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SOME COMPARISONS OF THE ROOSEVELT AND BENNETT 'NEW DEALS'

W. H. McCONNELL*

"When anyone is starving to death in a country don't read him a Constitution," —
Real Caouette

Until the advent of the Great Depression of the thirties, the domestic legislative programmes of North American governments tended to reflect the economic doctrines of *laissez-faire*. In Canada and the United States the dominant mood was one of individualism rather than collectivism.¹ Widespread planning in economic and social matters was not a concern of governments; their function was characteristically one of maintaining internal political order and external security. With national energies expended from the start in opening up new frontiers and developing nascent industries, the ethos of the rugged amoral entrepreneur, ready to risk substantial investment capital in return for the rewards of successful initiative, prevailed. Even nineteenth century law reformers like the English Benthamites extolled individualistic virtues and sought, wherever possible, to curb the rise of "social democracy." John Stuart Mill, for instance, held the "tyranny of the Majority" which he attributed to coming collectivist societies, as engendering monolithic uniformity and depressing the individual excellence supposedly thriving under conditions of unfettered social and eco-

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¹ For a classical formulation of the distinction see A.V. Dicey, *Lectures on the Relation Between Law and Public Opinion in England* (London: Macmillan and Company, 1905) 299-301.

conomic competition. Social Darwinists like Herbert Spencer theorized that the "fittest" would survive in the social and economic contexts, as well as in the biological one, to the benefit of society, as long as governments did not interfere in "non-political" matters.² Mass political democracy, which loomed upon the horizon, while regarded by some as inevitable, inspired a sentiment of repugnance among these thinkers inasmuch as it was seen as the harbinger of conformity, mediocrity, and inevitably low mass standards. It may be posited that until the thirties, the economic values of Adam Smith and the individualism represented by Bentham, Mill and their later followers were the most influential currents in North American politics.

The factors which finally combined to eliminate *laissez-faire* were complex. One of the factors was the development of effective mass political participation based on the universal franchise. From the time of Jackson, however, (with the notable exception of Negroes) the suffrage was exercised by adult males in the United States. In Canada, the universal franchise was a later arrival³, but at least in federal elections voting was virtually unrestricted at the onset of the depression. Another factor was the occurrence of a depression throughout the world of unprecedented severity in the 1930s. Yet another, and related factor, was the impression among well-informed leaders of opinion that government could intervene in the national economy (employing, for example, the prescriptions of economists like J.M. Keynes) to bring about a marked amelioration of economic conditions. While the public at large was ignorant of the intricacies of Keynesian economics, it was receptive to governmental measures which would relieve hunger and despair.

As concrete examples of the response of governments to the depression, the 'New Deals' of President Franklin D. Roosevelt in the United States and Prime Minister R.B. Bennett in Canada are instructive. However unsystematic and disjointed they may appear on close scrutiny, they have come to be regarded as manifestations of the end of an economic era. The lineaments of the new age of extensive state planning are still unclear, and one would be foolhardy to predict exactly where society is tending. There can hardly be any question, however, that governments of all political hues will henceforward use all the instruments of fiscal and economic policy to prevent a recurrence of the depression and, in smaller or greater measure, to achieve the overall economic planning that is associated with the further development of the "welfare state". The transition from an era of individualism to one in which security and well-being were the pervasive goals was not without its attendant evils. It cannot be denied that some of the strictures of J.S. Mill and other Victorian liberals concerning the consequences of "mass democracy" were well-founded. In a system of mass education, for instance, in some cases educational standards are lowered. How-

² Cf. Ernest Albee, *History of English Utilitarianism* (London: Allen and Unwin, 1901; 2nd Impression, New York: Macmillan and Company, 1957) 341 ff.

³ *The British North America Act*, U.K. 1867, 30 & 31 Victoria, c. 3, provided that until Parliament introduced its own franchise, the provincial franchise would prevail in federal general elections. In 1885 when Macdonald introduced a federal franchise there were low property qualifications. In 1898, Laurier reintroduced the provincial franchise and it was not until 1920 in the *Dominion Franchise Act* that adult suffrage was provided for in Canada; even in the last case Indians living on reservations could not vote. They achieved the suffrage only in 1960. Cf. J.R. Mallory, *The Structure of Canadian Government*, Toronto: Macmillan of Canada, 1971) 181-2.

ever, one must explore the existing system, such as it is, before correctives are prescribed and the remainder of this investigation will be devoted to an examination of the American and Canadian New Deals, which were phenomena of mass democracy. Before this examination is begun, however, a brief description is necessary of the economic factors in both countries which led to Roosevelt's and Bennett's reform programmes.

The Depression in the United States and Canada

There has been a protracted debate among economists about the precise causes of the Great Depression. As Galbraith has said: "The causes of the Great Depression are still far from certain . . . When people are least sure they are often most dogmatic."⁴ Some scholars have asserted that there is a cyclical pattern in economic life and that in 1929 a depression was overdue. The establishment of a rhythmic interval or an exact periodicity between depressions on any kind of systematic basis has, however, defied all attempts at analysis. Economic history appears to show no predictable regularity in the succession of boom and bust.

One of the most vexed problems facing economic analysts is the causal relation, if any, of the stock market crash of October, 1929, to the depression. After the crash, there was a pronounced downward trend of the whole economy, but there had been a more gradual and distinctly abnormal downward slope since the preceding June.⁵ Perhaps the crash was merely indicative of the evolving distress of the economy and, in a sense, a confirmation rather than a cause of what was about to transpire. Those who argue, for example, that declining dividend income after October hurt the "real" economy are constrained to explain why the drop in dividends resulted in a decrease of only some four per cent of total consumer spending in the United States, or less than \$1 billion of a decline of from seven to eight billion dollars in consumer spending in 1930 and 1931.⁶

While the exact causes of the Great Depression are difficult to find, some of the major contributing factors are evident. In the good years of the twenties, substantial surplus inventories had accumulated and in 1929 production had considerably exceeded consumer and investment demand. Perhaps, in producing such large stocks, business men were overly optimistic about future market prospects. As large undisposed stocks of commodities piled up, production and employment fell and, through the interplay of various factors, there occurred a marked decrease in purchasing power.⁷ The decrease in American and world production, of course, had strong repercussions on a Canadian economy largely dependent on external trade and foreign investment. Hurt by the slump in trade, the problem was accentuated in Canada by an over-expansion similar to the one in the United States, and the continuing need by businesses to liquidate fixed costs not affected by the depression. In both countries, there was a profound

⁴ J.K. Galbraith, *The Great Crash*, (Boston: Houghton Mifflin, 1955) 176, [hereinafter Galbraith].

⁵ See, Galbraith *supra* note 4, at 179, and A. Safarian. *The Canadian Economy in the Great Depression*, (Toronto: University of Toronto Press, 1959) 44 [hereinafter Safarian].

⁶ *Christian Science Monitor*, Friday, July 9, 1971 at 7 [hereinafter Monitor].

⁷ Galbraith, *supra* note 4.

demoralization in the business community which contributed to the decline in domestic investment,⁸ and a progressive slowdown of the economy with all its attendant ills. Even here, it has been asserted that the larger part of investment in stocks during the 1920s went for things such as mergers with a relatively smaller proportion of stock issues financing new "real" investments. Accordingly, the stock market crash may not itself have had such an impact on reduced real investment as is sometimes supposed.⁹

Whatever may be the final conclusions by economic historians concerning the causes of the depression, there can be no dispute that the consequences in terms of human misery were enormous. In 1933, when the depression in Canada and the United States was at its lowest point, 817,000 Canadians out of a total work force of just over four million, or almost twenty per cent of the total, were jobless.¹⁰ In the United States in the same year, some 12 million persons, or about 29 per cent of the work force were totally unemployed.¹¹ Just prior to the inauguration of the respective New Deal programmes, in other words, the families of the totally unemployed must have numbered over 30 million in the United States and about three million in Canada. It should be remembered, too, that in both countries many people who were technically "employed", or self-employed, were working in industries or pursuits which were in grave difficulties because of the general business recession and were receiving incomes substantially lower than in the preceding decade. The incidence of the depression, moreover, was uneven in geographical and in industrial terms. There were pronounced disparities from industry to industry and in different regions. By 1933, wages and salaries in agriculture and primary industries in both countries had declined to about half their 1929 level.¹² Manufacturing, mining, the wholesale and retail trades, and the transportation and construction industries suffered great declines also, with the government service, public utilities, and the financial, insurance and real estate sectors undergoing lesser but still substantial hardships.¹³

In Canada, the most devastating effects of the Great Depression were felt in Saskatchewan. The peculiar difficulties of that province stemmed from the fact that in an agricultural region which depended for its prosperity on the monoculture of grain (producing more wheat than the rest of Canada), drought coincided with depression to ruin farmers and gravely undermine the service and other industries dependent for their survival on farm income. As the *Rowell-Sirois Report* summed it up: "If the repercussions upon other sections of the Dominion were widespread and severe, the conditions in Saskatchewan were nothing short of disastrous."¹⁴

⁸ See Safarian, *supra* note 5 at 45-46, and see J. Morgan, *Manic-Depressive Psychoses of Business*, in Himmelberg (ed.) *The Great Depression and American Capitalism*, (Boston: Heath, 1968) 8.

⁹ Monitor, *supra* note 6.

¹⁰ D.B.S., *Canadian Labour Force Estimates, 1931-1950* at 15.

¹¹ L. Chandler, *America's Greatest Depression*, (New York: Harper and Row, 1970) 34 [hereinafter Chandler].

¹² *Cf., id.* at 36; see also Safarian, *supra* note 5, at 45 ff.

¹³ See Chandler, *supra* note 11, c. 3; also, Safarian, *supra* note 5, at c. 3.

¹⁴ *Report of the Royal Commission on Dominion-Provincial Relations*, (Ottawa: The Queen's Printer, 1954), Book 1, 169 [hereinafter Rowell-Sirois Report].

By 1933, one-third of the provincial farm population were destitute, and the remainder were in serious financial difficulties. In subsequent years, up to 1939, the proportion increased. Successive crop failures meant not only the loss of farm income, but also the loss of the accumulated capital investment needed to procure seed, feed and supplies in the following year so that, hopefully, farmers could again become solvent. In areas of urban industrial unemployment throughout the continent, relief consisted in providing the basic means of subsistence to workers while factories and plants were idle or working at greatly reduced capacity. To operators of large prairie farms, the government had to provide, in addition to basic relief, the capital required to seed and harvest another crop.¹⁵ As if depression and drought were not sufficient, further ordeals arose to harass hard-pressed farmers. In 1934, an infestation of grasshoppers ensured yet another crop failure in the Province.

Dean F.C. Cronkite, Q.C., of the College of Law, and Dr. G.E. Britnell, an economist, both of the University of Saskatchewan, exhaustively documented the plight of the Province in the submission which they prepared in 1937, at the request of the provincial government, for presentation to the Rowell-Sirois Commission.¹⁶ One passage from their submission is especially arresting:

If the combined provincial and municipal debt is expressed as a percentage of income of the people of the province, the public debt burden of Saskatchewan is seen as the highest among the provinces. Indeed it would perhaps be more proper to express income as a percentage of debt, since the latter has exceeded the former on several occasions since 1930 . . .¹⁷

The high-tariff policies of the central government placed grain growers under an additional disability.¹⁸ The traditional Western grievance against tariffs was expressed forcefully in the concluding part of the submission, where the peculiar difficulties inherent in a high tariff structure for the depressed grain-growing industry were stressed:

The tendency to raise tariffs in times of economic depression has particularly serious consequences for Saskatchewan which can best be illustrated with reference to the conditions underlying the production and marketing of wheat. In a period of depressed demand for exported wheat, it is essential that the Saskatchewan producers be put in a position where they can cut costs and carry on, but the imposition of a higher tariff or even the maintenance of tariff schedules at former high levels, introduces rigidities into the cost structure of western agriculture and places the wheat grower in a peculiarly vulnerable position . . . The more elastic the demand function for Canadian wheat, the more vicious will be the inflexible elements in the cost structure of prairie wheat producers. Faced with dwindling markets, effectively prevented by the tariff from cutting costs, they are forced to sell their wheat crops at a heavy loss and live out of capital. The results of such a situation are seen in the exhaustion of reserves, a mounting burden of agricultural debt and governmental relief, abandonment of farms and the steady depreciation of machinery, buildings and equipment, a sharp reduction in the standard of living of the entire agricultural population, and all the other marks of a chronically depressed agricultural region.¹⁹

¹⁵ *Id.*

¹⁶ *A Submission by the Government of Saskatchewan to the Royal Commission on Dominion-Provincial Relations, Regina, 1937* [hereinafter *Submission*].

¹⁷ *Id.* at 72.

¹⁸ Conditions were similar in the United States. The *Smoot-Hawley Tariff Act* 1930 (2nd Session), c. 497 passed during the Hoover administration imposed the highest tariff levels in history in the United States, although the *Reciprocal Tariff Act* 1934 (2nd Session), c. 473, 474, passed by the succeeding Democratic administration led to a gradual reduction in tariffs.

¹⁹ *Submission, supra* note 16, at 228-29.

It was, accordingly, one of the recommendations of the submission "that the customs tariff shall be completely removed from all instruments of production and shall be drastically reduced on all necessities of life."²⁰ The establishment of a permanent Grants Commission charged with subsidizing the Province in hard times up to the level of the provincial-average annual income was another important recommendation²¹ (along with the amelioration of freight rates, the assumption of responsibility for social services by the Dominion, proposed tax reforms to enable Ottawa to more effectively distribute national wealth among the provinces, and suggested constitutional amendments empowering the federal government to grant money to the provinces for provincial purposes).²²

The annual vagaries of the weather and the resulting variability of provincial revenues in a wheat-growing economy dictated that there should be a strong central government to overcome inequities in the distribution of national wealth. Dean Cronkite has subsequently related how he and Professor Britnell urged the provincial government to press for the grant of federal subsidies to the national average, and not to the hypothetical "average year" in the Province based on "... an examination of long-term production and price records, weighted as far as possible by available data with reference to soils, population and production trends".²³ The former standard, of course, would be considerably higher than the latter because of the greater average wealth of the federation considered as a whole.

During the hearings of the Rowell-Sirois Commission in 1937, although provincial spokesmen were instructed to advocate subsidization to the level of an "average year", the members of the Commission swiftly saw the implicit contrast between provincial and national standards and drew their own conclusions. In Dean Cronkite's summation:

In the late summer of 1937 Hon. T.C. Davis, Attorney-General, Dr. G.E. Britnell and I discussed the position the province should take before the Commission. We decided to take a bold stand, a stand that was very bold at that time. Our first point was that under the B.N.A. Act the burden of social services fell on the provinces whereas the Dominion held chief taxing powers. Secondly, national policies such as the customs tariff and east-west transportation routes gave a great advantage to Central Canada. So we proposed to claim in the absence of constitutional amendments and new national policies that federal grants should be paid to keep the federation in equilibrium. These grants should be sufficient to enable each province to provide services up to the national average with the building and maintenance of roads to be considered a service.

We submitted our plan to the cabinet along with an analysis of our supporting material. There was no dissent to our approach, only useful suggestions as to additional supporting material. The Premier was enthusiastic in his approval, but he had one suggestion regarding tactics. He suggested that it might be better to tone down our demands. His thought was that the message was clear, without spelling it out, and he felt that it was undesirable to provoke a rampage by Premier Hepburn so early in the struggle. In the end, we respected the Premier's suggestions, who probably had an insight regarding the manner in which political objects are achieved.

The oral presentation to the Commission had not proceeded very far when it became clear that the message was plain. In particular, Mr. Dafoe, then editor of the *Winnipeg Free Press*, pounced on our position with the enthusiasm of a boy for a

²⁰ *Id.* at 331.

²¹ *Id.* at 333, 306 ff. (on the method of computation).

²² *Id.* at 332-35.

²³ *Id.* at 306.

new bicycle and there was no doubt that the Chairman appreciated the practical logic of the situation. It was also evident that Mr. Rowell, as a lawyer, had no faith in any part of the Bennett New Deal.

Later on when the *Report* of the Commission appeared, we in Saskatchewan were delighted. The Dominion was prepared to implement the recommendations and I had the privilege of attending the Dominion-Provincial Conference at which the offer was made. Despite the strong efforts of Mr. King and Mr. Illsley, the Conference was wrecked by the Premiers of Ontario, Alberta and British Columbia. Mr. Hepburn covered up his hypocrisy with rude abuse and Mr. Aberhart used cunning; Mr. Pattullo was pretty clumsy.

It is interesting to note that Premier Godbout of Quebec strongly supported Mr. King. Thirty years ago the federation seems to have been quite acceptable to Quebec.²⁴

Accordingly, in the final recommendations of the Rowell-Sirois Commission it was the *national* standard which Cronkite and Britnell had privately urged the cabinet to request to which the commissioners acceded.

What is significant for the purposes of the Commission is the size of the surplus or deficit which would exist in a province if it were to provide the normal Canadian standard of services and impose taxation of normal severity. It is not the services which each province is at present providing, but the average Canadian standard of services, that a province must be put in a position to finance.²⁵

The broader implications of such a recommendation for federal systems undergoing times of depression are evident. In order to ensure the provision of an acceptable minimum level of services throughout a federal state as a whole, the central government must endeavour to redistribute national wealth from its wealthier components to the poorer ones.

There could be no doubt that economic conditions in Saskatchewan during the depression were the worst in Canada, but conditions in some of the other provinces, though not comparably bad, were still critical in terms of pre-1929 standards. The relative decline in provincial per capita incomes forcibly illustrates the nation-wide effects of the depression. The 1928-29 average per capita income in Saskatchewan was \$478, the Province ranking fourth in Canada behind British Columbia (\$594), Ontario (\$549), and Alberta (\$548). Four years later, after an awesome decrease of 72 per cent in per capita income Saskatchewan stood last among the provinces with only \$135 per capita.²⁶

In the extensive wheat lands of North Dakota, a state which agriculturally and geographically bore a close resemblance to Saskatchewan, the economic plight of grain growers was much the same.²⁷ Some of the Southern farmers, however, were even more oppressed by economic conditions:

... Tractored off their land, some of the "Arkies," and even more of the "Okies," whose farms had blown away in the dust storms, trekked westward to the orange

²⁴ Cronkite to writer, July 1971.

²⁵ *Rowell-Sirois Report*, *supra* note 14, Book II at 272.

²⁶ *Id.* Book I at 150. The neighbouring prairie provinces, with somewhat more diversified economies, were not as hard hit. Alberta declined from \$548 to \$212 and Manitoba from \$466 to \$240 (from 1929 to 1933) representing declines, respectively, of 61 and 49 per cent. British Columbia fell from \$594 to \$314, showing a decrease of 47 per cent, and the central provinces of Ontario and Quebec underwent identical decreases of 44 per cent from \$549 to \$310 and from \$391 to \$220. In the Atlantic region, even tiny Prince Edward Island had a larger *per capita* depression income than Saskatchewan, declining by 45 per cent from \$278 to \$154. The provinces of New Brunswick and Nova Scotia suffered a smaller comparative decline, the former province falling by 39 per cent from a 1928-29 per capita income of \$292 to \$180 in 1933, while the latter fell by 36 per cent from \$322 to \$207. The national average percentage decrease was 48 per cent, representing a national decline of \$224 per capita from \$471 just before the depression to \$247 in 1933.

²⁷ Cf. S. Lipset, *Agrarian Socialism* (Garden City, N.Y.: Anchor Books, 1968) 44, 261.

groves and lettuce fields of the Pacific Coast. By the end of the decade, a million migrants, penniless nomads in endless caravans of overburdened jalopies with half-clad tow-headed children, had overrun small towns in Oregon and Washington and pressed into the valleys of California.²⁸

The institution of tenant farming in the South resulted in forced evictions, with tenants organizing the Southern Tenant Farmers' Union in July, 1934, and bands of vigilante landlords, some of them members of the Ku Klux Klan, hunted down, flogged, and even in some instances murdered union organizers.²⁹

In both countries, the average per capita farm income during the depression was scarcely half the respective national per capita incomes. Plagued with fixed interest charges and other inelastic items of overhead, farmers were faced in many cases with real property and other taxes which actually increased after the advent of the depression. This meant, inevitably, that with severe deflation the net income of farmers declined at a time when there was little market for their produce. They were caught between unavoidable fixed charges and declining farm prices. Among the hardest hit were producers and regions specializing in a single crop, whether it was wheat in Saskatchewan, North Dakota and Kansas; cotton in Texas and Mississippi or tobacco in North Carolina and Kentucky.³⁰ If demand disappeared and farmers were unable to sell their lone crop, importunate creditors could invoke legal processes to seize their farms and sequester their chattels.

The Political Response

Faced with economic problems of unprecedented magnitude, Roosevelt in the United States and Bennett in Canada devised legislative programmes to combat the depression. Being politicians, of course, they were both intent on retaining power and political expediency played a large part in their motivation. Their positions, however, were very different. Roosevelt began his 'New Deal' at the head of a crusading 'liberal' party and with an overwhelming popular mandate. He had an intense desire to arrest economic setbacks early in the course of the depression. Inspired by the impending threat of political disaster, Bennett inaugurated his version of the New Deal in desperation in his fifth year in office, as custodian of the declining fortunes of an increasingly unpopular Conservative party. Despite their different situations, their common economic aim of resuscitating the economy, and their vow to bring the full force of governmental, and particularly executive, powers into operation for this purpose provides a link between them. There is also evidence of a certain interchange, or borrowing, of ideas between proponents of the two reform programmes.³¹ In order to get a clearer perspective of the actual formulation of the reform policies, however, it would now be appropriate to compare the respective architects of the 'New Deals' in both countries, and to examine some of the considerations impelling them to propose far-reaching changes.

²⁸ W. Leuchtenburg, *Franklin D. Roosevelt and the New Deal, 1932-40* (New York: Harper and Row, 1963) 138-49 [hereinafter Leuchtenburg].

²⁹ *Id.*, at 138.

³⁰ The parallel comes to mind of Cuba, where the supreme reliance of the economy on the export of sugar, which was virtually the sole staple crop of the island, also led to economic adversity in times of depression.

³¹ See *infra*, 232-234.

"The Brains Trusts"

There is nothing odd about the fact that the American and Canadian New Deals reflected both the individualist and collectivist tendencies mentioned at the outset. At a time of historical transition, there is inevitably a juxtaposition of new and old ideas. The proponents of reform, however radical their model of the ultimate collectivist society, must learn as everyone does that compromise is the essence of democratic politics. The advisers of the political executives who fashioned the respective New Deals, moreover, were drawn from more than one school of thought. Both Bennett and Roosevelt drew their inspiration from many sources. Their New Deal programmes lacked overall coherence; they were never systematic attempts to change the capitalist system, or even to set up an interim regime with some form of mature collectivism as the final goal. They were both pragmatists rather than ideologues, devising, adjusting, discarding and refashioning as they went along, without any obsessive preoccupation about the overall design or the aesthetic qualities of the structures they were building. And contributing to the confusion were the master craftsmen who at times gave each of the architects discordant and conflicting advice.

In the United States, Professor Rexford Guy Tugwell of Columbia University explicitly advocated certain collectivist goals, such as the nationalization of the banking system and the state regulation of national credit to balance the interests of producers and consumers.³² His Columbia colleague Raymond Moley was inclined more to support an atomistic progressivism to which business would be more receptive; he disagreed with Tugwell about the handling of the banking system³³ and later condemned the latter's collectivism while defending him from an exaggerated charge that he was seeking to "sovietize" America.³⁴ Tugwell and Moley, along with A.A. Berle were probably the most influential members of the American "Brains Trust". The group, however, was amorphous in composition with lesser luminaries being classified sometimes as "brains trusters." The original "Brains Trust" as Sternsher relates in his book on Tugwell, was set up to plan the overall economic strategy for Roosevelt's 1932 campaign against Hoover. At this stage it consisted of Moley, Berle, Tugwell and two lawyers, Samuel Rosenman and Basil O'Conner, who wrote and re-wrote speeches for the candidate and made copious suggestions to him about economic policy.³⁵ Tugwell was tireless and urgent in this respect, suggesting "... economic planning, price controls, social management of investments, and emergency public works and relief". Roosevelt, however, tended to reject Tugwell's ambitious ideas, especially those favouring fundamental economic changes and, according to Tugwell, lapsed back into the "reformist" concepts of his liberal-progressive heritage.³⁶ In the agricultural sphere, Tugwell advocated "national regulation of production through democratic planning," and for

³² B. Sternsher, *Rexford Guy Tugwell and the New Deal* (New Brunswick, N.J.: Rutgers University Press, 1964) 125 [hereinafter Sternsher].

³³ *Id.* at 126.

³⁴ *Id.* at 366.

³⁵ *Id.* at 41-43.

³⁶ See, D. Fustfeld, *The Economic Thought of Franklin D. Roosevelt and the Origins of the New Deal* (New York: Columbia University Press, 1954) esp. c. 17; and also see Sternsher at 43.

industry, the sanction, co-ordination and control of business combinations for the public benefit.³⁷

Of a somewhat more conservative disposition, Moley recognized that the era of *laissez-faire* was at an end and that the advent of the positive state was inevitable, but he foresaw a larger role for business expertise in the new economic order. As Schlesinger paraphrases his views: ". . . The March 'toward greater and greater concentration cannot be checked.' The obligation of government was to supply the focal point where economic problems could be integrated and resolved. Within the pattern of business-government planning, however, Moley was increasingly accepting the idea that business knew best."³⁸ The last of the initial triumvirate, Berle, was also prepared to leave most operations in the control of businessmen, but felt that it might be necessary to fasten mandatory legal obligations on them in certain areas to safeguard the public interest. He did not foresee nationalization of key industries as imminent, but he did envisage a time when government would acquire more relevant experience and public ownership might be much more widespread. Finally, he urged business to develop a new 'moral climate': a corporation should have a conscience.³⁹

Some twenty-five years after the formation of the original brains trust, Tugwell, regarding it from the possibly distorted perspective of his own participation in it, characterized it as a "collectivist" body: "They could see that a national collectivism would . . . make it necessary for government rather than business to make final determinations and ultimately to regulate the conjuncture in the public interest."⁴⁰ If the characteristic relationship of nineteenth-century *laissez faire* was a contractual one of individual with individual, Tugwell envisaged its supersession by a regime in which individuals and legal persons such as corporations and the state would assume reciprocal rights and duties towards each other in an elaborate network of relationships that would evolve into a new public order. One might almost say, reversing Maine's dictum, that status was displacing contract. We have already seen that this description is perhaps too sweeping a one for the concepts generated by other brains trusters, but it still might have a kind of poetic veracity as an indication of the trend of thought, if it was not, admittedly, a consensus view of Tugwell's colleagues' actual opinions.

In Canada, where the brains trusters never formed an organized or cohesive group, there were the same tensions between collectivist and individualist concepts in the articulation of Prime Minister Bennett's less ambitious reform programme. W.D. Herridge, Bennett's brother-in-law, was more inclined to radical reform in Canada than were his colleagues Major-General A.G.L. McNaughton and R.K. Finlayson, Bennett's executive secretary, but even Herridge vacillated and his precise position is difficult to define.

A decorated veteran of the First World War, Herridge, an erstwhile Liberal, was an Ottawa lawyer who married Bennett's sister Mildred and was appointed to succeed Vincent Massey as Canadian Minister to Washington soon after

³⁷ A. Schlesinger, *The Coming of the New Deal* (Boston: Houghton Mifflin, 1959) 183 [hereinafter Schlesinger].

³⁸ *Id.* at 182.

³⁹ *Id.* at 183.

⁴⁰ R. Tugwell, *The Democratic Roosevelt* (New Orleans: Pelican, 1969) 283.

Bennett's election victory in 1930. From the vantage point of the Canadian Legation, Herridge was able to observe closely the development of Roosevelt's New Deal. He befriended and received advice from some of the best-known American New Dealers, including Tugwell, Berle and Moley. As the political fortunes of his brother-in-law's Party declined, in 1934 and 1935 Herridge wrote a lengthy series of letters to Bennett imploring him to adopt a 'New-Deal' type programme as a possible means to electoral salvation. That he was prepared to accept a radically different type of society is apparent from a question he puts to Bennett in one of his letters: "Will Capitalism ever work again? Are we compelled to keep it, crippled though it may be?"⁴¹ Finlayson, who worked daily with the Prime Minister, later recalled that in 1934 Herridge entreated Bennett to bring some of the leading American brains trusters north to help formulate a Canadian version of the U.S. New Deal. The Prime Minister, however, was lukewarm to the idea and nothing happened.⁴²

Herridge was interested in the American New Deal, and a possible Canadian counterpart, both as practical programme and as political myth. In the practical sense, the New Deal, if it were a well-conceived plan for economic recovery, could stimulate the resurgence of business confidence on which a return to prosperity would be based. The practical programme, however, insofar as it was a stimulus for morale, was essentially a myth inasmuch as it was contrived only *indirectly* to achieve recovery. This strategy was elucidated by Herridge in one of his frequent memoranda to Bennett:

... The New Deal accomplished incalculable things. Pandora's Box has charmed the people into a new state of mind. To all of them, even yet, its depths are illimitable, and from them they confidently hope will be produced . . . new instruments with which to combat contemporaneous problems. So long as that faith can be sustained, I do not have much doubt that this country will continue on the road to recovery. Therefore the spirit of the New Deal is what really mattered. The mechanics of the New Deal are a lesser thing.⁴³

Of some of Roosevelt's measures, Herridge was bitingly contemptuous, mentioning that their destruction would have to be encompassed by "... an early *coup de grace* lest they turn inwards and devour those who brought them into being."⁴⁴ While foreseeing the possibility of a collectivized society in Canada, Herridge was unsure of the form it might assume or the time of its arrival. He was preoccupied, above all else, with the more immediate problem of ensuring Bennett's re-election, and deeply distressed when the latter did not respond enthusiastically to his suggestions for a reform programme.⁴⁵

Herridge's cohorts, McNaughton and Finlayson, played a somewhat lesser role in the sponsorship of the Canadian New Deal. Finlayson, in private life a Manitoba lawyer, was not a warm exponent of the type of reform programme advocated by Herridge. He was essentially a Tory who was distrustful of a large

⁴¹ *Bennett Papers* (Public Archives of Canada) Memorandum, Herridge to Bennett, July 18, 1934.

⁴² Interview with R.K. Finlayson, March 23, 1966.

⁴³ *Bennett Papers* (Public Archives of Canada) Memorandum, Herridge to Bennett, April 12, 1934.

⁴⁴ *Id.*

⁴⁵ *Cf. inter alia, McNaughton Papers* (Ottawa: Army Historical Section) Herridge to McNaughton, May 24, 1935. The material which follows, unless otherwise mentioned, is taken from interviews with Finlayson and McNaughton in March and June, 1966.

state apparatus ever seeking to expand its control into new areas. He was also devoted to Bennett and hopeful that Mackenzie King could somehow be beaten in the coming general election.⁴⁶ When Bennett, at last, began to consider the implementation of a Canadian New Deal, Finlayson loyally, but without much conviction, made suggestions about possible reform policies. On one occasion he puckishly suggested to Bennett, in Herridge's presence, that the Canadian farm-implement industry might be nationalized, knowing that Bennett was a close friend of Thomas A. Russell, the president of Massey-Harris. The proposal was met by the Prime Minister's wrath, but Finlayson felt a surge of sympathy from Herridge during the denunciation. Another measure which he recommended to Bennett was unemployment insurance (which Herridge opposed, for the present, as being premature) and the abolition of no-par-value shares which were said to be subject to abuse by corporations. Finlayson, whose mind was keenly attuned to practical political realities, thought that the incendiary reference to such shares (the regulation of which probably fell under provincial jurisdiction), would incite provincial attorneys-general, most of whom by now were Liberals, to violent protest and thereby cast the Liberal Party in a reactionary light.⁴⁷

McNaughton, in his capacity as Chief of the General Staff, was in charge of setting up a series of relief camps across Canada, one of the chief purposes of which was to build air strips. He later conceded that the suppression of radical agitators was a subsidiary motive prompting the government to confide such a task to the Army. His leadership of large numbers of men in France, however, had given him a certain compassion for the victims of social problems, and he was deeply concerned about the alleviation of unemployment. McNaughton, Finlayson and Herridge secretly collaborated, in the fall of 1934, on Bennett's five celebrated New Deal radio speeches at Herridge's cottage in the Gatineau Hills, with Herridge being the principal author. The speeches bear the unmistakable imprint of the latter's style: "I am for reform," said Bennett in one of the January, 1935, talks, "And in my mind reform means government intervention. It means the end of *laissez-faire*. . . . I nail the flag of progress to the masthead. I summon the power of the state to its support."⁴⁸ There was an apocalyptic tone to the addresses that seemed to presage a fundamentally-altered new society but, somewhat surprisingly, little public reaction to the speeches. Perhaps the new policy was so unexpected, coming from such a source, that the audience was dazed and disbelieving.

Reciprocal Influences in the U.S. and Canadian New Deals

To Herridge, performing his diplomatic tasks in Washington, the improved psychological and economic climate in the United States was attributable to the symbolic value of Roosevelt's reform programme. The resurgence of public confidence, the new momentum in national affairs, arose from the feeling of direc-

⁴⁶ Finlayson, who knew Bennett and King intimately, perhaps jestingly referred to the former's tendency to say "he knifed me in the back," while King would say "he stabbed me in the breast," as indicative of Bennett's supposedly masculine nature and King's femininity, Interview with Finlayson, March 1966.

⁴⁷ Interview with Finlayson, March 1966.

⁴⁸ Dominion Conservative Association, *The Premier Speaks to the People* (The First Address), Ottawa, 1935, at 11.

tion and purpose inspired by the New Deal. A Canadian application of a New-Deal type programme would have a similar psychological effect, and would resuscitate confidence in imminent recovery. Accordingly, the U.S. New Deal was a model, but not necessarily a model of specific legislation — its particular nostrums were not of much importance. It was rather, a tactical device to generate a self-sustaining impulse toward recovery and thereby deliver the Conservatives from almost certain defeat.

Among those counselling Herridge in the Canadian Legation was his close friend Dean Acheson,⁴⁹ who was successively Undersecretary of the Treasury in Roosevelt's first administration and then in private law practice. Although at times Acheson became disaffected with Roosevelt's reform policies,⁵⁰ he was nevertheless a leading Democrat who knew the "brains trusters" and was thoroughly conversant with the American New Deal. Praising Herridge posthumously as ". . . one of the ablest diplomats this country has ever known," President Truman's Secretary of State disclosed that some of the Canadian New Deal proposals, including the minimum wages, maximum hours of work and unemployment insurance measures were the result of close and frequent consultation between Herridge and Acheson in the Canadian Legation when their wives were away on summer vacation. The Herridge-Acheson proposals, apparently, were predicated on the assumption that a radical economic reform programme, under prevailing conditions, would appeal to the electorate everywhere except in Quebec, which was written off as a reactionary bastion of Liberal strength,⁵¹ enabling Prime Minister Bennett to retain power. Bennett's social legislation, however, was tardy and half-hearted and never captivated the fancy of Canadian voters. In the election of October, 1935, his Party suffered its most disastrous defeat in history,⁵² and his New Deal legislative programme was repudiated by the victorious Liberals who sent it to the courts, by way of a reference, to its almost certain invalidation.

Another example of interaction between proponents of the American and Canadian New Deals were the visits by General McNaughton to Washington in the early thirties. McNaughton met Berle and Moley in the American capital and found them intensely interested in his experiences in setting up relief camps in Canada.⁵³ The scheme to organize relief camps for the accommodation of "physically fit single homeless males" was commenced by order-in-council dated October 8, 1932, after McNaughton had converted the Conservative cabinet to the idea; there were probably never more than about 30,000 unem-

⁴⁹ See Acheson's tribute to his "much-loved friend" in D. Acheson, *Present at the Creation* (New York: Signet, 1970) 896.

⁵⁰ See *Leuchtenburg*, *supra* note 28, at 178-79.

⁵¹ See T. Creery, *Former U.S. State Secretary Pays Tribute to W.D. Herridge*, (October 2, 1961) 51 *Edmonton Journal*, 24. Although Acheson may have urged the merits of unemployment insurance on Herridge, the latter did not favour the proposal, see *Bennett Papers* (Public Archives of Canada) Herridge to Bennett, January 16, 1934.

⁵² The Conservatives lost almost 100 seats, retaining only 39 to 171 won by the Liberals, with the C.C.F. winning seven, Social Credit 17, and Bennett's ex-Trade and Commerce Minister, H.H. Stevens, who split with the Conservatives and formed the Reconstruction Party, winning only his own seat, see J. Wilbur (ed.), *The Bennett New Deal: Fraud or Portent* (Toronto: Copp Clark Publishing Co., 1968) 4 [hereinafter Wilbur].

⁵³ On the camps themselves, see *infra*, and also J.G. Eayrs, *In Defence of Canada I* (Toronto: University of Toronto Press, 1964) 124-28, and L.A. Brown, *Unemployment Relief Camps in Saskatchewan* (1970), 23 *Saskatchewan History*, 81.

ployed workers in such camps at any one time.⁵⁴ The American New Dealers whom McNaughton met at the Canadian Legation were deeply interested in his experiences in setting up the camps, and used some of the information he relayed to them in setting up their own *Civilian Conservation Corps*, which was set up in 1933, mainly to perform practical soil conservation work by planting trees, building small dams and clearing fire hazards from forested areas; the C.C.C. was also organized under Army auspices and employed as many as 300,000 young, unemployed men.

While the ideological proclivities of the architects of both New Deals were derived from different sources, the formulation of the respective programmes provides an arresting example of a political phenomenon that has become much more common in recent years. Both programmes were, very largely, products of extra-parliamentary activity. Bennett never formally submitted his New Deal to the cabinet before announcing its contents,⁵⁵ and the progenitors of the U.S. New Deal were academic intellectuals rather than members of the executive or of Congress. It is arguable that in proposing a potentially vast reform programme to the country without consulting his cabinet colleagues, the Canadian Prime Minister violated the convention of cabinet solidarity which surely implies at least consultation, if not acquiescence, in policies prior to their promulgation. In the case of the American chief executive, however, he is, by the Constitution,⁵⁶ virtually the exclusive repository of executive powers, and there would appear to be no similar convention in the United States; members of American cabinets, in fact, often disagree in public on current issues in a way that would be unheard of in Canada or the United Kingdom where the convention prevails.

The Legislation:

The New Deal statutes enacted by the United States and Canada can be dealt with under the following three classifications: (a) agricultural statutes; (b) industrial and labour statutes and (c) unemployment legislation. In the resumé that follows, no attempt will be made to set out exhaustively the provisions of the various laws, but an endeavour will be made to state briefly the purpose of the legislation against the background of the depression.

The Agricultural statutes: The chief U.S. New Deal statute dealing with agriculture was the *Agricultural Adjustment Act* of May 12, 1933, along with its sequel of 1938. One of the initial laws passed by Roosevelt's first New Deal Congress, it sought to enlist the voluntary cooperation of farmers in reducing the size of their crops as a means of maintaining price levels and purchasing power. Taking the base period 1909-1914 (except in the case of tobacco and potatoes where the period was from 1919-1929), the legislation strove to give farmers the same purchasing power for commodities usually bought by them as they commanded in the respective base periods. A number of modalities were used for this purpose. Production controls and marketing agreements were employed to regulate the flow of produce and ensure that there was no glut on

⁵⁴ See *Brown*, *supra* note 53, at 83.

⁵⁵ See *Manion Papers* (Public Archives of Canada) memorandum by Manion, January 3, 1935; and *id.* memorandum by Manion, January 7, 1935.

⁵⁶ *Cf.* U.S. Constitution, Article II (1).

the market resulting in plummeting prices. Farmers agreeing to limit their production to an individual quota set by the government received benefit payments for idle acreage as well as the price advantages resulting from output restrictions. Although non-participating farmers also received the latter benefit, they did not obtain the often substantial benefit payments accruing to those cooperating with the government plan. In the years following the enactment of the legislation in 1933, farm income rose markedly, but it is possible that a proportion of the increase was attributable to a general advance in prosperity rather than to specific A.A.A. programmes. Another factor contributing to improved farm prices were severe droughts in the United States, similar to the ones which paralysed the Saskatchewan grain industry, and the dust storms which afflicted Kansas, Colorado and the Midwest in the 1930's. Two controversial agricultural measures which elicited fierce criticism were (a) the killing of six million hoglets in the spring of 1933, and (b) the plowing under of ten million acres of cotton in May of the same year. The former measure resulted after a government survey forecast an abnormally large production of pork in several months time. Critics, who termed the action "the murder of six million little pigs", were not allayed by the distribution of the pork to indigent persons through the recently-established *Federal Surplus Relief Corporation*.⁵⁷ The interment of the cotton resulted from the prediction of an unnaturally high yield of 40 million acres, much of which would not secure buyers and would be added to an accumulating surplus from former years. Farmers were compensated for the retirement of productive land at a rate of \$11 per acre. In order to raise money to pay for the benefits under the A.A.A. a processing tax was levied on the initial processing of the product for domestic use; the tax was imposed whether the agricultural produce in question was domestic or imported. This processing tax was later declared unconstitutional, as it related to cotton,⁵⁸ inasmuch as it was an attempt to regulate production in intrastate commerce.⁵⁹

The 1938 *Agricultural Adjustment Act*, which superseded the invalidated 1933 statute, focussed on marketing rather than production, empowering the Secretary of Agriculture to fix yearly marketing quotas for tobacco, rice, corn, wheat and cotton, equal to the projected annual national requirements. It was essential, however, before a marketing scheme was put into operation that two-thirds of the farmers growing a specific crop agree to it. If crop prices fell below the levels set for base periods, parity payments were to be made by the government to bring the prices up to those levels. The statute also provided that payments would be made to farmers planting "soil-conserving crops" on part of their land. Other measures in the improved legislation "... provided commodity loans on surplus crops, storage facilities to ensure an 'ever-normal granary,' and insurance for wheat. The resultant decrease in the production of staple crops and the opening up of new markets succeeded in raising the prices of agricultural commodities: by 1939 farm income was more than double what it had been in 1932."⁶⁰

⁵⁷ *Leuchtenburg, supra* note 28, at 73.

⁵⁸ *United States v. Butler* (1935), 297 U.S. 1.

⁵⁹ For a comparison of the U.S. interstate commerce power and the much weaker Canadian power over "trade and commerce", see A. Smith, *The Commerce Power in Canada and the United States* (Toronto: Butterworths, 1963).

⁶⁰ A. Nevins and H.S. Commager, *A Pocket History of the United States* (5th ed., New York: Pocket Books, 1967) 424.

In the area of agricultural debt adjustment, Schlesinger describes the changes wrought by the *Farm Credit Act* of June, 1933:

. . . F.C.A. refinanced farm mortgages, inaugurated a series of "rescue loans" for second mortgages, developed techniques for persuading creditors to make reasonable settlements, set up local farm debt adjustment committees, and eventually established a system of regional banks to make mortgage, production and marketing loans and to provide credits to co-operatives. It loaned more than \$100 million in its first seven months — nearly four times as much as the total of mortgage loans to farmers from the entire landbank system the year before. At the same time it beat down the interest rate in all areas of farm credit.⁶¹

In accomplishing all these tasks, the F.C.A. enabled a large number of American farmers to retain debt-burdened farms.

The Canadian New Deal agricultural legislation consisted chiefly of the *Farmers' Creditors Arrangement Act*⁶² and the *Natural Products Marketing Act*,⁶³ the latter statute being applicable to a wide range of natural products, and not merely to agricultural produce narrowly defined. Neither as comprehensive nor as detailed as the U.S. New Deal agricultural legislation, the Canadian statutes did not attempt the systematic amelioration of conditions throughout the whole agricultural industry that the major American legislation did, leaving planning much more to individual initiative. There was no real scope under the Canadian legislation for extensive cooperation between government and farmers, or for the payment of substantial sums of money to farmers participating in government-sponsored schemes.

The Farmers Creditors Arrangement Act dealt with the problem of debt adjustment as it affected farmers who were labouring under crushing debt loads and confronted with the loss of their land. The statute enabled farmers to enter into a compulsory compromise of principal and interest payments with their creditors on both secured and unsecured loans. Once such a compromise was registered by a superior or district court, it was a legally enforceable variation of the original contract or mortgage. In the absence of a voluntary agreement, the farmer might apply to a provincial board of review (usually a local judge appointed for the purpose) which had jurisdiction to formulate a mandatory alternative proposal. The widespread invocation of this statute, especially on the prairies, did not escape criticism. It was found in some cases that small merchants and tradesmen operating themselves under conditions of hardship were in a disadvantageous position vis-a-vis farmers: "There is, of course, a sense in which the farmers' immediate creditors in themselves constitute something closely akin to an exposed group. This is most true where they are unsecured, but the drop in the value of security held by secured creditors has wiped out equities in a large number of cases and they too have taken severe losses."⁶⁴ In many instances, the apprehension by prospective creditors that hard-pressed farmers could invoke the legislation to reduce the amount of their indebtedness may actually have led to a refusal on the part of merchants and others to extend credit to them.

⁶¹ Schlesinger, *supra* note 37 at 45.

⁶² 24-25 Geo.V. c. 53.

⁶³ 24-25 Geo.V. c. 57.

⁶⁴ W.T. Easterbrook, "Agricultural Debt Adjustment" in (1936), 2 C.J.E.P.S. at 397.

The *Natural Products Marketing Act* enabled producers of defined natural products (including fish and forest, as well as farm products) to adopt collectively schemes to facilitate the orderly distribution and marketing of their produce. As with the *Agricultural Adjustment Act*, it was sought to provide a mechanism to prevent conditions of artificial glut on the market with resultant low commodity prices. The Canadian legislation was weaker, however, in that it did not provide for large-scale bureaucratic planning by a centralized government agency nor financial inducements for those farmers participating in the various schemes. What was provided, essentially, was a highly decentralized means whereby producers of natural products, on their own initiative, could combine on a local, provincial or national level to regulate marketing practices throughout the geographic regions under their jurisdiction. The *Dominion Marketing Board* exercised loose supervision over subordinate boards set up by producers, but lacked the broad powers possessed by the A.A.A. in the United States. Some of the characteristic objects of the subordinate boards, whether they were engaged in the marketing of milk, tobacco, apples or honey, were to regulate the orderly flow of agricultural commodities to the market to avoid unreasonable gyrations in price levels (for example, by making adequate storage and transportation arrangements in advance to facilitate the systematic control of future marketing) and also to regulate the quality of produce so that consumers would be assured of value for their money and would purchase Canadian produce rather than imported commodities. Vexed by a constitutionally inelastic marketing power,⁶⁵ the federal government sought to cover the whole field by framing its legislation in general and comprehensive terms and enlisting the legislative cooperation of the nine provinces⁶⁶ to validate that part of its legislation which might fall under provincial jurisdiction; the provincial statutes normally provided that whatever legislation comprised in the federal statute was "within the legislative competence of the Legislative Assembly of the Province,"⁶⁷ was declared to be "in force" in the Province, and provided for cooperation between the federally- and provincially-constituted marketing boards.⁶⁸ The aim of the latter provision, of course, was to cover the whole field of marketing so that responsibilities would be allocated conformably with jurisdiction. Farmers preferring not to invoke governmental marketing devices set up in the United States in 1933 and in Canada in 1934 were free to shift for themselves as best they could. It was apparent, however, that the inducements offered to cooperating farmers and the intricacy of the planning was much greater in the United States than in Canada.

⁶⁵ See *Smith (1963)*, *supra* note 59 *passim*.

⁶⁶ The provincial statutes were: (1) *The Ontario Marketing Act* 1931, 21 Geo.V, c. 17 as am. by the *Ontario Marketing Act* 1934, 24 Geo.V, c. 38; (2) *Statutes of Quebec* 1934, 24 Geo.V, c. 24; (3) *The Nova Scotia Marketing Act* 1933, 23-24 Geo.V, as am. by c. 58 of the *Statutes of Nova Scotia* 1934; (4) *The New Brunswick Marketing Act* 1934, 24 Geo.V, c. 19 as am. by 25 Geo.V, 1935, c. 44; (5) *Natural Products Marketing Act*, P.E.I. 1934, 24 Geo.V, c. 17; (6) *The Manitoba Natural Products Marketing Act* 1934 Geo.V, c. 90; (7) *The Natural Products Marketing Act*, B.C. 1934, 24 Geo.V, c. 38; (8) *The Natural Products Marketing Act*, Sask., 1934, 25 Geo.V, c. 62 as am. by c. 90 of the *Statutes of Saskatchewan* 1934-35; (9) *An Act to Supplement Legislation of Canada Relating to the Marketing of Natural Products and Providing for the Appointment of a Marketing Board* 1934, c. 34, *Statutes of Alberta*.

⁶⁷ s. 3 of the Alberta statute referred to *id.* (9).

⁶⁸ *Id.*, s. 5.

Industrial and Labour legislation: When the *National Industrial Recovery Act* was enacted on June 16, 1933, President Roosevelt described it as "... the most important and far-reaching legislation ever enacted by the American Congress. It represents a supreme effort to stabilize for all time the many factors which make for the prosperity of the nation and the preservation of American standards."⁶⁹ The N.I.R.A. established a *Public Works Administration* (P.W.A.), with Secretary of the Interior, Harold L. Ickes as Administrator, in order to provide direct employment through a vast range of public works projects. A complementary agency, the *National Recovery Administration* (N.R.A.) was set up under General Hugh S. Johnson, to raise commodity prices and the wages of the lowest-paid workers through a series of "codes" promulgated separately for each industry. Through these two instrumentalities, the N.I.R.A. sought to gain the support of industrial and labour leaders by pledging an improvement of conditions for both management and workers.

Large sums were expended by the P.W.A. under Secretary Ickes's direction during his first year as Administrator. By June 16, 1934, exactly a year after the legislation was passed, he had allocated its works budget of \$3.3 billion among 13,266 federal and 2,407 other projects. Almost every county in the United States had at least one P.W.A. project, the majority of them involving heavy construction. In addition, a substantial sum of money went to finance construction under the *Tennessee Valley Authority* (T.V.A.). The T.V.A. was established to build dams on the Tennessee River system, providing public power at cheap rates and setting a standard to determine whether rates charged by private power companies were fair. Conditions vary greatly in public and private enterprise, of course, but in a recent year the charge for electricity supplied by T.V.A. was less than one cent per kilowatt hour as compared with a nation-wide rate of 2.4 cents charged by private power companies. The T.V.A. also provided flood control, and by a series of massive locks increased haulage by commercial navigation from 33 million ton-miles in 1932 to 2.2 billion ton-miles in 1963.⁷⁰

The inventory of construction projects completed under P.W.A. auspices was awesome:

... From 1933 to 1939, P.W.A. helped construct some 70 per cent of the country's new school buildings; 65 per cent of its courthouses, city halls and sewage plants; 35 per cent of its hospitals and public health facilities. P.W.A. made possible the electrification of the Pennsylvania Railroad from New York to Washington and the completion of Pennsylvania's 30th Street Station. ... Under P.W.A. allocation, the Navy built the aircraft carriers *Yorktown* and *Enterprise*, the heavy cruiser *Vincennes*, and numerous light cruisers, destroyers, submarines, gunboats and combat planes; the Army Air Corps received grants for more than a hundred planes and over fifty military airports.⁷¹

In the area of low-cost housing projects and slum clearance, the progress of the P.W.A. was a sore disappointment to its Administrator. Fearing that rapacious speculators would reap the major benefit from such construction, Ickes was inclined to reject most of the proposals of this nature emanating from

⁶⁹ E. Ritchie, *Totalitarianism and the Great Depression* (New York: Western Publishing Company, 1966) 1191, and see *Chandler*, *supra* note 11, at 223.

⁷⁰ S.E. Morison, *The Oxford History of the American People* (New York: Oxford University Press, 1965) 963 [hereinafter Morison].

⁷¹ *Leuchtenburg*, *supra* note 28, at 133.

limited-dividend corporations. After inspecting some of the projects of this kind under way in Chicago, he confided to his Diary on June 2, 1936, "There isn't any doubt that something is wrong in the Housing Division, in fact, has been wrong for a long time. We are not getting results. There is a failure to accept responsibility and an inability to decide questions as they come up, with too much of a disposition to build alibis to be invoked in case of future criticism and a general lack of an effective aggressive organization."⁷² On balance, however, the record of the P.W.A. was an impressive one. In the number of useful construction projects completed, in the reduction of unemployment and in the infusion of more purchasing power into the economy it improved the morale of the nation and contributed to recovery.

Complementary to the P.W.A., the *National Recovery Administration* was the other major public agency established under N.I.R.A. Using the distinctive "Blue Eagle" emblem as a symbol to be displayed by participating industries, the government sought to have each major industry draw up a code of fair industrial practices covering such matters as fair competition, maximum hours of work and minimum wages. In each case the government had to approve the code which incorporated such provisions, varying them where necessary to protect consumers, competitors, employees and others. It was expressly provided that no code should permit monopolies or monopolistic practices,⁷³ but the various fair practices provisions supervised by the government aimed at eliminating the fierce competition which had led to many recent business failures. The government was thereby assuming the precarious task of balancing the interests of producers and consumers while attempting to ensure that many struggling business enterprises remained solvent.

There were two characteristic facets to each code, one promoting the interests of industrialists and the other those of labour. The former embraced provisions regulating production, price levels and various trade practices; the latter set out approved practices concerning collective bargaining, wage rates and hours and conditions of labour. It will be readily seen that the adoption of rigorous industrial standards by some industries and not by others would give an unfair competitive advantage to delinquent industries. It was for this reason that the statute provided, for the sake of comprehensiveness, that in the absence of an approved code:

. . . The President, after such public notice and hearing as he shall specify, may prescribe and approve a code of fair competition for such trade or industry or subdivision thereof, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of this section . . .⁷⁴

Once accepted and promulgated, a code had the full force of law, and in default of compliance with its provisions, violators could be brought into court, whether or not they had signed an N.R.A. agreement, and compliance could be enforced legally.

⁷² H.L. Ickes, *The Secret Diary of Harold L. Ickes*, 3 Vols., (New York: Simon and Schuster, 1954) I, 610 [hereinafter Ickes].

⁷³ See section 3 (a), Title I, *National Industrial Recovery Act*, U.S. Statutes at Large, vol. XLVIII, 195.

⁷⁴ *Id.* s. 3 (d).

Another significant provision was section 7(a) of the Act which recognized the pre-existing right of labour to organize and to bargain collectively, but added a proviso that no employee should be required as a condition of employment to join any company union or to refrain from joining any labour organization of his own choosing. A fierce dispute followed between management and labour concerning the precise meaning of these provisions.⁷⁵ Did section 7(a) confer a right to choose a union independently of company supervision at the balloting, where such supervision had been widespread in the past? Must a company bargain exclusively with a nationally-affiliated union displacing a company union? These questions were unanswered in the legislation. To remove the resultant uncertainty and in an endeavour to create labour peace, President Roosevelt and General Johnson established a series of labour boards to adjudicate disputed questions. One historian of the New Deal succinctly summarizes the tendency of the decisions handed down by these boards:

They claimed for the government the power to conduct secret elections to permit workers to decide whether they wanted to be represented by a nationally-affiliated union, a company union, or no union at all. Increasingly, they also came to hold that the union chosen by the majority of the workers would have exclusive bargaining rights for all workers. If this principle were established, the company union speaking for a minority of workers in a unionized plant would be doomed. Finally the board insisted that 7 (a) required employers to bargain with unions in good faith, and that bargaining must lead to an agreement.⁷⁶

Under the dominant interpretation of section 7(a) by these labour boards, national unions were able to acquire negotiating influence that they had never possessed until the depression.

Critics of the NRA were quick to perceive authoritarian, or even fascist, overtones in the legislation. The integration of various key industries along with the labour force in a kind of gigantic syndicate operated by the state, which was empowered to authoritatively decree conditions of association for all conjured up the image of the fascist corporative state. A somewhat gentler critic, the distinguished economist Joseph A. Schumpeter, pointed out: "Stripped of phraseological mimicry and apart from provisions about labour, (it) was legal recognition and official encouragement, amounting to compulsion, of a modified form of the German cartel which, quite independently of this legislation, tended to grow out of the activities of trade associations."⁷⁷

In Canada, the relegation of most industrial contracts to the jurisdiction of the provinces by Lord Haldane a decade earlier⁷⁸ appeared to some lawyers to constitute an insurmountable constitutional obstacle to the enactment of a Canadian version of the N.I.R.A. Prime Minister Bennett, moreover, voiced the practical objection to a Canadian N.R.A.-type scheme that the legislation was designed for a more self-sufficient economy, and not for a Canadian economy which had to compete strenuously to export its produce abroad in order to maintain its vitality:

Obviously, it would be impossible for me in a few minutes to analyze the National Industrial Recovery Act, but what I said the other evening in Montreal was this. That Canada had a huge debt and that with ten and a half millions of people in-

⁷⁵ Cf. *Schlesinger*, *supra* note 37, at 145-49.

⁷⁶ *Leuchtenburg*, *supra* note 28, at 107.

⁷⁷ J. Schumpeter, *Business Cycles*, II (New York: McGraw-Hill, 1939) 922.

⁷⁸ *Toronto Electric Commissioners v. Snider* (1925), A.C. 396.

habiting half a continent it was obvious that we must maintain an export business, that we had now the fifth place in volume of exports, that it was quite clear our friends to the south had abandoned the idea of export business, which is very small, may be 10 per cent of the whole. That we could not place ourselves in that position, and therefore we could not by the very nature of things reduce hours of labour and increase pay and maintain our export position at the same time.⁷⁹

Shortly after Bennett spoke, Dr. T.W.L. MacDermot, an academic historian and a Liberal articulated virtually the same sentiments about the possible implementation of an N.R.A. programme in Canada: "It is obviously not literally applicable to this country—which has such a small population and such a large area, and which is not self-supporting, but is an exporting country. . . ."⁸⁰

In the ranks of both Conservatives and Liberals, therefore, there was a convergence of views about the inapplicability of the norms of the National Industrial Recovery Act to Canadian industries.

Nonetheless, on a much less ambitious scale, the *Dominion Trade and Industry Commission Act*⁸¹ which Parliament enacted in 1934 attempted, like the N.I.R.A., to regulate price levels and combat monopolistic practices for the joint benefit of producers and consumers. The purpose of the *Dominion Trade and Industry Commission* set up under the legislation was delineated as follows in the *Royal Commission on Price Spreads*⁸² of which the statute was really an emanation:

The Commission should be charged with the duty of protecting the interests of all classes and groups. Since the major problems with which the Commission would have to deal arise out of the growth of concentration, its basic functions would be concerned with the prevention or regulation of monopolistic practices. It is in this way that the Commission would serve to protect the consumer and the primary producer. But the complexity of the problem excludes any single formula or simple policy. We therefore make . . . the following specific recommendations:

- (a) Rigorous administration of the Combines Act.
- (b) Sanction and regulation of monopoly where it is agreed by the government that competition cannot or should not be restored.
- (c) Sanction or supervision of agreements within a trade or industry where it is agreed by the government that competition has become wasteful or demoralizing.⁸³

As with the N.R.A., therefore, agreements among industrialists of what might be termed a 'quasi monopolistic' nature would be approved by the government provided that the consumer was not thereby injured.

Statutory provision was made in the *Dominion Trade and Industry Commission Act* to implement the above recommendations. The statute was concerned with the widespread practice of undercutting business competitors' prices for the purpose of remaining competitive, and it was an assumption of the legislation that agreements regulating prices would not be an evil if they counteracted indiscriminate price-cutting which forced rivals out of business.

⁷⁹ Text of remarks by Mr. Bennett to the Liberal-Conservative Summer School in Newmarket, Ontario, 1933, quoted in *Wilbur*, *supra* note 52, at 28.

⁸⁰ Text of remarks delivered at the First Liberal Summer Conference, Port Hope, Ontario, September 1933, quoted in *Wilbur*, *supra* note 52, at 63.

⁸¹ 25-26 Geo.V, c. 59.

⁸² *Report of the Royal Commission on Price Spreads* (Ottawa: King's Printer, 1937).

⁸³ *Id.*, at 265-66.

Means were therefore provided to authorize agreements designed to eliminate "wasteful" or "demoralizing" competition.⁸⁴

Under the *Act*, the Commission exercised broad supervisory powers over other statutes, such as the *Combines Investigation Act*, which sought to eradicate unfair trade practices. In a more positive sense, it endeavoured to promote fair merchandising and high commodity standards. For the time being, no new agency with a membership of its own was established, but members of the Tariff Board were constituted members of the *Commission*. The *Commission* was directed to investigate complaints of contraventions of *any* federal statute enacted for the elimination of unfair trade practices, and to institute prosecutions of violators. This, however, was far removed from the specialized regimes set up for specific industries under N.R.A. codes. In addition, for an agency which was already performing the onerous task of adjusting tariffs, this added duty would be a most time-consuming and exacting one.

A special national trademark, "Canada Standard" (C.S.) was established under sections 18 and 19 of the Act to promote high commodity standards in marketing products. In order to be eligible to use the trademark, applicants had to submit to government inspection of their merchandise.

Corresponding to the labour standards provisions in the N.R.A. codes, Parliament enacted three statutes in 1935 pursuant to conventions of the *International Labour Organization*. The *Minimum Wages Act*,⁸⁵ the *Weekly Rest in Industrial Undertakings Act*⁸⁶ and the *Limitation of Hours of Work Act*⁸⁷ were drafted to give effect to labour standards adopted by the General Conference of the I.L.O. in Geneva further to the Labour Provisions of the *Treaty of Versailles*.⁸⁸ Because these statutes implemented international agreements, the treaty power was invoked to give them legal effect, particularly, it would seem, since most labour matters were considered to come under the provincial head of 'property and civil rights' and a more direct approach might be fatal. It was contended, in addition, that only the Dominion could establish nationwide uniform standards in labour matters, and that varying provincial standards were undesirable since workers in some provinces would then constitute under-privileged groups and would be continually enticed away to areas with higher standards.

Whatever the rationale of the labour legislation might be, the exceptions provided for in the statutes tended to eviscerate them from the start. The *Hours of Work* statute provided that no person should be employed in an industrial undertaking for hours "in excess of eight in the day and forty-eight in the week except in cases hereinbefore provided for."⁸⁹ (Stated exceptions existed, however, in cases of urgency, *vis major*, family undertakings or where exceptional work pressures existed). The *Minimum Wages Act* did not establish an all-

⁸⁴ See, *supra* note 81, s. 14.

⁸⁵ 25-26 Geo.V, c. 44.

⁸⁶ 25-26 Geo.V, c. 14.

⁸⁷ 25-26 Geo.V, c. 63.

⁸⁸ See Part XIII of the *Treaty of Peace Between the Allied and Associated Powers and Germany and Protocol*, (Ottawa: 1919) 154-64.

⁸⁹ S. 3.

inclusive minimum wage, which would hardly be possible, but provided that the Governor-in-Council might from time to time promulgate minimum wage levels in unspecified 'rateable' trades, which the cabinet would define at its own discretion. Without an executive proclamation to give effect to this provision, matters would remain as they were. The *Weekly Rest in Industrial Undertakings Act* provided that a minimum period of twenty-four consecutive hours was to be set aside for rest purposes in any seven-day period for "the whole of the staff employed in any industrial undertaking."⁹⁰

Provincial constitutional experts were quick to point out that in enacting this legislation Parliament was, in effect, adding extra statutory terms to contracts of industrial employment, the majority of which were considered to fall under provincial jurisdiction. They also invoked a 1925 decision in a reference on the unratified *Hours of Work* convention,⁹¹ in which the Supreme Court of Canada appeared to support the foregoing position, except in the case of employees of the federal government and certain other employees in restricted categories who clearly fell under the regulatory powers of Parliament.

For reasons already mentioned, Bennett was reluctant to embark upon an extensive nation-wide N.I.R.A.-type programme, and the exemptions and executive discretion which made the implementation of the 1935 labour statutes a matter of cabinet fiat ensured that Canadian regulatory powers in labour matters would be vastly inferior to those in the United States.

Further industrial legislation consisted of Section 498A of the *Criminal Code*,⁹² which forbade discriminatory discounts, rebates, and allowances or predatory price cutting. This penal legislation was directed against the practice of selling goods at unreasonably low prices in order to destroy competition and eliminate competitors. Under the section, the sale of goods in any area of Canada at a price lower than that asked elsewhere was an offence.

A leading member of the Liberal opposition, J.L. Ralston, sardonically criticized the section as ". . . just another instalment of the series of anti-climaxes to those radio speeches of January last, which has been furnished to the House during the last three or four months."⁹³ He argued that the section as drafted could readily be evaded. Instead of giving a discriminatory discount, a merchant could take a base price of \$80 and sell to one customer for 80 plus 10 per cent and to another for 80 plus 15 per cent. The section was a "snare and a delusion," he charged, both for the mercantile people of the country and for the consumer.⁹⁴

Both the scope of the work projects authorized under the P.W.A., and the executive powers conferred on the President to regulate industrial conditions under the N.R.A. significantly exceeded any powers possessed by the Canadian executive over industrial or labour relations. The relatively smaller size of the Canadian economy, the larger sector devoted to primary production,

⁹⁰ S. 3.

⁹¹ *In re Legislative Jurisdiction over Hours of Labour*, [1925] S.C.R. 505.

⁹² 25-26 Geo.V, c. 56, s. 9.

⁹³ *Canada, Parliament, House of Commons Debates*, June 10, 1935, 3478.

⁹⁴ *Id.*, at 3479.

and its much greater reliance on export markets for its vitality dictated, as Bennett and MacDermot emphasized, that the compulsory governmental regulation of price levels and hours of work in Canadian industries be avoided. The application of what labour legislation there was for this purpose was bound to be uneven and piecemeal. Canadian exports could not compete in foreign markets under a regime of compulsory domestic price levels and maximum hours of work.

The unemployment legislation: One of the classical arguments advanced by employers against unemployment insurance schemes in federal states was that any province or state which levied a compulsory tax on firms for such a purpose would place such firms at a competitive disadvantage vis-a-vis firms in provinces without such insurance. Partly for this reason, there was no publicly-sponsored unemployment insurance scheme anywhere in Canada or the United States at the beginning of the depression. The obvious solution, if it was constitutionally feasible, was to have a nation-wide federally-sponsored plan, or at least a plan that was centrally controlled and would not be uneven in its application.

The *Social Security Act* signed by President Roosevelt on August 14, 1935, used the device of tax credits to induce states to establish their own unemployment insurance plans, in addition to the federal plan set up under the statute. The legislation imposed a federal tax on the total aggregate payrolls of all employers (with a few exceptions) allowing them to credit 90 per cent of their tax against payments to approved state unemployment insurance schemes. Taking the standard three per cent federal rate in effect after 1937 (before this it was one per cent), employers could contribute up to 2.7 per cent of the amount represented for state unemployment insurance schemes without incurring any net additional costs. By this sliding tax-credit device, the federal government was able to exert pressure for the establishment of state schemes and also to promote uniformity among the various state plans by setting a level of tax credits from which it was financially and practically difficult to deviate.⁹⁵

Besides establishing an unemployment insurance scheme, the *Act* created old age pensions, financed by assessments on both employers and employees, entitling employees to pensions at the age of 65 proportionate to the earnings on which they had contributed. The federal government and the states, in addition, paid equally or on a matching basis for the provision of care to destitute persons over 65 who could not participate in the Social Security scheme (domestic workers, casual labourers and farmers, for example, were not insurable), for the blind, the crippled, and dependent mothers and children.

The legislation was criticized because the contributions levied were regressive and because, unlike the practices in force in other welfare systems in industrialized countries, it imposed levies on the current earnings of industrial workers to build up a fund to provide for the indigent aged. This practice was virtually unprecedented in industrialized states and caused some critics to characterize the legislation as "astonishingly inept and conservative."⁹⁶

⁹⁵ Cf., Chandler, *supra* note 11, at 207-08.

⁹⁶ Leuchtenburg, *supra* note 28, at 132; cf. Schlesinger, *supra* note 37, at 308-15.

The Canadian *Employment and Social Insurance Act*,⁹⁷ also enacted in 1935, was restricted to unemployment insurance, old age pensions having been established in Canada between the federal government and the provinces on a co-operative basis in 1927⁹⁸ when each shared half the cost of pensions provided to persons over 70 who qualified under a means test. Until that time, such assistance for the aged as there might be was a matter exclusively of municipal or provincial concern. When the provinces were forced increasingly to rely on Ottawa to discharge their social obligations during the thirties, annual emergency grants were provided by Ottawa from 1931 to 1941, which the provinces passed on to local governments for direct relief. Beginning in 1940, the federal government assumed a much greater role in social security, extending social benefits in the form of family allowances (1944); pensions for the blind (1951) and the disabled (1954), to name only the chief forms of assistance.⁹⁹ It was beyond question, as the depression made clear, that the majority of the provinces simply could not raise sufficient revenues under their taxing powers to discharge their social obligations under the Constitution.¹⁰⁰ Despite the tangible benefits arising from federal social legislation, to some constitutional experts in the various provinces it seemed that the federal government was encroaching in a wholesale fashion in the provincial domain, and the cry of 'provincial autonomy' was raised by those of a strong provincialist disposition such as Premier Duplessis in Quebec.

The Canadian unemployment insurance legislation imposed levies on employers and employees of 25 cents weekly. The statute provided an indemnity of \$6 per week to industrial workers who had made contributions to the fund for a period of forty weeks and were subsequently capable of and available for work, but who were unable to find employment. The indemnity was payable for a maximum period of 78 days. In Canada and the United States, the initial benefits of unemployment insurance were small, but they increased somewhat as time passed. As Chandler says of the American scheme, "At first, there were many exclusions from coverage and unemployment benefits were low. However, coverage was extended and benefits increased with the passage of time."¹⁰¹ Like the American legislation, the Canadian statute was not of a comprehensive character, excluding domestics, casual, and farm labourers from its benefits. It was, moreover, naturally of no assistance to the large numbers of chronically unemployed, and it shared with its United States counterpart the undesirable characteristic of regressiveness. Both the American and Canadian schemes, by their own terms, covered only a segment of those needing unemployment assistance during the depression, leaving the remainder to apply to the hard-pressed and often almost insolvent local authorities.

Unemployment insurance was devised to assist unemployed industrial workers who fulfilled certain conditions. The unskilled, transient, homeless, unemployed who drifted from place to place in both countries seeking casual work or just trying to stay alive could not meet these conditions. For them,

⁹⁷ 25-26 Geo.V, 1935, c. 38.

⁹⁸ *Old Age Pensions Act*, S.C. 1927, c. 35.

⁹⁹ Cf. C. Tallant, *Canadian Problems* (Toronto: 1968) c. 4.

¹⁰⁰ Cf. *Rowell-Sirois Report*, *supra* note 14, Book II, *passim*.

¹⁰¹ *Supra* note 11, at 207-08.

other social remedies were necessary, and the Canadian relief camps set up under General McNaughton's direction, along with the American *Civilian Conservation Corps* were established to meet their needs. Chronologically, General McNaughton's relief camps preceded those set up under the C.C.C. and it would be appropriate to consider them first.

In 1932 McNaughton estimated that of a total unemployed work force of over 700,000 men, some 70,000 were homeless, wandering, single men, mostly young in age. In his opinion, the most burdensome problem facing Mr. Bennett's government at this time was the provision of relief for these homeless transients. Although the administration of relief had historically and constitutionally devolved upon local authorities,^{101A} the disposition during the depression was for local governments and provinces to assume responsibility principally for families domiciled (usually for a minimum one-year period) within their boundaries; the succour of transients was regarded by these units of government as a federal matter.¹⁰² In 1932, bowing to provincial pressures, the Dominion agreed to assume responsibility for the single, homeless unemployed.¹⁰³

McNaughton, accordingly, proposed the establishment of a series of relief camps across Canada where such men would receive food, shelter, clothing and medical treatment, and could participate in various kinds of construction projects, mostly of a military nature. After securing the consent of the Minister of Labour, W.A. Gordon, and the cabinet, an order-in-council was passed on October 8, 1932, authorizing the project and during the more than three years the relief camps were in existence their work was authorized by successive orders-in-council. McNaughton proposed as initial work projects the repair of the historic citadels at Halifax and Quebec and the completion of the Trans-Canada Airway, work on which had been interrupted after the beginning of the depression. Men working in the camps were to receive one dollar a day, eighty cents of which was allocated for food, clothing and accommodation, leaving each worker twenty cents daily for spending money.¹⁰⁴ The men worked eight-hour days except on weekends, when Saturday afternoons and Sundays were free. McNaughton contended that one of the primary objects of the camps, apart from their construction work, was to conserve rootless young men physically and psychologically.

By November, 1932, as McNaughton confided to Herridge, work was in progress on 28 projects across Canada, principally on the construction of aerodromes and other air facilities for the Trans-Canada air system.¹⁰⁵ As director of the camps, he sought to avoid a militaristic atmosphere, with all military personnel engaged in supervisory capacities being instructed to wear civilian clothes.

^{101A} Cf J. and B. Hammond, *The Bleak Age* (Middlesex: Penguin, 1947) c. 7.

¹⁰² See *Brown*, *supra* note 53, at 83.

¹⁰³ *Id.*

¹⁰⁴ The twenty cents daily stipend led opponents of the relief camps to confer upon the workers the somewhat derogatory title of "Royal Twenty Centers", presumably a sarcastic imitation of the title of an army corps. J.A. Swettenham, *McNaughton*, I (Toronto: Ryerson Press, 1968) 278 [hereinafter Swettenham].

¹⁰⁵ *McNaughton Papers* (Ottawa: Army Historical Section) McNaughton to Herridge, November 1, 1932.

When the camps were closed in July, 1936, the Department of National Defence estimated that from its inception the scheme had cost the federal government some \$22 million, with work performed by the men valued at \$18 million, representing a net cost to the public purse of \$4 million, which was considered to be a small sum for the relief provided.¹⁰⁶ By the time the project was wound up, six aerodromes and 42 intermediate landing fields of the Trans-Canada Airway had been completed, as well as three R.C.A.F. stations, four training camps and barracks at various military establishments across Canada.¹⁰⁷

One of the criticisms directed at the camps was that they were essentially reservoirs of forced labour, operated by the Army to convert single, unemployed young men into soldiers. Initially, it may have been thought tactically advisable to divert the transient, rootless, unemployed who ultimately made up the population of the camps from cities and urban areas where they would be a prey of radical agitators, to more remote areas where they could be watched.¹⁰⁸ McNaughton himself conceded that the suppression of subversive activity was a subsidiary motive for the establishment of the camps.¹⁰⁹ The localized concentrations of relatively large numbers of unattached and restless young men in relief camps did lead to major disturbances on many occasions from 1933 to 1935, especially in British Columbia; McNaughton ascribed this to political subversion by agitators. In some cases, he put down such disturbances with great firmness.¹¹⁰

Although the men were not directly coerced into joining the relief camps, and Prime Minister Bennett constantly reiterated that the system was purely voluntary, often the only practical alternative to joining the camps was a charge of vagrancy; the camps may have appeared to many to be preferable to a jail cell. Especially when men felt "dragooned" into the camps, they would probably be susceptible to the influence of radical spokesmen. Where the authorities became suspicious of impending disturbances, they would occasionally place police spies in the camps as undercover agents.¹¹¹ There seems, in fact, to be considerable evidence that radical agitators did circulate frequently in the camps.¹¹²

In the United States, the *Civilian Conservation Corps* was established by executive order on April 5, 1933. During the preceding year McNaughton had spoken of his relief camps to members of the brains trust at the Canadian Legation in Washington, and many of the features of the later C.C.C. camps were similar to those in his establishments. Both organizations strove to provide single, unemployed young men with some sense of purpose in admittedly discouraging circumstances, while at the same time giving them useful work to perform, principally in the outdoors. The Army was in charge of the camps in both countries. There were criticisms in both countries that the camps were

¹⁰⁶ *Swettenham, supra* note 104, at 283.

¹⁰⁷ *Id.*, at 284.

¹⁰⁸ See *Brown, supra* note 53, at 82 ff.

¹⁰⁹ Interview with McNaughton, June, 1966.

¹¹⁰ *Swettenham, supra* note 104, at 279.

¹¹¹ *Saskatoon Star-Phoenix*, September 21, 1933.

¹¹² *Brown, supra* note 53, at 87-90.

being maintained to create a nucleus of military manpower, and that subversive infiltrators were engaged in agitation in the camps for revolutionary purposes.¹¹³

The American C.C.C. was organized on a much larger scale than its Canadian counterpart. Only three months after its inception, 1,600 camps had been set up, and by 1935 the total rose to 2,650. In October, 1933, there were 222,000 men in the camps, and in August, 1935, the number had reached 480,000. Even in the months just preceding American entry into the Second World War, there were substantially in excess of 200,000 men in C.C.C. camps. In Canada, there were never more than 30,000 men in the camps at any period.¹¹⁴

If the Canadian relief camps were concerned predominantly with military construction and the building of landing strip facilities, the American camps focussed on conservation, but the public was always aware that the camps were under military supervision:

... before the camps were wound up in wartime, some 2½ million men had passed through them, 17 million acres of new forests had been planted, numerous dams built to stop soil erosion, and an immense amount of other useful work performed in federal and state parks. The C.C.C. might also have been a valuable backlog for the future army but for pacifist pressure which deprived the army of an opportunity to give young men even close order drill.¹¹⁵

The wave of isolationist and pacifist sentiment that swept over Canada and the United States after the First War, resulting in the United States in failure to join the League of Nations and in Senator Gerald Nye's celebrated munitions enquiry, and which attracted spokesmen in Canada like Frank Underhill, Dr. O.D. Skelton and Mackenzie King himself, was bound to arouse public suspicions in some quarters of camps for young men directed by the military.

Despite the frequent criticism of the camps, with adequate food and bracing work in the outdoors the young men who worked on public projects in Canada and the United States under such auspices were bound to improve in health and morale. With all their defects, the camps were for many a palatable alternative to the enforced idleness and hunger that were the lot of so many during the depression.

The Reform Legislation Before the Courts: The rigidity of federal constitutions has become almost proverbial, although the judicial process has sometimes itself been seen as an informal amending process through which, by expansive interpretations, the judges can at times adapt the terms of written federal charters to circumstances unforeseen by their draftsmen. In the respective New Deal cases argued before tribunals in the United States, Canada and England, the judges showed no such benevolent inclination. At a time of profound world economic crisis, conservatism in the judiciaries of all three countries resulted in the invalidation of much of the respective New Deal programmes. In the United States it led to President Roosevelt's celebrated Judicial Reform Bill of 1937¹¹⁶ and to the later appointment of liberal Justices Frankfurter,

¹¹³ Cf. Chandler, *supra* note 11, at 202-03.

¹¹⁴ L.A. Brown, *The Trek to Ottawa* (1971), 8 Canadian Dimension; see also, *supra* note 53.

¹¹⁵ Morison, *supra* note 70, at 955.

¹¹⁶ U.S. 75th Cong. 1st Sess. *Sen. Report*, 711.

Douglas and Black, and in Canada it led to the successful agitation to abolish the Judicial Committee, which has emasculated the Canadian New Deal, as the ultimate Canadian court of appeal.¹¹⁷

In a 6-3 decision the United States Supreme Court decided in the case of *United States v. Butler*,¹¹⁸ that in enacting the *Agricultural Adjustment Act* of 1933, Congress was not in pith and substance imposing a tax, but was encroaching on the domain of the states by regulating agricultural production. The case arose when a Massachusetts cotton mill attacked the constitutionality of processing taxes levied against it under the statute. Under the *Act*, these taxes were assessed against processors and the fund so raised was used to pay farmers cash benefits to restrict their output of cotton (or other crops). It was argued by the government that the impost was valid under section 8(1) of the Constitution authorizing Congress to lay and collect taxes in order to ". . . provide for the common defence and general welfare of the United States." The majority opinion, as delivered by Justice Roberts, held, essentially that the A.A.A. invaded the domain reserved for the states by virtue of the tenth amendment and that Congress could not resort to its general taxing power as a subterfuge to effectuate an end that was not otherwise within its jurisdiction. An interesting insight into Chief Justice Charles Evans Hughes' concept of judicial leadership, as it applied in this case, is recorded in Ickes' *Diary*. The Secretary of the Interior refers to a report made by Attorney-General Homer Cummings to the cabinet after the adverse decision in the A.A.A. case: ". . . He said there was a report to the effect that Chief Justice Hughes was willing to go either way in the A.A.A. case. The Chief Justice does not like five-to-four opinions and if Justice Roberts had been in favour of sustaining A.A.A. the Chief Justice would have cast his vote that way also."¹¹⁹ Professor A.T. Mason had an acerbic comment on this excessive adulation of stability on the part of the Chief Justice:

. . . *United States v. Butler* was destined to become a "self-inflicted" wound of the first dimension. Its tendency was to stabilize chaos and depression rather than to lend certainty to judicial decisions and thus stimulate "public confidence" in the Court and the Constitution. In the face of this narrow construction of the national taxing power and within less than a year, the Chief Justice himself joined in sustaining the constitutionality of the Social Security Act leaving *United States v. Butler* without a leg to stand on. Few today would deny that the decision upsetting the A.A.A. was a far greater threat to stability and effective government than the legislative experiment it halted.¹²⁰

It seemed a pity to some that when dissenting judges of the eminence of Stone, Brandeis and Cardozo avowed that the A.A.A. could be set aside only by a "tortured construction of the Constitution", the six justices in the majority would not be more amenable to an interpretation sustaining the *Act*.

The N.R.A. met the same fate as the A.A.A. in *Schechter Poultry Corp. v. United States*.¹²¹ The four Schechter brothers were Brooklyn poultry dealers who disregarded the "Live Poultry Code" establishing standards for the poultry

¹¹⁷ See *infra*.

¹¹⁸ 297 U.S. 1 (1935).

¹¹⁹ Ickes, *supra* note 72, at 536.

¹²⁰ A.T. Mason, *The Supreme Court from Taft to Warran* (New York: Norton Library, 1964) 90 [hereinafter Mason]; and F. Rodell, *Nine Men* (New York: Norton Library, 1964) 238 [hereinafter Rodell].

¹²¹ 295 U.S. 495 (1935).

industry under the N.R.A. enforceable by civil and criminal sanctions. Their specific offence was the selling of diseased fowl in contravention of the Code. When tried, they were convicted on eighteen counts and sentenced to short jail terms. They appealed to the Supreme Court, contesting the constitutional validity of the N.I.R.A. As applied in the *Schechter* case, the "Live Poultry Code" regulated the marketing of fowl in New York City, much of which had been brought in from other states; in addition, it fixed hours, wages and working conditions of employees throughout the poultry industry.

Chief Justice Hughes, speaking for a unanimous bench, wrote the decision in 1935 invalidating the N.R.A. under which dozens of industries had been operating for almost two years. He found the scheme repugnant to the Constitution on several grounds. First, section 3 of the statute authorizing the President to approve or impose industrial codes involved too broad a delegation of legislative power to the executive. The delegation was ineffective because it set no clear standards governing its exercise. It was inherently imprecise. There was no definition in the statute of "fair competition" for instance and the phrase was not a term of art susceptible to refined or exact analysis—it could cover, arguably, a profusion of matters. The President accordingly, in exercising his delegated discretion, had no real policy guidelines set up by the delegating authority and in approving a code he would be usurping the legislative function entrusted to Congress. A delegation of powers, in other words, while permissible must be made in precise terms so that its exercise might be supervised by Congress and the courts. Second, when the Schechter brothers bought their chickens at the railroad terminal in New York City, the "flow" or "current" of interstate commerce had ended. When they brought the chickens to their slaughterhouse for slaughter and sale to retail dealers and butchers, they were involved not with interstate commerce but with local transactions; at that time, the flow of interstate commerce had ceased. Accordingly, the sale of diseased fowl purportedly regulated by the "Live Poultry Code" would be a matter for state and not for federal regulation. Moreover, while Congress could control those intrastate transactions which directly affected interstate commerce—for example, the fixing of rates for intrastate transportation which unjustly discriminated against interstate commerce—it could not regulate intrastate matters which merely indirectly affected interstate commerce. In this case, the attempt under the Code to fix the hours and wages of the Schechters' employees in their intrastate business was not a valid exercise of the federal interstate commerce power.

Professor Fred Rodell, however, considers that the decision could easily have been different: "Chief contention of the lawyers [for the Schechters] was that Congress had no power, under the interstate commerce clause, to regulate even with industry co-operation, such little local businesses as poultry markets—and this despite the widely overlooked fact that, just four years before, the court had held that poultry markets were enmeshed enough in interstate commerce to bring them under federal anti-trust laws. . . . A few sick chickens had murdered the mighty Blue Eagle."¹²²

¹²² Rodell, *supra* note 120, at 234.

In *Steward v. Davis*¹²³ and *NLRB v. Jones and Laughlin Steel Corporation*¹²⁴ both decided in 1937, the Court displayed a new more tolerant attitude towards the New Deal. In the former case it decided, notwithstanding its decision two years earlier in the *Butler* case, that the tax imposed on employers under the *Social Security Act* was a valid exercise of the federal power. It was argued that the *Act* represented an ulterior motive to promote state unemployment insurance schemes; but the Court found that in paying the tax employers were complying with the mandate of their local legislature; there was no coercion nor violation of state sovereignty in the *Act*, and states might at any time repeal their insurance statutes.

The *Laughlin* case rehabilitated and expanded the commerce power which had been restricted in *Schechter*. The appeal arose out of the attempt by the *National Labour Relations Board* to regulate labour relations in a large Pennsylvania steel plant. On the analogy of the *Schechter* case, this might be regarded as the regulation of "intrastate" commerce. It was held by Chief Justice Hughes, however, in a 5-4 decision, that labour disturbances in the plant would restrain interstate commerce and were therefore subject to federal control. In Hughes's words, "The steel industry is one of the great basic industries of the United States, with ramifying activities affecting interstate commerce at every point . . . The fact that there appears to be no major disturbance in that industry in the more recent period did not dispose of the possibilities of future and like dangers to interstate commerce which Congress was entitled to foresee and exercise its protective power to forestall."

The apparently startling change of course by the Court in 1937 and afterwards caused one observer to comment: "Americans learned that judges are human, and that the judicial power need be no more sacred in our scheme than any other power. . . ."¹²⁵ Others speculated that the torrent of hostile public opinion vented against the Court for "wrecking" the New Deal might have caused some of the judges to reconsider their interpretations of important constitutional provisions.¹²⁶ Chief Justice Hughes, however, always contended that the Court had never deflected from its course. The *Schechter* and *Laughlin* cases, according to him, were not really inconsistent because they were grounded in different factual contexts and because the distinction between the direct and indirect effects of intrastate commerce was one of degree rather than kind.¹²⁷

President Roosevelt was particularly irked at the decision in the *Schechter* case which invalidated the N.R.A. In his first radio address during his second term of office, delivered on March 9, 1937, he proposed to enact a Bill to reform the federal judiciary to make it more amenable to the popular will.

Addressing a national radio audience, he argued that his overwhelming electoral victory over Governor Landon of Kansas represented a renewed mandate to carry on his reform policies:

Last Thursday, I described the American form of government as a three-horse team provided by the Constitution to the American people so that their field might be

¹²³ 301 U.S. 548 (1937).

¹²⁴ 301 U.S. 1 (1937).

¹²⁵ M. Lerner, *Ideas for the Ice Age* (New York: The Viking Press, 1941) 259.

¹²⁶ Cf. Rodell, *supra* note 120, at 242 ff.

¹²⁷ Cf. Mason, *supra* note 120.

plowed. The three horses are, of course, the three branches of government—the Congress, the executive and the courts. Two of the horses are pulling in unison today; the third is not. Those who have intimated that the President of the United States is trying to drive that team overlook the simple fact that the President, as Chief Executive, is himself one of three horses.¹²⁸

Roosevelt's specific proposal was to reorganize the inferior federal courts to promote greater efficiency, and to appoint a new judge to the Supreme Court bench for every Justice who, having served for at least ten years on the Court, attained the age of 70 and failed to retire. The Bill authorized him to appoint up to six new Justices in this manner, increasing the membership of the Court to a maximum of fifteen.¹²⁹ ". . . (W)e must," he said, "have judges who will bring to the courts a present-day sense of the Constitution—judges who will retain in the courts the judicial functions of a court and reject the legislative powers which the courts have today assumed."¹³⁰

Despite Roosevelt's persuasiveness over the radio, a medium which he used to better effect than Bennett, his 'court packing' proposal met with a markedly negative response. Under the American system, of course, government is by a constellation of powers, each of which must co-operate to achieve major new objectives. The system, perhaps, reflects the prudence of the Founding Fathers who were apprehensive about confiding wide powers to a popularly-elected body. To many influential Americans, the proposal seemed to violate the American system of countervailing powers, or "checks and balances" and to be an indirect assault on judicial independence. As Morison says: "From almost every quarter the proposal was denounced as an attempt to 'pack' the Court, the Congress refused to pass the desired law. But, if Roosevelt lost this battle, he won the campaign. The Court itself, while the debate was under way, managed to find reasons for passing favourably on new laws differing little from those formerly under the ban: —a farm mortgage act, the National Labour Relations Act and Social Security".¹³¹

The Canadian New Deal legislation fared equally badly before the courts. Of the agricultural statutes, the *Natural Products Marketing Act* was unanimously found *ultra vires* by the Supreme Court,¹³² the decision being upheld by the Privy Council,¹³³ while the *Farmers' Creditors Arrangement Act* was upheld as a valid exercise of the federal power over "bankruptcy and insolvency" by both tribunals.¹³⁴

In the reference on the marketing statute, Chief Justice Sir Lyman Duff cited the *Board of Commerce* case¹³⁵ as authority for the proposition that Parliament could not regulate, as it was purporting to do, trade in commodities of

¹²⁸ "Address by the President of the United States, March 9, 1937," in H. Commager (ed.) *Documents of American History* (4th ed., New York: Appleton-Century-Crofts, 1948) 563.

¹²⁹ See *supra* note 115.

¹³⁰ *Supra* note 127 at 565.

¹³¹ Morison, *supra* note 70, at 970.

¹³² (1936), S.C.R. 426.

¹³³ (1937), A.C. 377.

¹³⁴ See *Reference re Farmers' Creditors Arrangement Act* (1936), S.C.R. 384; (1937), A.C. 403.

¹³⁵ (1922), 1 A.C. 191.

purely local concern. In the Privy Council, Lord Atkin, while cognizant that all of the provinces had joined with the Dominion to enact complementary statutes regulating all aspects of marketing, held that the *Act* was invalid. While cooperative legislation might effectively set up a comprehensive marketing scheme, ". . . the legislation will have to be carefully framed," said Atkin, "and will not be achieved by either party leaving its own sphere and encroaching on that of the others."¹³⁶ The decision which frustrated a marketing device approved by all units of the Canadian federation created practical difficulties in establishing a comprehensive Dominion-wide system capable of regulating both national and local marketing transactions which would also be legally acceptable. "What has emerged so far," said Mr. Justice Rand in 1960, "is the device of co-operative regulation of marketing by a single Board appointed by both Dominion and Province; how far this will be satisfactory remains to be seen."¹³⁷

Speaking again for a unanimous bench, Duff held that the industrial agreements to prevent "wasteful" or "demoralizing" competition envisaged by section 14 of the *Dominion Trade and Industry Commission Act* were *ultra vires*. Like the repugnant provisions of the marketing statute, they sought to regulate purely intraprovincial transactions under provincial jurisdiction. His brief judgment also struck down the asserted federal power to create a national trade mark "Canada Standard" on the basis that it was a 'novel civil right invading the provincial sphere.'¹³⁸ Their Lordships, on appeal, agreed that section 14 was invalid, but voted to sustain the section creating a national trade mark.¹³⁹

Concerning the other industrial legislation relating to discriminatory rebates, both the Supreme Court¹⁴⁰ and the Privy Council¹⁴¹ upheld the constitutionality of Section 498A of the *Criminal Code*. In a dissenting judgment in the lower court, Mr. Justice Crocket had asserted that the intent to do wrong was the characteristic feature of crime, and that, by this criterion, the behaviour penalized in the section was not essentially criminal. "(T)here is no other criterion of 'wrongness'," retorted Atkin in the Privy Council, "than the intent of the legislature in the public interest to prohibit the act or omission made criminal".¹⁴²

There was an even division in the Supreme Court concerning the validity of the labour statutes (with Duff, Kerwin and Davis voting to uphold the legislation and Rinfret, Cannon and Crocket strongly opposing it), the decision turning on the propriety of invoking the treaty power (found either in section 132 of the B.N.A. Act or in the 'peace, order and good government' clause) to implement I.L.O. conventions regulating maximum hours of work, minimum wages and weekly day of rest. Had there been no appeal, because of the tie the legislation would have been upheld. Speaking for the centralists, Duff contended

¹³⁶ (1937), A.C. at 389.

¹³⁷ I.C. Rand, *Some Aspects of Canadian Constitutionalism* (1960), 38 Can.B.Rev. 135 at 158.

¹³⁸ (1936), S.C.R. at 381-383.

¹³⁹ (1937), A.C. 405 at 418.

¹⁴⁰ (1936), S.C.R. 363.

¹⁴¹ (1937), A.C. 375.

¹⁴² *Id.*

that since its recent accession to sovereignty, Canada enjoyed a treaty-making capacity as plenary in every respect as that of the United Kingdom.¹⁴³ In the recent *Radio*¹⁴⁴ and *Aeronautics*¹⁴⁵ cases, the Privy Council itself had held that the federal treaty-making power was exclusive. Referring to a 1923 case¹⁴⁶ in which Haldane had held that a British Columbia statute purporting to validate provincial Orders-in-Council barring Japanese from certain classes of work was invalid as violating a prior federal statute, the *Japanese Treaty Act*, 1913, he contended that if provincial labour legislation could be overridden by a treaty, or by a federal statute enacted thereunder, the I.L.O. statutes could validly implement international agreements regulating labour standards notwithstanding the fact that they ordinarily fell within provincial jurisdiction. The adverse decisions of the Quebec and New Brunswick judges held that the implementing statutes encroached in a fundamental fashion on the provincial sphere of property and civil rights, and that the treaty power could not be invoked to circumvent, in effect, ordinary provincial jurisdiction.¹⁴⁷

In the ultimate I.L.O. judgment, Atkin held that the subject matter of the conventions fell within provincial jurisdiction, and that their ratification by the Dominion did not enhance the latter's legislative powers. Where the federal government entered into an international agreement on provincial subject matter, it could not itself implement the agreement by legislation but would have to enlist provincial legislative cooperation. "While the ship of state now sails on larger ventures and into foreign waters," said he, "she still retains the watertight compartments which are an essential part of her original structure".¹⁴⁸ Atkin was able to distinguish the *Aeronautics* case by asserting that in that case there was no 'Empire' treaty and section 132 plainly did not apply. There is, however, more doubt about his distinguishing of the *Radio* case, where Lord Dunedin had apparently based the treaty power at least in part on the residuary clause, which was invoked in the I.L.O. case to uphold the statutes under the treaty power. A disappointed Duff, on hearing of the decision, attributed its strong provincialist thrust to Atkin's Queensland origin, and his exposure to the supposedly less centralized version of Australian federalism.¹⁴⁹

The Privy Council's decision in the I.L.O. case was criticized by many Canadian jurists. The comment of F.R. Scott in his presidential address to the Royal Society of Canada is perhaps typical of this criticism: "... The damaging effects of the I.L.O. conventions case, which in effect overruled the more liberal interpretation of the Privy Council in the *Radio* case, have not been overcome. Every time Canada abstains from participating in multilateral conventions aimed at achieving good international standards, because of lack of jurisdiction

¹⁴³ (1936), S.C.R. 477.

¹⁴⁴ (1932), A.C. 304.

¹⁴⁵ (1932), A.C. 54.

¹⁴⁶ *Attorney-General of British Columbia v. Attorney-General of Canada* (1924), A.C. 203.

¹⁴⁷ See (1936), S.C.R. 461, Rinfret at 511-12; Cannon at 520, and Crocket at 522.

¹⁴⁸ (1937), A.C. 354.

¹⁴⁹ Interview with Finlayson and See (1932) A.C. at 312, and W. R. Lederman, *Legislative Power to Implement Treaty Obligations* in J. Aitchison, (et.) *The Political Process in Canada* (Toronto: University of Toronto Press, 1963).

to implement them, she withholds her influence for peace and co-operation."¹⁵⁰ In severing the treaty-implementing from the treaty-making power, the Privy Council placed Canada under an international disability shared by few, if any, other federal states in the world.

The Supreme Court and the Judicial Committee also found against the *Employment and Social Insurance Act*,¹⁵¹ the Canadian tribunal holding by a 4-2 decision (with Duff and Davis dissenting) that the *Act* dealt essentially with contracts of employment, the provision of an unemployment insurance fund by means of levying taxes being purely subsidiary to that end. In his dissent, Duff would have upheld the measure under the taxing power (it will be recalled that the *American Social Security Act* which *inter alia* established an unemployment insurance fund, was held to be a valid exercise of the taxing power of Congress),¹⁵² and also under the double aspect doctrine, inasmuch as the scheme could incidentally trench on provincial jurisdiction as long as, in its paramount aspect, it dealt with subject matter of national dimensions.¹⁵³ In the Judicial Committee, Atkin found the statute unconstitutional for reasons similar to Rinfret's: ". . . But assuming the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence. It may still be legislation affecting the classes of subjects enumerated in s. 92 and, if so, would be *ultra vires*."¹⁵⁴

As a result of the Canadian New Deal references, and the appeals therefrom to the Privy Council, national unemployment insurance and marketing schemes, and important provisions of a statute to control industrial abuses were vitiated. In addition, three labour statutes implementing I.L.O. conventions were invalidated with the incidental result that Canada was placed under a grave treaty-making incapacity impairing her future role in her international relations. There can be little wonder that there was a spirit of consternation in Canadian legal circles over these decisions.

No tribunal emerged from the New Deal litigation with its reputation enhanced. In order to understand the particular opprobrium attaching to the United States Supreme Court because of its emasculation of the American New Deal, it should be borne in mind that constitutionally the Court is a co-ordinate branch of government, equal in status to the executive and legislature (one recalls Roosevelt's 'troika' analogy). It could contend with Roosevelt and Congress on a basis of constitutional equality,¹⁵⁵ asserting that it was performing an essential task within the American system of checks and balances. In doing this, however, it was also frustrating a widely acclaimed and desperately needed programme of social reform legislation. The Canadian tribunal on the other hand, was not a constitutional court but was a mere creature of statute, derived from section 101 of the *British North America Act*. It was, moreover, overshadowed from its inception in 1875 until the abolition of Privy Council

¹⁵⁰ F.R. Scott, *Our Changing Constitution*, in W.R. Lederman (ed.) *The Courts and the Canadian Constitution* (Toronto: McClelland and Stewart, 1964) 31.

¹⁵¹ See (1936), S.C.R. 427 and (1937), A.C. 355.

¹⁵² See *supra* note 123.

¹⁵³ (1936), S.C.R. 443-444.

¹⁵⁴ (1937), A.C. at 418.

¹⁵⁵ Cf. U.S. Constitution, Article 3 (1).

appeals in 1949 by the latter forum whose decisions were binding on it. Because of its subordinate judicial role, the numerous Canadians who disliked the result of the New Deal hearings reserved their wrath for the Privy Council, considering the Supreme Court to be helpless by virtue of binding precedent and by the inferior place of the tribunal in the judicial hierarchy. The American Court, on the other hand, must have seemed a formidable opponent to Roosevelt. In a presidential system characterized by the separation of powers (rather than the fusion of powers of the British parliamentary system) confrontation and challenge seem to be actually built into day to day politics.

The Supreme Court and the Privy Council, nevertheless, wrought havoc with the Canadian New Deal, with the latter body receiving the major share of the blame. In 1937, the Privy Council appeared to many Canadians to be a vestige of a now anachronistic colonial heritage and the tribunal actually signaled its own demise as an ultimate Canadian appellate tribunal as a result of its New Deal decisions.

With the quiet cooperation of Ernest Lapointe, Mackenzie King's Minister of Justice, C.H. Cahan, a former member of Bennett's cabinet, who was aghast at the New Deal decisions, sponsored a private member's Bill to abolish Canadian appeals to the Privy Council, deploring the whole provincialistic tendency of its decisions culminating in the New Deal opinions.¹⁵⁶ He withdrew the Bill, however, at Lapointe's request, until advice on its merits could be obtained from members of the bar across Canada and the courts.¹⁵⁷ There followed a reference decision by the Supreme Court¹⁵⁸ holding that the abolition of overseas appeals fell within federal constitutional powers. The Privy Council, in a post-war decision,¹⁵⁹ graciously acceded to its own extinction as a Canadian appellate court, and on December 10, 1949, the St. Laurent government passed legislation accomplishing this purpose.¹⁶⁰

Roosevelt in his 1937 confrontation with the American Supreme Court, therefore, was not able to achieve his objects through legislation in the way that Canada achieved her even more drastic objects in 1949. While it is true that after 1937 the U.S. Supreme Court was more restrained in its disposition of federal statutes, its constitutional position as a co-ordinate branch of government and the general estimation in which it was held, defects notwithstanding, gave it an immunity from executive and legislative interference which the alien Privy Council or lesser tribunals lacked. The difference in legal and political status of ultimate federal courts in the presidential and parliamentary systems, especially as seen in the operation of the American and Canadian constitutions, provides much of the explanation for the survival of a viable U.S. Supreme Court after 1937 and the demise of the Privy Council as a Canadian appeal court in 1949.

¹⁵⁶ *Official Report of Debates*, April 8, 1938.

¹⁵⁷ *Cahan Papers* (Public Archives of Canada), Cahan to C.M. Woodsworth, June 15, 1938.

¹⁵⁸ (1950), 1 D.L.R. 289.

¹⁵⁹ (1947), A.C. 153.

¹⁶⁰ See the *Supreme Court Act*, R.S.C., 1952, c. 259, s. 54(2) enacted by (1949) (Can.2d sess.) c.37, s.3.

The Implications of the New Deal Programmes

Although the term "collectivism" has been variously interpreted, the New Deals in the United States and Canada marked the advent of the positive state, with an increasingly large public sector in a mixed economy. If one compares the nineteenth century individualism of Bentham and the Mills with the collectivism of Marx, Lenin or Mao-Tse Tung it will be obvious that the regulated North American mixed economy falls somewhere between the extremes.

To "philosophic radicals" like John Stuart Mill, artificial legal restraints imposed by government cramped individual initiative and destroyed the social and economic conditions required to produce excellence in both the intellectual and the commercial spheres. Free enterprise in ideas was as necessary as *laissez-faire* in economics. The curtailment of either by legislation was bound to suppress those with naturally superior attributes and to encourage the inferior and the spurious. Above all, there must be no legislative interference with conditions of the free market. To the Mills, the *Natural Products Marketing Act*, or the marketing provisions of the A.A.A. or related American statutes would be abhorrent. Equally abhorrent, as interfering with freedom of contract, would be unemployment insurance or the regulation of labour conditions. Accordingly, for them the function of the state was a "negative" or police function. The corollaries of such a concept of the state were freedom of contract, freedom of enterprise in ideas and commerce, a minimum of legislative restraints and these largely to prohibit crime or other interferences with the person, and a policy of encouraging individuals to look after their own welfare by their own devices. The incidental evils of social legislation which strove to benefit the poor—a burgeoning state and the suppression of individual liberty and initiative—would be worse than the benefits.

In 1954, an unrepentant Herbert Hoover delivered a birthday address at his *alma mater*¹⁶¹ condemning in scathing terms the growth of the welfare state which he described as "the road to collectivism." As the Chief Executive who presided over the last professedly *laissez-faire* administration, his contrast between the old order and the new scheme of affairs ushered in by the New Deal deserves attention.

Among the chief evils of the welfare state, according to Hoover, were the phenomenal increase in government spending, and the growth of bureaucracy. On Roosevelt's accession to power, the charge to the average family for all varieties of government spending was less than \$200 annually, in 1954 when he spoke it was \$1,300 (both figures omitting federal debt service). "It does not seem very generous," he argued, "to set up an 'acceptable' standard of living and then make it impossible by taxes."¹⁶² As evidence of the growth of bureaucracy he stated that when the American government apparatus was first organized there was less than one government employee for each 120 of the population, as compared with one for 22 of the population generally, or one for eight of the working population, in 1954. Parallel with the expansion of the

¹⁶¹ Herbert Hoover, *Birthday Address at Stanford University* (August 10, 1954), reproduced in W. Ebenstein (ed.) *Great Political Thinkers* (3rd ed. New York: Rinehart & Company, Inc., 1960) 827-30.

¹⁶² *Id.*

public service of different levels of government has been the considerable increase of governmental activities. There will, inevitably, he contended, be more government borrowing and increasing taxes to finance expanding government projects. With state activities constantly extending into new areas, ". . . the Government becomes the major source of credit and capital to the economic system. At best the small business man is starved in the capital he can find. Venture capital to develop new ideas tends to become confined to the large corporations and they grow bigger."¹⁰³ The result of these pernicious tendencies is an increase of servile dependency by individuals, private colleges and other institutions on an immensely powerful state with full-blown collectivism a possible end result:

The American mind is troubled by the growth of collectivism throughout the world. We have a few hundred thousand Communists and their fellow travellers in this country. They cannot destroy the Republic. . . . But there is a considerable group of fuzzy-minded people who are engineering a compromise between free men and these European infections. They fail to realize that our American system has grown away from the systems of Europe for 250 years. They have the foolish notion that a collectivist economy can at the same time preserve personal liberty and constitutional government. That cannot be done. The steady lowering of the standard of living by this compromised collectivist system under the title "austerity" in England should be a sufficient spectacle for the American people. It aims at an abundant life but it ends in a ration.¹⁰⁴

In a final castigation of New Deal 'welfarism' and its sequel, Hoover branded the welfare states as ". . . a disguise for a collectivist state by the route of spending," which carried with it great dangers for personal liberty, ". . . we must make a choice between economy and liberty or profusion and servitude . . ."¹⁰⁵

Preferring the term "service state" to that of "welfare state" the distinguished jurist Roscoe Pound expressed essentially the same warning: ". . . unless we are vigilant, the service state may lead to a totalitarian state. It has Marxian socialism and absolute government in its pedigree . . . Liberty—free individual self assertion, individual initiative and self help—is looked on with suspicion if not aversion by the service state and its advocates seek a 'new concept of liberty' as freedom from want and freedom from fear, not freedom of self assertion or self-determination . . . Spontaneous individual initiative is frowned on as infringing on the domain of state action."¹⁰⁶ Mill himself could hardly have expressed the peril more elegantly.

And while, as Hoover and Pound indicated, there was an undeniable tension between individual freedom and the welfare norms established by a bureaucracy or, in a more general sense, between liberty and equality, these libertarians did not perhaps address themselves sufficiently to the exigencies arising for government from individual and regional economic disparities in times of depression. The opposite side, as advanced by proponents of the respective New Deals, can also be persuasively put. It would not be much solace to farmers facing ruin in North Dakota or Saskatchewan in the thirties to tell them

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ R. Pound, *The Welfare State and Constitutional Government*, in W. Ebenstein (ed.) *Great Political Thinkers* (New York: Rinehart & Company, Inc., 1960) 831.

that the deprivation of government assistance was essential to preserve individual liberty or "spontaneous individual initiative." New Deal farm credit and marketing legislation in the United States and Canada undoubtedly did restrict the freedom of some merchants, tradesmen and small lenders in the one case and dissident producers in the other; but for the farmers it benefitted it provided in many cases the essential minimum assistance needed for economic survival. Given equality of economic opportunity, favourable economic conditions, skill, initiative and resourcefulness, Pound and Hoover could make out a strong case, but when one considers the dissimilarities in natural endowments between individuals and economic regions in times of depression, their argument loses some of its force. In such circumstances, as Cronkite and Britnell urged in preparing their Submission for the *Rowell-Sirois* Commission, the government must assume the role of 'leveller' between disparate regions.

In a diversified economy spanning a whole continent, the incidence of depression will naturally be more severe in some regions than in others. If in a federal system, as the *Rowell-Sirois Report* argues, there should be a universal minimum standard of services, the only way to accomplish this goal is to tax the more affluent areas and redistribute the proceeds in the poorer ones, or in the areas worst hit by the vagaries of weather and economics. In an indirect way, Canada and the United States may have worked towards this end in the past by establishing military bases in a large number of disadvantaged areas, such as the Atlantic Provinces or the Southern United States. The payrolls of armed forces personnel and government purchase orders can be counted on to infuse more vitality into depressed local economies. More recently, various types of government grants, equalization payments and the establishment of the Department of Regional Economic Expansion in Canada and the Office of Economic Opportunity (OEO) in the United States have sought to achieve the same "levelling" function. Although this trend has brought with it increasing government spending, bureaucracy and centralization, as President Hoover pointed out, the only alternative would seem to be the congealing of regional economic inequalities, excessive disparities in individual wealth, and perhaps ultimately movements demanding political separation in poor, disaffected areas. When there is no kind of economic parity in the different units of a federal state, the concept of common citizenship becomes relatively meaningless; the provision of a minimum level of standards by the central power may hold together a federation with fragmenting tendencies.

In formulating their respective New Deals, Roosevelt on his vast scale and Bennett on his more anemic one had, undoubtedly, some such levelling concept in view. Their various social reform policies won them unjustified unpopularity among the business interests. Had the depression of the thirties continued unabated, it is not inconceivable that the North American middle class might have been destroyed and, in that case, there could have developed a genuine revolutionary situation. It is a trite observation that the lack of a significant middle class in Latin America, for example, is what has made democratic government there so precarious and intermittent. That the middle class survived and even improved its position is attributable in large part to the restoration of national morale during Roosevelt's presidency, as well as to the specific New Deal measures he took. The less ambitious Canadian New Deal,

which never captured the imagination of Canadians, did not really contribute to a similar result in Canada. With the many links between the American and Canadian economies, however, revival in the United States was bound to have a stimulating effect on the Canadian economy, and the continued expansion of the economy created by the Second World War provided further revitalization. Regarded in this light, Roosevelt played the essentially conservative role of preserving, with extensive modifications, the existing system. However when one regards the respective New Deals, it is hardly rash to predict that a legislative policy of vigorous economic interventionism and increased social welfare is here to stay.