rule upon the proposed legislation until after it had become law. Even submitting a reference to the Supreme Court for an advisory opinion could be hazardous since the government had no way of knowing whether the judges would support the government.

The other statutes comprising the New Deal were also not free from constitutional obstacles. The *Employment and Social Insurance Act*, for example, was viewed by members of the Opposition as encroaching upon provincial jurisdiction in matters of property and civil rights, particularly insurance. Even the title of the act seemed to suggest that it was a matter concerning intraprovincial trade, a subject held to be exclusively within provincial jurisdiction.<sup>63</sup> Without an amendment to the B.N.A. Act, it was argued, the government's legislative attempts would be a futile exercise. Of course, securing an

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<sup>61</sup>*Ibid.*, 1737.

<sup>62</sup>*Ibid.*, 1745.

<sup>63</sup>In *Citizens Insurance Co. v. Parsons*, (1881) 7 A.C. 96, the Privy Council held that the words "Property and Civil Rights" were sufficiently broad to allow the provinces to regulate matters of intraprovincial trade such as business contracts within their borders. As a result, the federal government's trade and commerce power was confined in such a way that it could not conflict with provincial powers arising under section 92(13). Subsequent Privy Council decisions further restricted the federal government's ability to deal with matters which in any way affected property and civil rights within even a single province.

amendment to the B.N.A. Act would not have been a realistic course to pursue in the short-run and the Liberals were well aware of this. On the other hand, they also realized that a compulsory unemployment insurance plan would affect the rights of both employees and employers within the provinces. It was not sufficient as Bennett maintained, based upon his understanding of the *Aeronautics* and *Radio* judgments, to support this legislation under section 132. Even ignoring the fact that the government had not ratified any specific treaty in this instance, the use of section 132 was clearly inappropriate. As Lapointe pointed out, section 132 gave jurisdiction to "parliament in the obligation of Canada towards foreign countries, not towards any class of the population in Canada."<sup>64</sup> And, again, there was the issue that the federal government was using section 132 to gain powers which would normally fall under provincial jurisdiction.

In a scenario similar to that of the debate over the I.L.O. draft conventions, Mackenzie King called for the government to submit its legislation to the Supreme Court for judicial review. The Liberals, while not opposed to an unemployment insurance plan, were unwilling to trust Bennett's legal reasoning in this matter. Stated King: "The Liberal Party approves the principle of social legislation thus far introduced and desires to see it in operation. We refuse to maneuvered into a position of opposition to this legislation."<sup>65</sup> If the government was not willing to accept an advisory opinion from the Supreme Court or to secure a constitutional amendment, King submitted that the "government must assume sole responsibility for adopting a more arbitrary and uncertain procedure."<sup>66</sup> The Liberals, however, supported this measure because they did not want to give the government the opportunity to use such a vote against them in the upcoming election.

The other New Deal statutes introduced in the 1935 session did not receive nearly as much attention in the House as the bills previously discussed. The *Dominion Trade and Industry Commission Act*, for example, was a contentious piece of legislation and Bennett

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<sup>64</sup>*Debates*, 1935, I, 825.

<sup>65</sup>*Debates*, 1935, II, 1621.

<sup>66</sup>*Ibid.*



knew it. In his January radio broadcasts he had pledged that legislation would be enacted to comply with recommendations from H.H. Stevens' Royal Commission on Price Spreads. Unfortunately, the Report had not yet been submitted to the government at the time Bennett made this promise. Therefore, there was no way of knowing that the Commission would recommend measures that would have required nothing short of a complete overhaul in the relationship between a business and its employees. Not only were many of the recommendations of the Report quite idealistic, most were plainly beyond the jurisdiction of the federal government. As Bennett explained to members of the House afterwards, "I of course believed that the price spreads commission would at least recommend legislation that was intra vires of this parliament . . . ." <sup>67</sup> This it had not done and the *Dominion Trade and Industry Commission Act* was an attempt to meet the Report's recommendations and still remain within the legislative competence of Parliament.

The Act was based primarily upon Parliament's ability to legislate in relation to matters of trade and commerce. Considering the nature of the Act, it was indeed questionable whether the Privy Council would support such legislation at all. In previous rulings it had defined section 91(2) in such a restrictive manner that it had become practically impotent. As a result, the federal government could use the section to regulate matters concerning external and interprovincial trade only, although it was theoretically conceivable that the *obiter* in *Parsons*--"general regulation of trade affecting the whole dominion"<sup>68</sup>--might still have some minor life after being steadfastly ignored by Haldane. This, however, was relevant only with regard to sections 18 and 19 of the Act which established a dominion or national trademark. It was clear that if the Privy Council held that any part of the Act affected local trade, that section would be declared *ultra vires*. In a sense, the question was not whether the Act as a whole would emerge unscathed from a court

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<sup>67</sup>*Debates*, 1935, IV, 3802.

<sup>68</sup>(1881) 7 A.C. 96 at 113.

ruling. Instead, the more interesting question was how much of it would remain intact after a ruling from the Privy Council?

The government sought to avoid this same kind of difficulty by enacting penalties for unfair trade practices under an amendment to the *Criminal Code*. Hugh Guthrie, Minister of Justice, believed that if these penalties were placed

in the trade commission act, as recommended in the [Price Spreads] report, they will be ultra vires of the powers of this parliament as an interference with property and civil rights within the various provinces. If we place them in the criminal code, however, and treat this as criminal legislation probably they will stand fine . . . .<sup>69</sup>

At first glance, such reasoning may appear strange. Yet when one considers the limited value of section 91(2) to the federal government, enacting criminal legislation for unfair trade practices was the best option available. In 1931, Lord Atkin had given a wide definition of the criminal law power, section 91(27), saying that it "connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State."<sup>70</sup> In other words, as long as the federal government did not attempt in bad faith to enact legislation encroaching upon provincial jurisdiction, it was free to define what it deemed to be a criminal offense. Atkin's definition of criminal law had been surprisingly broad in this case, but for the purposes of the federal government in enacting penalties as recommended by the *Price Spreads Report* it provided a convenient escape.<sup>71</sup> The Liberals did not contest the government's use of the criminal law power in this instance.

The last two statutes to be discussed, the *Natural Products Marketing Act* and the *Farmers' Creditors Arrangement Act*, were both enacted in 1934 and underwent only minor revisions in 1935. Still, like the more recent New Deal legislation, they were open to legal challenge. Speaking in the House, Bennett made it clear that the *Natural Products Mar-*

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<sup>69</sup>*Debates*, 1935, IV, 3478.

<sup>70</sup>*Propriety Articles Trade Association v. A.G. Can.*, [1931] A.C. 310 at 324.

<sup>71</sup>This escape route was closed by the Supreme Court in the *Margarine Reference*, [1949] S. C. R. 1. when Rand J. set down guidelines for the proper use of the criminal power.

keting Act had been carefully designed not to interfere with provincial marketing schemes, being intended for the regulation of interprovincial and export marketing only.<sup>72</sup> Still, even with the limits of the Act painstakingly defined, the government was embarking on a perilous journey in light of previous Privy Council decisions in this field. In 1922 Lord Haldane had held the *Board of Commerce Act* and the *Combines and Fair Prices Act* which prohibited trade combines considered detrimental to the public interest *ultra vires* the federal government.<sup>73</sup> The reasoning: these Acts interfered "seriously" with "property and civil rights in the Provinces."

After reminding the Prime Minister of this ruling, Mackenzie King persisted, stating that "the government must be aware of what the findings of the courts is likely to be in a matter of this sort."<sup>74</sup> Under such circumstances, King implied that the government must have other motives in mind. He proceeded to deliver the following lecture: "I hardly think it is treating fairly the great body of producers and distributors in this country to be passing on the eve of a general election, an act which in all probability will be made to serve its purpose in the general election, but which once the election is over will be found to be *ultra vires* . . ."<sup>75</sup> Robert Weir, Minister of Agriculture, speaking a few weeks later confidently claimed that there was "nothing in the bill that could in any way affect the British North America Act with respect to trade and the jurisdiction of the federal and provincial authorities . . ."<sup>76</sup> Both the Supreme Court and the Privy Council would prove him wrong.

The federal government believed it could enact the *Farmers' Creditors Arrangement Act* under section 91(21) which gave it power in matters of bankruptcy and insolvency. However, there remained the risk that the courts would see this legislation which affected

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<sup>72</sup>Canada, House of Commons, *Debates*, 1934, Vol. II, 1813.

<sup>73</sup>*In re Board of Commerce Act and Combines and Fair Prices Act*, 1919, [1922] 1 A.C. 191.

<sup>74</sup>*Debates*, 1934, III, 2330.

<sup>75</sup>*Ibid.*

<sup>76</sup>*Debates*, 1934, III, 2940.

contracts within the provinces (i.e. between the farmer and his creditors) as encroaching upon property and civil rights. By framing the statute in general terms the government hoped that this hurdle could be sidestepped. As Bennett himself remarked "this whole statute is surrounded with difficulty. There is not a legal member of the house who does not realize that, and the effort has been made to so steer the legislative ship that it will escape the shoals of the provinces on the one hand and the disaster of being beyond federal jurisdiction on the other."<sup>77</sup> How confident the government was with this approach became vividly clear a year later when it suddenly proposed an amendment to the statute.

In May 1935, British Columbia announced that it had decided to challenge the Act in its Supreme Court, contending that it represented an invasion of provincial rights. The federal government's response to this news was nothing short of amazing. The Minister of Finance, Edgar Rhodes, announced that "While we are advised by the Department of Justice that this law is intra vires of the parliament, what a court of law might do is another matter."<sup>78</sup> Rhodes' solution to this problem was simple: "If we withdraw the operation of the act in British Columbia they cannot raise any constitutional question."<sup>79</sup> In other words, the government proposed to maintain the Act in the other eight provinces while removing it from British Columbia in order to avoid a court test. Instead of supporting the Act, the government was running away from its responsibilities. Ernest Lapointe remarked on the serious predicament the government would soon find itself in if it adopted such a stance: "I know provinces that claim that our bills passed this session on hours of labour and minimum wages and even unemployment insurance are not intra vires of this parliament. If any one of them starts litigation to have the courts decide on that matter will this parliament exclude that province from the operation of the act?"<sup>80</sup> The idea was quickly dropped by the government. It had been an error in the first place to have even

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<sup>77</sup>*Ibid.*, 3874.

<sup>78</sup>*Debates*, 1935, IV, 3862.

<sup>79</sup>*Ibid.*, 3999.

<sup>80</sup>*Ibid.*, 4018.

made the suggestion. Yet this episode was clearly revealing of the lack of confidence the government had in its New Deal legislation. Lapointe's comment had been truly insightful.

Unquestionably the Conservatives were afraid that much of the New Deal legislation was unconstitutional. And, furthermore, it was obvious that the government would go to great lengths to avoid having any of the statutes tested in the courts. With the close of Parliament, however, the government's priorities shifted from defending the New Deal to defending the government itself. Needless to say, the fate of the New Deal hinged upon the outcome of the 1935 general election.

### **Social Reform and the 1935 General Election**

If a key goal of the Bennett government had been to adopt social reform as a plank in the 1935 general election, the tactic failed--miserably. King had predicted while in Opposition--and not incorrectly--that the government was considering going to the polls on the issue, perhaps as early as April.<sup>81</sup> Yet Bennett's January radio broadcasts, when followed by a lackluster performance in the House of Commons, precluded such a strategy. Watching events unfold from the Canadian Legation in Washington, a despondent Bill Herridge wrote to his ally in Cabinet, Robert Manion: "The colour has faded from the reform picture. The promise of performance is gone."<sup>82</sup> In a subsequent letter, Herridge brooded over the negative impact of the last Parliament upon the Conservatives' chances in the election: "It will have succeeded in convincing everyone that when the Conservative Government talked about reform in January, it was merely communicating to the country its idea of a good joke."<sup>83</sup> His analysis would prove correct; the fate of the Conservative Party seemed an almost foregone conclusion.

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<sup>81</sup>King Diary, entry of 18 January 1935.

<sup>82</sup>Manion Papers, Herridge to Manion, 25 March 1935.

<sup>83</sup>*Ibid.*, Herridge to Manion, 23 May 1935.

If Bennett's conversion to social reform was but a passing phase, public interest in the New Deal was also but fleeting. The New Deal was never an issue in the election campaign *per se*; social reform, however, was. The Conservatives had given the Liberals the opportunity to campaign on the issue and Mackenzie King for personal as well as political reasons did not allow it to pass him by.<sup>84</sup> Referring to Bennett's January radio broadcasts during the election campaign, King asserted that it was an "open secret" that the program of social reform came as a complete surprise to "members of Mr. Bennett's own Cabinet, and all of his following in the House of Commons," all of whom "had little or no knowledge either of his intention to announce such a program, or the nature of it."<sup>85</sup> King discussed the legislation subsequently introduced in Parliament, noting that "the validity of some of them was at once questioned, not by members of the Opposition alone, but by members of the Government itself" concluding that the Government's reform program was nothing but a "make-believe affair."<sup>86</sup>

In a subsequent speech King declared "The Liberal party has made it abundantly clear in Parliament that there is no issue between Mr. Bennett and ourselves on the need for social reform. There is, however, a very marked and significant difference between us in the methods by which we would seek reform."<sup>87</sup> King took offense with Bennett over

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<sup>84</sup>King viewed Bennett's adoption of the New Deal as a personal affront, convinced that Bennett had stolen his life work merely for the sake of politics. King's conviction that he had been personally wronged by Bennett should not be underestimated. The passage cited below offers convincing evidence that, for King, the campaign against the New Deal involved more than politics: "This morning I dreamt I had been made a member of the judicial committee. It seemed to me I had been a Privy Councillor but without the right to sit on legal cases and that this was added--I seemed to be in a room where very learned men were sitting at a long table. Rowell was at one end.--The question was asked by the one at the other who seemed to be presiding "Is there anything else for us to do?" and then he added--"recognize as a member of our body Mr. King--that he be appointed to the Privy Council for whom he hath the key." Rowell looked up asked "Had he?"--turned towards myself. I replied "I have"--there was a look on the face of the others as a certain professional jealousy at one so young or immature being added to a privileged group--the right to sit in judgment on matters of State would seem to be signified--& thus at the moment I began criticism of Bennett's broadcasts." King Diary, entry of 12 September 1935.

<sup>85</sup>W. L. M. King, *Mackenzie King to the Canadian People 1935* (Toronto: National Liberal Publicity Committee, 1935), The Second Address, 2 August 1935.

<sup>86</sup>*Ibid.*

<sup>87</sup>*Ibid.*, The Third Address, 5 August 1935.

his handling of the New Deal on two separate counts. First, he asserted what he seems to have genuinely believed: "Mr. Bennett must know by now that no broad scheme of social reform can be carried through successfully in Canada without close co-operation between the Dominion and the provinces" charging that "to ignore the provinces, or deliberately invade their constitutional rights, is a dangerous assault upon the very foundations of our national life."<sup>88</sup> Second, he challenged the merits of the New Deal itself, arguing "the trouble with Mr. Bennett's social reform program is that Mr. Bennett has not distinguished between reform and recovery."<sup>89</sup> For King, economic recovery was essential to social reform; moreover, "to seek to erect an ambitious program of social services upon a stationary or diminishing national income, is like building a house upon the sands."<sup>90</sup>

Social reform, it must be stressed again, was only one of several issues debated in the 1935 general election. As a result, one must be careful not to place undue emphasis on this issue alone. Bennett, who quickly lost interest in the New Deal, campaigned vigorously on a wide variety of issues--a notable exception being social reform. King, to the contrary, discussed social reform primarily from the viewpoint of criticizing the New Deal, offering little detail to indicate what a Liberal government would do in the area. A notable exception, of course, was King's commitment, oft repeated, that if elected the Liberals would submit the New Deal to the Supreme Court for a constitutional reference. On election day the electorate would give King the opportunity to fulfill this commitment.

The election of 14 October 1935 saw 892 candidates contest 245 seats. The electorate awarded the Liberals 44.8 per cent of the popular vote and 173 seats, as opposed to

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<sup>88</sup>*Ibid.* King, of course, realized constitutional questions were not of general interest or knowledge to the public. Still, as the following note indicates, King believed that it was the "duty of statesmen, however, to be scrupulously honest re; not deceive people as to what possible; indicate where jurisdiction does or does not exist; indicate clearly what steps and how long necessary to effect change." King Papers, Notes for Speeches by Topics: 1935 General Election Campaign, n.d.

<sup>89</sup>*Ibid.*

<sup>90</sup>*Ibid.*

the Conservatives who polled 29.6 per cent of the popular vote, receiving only 40 seats.<sup>91</sup> Commenting on the results, Escott Reid, secretary of the Canadian Institute of International Affairs, concluded "the Liberal victory was the result, not of a Dominion-wide landslide towards Liberalism, but a Dominion-wide landslide away from Conservatism."<sup>92</sup> Furthermore, he asserted, "the competing policies of the Liberal and Conservative parties had little influence on the voters, for the issues in the campaign were most obscure . . . ." <sup>93</sup> In the final analysis, "The Liberals counted on the depression defeating any government, and the depression did what was expected of it. The voters voted against the party which had been responsible for governing them during the five lean years from 1930 to 1935."<sup>94</sup> If the electorate was faced with a choice between 'King or Chaos' (to borrow a line used extensively in Liberal campaign advertisements), the voters seemed overwhelmingly to chose the former. In so doing, the electorate made another choice: they gave the incoming Liberal administration the opportunity to decide the fate of the New Deal. As the following chapter will show, the Liberals were to take full advantage of this very opportunity; true to their word, a reference case to the Supreme Court was immediately initiated on the controversial legislation.

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<sup>91</sup>R. MacGregor Dawson, *The Government of Canada* (Toronto: University of Toronto Press, 1948), 370; Robert Bothwell, Ian Drummond and John English, *Canada, 1900-1945* (Toronto: University of Toronto Press, 1987), 267.

<sup>92</sup>Escott Reid, "The Canadian Election of 1935--and After," *American Political Science Review* 30 (February 1936): 115.

<sup>93</sup>*Ibid.*, 116.

<sup>94</sup>*Ibid.*



## Chapter 2

### The New Deal Before the Supreme Court

On 30 October 1935, Ernest Lapointe, having returned to the Justice portfolio only days before, submitted the eight New Deal statutes passed by the former administration to the Supreme Court. The *Toronto Globe and Mail* supported the move, declaring it "desirable to clear the air at once on the point."<sup>1</sup> The *Globe and Mail*, however, never stopped to consider why the reference cases were submitted in such a hurry. As W.H. McConnell observed, "When the Liberals were elected on October 14, 1935 . . . they had the power necessary to do with the New Deal whatever they desired."<sup>2</sup> While a reference case was not the only recourse available to the new administration, it was the only option seriously considered. Other options, such as allowing the New Deal legislation to be tested by a private party in the courts were never studied; nor was the idea of repealing individual pieces of legislation the Liberals believed were unconstitutional. In the final analysis, King wished to settle the numerous constitutional questions raised by the social reform program concerning federal-provincial jurisdiction as quickly as possible--and, needless to say, without political harm to himself. An immediate reference to the Supreme Court made this possible. Furthermore, allowing the Supreme Court justices to decide the fate of the New Deal also gave the government the luxury of time: once the court decisions were handed down the administration could either embark upon its own social reforms or--if need be--adopt Mr. Bennett's. In any event, the government knew that a reference case would take time; the new administration could afford to wait patiently while Mr. Bennett's New Deal was examined. King's political use of reference cases had begun.

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<sup>1</sup>The *Toronto Globe and Mail*, Wednesday, 6 November 1935, 4.

<sup>2</sup>W.H. McConnell, "The Judicial Review of Prime Minister Bennett's 'New Deal'," *Osgoode Hall Law Journal* 6 (1968): 46.

King had nothing to lose and had everything to gain from a reference to the Supreme Court. While his administration was submitting the New Deal package as a whole to the Court, its political objectives would be realized if only the more controversial pieces of legislation were found *ultra vires*. There was every indication that this would be the case. For example, the government was certain that the *Natural Products Marketing Act* would be declared *ultra vires*, encroaching upon intra-provincial trade transactions; there were numerous authorities distinctly implying this could not be done under section 91(2).<sup>3</sup> Similarly, the government was confident that the Supreme Court would not unanimously uphold the three I.L.O. statutes; several factors contributed to this sense of confidence. Not only did the Supreme Court's 1925 decision in the *Hours of Labour Reference* raise serious doubts about the validity of the present I.L.O. statutes, the Privy Council's decision in the *Radio* case had not dealt with matters *prima facie* falling under section 92 as was the case in the present instance. Similarly, it was almost certain that the Supreme Court would not unanimously uphold the *Employment and Social Insurance Act*, the whole subject of insurance having passed to the provinces.<sup>4</sup> If the Liberals had every reason to doubt the validity of the New Deal, the Conservatives had every reason to be afraid of a reference case. Despite Bennett's strenuous objections to the contrary, the case to be made in favour of the New Deal was not as strong as he would like to think. And Bennett, like King, knew that the provinces would vigorously attack the New Deal, claiming that either individually or as a whole, the New Deal statutes represented a serious invasion into provincial fields of jurisdiction.

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<sup>3</sup>See the following cases: *Citizens Ins. Co. v. Parsons* 7 A.C. 96; *A.G. Ont. v. A.G. Can. (Local Prohibition)* [1896] A.C. 348; *A.G. Can. v. A.G. Alta. (Insurance)* [1916] A.C. 588; *Bd. of Commerce Act, 1919 & Combines and Fair Prices Act, Re* [1922] 1 A.C. 191; *Toronto Elec. Commrs. v. Snider* [1925] A.C. 396; *Lawson v. Int. Tree Fruit & Veg. Comm.* (1931) S.C.R. 357.

<sup>4</sup>Of particular importance are: *Citizens Ins. Co. v. Parsons* 7 A.C. 96; *A.G. Can. v. A.G. Alta. (Insurance)* [1916] A.C. 588; *A.G. Ont. v. Reciprocal Insurers* [1924] A.C. 328; *Ins. Act of Can., Re* [1932] A.C. 41.

There is no evidence which has come to light to indicate that King attempted to directly influence the Supreme Court of Canada--he didn't need to. The same, however, cannot be said for Bennett. As Leader of the Opposition, Bennett saw nothing wrong with sending his Private Secretary, R.K. Finlayson, to Chief Justice Duff's chambers to explain to him the purposes behind the New Deal statutes; and in the process, to advise "Duff of the reasons why Bennett considered the legislation *intra vires*."<sup>5</sup> King had no need to resort to such tactics and would have considered it improper to have done so. He did, however, suspect Bennett of employing such means. In his diary, King confided that "I feel pretty sure that Bennett had discussed these views with some members of our Supreme Court, possibly even before introducing the legislation thereby having the Government partially committed."<sup>6</sup>

If the King administration was interested in influencing the Court, there were more subtle means available to it than those adopted by Bennett. The exact wording of the questions submitted to the Supreme Court provided an ideal opportunity. Here, the government perhaps did not show the restraint it could have. A typical question to the Supreme Court asked "Is this Act *ultra vires* of the Parliament of Canada?" In a letter to Lapointe, H.H. Stevens protested that such wording suggested "to the Supreme Court that they search for reasons why the Acts are *ultra vires*."<sup>7</sup> Stevens asked: "Would it not be better to have asked the courts to declare that they are *intra vires*?"<sup>8</sup> His point is not without merit. Phrasing the questions in the negative, and not in the positive, could be seen as an attempt to influence the Court. Yet this was not the unusual practice Stevens implied; an examination of past Supreme Court Reports shows that quite often the gov-

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<sup>5</sup>McConnell, "Judicial Review," 82-83. McConnell interviewed Finlayson on 23 March 1965 and bases his comments upon this interview. It should be noted that Duff's biographer supports McConnell's findings on Bennett's intervention. See David Ricardo Williams, *Duff: A Life in the Law* (Vancouver: University of British Columbia Press, 1984), 187.

<sup>6</sup>King Diary, entry of 28 January 1937.

<sup>7</sup>Lapointe Papers, H.H. Stevens to Lapointe, 6 November 1935.

<sup>8</sup>*Ibid.*

ernment had posed questions in the negative when submitting a reference to the Court. In the present instance, the only effect that phrasing the questions in the negative had--if any--was to suggest the government's disposition toward the statutes was not entirely favourable. In any case, the judges of the Supreme Court were surely aware of the government's attitude towards the New Deal, to say nothing of the role the new administration envisioned the Court to play in determining the New Deal's validity.

### Counsels' Arguments Before the Supreme Court

Representing the federal government in each of the references was Newton Wesley Rowell, Louis St. Laurent and Charles Percy Plaxton. All were able constitutional lawyers who had argued numerous cases before both the Supreme Court and Privy Council.<sup>9</sup> It is obvious that Lapointe was careful to appoint only preeminent counsel, cautious to avoid the charge that the administration would not fully support the statutes it referred to the Court. Nonetheless, the issue was immediately raised by H.H. Stevens who suggested the government should "appoint some able counsel to argue for the support of these measures," preferably someone "sympathetic with the view that these Acts should be sustained."<sup>10</sup> Lapointe, in reply, defended his choices, commenting "my instructions are that they should uphold and defend the validity and the constitutionality of all the Acts," adding "I have no doubt that their appointment will satisfy Canadian public opinion and is a guarantee that the best argument possible will be presented to the Court."<sup>11</sup>

Six judges sat on the 1936 Supreme Court which heard the New Deal references. Sir Lyman Poore Duff, a member of the Court since 1906 and Chief Justice since 1933.

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<sup>9</sup>Rowell, for example, had recently won in the *PATA* case; Plaxton, a representative of the Department of Justice in both Ottawa and London, had argued successfully before the Privy Council in *Transfer of Natural Resources to Sask, Re* [1932] A.C. 28, not to mention *Aeronautics*. St. Laurent, it should be added, was a noted corporate lawyer, although not as strong in constitutional law as either Rowell or Plaxton.

<sup>10</sup>Lapointe Papers, H.H. Stevens to Lapointe, 6 November 1935.

<sup>11</sup>*Ibid.*, Lapointe to H.H. Stevens, 14 November 1935.

Duff, who before his appointment to the Court practiced law in Victoria, was considered by many to be the foremost legal authority sitting on the 1936 bench. Thibaudeau Rinfret, originally a judge of the Superior Court of Quebec was appointed in 1924 to the Supreme Court of Canada. After Duff's retirement in 1944, Mr. Justice Rinfret assumed the Chief Justiceship, a position he would hold for ten years. Also from Quebec was Lawrence Cannon, formerly a judge of the Superior Court of Quebec. Mr. Justice Cannon was appointed to the Supreme Court in 1930 by Mackenzie King. Mr. Justice Crocket was from New Brunswick where he was elected to the House of Commons as a Conservative three times: 1904, 1908 and 1911. In 1913 he resigned his Commons seat after his appointment to the New Brunswick Supreme Court; in 1932 he was appointed to the Supreme Court by Prime Minister Bennett. Two other Conservatives, both appointed by Bennett to the Court within months of one another in 1935, were Mr. Justice Davis and Mr. Justice Kerwin. Mr. Justice Lamont did not sit on the New Deal references, absent due to illness. Aside from this brief, albeit limited, biographical description of the 1936 Court, little else can be added. The Court cannot be accurately defined as being Liberal or Conservative, or provincialist or centralist in nature; moreover, such labels are more misleading than illuminative. If these six judges shared one thing in common, it was an understanding of the political issues involved in the New Deal references. No doubt each had read newspaper accounts detailing the political evolution of the New Deal from its inception in January 1935; one year later it was time for them to decide the questions of law upon which the success--or failure--of the New Deal rested.

On 15 January 1936, federal counsel began argument before the Court on section 498A of the *Criminal Code*. Counsel for the federal government maintained that Parliament could enact penalties for unfair trade practices under the *Criminal Code* using section 91(27) of the B.N.A. Act; arguing, as well, that the statute concerned the regulation of trade and commerce, thereby invoking section 91(2). Approving the definition of the

criminal law as being "the criminal law in its widest sense,"<sup>12</sup> counsel referred to the recent *Propriety Articles Trade Association* case, positing that "the power of the Parliament of Canada to legislate in relation to the criminal law extends to commercial activities which Parliament has genuinely determined are to be suppressed in the public interest."<sup>13</sup> Parliament, counsel maintained, was not interested in regulating individual trades or industries--an encroachment upon provincial jurisdiction. On the contrary, the act was designed to apply generally throughout the country to all industry, prohibiting only those trade practices deemed unfair.

Covering counsels' arguments before the Court, the *Ottawa Evening Journal* reported "Quebec and Ontario . . . combined in an attack" on the federal government's interpretation of the criminal law power.<sup>14</sup> Both provinces took issue with the federal government's reading of the *PATA* case, Mr. Geoffrion, counsel for Quebec, expressing concern "that there must be limits beyond which the Dominion could not step or there would be no room left for the provinces."<sup>15</sup> Quebec believed the federal government was encroaching upon provincial jurisdiction, in particular, section 92(16). Referring to section 92(13), Mr. Farris for British Columbia, argued the subject matter of the statute affected property and civil rights; therefore, it was not within the field of criminal jurisprudence, describing it as 'colourable legislation,' that is to say, legislation having the formal trappings of a criminal law, but in reality concerned with provincial property and civil rights. To hold otherwise, he argued, "will be to open a door not afterwards to be closed which will permit serious inroads on provincial powers and impair the scheme of the Constitution."<sup>16</sup>

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<sup>12</sup>*A.G. Ont. v. Hamilton Street Railway* (1903) A.C. 524 at 529.

<sup>13</sup>*Factum of Canada* (Section 498A of the *Criminal Code*), undated, signed by N.W. Rowell, L.S. St. Laurent and C.P. Plaxton, (File 6247, Supreme Court of Canada, Ottawa), at 8.

<sup>14</sup>The *Ottawa Evening Journal*, Thursday, 16 January 1936, 1.

<sup>15</sup>*Ibid.*, 2.

<sup>16</sup>*Factum of British Columbia* (Section 498A of the *Criminal Code*), undated, signed by J.W. DeB. Farris, (File 6247, Supreme Court of Canada, Ottawa), at 7.

The next act before the Court, the *Dominion Trade and Industry Commission Act*, was defended by federal counsel as a law for the peace, order and good government of Canada. Defending the statute using the residuary clause was a risky venture considering Lord Watson's 'national dimensions test,' first enunciated in the *Local Prohibition* case.

Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local or provincial and that which has ceased to be merely local or provincial, and has become a matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.<sup>17</sup>

Did the Act in question meet this test? Federal counsel asserted that it did, dealing with matters which are "unquestionably matters of national interest and importance and which have attained such dimensions as to affect the body politic of the Dominion."<sup>18</sup> Counsel further adopted the strategy of then defending individual sections of the Act under either section 91(2) or section 91(27), depending on the intent of the particular section involved.

Speaking for Ontario, Attorney General Roebuck denounced the Act, charging that it represented "an usurpation of provincial control" over the administration of justice, section 91(24), establishing "star chamber methods."<sup>19</sup> Particularly offensive was the appointment of a Dominion public prosecutor empowered to prosecute those found guilty of unfair trade practices. In a similar vein, he criticized the infringement of "contract and civil rights of individuals and corporations" under the Act, charging that "the country is tied hands and feet by this commission."<sup>20</sup> British Columbia and Quebec maintained that not one of the enumerated heads of section 91 conferred jurisdiction upon the Dominion Parliament, nor was power to be found under the residuary clause. Both provinces insisted the Act represented an attempt to regulate individual trades or industries within a

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<sup>17</sup>[1896] A.C. 348 at 361.

<sup>18</sup>*Factum of Canada* (Dominion Trade and Industry Commission), at 9.

<sup>19</sup>The *Ottawa Evening Journal*, Monday, 20 January 1936, 2.

<sup>20</sup>*Factum of Ontario* (Dominion Trade and Industry Commission), undated, signed by I.A. Humphries, (File 6247, Supreme Court of Canada, Ottawa), at 4.

province, dismissing the federal argument that circumstances were in evidence, as argued in the Price Spreads Commission, that imperiled the national life. Likewise, provisions within the Act concerning price and production agreements, commodity standards and a 'Canada Standard' trademark were submitted to be beyond federal jurisdiction. British Columbia alone argued that the Act must be interpreted in conjunction with the amendment to the *Criminal Code*, believing both represented colourable invasions of provincial jurisdiction under sections 92(13) and (16).

In contrast to its relatively weak position with respect to the *Dominion Trade and Industry Commission Act*, the federal government enjoyed the upper hand when it came to defending the *Farmers' Creditors Arrangement Act*. It justified the Act as legislation in relation to Bankruptcy and Insolvency, invoking section 91(21) of the B.N.A. Act; the argument was convincing. The Act supplemented existing federal bankruptcy laws, being available to those farmers unable to meet their current financial obligations. Additionally, the federal government justified the statute as legislation in relation to agriculture under section 95, also a matter of federal concern. Anticipating provincial objections that the Act trespassed upon civil rights within a province or matters of a local or private nature (Ontario, Quebec and British Columbia each adopted this very stance), federal counsel argued persuasively in their *factum* that the Act could also be supported under the residuary clause, again invoking Watson's 'national dimensions' doctrine. Their reasoning: "the relations of farmers and their creditors throughout the whole of Canada in a time of economic stress such as that through which Canada has been passing, are matters unquestionably of Canadian interest and importance."<sup>21</sup> In other words, the Act was designed to keep farmers on their farms, thereby protecting the peace, order and good government of Canada. Provincial objections, not surprisingly, paled against such reasoning.

Turning to the *Natural Products Marketing Act*, federal counsel found themselves explaining that the legislation in question did not, in fact, encroach upon provincial jurisdic-

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<sup>21</sup>*Factum of Canada* (Farmers' Creditors Arrangement), at 18.



tion. Claiming that in its 'pith and substance' the Act would regulate the marketing of natural products on an interprovincial and export basis only, counsel did concede that the legislation would incidentally affect civil rights in the province (i.e., local trade), as well as matters of a merely local or private nature. Still, it was argued, this was "not an attempt to regulate in the Provinces individual trades or particular occupations," instead, only an attempt to ensure "the attainment of the central object of the Act . . . ." <sup>22</sup>

The provinces, not surprisingly, easily disputed such reasoning. Ontario, for example, stated that unless the *Marketing Act* could be supported under POGG (i.e., if the federal government could show that the marketing of natural products had become a matter of national concern), the legislation could not be upheld. Ontario disputed the likelihood of such an interpretation: "Scrutinizing the Act as a whole, it is submitted that it is the regulation of particular trades and occupations and that is the pith and substance of the Act." <sup>23</sup> Quebec, meanwhile, claimed that "the mere fact that 51% of the market being, in the opinion of the Governor in Council, out of the province is far from sufficient . . . to give the Dominion jurisdiction" <sup>24</sup> to market goods listed in the Act.

Referring to the *Employment and Social Insurance* reference, W.H. McConnell has suggested that "indirection, if not outright deviousness" <sup>25</sup> was a key characteristic of the federal government's argument. I agree with his assessment. While federal counsel believed unemployment insurance transcended "provincial and even national boundaries" having "developed international as well as national aspects," <sup>26</sup> they failed to elaborate where support for this position was to be found within the B.N.A. Act. Relying on section 91 alone, as counsel did, was indeed evasive since Parliament had framed the Act in response to obligations perceived to arise from the Treaty of Versailles to which Canada was

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<sup>22</sup>*Factum of Canada* (Natural Products Marketing), at 12.

<sup>23</sup>*Factum of Ontario* (Natural Products Marketing), at 9.

<sup>24</sup>*Factum of Quebec* (Natural Products Marketing), signed by Charles Lanctot and Aime Geoffrion, (File 6247, Supreme Court of Canada, Ottawa), at 5.

<sup>25</sup>McConnell, "Judicial Review," 65.

<sup>26</sup>*Factum of Canada* (Employment and Social Insurance), at 10.

a signatory in 1919. If Parliament believed the Act was within its jurisdiction as a result of its treaty-making power, section 132, the question arises--why did federal counsel conceal this in their *factum*? An examination of the provincial *factums* provides several clues.

According to the provinces, Ottawa was knowingly intruding upon a long-recognized provincial sphere: the regulation of insurance, not to mention the civil rights of employers and employees within the provinces, under heads 92(13) and (16). Quebec, for instance, recognized the shortcoming of section 132 for the federal government: "It can scarcely be said that the general and very vague aspirations thus set forth in the Treaty constitute in themselves an obligation affording a foundation for the exercise by Parliament of legislative powers which it does not otherwise possess."<sup>27</sup> Surprisingly, the provinces were divided on whether the Act could be sustained under the residuary clause. British Columbia and Ontario, for instance, believed the Act could be supported as legislation for the peace, order and good government of Canada under the 'national dimensions doctrine.' In marked contrast, Quebec favoured Lord Haldane's 'emergency test.' According to this test, first described in the *Board of Commerce* case, there may be circumstances "such as those of war or famine, when the peace, order and good Government of the Dominion might be imperilled under conditions so exceptional that they require legislation of a character in reality beyond anything provided for by the enumerated heads in either section 92 or 91 itself."<sup>28</sup> Quebec advised that "unless there is an emergency amounting to national peril"<sup>29</sup> the statute would be *ultra vires* the federal government. Only with regard to the treaty-making power did the provinces show unanimity: clearly, none wanted to risk having the Court hand down a broad interpretation of section 132, thereby curtailing their own powers.

If the question of the treaty-making power was raised only incidentally in the *Employment And Social Insurance Act* reference, it was clearly the central issue in the I.L.O.

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<sup>27</sup>*Factum of Quebec*, (Employment and Social Insurance), at 10.

<sup>28</sup>[1922] 1 A.C. 191 at 200.

<sup>29</sup>*Factum of Quebec*, at 11.

reference, the most controversial New Deal case before the Supreme Court. According to the *Ottawa Evening Journal*, "the judges found lawyers for the provinces and Dominion . . . sharply divided"<sup>30</sup> on the validity of the legislation enacting maximum hours of work, minimum wages and weekly rest legislation. In the reference, Ottawa maintained that it had jurisdiction to enact the laws on four separate grounds. Firstly, stating that the laws were in response to three International Labor Organization draft conventions Canada had signed and ratified, Ottawa was claiming jurisdiction under section 132 arguing that its obligations arose as a direct result of a British Empire treaty, the Treaty of Versailles. Secondly, counsel suggested that section 132 could be 'stretched' to include Dominion treaties making no mention of the British Empire. Thirdly, the federal government argued the legislation could be supported under Peace, Order and good Government. In other words, the Dominion suggested that Dominion treaty implementation--of any treaty--not being a subject defined anywhere in section 92, fell under the residuary clause. And, finally, counsel maintained that the laws came under federal jurisdiction to regulate trade and commerce.

Ottawa's use of section 132 to justify its enactment of labour legislation, traditionally a matter under provincial jurisdiction, relied heavily on the *Aeronautics* and *Radio* cases. Unlike the *Dominion Trade and Industry Commission Act* where no convention was involved, Ottawa argued in the present instance that ratification of the three I.L.O. draft conventions under section 132 gave it jurisdiction to enact legislation thereby fulfilling its international obligations. The question, in short, came down to whether Ottawa was, in fact, the competent authority to enact such legislation? Put differently, did section 132 give the federal government the jurisdiction it claimed?

Federal counsel contended that Parliament, when speaking for the country as a whole, had the necessary authority to enter into treaties and carry them into effect re-

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<sup>30</sup>The *Ottawa Evening Journal*, Thursday, 23 January 1936, 1.

gardless of provincial jurisdiction.<sup>31</sup> Ontario condemned this stance in its entirety realizing that if such reasoning was upheld it meant

that every year delegates may leave Canada to attend a Labor Conference, pass all sorts of draft conventions covering many matters exclusively within the jurisdiction of the Provinces and, when ratified by the Dominion Parliament, that Parliament, under the authority of Section 132 of the British North America Act, could enact legislation which would have the effect of completely overthrowing Provincial autonomy.<sup>32</sup>

Furthermore, Ontario contended neither *Aeronautics* nor *Radio* gave Parliament jurisdiction to enact legislation encroaching upon section 92 powers.

In marked contrast to B.C., Alberta and Quebec, Ontario alone submitted that Parliament could enact such social and labour legislation under its residuary clause, believing a national standard preferable to competing provincial standards: "if various provincial schemes are adopted instead of a national scheme, it would disturb the equilibrium of industrial relations in the various provinces,"<sup>33</sup> thereby affecting the body politic of the Dominion. That Ontario was alone in this position becomes clear with B.C.'s rebuttal, delivered by Mr. Farris, that Ontario's contention "strikes a violent blow at the rights of the provinces,"<sup>34</sup> particularly property and civil rights.

Argument before the Court spanned three weeks from 15 January to 5 February. While the legal issues before the Court had been complex and multifaceted, the judges could not have helped but realize the underlying political implications of the references. Both in Parliament and during the 1935 election campaign, King had made it clear that he did not support the New Deal legislation, believing it to be *ultra vires* the Parliament of Canada. The six Supreme Court judges were surely aware of this. For Ottawa, now under a Liberal administration, the challenging task of federal counsel had been to support

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<sup>31</sup>Ottawa was not alone in maintaining this position. See, for example, C. Wilfred Jencks, "The Constitutional Capacity of Canada to Give Effect to International Labour Conventions," two parts, *Journal of Comparative Legislation* 16 (1934): 201-215; 17 (1935): 12-30, respectively.

<sup>32</sup>*Factum of Ontario* (Labour Conventions), at 7.

<sup>33</sup>*Ibid.*, at 15.

<sup>34</sup>The *Ottawa Evening Journal*, Friday, 31 January 1936, 3.

measures enacted by the former Conservative government which both the present Prime Minister and Minister of Justice believed unconstitutional. As W.H. McConnell has observed, "the inference would be not unnatural that the government was seeking a legal pretext not to implement [the New Deal]."<sup>35</sup> Similarly, considering none of the provinces supported the legislation--at least *in toto*--the judges might have suspected an unspoken consensus between the two levels of government, each wishing the legislation to be declared *ultra vires*. While we will most likely never know the opinion of the judges on such matters, a subordinate concern in any event considering the long line of Privy Council decisions the Court was bound to follow, we are left with a letter by Chief Justice Duff referring to the burden placed upon the Court by the references: "The question of the Federal authority in such matters is a highly controversial one and the consideration of these references, superadded to the ordinary work of the court, will, in all probability tie me to Ottawa until the end of May."<sup>36</sup> Duff's prediction was close; the decisions of the Court--six months in the writing--were handed down on 17 June 1936.

### The Supreme Court Decisions

"Six judges of the Supreme Court of Canada sat in a plain, dusty old courtroom today and gave judgments on eight social reform laws," marking the end of "the longest and most important constitutional reference in the 61-year history of the Supreme Court."<sup>37</sup> Of the six decisions handed down, observers paid close attention to the divided opinion of the Court in the I.L.O. reference, cognizant that the federal government's treaty-making power was the central issue.

Speaking for Davis and Kerwin, Duff championed the validity of the three labour statutes under the federal government's treaty-making power. Based upon his examina-

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<sup>35</sup>McConnell, "Judicial Review," 48.

<sup>36</sup>NAC, Duff Papers, Duff to Roscoe Pound, 16 November 1935.

<sup>37</sup>The *Montreal Gazette*, Thursday, 17 June 1936, 1.

tion of *Aeronautics* and *Radio*, Duff rejected the provincial argument that treaties based upon section 132 were *ultra vires* the federal government if they applied to matters falling under provincial jurisdiction. Noted Duff:

The power to legislate for the performance of obligations under treaties within that section is reposed exclusively in the Dominion Parliament, their Lordships declare, and, as their Lordships imply, the language is general and the power in no way depends upon the condition that the matters with which the obligation shall be concerned shall be matters in respect of which Parliament is vested with jurisdiction under section 91 or any other sections of the B.N.A. Act.<sup>38</sup>

In other words, where section 132 was concerned, the division of powers was not an issue.

Duff continued his analysis of the effects of the *Aeronautics* and *Radio* decisions:

It seems hardly open to dispute that their Lordships intended to lay down that international obligations, which are strictly treaty obligations within the scope of s. 132, as well as obligations under conventions between governments not falling within s. 132, are matters which, as subjects of legislation, cannot fall within s. 92 and, therefore, must fall within s. 91; and since they do not fall within any of the enumerated subjects of section 91, they are within the ambit of the Dominion to make laws for the peace, order and good government of Canada.<sup>39</sup>

In no way whatsoever was Duff 'stretching' the meaning of section 132 to include non-imperial treaties. Duff's interpretation of the effect of these two decisions was that in terms of international obligations section 132 would normally apply, except in instances where the exact meaning of the words excluded its use. In such situations, Parliament's residuary clause would come into play. In either instance--imperial or Canadian treaty--the Chief Justice argued, the division of powers as defined in section 91 and 92 would not apply.

Most important in Duff's opinion, was the effect over the last thirty years of Canada's constitutional development upon treaty making. In Duff's opinion, the federal government, when speaking for the nation as a whole, had the status to enter into interna-

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<sup>38</sup>*In re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act, Limitation of Hours of Work Act*, [1936] S.C.R. 461 at 484, 485.

<sup>39</sup>*Ibid.*, at 486.

tional arrangements--be they treaties under section 132, or conventions not falling within section 132--independent of Britain. It necessarily followed that the federal government could enact legislation for any obligations arising under such arrangements. For those agreements outside the explicit wording of section 132, Duff believed "as such matters are embraced within the authority of Parliament in relation to peace, order and good government, its power is plenary."<sup>40</sup> Continued Duff, "Parliament has full power by legislation to determine the conditions under which international agreements may be entered into and to provide for giving effect to them."<sup>41</sup> Such matters, by their very nature, were excluded from the ambit of section 92.

The Chief Justice gave little weight to provincial concerns that the ratification of treaties by the federal government, under either a stretched section 132 or the residuary clause, could allow it conceivably to invade provincial fields of jurisdiction. His reasoning: "the exclusive authority of the Dominion to give the force of law to an international agreement is not affected by the circumstances alone that, in the absence of such an agreement, the exclusive legislative authority of the provinces would extend to the subject matter of it."<sup>42</sup> Rinfret, Cannon and Crocket each challenged Duff's reasoning on this very point. Rinfret, for example, stressed that "the subject-matter of these legislations is undoubtedly one in relation to which, under the Constitution of our Country, the legislature in each province may exclusively make laws."<sup>43</sup> Drawing a distinction between the power to create an international obligation and the power to perform it (*Aeronautics* and *Radio* being examples of the latter), Rinfret maintained that "A civil right does not change its nature just because it becomes the subject-matter of a convention with foreign States." In other words, the federal government could not safely enter into an international agreement with a foreign government involving legislation upon matters under provincial jurisdiction with-

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<sup>40</sup>*Ibid.*, at 487.

<sup>41</sup>*Ibid.*, at 496

<sup>42</sup>*Ibid.*, at 499.

<sup>43</sup>*Ibid.*, at 502.

out provincial consent. In a similar vein, Cannon suggested that if "interference with provincial rights by way of international agreements is admitted as *intra vires* of the central government, we may as well say that we have in Canada a confederation in name, but a legislative union in fact."<sup>44</sup> For Cannon, no "gloss or commentary to be found in judicial pronouncements" could change the fact that "the Parliament of Canada is *not a Parliament of unlimited authority*."<sup>45</sup> Crocket, by way of comparison, similarly rejected the ability of the federal government to invoke section 132 to enact the I.L.O. statutes, claiming that "no matter from what point of view they are examined" each deals "in a very real and radical sense with civil rights in all the provinces of Canada alike."<sup>46</sup>

Unlike the divided Court in the I.L.O. reference, a majority of the justices found the *Employment and Social Insurance Act* *ultra vires* the Dominion Parliament. Only Duff, with Davis in agreement, maintained the Act's validity. Quoting the preamble of the Act in its entirety, Duff proclaimed "No one of the aims stated . . . is illegitimate as an ultimate aim of legislation by the Parliament of Canada."<sup>47</sup> Turning to the legal issues at hand, the Chief Justice rejected Mr. Rowell's contention that the legislation could be supported under either section 91(2) or the residuary clause. Instead, Duff endorsed Parliament's ability to create an unemployment fund from which benefits would be paid under section 91(3), The raising of Money by any Mode or System of Taxation. Furthermore, under section 91(1) the Dominion was competent "to expend such moneys in exercise of its exclusive and plenary control over the public assets," in this instance, "for the relief of the inhabitants of the Dominion, almost all of whom are necessarily inhabitants of the provinces."<sup>48</sup> Duff in

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<sup>44</sup>*Ibid.*, at 521.

<sup>45</sup>*Ibid.*, at 521, 522.

<sup>46</sup>*Ibid.*, at 522.

<sup>47</sup>*In re Employment and Social Insurance Act*, [1936] S.C.R. 427 at 430. The preamble cited the desire to "secure and maintain fair and humane conditions of labour," declaring, as well, that "the well-being, physical, moral and intellectual, of industrial wage-earners" was of supreme importance. *Statutes of Canada*, 25-26 Geo. V, 1935, c. 38.

<sup>48</sup>[1936] S.C.R. 427 at 435.



short articulated what after World War II would become the common justification for the federal spending power on matters falling within provincial jurisdiction.

Duff rejected provincial claims that a national unemployment insurance fund violated the civil rights of employers and employees. In his opinion, compulsory contributions by both employers and employees were an acceptable form of taxation by the federal government and did not in any way infringe upon provincial jurisdiction. Furthermore, he argued, "no single province, nor all the provinces combined, could enact this legislation" which created a fund constituted of Dominion monies "and no province possesses any authority to legislate in relation to the application of such a fund."<sup>49</sup>

Like Duff, Rinfret rejected federal counsel's argument that the *Employment and Social Insurance Act* could be supported under either section 91(2) or the residuary clause. In addition, he denied the possibility of the Act being supported under section 132, although the preamble had made mention of the 1919 Treaty of Peace. The critical question in Rinfret's opinion was whether sections 91(1) and (3) conferred the necessary power upon the Dominion Parliament to create and administer an unemployment insurance fund. In his opinion they did not, the whole field of insurance falling within provincial jurisdiction: "In my humble view," wrote Rinfret, "the subject-matter of the Act is employment service and social insurance, not public debt and property or taxation."<sup>50</sup> It logically followed, he argued, that the federal government could not under the guise of its taxing power invade the legislative domain of the provinces, in particular, property and civil rights.

In a similar vein, Kerwin stressed that even though the object "of the present Act may be praiseworthy and if the desired result might better be obtained by the Dominion than all or some of the provinces acting within their constitutional limitations might accomplish, the matter is not translated from the jurisdiction of the provincial legislature to that of Parliament."<sup>51</sup> In many ways this was the underlying difficulty of the *Employment*

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<sup>49</sup>*Ibid.*, at 444.

<sup>50</sup>*Ibid.*, at 454.

<sup>51</sup>*Ibid.*, at 460.

and *Social Insurance Act*. Despite the praiseworthiness of the legislation, the federal government was not deemed competent to enact it under the terms of the B.N.A. Act; conversely, the provinces acting alone, or in conjunction with one another, lacked the necessary powers to enact such legislation on a national scale.

The *Natural Products Marketing Act* suffered from the same debilitating malady. Chief Justice Duff, speaking for the entire Court, found little in the way of legal precedent to sustain federal counsel's argument that the Act could be supported as legislation for the regulation of trade and commerce or, alternately, peace, order and good government. Canvassing the long line of Privy Council decisions detailing the distribution of legislative powers between the federal government and the provinces, Duff concluded "It is settled by the decisions of the Judicial Committee that the phrase 'Property and Civil Rights' is used in the 'largest sense,' subject, of course, to the limitations arising expressly from the exception of the enumerated heads of section 91, and impliedly from the specification of subjects in section 92."<sup>52</sup> In the final analysis, Duff held that section 3 of the Act, creating a Dominion Marketing Board for natural products, and section 4, which defined the powers of the Board, were both outside of federal jurisdiction: "The legislation admittedly affects civil rights and interferes with, and controls, and regulates the exercise in every one of the provinces the civil rights of the people in those provinces . . ."<sup>53</sup> The attempt to regulate within the provinces individual commodities and classes of commodities, Duff recognized, was also an infringement of section 92(16). Unquestionably, the Supreme Court--under the heavy burden of over fifty years of Privy Council decisions--had no choice given the prevalence of positivism but to declare the legislation *ultra vires* the federal government.

In a remarkably short judgment--only two pages--Duff, speaking for the entire Court, held three of the seven sections before the Court in the *Dominion Trade and Industry Commission Act* *ultra vires* the federal government. Section 14 provided that where

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<sup>52</sup>*In re Natural Products Marketing Act*, [1936] S.C.R. 398 at 416.

<sup>53</sup>*Ibid.*

any wasteful or demoralizing competition existed in a particular industry, but not to the detriment of the public, the Governor in Council, acting on advice by the Commission, may allow such agreements to continue. Duff maintained that this section could not be supported in relation to the criminal law, nor in relation to trade and commerce since, he noted, such an agreement between the Commission and the Governor in Council could conceivably relate to local trade. Of a more innovative character was the creation of the 'Canada Standard' trademark or 'C.S.' under section 18 of the Act. Section 19, meanwhile, defined how such a trademark would apply to sanctioned commodities. In a surprisingly narrow critique--which completely ignored *Parsons*--Duff denied the validity of the two sections, stating "The so-called trade mark is not a trade mark in any proper sense of the term," insisting that it was "really an attempt to create a civil right of novel character."<sup>54</sup> Duff's explanation that the federal government could not create a civil right of a new kind did little to clarify his reasoning in the matter.

With only Cannon dissenting, the Supreme Court upheld the *Farmers' Creditors Arrangement Act* under section 91(21) of the B.N.A. Act. Stated Duff in his opinion: "The provisions of the statute affect farmers who are in such a situation that they are unable to pay their debts as they fall due. It is competent to Parliament, possessing plenary authority in respect to bankruptcy and insolvency, to treat this condition of affairs as a state of insolvency."<sup>55</sup> Cannon, in disagreement, denied that the Act was, in fact, true federal bankruptcy legislation, siding with the provinces that the legislation came under provincial jurisdiction. His reasoning, however, that the matter was a local and private matter within a province was not only unduly restrictive, but completely ignored the pith and substance of the Act.

The last Act pronounced on by the Court, section 498A of the *Criminal Code*, was held *intra vires*. Duff, speaking for the majority, approved federal counsel's assertion that

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<sup>54</sup>*In re Dominion Trade and Industry Commission Act*, [1936] S.C.R. 379 at 382.

<sup>55</sup>*In re Farmers' Creditors Arrangement Act*, [1936] S.C.R. 384 at 393.

the legislation could be supported under section 91(27). Bearing in mind the recent *PATA* decision, Duff concluded "The prohibitions seem to be aimed at the prevention of practices which Parliament conceives to be inimical to the public welfare; and each of the offenses is declared in explicit terms to be an indictable offense."<sup>56</sup> In dissent, Cannon and Crocket strongly disagreed with such reasoning. Crocket noted that the amendment lacked an essential feature characteristic of criminal legislation: the intent to do wrong. Parliament was simply interested in prohibiting an act or omission it had declared criminal. Cannon further developed this idea, stating "Parliament has legislated directly in a matter of civil rights and has simply annexed to it a sanction, which would, by force of 91(27) transfer the subject-matter from the provincial to the federal realm."<sup>57</sup> The true test in their opinion did not rely solely upon the *PATA* decision; instead, emphasis was placed upon Lord Haldane's earlier ruling in the *Board of Commerce* case where he held that the criminal law was applicable only "where the subject matter is one which by its very nature belongs to the domain of criminal jurisprudence."<sup>58</sup> Subsection (a) of the Act which provided that any person engaged in unfair trade practices was guilty of an indictable offense, seemingly failed this test, being nothing less than a colourable attempt to trespass upon the legislative authority of the provinces. Their point of view, however, was not supported by the majority of the Court who preferred to follow the more centralist leaning of the Privy Council in the *PATA* case.

The result of the six decisions handed down by the Supreme Court was that, of the eight New Deal statutes, five were found constitutional. Such an outcome may seem modest, but at first glance only. The judges had divided evenly on the I.L.O. case, thereby technically allowing the three most contentious statutes of the New Deal package to remain dubiously valid. The *Employment and Social Insurance Act* and the *Natural Products Marketing Act* were both declared *ultra vires* the federal government. Similarly, important

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<sup>56</sup>*In re Section 498A of the Criminal Code*, [1936] S.C.R. 363 at 366.

<sup>57</sup>*Ibid.*, at 368.

<sup>58</sup>[1922] 1 A.C. 191 at 198.

sections within the *Dominion Trade and Industry Commission Act* were declared beyond the federal government's competence. Only the *Farmers' Creditors Arrangement Act* and the amendment to the *Criminal Code*, section 498A, were allowed to stand unscathed. Clearly, the New Deal had survived the scrutiny of the Supreme Court--but barely.

At this juncture, a critical question is suggested: Had the Supreme Court decided that the depression was not an emergency? Put differently, was it the opinion of the Court that Lord Haldane's emergency doctrine could not be invoked to justify use of the general power to defend the New Deal? According to Gerald Le Dain, former Dean of Osgoode Hall Law School and later a justice on the Supreme Court, "The Federal Government invoked the general power as a basis of jurisdiction, among others, but economic depression was held not to meet the requirement of Lord Haldane's emergency doctrine."<sup>59</sup> This is not strictly true. The issue was indeed commented upon by Rinfret in the *Unemployment Insurance Reference* who noted that federal counsel had introduced no evidence of an emergency. More important was Rinfret's comment that the Act was not "on its face . . . intended to deal with a temporary national peril; it is a permanent statute dealing with normal conditions of employment."<sup>60</sup>

In the *Natural Products Marketing Act Reference*, meanwhile, Duff had written a lengthy analysis of the case law concerning the residual power, cognizant that the Court was bound by Lord Haldane's decisions on this matter. Two points are worthy of mention: First, it is apparent that the Chief Justice felt obligated under the circumstances to reduce Lord Watson's national dimensions criterion to an emergency test, that is, to follow Haldane. Second, Duff defined an emergency to include only those situations where the state was in immediate danger--again obviously under the influence of Haldane. The result was the implication--although never stated directly by Duff--that the current economic depression did not qualify as an emergency.

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<sup>59</sup>Gerald Le Dain, "Sir Lyman Duff and the Constitution," *Osgoode Hall Law Journal* 12 (1974): 288.

<sup>60</sup>[1936] S.C.R. 427 at 451.

In fairness to Duff, as well as to other members of the Court, there was no need to come out and openly state that the depression did not *legally* qualify as an emergency. Haldane, for all practical purposes, had done this for the Court years earlier with his restrictive definition of what an emergency was--and what it was not. Furthermore, in none of the reference case hearings had federal counsel introduced evidence to suggest a national peril or, for that matter, even attempted to invoke the emergency power. To have attempted the latter would have been futile since all the impugned statutes were drafted as permanent, not temporary measures, as would logically have been required to meet an emergency. Perhaps if Bennett's draftsmen had referred to the depression as an emergency in the preambles of the various statutes and, also, made each Act temporary, more of the legislation might have been sustained on this basis. Still, even for this to have occurred, counsel would have had to get over the difficult barrier (the effect of Haldane's decisions--in particular *Board of Commerce*, dealing with severe inflation) that an economic crisis did not qualify as an emergency. In retrospect, the Supreme Court neither denied nor affirmed that the depression was an emergency: the question was never put forward for the Court to decide.

Public reaction to the Supreme Court decisions was generally favourable. The *Winnipeg Free Press*, like most Liberal newspapers, had supported the King government's decision to refer the New Deal legislation to the Supreme Court: "That stand was not in opposition to the purpose of the legislation, but to the blind, ill-considered way in which it was rushed through [Parliament] without assurance as to its validity."<sup>61</sup> Likewise, the *Toronto Globe and Mail* charged that it was regrettable that the Bennett administration "did not find out where it stood before embarking on legislation which raised high hopes among great sections of the people."<sup>62</sup> The Supreme Court, the *Globe and Mail* maintained, was not to be criticized for holding parts of the New Deal unconstitutional. The

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<sup>61</sup>The *Winnipeg Free Press*, Thursday, 18 June 1936, 13.

<sup>62</sup>The *Toronto Globe and Mail*, Thursday, 18 June 1936, 4.

central issue before the Court had been "whether or not the Dominion infringed on the constitutional territory of the Provinces . . . and this was all the Court decided."<sup>63</sup> The traditionally conservative and pro-business *Montreal Gazette* agreeing that the "present Prime Minister took an eminently proper course in dealing with this whole constitutional question,"<sup>64</sup> applauded the Supreme Court decisions. In the *Gazette's* opinion, the judgments represented "a highly important contribution to an already impressive body of judicial opinion through which the constitution of Canada has been fortified and the respective legislative rights of the Dominion and the provinces defined or confirmed."<sup>65</sup>

For Mackenzie King, "the views of the Liberal Party concerning Mr. Bennett's New Deal legislation [had] been completely vindicated by the opinions given by members of the Supreme Court,"<sup>66</sup> to say nothing of his own personal convictions. Unquestionably, King found great satisfaction in the Supreme Court decisions, never doubting that the Privy Council would concur. As King himself commented, the fact that the Supreme Court decisions were to be heard on appeal "arises in no way from dissatisfaction on the part of the government with the opinions given or expectation of their being reversed."<sup>67</sup> Instead, the government expected the final appellate body to confirm the decisions of the Supreme Court that much of the New Deal was unconstitutional and, in so doing, prove conclusively that the Liberals had been right from the start in opposing the legislative program. In the final analysis, King looked forward to the Privy Council decisions with confidence.

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<sup>63</sup>*Ibid.*, Friday, 19 June 1936, 4.

<sup>64</sup>The *Montreal Gazette*, Thursday, 18 January 1936, 12.

<sup>65</sup>*Ibid.*

<sup>66</sup>King Papers, King to W.Y. Elliott, 7 August 1936.

<sup>67</sup>*Ibid.*

### Chapter 3

#### The New Deal Before the Privy Council

On 1 November 1936, just days before the Judicial Committee was to hear argument on the New Deal cases, Lord Atkin wrote to Sir Claud Schuster, Lord Chancellor Hailsham's Permanent Secretary. In his letter, Atkin expressed concern regarding the proposed makeup of the Board in the Canadian appeals, believing that only Law Lords should sit on this case, and not be constituted in part by ex-judges or Lord Justices who happened to be Privy Councillors. Atkin's concern echoed one frequently stated by critics of the Judicial Committee: the members who sat on Canadian appeals were not always of the highest calibre; moreover, they were, more often than not, unsuited for the task at hand. In his reply, Hailsham stated

But I cannot agree to regard the Judicial Committee as composed of two grades of Judges, one, the Law Lords, and the other, the ex-Judges and Lords Justices who give us help from time to time. To do this would be to render it practically impossible to obtain the help of retired judges and Lords Justices and it would render the authority of any Board which was constituted with them for Indian or Colonial Appeals very questionable.<sup>1</sup>

Interestingly, Hailsham revealed he had asked Lord Sankey to sit on the appeals, but Sankey, author of the *Aeronautics* decision, for reasons not given, declined. "In these circumstances," wrote Hailsham, "I had chosen what I thought was as strong a Board as it is possible to compose . . ."<sup>2</sup> The final composition included Lord Atkin, Lord Thankerton, Lord Macmillan, Lord Wright M.R., and Sir Sidney Rowlatt. Referring to Thankerton, the Lord Chancellor confided, "his recent trip to Canada renders him a very suitable member of the Board . . ."<sup>3</sup> With the exception of Lord Atkin who authored the 1931 *PATA* deci-

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<sup>1</sup>Hailsham to Atkin, 3 November 1936. Cited in Geoffrey Lewis, *Lord Atkin* (London: Butterworths, 1983), 101.

<sup>2</sup>Geoffrey, *Lord Atkin*, 216.

<sup>3</sup>*Ibid.*



sion, and who was a member of the *Aeronautics* Board along with Lord Macmillan, the remaining three members of the Board had only a limited exposure to Canadian appeals; for Sir Sidney Rowlatt this was his first Canadian appeal.<sup>4</sup> Such was the makeup of the Board that would determine the fate of the New Deal.

It is necessary to state at the outset that Lord Chancellor Hailsham in no way whatsoever attempted to pack the Board so as to insure *ultra vires* decisions. The very fact the Hailsham originally asked Sankey, the 'living tree' judge willing to adjust the Constitution to suit changing conditions, to sit on the Board makes this abundantly clear. So, too, does the record of the four judges with previous experience with Canadian appeals make it apparent that the Board, as finally struck, was in no particular sense provincialist in nature. In the period between 1928 and 1936 four of the five New Deal judges sat on eighteen Canadian appeals. Of these, twelve decisions had been centralist, and six decentralist.<sup>5</sup> Lord Atkin, for further illustration, had sat on thirteen Canadian appeals in this same period. The result of the cases: nine centralist decisions, four provincialist. A further breakdown indicates that of the three decisions he wrote, two were centralist and one provincialist.<sup>6</sup> In the final analysis, the Board, as finally composed, was the best available under the circumstances.

### The Privy Council Decisions

Counsel for the federal government had changed since the Supreme Court references. Most noticeable was the loss of Newton Wesley Rowell due to his recent elevation

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<sup>4</sup>Macmillan, it is interesting to recall, had at one time served as standing counsel for the Canadian government for appeals before the Judicial Committee. See, for example: *Royal Bank v. Larue* [1928] A.C. 187; *A.G. Alta. v. A.G. Can.* [1928] A.C. 475; *A.G. Can. v. A.G. B.C.* [1930] A.C. 111. Between 1930 and 1936 Lord Macmillan sat on thirteen Canadian appeals, of which he wrote the judgment in three cases.

<sup>5</sup>I base my findings on an examination of Richard A. Olmsted, *Decisions of the Judicial Committee of the Privy Council relating to the British North America Act, 1867 and the Canadian Constitution 1867-1954*, 3 vols. (Ottawa: Department of Justice, 1954).

<sup>6</sup>Again, my findings are based on my examination of Olmsted, cited above.

as Chief Justice to the Supreme Court of Ontario. His replacement, R.S. Robertson, K.C., was not nearly as well versed in constitutional matters, thus placing the federal government at a disadvantage in London. While it is tempting to consider what motivations King had--if any--for promoting Rowell to the Bench and replacing him with counsel of a lesser calibre in terms of constitutional matters, the fact of the matter remains that Rowell's promotion was in no way motivated by a desire to prevent him from defending the New Deal in London.<sup>7</sup> In retrospect, it is apparent that federal counsel, while not incompetent, were neither of outstanding brilliance. Still, federal counsel did their best in London, despite arguments to the contrary.<sup>8</sup> Similarly, it would be incorrect to assume that Mackenzie King manipulated the lawyers in London to lose the case, i.e., with the replacement of Rowell with Robertson or by any other means. King, as has been stated earlier, was confident that the New Deal would fail--no matter who defended the statutes for the federal government.

Rowell's absence was keenly felt in the I.L.O. case, the most challenging of the New Deal references for the federal government. Before the Privy Council, federal counsel admitted that the three statutes in question "would ordinarily come within head 13 of s. 92 of the British North America Act . . . and there must therefore be some ground for taking

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<sup>7</sup>King made the following entry in his diary concerning the Supreme Court of Ontario: "Had a long discussion on judges (. . . .) Strongly recommended Urquhart for judgeship. Was agreeable to Rowell being made Chief Justice, failing him Robertson or McCarthy. I feel in some ways that it might be as well to let Latchworth continue for a time, though I think the strengthening of the bench is an important matter in Ontario, and Latchworth and Riddell both being over eighty, are really to old to be in that post." King Diary, entry of 11 September 1936.

<sup>8</sup>R.B. Bennett, based on information he received from observers in London, was convinced that federal counsel had not adequately presented its case before the Privy Council. See, for instance, his comments regarding the *Employment and Social Insurance Act* reference condemning the failure of federal counsel (Mr. Plaxton) to follow after Mr. St. Laurent. Said Bennett on 1 February 1937: "I say that the Department of Justice was not heard at all on that reference. They had a counsel there. Did he speak? Why not?" Canada, House of Commons, *Debates*, 1937, Vol. I, 503. In a memorandum to the Minister of Justice, C.P. Plaxton, present during oral arguments, repudiated Bennett's statements in the House, stating that the "references were fully and ably argued" by Dominion Counsel. Lapointe Papers, memorandum of 2 February 1937.

them out."<sup>9</sup> Taking no chances, federal counsel listed no less than thirteen reasons in its *factum* to support its position. During oral argument, however, they concentrated specifically upon the federal government's treaty-making power, placing emphasis on three points in particular. First, international obligations in the form of draft conventions arose as a direct result of the Treaty of Versailles, thereby requiring federal legislation. Second, if such legislation could not be supported as being the result of an obligation under the Treaty of Versailles, the federal government was empowered to advise His Majesty in respect to such conventions. Third, as a result of recent constitutional developments, the federal government could now advise His Majesty with regard to international obligations affecting Canada alone. Surprisingly, only limited attention was given to the use of the residuary power as an alternate ground for justification of the legislation in question, saying only that the legislation was for the peace, order and good government of Canada. Considering Viscount Dunedin's reasoning in the *Radio* case, where considerable attention was given to the residuary clause for treaties outside the explicit words of section 132, counsel's strategy is difficult to fathom.

While federal counsel contended that "This matter must not be looked at as though Canada is going to look about the world to find some one with whom to make an agreement for the purpose of robbing the provinces of their constitutional rights,"<sup>10</sup> Lord Atkin's decision implies that this was the vantage point from which he viewed the federal government's argument:

It would be remarkable that while the Dominion could not initiate legislation, however desirable, which affected civil rights in the Provinces, yet its Government not responsible to the Provinces nor controlled by Provincial Parliaments need only agree with a foreign country to enact such legislation, and its Parliament would be forthwith clothed with authority to affect Provincial rights to the full extent of such agreement. Such a result would appear to undermine the constitutional safeguards of Provincial constitutional autonomy.<sup>11</sup>

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<sup>9</sup>*A.G.B.C. v. A.G. Ont. (Labour Conventions)* [1937] A.C. 326 at 328.

<sup>10</sup>*Ibid.*, at 330.

<sup>11</sup>*Ibid.*, at 352.

Adopting a strict interpretation of the federal government's treaty-making power, Atkin firmly denied the validity of section 132, noting that the obligations arose not from a treaty between the British Empire and a foreign country but, instead, by virtue of Canada's new status as an international person. In marked contrast to Viscount Dunedin in the *Radio* case, Atkin rejected the use of the residuary power as an alternate means to support the legislation. According to Atkin, the 'true ground' of the *Radio* decision centered on the fact that the legislation then in question did not fall within the enumerated classes of section 92, thereby bringing the residuary clause into play. Needless to say, this was a distinction Dunedin in no way made in 1932, although Atkin's assertion was not without merit as will be shown later. Such a distinction, of course, allowed Atkin to decide the fate of the legislation based upon the division of powers in sections 91 and 92: "The distribution is based on classes of subjects; and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained."<sup>12</sup> Having no difficulty deciding that each statute affected property and civil rights, it followed that the Provinces alone were competent to enact such legislation.

In his decision, Atkin distinguished between the formation and the performance of treaty obligations outside of section 132. Unlike Duff in the Supreme Court, who argued that the federal government alone was competent to enter into any treaty with a foreign government--regardless of subject-matter--and introduce the necessary legislation to execute its provisions, Atkin based the ability to enter into a treaty and enact legislation to bring its provisions into force, solely upon the division of powers as defined in sections 91 and 92. Did this mean that if a treaty concerned matters falling exclusively under section 92 the provinces alone were capable of entering into such treaties independent of the federal government? Atkin did not say. This was but one of several controversies to arise from the ruling. As guidance, Atkin left behind his now famous "watertight compartments" doctrine: "While the ship of state now sails on larger ventures and into foreign wa-

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<sup>12</sup>*Ibid.*, at 351.

ters she still retains the watertight compartments which are an essential part of her original structure."<sup>13</sup> The implications of these remarks, not to mention the decision as a whole, cannot be understated: having, in effect, overturned *Radio*--a decision handed down only five years earlier--Atkin had forged an unexpected definition of the treaty-making power for Canada.

Turning our attention to the *Employment and Social Insurance Act*, Canada and Ontario joined forces, both arguing that the Act should be supported under the residuary clause. Speaking for Canada, Louis St. Laurent submitted what is best described as a functional argument, stating that "the main object of the Act was to abate an evil which was a threat to the body politic of the Dominion"<sup>14</sup>: unemployment. "He hoped to indicate," counsel continued, "that there was a situation which Parliament was entitled to look upon as a threat from internal causes to the peace, order, and good Government of the Dominion as a whole."<sup>15</sup> Attorney General Roebuck of Ontario, echoing the position enunciated by Mr. St. Laurent, alluded to the desire "to find means, if possible, within the four corners of the Constitution by which the Act might be supported as a matter of law, not of revolution."<sup>16</sup> The Privy Council declined Mr. Roebuck his petition.

Lord Atkin denied the grounds upon which both Duff and Davis had upheld the Act, heads 1 and 3 of section 91. Although conceding that the federal government could raise funds by any mode or system of taxation, Atkin maintained it did not necessarily follow "that any legislation which disposes of it is necessarily within Dominion competence."<sup>17</sup> In other words, the federal government could create an unemployment insurance fund out of monies it raised but could not distribute such funds in a way which may have affected the civil rights of employers and employees as understood by section 92(13), the statute being arguably a form of compulsory insurance. The effect, of course, of Atkin's

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<sup>13</sup>*Ibid.*, at 354.

<sup>14</sup>The *London Times*, Saturday, 7 November 1936, 4.

<sup>15</sup>*Ibid.*

<sup>16</sup>*Ibid.*

<sup>17</sup>*Ibid.*

decision was to curtail the already limited options available to the federal government under the terms of the B.N.A. Act to advance legislation to remedy nation-wide unemployment. Needless to say, Atkin's decision completely ignored the practical problems of enacting suitable unemployment legislation as elaborated upon by both Ontario and the federal government in their *factums* and in argument before the Privy Council.

As for the *Natural Products Marketing Act*, the last piece of legislation to be declared *in toto ultra vires* the federal government, the Privy Council had no difficulty accepting the unanimous ruling of the Supreme Court. Atkin expressed "no doubt that the provisions of the Act cover transactions in any natural product which are completed within the Province, and have no connection with inter-Provincial or export trade"<sup>18</sup>--the two grounds upon which the legislation might have been deemed valid under section 91(2). As it stood, however, the Act affected property and civil rights in the provinces. Despite the objections of British Columbia and Canada to the contrary, Atkin was not willing to sever those sections of the Act which encroached upon provincial jurisdiction from those which purported to deal with inter-Provincial or export trade, arguably the 'pith and substance' of the Act. According to Atkin, "it appears to their Lordships that the whole texture of the Act is inextricably interwoven . . . ." <sup>19</sup> Atkin's concluding thoughts, that the Provinces and the Dominion "possess a totality of complete legislative authority," and that between them "it must be possible to combine Dominion and Provincial legislation so that each within its own sphere could in co-operation with the other achieve the complete power of regulation which is desired,"<sup>20</sup> was a most hollow consolation.

The three Acts upheld by the Privy Council require only brief scrutiny since, for the most part, they mirrored the reasoning of the Supreme Court for upholding the legislation. It came as little surprise that the Privy Council agreed with the majority of the Supreme Court, holding that section 498A of the *Criminal Code* was a valid exercise of the

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<sup>18</sup>*A.G.B.C. v. A.G. Can.* (Natural Products Marketing) [1937] A.C. 377 at 386.

<sup>19</sup>*Ibid.*, at 388.

<sup>20</sup>*Ibid.*, at 389.

criminal law power under section 91(27)<sup>21</sup> The dissenting arguments of Cannon and Crocket were dismissed; Atkin, siding with the Chief Justice, held that the *Propriety Articles* decision was applicable. Similarly, in the only decision not delivered by Atkin, Lord Thankerton held that the *Farmers' Creditors Arrangement Act* was genuine bankruptcy and insolvency legislation under section 91(21).<sup>22</sup> Lastly, Atkin did differ with Duff in the *Dominion Trade and Industry Commission Act*, holding that the 'Canada Standard' trademark was a valid exercise of the federal government's trade and commerce power. Said Atkin: "There could hardly be a more appropriate form of the exercise of this power than the creation and regulation of a uniform law of trade marks," concluding "it is difficult to see why the power should not extend to that which is now a usual feature of national and international commerce--a national mark."<sup>23</sup> Atkin saw no reason why the Dominion could not create a civil right of a novel character if it could be justified under the federal government's field of jurisdiction.

On appeal to the Privy Council the Bennett New Deal had not survived intense judicial scrutiny, as it had before the Supreme Court. In total, the Board held that five of the eight statutes were *ultra vires* the federal government. In marked contrast to the divided Supreme Court in the I.L.O. case, Lord Atkin held that the federal government was clearly encroaching upon provincial jurisdiction by enacting hours of work, minimum wages and weekly rest legislation. As for its disposal of the other cases, the Privy Council also differed from the Supreme Court in its ruling on the *Dominion Trade and Industry Commission Act*, allowing more of the Act to stand. The *Employment and Social Insurance Act* and the *Natural Products Marketing Act* were again declared *ultra vires*. And, as before, the *Farmers' Creditors Arrangement Act* and the amendment to the *Criminal Code*,

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<sup>21</sup>*A.G.B.C. v. A.G. Can.* (Criminal Code) [1937] A.C. 368.

<sup>22</sup>*A.G.B.C. v. A.G. Can.* (Farmers' Creditors Arrangement) [1937] A.C. 391.

<sup>23</sup>*A.G. Ont. v. A.G. Can.* (Canada Standard Trade Mark) [1937] A.C. 405 at 417.

A national trade mark was an example of a general regulation of trade affecting the whole Dominion, one of the three kinds of laws mentioned in the *Parsons* case by Sir Montague Smith as valid under section 92(13).

section 498A, were allowed to stand. For all practical purposes, the Bennett New Deal was no more.

Lord Atkin's biographer, Geoffrey Lewis, has suggested that Atkin's "reputation for being unpersuadable was well-founded" and that, as author of all but one of the decisions handed down, "it seems safe to treat the point of view revealed by the 1937 decisions as his own."<sup>24</sup> I concur with these conclusions. The Privy Council, and Atkin in particular, suffered much criticism as a result of the New Deal decisions, mainly from legal experts and other scholars. Some of the criticism was deserved; some was not. What is important to understand, before offering a critique of the decisions themselves, is that certain extra-legal factors were at play, and perhaps influenced the decisions of the Judicial Committee. W.H. McConnell, for example, has suggested this, writing that "It is obvious that overseas judges like Thankerton, Rowlatt, Wright and Atkin, who had an excellent knowledge of Scots or English law would not be equally adept at Canadian constitutional law. Neither their political background nor their training fitted them for the exacting task of rendering competent decisions on the Canadian Constitution."<sup>25</sup> Such a 'flaw' could only be corrected by abolishing overseas appeals, a direct result of the 1937 decisions and the subject of a later chapter.

Another extra-legal factor worthy of mention was raised by Professor J.R. Mallory who wrote of "the waning of the belief in laissez-faire and the consequent erosion of many legal principles derived from it."<sup>26</sup> Of particular importance was the shift in the inter-war

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<sup>24</sup>Geoffrey, *Lord Atkin*, 110. Lord Wright's remarks in 1955 support Geoffrey. Wright maintained that Atkin was primarily responsible for deciding the I.L.O. case as he did, suggesting that not all the other members of the Board did not concur with his reasoning. In particular, it is suspected that Lord Macmillan sided with Lord Wright and that Lord Thankerton sided with Lord Atkin. Sir Sidney Rowlatt, a taxation judge with no experience in Canadian appeals cast the deciding vote. See Rt. Hon. Lord Wright, "Rt. Hon. Sir Lyman Poore Duff, G.C.M.G.," *Canadian Bar Review* 33 (December 1955): 1123-1129; B.J. MacKinnon, "Labour Conventions Case Revisited: Wright's Undisclosed Dissent," *Canadian Bar Review* 34 (January 1956): 115-117.

<sup>25</sup>McConnell, "Judicial Review," 84. To be fair, this could be said of every Privy Council decision ever handed down concerning Canada.

<sup>26</sup>J.R. Mallory, *Social Credit and the Federal Power in Canada* (1954; reprint, Toronto: University of Toronto Press, 1976): 189.



period from individualism to collectivism, represented in the 1930's by a growing awakening on the part of the federal government that changing world conditions made it necessary to increase its areas of responsibility to include new areas not specifically detailed in the B.N.A. Act. If the federal government proved willing to be creative (i.e., the New Deal), the courts, however, were more reluctant. According to Mallory, "it was one thing for the courts to admit a general proposition that the Dominion should have jurisdiction over the field of aeronautics. It was, apparently, quite another to admit the constitutional validity of a statute like the Natural Products Marketing Act."<sup>27</sup> Here again, however, the problem of interpretation lies not so much with the makeup of the 1937 Board but, instead, with the weight of over fifty years of Privy Council precedents strictly defining the limitations of the B.N.A. Act.

Lastly, one could charge that the 1937 Board was trying to appease Mackenzie King by overturning the New Deal. As discussed earlier, King's attitude toward the New Deal was public knowledge. But did this influence the Privy Council? Maybe. But probably not. The Privy Council, like the Supreme Court, was no doubt aware of the current Prime Minister's attitude towards the legislative package before it. But to this day no evidence has surfaced to prove that Atkin was motivated by external political concerns--such as the attitude of the Canadian Prime Minister. In all fairness to Atkin, he, like the other members of the Board, was simply applying the law as he understood it. However, this is not to say that Atkin's was the only correct interpretation of the law possible. It is here that an evaluation of key aspects of the Privy Council decisions proves useful.

Like the Supreme Court before it, the Privy Council did not deny that the depression was an emergency. The question was raised only in the *Unemployment Insurance* reference where not only did federal counsel refrain from making an emergency argument, they explicitly denied its relevance: the 'unemployment problem' had "reached such dimensions that it had become a threat to the body politic of the Dominion . . . [but] It would not

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<sup>27</sup>*Ibid.*, 188.

be an emergency in the strict sense."<sup>28</sup> Louis St. Laurent emphasized this point, saying that the "present matter was not an 'emergency'" in the strict sense used by Lord Haldane.<sup>29</sup> In the Board's judgment, Lord Atkin found it sufficient to approve Duff's reasoning on the point as expressed in the *Natural Products Marketing Act Reference*, although his comment that "there is agreement between all the members of the Supreme Court that [the Act] could not be supported upon the suggested existence of any special emergency"<sup>30</sup> is somewhat misleading. Atkin, it should be emphasized, did not expressly decide the point, presumably because it had not been raised by counsel and, as he wrote, because "the present Act does not purport to deal with any special emergency."<sup>31</sup> Said Atkin: "It founds itself in the preamble on general world-wide conditions referred to in the Treaty of Peace: it is an Act whose operation is intended to be permanent."<sup>32</sup> Any other remarks on the point are clearly *obiter*, the question of whether the depression was or was not an emergency not being an issue before the Board.

Peter Hogg, professor of law at Osgoode Hall Law School, has criticized Atkin's decision in the I.L.O. case, invoking the rarely used 'gap test.' Briefly, one of the purposes of the Peace, Order, and good Government clause of section 91 as envisaged by the framers was to fill any gaps in the distribution of powers, in particular sections 91-95 and section 132. According to Hogg, there was a gap concerning the treaty making power as defined in section 132:

The framers of the Constitution Act, 1867 evidently did not contemplate that Canada would eventually acquire the power to enter into treaties on its own behalf. Accordingly, s. 132 is silent about performing the obligations of Canada arising under treaties entered into by Canada in its own right as an international person.<sup>33</sup>

Hogg continues his argument, saying,

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<sup>28</sup>[1937] A.C. 355 at 358.

<sup>29</sup>*Ibid.*, at 363.

<sup>30</sup>*Ibid.*, at 367.

<sup>31</sup>*Ibid.*

<sup>32</sup>*Ibid.*

<sup>33</sup>Hogg, *Constitutional Law*, 373.

In the *Radio Reference* (1932), the Privy Council held that the p.o.g.g. power filled this gap. Viscount Dunedin said that the power to perform Canadian (as opposed to imperial) treaties came within p.o.g.g. because it was 'not mentioned explicitly in either s. 91 or s. 92'. This reasoning appears to be a faithful reading of the Constitution Act, 1867. However, it was later rejected by a differently-constituted Privy Council, speaking through Lord Atkin, in the *Labour Conventions* case (1937)."<sup>34</sup>

The implications of Hogg's argument are obvious: either Atkin did not decide the I.L.O. case correctly or, conversely, he was selective in which laws he chose to apply. The debate can be furthered by examining comments on the same subject made by Professor Lederman, professor of law at Queen's University.

In Lederman's opinion, Atkin was at fault for not recognizing (perhaps ignoring) the fact that *Radio* was decided on two separate grounds. First, it was held that Parliament could independently enact any treaty under its residuary clause; second, it was held that radio communication fell under sections 91(29) and 92(10)(a). Lederman faults Atkin for dismissing the holding in *Radio* regarding the Dominion's ability to implement treaties as a matter falling under the residuary clause. Said Lederman on Atkin: "He dismissed the remarks of Viscount Dunedin on the treaty-performing power as *obiter dicta* and said that the one true reason of that decision was the finding that regulation of radio communication was within the federal legislative power anyway even if there were no treaty."<sup>35</sup> Lederman's reasoning is compelling: if two reasons for a decision are given, both are equally binding and one cannot be dismissed as being *obiter*.

In Atkin's defense, however, it can be argued that it was not necessary to decide in the *Radio* case, as Dunedin did, that treaty implementation was a matter falling under the residuary clause. Since the subject matter of the treaty, radio communication, did not fall under section 92, falling instead under sections 91(29) and 92(10)(a), this meant that radio communication fell under federal jurisdiction. Accordingly, the need to invoke the residuary clause was not necessary to the outcome of the case. Under such circumstances,

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<sup>34</sup>*Ibid.*

<sup>35</sup>W.R. Lederman, *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981), 354.

Atkin perhaps reasoned that Dunedin's comments regarding the residuary clause were non-binding in the I.L.O. reference since the issue in the I.L.O. case (matters falling under provincial jurisdiction) was not an issue in the *Radio* case, the subject matter being federal. Adopting this line of reasoning it follows that Atkin was indeed following precedent, in this instance the 1925 Supreme Court decision concerning I.L.O. draft conventions.

In contrast to the controversy that continues to follow Atkin's I.L.O. decision, his handling of the *Unemployment Insurance* reference cannot be faulted. Atkin was correct in holding that the *Employment and Social Insurance Act* was a compulsory insurance act; therefore, a matter of provincial jurisdiction. Given four Privy Council precedents dealing with insurance,<sup>36</sup> Atkin's reasoning was sound. Even if federal counsel had attempted to distinguish between commercial and social insurance, thereby drawing attention away from previous precedents, it is unlikely that the outcome would have been much different. Interestingly, Atkin stated that the Dominion could not simply spend federal funds on provincial objects despite the fact that the federal spending power is nowhere defined in the B.N.A. Act. Atkin, like later critics, realized that an unrestricted spending power could undermine the division of legislative authority.<sup>37</sup> In any event, Atkin's decision as far as unemployment insurance was concerned would be 'reversed' in 1940 with an amendment to the B.N.A. Act, adding the subject matter as one of federal concern.

Had Atkin been able to invoke Lord Watson's 'national dimensions test,' first enunciated in the *Local Prohibition* case,<sup>38</sup> it is possible that more of the New Deal legislation may have survived judicial scrutiny. In the I.L.O. case, Atkin observed "It is interesting to note how often the words used by Lord Watson . . . have unsuccessfully been used in attempts to support encroachments on the provincial legislative powers given by s. 92."<sup>39</sup> His analysis was certainly correct. Watson's 'national dimensions test' had often been ar-

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<sup>36</sup>See Chapter Two, Note 4.

<sup>37</sup>Critics of condition grants often point out this fact. See *Rowell-Sirois Report*, Book I, 148-49.

<sup>38</sup>See Chapter Two, Note 17.

<sup>39</sup>[1937] A.C. 326 at 353.

gued in both the Supreme Court and Privy Council, but with little success.<sup>40</sup> In the *Aeronautics* case, Lord Sankey touched upon national dimensions briefly, saying that "aerial navigation is a class of subject which has attained such dimensions as to affect the body politic of the Dominion."<sup>41</sup> However, Sankey's comments, coming at the end of his decision, were *obiter*, having already decided the merits of the case on alternate grounds. As a supporting precedent in the New Deal references, then, *Aeronautics* was a poor choice as both Chief Justice Duff and Lord Atkin would note; however, lawyers for the Dominion were not of a like mind, frequently invoking Sankey's comments regarding national dimensions as grounds for support of much of the New Deal.

Duff had dismissed the applicability of national dimensions before the Supreme Court in the *National Products Marketing Act* reference. His comments, touching upon the limitations of peace, order and good government, are relevant for the other references where the residuary clause was similarly employed. Said Duff: "One sentence is quoted from the judgment in the *Aeronautics* case which . . . we do not think their Lordships can have intended in that sentence to promulgate a canon of construction for sections 91 and 92."<sup>42</sup> Duff's observation and extensive supporting arguments were applauded by Atkin in the *I.L.O.* case as forming the "locus classicus of the law on this point."<sup>43</sup> This meant that six of the eight New Deal statutes could not be supported by invoking Watson's 'national dimensions test.'<sup>44</sup> Most commentators believe that Atkin, like the Chief Justice before

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<sup>40</sup>See, for example, the following six Privy Council cases where Dominion counsel employed the dimensions doctrine and failed. *Montreal v. Montreal St. Ry.* [1912] A.C. 333 at 337; *A.G. Can. v. A.G. Alta.* [Insurance] 1 A.C. 588 at 591; *Bd. of Commerce Act, 1919 & Combines and Fair Prices Act, Re* [1922] 1 A.C. 191 at 192-93; *Toronto Elec. Commrs. v. Snider* [1925] A.C. 396 at 400; *In re Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54 at 57; *In re Regulation and Control of Radio Communication in Canada*, [1932] A.C. 304 at 308.

<sup>41</sup>[1932] A.C. 54 at 77.

<sup>42</sup>[1936] S.C.R. 398 at 425.

<sup>43</sup>[1937] A.C. 326 at 353.

<sup>44</sup>The only exceptions was the *Dominion Trade and Industry Commission Act* and the amendment to the *Criminal Code*, section 498A. The remaining six statutes, namely, the *Minimum Wages Act*, the *Limitation of Hours of Work Act*, the *Weekly Rest in Industrial Undertakings Act*, the *Employment and Social Insurance Act*, the *Farmers' Creditors Ar-*

him, was correct in refusing to consider the comments made by Sankey in *Aeronautics* as appropriate in the New Deal references.<sup>45</sup>

Having reviewed the history of the New Deal before the Privy Council, several comments are appropriate. If one wanted to characterize Atkin's main concern, it was to prevent encroachment by the Dominion claiming open-ended powers over the jurisdiction of the provinces. In the *Natural Products Marketing Act* reference, for example, Atkin rejected Dominion counsel's contention that the Dominion could encroach upon intra-provincial trade transactions, thereby affirming the unanimous Supreme Court decision before him. Similarly, in the I.L.O. reference, Atkin sided with the provinces, saying that treaties could not be implemented by the federal government which would "undermine the constitutional safeguards of provincial constitutional autonomy."<sup>46</sup> Likewise, in the *Employment and Social Insurance Act* reference, he noted that the federal spending power, if unrestricted, could "encroach upon the classes of subjects which are reserved to Provincial competence."<sup>47</sup> Numerous other illustrations of Atkin's concern for the protection of provincial jurisdiction from Dominion advances also may be cited, his dismissal of the dimensions doctrine being yet another relevant example.

As my analysis of the Privy Council decisions in this chapter has shown, Atkin's actions were totally in line with Privy Council decisions stemming back as far as 1896 with the *Local Prohibition* case. With only one exception, Atkin's concern for the maintenance of provincial autonomy was consistent. Only where the amendment to the *Criminal Code* was concerned, section 498A, did Atkin 'fall away' from his 'no potential encroachment' thrust, central to his other New Deal decisions. In this particular reference, Atkin affirmed the decision he himself had written in the *PATA* case, reiterating the wide inter-

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*rangement Act* and, lastly, the *Natural Products Marketing Act* could not be sustained under POGG using the national dimensions argument.

<sup>45</sup>W.F. O'Connor, a vigorous critic of the Judicial Committee, concedes this very point. See, W.F. O'Connor, *Report to the Senate of Canada on the B.N.A. Act* (Ottawa: King's Printer, 1939): 77.

<sup>46</sup>[1937] A.C. 326 at 352.

<sup>47</sup>[1937] A.C. 355 at 367.

pretation of the criminal law power. Despite cogent arguments of the provinces suggesting the need to limit what the federal government could define as criminal, Atkin refused to offer any guidelines. As a result, section 498A was deemed a valid amendment to the *Criminal Code*. On the one hand, Atkin was following precedent--his own; on the other hand, he was showing an inconsistency with the overall thrust of the other New Deal decisions. The reasons behind such an inconsistency remain a topic for speculation.

### **The Aftermath: Implications and Expectations**

Public reaction to the Privy Council rulings was favourable. The *Vancouver Sun* declared them wise decisions, commenting that "Those Canadians who have always maintained the value of the Judicial Committee of the Privy Council as a court competent to deal with Canadian constitutional questions . . . will find justification for their belief in the decisions just handed down . . . ." <sup>48</sup> Likewise, the *Winnipeg Free Press* wrote that the decisions justified "the stand taken by the Liberal party" and "the course taken by the King Government when it assumed office of referring the legislation to the courts." <sup>49</sup> In its opinion, "The air has been cleared by the decisions of the Privy Council indicating the limits of federal and provincial authority." <sup>50</sup> The *Montreal Gazette* repeated the same sentiment, noting the decisions upheld "the view Mr. Mackenzie King expressed on behalf of the Liberal Opposition at the time, namely, that the legislation invaded provincial rights and therefore was unconstitutional." <sup>51</sup> Offering a more somber assessment, the *Toronto Globe and Mail* found it "regrettable that so much time has been lost discovering that legislation of wide concern could not be passed at Ottawa." <sup>52</sup>

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<sup>48</sup>The *Vancouver Sun*, Friday, 29 January 1937, 6.

<sup>49</sup>The *Winnipeg Free Press*, Friday, 29 January 1937, 13.

<sup>50</sup>*Ibid.*

<sup>51</sup>The *Montreal Gazette*, Friday, 29 January 1937, 8.

<sup>52</sup>The *Toronto Globe and Mail*, Saturday, 30 January 1937, 6.

In one way or another, newspaper editorials of various political stripes at the time shared a common thread: they echoed the attitude shared by Mackenzie King. The day the Privy Council decisions on the New Deal were made public, King confided in his diary "Practically everything I opposed on the score of it being ultra vires has been declared ultra vires."<sup>53</sup> For King, the Privy Council decisions represented a private victory: "It is a satisfaction to me that with my legal training limited to the university course, to have been sounder all through on my law and understanding of the constitution than Bennett himself has been, though for a time President of the Law Society of Canada and assertive of his professional great legal attainments."<sup>54</sup> But, at the same time, King could not help but note that "The whole course of social reform has not only been delayed for years but has been made more difficult of accomplishment in view of the changed point of view that has taken place as result of Bennett's action to force the pace."<sup>55</sup>

Although Mackenzie King, like most newspaper editors, viewed the Privy Council decisions as satisfactory, the legal community, if comments in the *Canadian Bar Review* are any indication, condemned the rulings.<sup>56</sup> As the following excerpts indicate, leading members of the legal community, both at home and abroad, realized the numerous constitutional dilemmas the 1937 decisions represented for Canadian federalism. If Mackenzie King had won a decisive political victory over R.B. Bennett, it was left for legal scholars to

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<sup>53</sup>King Diary, entry of 28 January 1937. Alan Cairns is correct in his assessment of King who "questioned the constitutionality of the legislation from the outset, never displayed any enthusiasm for its retention on the statute books, forwarded it willingly, almost eagerly, to the courts for their opinion, and uttered no cries of rage when the decisions were announced." Alan C. Cairns, "The Judicial Committee and its Critics," *Canadian Journal of Political Science* 4 (1971): 326.

<sup>54</sup>*Ibid.*

<sup>55</sup>*Ibid.*

<sup>56</sup>The June 1937 issue of the *Canadian Bar Review* was devoted entirely to an analysis of the Privy Council rulings of the New Deal. In all, ten commentators expressed their views on the impact of the decisions upon Canada's constitutional development. Not surprisingly, a majority of the articles examined the I.L.O. case in great detail, while others took the opportunity to examine the B.N.A. Act itself and the impact of over fifty years of Privy Council decisions upon the document. Likewise, the *Rowell-Sirois Report* contained a critical examination of the role of the Privy Council, as did the O'Connor Report.



soberly assess the legal costs involved. "The pendulum that has been swinging to and fro since 1867 has swung against the Dominion," noted British law professor, W. Ivor Jennings, and "the decision that section 132 means nothing in modern conditions is 'right' or 'wrong' is not a question that can be answered where everything depends on the 'atmosphere' of a case and the composition of the Board."<sup>57</sup> Similarly, for Norman Mackenzie, professor of law at the University of Toronto, the Privy Council's ruling in the I.L.O. case was completely unjustified, "being destructive of the Dominion's control over the treaty-making power and foreign affairs generally."<sup>58</sup> Writing from the University of Saskatchewan, F.C. Cronkite argued that "the decision is unsound" and that Atkin had "entirely misapplied the *Radio Case*."<sup>59</sup> In Cronkite's opinion, the I.L.O. legislation had been validly enacted by Parliament as laws for the peace, order and good government of Canada. And according to Frank Scott of McGill University, "Canada ceases to be a single nation in the conduct of her international relations. This fact is without question the most serious consequence of the decisions."<sup>60</sup>

Despite appearances to the contrary, the Privy Council decisions did not come as a complete surprise to all members of the legal profession. Shortly after the decisions were handed down, W. Ivor Jennings noted that "of the six most recent cases my class correctly forecast five of the decisions; and we were wrong in the sixth only because we took a different view of 'pith and substance'."<sup>61</sup> Jennings comments are important for it is often forgotten that the Privy Council decisions overturning the New Deal were not unexpected, although the exact nature of some of the decisions did come as a surprise to many.

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<sup>57</sup>W. Ivor Jennings, "Dominion Legislation and Treaties," *Canadian Bar Review* 15 (June 1937): 463.

<sup>58</sup>N.A.M. MacKenzie, "Canada and the Treaty-Making Power," *Canadian Bar Review* 15 (June 1937): 454.

<sup>59</sup>F.C. Cronkite, "The Social Legislation References," *Canadian Bar Review* 15 (June 1937): 480, 482.

<sup>60</sup>F.R. Scott, "The Consequences of the Privy Council Decisions," *Canadian Bar Review* 15 (June 1937): 485.

<sup>61</sup>W. Ivor Jennings, "Constitutional Interpretation: The Experience of Canada," *Harvard Law Review* 51 (November 1937): 38.

As I have shown in the first chapter, the Bennett New Deal was introduced at the last minute; without fully considering the constitutional implications of the legislative package as a whole. Not only did Bennett refuse to seek amendment to the B.N.A. Act, he did not try to exploit an expanded emergency power or, for that matter, conditional grants or federal-provincial cooperation in marketing. Instead, he threw together legislation of exceedingly doubtful constitutionality. King took advantage of such shortcomings brilliantly. The Liberals, while in Opposition, raised serious concerns regarding the New Deal's validity. That Mackenzie King, after the election, chose to refer the New Deal to the courts is understandable under the circumstances. To have allowed such controversial legislation to remain on the books when there were so many questions regarding the validity of the statutes would have been irresponsible. Furthermore, King had nothing to lose by submitting the New Deal to the Courts as the decisions handed down by both the Supreme Court and the Privy Council would prove conclusively. In the final analysis, then, it was R.B. Bennett--and not the Judicial Committee of the Privy Council--who was responsible for the failure of the New Deal.

## Chapter 4

### Social Credit and the Constitution

The failure of the New Deal to survive judicial scrutiny had numerous consequences, both short-term and long-term, for Canada's constitutional development. Most noticeable in the months after the court decisions were handed down was the severe limitation upon the federal government's ability to regulate economic activity. Be it legislation for the regulation of hours of work, a weekly day of rest, or, for that matter, the setting of a minimum wage--all were subjects deemed beyond the federal government's legislative competence. Similarly, while the national government could create an unemployment insurance fund out of federal monies, it could not administer such a fund. The regulation of natural products, too, even in conjunction with provincial agencies, was deemed unconstitutional. Still ravaged by the effects of depression, such decisions meant that Parliament could not enact even the most rudimentary labour or social legislation, no matter how desirable such legislation might be to the Canadian people. The combined effect of the Supreme Court and Privy Council decisions was to leave a gaping void in terms of economic, social and industrial policy which the provinces could not fill, no matter how hard they tried. The federal government's inability to promote a coherent national policy in these fields led, not surprisingly, to a constitutional crisis in Canada.

Against this background events in Alberta in the autumn of 1937 must be examined. William Aberhart, leader of the world's first Social Credit government, had come to power in August 1935, his party winning 56 of the 63 seats in the Alberta legislature. 'Bible Bill,' as he was commonly known, promised Albertans relief from the depression, pledging to implement a modified version of the Social Credit economic doctrines developed by British engineer, Major C.H. Douglas. As a result of seductive promises such as a 'just

price' for goods both purchased and sold and, most famous of all, his \$25-a-month 'basic dividend,' Aberhart soon found himself in the Premier's Office. Once in power, Aberhart allowed himself eighteen months to put Social Credit policies into effect in Alberta, a task he was never able to complete. In the process of trying, however, Aberhart and his followers were to illuminate clearly, in ways that the New Deal had failed to do, that the federal government remained the best agent to implement viable strategies for economic recovery. As J.R. Mallory has commented, the "Aberhart programme provided the *reductio ad absurdum* which was required to demonstrate the unsuitability of the provinces as agencies of major fiscal and economic policy."<sup>1</sup>

It is worthwhile at the outset to recall Mackenzie King's initial thoughts on the man who had become Premier of Alberta. In August 1935, upon hearing the results of the provincial election in Alberta, King, who was still sitting in Opposition, recorded in his diary: "It is a weird business--a fortunate thing it is for Canada as a whole, that this fanatical flame has thus far been kept within the bounds of a single province."<sup>2</sup> Yet King, always one to interpret current events and their implications for the future, also believed that the Alberta election was a positive omen--an omen of Liberal victory in the upcoming federal election. While in Alberta during the federal election campaign, King had the opportunity to meet Aberhart and his cabinet; he was impressed by neither: "I was appalled at the immature look of those around or rather on both sides of the table, all with paper and pencil in hand."<sup>3</sup> It was during this same trip that King made his 'hands off Alberta' speech in Calgary on 30 September, stating his willingness "to give Alberta every chance to work out what she is seeking to do."<sup>4</sup> As events unfolded a few years later, however, King was unable to keep his election promise and found himself, once again, using the courts to solve a political dilemma.

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<sup>1</sup>J.R. Mallory, *Social Credit and the Federal Power in Canada* (1954; reprint, Toronto: University of Toronto Press, 1976), 189.

<sup>2</sup>King Diary, entry of 23 August 1935.

<sup>3</sup>*Ibid.*, entry of 25 September 1935.

<sup>4</sup>The *Edmonton Bulletin*, Tuesday, 1 October 1935, 2.

### The Attempt to Implement Social Credit in Alberta

By early 1937 his eighteen-month honeymoon ended, and having failed to implement Social Credit policies in Alberta, Aberhart found himself facing growing dissension in party ranks. With his hold on power threatened by backbencher rebellion, Aberhart made several concessions hoping to appease. The most important was the passage of the *Alberta Social Credit Act*<sup>5</sup> which created a Social Credit Board consisting of five members whose mandate was to find the means to implement the monetary doctrine in Alberta. To assist in this task, the Board enlisted the help of Major Douglas in England who sent two of his associates to work closely with Board members. In the special legislative session of August 3-6, the fruits of their labours were made public for the first time as the Alberta government introduced three radical bills representing a no-holds-barred attempt to hasten the implementation of Social Credit in Alberta.

The three bills require only cursory examination. The *Credit of Alberta Regulations Bill*<sup>6</sup> required banks and their employees to be licensed by the province. Once licensed, the banks would report to a representative of the Social Credit Board who would oversee all the bank's activities. To complement this Bill, the *Bank Employees Civil Rights Bill*<sup>7</sup> prevented any unlicensed bank or bank employee from seeking legal recourse through the courts. Lastly, the *Judicature Act Amendment Bill*<sup>8</sup> prevented court action questioning any enactment of the Alberta legislature. The three Bills speak clearly for themselves.

The new Lieutenant Governor of Alberta, John Campbell Bowen, having assumed his post only a few months earlier following the sudden death of his predecessor, found himself consulting Premier Aberhart and Attorney General Hugill in his office on the constitutionality of the three Bills described above. Afterwards, in a letter to Ernest Lapointe whom he had telephoned for advice, Bowen explained his actions. "I decided to assent to the measures, even though in the presence of the Premier, the Attorney General stated

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<sup>5</sup>*Statutes of Alberta*, I George VI, Session I, 1937, chapter 10.

<sup>6</sup>*Statutes of Alberta*, I George VI, Session II, 1937, chapter 1.

<sup>7</sup>*Ibid.*, chapter 2.

<sup>8</sup>*Ibid.*, chapter 5.

that . . . the Bills were in his judgement ultra vires."<sup>9</sup> Bowen reported that when he asked Aberhart if these initiatives were within the power of the Legislature to enact, the Premier answered that the Bills were sound. Although doubting the validity of such reasoning, Bowen allowed them to become law. His reasoning: "Had any other action on my part been followed, my opinion is [the Premier] would have asked for dissolution."<sup>10</sup>

Until August 1937, it had been possible for the federal government to hold its nose and look the other way as Alberta experimented with Social Credit. However, with the declining fortunes of Aberhart, who now assumed a much more militant attitude than normal (not so much in the interests of policy, but for political survival), such a recourse was no longer available to the King government. An editorial in the *Calgary Daily Herald* summarized the predicament that the federal government found itself in.

The government had been pursuing a policy of caution in its attitude towards all legislation passed by the Alberta legislature under the dominance of the "social credit" party of Premier Aberhart so it could not be charged at any time in the future should the "Social Credit" government "flop" that its destruction was due to unfair treatment from Ottawa.<sup>11</sup>

In the days that followed, the federal government maintained its policy of caution, nonetheless realizing that some form of action on its part was inevitable. The options available, however, were limited. Bowen, if he had been requested to do so by Lapointe, would have reserved the three Bills for the Governor General's pleasure. To have done so, however, would have been to give Aberhart a platform from which he could vehemently denounce the federal government, claiming it was usurping the will of the Alberta people. The other alternative, the option the federal government chose, was to allow the Bills to become law and *then* try to reason with the Premier of Alberta, a tactic which, in the end, would fail.

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<sup>9</sup>Lapointe Papers, J.C. Bowen to Lapointe, 10 August 1937.

<sup>10</sup>*Ibid.*

<sup>11</sup>The *Calgary Daily Herald*, Saturday, 7 August 1937, 1.

Only to Aberhart and his most zealous followers were the three Bills, now law, constitutional. To anyone else, it was evident that the legislation was not only *ultra vires* the Alberta Legislature, but an infringement of basic civil liberties. After reading press accounts of the political situation in Alberta, King concluded

It was perfectly clear to me that the Dominion could not afford to allow any legislation to close the courts to its citizens, with respect to their property and civil rights--that this was going back prior to the days of the "Magna Charta"; that above all else we should preserve freedom & liberty,--also not permit the federal jurisdiction to be invaded.<sup>12</sup>

This was the stance King was determined to adopt in Council. For King, the ideal situation would be to refer the three pieces of legislation to the Supreme Court for an opinion regarding their constitutionality. Such a course would "allow the province to find out the error of its ways & prevent the errors spreading, because of coercive action on our part."<sup>13</sup> The underlying difficulty would be to convince Aberhart of the wisdom of such a course of action. Failing this, the government would have no choice but to disallow the legislation, invoking sections 56 and 90 of the B.N.A. Act.<sup>14</sup> King realized whatever course of action was taken would infuriate Aberhart. With Lapointe and other members of Council in agreement, the federal government decided its strategy: suggest to Aberhart a reference to the Supreme Court; failing that, disallow the controversial Alberta legislation. Surprisingly, the federal government never seemed to have considered the idea of forwarding the

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<sup>12</sup>King Diary, entry of 6 August 1937.

<sup>13</sup>*Ibid.*, entry of 5 August 1937.

<sup>14</sup>Section 56 reads "Where the Governor General assents to a Bill in the Queen's Name, he shall by the first convenient Opportunity send an authentic Copy of the Act to one of Her Majesty's Principal Secretaries of State, and if the Queen in Council within Two Years after Receipt thereof by the Secretary of State thinks fit to disallow the Act, such Disallowance (with a Certificate of the Secretary of State of the Day on which the Act was received by him) being signified by the Governor General, by Speech or Message to each of the Houses of the Parliament or by Proclamation, shall annul the Act from and after the Day of such Signification." Section 90 modifies certain aspects of section 56. Of particular importance is "the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada."

controversial legislation to the Supreme Court itself, hopeful perhaps that any reference case would be supported by the Aberhart government.

In a telegram to the Premier of Alberta, the Prime Minister stated, diplomatically, that the "Minister of Justice is considering under provision British North America Act certain legislation enacted at recent session Alberta Legislature."<sup>15</sup> The telegram continued, asking, "Before submitting question for decision of Governor in Council would appreciate your letting me know whether your Government would be willing to facilitate hearing of a reference to Supreme Court of Canada regarding validity of bills" and in the interim "not to take any steps towards enforcement of any of said measures."<sup>16</sup>

Aberhart, in his characteristic style, replied in a manner anything but diplomatic. Stating that the "Alberta Government is convinced that its three acts are wholly within the legislative jurisdiction of the province," he added:

This government unanimously and wholeheartedly upholds confederation and would deeply regret the results if tension among debt ridden and poverty stricken people were increased by faintest suspicion that federal government would side with plutocratic bankers alien to province against democratic Albertans earnestly seeking their economic freedom.<sup>17</sup>

The telegram concluded on the following note: "We respectfully submit that we are compelled by the mandate of the people to proceed with the enforcement of our legislation and with due deference we suggest that the responsibility of questioning its validity should be assumed by those desiring to render it abortive."<sup>18</sup>

News of Aberhart's reply received widespread condemnation in the press. The *Calgary Daily Herald* was not alone when it commented that "When, in response to this reasonable and just proposal, the Premier shouts 'hands off Alberta' we cannot help thinking he means 'hands off Aberhart.'"<sup>19</sup> The editorial continued, "For he is really de-

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<sup>15</sup>King Papers, King to Aberhart, 11 August 1937.

<sup>16</sup>*Ibid.*

<sup>17</sup>*Ibid.*, Aberhart to King, 16 August 1937.

<sup>18</sup>*Ibid.*

<sup>19</sup>The *Calgary Daily Herald*, Monday, 16 August 1937, 1.



manding that the people of this province should accept the opinion of Aberhart rather than the opinion of the Supreme Court."<sup>20</sup> Not surprisingly, newspapers began speculation on what action the federal government would now take; the power of disallowance was frequently mentioned.

Before news of Aberhart's decision reached him, King confided to his diary his thoughts on the current situation in Alberta. Comparing himself to Abraham Lincoln fighting to prevent breakup of the American Union, King wrote

It was quite clear that what Alberta was seeking today amounts to secession, quite as much as the desire of Kentucky and other Southern states to secede because of slavery. That my stand must be the same as Lincoln's, save the Union at all costs and not permit any development which would tend to disrupt it, any minority to destroy the will of the whole. I had precisely made up my mind to disallow the Alberta legislation. Here was a parallel which on all fours justified it, and by what has come to be seen was the wisest decision ever made.<sup>21</sup>

Under the circumstances, King's reaction to the telegram once it reached him was that of quiet resignation. His course of action had been set.

After meeting with Cabinet, it was decided that the Alberta legislation would be immediately disallowed; Order in Council P.C. 1985, dated 17 August, formally disallowed the three Acts. Writing to Aberhart, King explained the reasons behind his government's actions. Noting that his government "had to consider what action is required on the part of the Government of Canada in the exercise of its powers and duties as established by law,"<sup>22</sup> King proceeded to give Aberhart an elementary lesson in constitutional law:

We are advised that there is no possible doubt that the measures purporting to control banking and credit by a body or bodies appointed by the Province of Alberta, and seeking to enforce that control by depriving individual citizens of their established right of appeal to the courts, are beyond the powers of the provincial legislature and constitute an infringement upon the recognized powers of the Dominion. The fact that under the constitution from which both the federal and provincial legislatures derive their ju-

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<sup>20</sup>*Ibid.*

<sup>21</sup>King Diary, entry of 16 August 1937.

<sup>22</sup>King Papers, King to Aberhart, 17 August 1937.

risdiction, the field of money and banking falls to the federal authority, has never been seriously questioned in the seventy years since Confederation.<sup>23</sup>

Rejecting the charge made by Aberhart regarding the financial tyranny and plutocratic opposition on the part of bankers, King explained that if changes were desired to either the currency or banking laws of the Dominion, passed under sections 91(14) and 91(15) of the B.N.A. Act, respectively, "it is open to any citizens of the Dominion, residing in Alberta, or in any other province, to seek to have those changes made by the only body which has due authority,"<sup>24</sup> the Parliament of Canada. In the present instance, however, the actions of Alberta were unconstitutional, invading upon federal jurisdiction as they did; the federal government had no choice in light of Alberta's rejection of a Supreme Court reference but to disallow the three acts. Under the circumstances, King could avoid immediate enforcement of the acts only by disallowance, reference litigation being too time-consuming a process.

It is clear that the King government had chosen the most reasonable approach available under the circumstances. No matter what course of action was adopted, be it a reference to the Supreme Court or disallowance, there would be political fallout in Alberta. Having failed in its strategy to realize the former, the federal government had no choice but to invoke the latter. "It should be understood by every adult mind in Alberta that the Dominion government has not been hasty in its action,"<sup>25</sup> counselled one Alberta newspaper. Outside the province newspaper editors were of a like opinion. Stated the *Toronto Globe and Mail*: "Ottawa's disallowance of the Alberta bank and judicial control legislation was so obviously the only course and so generally anticipated that it could come as a surprise to no one."<sup>26</sup>

Under the circumstances, neither could it come as a surprise what the Alberta government's reaction would be. A bombastic Aberhart advised King that "Our people insist

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<sup>23</sup>*Ibid.*

<sup>24</sup>*Ibid.*

<sup>25</sup>The *Calgary Daily Herald*, Wednesday, 18 August 1937, 1.

<sup>26</sup>The *Toronto Globe and Mail*, Thursday, 19 August 1937, 6.

that we are pledged to go forward in obedience to them not to you nor to the banks. Frustrating us will not evade the final outcome and will only lead to our people demanding with ever increasing insistence that their will shall prevail."<sup>27</sup> As for the power of disallowance, a defiant Aberhart stated "We do, however, challenge immediately the right of the Dominion to disallow any provincial legislation whatsoever because it has no such power today."<sup>28</sup> A week later Aberhart informed King that "we have gone more fully into the matter of disallowance and find that you have not now such powers, Consequently our legislation is still law and will remain law until declared "ultra vires" by the Courts."<sup>29</sup> As events in the following weeks were to show, the federal government's problems in Alberta were anything but over.

### Alberta vs. the Federal Government

Far from being chastised by the disallowance of its legislation, the Alberta government forged ahead, planning new legislation for the fall session, again promoting Social Credit. The question naturally arises: had the Alberta government learned nothing from recent events? The answer, if comments made by one of Major Douglas' advisers are any indication, is that the Social Credit Board never expected the federal government to permit the disallowed legislation to come into effect. Stated George F. Powell: "The disallowed Acts had been drawn up mainly to show the people of Alberta who were their *real* enemies, and in that respect they succeeded admirably."<sup>30</sup> Interestingly, the *Montreal Gazette* had made this interpretation as early as 6 August when it wrote: "There is room at least for the suspicion that the [Alberta] Government is ready for an inevitable fall and is attempting to throw the responsibility for failure off its own shoulders and on to the shoulders of

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<sup>27</sup>King Papers, Aberhart to King, 19 August 1937.

<sup>28</sup>*Ibid.*

<sup>29</sup>King Papers, Aberhart to King, 26 August 1937.

<sup>30</sup>Cited in David R. Elliott and Iris Miller, *Bible Bill: A Biography of William Aberhart* (Edmonton: Reidmore Books, 1987), 269.

others."<sup>31</sup> If the strategy was to confront the federal government and, in the process, put the blame on it for Alberta's failure to introduce Social Credit, the strategy continued--unabated--in the fall.

Aberhart called a fall sitting of the legislature where a number of new bills, again designed by the Social Credit Board, were to be introduced. News of the upcoming session quickly reached Ottawa. "I see . . . they have called another Session," noted Lapointe in his letter of 16 September to Bowen, commenting "Circumstances might be different now if they were enacting the same bills. You would probably be justified to reserve the assent under such circumstances."<sup>32</sup> In his reply of 23 September, Bowen spoke of "Indications that disallowed legislation will be re-enacted in modified form at present session."<sup>33</sup> Bowen theorized that Aberhart would likely ask for dissolution of the Legislature, wanting to ascertain the will of the people before having the acts from the fall session proclaimed. If this chain of events transpired, Bowen stated he would refuse to grant dissolution and insist the government refer its legislation to the courts to ascertain its validity before proclamation. "Should the government refuse," continued Bowen, "I may form new ministry."<sup>34</sup> Concluded Bowen: "Unless you suggest alternative my line of action will probably be as indicated."<sup>35</sup>

While events did not materialize exactly as Bowen had predicted, the communication between the Minister of Justice and the Lieutenant Governor is invaluable, demonstrating just how perilous the federal government now perceived the situation in Alberta to be. To his diary Mackenzie King confided details of Cabinet's discussion on 28 September concerning 'instructions' the federal government would in all likelihood soon be forwarding to the Lieutenant Governor.

I took the position strongly that as Liberals we must uphold the Constitution, that the issue was whether a single province could dictate to & deter-

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<sup>31</sup>The *Montreal Gazette*, Friday, 6 August 1937, 8.

<sup>32</sup>Lapointe Papers, Lapointe to J.C. Bowen, 16 September 1937.

<sup>33</sup>Lapointe Papers, J.C. Bowen to Lapointe, 23 September 1937.

<sup>34</sup>*Ibid.*

mine for the Fed. Govt. the rest of Canada what the policy and powers were to be with respect to matters on which the Fed. Govt. had exclusive jurisdiction, that the present was essentially a battle between the Alberta prov. and the Fed. Govts. & that we could not afford to permit a province to do by indirect means which when done by direct means had been disallowed.<sup>36</sup>

King's diary further reveals that Cabinet unanimously adopted the position put forward by Lapointe that the Lieutenant Governor should reserve any such legislation under sections 57 and 90 of the B.N.A. Act,<sup>37</sup> preferring it to the course suggested by Bowen of refusing dissolution and possibly forming a new ministry. In the end, the federal government would send such legislation "to the Supreme Court for decision as to its being intra or ultra vires."<sup>38</sup>

Of the eleven Bills the Alberta government introduced in the fall session, the federal government believed three to be *ultra vires*. Each will be briefly discussed:

Despite claims to the contrary, the sole purpose of Bill No. 1, *An Act respecting the Taxation of Banks*,<sup>39</sup> was to tax the banks out of existence in Alberta. The Act required any bank doing business in the province to pay a tax of one-half per cent on all paid up capital; as well, the Act imposed a tax of one per cent on any reserve funds and unpaid dividend profits. Clearly, if forced to pay such 'taxes,' the chartered banks would neither be able to compete nor survive in Alberta, especially when Bill No. 8, discussed below, is taken into consideration.

Bill No. 8: *An Act to amend and consolidate The Credit of Alberta Regulation Act*,<sup>40</sup> was a reconditioned version of the recently disallowed Act. The most noticeable difference

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<sup>35</sup>*Ibid.*

<sup>36</sup>King Diary, entry of 28 September 1937.

<sup>37</sup>Section 57 reads "A Bill reserved for the Signification of the Queen's pleasure shall not have any Force unless and until, within Two Years from the Day on which it was presented to the Governor General for the Queen's Assent, the Governor General signifies, by Speech or Message to each of the Houses of the Parliament or by Proclamation, that it has received the Assent of the Queen in Council. See note 14 for a discussion of section 90.

<sup>38</sup>*Ibid.*

<sup>39</sup>*Statutes of Alberta*, 1 George VI, Session III, 1937, Bill No. 1.

<sup>40</sup>*Ibid.*, Bill No. 8.

was the replacement of the term 'bank' with the term 'credit institution' in the new Bill. In all other senses--despite its new guise--the purpose of the Bill remained the same as that of its predecessor: to replace the chartered banks in Alberta with Social Credit-approved institutions.

Lastly, Bill No. 9, *An Act to ensure the Publication of Accurate News and Information*,<sup>41</sup> was designed to silence the press. Like the banks, the press was a favourite target for Aberhart. One need only consider comments made in a radio broadcast in September 1937 in order to fully appreciate his disposition towards the newspapers: "I can see that in spite of all that one can say in protest, the newspapers who are entirely the mouthpieces of the financiers persist in publishing falsities that are entirely unfair and untrue!"<sup>42</sup> Bill No. 9 was clearly an attempt on the part of the Alberta government to right this perceived wrong.

News of the three Bills not surprisingly caused an uproar in the press. The *Calgary Daily Herald*, never a friend of the Premier's, denounced the *Accurate News and Information Act*, saying, "Characteristically, they would rather try to muzzle their critics than answer them."<sup>43</sup> Referring to the Bank Taxation Act, the *Toronto Globe and Mail* reported acidly that "Taxation in a democracy has not been regarded as a means of punishment heretofore."<sup>44</sup> And as for the *Credit of Alberta Regulation Act*, it did not escape the attention of the press that it was merely a revamped version of the disallowed *Credit of Alberta Regulations Bill*. The only surprise for those viewing events in Alberta was Lieutenant Governor Bowen's reservation of the three Bills on 6 October. Noted the *Montreal Gazette*:

Few people believed that the new Aberhart legislation for the exploitation of banks and the strangulation of the press would become operative, but it was generally assumed that their application would be blocked by federal action, as was the case with the first bank legislation. That the Lieutenant-Governor of the province, having assented to the first Bank Bill,

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<sup>41</sup>*Ibid.*, Bill No. 9.

<sup>42</sup>Cited in *Bible Bill*, 272.

<sup>43</sup>The *Calgary Daily Herald*, Friday, 1 October 1937, 1.

would alter his course in regard to the second, and regard to the Newspaper Control Bill as well, was not expected, unless perhaps by some inner circle at the federal capital.<sup>45</sup>

The *Gazette* was closer to the truth in its conjecture than it could have possibly known. Lieutenant Governor Bowen, acting in his capacity as an officer of the federal government, reserved the three Bills for the Governor General's pleasure, all other options having failed.<sup>46</sup> Over the course of the next four weeks, the governments of Alberta and Canada decided what questions would be referred to the Supreme Court of Canada.

### **The Terms of the Reference Cases are Defined**

J.R. Mallory, as late as 1961, suggested that the revival of the power of reservation in August 1937, unused since 1920, caused surprise in Canada, many believing the power to have become obsolete through lack of usage. According to Mallory, "So general was the uncertainty that the federal government referred the whole question of the scope and validity of the powers of disallowance, reservation, and withholding assent to the Supreme Court in the autumn of 1937."<sup>47</sup> Professor Mallory, as I will indicate below, overstates his case.

On 16 October King recorded in his diary that "a letter came from Aberhart this morning . . . which seems to afford a basis for conciliatory settlement of the Alberta situa-

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<sup>44</sup>The *Toronto Globe and Mail*, Friday, 1 October 1937, 6.

<sup>45</sup>The *Montreal Gazette*, Thursday, 8 October 1937, 8.

<sup>46</sup>As the following excerpt of a letter from Bowen to Lapointe indicates, the Lieutenant Governor exercised the power of reservation only after all other courses of action had been exhausted. Wrote Bowen: "When I informed Premier Aberhart of my intention to reserve these Bills, he made an alternative proposal to the effect that he should arrange to have these Bills brought in on proclamation, I informed him that I would concur in his request only on definite assurance from him that before a proclamation would be issued, that the said Bills would be referred to the proper court for an opinion as to their constitutionality. After an hours adjournment of the house, in order to call his members into caucus, he came back and informed me that they had decided not to suggest an alternative. Lapointe Papers, J.C. Bowen to Lapointe, 9 October 1937.

<sup>47</sup>J.R. Mallory, "The Lieutenant-Governor's Discretionary Powers: The Reservation of Bill 56," *Canadian Journal of Economics and Political Science* 27 (November 1961): 519.

tion."<sup>48</sup> In the letter, dated 12 October, Aberhart had once again brought up the issue of disallowance, reminding King "we have already contended that the Dominion no longer has the right to disallow provincial legislation, and that consequently our legislation, is still law and should remain law until declared *ultra vires* by the courts."<sup>49</sup> But, suggested a conciliatory Aberhart, "in order to maintain harmonious relationship between the Provincial and Federal Governments . . . this important question should be definitely settled by the Courts."<sup>50</sup> Regarding the three reserved Bills, Aberhart had two suggestions. Concerning the *Press Bill*, Aberhart expressed his willingness to submit it to the Court for an advisory opinion along with the question of disallowance. However, Aberhart argued, the *Credit Regulation Bill* and the *Bank Taxation Bill* were in a different category. His reasoning: "The question involved is one more of fact than of law, and consequently it would be necessary to submit evidence to the courts in order to enable them to give a proper decision."<sup>51</sup>

In Council three days later it was agreed to "accept the invitation of the Alberta Government to refer the question of disallowance itself to the Supreme Court for an opinion."<sup>52</sup> As for Aberhart's suggestions concerning the reserved Bills there was division. As far as the *Press Bill* was concerned, wrote King, "we thought we might reserve finally deciding upon it until the Supreme Court has pronounced itself upon our power to disallow on grounds of public policy as well as because of *ultra vires*."<sup>53</sup> As for the other two Bills were concerned, noted King, "we were of the opinion they should perhaps be referred to the Courts, and our action to be decided only after the Court's decision."<sup>54</sup> Again, King preferred that the Supreme Court not simply find the Bills *ultra vires*--which King was certain they were--but hold first that the government could disallow legislation on grounds of

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<sup>48</sup>King Diary, entry of 16 October 1937.

<sup>49</sup>King Papers, Aberhart to King, 12 October 1937.

<sup>50</sup>*Ibid.*

<sup>51</sup>*Ibid.*

<sup>52</sup>King Diary, entry of 19 October 1937. Interestingly, at this stage Cabinet did not concern itself with the power of reservation. This was added to the reference case on disallowance later at Alberta's request.

<sup>53</sup>*Ibid.*

<sup>54</sup>*Ibid.*



public policy. Cabinet's decision referring the other two Bills, it should be noted, was in opposition to the proposed test cases suggested by Aberhart, an unnecessary action thought King, who believed that "It is not a mere hypothetical question being asked, but an opinion of an existing Statute."<sup>55</sup>

One week later Council made its final decision on the fate of the Alberta legislation. The *Press Bill*, along with the other two reserved Bills, would be submitted to the Supreme Court at Lapointe's insistence. This was not the course of action preferred by King who would have rather held the *Press Bill* "until the Court had pronounced on our right to disallow for reasons of public policy as well as on grounds of jurisdiction."<sup>56</sup> While willing to accept Lapointe's point of view, King maintained certain reservations concerning the question of disallowance for public policy reasons.

I felt that the Court would probably declare the Bill ultra vires which would make then doubly difficult our disallowance for public policy reasons. However, Lapointe seemed afraid of the exercise of disallowance on the score of public policy, and, as it was pointed out, if this one Bill were held back where Aberhart had said he was agreeable to have it referred, it might be thought we were afraid of the decision.<sup>57</sup>

In the end, wrote King, "I agreed to not press my decision on that course; so it was decided all three measures should be referred next week."<sup>58</sup>

Order in Council P.C. 2715, dated 28 October, submitted two questions concerning the power of disallowance to the Supreme Court. First, "Is the power of disallowance of provincial legislation vested in the Governor General in Council by section 90 of the British North America Act, 1867, still a subsisting power?" Second, "If the answer to Question 1 be in the affirmative, is the exercise of the said power of disallowance by the Governor General in Council subject to any limitations or restrictions and, if so, what are the nature and effect of such limitations or restrictions?" In a telegram to King, Aberhart complained

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<sup>55</sup>*Ibid.*

<sup>56</sup>*Ibid.*, entry of 28 October 1937.

<sup>57</sup>*Ibid.*

<sup>58</sup>*Ibid.*

that "your submission of disallowance under the two questions publicly reported seems hardly adequate,"<sup>59</sup> requesting that Alberta be allowed to assist draft the questions to be submitted to the Supreme Court. In reply, King remarked that "the object of the reference is to assist the Federal Government in an important aspect of the exercise of their own responsibility regarding the giving or withholding of the royal assent in these cases," noting the federal government "cannot be considered bound to submit the terms of reference to others for agreement."<sup>60</sup> King, however, was willing to consider specific suggestions Alberta might wish to make and would consider adopting them if reasonably possible.

In the same letter, King included the text of the questions to be submitted to the Supreme Court concerning the three reserved Bills based on Order in Council P.C. 2749, dated 2 November. For each Bill the question was identical, asking if ". . . any of the provisions thereof and in what particular or particulars or to what extent *intra vires* of the Legislature of the Province of Alberta?" King explained to Aberhart that "before considering any other questions touching the propriety of the royal assent being given or withheld, the Government has decided to refer the question of the legal validity of the three Bills to the Supreme Court of Canada."<sup>61</sup>

While Aberhart seemed willing to accept the federal government's decision to submit all three Bills to the Supreme Court, and not just the *Press Bill* as he had wanted, the Premier noted that "the question of disallowance does not deal with the case of the reservation of a bill not dealt with by Governor General within a year," requesting that "in presenting case of disallowance two other question should be added."<sup>62</sup> A third Order in Council, P.C. 2802, dated 9 November, added questions 3 and 4 to the two original questions already posed in P.C. 2715. Question 3 asked: "Is the power of reservation for the signification of the pleasure of the Governor General of bills passed by the legislative as-

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<sup>59</sup>King Papers, Aberhart to King, 30 October 1937.

<sup>60</sup>King Papers, King to Aberhart, 2 November 1937.

<sup>61</sup>*Ibid.*

<sup>62</sup>King Papers, Aberhart to King, 5 November 1937.

sembly or legislative authority of a province vested in the Lieutenant Governor by section 90 of the British North America Act, 1867, still a subsisting power?" Question 4, in turn, asked: "If the answer to question 3 be in the affirmative, is the exercise of the said power of reservation by the Lieutenant Governor subject to any limitations or restrictions, and if so what are the nature and effect of such limitations restrictions?"

In total, seven questions were submitted to the Supreme Court--the direct result of a chain of events beginning with the federal government's disallowance of three Alberta Statutes in mid-August; culminating with the reservation of the three Bills by the Lieutenant Governor in the first week of October. That these seven questions, which formed the basis of the two references to the Supreme Court, were politically motivated--questions of law being a secondary concern--is not to be doubted. Furthermore, it is equally obvious that both governments hoped to realize with the reference cases political objectives unavailable to them by other means.

For Alberta, not only did it hope to prove that the federal powers of disallowance and reservation defunct as a result of *non user*, thereby gaining points for provincial rights in the process, but, more importantly, it hoped to score a victory for Social Credit as well. Ironically, it would not matter whether the Court found the three Bills *intra vires* or *ultra vires* the province. Should the Court side with the federal government, Alberta could claim that despite all its efforts and good intentions, the federal government--and its agencies including the Supreme Court of Canada--were thwarting Alberta's attempt to introduce Social Credit in the province. Conversely, if the Court held that the reserved Bills were *intra vires* the Alberta government, Aberhart and his followers could proceed to implement Social Credit with a sense of confidence.

For the federal government, on the other hand, the issues of disallowance and reservation were not a major concern, the King government confident that these powers, despite their infrequent use, retained their full force. The real issue that the Court would decide--and not the King government--was the fate of Social Credit in Alberta. Like the

New Deal legislation the government had forwarded to the Court two years earlier, there was a quiet sense of confidence that the Supreme Court decisions, when handed down, would be favourable to the federal government. In no way whatsoever was the King government motivated by a sense of uncertainty.

### The Supreme Court Decisions and Their Implications

Argument before the Supreme Court on the two Alberta reference cases began on 10 January 1938 and lasted only five days. Representing the federal government in both cases was Aime Geoffrion and C.P. Plaxton, two able constitutional lawyers as we have seen in the New Deal cases, and J. Boyd McBride of Edmonton, Alberta. McBride, it should be noted, was retained, not only for his legal skills, but because of his longstanding ties to Alberta.<sup>63</sup> Present for Alberta was O.M. Biggar, W.S. Grey and J.J. Frawley.

In the first reference, concerning disallowance and reservation, federal counsel argued that both were subsisting powers in terms of law and constitutional usage. Aime Geoffrion noted that they were statutory provisions under section 90 of the B.N.A. Act, and neither the Imperial Parliament, nor the Parliament of Canada, had enacted any statute which "affects in the slightest degree the integrity and continued existence"<sup>64</sup> of either power. Referring to the 1926 Imperial Conference and its effect on Canada's constitutional growth, counsel argued that while the Conference laid down the stipulation that London would no longer exercise the power to disallow Dominion laws, Dominion-Provincial

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<sup>63</sup>In a letter to the Minister of Justice, McBride spoke of public feelings in Alberta regarding the government's actions, confirming as well the strategic value of having him as one of the lawyers for the Dominion: People "felt that by bringing myself in as Counsel with Mr. Geoffrion, the Dominion gave recognition to the fact that this was also Alberta's fight and that Alberta should be given the chance to fight for itself; in addition they feel that the Dominion's cause was strengthened by having someone familiar with all the devious wriggings of our Social Credit Government since it's election to office." Lapointe Papers, J. Boyd McBride to Lapointe, 11 February 1938.

<sup>64</sup>*Factum of Canada* (Disallowance and Reservation), undated, signed by Aime Geoffrion, J. Boyd McBride and C.P. Plaxton, (File 6590: Supreme Court of Canada), at 12.

relationships were not at all affected. Summarized Geoffrion: "The relationship between London and Ottawa had no effect on relationships between Ottawa and the provinces."<sup>65</sup> Similarly, the 1931 *Statute of Westminster*<sup>66</sup> left these powers not only legally unaffected, but legally preserved until either amended, repealed or altered. Furthermore, in terms of constitutional usage, counsel argued that despite irregular usage "the continued legal existence of the powers and the legal right of the responsible authorities, in the exercise of a sound discretion, to exercise them would be wholly unaffected by that fact."<sup>67</sup>

In contrast to the position adopted by federal counsel, Alberta argued that both the powers of disallowance and of reservation had lapsed through constitutional practice, noting that disallowance had not been used since 1924. Counsel also suggested that it was impossible to reconcile the explicit wording of section 90 with constitutional practice in Canada since 1867. In some provinces, Alberta in particular, the Lieutenant Governor assented to bills in the name of the Sovereign, and not in the name of the Governor General as required by the B.N.A. Act. It followed, the argument went, that the Governor General's power of disallowance did not exist--it must reside with the Sovereign. Based on these contentions, Alberta argued in its *factum* that "the purported disallowance of certain Acts of the Legislature of the Province of Alberta . . . was ineffective since those Acts were presented to the Lieutenant Governor for assent by His Majesty and were in fact assented to in His Majesty's name."<sup>68</sup> Similarly, the three reserved Bills now before the Court, having been reserved for the pleasure of the Governor General, not His Majesty as specified in the B.N.A. Act, were improperly handled.

On 4 March 1938 the Court handed down its ruling. Duff began his opinion acknowledging the argument developed by Mr. Biggar that the Governor General never possessed the authority to disallow provincial legislation and that the Lieutenant Governor,

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<sup>65</sup>The *Ottawa Evening Journal*, Monday, 10 January 1938, 1,2.

<sup>66</sup>*Statutes at Large* (U.K.), 22 Geo. V, 1931, c. 4.

<sup>67</sup>*Factum of Canada*, at 14.

<sup>68</sup>*Factum of Alberta* (Disallowance and Reservation), undated, signed by O.M. Biggar, W.S. Gray and J.J. Frawley, (File 6590: Supreme Court of Canada), at 4.

when reserving bills, did so for the Sovereign and not the Governor General. Noting the "alternative construction" of section 90, "in support of which everything could be said for it with any degree of plausibility was lucidly put before us by Mr. Biggar,"<sup>69</sup> Duff denied the argument's legitimacy, preferring the position presented by federal counsel. In his opinion Chief Justice Duff stated "that the power of disallowance and the power of reservation are both subsisting powers, and that the former is subject to no limitations or restrictions and the latter only to the restriction that the discretion of the Lieutenant-Governor shall be exercised subject to the Governor General's instructions."<sup>70</sup> It can be argued that, in essence, Duff's reasoning was illustrative of the proposition, later enunciated in the Supreme Court, that constitutional conventions cannot crystalize into law.<sup>71</sup> The other members of the Court, in their respective opinions, gave similar answers to the questions posed.

Justice Cannon's opinion deserves attention for comments he made regarding the origin of the reference cases. Commenting "that these references were deemed advisable as a result of difficulties between the Dominion and the province of Alberta,"<sup>72</sup> Cannon offered an interesting political justification for maintaining the power of disallowance. In his opinion,

An additional reason for the preservation of this power of disallowance of provincial statutes is its necessity, more than ever evident, in order to safeguard the unity of the nation. It may become essential, for the proper working of the constitution, to use in practice the principle of an absolute central control which seems to have been considered an essential part of the scheme of Confederation; this control is found in the Lieutenant-Governor's power of reservation and the Governor General in Council's power of disallowance.<sup>73</sup>

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<sup>69</sup>*Powers of Disallowance and Power of Reservation, Ref. re* [1938] S.C.R. 71 at 74.

<sup>70</sup>*Ibid.*, at 79.

<sup>71</sup>See *Re Resolution to Amend the Constitution* [1981] S.C.R. 753.

<sup>72</sup>*Ibid.*

<sup>73</sup>*Ibid.*, at 83.

Certainly, there could be no stronger endorsement from a court of law on the value of such powers in a federal system such as Canada's. The federal government, it is certain, could not have stated the case in stronger terms.

If the questions regarding the powers of disallowance and reservation had been relatively straightforward for the Court to decide, determining the validity of the three reserved Bills proved to be more complex. Federal counsel asserted that the Court must consider the validity of the *Alberta Social Credit Act*, the 'master statute' under which the three reserved Bills were designed to operate. Accordingly, federal counsel believed it was

not only legitimate but necessary as to a proper consideration of the three reserved Bills in question to outline briefly the principles of the theory of Social Credit; the legislative efforts and scheme by which the Social Credit Government has sought to bring about the establishment of a new economic order in the Province of Alberta on the basis of these principles, and generally the circumstances of public notoriety which led up to and surrounded the passing of the said Bills and of the legislation with which they linked.<sup>74</sup>

Only by understanding "the setting or *milieu* supplied by the foregoing considerations,"<sup>75</sup> federal counsel asserted, could the Court understand the true nature and substance of the Bills in question. The implications from such a request cannot be understated: federal counsel was asking the Supreme Court to rule on the validity of the Social Credit experiment in Alberta itself. Despite a motion from Biggar "to strike from the Dominion factum 52 pages of opinions, newspaper accounts, radio speeches and various quotations which attempted to elucidate the social credit theories of Major C.H. Douglas,"<sup>76</sup> the Court, after a five-minute recess, allowed federal counsel to continue their line of argument.

In contrast to the argument developed by federal counsel, Biggar struggled to avoid discussing the legislative history behind the three Bills. An examination of his closing comments in the *Bank Taxation Bill* illustrate his tactics: "Whether or not its enactment

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<sup>74</sup>*Factum of Canada* (Alberta Legislation), undated, signed by Aime Geoffrion, J. Boyd McBride and C.P. Plaxton, (Vancouver: University of British Columbia Law Library), at 17.

<sup>75</sup>*Ibid.*, at 18.

<sup>76</sup>The *Ottawa Evening Journal*, Tuesday, 11 January 1938, 12.

would be wise, public or expedient is . . . for the consideration of the Legislative Assembly and of the Assenting Authority but is not a question for decision by a court of law." Almost identical comments were made in defense of the *Credit Regulation Bill* and the *Press Bill*. Clearly, Biggar did not want the Court to consider the underlying motives of the Alberta government in enacting the Bills as federal counsel had suggested was prerequisite to understanding the measures. Biggar, perhaps somewhat embarrassed by the Bills, wanted to avoid having the Court consider the wisdom of the legislation, preferring that the Court rule only that, legally speaking, the provincial legislature was competent to enact such legislation.

As had been the case in the previous reference, the Court found itself once again affirming arguments presented by federal counsel. In fact, all members of the Court (only Cannon expressing no opinion) held the *Alberta Social Credit Act ultra vires* the province. After a lengthy analysis of the Act, Chief Justice Duff, in the principal opinion of the Court, concluded that it was "not within the power of the province to establish statutory machinery with the functions for which this machinery is designed and to regulate the operation of it."<sup>77</sup> In his opinion, the Act was *ultra vires* the Alberta legislature, coming under section 91(14), Currency, and section 91(15), Banks and Banking, not to mention section 91(2), Trade and Commerce--all federal powers. Stated the Chief Justice: "Such legislation, if not legislation in respect of banking or currency, would appear to be concerned with the regulation of trade and commerce, rather than with property and civil rights or matters merely local or private in the province."<sup>78</sup> That the province was not capable of enacting such legislation was not to be doubted.

If the *Alberta Social Credit Act* itself was unconstitutional, its provisions being designed "to effect a radical reorganization of the whole system of trade and commerce within the province by the substitution of a novel system of credit" in place of the "present

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<sup>77</sup>*Alta. Statutes, Ref. re* [1938] S.C.R. 100 at 116.

<sup>78</sup>*Ibid.*



financial system under which the operations of trade, industry and commerce are now conducted,"<sup>79</sup> it logically followed that any legislation dependent upon this 'master statute' would similarly be *ultra vires*. Referring to the *Credit Regulation Bill*, Duff stated "that it is a part of a general scheme of legislation of which *The Alberta Social Credit Act* is really the basis; and that statute being *ultra vires*, ancillary and dependent legislation falls with it."<sup>80</sup> The *Bank Taxation Bill* and the *Press Bill*, too, were declared *ultra vires* on these grounds.

The Court detailed other grounds upon which the three reserved Bills were *ultra vires* the Alberta Legislature without reference to the now-unconstitutional *Alberta Social Credit Act*. These arguments deserve scrutiny. Commenting upon the *Credit Regulation Bill*, Duff noted that it was a licensing statute designed to regulate chartered banks, a matter of federal jurisdiction under section 91(15), Banking, not to mention section 91(2), Trade and Commerce. Turning to the *Bank Taxation Bill*, the Chief Justice stated that this Bill, too, related to banking and did not fall under section 92(2), Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes. In the present instance, the 'Provincial Purposes' of the high rate of taxation outlined in the Bill were self-evident. Stated Duff: "In our opinion it requires no demonstration to show that such a rate of taxation must be prohibitive in fact and must be known to the Alberta legislature to be prohibitive."<sup>81</sup> And in his opinion on the *Press Bill*, Duff acknowledged that "Some degree of regulation of newspapers everybody would concede to the provinces," but not to the extent that such legislation frustrates the "rights of the Crown and the people of Canada as a whole."<sup>82</sup>

The lasting importance of both Chief Justice Duff's and Justice Cannon's opinions in regards to the *Press Bill* deserve further emphasis. In his opinion, Duff spoke of free

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<sup>79</sup>*Ibid.*, at 119.

<sup>80</sup>*Ibid.*, at 123.

<sup>81</sup>*Ibid.*, at 128.

<sup>82</sup>*Ibid.*, at 134, 135.

political discussion being "the breath of life of parliamentary institutions."<sup>83</sup> Similarly, Cannon held that "no political party can erect a prohibitory barrier to prevent the electors from getting information concerning the policy of government,"<sup>84</sup> in this case, the *Accurate News and Information Act*. Stated Cannon: "Freedom of discussion is essential to enlighten public opinion in a democratic State; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the government concerning matters of public interest."<sup>85</sup> The effect of these comments was to invoke an implied Bill of Rights. In the present instance, the Court was protecting an important civil liberty, freedom of the press, nowhere explicitly protected in the Constitution, but imperative nonetheless to the workings of parliamentary democracy. Not only was the Press Bill *ultra vires*, it was offensive for reasons of public policy.

Newspapers across the country praised the Supreme Court decisions. For the *Montreal Gazette*, the Supreme Court decisions went "a very long way as an assurance of constitutional and financial stability and order in contrast with the extraordinary efforts of the Aberhart Government and the Alberta Social Credit plan to override and defy some of the basic principles of government and finance."<sup>86</sup> As the *Globe and Mail* reported following news of the decisions, "The invalidation of the three bills by the Supreme Court means that every step Mr. Aberhart has taken to implement or further his program has been outlawed; but, more importantly, that Social Credit itself, as defined in the enabling Act, has been destroyed."<sup>87</sup>

As far as Mackenzie King was concerned, the federal government could have asked for nothing more from the Supreme Court decisions. The Supreme Court--and not his administration--had derailed Alberta's experiment with Social Credit.<sup>88</sup> Of course, the fed-

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<sup>83</sup>*Ibid.*, at 133.

<sup>84</sup>*Ibid.*, at 145.

<sup>85</sup>*Ibid.*, at 145, 146.

<sup>86</sup>The *Montreal Gazette*, Saturday, 5 March 1938, 8.

<sup>87</sup>The *Toronto Globe and Mail*, Saturday, 5 March 1938, 6.

<sup>88</sup>Alberta appealed the Supreme Court decisions concerning the three reserved Bills to the Privy Council. However, after the appeal was filed the Alberta government

eral government's problems with Alberta were anything but over; but the main victory had been won: Aberhart's experimentation with Social Credit had been declared irreconcilable with the terms of the B.N.A. Act. As J.R. Mallory commented, after the defeat of the Social Credit measures "There was no further serious attempt to introduce Social Credit by legislation, and its attainment on a provincial scale was practically abandoned."<sup>89</sup>

The federal government scored other major victories as well. Most important was the fact that the federal government retained full control in the fields of banking and currency. The Court also had declared that the Governor General's power of disallowance, as well as the Lieutenant Governor's power of reservation, retained their full vigor, despite the creative arguments of Alberta to the contrary. In all, events had gone exceedingly well for the federal government. It had won its two court cases without difficulty, not to mention gaining favourable public opinion in the process. In Alberta, the public approved of the federal government's handling of the reference cases despite the fact that Alberta lost both cases. If blame was to be had, it lay not with the federal government but, instead, with the Social Credit government of Premier Aberhart. However, the federal government's overwhelming success in the handling of the Alberta situation had unexpected, indeed unwanted, implications as well. While the federal government enjoyed its victory over Alberta, critics were beginning to ask why Maurice Duplessis' Padlock Act in Quebec did not receive similar treatment from the federal government. The government's response, the focus of the next chapter, is illustrative of a situation where the King government would avoid--at great length--the use of a reference case to the Supreme Court.

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repealed the *Alberta Social Credit Act*, declared unconstitutional by the Supreme Court. Both the *Credit Regulation Bill* and the *Press Bill* contained reference to the now-repealed statute, and the Privy Council therefore declined to consider them. Only the *Bank Taxation Bill* was considered by the Board which had no difficulty upholding the Supreme Court's decision in *A.G. Alta. v. A.G. Can. (Bank Taxation)* [1939] A.C. 117.

<sup>89</sup>Mallory, *Social Credit*, 90.

## Chapter 5

### The Padlock Act and the Constitution

On 24 March 1937 the Lieutenant Governor in the Province of Quebec gave royal assent to an act entitled *An Act to protect the Province against communistic propaganda*.<sup>1</sup> An authentic copy of the Act, otherwise known as the Padlock Act, was formally received by the Secretary of State in Ottawa on 8 July 1937. From that date forward, for a period of one year, the federal government contemplated both the political and legal implications of Quebec's Padlock Law, trying to decide what to do--if anything--with the controversial statute. After the Supreme Court of Canada handed down its rulings in the two Alberta references cases on 4 March 1938, the Mackenzie King government came under increased pressure to act decisively in Quebec. The two judicial decisions, one affirming the powers of reservation and disallowance, the other holding *ultra vires* three Alberta Bills, the most notable being the controversial *Press Bill*, certainly caused the federal government much discomfort. Still, despite such seemingly befitting precedents, and in marked contrast to its determined action in Alberta, when it came to Quebec the federal government did nothing to stop the Quebec government from enforcing the Padlock Act.

The Padlock Act had been created in response to the King government's repeal of section 98 of the *Criminal Code*, the contentious anti-communist statute. Not only did the repeal of the federal statute cause the Catholic hierarchy in Quebec considerable distress, it, too, seemingly worried the new Premier of the Province, Maurice Duplessis. On 1 October 1936 the Premier and Cardinal Villeneuve attended a rally in Quebec City where they launched what would become a crusade against communism in the province. Afterwards, "Duplessis and Villeneuve arranged a system of complete exchange of information

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<sup>1</sup>*Statutes of Quebec*, 1 George VI, 1937, c. 11.

on what they discovered of communist activity."<sup>2</sup> As Richard Jones has commented in his succinct history of the Union Nationale Administration in Quebec, "Duplessis's conservatism . . . took the form of an unrelenting battle against the supposed communist threat in Quebec."<sup>3</sup> According to Jones, "In these years of economic crisis and of epic combats in Europe between the left and the right . . . the Catholic hierarchy increasingly worried over subversive action in the province."<sup>4</sup> Still, a further examination of events reveals that there were other motives involved, compelling Maurice Duplessis to mobilize against communism.

Conrad Black, in his biography *Duplessis*, argues that the period offered Duplessis a splendid opportunity "to appease prevailing sentiment, harass the federal authorities, and compel the solemn adherence of the rowdies in the provincial opposition."<sup>5</sup> Duplessis, taking careful note of the Catholic church's response to Ottawa's action, used the alleged communist threat in the province as a means of attacking the federal government.

Duplessis harangued provincial audiences about the federal immigration policies, easy prey in Quebec, because most immigrants entered the English-speaking community and were regarded as agents of Anglo-Saxon assimilation as well as job-stealers. So Duplessis skillfully conjured up the vision of the federal government throwing open the doors of Canada to hordes of subversive foreign scabs. In addition, as Ottawa controlled the Post Office, Duplessis declared that Ottawa had the responsibility, which it was conspicuously failing to discharge, of preventing the free flow of red propaganda through the mails.<sup>6</sup>

Soon Duplessis took matters into his own hands and crafted a law for Quebec designed to replace the repealed section 98. Unlike the former federal statute, however, the Padlock Act was vaguely worded, which suited the needs of its creator very well. According to the Premier, "Communism can be felt," and "Any definition would prevent the application of

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<sup>2</sup>Conrad Black, *Duplessis* (Toronto: McClelland and Stewart, 1977), 161.

<sup>3</sup>Richard Jones, *Duplessis and the Union Nationale Administration* (CHA Historical Booklet 35, Ottawa 1983), 9.

<sup>4</sup>*Ibid.*

<sup>5</sup>Black, *Duplessis*, 162.

<sup>6</sup>*Ibid.*

the law."<sup>7</sup> Had the federal government not repealed section 98, and had the Catholic elite not responded so vehemently against Ottawa's action, it is likely that the 'communist threat' in Quebec would have been largely ignored by the Premier. However, with Quebec's drafting of the Padlock Act--its express purpose being to replace the repealed section 98--it is clear that the Premier of Quebec was embarking upon a course of action that patently invaded the federal sphere of jurisdiction regarding the criminal law power under section 91(27) of the B.N.A. Act.

The Padlock Act stated that "It shall be illegal for any person, who possesses or occupies a house within the Province, to use it or allow any person to make use of it to propagate communism or bolshevism by any means whatsoever."<sup>8</sup> The penalty for such an offense was "the closing of the house against its use for any purpose for a period of not more than one year . . . ."<sup>9</sup> In other words, the house would be padlocked--a term never used in the Act itself. Should the Attorney General deem it necessary, the premises could remain closed indefinitely. Similarly, the Act declared it "unlawful to print, to publish in any manner whatsoever or to distribute in the Province any newspaper, periodical, pamphlet, circular, document or writing whatsoever propagating or tending to propagate communism or bolshevism."<sup>10</sup> Any person possessing such materials could be jailed for up to a year, the materials confiscated, and the house padlocked. Such materials, should the Attorney General deem it advisable, were to be destroyed.

Under the terms of the Act, the onus of proof was on the accused. Although the Act contained a provision whereby the accused could present his case to a judge of the Superior Court appealing the decision of the Attorney General closing a premises, the section was of little real value. If the judge upheld the closure the decision was deemed final and without appeal under the terms of the Act; should the judge side with the accused and re-

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<sup>7</sup>Cited in Forsey, *A Life on the Fringe*, 189.

<sup>8</sup>*Statutes of Quebec*, 1 George VI, 1937, c. 11, s. 3.

<sup>9</sup>*Ibid.*, c. 11, s. 4.

<sup>10</sup>*Ibid.*, c. 11, s. 12.

voke the closure "the A.-G. can promptly get another, and you're apparently back where you started from."<sup>11</sup> Interestingly, nowhere in the Act was "communism" or "bolshevism" defined, giving Maurice Duplessis, the Attorney General of the Province of Quebec, a potent weapon in his crusade against his political enemies.

Critics of the Padlock Act, both inside and outside the Province of Quebec, argued that the Act was not only unconstitutional, but that it represented an infringement of fundamental civil liberties. The Act was frequently cited as infringing upon the Magna Carta, in particular those provisions regarding punishment without trial as well as dispossession without due process of law. Similarly, the Act was criticized for depriving a citizen convicted under the Act of any form of redress in the courts, no matter how unjust or arbitrary the application of the law may be. With neither "communism" nor "bolshevism" defined, opponents argued that the Attorney General had a free rein in deciding how--and to whom--the law applied. Critics also charged that the Act represented an invasion into federal fields of jurisdiction, in particular the criminal law under the B.N.A. Act, imposing punishment for the crime of carrying on communist or bolshevist propaganda in a house. And as for the alleged communist threat to which the Act owed its existence, it is illustrative to consider comments made by Eugene Forsey, then professor of economics and political science at McGill University. According to Forsey,

at the time the Act was passed, there were according to Father Bryan (one of Montreal's leading Red-baiters) slightly more than 900 Communists in Montreal. Assuming that there were as many more in the rest of the province (which not even the Premier has had the temerity to suggest) would mean that approximately 57/1000 of one per cent. of the population was Communist.<sup>12</sup>

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<sup>11</sup>"A Montreal Member of the C.C.F. Describes the Padlock Act," *The Dirty Thirties*, ed. Michiel Horn (Toronto: Copp Clark Publishing Company, 1972): 677.

<sup>12</sup>Eugene Forsey, "The Padlock--New Style," *Canadian Forum* 18 (March 1939): 363.

In short, the Padlock Act, criticized for nullifying the most elementary principles of British justice, those fundamental and democratic rights upon which Canada was founded, lacked even the slightest rationalization for existence.

The federal government's reluctance to forward a reference to the Supreme Court, despite the glaring injustices of the Padlock Act, especially those curtailing basic civil liberties, provides an interesting contrast to both the New Deal and the situation in Alberta where reference cases were initiated almost immediately. The federal government's marked reluctance to deal with Quebec in a comparable manner therefore deserves close attention. This chapter will examine the federal government's rationale for not using either the power of disallowance or a Supreme Court reference where either power could have been used but was not. Political motivations on the part of the King government naturally arise within such a context and will be dealt with as appropriate.

### **A Call for Action: Protest Against the Padlock Act**

In an article in the *Canadian Forum* entitled "Disallowance: A Contrast," Eugene Forsey, like many others, spoke of the glaring contradiction between the federal government's action in Alberta and its inaction in Quebec. The article was timely, appearing shortly after the Supreme Court decisions on Alberta were handed down. Said Forsey: "When the Dominion government disallowed three Alberta Acts last summer, it professed to do so on the loftiest grounds of legal and constitutional principle. Moreover, it lost no time about it."<sup>13</sup> In the case of Alberta, he noted,

it took less than one day's consideration for the Minister [of Justice] to recommend disallowance of the Alberta Acts, without any petition from anyone, and just one day for the government to offer a reference of the same Acts to the Supreme Court. Exactly eleven days intervened between assent and disallowance. In the case of the reserved bills, the government was

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<sup>13</sup>Eugene Forsey, "Disallowance: A Contrast," *Canadian Forum* 18 (June 1938): 73.



able to make up its mind to a reference to the Supreme Court in less than four weeks.<sup>14</sup>

Forsey went on to contrast the procedure the government employed when it came to the situation in Quebec: "In the case of the Padlock Act, nearly fourteen months have passed since the Act was assented to . . . . And still we do not know what action, if any, the government proposes to take."<sup>15</sup>

In the period following the Supreme Court's handing down of its decisions in the Alberta reference cases, Forsey was not alone in calling for action in Quebec. In the west, for example, the *Vancouver Sun* offered the following advice: "Canadians in the English-speaking provinces should demand of Prime Minister Mackenzie King and the Hon. Ernest Lapointe that they take the same stern action against the 'Padlock Law' of Quebec that they took against the Newspaper Act of Alberta."<sup>16</sup> Furthermore, argued the *Sun*, "The Supreme Court, in upholding federal disallowance of this particular legislation, pointed the way in no uncertain terms, leaving no room for quibbling."<sup>17</sup> The *Winnipeg Free Press* maintained an identical stance: "Since the ringing affirmation of the principles of freedom by the Supreme Court there remains little reasonable doubt that if the Quebec Padlock law were carried before that tribunal it would be found ultra vires, and this scandalous infringement of civil liberty would be quashed."<sup>18</sup> Noting that "the policy of the Government is a cautious one," the paper commented "It is a matter of deep regret that the Dominion Government has not yet seen fit to take action."<sup>19</sup> Like the *Sun*, the *Free Press* insisted that Quebec's Padlock Act be disallowed. English-speaking eastern papers, for the most part, offered similar advice.

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<sup>14</sup>*Ibid.*, 74.

<sup>15</sup>*Ibid.*

<sup>16</sup>The *Vancouver Sun*, Tuesday, 15 March 1938, 4.

<sup>17</sup>*Ibid.*

<sup>18</sup>The *Winnipeg Free Press*, Tuesday, 15 March 1938, 13.

<sup>19</sup>*Ibid.*, Saturday 19 March 1938, 19.

Private citizens, incensed by the Padlock Act, reacted in one of two ways. Many signed one of countless petitions circulating across the country protesting the law. A typical petition read:

We the undersigned consider that the act known as the 'Padlock Act' is a gross violation of the traditional liberties guaranteed by the Magna Charta. It is, in our judgement, an effort on the part of the Quebec Government to limit the Canadian tradition of free speech, free assembly and free association, guaranteed to all Canadian citizens by the B.N.A. Act.<sup>20</sup>

Other petitions spoke of "undemocratic forces in this country which have instituted the Padlock Law" and demanded that "the Dominion Government disallow this legislation without further delay."<sup>21</sup> Tens of thousands of people signed such petitions sponsored by a variety of organizations throughout the country, indicative of the widespread opposition to the statute. These organizations, in turn, forwarded the petitions to either the Prime Minister or the Minister of Justice.

Meanwhile, others, such as Frank Scott, professor of law at McGill University, wrote letters condemning the actions of the Quebec Legislature. Writing to the editor of the *Montreal Gazette* on 19 March 1937, Scott asks: "Is public order better preserved by freedom or by repression?"<sup>22</sup> Arguing persuasively that the "new law shows a belief in arbitrary repression," Scott maintained that the "whole history of British countries for the past 250 years has been based on a belief in freedom."<sup>23</sup> Continued Scott: "If the new law is right, then England is wrong. If England is wrong, why has her political evolution been peaceful and orderly since 1688, whereas that of innumerable other countries which have tried the method of repression been the opposite?"<sup>24</sup> In another letter, this time to English

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<sup>20</sup>Lapointe Papers, Petition to Unlock the Padlock Law, Petition sponsored by the League for Peace and Democracy, undated.

<sup>21</sup>*Ibid.*, Petition of citizens of Canada domiciled in the Province of Quebec the to the Hon. W.L.M. King and Rt. Hon. Ernest Lapointe, 14 June 1938.

<sup>22</sup>NAC, F.R. Scott Papers, Scott to the editor, *Montreal Gazette*, 19 March 1937.

<sup>23</sup>*Ibid.*

<sup>24</sup>*Ibid.*

representatives on the Legislative Council, Scott adopted a similar line of argument. He concluded his letter on the following note:

It may be difficult for you to stand out as opposing this legislation, since that will appear to ignorant people to make you a supporter of Communism, but it seems to me there are times when it is the duty of public men to stand clear on fundamental issues of this character, and that in the long run they will be recognized as having been the true defenders of the commonwealth.<sup>25</sup>

It was advice that Scott would follow himself in his personal struggle against the Padlock Act, a struggle which would last twenty years.

It seems fitting that Frank Scott, along with Eugene Forsey, was one of the earliest supporters of the Canadian Civil Liberties Union (CCLU), the principal opponent of the Padlock Act in Quebec. The Union was founded in the spring of 1937 in response to "the threats to freedom of speech, press and public meeting, the right to a fair trial in open court, and freedom of the home from arbitrary search and interference, contained in the Padlock Act."<sup>26</sup> While membership in the CCLU consisted mainly of Liberals and members of the C.C.F., with some concerned citizens of no political affiliation, the Union maintained affiliation with over forty organizations, all unified in their opposition to the Padlock Act.<sup>27</sup> It was the CCLU, however, which mounted the most effective campaign against the Padlock Act; in fact, the CCLU was the only organization permitted to send a delegation to Ottawa to meet with the Minister of Justice to discuss the issue. Informing its members of the upcoming meeting on 30 March 1938, the CCLU *Bulletin* was optimistic, saying, "The Supreme Court judgment on the Alberta Press Bill, especially the judgement of Mr. Cannon, has given new hope to defenders of civil liberties throughout the Dominion. It has also called fresh attention to the Padlock Act . . . ." <sup>28</sup>

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<sup>25</sup>*Ibid.*, Scott to W.S. Bullock, M.P.P., 19 March 1937. Scott sent a version of this letter to every English member of the Legislative Council.

<sup>26</sup>Scott Papers, *Bulletin No. 1*, Canadian Civil Liberties Union, 2 February 1938.

<sup>27</sup>According to the Union's first *Bulletin*, forty-five groups supported the CCLU in its fight against the Padlock Act. Included were various religious organizations, youth and student groups, including, as well, a number of political interest groups.

<sup>28</sup>Scott Papers, *Bulletin No. 2*, 19 March 1938.

Although the Quebec government had been invited to send a delegation to participate in the meeting between the CCLU and the Minister of Justice it refused to attend. In Ottawa, the CCLU delegation, meeting alone with Lapointe, impugned the legitimacy of the Padlock Act on two grounds. First, the CCLU argued that the law curtailed basic civil liberties in Quebec; second, they argued that the law was of doubtful constitutional validity, conflicting with Dominion policy in relation to the criminal law. It was the opinion of the CCLU delegation that either the Act be disallowed by the federal government or, alternately, be referred to the Supreme Court for an advisory opinion regarding its constitutionality. Lapointe remained noncommittal. The meeting, held in private with the Minister, lasted two hours. It was to be the only meeting Ernest Lapointe would have with any delegation concerning the Padlock Act.

The options available to the government, should it choose to act, were straightforward: as the CCLU suggested either they could disallow the Padlock Act or, refer it to the Supreme Court. Interestingly, as early as 30 March 1937 J.S. Woodsworth had suggested either course of action in the House of Commons. Speaking to the Minister of Justice, Woodsworth had offered the following advice: "I recognize that disallowance may not be a very wise procedure. Yet the power of disallowance exists in Canada. But there is another course which might be adopted. The governor in council under the Supreme Court Act . . . has the power to refer any dominion or provincial legislation to that court for a test of its validity."<sup>29</sup> Stating what would become a common line of argument in the months to follow, Woodsworth declared that the government "should not hesitate to act when the rights and liberties of people resident in the province of Quebec . . . are imperilled."<sup>30</sup> In reply, Lapointe remarked, in what would become his common line of defense,

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<sup>29</sup>Canada, House of Commons, *Debates*, 1937, Vol. III, 2290-91. Woodsworth did not resist temptation, adding, "Seeing the government were so anxious to find out whether the social legislation enacted by the Bennett government was valid they might try to find out whether this law is valid," adding, "On unemployment insurance legislation the government immediately ran off to the supreme court and then carried it to the judicial committee of the privy council."

<sup>30</sup>*Ibid.*, 2291.

that "If, as the hon. member suggests, [the Padlock Act] is ultra vires, then the courts will so rule."<sup>31</sup> As far as the use of the disallowance power was concerned, Lapointe had the following to say: "I do not think that in a federation such as this the power of disallowance could easily be exercised by the central government. I believe the provincial legislatures feel that they are still supreme and sovereign within the sphere of their jurisdiction."<sup>32</sup> A few months later, as events unfolded in Alberta, he would no doubt regret having ever uttered such words. As Donald Creighton would later note, "No man was ever forced by circumstances to eat his words more quickly or more completely than Ernest Lapointe. He soon found that, if necessary, he could exercise the power of disallowance very easily indeed."<sup>33</sup>

Over a year later, on 30 May 1938, again in the House of Commons, Woodsworth continued to press the government to act. "I brought up this matter some fourteen months ago," began Woodsworth, "and the minister promised that he would take it under consideration."<sup>34</sup> Noting that the Minister of Justice had taken no action, Woodsworth renewed his plea that the government "refer this matter to the Supreme Court of Canada and thus give relief to a numerous class of the citizens of Canada."<sup>35</sup> According to a release from the Attorney General's department which Woodsworth read in the House, "raids under the 'padlock act' between November 9, 1937, and May 10, 1938, numbered 124; communist--or so-called communist--books seized, 532; copies of *Clarke* seized, 5,000; copies of the *Clarion* seized, 1500."<sup>36</sup> As Woodsworth reminded the House,

When it is remembered that not one of the persons or affected has yet been ever charged with any offense, let alone convicted, these are formidable totals. Twice every three days, for six months, the provincial police have

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<sup>31</sup>*Ibid.*, 2294.

<sup>32</sup>*Ibid.*

<sup>33</sup>Donald Creighton, *Canada's First Century* (Toronto: Macmillan of Canada, 1970), 229.

<sup>34</sup>Canada, House of Commons, *Debates*, 1938, Vol. IV, 3374.

<sup>35</sup>*Ibid.*, 3375.

<sup>36</sup>*Ibid.*, 3376.

carried out execution without due process of law; twenty times a month they have trampled on liberties as old as Magna Charta.<sup>37</sup>

Lapointe made no reply. Two days later, on 1 June 1938, the House recessed for the summer. The government had a little over a month before the deadline of 8 July 1938 would arrive--the last day possible to disallow the Padlock Act. As *Saturday Night* magazine commented to its readers, "There is not one chance in a thousand that the Act will be disallowed, but there are one thousand chances to one that between now and July 8 the fact that they could disallow it if they desired will be the most embarrassing thought in the minds of the King Government."<sup>38</sup>

### A Crisis of Liberalism

"Lapointe read over a draft recommendation regarding disallowance of the Padlock Act,"<sup>39</sup> recorded Mackenzie King in his diary on 5 July 1938. According to King, Lapointe recommended to Cabinet "that the Law not be disallowed nor referred to the Courts but left for individuals to test on a specific case."<sup>40</sup> In Council the next day Lapointe reviewed his recommendations; King's recollections of that meeting reveal the political motivations at work in Ottawa in the days before the final deadline for action. His diary makes it clear that with the exception of Lapointe, the remaining members of Cabinet were willing to consider either disallowing the Padlock Act or referring it to the Supreme Court. It was Lapointe--King's influential and powerful Quebec Lieutenant--who adamantly refused to adopt such a course. Noted King:

All, with the exception of Cardin, would have preferred a reference to the Supreme Court as to the constitutionality of the Act, and I think all would have been prepared to disallow it had it not been that it was clear that Lapointe would not go that far; also that its disallowance would be pretty cer-

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<sup>37</sup>*Ibid.*

<sup>38</sup>"No Disallowance," *Saturday Night*, 11 June 1938: 1.

<sup>39</sup>King Diary, entry of 5 July 1938.

<sup>40</sup>*Ibid.*

tain to bring on an election on that issue in Quebec, with a certain win for Duplessis.<sup>41</sup>

Here was the dilemma facing the federal government: unlike its handling of the situation in Alberta, the consequences of similar action where Quebec was concerned would only make matters worse for Ottawa--the federal Liberals' power base being centered in Quebec. In this case, a stronger and more powerful Union Nationale government under the guidance of the ultra-conservative Maurice Duplessis. "This would mean another great division in Canada," concluded King, who adopted the stance that "the unity of Canada was the test by which we should meet all these things."<sup>42</sup>

Lapointe offered a convenient escape route which King proved willing to use: "Lapointe made quite clear that the Act did not affect the rights of the people in any of the Province outside of Quebec itself, nor did it invade Federal jurisdiction."<sup>43</sup> In other words, since the Act did not threaten the interests of the whole country, nor in the Justice Minister's opinion clearly invade upon any federal field of jurisdiction, there was no need to disallow the Act. The only circumstances under which the government would disallow a provincial statute was in the case where the protection of the federal structure was at stake. "In the circumstances," explained King, "we were prepared to accept what really should not, in the name of Liberalism be tolerated for one moment--any interference with the freedom of speech, the freedom of the Press, freedom of religious belief, or freedom of thought."<sup>44</sup> King put on a brave front in his diary, commenting, "I personally would be quite prepared to fight a Federal battle on the issue, strongly denouncing the legislation of the Quebec Government. That legislation will lead to trouble in the end. It is repression of the kind which breeds and brings revolution."<sup>45</sup> Still, despite such brave words, King's conscience would not rest easy: "I think perhaps a wise decision has been made in refer-

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<sup>41</sup>*Ibid.*, entry of 6 July 1938.

<sup>42</sup>*Ibid.*

<sup>43</sup>*Ibid.*

<sup>44</sup>*Ibid.*

<sup>45</sup>*Ibid.*

ence to the present political situation in Canada but it is not a decision which does credit to Liberal thought, at a time when Liberalism is being crushed in other parts of the world."<sup>46</sup>

Cabinet realized that having disallowed the three Alberta Acts the year before, not to disallow the Padlock Act nor refer it to the Supreme Court would leave the government open to criticism. Still, under the circumstances, this was considered an acceptable--indeed inevitable--consequence of their decision. There were, however, certain differences between the Padlock Law and the disallowed Alberta statutes, differences which seemingly justified their decision regarding Quebec. According to a memorandum prepared for the Prime Minister, the "Alberta statutes were a flagrant invasion of Dominion sphere and interfered with institutions legally constituted under Dominion authority."<sup>47</sup> Although acknowledging the possibility that the Padlock Act might represent an invasion into the field of the federal criminal law, the memorandum explained that expert legal opinion was divided on the question. In essence, it "[m]ight be said that Alberta statutes trespassed on a field which was fenced, ploughed, cultivated and bearing a crop, while the Padlock law occupied a field which was still virtually unbroken soil, unfenced and without clearly marked boundaries."<sup>48</sup> It was a soothing analogy. Concluded the memorandum: "Although constitutional validity in question, government has always maintained (and still does) desirability of having constitutional conflicts resolved by the courts."<sup>49</sup> Lapointe's Report to the Governor General in Council, made public on 5 July 1938, would further develop this line of reasoning.

In his Report, Lapointe outlined at length the reasons why the government would not instigate any action against Quebec's Padlock Law, refusing to disallow the Act or submit it to the Supreme Court. After having examined the various provisions within the Act, Lapointe detailed the legal grounds upon which the CCLU had urged disallowance of

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<sup>46</sup>*Ibid.*

<sup>47</sup>NAC, King Papers, Memorandum on Alberta legislation, 1937, Disallowance and Reservation of, n.d., 15.

<sup>48</sup>*Ibid.*

<sup>49</sup>*Ibid.*



the Act and then proceeded to describe three circumstances where the government would intervene and disallow provincial legislation on the grounds of being *ultra vires*. They were: "(a) a clear and palpable attempt to invade the legislative field of the Dominion Parliament . . . ; or (b) injurious interference with Dominion property, interests or policies . . . ; or (c) conflict with Imperial interests or Dominion treaty obligations . . . ." <sup>50</sup>

Lapointe remarked that "the grounds upon which the petitioners urge disallowance of the Padlock Act . . . involve denial of the authority of the Legislature of Quebec to enact the statute in question, and also an attack upon the quality of the legislation as being destructive of elementary principles and processes of British constitutional government."<sup>51</sup> Lapointe stated his unwillingness to exercise the power of disallowance "if the measure complained of be not open to objection upon any of the scores herein indicated, and assuming it to be otherwise *intra vires* of the Provincial Legislature . . . ." <sup>52</sup> In his opinion, it would be "in opposition to the fundamental principles of local autonomy, to pass judgment upon the wisdom or propriety of a measure passed by the local legislature in the competent exercise of its assigned legislative powers, and for which it is the responsible to its political judges, the electors of the Province."<sup>53</sup> Showing deference to the Quebec Legislature, Lapointe added that, in his opinion, it appeared that only a few gentlemen in Montreal had petitioned against the Act, commenting that "the numerous protests against the Act which have been received have come almost exclusively from persons in other provinces unaffected by the law."<sup>54</sup>

Surprisingly, Lapointe declined the opportunity to discuss the two grounds upon which the legitimacy of the Act had been questioned by the Civil Liberties Union. First, the allegation that the Act overthrew basic civil liberties in Quebec; second, that the Act invaded the legislative jurisdiction of the federal government in relation to the criminal

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<sup>50</sup>Lapointe Papers, Report of the Minister of Justice, 5 July 1938.

<sup>51</sup>*Ibid.*

<sup>52</sup>*Ibid.*

<sup>53</sup>*Ibid.*

<sup>54</sup>*Ibid.*

law. Interestingly, the Minister found it sufficient to dismiss such grounds without comment, saying only,

Each of these submissions raises a constitutional question which is not free from difficulty; but as the legislation in question does not fall within the criticism of any of the three cases referred to above in which the propriety of the exercise of the power of disallowance is recognized and confirmed by a stream of precedents, the undersigned refrains from expressing any opinion upon the constitutional question so raised.<sup>55</sup>

Any questions concerning the validity of the Act may be more conveniently and satisfactorily determined by the Courts, concluded the Minister.

Turning to the alternate action urged by petitioners against the Act, a reference to the Supreme Court of Canada, Lapointe dismissed such action as inappropriate. Stated Lapointe: "The petitioners state that it is difficult under the terms of that Act and of other legislation in force in the Province of Quebec for the ordinary citizen to raise the question of the constitutionality of this Act in the Courts."<sup>56</sup> Continued the Minister: "They do not, however, state that it is not possible for any such person to challenge the validity of the Act in the Courts, and the undersigned is not persuaded that means may not be found by which the Courts could be afforded an opportunity to determine whether or not the said Act is *ultra vires* of the legislature."<sup>57</sup> In Lapointe's opinion, "it would be the preferable course that any question as to the validity of the Padlock Act should be determined in a concrete action, rather than upon the submission to the Supreme Court of Canada of an abstract question."<sup>58</sup> Lapointe, interestingly, did not see any reason why the CCLU itself could not find the means to forward a test case themselves.

While it is perhaps tempting to conclude that as Minister of Justice, Ernest Lapointe was adopting narrow legal arguments to avoid a distasteful responsibility on the part of the federal government--taking action against Quebec's Padlock Act--it can be ar-

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<sup>55</sup>*Ibid.*

<sup>56</sup>*Ibid.*

<sup>57</sup>*Ibid.*

<sup>58</sup>*Ibid.*

gued that he was maintaining a consistent policy in deciding when to recommend the disallowance of a provincial statute. As Gerard La Forest of the Department of Justice has argued, Lapointe "considered that Acts within provincial legislative competence should not be disallowed unless they conflicted with Dominion interests or policies."<sup>59</sup> Lapointe, according to La Forest, "consistently refused to disallow statutes simply because he considered them to be unwise, unjust or inexpedient"<sup>60</sup>--three criteria Quebec's Padlock Law certainly met with little difficulty. Almost without exception, the course of action preferred by Lapointe as Minister of Justice was to have any questionable provincial statute brought to the Courts by private litigation, and not by the federal government.

When the Liberals returned to power in 1935, for example, they were almost immediately faced with petitions demanding the federal government take action against Ontario's *Power Commission Act, 1935*<sup>61</sup>. As was the case with the Padlock Act, critics charged that the Ontario Act was *ultra vires* Queen's Park. Lapointe was not swayed by such arguments: "With regard to the allegation the said Act is *ultra vires* the Legislature of the Province, the undersigned is of opinion that this allegation, if well founded, would not constitute a sufficient ground for disallowance."<sup>62</sup> Conceding that there were

cases in the earlier years of Confederation in which Acts were disallowed on the ground that they were *ultra vires*, but the more modern view is that if the Act be questionable only as to its validity and not on the ground that it interferes with any Dominion policy or interest, the question of its validity should be left to the determination of the courts.<sup>63</sup>

In the final analysis, "To disallow a provincial statute solely upon the ground that it is *ultra vires* would be to subject the provinces to the findings of the law officers of the Crown

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<sup>59</sup>G.V. La Forest, *Disallowance and Reservation of Provincial Legislation* (Ottawa: Department of Justice, March 1955), 75.

<sup>60</sup>*Ibid.*

<sup>61</sup>*Statutes of Ontario*, 25-26 Geo. V, 1935, c. 53.

<sup>62</sup>Lapointe Papers, Report of the Minister of Justice, 30 March 1936.

<sup>63</sup>*Ibid.*

upon the questions of law involved and deprive them of the right to have such questions judicially determined . . . ."64

Only in the most extraordinary cases did Lapointe believe that the government should intervene. Such instances, however, were fortunately rare. The actions of the Alberta government, enacting statutes to implement Social Credit policies which patently invaded federal jurisdiction, was an example of such a situation. Concerning Alberta, Lapointe had made the following statement: "The statutes of Alberta in question constitute an unmistakable invasion of the legislative field thus assigned to Parliament," conflicting "with Dominion laws and virtually supplant Dominion institutions designed by Parliament to facilitate the trade and commerce of the whole Dominion."<sup>65</sup> Lapointe concluded his argument, saying

While the undersigned is of opinion that no project or policy of a Provincial legislature should be interfered with by exercise of the power of disallowance merely on the ground that measures to promote such project or policy are of doubtful constitutional validity, a distinction is to be made where the legislature deliberately attempts to interfere with the operation of Dominion laws and to substitute laws and institutions of its own for those legitimately enacted and organized by Parliament and this is particularly true where the legislature has denied recourse to the courts of justice.<sup>66</sup>

The Padlock Law, in comparison, did not interfere with federal jurisdiction, although it was certainly objectionable on other grounds--albeit none worthy of disallowance according to the Minister. As Minister of Justice, Lapointe did not deem it advisable under such circumstances for the federal government to consider the legislation's merits and justice; in so doing, substitute the federal government's judgment over that of the local legislature in a matter which was *prima facie* a provincial matter. Despite the political cost of such a decision, Lapointe had seemingly pursued a consistent course, faithful to previous precedents.

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<sup>64</sup>*Ibid.*

<sup>65</sup>Lapointe Papers, Report of the Minister of Justice, 10 August 1937.

<sup>66</sup>*Ibid.*

Still, the question arises: Should precedent have been followed under the circumstances? It was a question which would not go away.

### Public Reaction vs. Government Justification

As Arthur Lower commented in his classic text, *Colony to Nation*, had Lapointe "disallowed the Padlock Act, he (and Mr. King) would have been represented as friends of atheistic communism, the enemies of true religion and Quebec."<sup>67</sup> Instead, Lapointe was viewed in English Canada as a Minister of Justice willing to protect the sacredness of property by disallowing the controversial Alberta statutes but, at the same time, a Minister willing to allow the rights of the individual to be trampled upon. It was not an enviable reputation, nor one easy to discard. But as the following analysis will show, public reaction to the government's decision was mixed.

In contrast to its earlier stance calling for disallowance, the *Vancouver Sun* applauded Lapointe's decision not to intervene in Quebec. Said the *Sun*: "Mr. Lapointe is quite right in recommending that the courts be employed to settle this question on the basis of concrete cases brought before them."<sup>68</sup> The *Winnipeg Free Press*, however, was not as approving: "The assumption that this is a purely provincial matter in which there is no Dominion interest is one that will be rejected by a very great number--perhaps a majority--of the people of Canada."<sup>69</sup> In marked contrast, the *Toronto Globe and Mail* supported Lapointe's decision, saying, "In principle the law is not British, and therefore has not a proper place in this country, but this of itself does not make it illegal."<sup>70</sup> The *Globe and Mail*, it should be added, supported Lapointe's suggestion that the validity of the Padlock Law should be tested in the courts by a private party.

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<sup>67</sup>Arthur R.M. Lower, *Colony to Nation* (1946; reprint, Toronto: McClelland and Stewart, 1977), 532.

<sup>68</sup>The *Vancouver Sun*, Saturday, 9 July 1938, 4.

<sup>69</sup>The *Winnipeg Free Press*, Friday, 8 July 1938, 13.

<sup>70</sup>The *Toronto Globe and Mail*, Friday, 8 July 1938, 6.

Not all commentators, however, were as supportive as either the *Vancouver Sun* or Toronto's *Globe and Mail*. In the *Canadian Forum* Eugene Forsey was quick off the mark to condemn the government's decision, again drawing a comparison with Alberta: "When it is a matter of the liberties (and property) of banks, insurance companies and trust companies in Alberta, they are as brave as lions. But when it comes to defending the liberties of ordinary citizens in Quebec, all their courage oozes away."<sup>71</sup> Not surprisingly, Forsey attacked the constitutional grounds and principles Lapointe employed as justification for his decision. In agreement with the CCLU, Forsey argued that disallowance was justified on the grounds that the Padlock Act represented an attempt on the part of the Quebec government to interfere with Dominion policy in matters of criminal law, reimposing restrictions from the repealed section 98 of the *Criminal Code*. Likewise, Forsey rebutted Lapointe's arguments against submitting an 'abstract question' to the Supreme Court. "He has evidently changed his mind since 1936," suggested Forsey, "when he submitted Mr. Bennett's New Deal Acts."<sup>72</sup>

*Saturday Night* magazine informed its readers that political motivations were a prime consideration as Ottawa decided what to do with the Padlock Act. According to this analysis, the government realized that it "would have lost more votes in Quebec by disallowing the measure than it would have gained elsewhere."<sup>73</sup> "This is obviously not the kind of consideration that can be put forward in a state document," commented the magazine, "but even so we wish [Lapointe] had put a little more stress upon the general desirability of national unity . . ."<sup>74</sup> The article also criticized Lapointe for commenting, nonchalantly, that the Padlock Act affected only a small number of people within the province and that criticism of the Act outside of Quebec was negligible. It was a charge that the CCLU would also make against the Minister.

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<sup>71</sup>Eugene Forsey, "Mr. Lapointe and the Padlock," *Canadian Forum* 18 (August 1938): 148.

<sup>72</sup>*Ibid.*, 150.

<sup>73</sup>"Mr. Lapointe Turns the Key," *Saturday Night*, 16 July 1938: 2.

<sup>74</sup>*Ibid.*

Under the circumstances it was natural that the Canadian Civil Liberties Union respond to the decision announced by the Minister of Justice. In a letter to Lapointe, the CCLU thanked the Minister for considering the Union's petition against the Padlock Act, although expressing disappointment with the outcome. The letter expressed a number of areas of disagreement between the CCLU and the government over its decision. The CCLU argued that there was in fact no precedent for not disallowing the Act, stating that "there is no previous instance of refusal to disallow a provincial statute which violates the primary guarantees of personal freedom that underlay all British constitutional law and practice."<sup>75</sup> The CCLU argued, as well, that the disallowance "of certain Alberta legislation with your refusal to disallow still more iniquitous Quebec legislation creates in the public mind an impression of gross discrimination . . . ."<sup>76</sup> Noting that the Alberta legislation could have easily been tested by the courts by a private party, the letter pointed out that, in that instance, the government had been willing to go to the Supreme Court. In contrast, "whereas the Quebec legislation bears most heavily upon people who are far from wealthy, but whom you invite to suffer injustices unless and until they can raise out of their scanty resources the large sums needed to carry this legislation as far as the Privy Council."<sup>77</sup> The CCLU repeated this argument in its fourth *Bulletin* to its members, albeit in stronger terms: "This means, of course, that any victim of this legislation who is too poor to pay the costs of an action which might end only in the Privy Council, must suffer in silence until the Attorney-General is foolish enough to proceed against someone of greater wealth, or until an independent group like the Civil Liberties Union undertakes to sponsor his cause."<sup>78</sup>

Lastly, the letter criticized Lapointe for suggesting that since the Padlock Act was apparently supported by a majority of Quebecers, and that protest against the Act came

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<sup>75</sup>Lapointe Papers, Frank W. Beare, Acting Secretary of the Canadian Civil Liberties Union to Ernest Lapointe, 16 July 1938.

<sup>76</sup>*Ibid.*

<sup>77</sup>*Ibid.*

<sup>78</sup>Scott Papers, *Bulletin No. 4*, 9 July 1938.

predominantly from English Canada, the government was simply respecting the political autonomy of the local legislature:

On this we desire to comment that you are a Minister of the Government of Canada, not of any one province, and that you have an obligation to heed protests of public-spirited citizens from any part of the Dominion. Inhabitants of other provinces who have associated themselves with our protest have done so as Canadians, who are desirous that fellow-Canadians should not suffer wrong, even if they happen to dwell in a different province.<sup>79</sup>

Moreover, "the consent of a local majority cannot be held to override the traditional rights of English citizens, won and maintained through centuries of struggle against the tyranny of the executive."<sup>80</sup>

In defence of the government's decision it is perhaps best to consider a letter written by Mackenzie King a few weeks after Lapointe's Report was made public. The contents of this letter, when compared to the criticism outlined in the CCLU's letter, clearly indicate the extremes from which the government and its critics viewed the Padlock Act, both adopting the highest moral ground in the process. Conceding that there "can be no doubt about the constitutional power of the Governor-in-Council to disallow any act of a provincial legislature," King stated that "certain traditions have grown up regarding the character of legislation, which may appropriately be disallowed."<sup>81</sup> King argued that unless disallowance was exercised with restraint, not to mention respect for local government, it was inevitable that the use of the power would lead to strong resentment in the affected province. Ideally, in circumstances where there was no immediate urgency, the preferred course would be to see the legislation nullified, "not by disallowance, which, despite its judicial aspects, is fundamentally a political act, but by the law courts, if the legislation is not within the legislative jurisdiction of the province, or by the action of the voters at the polls, if the law, though within provincial jurisdiction, incurs the general disap-

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<sup>79</sup>Lapointe Papers, Beare to Lapointe, 16 July 1938.

<sup>80</sup>*Ibid.*

<sup>81</sup>King Papers, King to Lewis V. Smith, 23 July 1938.



proval of the electorate."<sup>82</sup> Listing Lapointe's three criteria for federal disallowance, King noted that the Padlock Law did not fall within any of the three classes; as a result, the government took no action.

As Minister of Justice, Lapointe did not involve himself with the question of whether or not the Padlock Act was within the legislative competence of Quebec, preferring to leave that question for the courts to decide. King supported this, saying that while the Padlock Act may "be beyond the constitutional jurisdiction of the province . . . it was preferable that any question as to the validity of the Padlock Law should be determined by the courts in a concrete case."<sup>83</sup> To have disallowed the legislation, argued King, would have prevented the courts from the opportunity of determining its validity. Said King: "The fact that the disallowance of a statute obliterates and annuls it, and removes it from the cognizance of the law courts, constitutes a further objection to its exercise in a case where the constitutional validity of the statute is in doubt."<sup>84</sup>

Surprisingly, nowhere in the letter did King attempt to explain the reasons why the government did not forward a reference to the Supreme Court on the Padlock Act. Lapointe had made passing reference in his Report to the fact that the government preferred concrete cases to 'abstract questions' as justification for the federal government not initiating a reference case. However, nowhere did Lapointe, or King for that matter, elaborate upon the reasons why the government maintained this position. One had only to consider the New Deal or Alberta reference cases--two recent instances where the government had no difficulty whatsoever in forwarding 'abstract questions' to the Supreme Court--to realize that there was a precedent for this type of action. Here, the issue of precedent was not convenient for the federal government--and was conveniently ignored. While it is obvious that the federal government could have proceeded with a reference case to the Supreme

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<sup>82</sup>*Ibid.*

<sup>83</sup>*Ibid.*

<sup>84</sup>*Ibid.*

Court if it had wanted, it is equally clear that the government preferred not to exercise this option.

The federal government also conveniently ignored the thrust of Duff's and Cannon's recent judgments in the *Alberta Press Bill* case that it was beyond provincial jurisdiction to interfere with political discourse. As Duff had remarked, free political discussion was "the breath of life of parliamentary institutions."<sup>85</sup> And Cannon's statement that "Freedom of discussion is essential to enlighten public opinion in a democratic State; it cannot be curtailed without effecting the right of the people to be informed through sources independent of the government concerning matters of public interest,"<sup>86</sup> most certainly had unmistakable relevance in Quebec. Unquestionably it was beyond serious argument that the Padlock Act curtailed free political discussion in the province. One need only to recall the comment made by R.L. Calder, one of the founders of the CCLU and former Crown Prosecutor of Montreal, that "the definition of Communism reposed in the cranium of the Attorney-General"<sup>87</sup> to understand just how dangerous *any* political discussion could be in Quebec at the time.

If the government arguably had precedent on its side when it came to the question of disallowance, the same cannot be said when it came to the issue of a government-sponsored court case. Here, the critics were certainly correct in suggesting that the federal government was motivated by political expediency. C.P. Wright, for one, argued that the federal government was being selective in the precedents it chose, presenting the compelling argument that the federal government had ample legal precedents for it to submit a reference case under the present circumstances. Writing in the *Canadian Forum*, Wright argued convincingly that there were numerous constitutional cases (which he details) "taken by Sir John Macdonald for the settlement of some of the most serious constitutional

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<sup>85</sup>[1938] S.C.R. 100 at 133.

<sup>86</sup>*Ibid.*, at 145, 146.

<sup>87</sup>Cited in Forsey, *A Life on the Fringe*, 190.

issues of his day."<sup>88</sup> Asks Wright at the close of his article: "With these precedents thus laid before him, will Mr. Mackenzie King take similar action upon the issue of the Padlock Act?"<sup>89</sup> The question, of course, was intended to be rhetorical.

In a confidential memorandum to the Prime Minister, the case to be made for or against a reference to the Supreme Court was outlined--and the reasoning was entirely political. On the one hand, the government was aware that a "reference to the Supreme Court would answer, in an effective way, the criticism in Western Canada that the government had discriminated against Alberta."<sup>90</sup> On the other hand, the government, too, was aware that were a reference case to proceed, Duplessis might represent the proposal as "indirect support for communism . . . an attack on provincial autonomy . . . [or] an attack on religion."<sup>91</sup> Any one of these three charges the government would have had difficulty defending itself against in Quebec. In the final analysis, the government preferred to leave it up to a private individual to mount a case against the Padlock Act, all the while cognizant of the grave difficulties for anyone to do so in a province where Maurice Duplessis was Attorney General.

### A Fitting Postscript

Despite the almost insurmountable obstacles preventing a private party from mounting a court case, such a case arose in 1939. The case originated as a result of a police order directing Louis Fineberg, who rented a dwelling to his son-in-law, Muni Taub, to evict Taub on the grounds that he was using the premises for illegal purposes. Realizing that if he did not take action, he would have his premises padlocked, Fineberg attempted to have Taub's lease cancelled in a Quebec Superior Court. In his defense, Taub conceded he

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<sup>88</sup>C.P. Wright, "To Finance Padlock Appeals, *Canadian Forum* 19 (October 1939): 220.

<sup>89</sup>*Ibid.*

<sup>90</sup>King Papers, Notes on the Padlock Law, 19 April 1938.

<sup>91</sup>*Ibid.*

was using the rented premises in contravention of the Padlock Act, but argued that he was involved in no illegal activity since the Act was invalid. Not surprisingly, the CCLU provided counsel for Taub's defense. On 31 May 1939, Chief Justice Greenshields of the Quebec Superior Court handed down his decision in the case of *Fineberg v. Taub*,<sup>92</sup> the subject of his decision being the constitutionality of the Padlock Act.

In his decision, Chief Justice Greenshields ruled that the Padlock Act dealt "entirely, to the exclusion of all others, with property and civil rights in this Province, as stated in par. 13 of sec. 92 of the British North America Act."<sup>93</sup> The Chief Justice supported this argument by saying that the "underlying purpose of the incriminated statute is to protect the Province of Quebec against communistic propaganda. Nowhere in the Act is a crime or criminal offense created. The purpose of the Act is to prevent and not to punish."<sup>94</sup> According to this logic, the purpose of the Act, to prevent the use of any house for communist or bolshevist purposes, was a legitimate aim of the Quebec Legislature in its attempt to curtail activities it deemed illegal. Accordingly, the Act did not encroach upon federal jurisdiction, namely, the creation of a criminal offense and punishment. Stated Greenshields on the Padlock Act: "[This] is clearly a declaration affecting the use of property within this Province."<sup>95</sup>

As far as the CCLU's assertion that the Act violated the constitutional and civil rights of Quebec citizens, in particular freedom of speech and free public discussion, Greenshields dismissed such arguments as unfounded. According to the learned judge, "It may be unfortunate that the legislators find it necessary sometimes, for just reason, and for the benefit of the state generally, to restrain what some citizen may consider his rights or liberties."<sup>96</sup> Continued Greenshields: "I fail to find in the statute any interference with free-

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<sup>92</sup>(1939) Que. S.C. 233.

<sup>93</sup>*Ibid.*, at 236.

<sup>94</sup>*Ibid.*, at 237.

<sup>95</sup>*Ibid.*

<sup>96</sup>*Ibid.*, at 242.

dom of speech . . . ."97 That Greenshields completely ignored the decision of the Supreme Court of Canada in the *Alberta Press Bill* is not to be doubted. Adopting the strictest literal interpretation of the Act possible, Greenshields' opinion completely ignored the pith and substance of the Padlock Act; his opinion, as a result, is nothing short of amazing.

In an article entitled "Land of Padlock's Pride," Eugene Forsey condemned Chief Justice Greenshields' decision in *Fineberg*, examining it--and disagreeing with it--section by section. As usual, his comments were tart and to the point. "The Chief Justice deals point by point with the reasons advanced by the Civil Liberties Union for considering the Act ultra vires," comments Forsey, "and rejects them all, sometimes rather summarily."<sup>98</sup> Noting that Greenshields found nothing in the Padlock Act to indicate that it conflicted with any Dominion Act, Forsey suggests that "The Act repealing section 98 of the Criminal Code has evidently escaped his notice."<sup>99</sup> Granting that the Act did not, strictly speaking, create a criminal offense as Greenshields himself stated, Forsey agrees that formally this is true. Still, states Forsey, "the mere fact that a provincial government and legislature say an Act is 'legislation in relation to property and civil rights' does not make it so."<sup>100</sup> Turning to the issue that the Padlock Act violated the constitutional rights and civil liberties of Quebec citizens, Forsey begrudgingly admires Greenshields remarkable ability to circumvent this crucial question; as well, the Supreme Court's decision in the *Alberta Press Bill* case. Says Forsey: "It is difficult to resist the conclusion that Judge Greenshields has not read the judgment."<sup>101</sup> Despite the negative outcome of the case, and Forsey's immediate condemnation of the opinion aside, the CCLU never mounted an appeal, most likely due to a lack of funds.

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<sup>97</sup>*Ibid.*

<sup>98</sup>Eugene Forsey, "Land of Padlock's Pride," *Canadian Forum* 19 (July 1939): 110.

<sup>99</sup>*Ibid.*

<sup>100</sup>*Ibid.*

<sup>101</sup>*Ibid.*, 111.

Eighteen years later, in the case of *Switzman v. Elbling*,<sup>102</sup> the Supreme Court of Canada overruled *Fineberg v. Taub*. According to Douglas Sanders, professor of law at the University of British Columbia, *Switzman* "was deliberately set up to test the validity of the [Padlock Act], [t]he owner of a house [having] brought a civil suit against a tenant to have a lease cancelled on the basis that the tenant was using the house in a manner contrary to the provincial law."<sup>103</sup> All similarity to *Fineberg* ends at this point; in marked contrast to Chief Justice Greenshields, Chief Justice Kerwin stated that the Padlock Act "is legislation in relation to the criminal law over which, by virtue of head 27 of s. 91 of the *British North America Act*, the Parliament of Canada has exclusive legislative authority."<sup>104</sup> Agreeing with Kerwin, Justice Nolan added

I am unable to agree that the legislation under attack is purely and simply to determine the civil consequences of a criminal act. Clearly it affects the use of property within the Province, but, in my view, it is not related to property and civil rights or to matters of a local or private nature in the Province, but its true nature and purpose is the suppression of communism by creating a new crime with accompanying penal provisions.<sup>105</sup>

Justice Cartwright, too, declared the Padlock Act invalid *in toto*, concluding "It is legislation in relation to what is conceived to be a public evil not in relation to civil rights or local matters."<sup>106</sup> Only Justice Taschereau dissented from the view that the Padlock Act interfered with the federal government's jurisdiction to regulate the criminal law.<sup>107</sup>

A minority of the Court held the statute invalid on an additional ground, arguing that it attempted to control freedom of speech. Justice Rand, along with Kellock and Ab-

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<sup>102</sup>[1957] S.C.R. 285. Present: Kerwin C.J. and Taschereau, Rand, Kellock, Locke, Cartwright, Fauteux, Abbott and Nolan JJ.

<sup>103</sup>Douglas Sanders, "Law and Social Change: The Experience of F.R. Scott," *On F.R. Scott*, eds. Sandra Djwa and R. St J. Macdonald (Kingston: McGill-Queen's University Press, 1983): 128.

<sup>104</sup>*Ibid.*, at 288.

<sup>105</sup>*Ibid.*, at 314.

<sup>106</sup>*Ibid.*, at 317.

<sup>107</sup>Taschereau dissented from the majority viewpoint, agreeing with Greenshields that the law was intended to suppress conditions favouring the development of communism or bolshevism by controlling properties against illegal uses made of them. In his opinion the Padlock Act was not criminal law, but legislation dealing with property and civil rights.

bott, echoed the thoughts of Duff and Cannon in the *Alberta Press Bill* case delivered twenty years earlier, commenting that while the Padlock Act attempted to prevent the spread of communism or bolshevism, the Act "could just as properly been the suppression of any other political, economic or social doctrine or theory . . . ." <sup>108</sup> His point--one that the CCLU had argued for years--had finally gained the recognition it long deserved. As Rand stated, the aim of the statute is "to prevent what is considered a poisoning of men's minds, to shield the individual from exposure to dangerous ideas, to protect him, in short, from his own thinking propensities." <sup>109</sup> Despite objections of Premier Duplessis to the contrary (not to mention Greenshields in his decision), the Padlock Act did not represent an attempt to regulate property and civil rights under section 92(13); nor could it be justified as a matter of a purely local or private nature under section 92(16). Quebec was attempting to hide behind the cloak of provincial jurisdiction when in fact it was curtailing the liberties of its citizens. Like the *Alberta Press* case, decided almost twenty years earlier, the Supreme Court once again found it necessary to uphold freedom of speech against the actions of a provincial Premier intent on achieving certain political ends.

It had taken twenty years to declare the Padlock Act unconstitutional. Fittingly, Frank Scott was one of the counsel to argue against the statute in the Supreme Court, ending the personal battle against the Act begun in 1937. <sup>110</sup> Certainly no one--not Ernest Lapointe or Mackenzie King--could have predicted that it would have taken so long for the courts to rule against the Act; it is not a fact that either would have been particularly proud of had either been alive to read the Supreme Court's decision. Maurice Duplessis,

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<sup>108</sup>*Ibid.*, at 305.

<sup>109</sup>*Ibid.*, at 306.

<sup>110</sup>Gerald Le Dain was certainly correct when he spoke of Scott's personal courage in acting as defence in *Switzman*: "It is difficult for someone who did not live in Quebec at that time to appreciate the psychological intimidation that was created by the Duplessis regime, and the determination that it took to challenge Duplessis in such a direct manner." Gerald Le Dain, "F.R. Scott and Legal Education," *On F.R. Scott*, 114. For an interesting account of Scott's involvement in *Switzman*, I recommend Sandra Djwa, *A Life of F.R. Scott: The Politics of the Imagination* (Toronto: McClelland and Stewart, 1987), 297-301.

however, who was still alive, could not have been greatly upset by the Court's ruling. After all, the Padlock Act had remained on the statute books for twenty years undisturbed. In that time it is almost impossible to calculate the suffering that occurred in his lengthy crusade against communism and other purported evils. One can only wonder if the injustices of the Padlock Act could have been brought to an end sooner, had the federal government been willing to submit an 'abstract question' to the Supreme Court of Canada. Under the circumstances, waiting twenty years for a 'concrete case' to reach the highest court seems an unnecessary delay. The lengthy history of the Padlock Act--in particular the federal government's reluctance to challenge the legitimacy of the Act--is illustrative of circumstances where the political use of a reference case to the Supreme Court should have ensued but did not. All that can be gleaned from this unfortunate episode is that the federal government bowed to political expediency when it could have exerted leadership as thousands of Canadians in various petitions had urged it to do.



## Chapter 6

### An End to Overseas Appeals

As discussed in the introduction to Chapter Three, the failure of the New Deal led to a constitutional crisis in Canada. Legal restrictions on Parliament's ability to legislate economic, social and industrial policies on a national scale brought about paralysis of the federal government in these fields. In Ottawa, the question most frequently asked after the Privy Council handed down its New Deal decisions was what to do now. Two options were cited: either seek revisions to the B.N.A. Act to allow Ottawa jurisdiction in these areas or, alternately, abolish overseas appeals to the Privy Council. Although the former was soon discarded as unworkable, the latter would become the basis for further discussion as commentators began to realize that the present constitutional impasse was not the result of any patent defect in the B.N.A. Act as it was drafted. Instead, many were beginning to debate whether or not fault lay with the Privy Council and its judicial interpretation of the B.N.A. Act. Under such circumstances, it seems natural that the drive to end overseas appeals gained increased momentum after 1937.

Before any action could be taken by the federal government to facilitate discussion on whether or not to abolish appeals to the Privy Council, the King administration found itself facing two urgent constitutional crises back to back: one in Alberta caused by William Aberhart; the other in Quebec brought about by the actions of Maurice Duplessis. Both situations, discussed in Chapters Four and Five respectively, required the immediate attention of the federal government. Only afterwards could it seriously consider the appeals structure in constitutional and civil cases. In the interim, the groundwork for such discussions had been laid by C.H. Cahan, former Minister of State in the government of R.B. Bennett, who formulated a private member's bill designed to abolish overseas appeals.

While Cahan's endeavour will be the primary focus of this chapter, it is useful to examine the other option considered but immediately discarded: amendment to the B.N.A. Act. Only by understanding the pitfalls of this approach, can we appreciate the difficulties inherent in the second, more viable approach, an end to the Judicial Committee of the Privy Council as the final court of appeal for Canada.

### **The First Option: Amendment to the B.N.A. Act**

The ideal of a constitutional conference to discuss the terms of the B.N.A. Act was anything but a new idea. It was a notion that had been discussed time and time again in Ottawa and the various provincial capitals. The thought of getting ten governments to sit down and discuss revision to the B.N.A. Act was a formidable challenge, to say the least. However, the Privy Council's New Deal decisions acted as a powerful catalyst for renewed discussion on this timeworn topic. In the House of Commons on 1 February 1937, just days after the Privy Council's rulings were announced, Major James William Coldwell, C.C.F. member for Rosetown-Biggar, made such a proposal. Calling for a special committee of the House to recommend amendments to the B.N.A. Act, Coldwell's proposal highlighted not only the need for action, but the inherent difficulty in seeking constitutional amendment.

Coldwell summarized the effect of the recent Privy Council decisions, saying, "Canada finds herself definitely unable to enact progressive social legislation on a national scale through a national parliament, and thereby a situation of national concern and emergency is created."<sup>1</sup> While few disagreed with his analysis of the constitutional dilemma Canada was in, his proposal that a committee be formed that would discuss the B.N.A. Act and perhaps meet with provincial representatives met skepticism. Commenting that such a committee had been formed in 1935 and had submitted its report only to call for a Do-

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<sup>1</sup>Canada, House of Commons, *Debates*, 1937, Vol. I, 425.

minion-Provincial conference, Ernest Lapointe wondered aloud about what yet another committee could do: "What could such a committee do except to read [Supreme Court and Privy Council] decisions! It could not define powers and jurisdiction other than as they exist and as they have been defined by the courts."<sup>2</sup>

The Minister of Labour, Norman Rogers, pointed out another fundamental flaw in Coldwell's proposal. While a committee could certainly talk about revisions, noted Rogers, there was no provision for amendment of the B.N.A. Act within the Act itself. In other words, before any comprehensive amendments could be approved redistributing legislative powers between Ottawa and the provinces, there would have to be put in place a mechanism for securing the extensive amendments that Coldwell suggested were required. Whether Ottawa could act alone or must act in conjunction with the provinces in seeking any such amendment, or amendments, was yet another matter which would have to be determined. This, in turn, would naturally raise the issue of provincial rights; in the process, the compact theory of Confederation. As the federal government's experience with the New Deal indicated, the provinces did not take kindly to the idea of giving up *any* jurisdiction to Ottawa.<sup>3</sup> Moreover, any important constitutional amendment once determined would have to be secured from an act of the British Parliament based upon a formal request from Canada, representing yet another hurdle.<sup>4</sup> Under the circumstances, it is not surprising that members of the House, using debate on Coldwell's proposal as an opportunity to discuss the failed New Deal, criticized the proposal as unworkable.

Coldwell, listening to the criticism of his proposal grow greater and greater, conceded to the House: "I am not so much interested . . . in the constitutional and legal as-

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<sup>2</sup>*Ibid.*, 434.

<sup>3</sup>For example, it took the King government three years to secure provincial agreement regarding an amendment to the B.N.A. Act concerning unemployment insurance. See Paul Gerin-Lajoie, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press), 104-109.

<sup>4</sup>The B.N.A. Act was amended ten times between 1871 and 1931; each time circumstances leading to the amendment were markedly different. Again, see Gerin-Lajoie's *Constitutional Amendment in Canada*.

pects of this particular problem as in the social and economic situation that has to be dealt with and remedied."<sup>5</sup> Here, he was not alone despite his motion being defeated on the same day that it had been introduced. In the months to follow, calls for government action, similar to Coldwell's, were frequent. However, emphasis began to switch from suggestions for revisions to the B.N.A. Act to calls for an end to overseas appeals to the Privy Council. Joseph Thorson, Liberal MP for Selkirk, for one, argued that overseas appeals "are now an anachronism," contrary "to the asserted principle of the British constitution--the right and duty of all people living under it to determine their own affairs without any hindrance or control by an extraneous body."<sup>6</sup> Moreover, in Thorson's opinion it would not "be sufficient to simply abolish appeals . . . for the harm which these decisions have done will remain."<sup>7</sup> How such harm could be rectified he did not say. For the government, despite well-meaning advice from Coldwell and Thorson, it was difficult to decide exactly what should be done to remedy the situation.

The strategy--if it can be called such--that the King government ultimately adopted in 1937 was to authorize a Royal Commission to look into dominion-provincial relations. The mandate given the Commission was remarkably broad, calling for "a re-examination of the economic and financial basis of Confederation and of the distribution of legislative powers in the light of the economic and social developments of the last seventy years."<sup>8</sup> Moreover, the five Commissioners selected were to make recommendations as appropriate.<sup>9</sup> Three years later, the Rowell-Sirois Commission as it came to be known, handed

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<sup>5</sup>*Ibid.*, 461.

<sup>6</sup>Canada, House of Commons, *Debates*, 1937, Vol. III, 2582.

<sup>7</sup>*Ibid.*, 2586.

<sup>8</sup>King Papers, P.C. 1908, 14 August 1937.

<sup>9</sup>The five Commissioners originally appointed included: Newton W. Rowell, Chief Justice of Ontario; Thibaudeau Rinfret, Supreme Court of Canada Justice; John Dafoe, editor of the *Winnipeg Free Press*; Robert MacKay, professor of government at Dalhousie University; and Henry Angus, professor of economics at the University of British Columbia. Owing to poor health, Justice Rinfret later resigned and was replaced by Joseph Sirois, professor of law at Laval University.

down its findings. It was diplomatic in its terms when it described the role of the Privy Council in Canada's constitutional development:

Some are satisfied that the Privy Council has merely made explicit what the Fathers intended. Others dismiss the controversy on the ground that we cannot now know what they intended. Others, again, hold that the constitution today is vastly different from what its framers meant it to be and seek to support their contentions from early historical evidence.<sup>10</sup>

Careful to take no sides in the above debate, the *Rowell-Sirois Report* contented itself to review the impact of the Privy Council's decisions upon the B.N.A. Act. The *O'Connor Report*, commissioned by the Senate in 1938, on the other hand, did not refrain from expressing its condemnation of the Privy Council.

The stated purpose of the *O'Connor Report* was to examine the B.N.A. Act and to summarize any divergence between its terms and judicial construction of the Act, a task which William O'Connor, Parliamentary Counsel to the upper chamber, would take on with a vengeance. Said O'Connor: "I think that the failure of the Act to fully achieve the intent of those who framed it has not been owing to any defect in draftsmanship, but has been caused by demonstratable error in the interpretation of its terms."<sup>11</sup> In O'Connor's opinion, "[m]any pronouncements of the Judicial Committee . . . are materially in conflict with the pre-confederation scheme of distribution of legislative powers and *also* . . . with the scheme of distribution provided by the Act."<sup>12</sup> It was O'Connor's submission that the B.N.A. Act itself was not in need of amendment, but instead enforced observance of its terms be encouraged. The Privy Council--it went without saying--had proven incapable of carrying out such a responsibility. While never saying so directly, the underlying theme of the *O'Connor Report* was that Privy Council appeals should be abolished.

Despite the lasting contributions to the study of Canadian federalism made by these two *Reports*, it is important to emphasize that their impact was delayed. In the case

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<sup>10</sup>*Rowell-Sirois Report*, Book 1, 32.

<sup>11</sup>W.F. O'Connor, *Report to the Senate*, 11.

<sup>12</sup>*Ibid.*

of the *Rowell-Sirois Report*, for example, the outbreak of war in Europe prevented many of its recommendations from being implemented, while others were thwarted by the provinces. Likewise, it is evident that neither *Report* would have been commissioned had it not been for the negative reaction to the Privy Council's New Deal decisions. However, in the interim before either *Report* was published, the issue of abolishing appeals to the Privy Council gained increased political support. It was an issue that would be embraced in the House of Commons by C.H. Cahan, acting in close consultation with two university law professors: Frank Scott of McGill and William Kennedy of the University of Toronto.

### The Second Option: Abolition of Appeals

Frank Scott's dissatisfaction with the Privy Council was nothing new. Contributing to the 1937 *Canadian Bar Review* symposium on the Privy Council's New Deal decisions, Scott did not pass up the opportunity to condemn the Judicial Committee:

To imagine that we shall ever get consistent and reasonable judgements from such a casually selected and untrained court is merely silly. To continue using it under the circumstances is costly sentimentality. The Privy Council is and always will be a thoroughly unsatisfactory court of appeal for Canada in constitutional matters; its members are too remote, too little trained in our law, too casually selected, and have too short a tenure. Confederation itself may well have difficulty in surviving the disintegrating effect of the Court's judgments upon the British North America Act. Canada is the only self-governing Dominion that has not yet realized this fact and taken steps to restrict or abolish the appeal. *No alterations to the British North America Act will ever achieve what Canadians want them to achieve if their interpretation is left to a non-Canadian judiciary.*<sup>13</sup>

While this was a thesis Scott had been advocating for years, he remained a member of a vocal minority until 1937 with his impassioned calls for an end to overseas appeals.<sup>14</sup>

Professor Kennedy shared many of the same convictions as Scott. Also contributing to the June 1937 symposium, Kennedy criticized the Privy Council for its history of

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<sup>13</sup>Scott, "Consequences," 494. [Italics mine.]

<sup>14</sup>Scott was in good company with his call for an end to appeals to the Judicial Committee. For example, see John S. Ewart, "Canada's Political Status," *Canadian Historical Review* 4 (September 1928): 194-205.

treating "the British North America Act as a statute, not as a constitution."<sup>15</sup> In Kennedy's opinion, decisive action was imperative to remedy the current constitutional impasse: "The time has come to abandon tinkering with or twisting the British North America Act--a curiosity belonging to an elder age. At long last we can criticize it, as the stern demands of economic pressure have bitten into the bastard loyalty which gave to it the doubtful devotion of primitive ancestor worship."<sup>16</sup> According to Kennedy, either the B.N.A. Act should be discarded *in toto* and a new constitution be written, or, all appeals to the Privy Council be abolished. With respect to the latter Kennedy commented, "above all we must get rid of all the past decisions of the Judicial Committee, for they will hang round the necks of the judiciary, if appeals are abolished, in that uncanny stranglehold with which *stare decisis* seems doomed to rob the law of creative vitality."<sup>17</sup>

It would be misleading to suggest that Scott and Kennedy were representative of how lawyers across the country viewed the Privy Council. While both had contributed provocative articles to the *Canadian Bar Review* in 1937, there were many in the legal profession who continued to respect the decisions of the Privy Council. In fact, many lawyers--and judges for that matter--were against the idea of abolishing overseas appeals. However, the New Deal was the catalyst that changed everything; no longer were Scott or Kennedy expressing a small minority's viewpoint, both were championing a cause whose time had come. Nevertheless, not everyone immediately agreed with Scott or Kennedy--even after the Privy Council handed down its New Deal decisions. The *Vancouver Sun* spoke for many when it said

Canadians who have always maintained the value of the Judicial Committee of the Privy Council as a court competent to deal with Canadian constitutional questions and yet above the immediate interest of Canadian politics, will find justification for their belief in the decisions just handed down

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<sup>15</sup>W.P.M. Kennedy, "The British North America Act: Past and Future," *Canadian Bar Review* 15 (June 1937): 394.

<sup>16</sup>*Ibid.*, 399.

<sup>17</sup>*Ibid.*

by that body in the matter of six acts passed during Mr. Bennett's regime.<sup>18</sup>

Likewise, the *Toronto Globe and Mail* declared the "usefulness of the Privy Council has been demonstrated once more by its judgments clarifying the relationship between Dominion and Provinces . . . ." <sup>19</sup> Not only did the Privy Council remain popular with many Canadians, it was seen as an important link with the Empire and an impartial umpire in constitutional disputes between the provinces and the Dominion. Its supporters argued that the Supreme Court, being a federal creation with federally appointed judges, could not be expected to deliver impartial judgments where conflicts between the two levels of government was concerned. Scott was certainly correct when he wrote, albeit condescendingly, that many Canadians truly believed that the Privy Council, "in its cool and distant chambers, can view our little animosities from an Olympian height, and dispense with ease and magnanimity a superior, almost divine justice."<sup>20</sup>

If the Privy Council was still regarded as an important institution by many Canadians, it was most certainly viewed as a powerful ally by the provincial Attorneys General in their legal disputes with Ottawa. Here, too, Scott was critical, arguing that the Privy Council "has carried its protection of provincial claims so far that to-day we have in Canada a distribution of legislative powers quite unlike that which was agreed upon at Confederation, and one which by its undue enlargement of the Provincial sphere, considerably weakens the efficient and harmonious structure of our constitution."<sup>21</sup> Although Scott wrote the preceding passage in 1930, the Privy Council's New Deal decisions did nothing to weaken the validity of his arguments; on the contrary, they had the opposite effect.

Not surprisingly, when C.H. Cahan was in the process of guiding his private member's bill through the House of Commons he turned to Frank Scott and William Kennedy

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<sup>18</sup>The *Vancouver Sun*, Friday, 29 January 1937, 6.

<sup>19</sup>The *Toronto Globe and Mail*, Saturday, 30 January 1937, 6.

<sup>20</sup>F.R. Scott, "The Privy Council and Minority Rights," *Queen's Quarterly* 37 (1930): 669.

<sup>21</sup>*Ibid.*, 677. W.F. O'Connor would echo Scott's thesis nine years later in his *Report to the Senate*.



for advice. In a letter to Scott, dated 11 February 1938, Cahan enclosed a copy of the Bill he had introduced in the House of Commons the day before concerning overseas appeals, asking Scott for "any arguments by which I could support the bill on its second reading."<sup>22</sup> In reply, Scott suggested some minor revisions to the Bill while detailing several arguments Cahan could use to promote an end to overseas appeals, adding "I sincerely hope that you will be able to persuade the House to adopt the measure, as I can think of nothing which will be more conducive to Canadian national unity in the long run."<sup>23</sup>

Cahan received similar encouragement and advice from William Kennedy, to whom he had also sent a copy of his Bill. Kennedy, like Scott, was pleased to be able to offer Cahan whatever support he could and also mentioned several points to assist him with the Bill in the House. Furthermore, Kennedy was of the opinion that the government would support Cahan's endeavour as best it could, and that Lapointe would likely give his 'unofficial' support to the Bill. Interestingly, Kennedy revealed that "I have been in correspondence with the Prime Minister about some other matters and I ventured to suggest to him that ample time be given by him for the discussion of your bill and that if it goes to votes the whips might be taken off."<sup>24</sup> In a subsequent letter, Kennedy again reaffirmed his belief that the government would support Cahan, saying "I may tell you that I entered into personal correspondence with the Prime Minister and Mr. Lapointe and I do not think it will be anyone's fault if opportunity is not given to you to discuss your bill."<sup>25</sup>

Fortified with advice from Scott and Kennedy, not to mention behind-the-scenes support from King and Lapointe, Cahan spoke in the House on 8 April 1938 on Bill No. 19, *The Privy Council Appeals Act, 1938*.<sup>26</sup> The object of the proposed Act, stated Cahan, was the repeal of two U.K. Acts as far as they applied to Canada, namely, *The Judicial*

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<sup>22</sup>Scott Papers, Cahan to Scott, 11 February 1938.

<sup>23</sup>*Ibid.*, Scott to Cahan, 17 February 1938.

<sup>24</sup>Cahan Papers, Kennedy to Cahan, 17 February 1938.

<sup>25</sup>Cahan Papers, Kennedy to Cahan, 10 March 1938.

<sup>26</sup>King Diary, entry of 8 April 1939.

*Committee Act, 1833*<sup>27</sup> and *The Judicial Committee Act, 1844*.<sup>28</sup> Mackenzie King recorded his impressions of the debate in his diary: "Spent all afternoon listening to debate on discontinuance of appeals to Privy Council. Was surprised at how almost unanimous the House of Commons appeared to be on this question. Cahan read his speech but did so with real vigour."<sup>29</sup> In his opening statement, Cahan spoke of Canada being an autonomous member of the British Commonwealth in all aspects except one. Canada, Cahan argued, was in a subordinate position when it came to civil and constitutional matters as a result of "these two ancient acts which it is the object of this bill to repeal" and which "dominates the independent judiciary of this country in respect of all civil matters coming within the appellate jurisdiction of the judicial committee."<sup>30</sup> Noting that the Canadian Parliament had successfully abolished criminal appeals to the Judicial Committee in 1931,<sup>31</sup> Cahan argued that it was time to do the same as far as civil and constitutional appeals were concerned.

Lapointe, after having listened to Cahan's opening statements, commented "I am sure my hon. friend is not optimistic enough to take it for granted that this bill will become law in consequence of this first step, but the mere fact that it will be in the domain of public discussion will ensure its enjoying the attention of all those who are interest in constitutional questions in Canada . . . ."<sup>32</sup> Lapointe stated his personal belief that the Parliament of Canada most likely had the legislative jurisdiction required to abolish the right of appeal from any court in Canada in civil cases as it had done in criminal cases. But, asked La-

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<sup>27</sup>*Statutes of the United Kingdom of Great Britain and Ireland*, 3 & 4 Will. IV, 1833, c. 41.

<sup>28</sup>*Ibid.*, 7 & 8 Vict., 1844, c. 69.

<sup>29</sup>King Diary, entry of 8 April 1938.

<sup>30</sup>Canada, House of Commons, *Debates*, 1938, Vol. III, 2151.

<sup>31</sup>In 1926 the Privy Council in *Nadan v. The King* [1926] A.C. 482 struck down a federal statute dating back to 1888 which purported to abolish appeals to the Privy Council in criminal cases. In 1931, after the passage of the *Statute of Westminster*, Parliament enacted a similar statute to abolish appeals to the Privy Council in criminal cases. Four years later the Privy Council held *this* enactment to be valid. See, *British Coal Corp. v. The King* [1935] A.C. 500.

<sup>32</sup>*Debates*, 1938, Vol. III, 2162.

pointe, legally speaking, "Is it desirable to do away with these appeals, and then, can we do it?"<sup>33</sup> Noting the highly politicized circumstances leading to the introduction of the present Bill, Lapointe argued "The privy council has been criticized very severely . . . on account of its decisions on the reference with regard to the social legislation a year or so ago,"<sup>34</sup> inferring that more time was needed before deciding conclusively that abolishing overseas appeals was the correct course of action to take. Lapointe's comments, it should be carefully noted, did not suggest any disfavour with the stated purpose of the Bill, only the need for caution.

At the government's request, the Bill was withdrawn from the current session of Parliament so that it could be considered by various bar associations across the country. As Cahan explained the outcome in one letter, "The bill to abolish appeals to the Privy Council was withdrawn temporarily at the request of the government, who desired that it might be further considered by the leading lawyers of the country."<sup>35</sup> Added Cahan: "The bill was withdrawn on the understanding that, if the government did not introduce a similar bill next session, I would certainly introduce one myself."<sup>36</sup>

As events turned out, this was exactly what happened. On 20 January 1939 Cahan introduced Bill No. 19, *An Act to Amend the Supreme Court Act*. The purpose of the new Bill was identical to that of the one it replaced: Repeal of the *Judicial Committee Acts* of 1833 and 1844 as well as any orders, rules and regulations made under such Acts as they applied to Canada. Speaking in support of the revamped Bill, which suggested evidence of assistance from Justice Department officials in its drafting, Cahan noted that Britain's 1865 *Colonial Laws Validity Act*<sup>37</sup> had prevented Parliament from repealing or amending the above two Acts. However, with the passage of the *Statute of Westminster* in 1931 Canada now had the necessary jurisdiction to repeal the two laws as far as they ap-

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<sup>33</sup>*Ibid.*

<sup>34</sup>*Ibid.*

<sup>35</sup>Cahan Papers, Cahan to Charles M. Woodworth, 15 June 1938.

<sup>36</sup>*Ibid.*

<sup>37</sup>*Statutes at Large* (U.K.), 28 & 29 Vict., 1865, c. 63.

plied to Canada.<sup>38</sup> Furthermore, stated Cahan, "From the communications which I have personally received, I am convinced that public opinion throughout Canada is favourable to this bill," adding nonetheless, "I have, however, received definite notes of warning from those whose legal learning and business command respect."<sup>39</sup> As a result, Cahan petitioned the government to "refer this measure to the supreme court and thence to the judicial committee for an advisory opinion as to its constitutional validity."<sup>40</sup> Only afterwards, concluded Cahan, "may this Parliament deal intelligently with the provisions of this bill; and then effective measures may forthwith be taken to reconstruct the Supreme Court of Canada and readjust its personnel, as public opinion assuredly demands."<sup>41</sup>

Again, as with the previous Bill the year before, Cahan maintained close contact with his liaison to the Minister of Justice and Prime Minister's office, Professor Kennedy at the University of Toronto. On 30 January 1939 Kennedy wrote Cahan acknowledging receipt of his new Bill and informed him that "I am writing to support it with the Prime Minister and Minister of Justice."<sup>42</sup> A few months later Kennedy confirmed that "I have written to the Prime Minister and Mr. Lapointe, and I believe that they will give facilities for its discussion."<sup>43</sup> Cahan, in reply, wrote "I wish now to procure a favourable vote on the second reading and then I shall urge the Minister of Justice to refer the bill to the Supreme Court for an advisory opinion thereon. This opinion will be appealed to the Judicial Committee."<sup>44</sup> Two weeks later, Cahan again wrote Kennedy informing him of his recent discussion with the Minister of Justice. Lapointe, said Cahan, has promised that he will announce to the House "that the government has decided to refer the bill to the

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<sup>38</sup>Section 2(1) of the *Statute of Westminster* repealed the *Colonial Laws Validity Act* as far as it applied to the Dominions; section 2(2) of the *Act* allowed a Dominion to repeal or amend any imperial statute which was a part of that Dominion's law.

<sup>39</sup>*Debates*, 1939, Vol. III, 2812.

<sup>40</sup>*Ibid.*

<sup>41</sup>*Ibid.*

<sup>42</sup>Cahan Papers, Kennedy to Cahan, 20 January 1939.

<sup>43</sup>*Ibid.*, Kennedy to Cahan, 29 March 1939.

<sup>44</sup>*Ibid.*, Cahan to Kennedy, 30 March 1939.

Supreme Court of Canada and thence to the Judicial Committee, for an opinion as to whether the terms of the bill are within the legislative jurisdiction of parliament."<sup>45</sup>

The next day, 14 February 1939, Lapointe made such an announcement in the House of Commons. Stating that he was "in entire accord with the substance and the form of my hon. friend's bill,"<sup>46</sup> Lapointe stated his personal belief that Parliament had complete jurisdiction to end all appeals to the Judicial Committee of the Privy Council.

Said Lapointe:

Personally I have no doubt that this parliament has complete jurisdiction to do away with appeals to any other tribunals than the final court of appeal in Canada, that is the Supreme Court of Canada, because of the residuary powers which this parliament has to legislate on any matters of peace, order and good government, as well as under section 101 of the British North America Act.<sup>47</sup>

Although confident that Parliament had the necessary jurisdiction under both POGG and section 101 to abolish any appeal in matters coming within its own legislative competence, a fact confirmed by the *British Coal Corporation* decision, Lapointe acknowledged that the Privy Council had left one important question unanswered: Did Parliament have jurisdiction to do away with appeals from provincial courts in matters coming under provincial jurisdiction? To remove any doubt on the matter, Lapointe agreed with Cahan on the wisdom of referring the question to the Supreme Court for an advisory opinion. Said Lapointe: "I have been told that some members of this house approve the suggestion that the Supreme Court and privy council should pass on the jurisdiction of this parliament in the matter but they would prefer to have this reference made before they are called upon to vote on the principle of the bill."<sup>48</sup> Lapointe proceeded to move for adjournment of debate on the Bill; one week later Bill No. 9 was referred to the Supreme Court of Canada.

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<sup>45</sup>*Ibid.*, Cahan to Kennedy, 13 April 1939.

<sup>46</sup>*Debates*, 1939, Vol. III, 2815.

<sup>47</sup>*Ibid.* Section 101, the provision used in 1875 to create the Supreme Court of Canada, reads in part: "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 . . ."

<sup>48</sup>*Ibid.*

C.G. Pierson has argued in his text *Canada and the Privy Council* that Cahan's Bill did not have the support of the government. I do not believe this to be true. Pierson's comments, however, are useful for they highlight the complete success of the government's strategy, in 1938, to allow Cahan to promote the Bill, thereby avoiding any political harm in the process should it have proven to be unpopular in the House. According to Pierson,

When in 1938 Mr. Cahan introduced a bill to abolish appeals, Mr. Lapointe, Minister of Justice, did not altogether support it; in fact, he maintained, as any good Liberal would do, that the Privy Council decisions were good law so far as the treatment of the Bennett program was concerned . . . Cahan's bill failed to pass, but a year later he introduced the same measure. Mr. Lapointe, instead of pushing the bill, announced his intention to have it referred to the Supreme Court to determine the power of Parliament to abolish appeals.<sup>49</sup>

If Lapointe did not appear to support Cahan's first Bill or push Cahan's second Bill as Pierson alleges, the reasons why concerned elementary questions of political prudence, as well as concern on the *vires* of abolishing provincial appeals. The government secretly supported Cahan's endeavour--indeed they encouraged it. At the same time, the Liberals were aware that the proposed measure was controversial--especially among francophone Quebec lawyers. If Lapointe supported a reference to the Supreme Court it was to determine conclusively that Parliament had the complete legal authority to enact it. Such a decision, the government was aware, would give it the political authority it would undoubtedly need--and wanted--in order to abolish all remaining appeals to the Privy Council.

In retrospect, allowing a former Conservative Cabinet Minister to promote such an important Bill in the House of Commons, all the while giving him behind-the-scenes support, proved to be the ideal arrangement for the King government. I agree fully with Professor McConnell in his assessment of the government's strategy regarding Cahan's private member's bill. On the one hand, "The co-operation between Lapointe and Cahan shows that by 1938 both major parties had come to the conclusion that overseas appeals

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<sup>49</sup>C.G. Pierson, *Canada and the Privy Council* (London: Stevens & Sons Limited, 1960), 74.

were an anachronism."<sup>50</sup> On the other hand, however, it would have been very difficult indeed for the Liberals to forward such a Bill themselves. Having shown no reluctance to go to the Privy Council in 1937 with Mr. Bennett's legislation, or again in 1938 with Mr. Aberhart's, the King government could not very well decide one year later to abolish such appeals. Under the circumstances, Cahan's sponsorship of the Bill was politically advantageous for the government. Furthermore, it "was convenient for Lapointe since, had he, as prime originator of the New Deal references, personally sponsored a Bill for this purpose it would have looked almost like a concession of wrongdoing; he would have been subject to the taunt that he was the author of his own misfortunes."<sup>51</sup> Once again, the King government found itself submitting a reference case to the Supreme Court for political purposes--this time at the insistence of the House of Commons.

### Chief Justice Duff's Most Important Decision

Argument before the Court on Bill No. 9 began on 19 June 1939, and lasted three days. The Dominion was represented by Aime Geoffrion of Montreal and C.P. Plaxton of the Justice Department, counsel in both the New Deal and Alberta reference cases. They contended that the Bill was within the legislative competence of Parliament on two grounds. First, it was argued that the Bill was a law for the peace, order and good government of Canada under section 91 of the B.N.A. Act. Second, it was argued that the Bill, its purpose being to amend the *Supreme Court Act*<sup>52</sup> to curtail appeals to the Privy Council, was valid under section 101 of the B.N.A. Act. Counsel submitted that since the passage of the *Statute of Westminster*, the federal government, and not the provinces, using either provision of the B.N.A. Act, was the competent authority to repeal the two *Judicial Committee Acts* of 1833 and 1844 as far as they applied to Canada. The Privy Council's

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<sup>50</sup>McConnell, "Judicial Review," 79.

<sup>51</sup>*Ibid.*

<sup>52</sup>*Revised Statutes of Canada*, 1927, c. 35.

decision in the *British Coal Corporation* case, it was further argued, confirmed Parliament's ability to end such appeals as it saw fit.

According to Geoffrion and Plaxton, the cardinal object of Bill No. 9 was to allow the Supreme Court of Canada to "have hold and exercise not merely . . . appellate jurisdiction, but 'exclusive ultimate' appellate civil and criminal jurisdiction within and for Canada, and that its judgments shall in all cases be final and conclusive."<sup>53</sup> Referring to section 92(14), The Administration of Justice in the Province, counsel maintained that this section was subject to a territorial limitation, being applicable only to the administration of justice within a single province. As a result, the provinces could not claim that section 92(14) allowed them to prohibit appeals to the Supreme Court of Canada concerning matters of provincial legislative competence; nor could the section be used to justify any continued right of appeal to the Judicial Committee. Appeals that transcended provincial boundaries would, federal counsel maintained, fall under the ambit of section 101 which was subject to no such territorial limitations.

The provinces naturally disagreed with this interpretation of section 92(14), not to mention section 101. As the *Ottawa Evening Journal* reported, Nova Scotia "joined with Ontario, New Brunswick and British Columbia in their contention . . . that the Federal Parliament has no power to abolish appeals to the Judicial Committee of the Privy Council."<sup>54</sup> Arguing that abolishing provincial appeals to the Judicial Committee would constitute a violation of provincial rights, each province in its respective *factum* maintained that Parliament did not have the jurisdiction to curtail appeals stemming from provincial courts.

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<sup>53</sup>*Factum of Canada* (An Act to Amend the Supreme Court Act), undated, signed by Aime Geoffrion, C.P. Plaxton and W.R. Jackett, (File 6729, Supreme Court of Canada, Ottawa), at 6.

<sup>54</sup>The *Ottawa Evening Journal*, Tuesday, 20 June 1939, 1. Manitoba and Saskatchewan both supported the federal government. Interestingly, Quebec chose not to appear in the case.



New Brunswick, for one, argued that it would be *ultra vires* the Parliament of Canada "to prohibit the Legislature of New Brunswick from passing legislation to the effect that a decision of the Appeal Division of the Supreme Court of New Brunswick shall be final and conclusive . . . ." <sup>55</sup> Adopting a worst case scenario, New Brunswick worried that if Bill No. 9 was found valid, New Brunswick courts might find themselves in a most perplexing situation:

For it would appear that if there could be no appeal from the Supreme Court of Canada by special leave or otherwise that such Supreme Court would not be bound by the Privy Council decisions, so that it might happen that the Supreme Court of New Brunswick relying on a Judicial Committee decision, would give a decision which on appeal to the Supreme Court of Canada would be reversed. <sup>56</sup>

Ontario adopted a similar argument, maintaining that under the terms of the B.N.A. Act provincial legislatures had the exclusive power to amend their constitutions under the provisions of section 92.

Ontario argued that section 101 of the B.N.A. Act allowed the Parliament of Canada to provide for the "constitution, maintenance and organization" of "a general Court of Appeal for Canada" only. In other words, the term "Canada" in this particular instance meant the federal government, and not the provinces. According to Ontario, this "did not include the power to limit appeals from that Court to His Majesty in Council in matters coming within the classes of subjects enumerated in Section 92." <sup>57</sup> In Ontario's opinion, "the Federal Parliament could not say when the judgment of a particular court should be final and when it should not be or to what body on appeal from a provincial court should be taken." <sup>58</sup> To do so would affect property and civil rights under section 92(13); as well, it would represent federal intrusion into matters of a merely local or private nature under

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<sup>55</sup>*Factum of New Brunswick* (An Act to Amend the Supreme Court Act), undated, signed by J.B. Dickson, (File 6729, Supreme Court of Canada, Ottawa), at 3.

<sup>56</sup>*Ibid.*, at 6.

<sup>57</sup>*Factum of Ontario* (An Act to Amend the Supreme Court Act), undated, signed by Gordon D. Conant, William B. Common and Clifford R. Magone, (File 6729, Supreme Court of Canada, Ottawa), at 10.

<sup>58</sup>The *Ottawa Evening Journal*, Tuesday, 20 June 1939, 7.

section 92(16); lastly, it would restrict the administration of justice within a province under section 92(14). British Columbia repeated the above arguments in its *factum*.

Seven months later, on 19 January 1940, the Supreme Court of Canada handed down its opinion on Bill No. 9, *An Act to Amend the Supreme Court Act*.<sup>59</sup> As Chief Justice Duff's biographer, David Ricardo Williams, has suggested, Duff was convinced "that the case was the most important he had ever heard."<sup>60</sup> It is not difficult to understand why. Duff, a Privy Councillor since 1919, was proud of his contributions to the body. Still, as Williams has argued: "His relationship with it had been an affair of the heart, but his judicial mind convinced him that the Parliament of Canada had the constitutional power to end it."<sup>61</sup> With only Justice Crocket in disagreement, Duff declared that it was within the legislative competence of Parliament to end all appeals to the Privy Council. The remaining members of the Court, in their respective opinions, agreed with Duff.

In his opinion, Duff agreed with federal counsel that section 101 and the opening words of section 91 were the two relevant clauses that needed to be considered. As far as section 101, creating "a general Court of Appeal for Canada" was concerned, Duff paid particular attention to the words "notwithstanding anything in this Act." The effect of this phrase was plain: "when the Court is constituted and its jurisdiction and powers are defined by Dominion legislation, such legislation takes effect according to the scope and purport notwithstanding anything in the Confederation Act or anything done under that

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<sup>59</sup>*Legislative Competence of Parl. of Can. to enact Bill No. 9 entitled "An Act to Amend the Supreme Court Act, Ref. re [1940] S.C.R. 41. Present: Duff C.J. and Rinfret, Crocket, Davis, Kerwin and Hudson JJ.*

<sup>60</sup>David Ricardo Williams, *Duff: A Life in the Law* (Vancouver: University of British Columbia Press, 1984), 212. It also could have been one of Duff's final opinions had he been compelled to retire from the Court in January once he turned seventy-five. As Mackenzie King recorded in his diary prior to the reference case being submitted to the Court: "Discussed with Lapointe position of Supreme Court, Duff's time being up in January. Four of the judges are anything but well. Court very weak. He could think of no one suitable being appointed Chief Justice, or from B.C. to take Duff's place on the Supreme Court Bench. I agreed to having Duff's term extended a year if he were agreeable." King Diary, entry of 9 March 1939.

<sup>61</sup>*Ibid.*

Act."<sup>62</sup> Furthermore, continued Duff, "it is competent to Parliament to give jurisdiction to entertain an appeal in any and every case in which it thinks fit to do so, and also to confer the correlative right of appeal in such cases and in any and every case to require the court appealed from to carry out any judgment pronounced upon the appeal."<sup>63</sup> According to his reading of section 101, its purpose was "to endow Parliament with power to effect high political objects concerning the self government of the Dominion . . . . So read it imports authority to establish a court having supreme and final appellate jurisdiction in Canada."<sup>64</sup>

Having made the above declarations, Duff asked rhetorically: "Are you then to imply a constitutional exception imperatively exempting from the operation of legislation under the section judgments or decisions from which, by the existing law, appeal may be taken or may have been taken to the Judicial Committee?"<sup>65</sup> Duff could think of no legal grounds to justify such an exception. "Since this legislative authority may be executed in Canada 'notwithstanding anything in the Act,' you cannot imply any restriction of power because of anything in section 92."<sup>66</sup> Nowhere in section 92, Duff concluded, could the provinces find the legal means to exempt the provincial courts from having their decisions heard on appeal to the Supreme Court of Canada.

Duff then turned to the issue of whether the right of appeal from provincial courts to the Privy Council stemmed from provincial authority under section 92 of the B.N.A. Act or from the *Judicial Committee Acts* themselves. He argued that the right of appeal stemmed from the two U.K. statutes, and not from any provincial jurisdiction. Said Duff:

I am unable to agree that clause 13 is pertinent. The subject-matter of administration of justice including jurisdiction of provincial courts is specifically dealt with in clause 14 and, if the particular matter with which we are now concerned does not fall within the ambit of clause 14, then I think

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<sup>62</sup>[1940] S.C.R. 41 at 62.

<sup>63</sup>*Ibid.*, at 63.

<sup>64</sup>*Ibid.*, at 63, 64.

<sup>65</sup>*Ibid.*, at 63.

<sup>66</sup>*Ibid.*

it must be taken to be excluded from the general clause 13 as well as the residuary clause, 16.<sup>67</sup>

In other words, the provinces could not maintain appeals to the Judicial Committee since such jurisdiction was outside their legislative competence. In a single sentence Duff had negated the three grounds upon which the provinces had based their claim for jurisdiction. Duff concluded his opinion stating that since the passage of the *Statute of Westminster* the Parliament of Canada alone was competent to end such appeals under section 101. Furthermore, argued Duff, since the provinces did not have the right of appeal "all such matters are, therefore, within the general authority in relation to peace, order and good government."<sup>68</sup>

Although Cahan's Bill, *An Act to Amend the Supreme Court Act* had passed its first hurdle, on 30 April 1940 four provinces, Ontario, New Brunswick, Nova Scotia and British Columbia, filed an appeal with the Judicial Committee of the Privy Council. War intervened and the case was not decided until 1947. After the war Quebec, too, joined the appeal. On 13 January 1947 the Privy Council upheld the decision of the Supreme Court of Canada.<sup>69</sup> Speaking for the Board, Lord Jowitt, L.C. had no difficulty whatsoever upholding Chief Justice Duff's arguments delivered seven years earlier. Since the passage of the *Statute of Westminster*, wrote the Lord Chancellor, it was "within the power of the Dominion Parliament to enact that the jurisdiction of the Supreme Court shall be ultimate. No other solution is consonant with the status of a self-governing Dominion."<sup>70</sup> Furthermore, "it appears to their Lordships that it is not consistent with the political conceptions which is embodied in the British Commonwealth of Nations that one member of that Commonwealth should be precluded from setting up, if it so desires, a Supreme Court of

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<sup>67</sup>*Ibid.*, at 60.

<sup>68</sup>*Ibid.*, at 70.

<sup>69</sup>*A.G. Ont. v. A.G. Can.* (Privy Council Appeals) [1947] A.C. 127. Present: Lord Jowitt L.C., Viscount Simon, Lord Macmillan, Lord Wright, Lord Greene M.R., Lord Simonds and Lord Goddard C.J.

<sup>70</sup>*Ibid.*, at 148.

Appeal having a jurisdiction both ultimate and exclusive of any other member."<sup>71</sup> Recognizing the importance of the Bill for Canada, Jowitt was certainly correct when he wrote: "It is, in fact, a prime element in the self-government of the Dominion, that it should be able to secure through its own court of justice that the law should be one and the same for all its citizens."<sup>72</sup> The second hurdle had been successfully passed; Cahan's Bill could become law.

Almost three years later, on 10 December 1949, the Canadian Parliament enacted Bill No. 9.<sup>73</sup> C.H. Cahan did not live to see his Bill become law, having died five years earlier. On 23 December 1949, the day the new law came into force, no longer could an appeal progress to the Judicial Committee of the Privy Council from Canada.<sup>74</sup> The Supreme Court of Canada--almost seventy-five years after its inception--was now the final court of appeal for Canada. The political and legal uses of reference cases by the Mackenzie King government between 1935 and 1940 had come to an end.

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<sup>71</sup>*Ibid.*, at 154.

<sup>72</sup>*Ibid.*

<sup>73</sup>The reasons for the delay were, for the most part, due to changes in the leadership of the Liberal Party. Mackenzie King stepped down as Prime Minister on 15 November 1948 and Louis St. Laurent took his place. The next year an election was called, and only afterwards did the St. Laurent government proceed with the Bill.

<sup>74</sup>Appeals already before the Privy Council could continue. Surprisingly, the last Canadian appeal the Privy Council decided was not handed down until 1960. *Ponoka-Calmar Oils. v. Wakefield* [1960] A.C. 18.

## Conclusion

The political and legal uses of reference cases by the Mackenzie King government between 1935 and 1940 to the Supreme Court of Canada offers several valuable lessons. The King government submitted five reference cases to the Supreme Court, three of which, the New Deal, the Alberta references and C.H. Cahan's private member's bill, were politically motivated. While reference cases can be very a powerful tool for the federal government, there are certain risks associated with their use. In each instance under discussion, the King government had options available to it other than seeking an advisory opinion from the Supreme Court. With the New Deal, for example, the government could have allowed a private party to initiate litigation. With the Alberta legislation it seems obvious that if the federal government had not acted against the controversial Social Credit legislation, either the banks or the press soon would have. When Bill No. 19, *An Act to Amend the Supreme Court Act*, is examined in historical context, it is evident that the government was again motivated by political concerns, all the while maintaining that it was only seeking a legal opinion to settle certain questions of law before proceeding to pass the Bill in Parliament. Only when we examine the federal government's reaction to Quebec's Padlock Act, do we see the government shy away from a reference to the Supreme Court of Canada. The contrast in behavior is both intriguing and indicative of the King government's attitude towards reference cases.

Having decisively won the 1935 general election, the King government immediately submitted the former administration's New Deal legislative package to the Supreme Court, knowing that it would ultimately be heard on appeal to the Judicial Committee of the Privy Council. Not only were King and Lapointe confident that the court case would be favourable to the federal government, they acted knowing that only the former Conserva-

tive government would condemn their action in seeking an advisory opinion from the courts. The electorate, if the mandate given the Liberals was any indication, seemed to have given tacit support to the legal action initiated by the Liberal administration. When the Alberta reference is examined, a parallel with the New Deal immediately suggests itself. Here, too, the government acted knowing that it had considerable public support behind it. Only in Alberta was the government's decision to forward Premier Aberhart's legislation condemned--and then only by zealous Social Creditors. Again, the government was confident that the Supreme Court would side with it and hold that Alberta's Social Credit experimentation was unconstitutional. As is indicated in Chapter Four, the King government was correct in its assumptions.

When we review the King government's decision to forward C.H. Cahan's private member's bill to the Supreme Court, the similarities between the New Deal and Alberta manifest themselves, albeit with a subtle twist. Amending the *Supreme Court Act* to abolish appeals to the Privy Council was a controversial course of action, to say the least. C.H. Cahan's sponsorship of the Bill, as discussed in Chapter Six, was a clever strategy on the part of the King government. After it became clear to the Liberals that the idea of ending overseas appeals was gaining popularity, the government took what was deemed both a correct and necessary step by submitting the Bill to the Supreme Court for an advisory opinion. Who could question the government's motives in promoting such a reference? Parliament's ability to end appeals stemming from the provincial courts was a question that needed to be settled, and the Supreme Court seemed the logical place to determine such an issue. At the same time, proceeding with a reference case also allowed the government the opportunity to further consolidate public opinion in favour of ending overseas appeals. If war had not intervened, it is obvious that the King government's plan would have come to fruition several years earlier. However, even with the delay brought about by the world war, the government's strategy remained successful.

When we turn our attention to Quebec's Padlock Act, however, the wisdom of the government's decision not to forward a reference case to the Supreme Court seems questionable. Certainly, after the King government had initiated a reference case to determine the validity of Alberta's controversial legislation, it would seem logical to have acted similarly with Quebec. Despite all claims to the contrary by the federal government, the Padlock Act infringed upon federal jurisdiction just as plainly as did the Alberta legislation before it. It can also be argued that the Padlock Act was even more repugnant than the Alberta legislation, blatantly infringing upon fundamental civil liberties as it did. However, despite such glaring injustices the federal government chose to do nothing, preferring to let a private party fight its battle.

To understand the King government's reluctance to forward the Padlock Act to the Supreme Court, one needs only consider the controversy such a reference case would have caused under the circumstances. Had King submitted the Padlock Act to the Supreme Court for judicial scrutiny it seems safe to assume that at the very least one of the justices (Duff, for example) would have found the Act unconstitutional. Certainly, it is arguable that given the *Alberta Press* decision a majority of the Court may have even ruled that the Act was *ultra vires* Quebec. Politically speaking, either outcome would have been disastrous for the King government. Maurice Duplessis would have used either scenario to vehemently denounce the federal government's actions. The King administration, to say the least, would have been mortified to find itself having to defend its decision to question the constitutionality, not to mention the wisdom, of Quebec's Padlock Act--after all, how does one defend oneself from the charge of being a defender of communism? For the Liberal administration in Ottawa it was better to avoid such a distasteful scenario altogether. In the short-term the King government's inaction certainly had the desired consequence of finessing political fallout in Quebec. In the long-term, however, it is an episode which tarnishes the administration's overall record.



Up until this point in my thesis I have avoided discussing the merits of reference cases to the Supreme Court of Canada. As mentioned in the Introduction, it is difficult to escape the conclusion that such reference cases have the potential to make the Supreme Court appear to be a tool of the federal government, or to be more precise, of the executive. *Prima facie* such an argument is compelling. Nevertheless, it must not be forgotten that the federal government assumes a certain degree of risk when it seeks an advisory opinion from the Supreme Court. Certainly no government--and the Mackenzie King government was no exception--would dare ask the Supreme Court for an advisory opinion if it had reason to believe that it would not be satisfied with the decision handed down. Perhaps this is the most important lesson to be learned from Chapter Five's discussion of the federal government's inaction where the Padlock Act was concerned. Moreover, once an advisory opinion is requested of the Court, the federal government relinquishes control of the issue until after the justices have had their say; with the passage of time, the government must act. Yet as both the New Deal and the Alberta reference cases indicate, once the courts hand down their decisions the federal government can find itself facing controversial issues it had never anticipated when the decision to seek an advisory opinion was first made. Reference cases, then, despite the potential rewards they offer the federal government--the opportunity to have another branch of government, in this case the Supreme Court, assist in solving a controversial political issue--also have certain risks associated with their use.

With both the New Deal and the Alberta references, the government's course of action led to consequences completely unexpected by the federal government. While King was certainly satisfied with the decision of both the Supreme Court and the Privy Council holding the Bennett New Deal unconstitutional, he could not have expected that the New Deal decisions would act as a catalyst for abolition of appeals to the Privy Council. As a result, the King government, having used the courts to solve one political dilemma, soon found itself using the courts once again to assist it deal with another political issue it found

itself confronting: what to do with C.H. Cahan's private member's bill. Similarly, the federal government's willingness to seek an advisory opinion from the Supreme Court in regards to Alberta's Social Credit legislation would soon prove to be a most unwanted precedent when Quebec's Padlock Act was under discussion in Ottawa. In the final analysis, a reference case carries risks. Even if the government successfully predicts the legal outcome of a court case, it may find itself dealing with a political outcome it had not bargained for. If the actions of the King government is any indication in the five-year-period under discussion, this is a complication a government seldom expects, although one it should undoubtedly be prepared for.

When reference cases arise, those most active in the political process--politicians, newspaper editors, concerned scholars--should watch out for two things in particular: First, the possibility that a reference may be initiated by the federal government to avoid or delay taking responsibility on substantive political issues. Certainly the King government's handling of the Bennett New Deal, not to mention C.H. Cahan's private member's bill, falls into this category. Second, the possibility that the decision to refer--or not to refer--a case to the Supreme Court may result in like cases not being treated alike. Here, the contrast between the federal government's handling of the Alberta Social Credit legislation and Quebec's Padlock Act speaks clearly for itself. Should references which fall clearly into either category be criticized because of their highly politicized origins? Certainly not. Despite their unmistakable political overtones, the ability of the federal government to submit such references to the Supreme Court of Canada is often valuable. On the other hand, however, to forget (or ignore) the origins of politically motivated references results in a failure to realize their full significance in both the historical and legal context.

The legal decisions which result from such reference cases pose yet another problem which needs to be considered. Once a court, be it the Supreme Court of Canada or, formerly, the Judicial Committee of the Privy Council, hands down its ruling on an issue, that decision becomes part of our nation's case law. While the federal government may

find itself dealing with political issues it had not bargained for at the time, members of the legal community may find themselves dealing with legal controversies which may continue almost indefinitely. One need only consider the long-lasting effect of the Privy Council's ruling in the I.L.O. case to appreciate this important fact. Still, reference cases continue to be seen as an important device by the federal government. As my examination of the political use of reference cases by the Mackenzie King government in the period between 1935 and 1940 indicates, it is not difficult to understand why. Reference cases may carry risks, but they can provide the federal government with substantial rewards as well. In the final analysis, reference cases, unique to Canada, are a tool which the federal government will continue to use: in some instances for defensible political purposes; in others for partisan gain.

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