

# The Judicial Review of Prime Minister Bennett's New Deal

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# THE JUDICAL REVIEW OF PRIME MINISTER BENNETT'S 'NEW DEAL'\*

by W. H. McCONNELL†

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As the originator of the most ambitious programme of social legislation to be enacted in Canada to his time, Prime Minister Bennett incurred more than his share of criticism from his contemporaries. His political enemies interpreted the 'New Deal' as a last, desperate attempt to avoid the electoral defeat presaged by a series of by-election reverses in 1934 and 1935 and the inability of Bennett's government to lead Canada out of the depression. The feeble legislative aftermath of his five apocalyptic radio broadcasts of January, 1935, moreover, reinforced the criticism of those who were sceptical of the Prime Minister's claim that he would refashion overnight the whole capitalist system, making it the servant, rather than the oppressor, of the Canadian people. Subsequent historians have generally deprecated the gulf between Bennett's grandiose promises and their inadequate implementation.<sup>1</sup> Nevertheless, despite its shortcomings, in an era of

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<sup>1</sup> See e.g., A. LOWER, *COLONY TO NATION* (4th ed., Toronto, 1964) 521, and R. COOK, J. SAYWELL and J. RICKER, *CANADA: A MODERN STUDY* (Toronto, 1963) 203-204.

*laissez-faire* the New Deal did represent the most significant attempt to its time (1934-35) to mitigate adverse economic conditions.

The disjointedness and incoherence of the New Deal—its lack of unity or system—is attributable to Bennett's notorious penchant for one-man rule. As his Minister of Railways and Canals, Hon. R. J. Manion, and others have disclosed,<sup>2</sup> the social reform programme was never submitted to cabinet or caucus before it was formally launched in Bennett's broadcasts. The principal instigators of the programme were Bennett's brother-in-law, Hon. W. D. Herridge, who as Canadian Minister to Washington was able to observe closely the operation of Roosevelt's New Deal, Major-General A. G. L. McNaughton, Chief of the General Staff (1929-1935), and to a somewhat lesser extent R. K. Finlayson, Bennett's executive secretary. These three associates of Bennett collaborated in writing the New Deal radio speeches at Herridge's cottage at Lake Mousseau in the Gatineau, with Herridge completing the final drafts. Herridge, indeed, had written a long series of letters to his brother-in-law, urging him to inaugurate a Canadian version of Roosevelt's New Deal to restore morale and revitalize the economy. In Herridge's opinion, it was not so much the legislation itself which would be the instrumental factor in recovery as it was the resurgence of confidence, especially in the business community, which would accompany the legislation. For this very reason it was necessary, according to Herridge, to 'sell' the programme to the Canadian people by a vigorous propaganda campaign waged at the same time the statutes were enacted.

The refusal of Bennett to share responsibility in the formulation of the New Deal with others, arising from his severe temporary incapacity from diabetes and heart trouble in the Spring of 1935, retarded the articulation of the legislation. Sir George Perley, the Acting Prime Minister, knew little of the actual details of the programme, although he loyally led what legislation there was through the House of Commons. Herridge and McNaughton, as helpless on-lookers, were almost distraught at the anticlimactic nature of the statutes which were enacted. The legislative sequel made Bennett's pretensions in his January broadcasts farcical.

After a landslide Liberal victory in the general election of October 14, 1935, Mackenzie King was faced with the problem of what to do with his predecessor's New Deal. To some extent, the New Deal had been framed as a defiant political manifesto by which Bennett and Herridge had hoped to rejuvenate and create a fresh and 'progressive' image for the Tories. They had hoped thereby to discredit a postulated Liberal attitude of *laissez-faire*, and to fashion a political coalition comprised of all those elements favouring government intervention in the economy as a nostrum for the depression. Thinking,

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<sup>2</sup> Memorandum by Manion, January 3, 1935, Manion Papers (Public Archives of Canada), and Memorandum by Manion, n.d., written on the back of a September, 1933, calendar leaf. *id.*

perhaps, that to carry on with the reform programme would be a servile admission of their own past failures,<sup>3</sup> the Prime Minister and the Minister of Justice, Ernest Lapointe, decided as almost the first act of the new administration to seek references on the constitutional validity of Bennett's New Deal. They were not 'in principle' opposed to the legislation, but they constantly reiterated that the whole programme probably constituted a federal encroachment on the jurisdiction of the provinces. They considered it necessary, therefore, before proceeding further with the programme, to send the New Deal statutes to the Supreme Court of Canada to obtain a legal opinion on their validity.

Although many writers have ably examined the New Deal references, not much attention has yet been focussed on the interaction of law and politics in the litigation. In view of the heated political confrontation over the New Deal, some attempt should be made to place the decisions in a broader political context than has so far been attempted. Accordingly, after a brief examination of the statutes themselves, such extra-legal factors will be examined below as: the political decision to send the reform programme to the courts to test its validity; the political background (in its broadest connotation) of the judges on the Supreme Court of Canada; the political influences that might have exerted a compelling pressure on the Court; and the general considerations of a policy rather than the strictly legal issues which may have been influential in shaping the decisions. In conclusion, the ultimate disposition of the references by the Judicial Committee will be briefly examined. In light of the above factors, it will be argued that extra-legal influences had an important bearing on the result of the references.

#### *The New Deal Statutes*

The eight New Deal statutes sent for judicial review fall into three broad categories: (1) the treaty legislation, i.e. three pieces of labour legislation implementing conventions prepared by the *International Labour Organization*, and the unemployment insurance statute which was originally conceived as a treaty statute; (2) the price spreads legislation, emanating from Hon. H. H. Stevens's *Royal Commission* on price spreads<sup>4</sup> and comprising *The Dominion Trade and Industry Commission Act* and Section 498A of the *Criminal Code*, and (3) the earlier legislation, enacted before the New Deal was formally announced and having for its purpose the assistance of farmers, fishermen, lumbermen and non-urban workers, consisting of the *Natural Products Marketing Act* and the *Farmers' Creditors Arrangement Act*.

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<sup>3</sup> Clauses 3, 4 and 5 of the *Liberal Platform* of 1919 committed the Liberals to minimum wage, minimum hours of labour and weekly day of rest legislation similar to that enacted by Bennett in 1935 as part of the New Deal. See RESOLUTIONS ADOPTED BY THE NATIONAL LIBERAL CONVENTION IN OTTAWA ON AUGUST 5, 6 AND 7, 1919, (Ottawa, 1919).

<sup>4</sup> CANADA, ROYAL COMMISSION ON PRICE SPREADS, REPORT, (Ottawa, 1937).

Before proceeding to survey the relevant political and legal influences affecting the New Deal, it would be in order briefly to examine the policy orientation of the different statutes as well as some of the constitutional problems that they presented to the courts.

*The Treaty Legislation:* One of the most contentious parts of the New Deal involved the three statutes enacted in 1935 pursuant to conventions of the I.L.O. *The Limitation of Hours of Work Act*,<sup>5</sup> the *Weekly Rest in Industrial Undertakings Act*,<sup>6</sup> and the *Minimum Wages Act*<sup>7</sup> were designed to implement enlightened labour standards established by the General Conference of the *International Labour Organization* further to the Labour provisions of the *Treaty of Peace*.<sup>8</sup> In the Canadian context, a goal common to each piece of legislation was to have nation-wide uniform standards in labour matters. Supporters of the legislation contended that if labour laws were enacted piecemeal by various provincial governments, some provinces would have lower standards than others with the result that workers in those provinces would constitute a relatively underprivileged group. It was argued that only the federal government could enact legislation of a sufficiently comprehensive character to regulate labour standards across the Dominion as a whole.

The *Limitation of Hours of Work Act* 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."<sup>9</sup> (Exemptions were provided for in cases of urgency, *vis major*, family undertakings or where exceptional work pressures existed.) *The Weekly Rest in Industrial Undertakings Act* required that a period of at least twenty-four consecutive hours was to be provided in any seven-day period for "the whole of the staff employed in any industrial undertaking."<sup>10</sup> While the *Minimum Wages Act* did not set a comprehensive minimum wage for all industrial undertakings, it did provide that the Governor in Council might establish machinery to set minimum wages in rateable trades; the Governor in Council could also declare what a "rateable trade" was. The purpose of the statute was to ensure that no industrial worker received remuneration insufficient to meet basic living costs.

Provincial spokesmen were quick to point out that in enacting these statutes Parliament was purporting to regulate the terms of industrial contracts, the great majority of which had formerly been held to fall under the provincial head of 'property and civil rights.' They also invoked a 1925 reference decision<sup>11</sup> of the Supreme Court

<sup>5</sup> 25-26 Geo. V, 1935, c. 63.

<sup>6</sup> 25-26 Geo. V, 1935, c. 14.

<sup>7</sup> 25-26 Geo. V, 1935, c. 44.

<sup>8</sup> See Part XIII of the TREATY OF PEACE BETWEEN THE ALLIED AND ASSOCIATED POWERS AND GERMANY AND PROTOCOL, (King's Printer, Ottawa, 1919) 154-164.

<sup>9</sup> Section 3.

<sup>10</sup> Section 3.

<sup>11</sup> Hours of Labour Reference, [1925] S.C.R. 505.

of Canada on the *unratified* Hours of Work convention in which Mr. Justice Duff (as he then was) had held that, except for certain federal employees or in federally-administered territories, the subject-matter of the convention fell under provincial jurisdiction.

It was Mr. Bennett's intention to have the three above-mentioned labour conventions ratified by Canada and enacted under the treaty-implementing power (section 132 of the B.N.A. Act) or, alternatively, (and in a distinctly subordinate place in the argument) under the residuary clause. It was probably hoped thereby to strengthen the claim that the three statutes had been validly enacted.

*Unemployment Insurance: The Employment and Social Insurance Act*<sup>12</sup> also related to the industrial community and was originally framed as a treaty statute. As with the I.L.O. statutes, the preamble of this Act invoked Articles 23 and 427 of the *Treaty of Peace* as authority for its enactment and the first few lines of all statutes were textually identical. Unlike the I.L.O. statutes, however, it did not proceed to invoke a specific convention ratified by Canada and empowering the federal government to enact its provisions. Where the other statutes go on to do this, it merely spoke generally of Canada's "obligations" under the Treaty. According to R. K. Finlayson,<sup>13</sup> Bennett's executive secretary, the first draft Bill on unemployment insurance did refer to a relevant convention, but Bennett himself ordered the reference struck out since he feared that its presence would incite J. S. Woodsworth, the C.C.F. leader, to press vigorously in Parliament for the appropriation of relief assistance (associated with unemployment insurance in I.L.O. conventions) by the federal government. Bennett felt that there were definite limits to what the federal government could do to assist the unemployed, and he did not want to be placed on the defensive by gratuitously invoking the mentioned convention. The difficulty was, of course, that without an express reference to a specific convention, there was little foundation for enacting the statute as treaty legislation.

The Act provided, *inter alia*, that workers who had contributed 25 cents weekly for forty weeks and who were subsequently capable of and available for work, but who were unable to find employment, would be paid an indemnity of \$6 weekly for a period of 78 days. The statute did not purport to be all-inclusive as various classes of seasonal and other workers could not participate in the scheme, and it was naturally of no assistance to the large numbers of unemployed during the depression. By its own terms it could cover only a portion of those needing unemployment assistance, leaving the remainder to rely on local relief or charity.

The constitutional problem presented by the statute was whether unemployment insurance was like any other type of insurance and thus a matter of contract falling under section 92 (13), or whether as "social insurance", it was an insurance *sui generis* not subject to

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<sup>12</sup> 25-26 Geo. V, 1935, c. 38.

<sup>13</sup> Mr. Finlayson supplied the writer with much helpful information on the New Deal in the course of two interviews early in 1966.

classification with commercial insurance contracts. In the latter case, it might be argued that (despite the precedents conferring jurisdiction over commercial insurance on the provinces) nation-wide social need would enable the government to enact the *new* species of social insurance under the residuary clause. The answer to this question could well depend on the extent to which the judiciary were willing to consider sociological factors, in addition to strictly legal ones, before rendering their judgments.

*The Price Spreads Legislation:* Section 498A of the *Criminal Code*<sup>14</sup> and the *Dominion Trade and Industry Commission Act*<sup>15</sup> emanated from the celebrated price spreads enquiry headed by Hon. H. H. Stevens towards the end of Bennett's term of office. (Stevens resigned his trade and commerce portfolio in October, 1934, and formed the *Reconstruction Party* in July, 1935, charging that Bennett's implementation of the *Report's* recommendations was grossly inadequate.) The price spreads legislation was designed to penalize various commercial abuses which were particularly prevalent during the depression.

The *Criminal Code* amendment prohibited discriminatory discounts, rebates and allowances, or predatory price-cutting. The *Dominion Trade and Industry Commission Act* brought into being a *Commission* with extensive supervisory powers over other statutes regulating trade practices such as the *Combines Investigation Act*. In effect, the Act was to be a master statute invoking all the powers at the disposal of the government so that unfair trade practices would be eliminated and fair merchandising and high commodity standards be promoted. In connection with the latter objective, the use of a federal trademark "Canada Standard" (C.S.) was authorized under sections 18 and 19 of the Act. The Commissioners, who were to be the members of the *Tariff Board* for the time being, were directed to receive and investigate complaints concerning fair trade practices. If satisfied that the practice complained of contravened federal law, they could recommend that a prosecution be instituted against the persons responsible.

Constitutionally, the most questionable provision in the legislation was section 14 of the *Dominion Trade and Industry Commission Act* allowing industrialists to modify competition wherever it was deemed to be "wasteful or demoralizing" by agreeing to control prices and production throughout the affected industry. The issue was whether such regulation was a valid exercise of the federal trade and commerce power, or whether, by regulating the terms of local contracts, it fell under the provincial head of property and civil rights.

*The Earlier Legislation:* There might be some question concerning whether the *Farmers' Creditors Arrangement Act*<sup>16</sup> and the *Natural Products Marketing Act*<sup>17</sup> should be classified as New Deal statutes at all. R. K. Finlayson is emphatic that, like unemployment in-

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<sup>14</sup> S. 9 of 25-26 Geo. V, c. 56.

<sup>15</sup> 25-26 Geo. V, c. 59.

<sup>16</sup> 24-25 Geo. V, 1934, c. 53.

<sup>17</sup> 24-25 Geo. V, 1934, c. 57.

insurance, they were conceived and developed before the Prime Minister decided to launch a New Deal. They would certainly have existed independently of the New Deal, whatever its fate had been. However, as they shared with the other New Deal statutes the social purpose of improving the fortunes of those hardest hit by the depression, and as they were sent for judicial review by the victorious Liberals in 1935, they may be regarded as New Deal statutes despite their earlier and independent origin. Both statutes sought to help non-urban workers to mitigate the effects of the depression. It should be mentioned that the plight of the prairie farmers was particularly hard as drought had coincided with depression in the three prairie provinces.

The underlying premise of the *Farmers' Creditors Arrangement Act* was that it was in the public interest to keep debt-ridden farmers on their land even if they could not meet their debts as they became due. Accordingly, at the option of the farmer, the statute made available a compulsory mechanism whereby he could negotiate a compromise of principal and interest payments with his creditors on both secured and unsecured loans. Farmers who could not meet their accruing liabilities could propose "a composition, extension of time or scheme of arrangement" to their creditors which, if accepted, would be referred to a distinct or superior court for registration. Once registered, the proposal was a legally enforceable variation of the original contract of loan or purchase. Should the creditors decline to agree to the scheme proposed, the farmer could apply to a provincial board of review (usually comprised of local members of the judiciary) who were empowered to formulate an alternative proposal which could be enforced whether approved by the creditors or not.

*The Natural Products Marketing Act* provided means for producers of defined natural products to adopt marketing schemes, which were legally binding on all producers within a specific geographic area, to improve marketing and distribution methods for their produce. By adopting more efficient marketing practices it was thought that the unduly large discrepancy between the primary producers' selling price and the ultimate consumers' buying price might be reduced, affording such producers a larger share of the ultimate selling price of their products. Producers, mainly of farm, fish and forest products, could organize on their own initiative on a local, provincial or national level provided that they satisfied the Governor in Council that a "representative number" of producers of a defined commodity wished to participate in a marketing scheme. The *Dominion Marketing Board* exercised over-all control of marketing under the statute, but provision was also made for local boards. One of the characteristic goals of marketing schemes was to ensure that an adequate supply of produce reached their markets under the Board's jurisdiction so that conditions of artificial glut or scarcity would not affect prices. Complementary legislation was enacted by all nine provinces so that both intra-provincial and inter-provincial and export marketing would be covered. Historically, one of the most vexing problems confronting legislative draftsmen was the articulation of marketing legislation (in both its intra-provin-



cial and extra-provincial aspects) which would be both comprehensive and constitutionally valid.<sup>18</sup> Before this statute was invalidated by the courts, a large number of marketing schemes were inaugurated in different industries and with varying degrees of success.<sup>19</sup>

As in the case of several of the other statutes, one of the issues in both of the above-mentioned Acts was whether there was an unconstitutional attempt by Ottawa to regulate purely local transactions. In purporting to modify mortgages of homesteads, or to facilitate intra-provincial marketing transactions, the federal government might well be accused of encroaching on provincial jurisdiction.

### *The Initiation of the References*

When the Liberals were elected on October 14, 1935, with a substantial parliamentary majority, they had the power necessary to do with the New Deal whatever they desired. The only restraints upon their action would be prudential ones based upon an appraisal of public reaction to their possible repudiation of the New Deal. Since the Conservatives had been decisively rejected by the electorate, however, in an election in which the New Deal was an issue, the manner in which the victors dealt with Mr. Bennett's reform programme would not seem to have caused the victors much anxiety.

It should be mentioned that the reference of the New Deal programme to the courts was only one of a series of options confronting the new government in its disposition of the programme. If it was reluctant to proceed with the implementation of the whole programme it could, for example, implement the statutes selectively, or even repeal the statutes. It could also leave the statutes on the books but refuse to implement them. Or, alternatively, it could either refer the statutes to the courts itself, or prepare for a provincial challenge to the legislation through provincial reference procedures.<sup>20</sup> The New Deal statutes might be placed in issue at any time, of course, by concerned individuals in the more common type of adversary process.

In deciding to employ a reference, the executive were selecting one mechanism from among several by which the social reform programme could be tested. The reference did, however, possess a singular advantage in that it enabled the executive to shift the burden of responsibility for the disposition of the New Deal, at least tempor-

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<sup>18</sup> See J. A. Corry, *Difficulties of Divided Jurisdiction*, Appendix 7, ROYAL COMMISSION ON DOMINION-PROVINCIAL RELATIONS, (King's Printer, Ottawa, 1939) esp. pp. 11-13.

<sup>19</sup> See R. B. HANSON, *THE DOMINION MARKETING BOARD AND THE IMPORTANT WORK IT HAS DONE* (Ottawa, June 12, 1935), Meighen Papers, (P.A.C.), and W. C. Hopper, *The Natural Products Marketing Act 1934, II: Notes on the Administration of the Act, in the* (1935) 1:3 CANADIAN JOURNAL OF ECONOMICS AND POLITICAL SCIENCE.

<sup>20</sup> The provincial reference power could well have been used to ascertain the validity of the New Deal statutes had the federal government shown reticence in seeking references. Cf. R.S.N.S., 1954, c. 50; R.S.P.E.I., 1951, c. 79; R.S.N.B., c. 120, s. 24A; R.S.Q., 1941, c. 8; R.S. Man., 1954, c. 44; R.S. Sask., 1953, c. 18; R.S. Alta., c. 55, 1955, and R.S.B.C., 1948, c. 66.

arily, from itself to the judiciary, and to gain time to devise alternative modes of procedure should the programme be upheld. However convenient the reference device might be in the short run, it should be remembered that there were also dangers accompanying its use. In a New Deal type situation it could result in a drastic curtailment of federal constitutional powers if the judiciary found a wide-ranging social reform programme to be *ultra vires*. Ottawa might find that in securing a temporary advantage through the employment of a reference, it had tied its hands as far as future social initiatives of a similar kind were concerned. This wider implication of the New Deal references, of course, might easily be present in other reference cases which may arise in future.

There were some who regarded the government's initiative with suspicion. Hon. H. H. Stevens queried whether the form in which the reference questions were couched ('Is this Act *ultra vires* of the Parliament of Canada?') did not contain a subtle suggestion that the legislation was invalid, or that the courts should search for "reasons why the Acts are *ultra vires*."<sup>21</sup>

In response to Stevens' question, Ernest Lapointe replied disarmingly, and perhaps a trifle disingenuously, that "The very concise form of the question means that all aspects which will have a bearing upon the matter shall be properly included in the argument and brought to the attention of the Court."<sup>22</sup> He also pointed out that the federal government had retained as counsel N. W. Rowell, K.C., and Louis S. St. Laurent, K.C., and that he had no doubt ". . . that their appointment will satisfy Canadian public opinion and is a guarantee that the best argument possible will be presented to the Court."<sup>23</sup> Mr. Lapointe's reply does indicate some concern in government quarters that the 'Canadian public' might entertain some suspicion of the executive's motives in sending the eight New Deal statutes for judicial review.

Whatever isolated segments of the public might think, however, the initiation of the references would inspire little criticism from either federal or provincial government spokesmen. (Federally, the Liberals had 171 seats to 40 for the Conservatives.) In a nation-wide election radio broadcast, eight out of nine provincial premiers (all except Alberta's Premier Aberhart) had spoken in favour of the election of Mackenzie King.<sup>24</sup> It is remarkable that in an election campaign in which the New Deal was an issue, only Premier L. A. Taschereau of Quebec, among the premiers, referred to it, and he in terms of scathing rejection.<sup>25</sup> As the subsequent litigation revealed,

<sup>21</sup> H. H. Stevens to Ernest Lapointe, 6 November, 1935, Lapointe Papers, (P.A.C.).

<sup>22</sup> Ernest Lapointe to H. H. Stevens, 14 November, 1935, Lapointe Papers, (P.A.C.).

<sup>23</sup> *Id.*

<sup>24</sup> The Toronto Daily Star, Wednesday, October 9, 1935, at 6-7. The full text of each premier's speech appears in this edition of the Star.

<sup>25</sup> *Cf.* Premier Taschereau's allusion to Bennett's earlier Conservatism: ". . . he tore these leaves from the book of his political life and, unfaithful to his past, launched into a socialistic venture, bordering on Communism, that will lead nowhere unless to the downfall of our country." *Id.* at 6.

many of the provinces considered that the sustainment of the New Deal, at least in the important 'treaty' cases, would result in an undesirable accretion of federal jurisdiction at the expense of the provinces. On balance then, the provinces were apt to be more hostile than not if the government sought to have the legislation implemented. In the conflict between social need and constitutional jurisdiction, the provinces were unwilling to sacrifice their prerogatives for what many of them considered to be the dubious benefits of the New Deal.

Once the Supreme Court was vested with jurisdiction to pronounce upon the validity of the New Deal, the judiciary could not fail to be impressed by two facts: (1) the initiation of references on the New Deal as Stevens had suggested, intimated that the government had qualms about implementing the programme and had cause to suspect its validity. Since the New Deal was an issue in a bitterly fought election campaign and constituted a controversial part of the defeated government's platform, the inference would be not unnatural that the government was seeking a legal pretext not to implement it; (2) The virtual unanimity of provincial counsel against the New Deal, together with the fact that it was the federal authorities who had sought a reference, would suggest that there was a consensus throughout Canada, both federal and provincial, against implementing the New Deal. The government could readily anticipate that the legislation would be attacked by most provinces and supported, as far as could be foreseen, by none.

*The Nature of Canadian Reference Cases:* The uniqueness in Anglo-American jurisprudence of the reference procedure existing in Canadian law by virtue of a section in the *Supreme Court Act*,<sup>26</sup> should be mentioned since it had an important bearing on the result of the New Deal cases. First, however, it is important to understand the purpose of the reference as it was conceived in the early years of its use. In parliamentary debates in 1891, Edward Blake, a former Liberal Minister of Justice, and Sir John Thompson, Conservative Minister of Justice and later Prime Minister, both stressed that references could have an important function in determining the validity of a provincial statute prior to the use of the power of disallowance by the federal authorities to nullify the statute.<sup>27</sup> They both conceived the reference as an instrument of federal control of the provinces, relieving the central executive of the politically sensitive task of itself pronouncing upon the validity of provincial statutes, often enacted by hostile provincial governments, before nullifying them. The courts, because of their supposed impartiality, could discharge such a task with greater objectivity. The result of the reference itself, of course, being purely advisory in nature, left the impugned statute in operation, leaving its disallowance up to the executive.

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<sup>26</sup> S. 55, *Supreme Court Act*, R.S.C., 1927.

<sup>27</sup> See the discussion of Blake's and Thompson's attitudes in Rubin, *The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law*, in W. R. LEDERMAN, ed., *THE COURTS AND THE CANADIAN CONSTITUTION*, (Toronto, 1964) 223-225, see also, Davison, "The Constitutionality and Utility of Advisory Opinions," (1937-38) 2 U. TOR. L.J. 254.

Despite the fact that the courts were supposedly more impartial than the executive in determining the constitutionality of statutes, Lord Chancellor Loreburn referred to the potential dangers of the reference device in a 1912 case: "No one who has experience of judicial duties can doubt that, if an Act of this kind were abused, manifold evils might follow, including undeserved suspicion of the course of justice and much embarrassment and anxiety to the judges themselves."<sup>28</sup> The Lord Chancellor does not expand upon the possible "abuse" of the reference device, but he would seem to be referring obliquely to a decision by the executive to transmit politically sensitive measures enacted, for instance, by a hostile provincial government, or a defeated federal rival, to the courts to avoid an embarrassing political decision for the moment or in the hopes that the legislation would be declared invalid, or possibly both. Such a procedure, of course, would project the courts into the forefront of the political arena, and might subject them to pressures of a kind to which they are not normally exposed. This is particularly the case where, as in Canada, judges are often appointed on the basis of past political services to the appointing authority,<sup>29</sup> and could well feel an indebtedness to such an authority. Of course, the past political allegiance of judges, in so far as it might have a bearing on their decisions in reference cases, is an intangible factor which cannot easily be weighed, and which might vary greatly in individual cases. It would seem, however, that the apprehensions voiced by Lord Loreburn would be manifest in a case where a politically sensitive issue was referred to the Court by an executive which was the appointing authority of the majority of judges on the Court.<sup>30</sup>

In his above-quoted remarks, it is evident that Lord Loreburn is speaking of a procedure which is based on a Canadian statute and which is unfamiliar in English law. There is no procedure strictly analogous, under English law, to the seeking of a reference in Canada. A declaratory judgment can be obtained in England, but such a judgment is always grounded on a concrete case and not on queries of a hypothetical nature like Canadian references. This is perhaps the

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<sup>28</sup> *Attorney-General for Ontario vs. Attorney-General for Canada*, [1912] A.C., at 582-583.

<sup>29</sup> *Cf.* PETER H. RUSSELL, *BILINGUALISM AND BICULTURALISM IN THE SUPREME COURT OF CANADA*, (Ottawa, 1966), at 182, ". . . there are two career patterns which are most apt to lead to the Supreme Court—politics and the federally-appointed judiciary. Of the 49 lawyers who have served on the Court only 10 had not previously either been members of a federal or provincial legislature or else members of the bench of a provincial supreme court. And even among the ten exceptions, two, Sedgwick and Newcombe, served as Deputy Ministers of Justice in Ottawa, which would bring them well within the inner circle of federal legal influentials."

<sup>30</sup> Four of the seven judges on the Supreme Court bench when the New Deal was argued were Liberal appointees—Duff, Cannon, Rinfret and Lamont—and the latter three, especially, had strong partisan backgrounds, having either been Liberal standard bearers or elected members of various legislatures.

closest approximation in English law to a reference under the *Supreme Court Act*.<sup>31</sup>

In the 1911 case of *Muskrat v. United States*<sup>32</sup> the U.S. Supreme Court ruled that the constitutional validity of laws enacted by Congress could not be tested until they were "properly" brought before the Court in a concrete case. The issue arose here when Congress passed a law in 1907 purportedly authorizing Mr. Muskrat of the Cherokee tribe to seek an advisory opinion from the Supreme Court on the validity of federal enactments redistributing certain Cherokee property. In his judgment, Mr. Justice Day said: "This attempt to obtain a judicial declaration of the validity of the Act of Congress is not presented in a "Case" or "Controversy", to which, under the Constitution of the United States, the judicial power alone extends."<sup>33</sup>

Neither in England nor in the United States, therefore, will the courts entertain a hypothetical question, quite apart from a concrete case, on an issue of national or federal law. Advisory opinions may be obtained on questions purely of state law, however, in certain American states;<sup>34</sup> the exact circumstances under which such local advisory opinions might be secured would depend on the particular state statute involved. The seeking of advisory opinions through references has been provided for, as well, by most Canadian provincial legislatures.<sup>35</sup>

On the national level, it would appear that Canada is the only state within the Anglo-American legal framework having a procedure allowing for constitutional references.<sup>36</sup> The lack of historical analogues in other judicial systems, on a national level, to the reference device entails that its evaluation must be made in a rather limited historical perspective.

It would seem though, that in a New Deal type situation the reference device singularly lends itself to imposing upon the courts a role approximating that of a political decision maker. Almost inevitably, in such a situation, the courts must weigh factors of political policy along with legal factors before rendering their decisions. When confronted with the embarrassment of implementing

<sup>31</sup> Cf. E. WADE & G. PHILLIPS, *CONSTITUTIONAL LAW*, (6th edition, London, 1960) 637. "An action for a declaratory judgment or the statement of a special case must be based on a concrete case which has arisen. The courts will not give answers to questions propounded in the form of hypothetical cases. Nor can the judges be asked to give advisory opinions on points of law."

<sup>32</sup> 219 U.S. 346.

<sup>33</sup> See *Muskrat v. United States* in W. MENDELSON, *THE CONSTITUTION AND THE SUPREME COURT* (2nd ed., New York, 1965) 11.

<sup>34</sup> The states concerned are Alabama, Colorado, Delaware, Florida, Massachusetts, Maine, North Carolina, New Hampshire, Rhode Island and South Dakota. See H. ABRAHAM, *THE JUDICIAL PROCESS*. (New York, 1962) 313.

<sup>35</sup> See *supra* note 20.

<sup>36</sup> In Australia, Commonwealth legislation providing for references to the High Court was held *ultra vires* in *In re Judiciary and Navigation Acts* (1921), 29 C.L.R. 257. Nevertheless, very liberal treatment of the declaratory judgment device in public law litigation has permitted the High Court to deal with issues quite similar to the kind of issue raised in Canadian reference cases. See Z. COWEN, *FEDERAL JURISDICTION IN AUSTRALIA*, (Oxford, 1959) 18.

unwanted statutes, the Canadian executive has a weapon shared by no other national executive within the common law tradition. At the very least the executive could delay a vexing decision on what to do with legislation for several months, or in the case of successive hearings before the Supreme Court and the Judicial Committee before 1949, for much longer. To make such a suggestion is not to aver that a reference case could not genuinely serve a needed purpose in some situations. However, in other situations references would seem to lend themselves particularly to political procrastination and evasiveness. In conclusion, it might be suggested that it is rather ironical, in view of the fact that the reference was originally conceived as a device for federal control of provincial legislation, that in the New Deal cases references were used by the provinces for the invalidation of federal legislation.

### *The New Deal Before the Supreme Court of Canada*

While the Canadian Supreme Court bench which heard the New Deal references cannot easily be categorized as a centralist—or provincialist—leaning body, it would probably be accurate to say that it was inclined to uphold provincial rights in constitutional disputes. The two Quebec judges and the New Brunswick judge had strong provincialist inclinations, while the other judges were not markedly eager to frame their judgments in such terms that they would be able to circumvent precedent, which in 1936 was a bulwark of the provincial power. Whether by force or legal precedent or natural inclination, the Court was considerably biased towards the provinces in any constitutional confrontation. An examination of the backgrounds of the judges assists in explaining the division of the court, especially in the *Natural Products Marketing Act* reference, the *Labour Conventions* reference and the unemployment insurance reference.

Probably the most arresting facts about the six-man panel which heard the references (Mr. Justice Lamont being absent through illness), were the political backgrounds of the judges and, with the exception of Chief Justice Sir Lyman Duff, their specialization in fields other than constitutional law.

Duff himself was a jurist of distinction and is generally held to have been the strongest legal authority on the 1936 Supreme Court bench. A master of trenchant and incisive English, he wrote his opinions in a style which bears comparison with Holmes or Brandeis. His very knowledge of the law, however, may have induced him to take a stereotyped view of cases which *prima facie* seemed to fall within the categories of Judicial Committee precedent. If the great jurist was not merely a man of legal erudition, but one who weighed factors of both law and policy before rendering a decision, it may be said that sometimes Duff did not sufficiently consider policy factors—legal scholar that he was, he tended to over-emphasize the importance of precedent. In certain instances his frame of reference was too narrow.

Born at Meaford, Ontario in 1865, Duff majored in mathematics and metaphysics at the University of Toronto, taking his arts degree in 1887 and his law degree in 1889. After teaching briefly at a secondary school in Barrie, he was called to the Ontario bar in 1893, but following two years of practice in Ontario decided to practice law in British Columbia. His rise in the legal profession there was rapid, and in 1903 he presented the federal brief before the Alaska Boundary Commission along with Edward Blake. In 1906 he was made a puisne judge of the Supreme Court of Canada, after having served for two years on the provincial Supreme Court.<sup>37</sup>

Duff was regarded as an authority on constitutional and criminal law. His meticulously phrased judgments were models of judicial literature, and a former lord chancellor said that his sole equals on North American courts were Brandeis and Holmes. In his own opinion, his greatest judgment was the one advising the government that appeals to the Judicial Committee could be abolished.<sup>38</sup>

Although Duff was never involved as actively in political affairs as some of his colleagues, he was, before his elevation, a strong supporter of the Liberal Party. A former president of the Victoria Liberal Club, he was asked on one occasion to serve in Laurier's cabinet, but declined. Although Sir Lyman was assuredly not a Conservative, Borden proposed in 1917 that he lead the Union Government being formed of pro-conscriptionist forces from both major parties. The possibility of Duff's serving as prime minister arose when some of the Unionist Liberals proved lukewarm to Borden's continued tenure of office at the head of a "national" government. Borden was able finally to secure the consent of the dissidents to his leadership before a formal offer was made to Mr. Justice Duff.<sup>39</sup>

In 1919, while still a puisne judge on the Supreme Court of Canada, he was appointed to the Imperial Privy Council and heard many judicial appeals in London. In the 1920s he served as an arbitrator in a boundary dispute between Ulster and the Irish Free State. A man of diverse experience and broad interests, he dabbled in higher mathematics, including relativity theory, and conducted a correspondence in Greek with Lord Haldane. He was an omnivorous reader and a lover of poetry, especially the work of the Canadian poet Duncan Campbell Scott, and he could recite pages of Milton from memory.<sup>40</sup>

Although among Duff's judgments there were several important ones upholding the provincial power at the expense of the federal government, he may, like many of his brethren, have felt that Judicial Committee precedents left him little choice but to find for the provinces when a conflict arose over constitutional jurisdiction. In the New Deal references, he adopted a moderate position, supporting the validity of the I.L.O. and unemployment insurance statutes, but holding that the *Natural Products Marketing Act* was *ultra vires*. It

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<sup>37</sup> The Ottawa Citizen, Friday, March 18, 1933, 1.

<sup>38</sup> The Montreal Gazette, Thursday, April 28, 1955, at 6. The decision referred to was Reference re Privy Council Appeals, [1940] 1 D.L.R. 289.

<sup>39</sup> The Ottawa Citizen, Tuesday, April 26, 1955, 1.

<sup>40</sup> The Montreal Gazette, Thursday, April 28, 1955 at 6.

is apparent from his conversation with acquaintances that he sought to gain a consensus on the bench for those parts of the New Deal, including the treaty legislation, which did not seem to him to run absolutely against the current of precedent. His observation to Finlayson that he was "having the devil's own time with my brother Crocket" during the New Deal litigation shows his proclivity towards judicial leadership. It was apparent to Duff that opposition to the treaty statutes by the two Quebec judges, Cannon and Rinfret, would produce a 3-3 tie (with Mr. Justice Lamont absent), unless Crocket could be won over to side with Kerwin, Davis and himself. His efforts to convince the intransigent Crocket proved fruitless, however, with the result that the court remained deadlocked. Although technically this meant that the statutes were upheld, it was bound to present an appearance of sharp division on the Canadian bench and enhance the provincial position when an appeal was taken to the Judicial Committee.

The New Brunswick appointee on the Court, with whom Duff took such fruitless pains, Mr. Justice O. S. Crocket, had been a judge of the provincial Supreme Court for 19 years when he was called to Ottawa in September, 1932. There was considerable vacillation by the government in choosing a successor to Mr. Justice E. L. Newcombe of Nova Scotia who had died the preceding fall, and much bitterness on Crocket's part that he was not selected earlier by Bennett. "Two weeks ago," he wrote Senator Meighen, "*The Gleaner* published a news article stating the P.M. had written Baxter strongly urging him to accept as a matter of public duty and that if he did not he would have to seek elsewhere for a competent man. As I regarded this a most pointed reflection on my character and sagacity as a judge I wrote the P.M. a letter of which I enclose you a copy. The affair had given rise to all sorts of talk."<sup>41</sup> Crocket's chagrin apparently arose from the fact that he and most of the provincial press considered that he would be appointed to the vacancy. Crocket wrote a further letter to Meighen, who was government leader in the Senate, asking for an "unpublicized" meeting in Montreal at the Windsor Hotel, where he evidently intended to press his candidacy further, but Meighen replied that the pressure of business made the meeting impossible.<sup>42</sup> Six months were to elapse before Crocket's appointment and he underwent much embarrassment over Bennett's hesitancy in appointing him to the Court.

Born at Chatham, New Brunswick, in 1868, Crocket graduated from the University of New Brunswick with an arts degree when only eighteen years of age. After his call to the bar, he was elected as a Conservative to the House of Commons in 1904 for the constituency of York. He was re-elected in 1908 and 1911, receiving a record majority in the latter year. On his appointment to the New Brunswick

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<sup>41</sup> Crocket to Meighen, 10 February, 1932, Meighen Papers, (P.A.C.).

<sup>42</sup> Crocket to Meighen, 7 March, 1932, and Meighen to Crocket, 9 March, 1932, *Id.*



Supreme Court in December, 1913, he resigned his seat.<sup>43</sup> His work as a judge in New Brunswick was concerned mainly with divorce proceedings, his appointment to the federal judiciary being recorded by the *Montreal Gazette* on an inside page under a heading which read partly "Now Divorce Judge."<sup>44</sup> Lacking Duff's more extensive judicial background and breadth of mind, Crocket tended to resent the pre-eminence of the former (who was to be elevated to the chief justiceship in the following year). His personal antipathy to Duff may have been one factor in hardening him against those portions of the New Deal programme which Duff supported, but this is difficult to assess objectively, and certainly other factors were present in Crocket's rejection of the reform programme. In addition to the mortification arising out of the tardiness of his appointment, Crocket represented an older school of Conservative politicians who found Bennett's New Deal ideologically distasteful. During the course of his efforts to persuade Crocket to support the I.L.O. Legislation, as Duff later told acquaintances, the New Brunswick jurist had charged that Bennett had "ruined" the Conservative Party with his New Deal speeches of January, 1935.<sup>45</sup>

A man of uncompromising morality himself, he tended to be inflexible once his opinions were formed. An obituary records that he declared a tire replaced on his car to Canadian customs, along with the most trivial purchases, when crossing the border. A staunch Presbyterian, he took a leading role in the opposition to amalgamation before the formation of the United Church of Canada. There was in both his religious and political views a traditionalism which extolled self-reliance and industry, and conversely deprecated "socialistic" experiments like the New Deal which, he would consider, cramped individual initiative by fostering state paternalism.

Along with Crocket, Mr. Justice Thibaudeau Rinfret and Mr. Justice L. A. Cannon furnished a hard core of resistance to the New Deal during the references.

Thibaudeau Rinfret, who was to succeed Duff as Chief Justice in 1944, was an authority on corporation and municipal law during his practice, serving concurrently as a professor of the law of public utilities and comparative law at McGill for a ten-year period. After his elevation to the Court in 1924, he was on terms of intimacy with Duff, frequently holding whispered consultations with the latter when court was in session. Before his appointment to the Supreme Court of Canada he spent two years as a judge on the Quebec Superior Court. In 1908 he contested the Quebec riding of Terrebonne for the Liberals, but was defeated. His brother Fernand Rinfret was twice Secretary of State in Mackenzie King's cabinet and a former Mayor of Montreal.<sup>46</sup> Like Duff, only much later in his career, he was appointed to

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<sup>43</sup> The Telegraph-Journal, Saint John, Wednesday, September 21, 1932, at 1.

<sup>44</sup> The Montreal Gazette, Wednesday, September 21, 1932, at 11.

<sup>45</sup> Interview with R. K. Finlayson, March 23, 1966.

<sup>46</sup> The Montreal Gazette, Saturday, November 8, 1944, at 1.

the Imperial Privy Council, but was able to serve on the Judicial Committee for only two years before the abolition of Canadian Appeals. Rinfret was among those prominently mentioned for the office of Governor-General in 1952. A Catholic, he received the Grand Cross of the Order of St. Gregory the Great from the Pope in 1948, marking the first time the award was made to a Canadian.<sup>47</sup> Rinfret was originally named to the 1936 Royal Commission established by King to review the financial basis of Confederation but when he became ill Joseph Sirois was appointed in his place, to serve on what was subsequently called the Rowell-Sirois Commission.

Rinfret's Quebec colleague, Mr. Justice L. A. Cannon, was appointed to the Court in 1930 to fill a vacancy caused by the retirement of Mr. Justice P. B. Mignault. Like Rinfret, he too had a brother in the King cabinet, Lucien Cannon, Mr. King's solicitor general. The son of a judge of the Quebec Superior Court, Cannon's family was of Irish descent but had long been regarded as French. Cannon had served as a Quebec City alderman for eight years before his election in 1916 as a Liberal member of the Quebec Legislature for Quebec Centre. One of the most important incidents of his busy practice was a two-year period when he was counsel for the Province of Quebec and the Quebec Harbours Board when the Railway Commission of Canada was investigating the structure of freight rates from 1925-1927. Before his Supreme Court appointment, Cannon served for three years on the Quebec Superior Court; he was married to a daughter of former Canadian Chief Justice Sir Charles Fitzpatrick.<sup>48</sup>

The three above-mentioned judges furnished what may be called the core of opposition to the New Deal on the tribunal which heard the cases. These three judges adamantly opposed the treaty legislation and unemployment insurance, while Duff, Kerwin and Davis held that the former statutes could be sustained and Duff and Davis held that the latter enactment was valid. They also joined with a unanimous bench in declaring unconstitutional the *Natural Products Marketing Act* while Crocket and Cannon delivered dissenting opinions in two other references where the statutes involved were upheld by the rest of the Court.<sup>49</sup>

Another future Chief Justice who sat on the bench considering Bennett's social legislation, Patrick Kerwin, was an unpretentious jurist who talked in short, simple sentences. After his call to the bar at the age of 22, Kerwin practiced law in Sarnia until his promotion to the Supreme Court of Ontario in 1932. In 1935 Kerwin was Prime Minister Bennett's last appointment to the Supreme Court of Canada. Although he was a Conservative, he was not involved as

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<sup>47</sup> The Ottawa Journal, Thursday, July 26, 1962, at 1.

<sup>48</sup> The Montreal Daily Star, Wednesday, January 15, 1930, at 8.

<sup>49</sup> See the dissent by Cannon J., in the Farmers' Creditors Arrangement Act reference at [1936] S.C.R. 394, and the dissents of Cannon and Crocket, JJ., in the reference re Section 498A of the Criminal Code at 368 and 371 respectively.

actively in partisan politics prior to his elevation to the bench as were some of his colleagues.<sup>50</sup>

Appointed to the Court five months before Kerwin, Mr. Justice H. H. Davis was a native of Brockville, Ontario, who sat for two years on the Ontario Court of Appeal before his appointment. Davis was involved in important investigations both before and after his elevation, inquiring into a Vancouver longshoremen's strike and into alleged irregularities in the manufacture of Bren guns for the federal government by John Inglis, Ltd., in 1938. Mr. Justice Davis had high standing in the legal profession, having served as president of the Canadian Bar Association in the same year he was appointed to the federal bench,<sup>51</sup> but nothing in his legal career discloses any close association with constitutional law.

#### *Counsel's Argument Before the Supreme Court*

Arguing for the federal government in the 1936 references were three counsel, not all of whom were uniformly able as constitutional lawyers. Unquestionably the ablest of the three, and soon to be appointed Chief Justice of Ontario, was Newton W. Rowell, K.C. Rowell had served as Acting Secretary of State for External Affairs in Borden's Union Government, and was present at the 1919 I.L.O. Convention in Washington where the groundwork was laid for some of the labour conventions involved in the New Deal litigation. Louis S. St. Laurent, K.C., was an able and experienced corporation counsel, but not the equal of Rowell as a constitutional lawyer. C. P. Plaxton, K.C., was the representative of the Department of Justice in both Ottawa and London.

Rowell expressed keen disappointment that he could not argue the ultimate New Deal cases before the Privy Council because of his promotion to the bench. Bennett and his associates, who greatly admired Rowell, considered that the ultimate appeals were mismanaged by St. Laurent and R. S. Robertson, K.C., who succeeded Rowell, and regretted the latter's inability to represent the federal government in London. This resulted in what they felt was a relatively weak case being presented before the Judicial Committee.

While the factums prepared by the various provinces may not have had a traumatic effect on the bench, the provincial unanimity against the enactment of the social legislation under the treaty clause could hardly fail to impress the judges with what amounted to a provincial abhorrence to the validation of the New Deal under section 132.

The focus of provincial opposition to the New Deal was undoubtedly the treaty legislation. If the I.L.O. legislation were upheld, similar federal enactments might in future oust any supposed area of provincial jurisdiction. Provincial attitudes on other parts of the reform programme varied, but there was provincial unanimity concerning

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<sup>50</sup> The Ottawa Journal, Monday, February 4, 1963, at 1.

<sup>51</sup> The Montreal Gazette, Saturday, July 1, 1944, at 1.

the constitutional repugnancy and political undesirability of the treaty statutes. The factums submitted to the Supreme Court late in 1935 and early in 1936 bear out a report in the *Regina Leader Post*<sup>52</sup> that only Quebec and New Brunswick were intending to attack the validity of all of the New Deal statutes; the report stated that of the seven provinces submitting factums (all provinces except Nova Scotia and Prince Edward Island), Manitoba, Saskatchewan and Alberta would attack only the treaty legislation.<sup>53</sup> It was further stated that on each of the other statutes the prairie provinces would express no opinion, neither defending nor attacking their validity, but *ex abundanti cautela*, reserving the right to appeal any decision rendered.

If the mildest and most qualified opposition to the New Deal statutes came from the prairies, the sharpest opposition to the social legislation came from Quebec and New Brunswick. New Brunswick, with the knowledge that Quebec would strenuously oppose the whole New Deal, did not have a separate legal argument drafted but adopted the grounds of objection and legal argument of the Quebec factum *in toto*.<sup>54</sup>

The factum of Quebec charged that the entire I.L.O. legislation was *ultra vires* the federal power since it concerned matters lying within provincial jurisdiction, specifically matters dealing with "civil rights" and "local and private" conditions.<sup>55</sup> Moreover, Mr. Justice Duff had, according to Quebec, disposed of any uncertainty surrounding the issue in his Hours of Work decision in 1925,<sup>56</sup> when he said that the subject matter of the relevant convention was within provincial jurisdiction except for federal employees and territories administered by the federal government.<sup>57</sup> In addition, the Dominion authorities had already brought the disputed conventions to the attention of the Quebec government and had no further duty to discharge under the Treaty of Versailles.<sup>58</sup> The only new act, according to the Province, was the federal ratification of the conventions, and the act of ratification did not itself remove the subject-matter of the agreements from provincial jurisdiction.<sup>59</sup> The position of Quebec

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<sup>52</sup> The Regina Leader Post, Saturday, January 18, 1936, at 19.

<sup>53</sup> This report was borne out by the three short factums presented by the prairie provinces. See *Factum of Manitoba*, dated 6 January, 1936; *Factum of Saskatchewan* dated 6 January, 1936, and *Factum of Alberta* dated 30 December, 1935, (I.L.O. file, Supreme Court Library, Ottawa).

<sup>54</sup> *Factum of New Brunswick*, undated, signed by Donald V. White of the Attorney General's Department, (I.L.O. file, Supreme Court Library, Ottawa).

<sup>55</sup> *Factum of Quebec*, undated, signed by Charles Lanctot and Aimé Geoffrion, 11, *Id.*

<sup>56</sup> See *supra* note 11.

<sup>57</sup> *Factum of Quebec*, 19.

<sup>58</sup> Article 405 of the Treaty of Versailles had acknowledged the difficulties that might arise in implementing labour conventions in federal states because of the division of legislative jurisdiction, and had made special provision therefor: "In the case of a federal state, the power of which to enter into conventions on labour matters is subject to limitations, it shall be in the discretion of that Government to treat a draft convention to which such limitations apply as a recommendation only . . ."

<sup>59</sup> *Factum of Quebec*, at 20.

was that ratification did not alter constitutional responsibilities. Quebec was, apparently, arguing either that ratification without prior provincial consent was ineffective, or that ratification imposed an international duty on Canada which it could not discharge by itself under the Constitution because the federal authorities could not appropriate provincial subject matter, clandestinely as it were, merely by ratifying international agreements. The political implications of the argument in the Quebec factum were not (however,) elaborated in detail.

The Ontario factum was considerably more convoluted. Ontario contended that in so far as the I.L.O. legislation rested on section 132<sup>60</sup> it was invalid, but contended at the same time that the legislation could be upheld under the peace, order and good government clause of section 91.<sup>61</sup> The provincial position, in brief, was that while it was not possible to sanction the labour legislation under the treaty-implementing power, it could probably be upheld under the residuary clause.

Senator Roebuck, who was provincial counsel during the references, later explained the provincial position at greater length.<sup>62</sup> The Ontario Government, according to him, was trying to reconcile provincial rights with a not unprogressive social philosophy: It was the only province to make an explicit attempt to do this before the courts. Attorney-General Roebuck, along with I. A. Humphries, K.C., of his Department, adopted a legal stance which they considered would not oppose the legislation unless it were impossible to uphold it without sacrificing the Province's constitutional powers to the central government. They considered that the validation of the statutes under section 132 would amount to such a sacrifice, since there was, they held, no authority whatsoever under that section which would authorize Parliament to enact the legislation, but, and they argued the point in considerable detail, the legislation could be upheld under section 91. In support of this contention, they submitted that the type of social legislation envisaged by the I.L.O. statutes reached out widely into the economic life of the nation and affected "the standard of life

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<sup>60</sup> Section 132 reads as follows: "The Parliament and Government of Canada shall have all powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries."

<sup>61</sup> *Factum of Ontario*, dated December, 1935.

<sup>62</sup> Interview with Senator Roebuck, January 7, 1966. It is noteworthy that among provincial counsel arguing the New Deal cases there were several, including Mr. Roebuck, Attorney-General J. B. McNair of New Brunswick and J. W. deB. Farris of British Columbia who held exceptionally strong views on provincial rights. Attorney-General Roebuck, for example, considered that within the ambit of its legislative jurisdiction, Ontario had many of the attributes of a sovereign state. Accordingly, the provincial legislature of Ontario could ratify an agreement involving property and civil rights which had been concluded by the Province with France or Japan. The fact that the right was not exercised did not mean that it did not exist. Once ratified, the formal perfection of the treaty required only the signature of the lieutenant-governor, who for all matters within the purview of section 92 was the Sovereign's sole representative.

of the Canadian people as a whole."<sup>63</sup> Economic conditions were handicapped throughout Canada by having different local rates for minimum wages and different maximum hours of labour, for example, and these were precisely the handicaps which the disputed legislation was designed to overcome. Moreover, if various provincial schemes were adopted, instead of a single national scheme, it could disturb the equilibrium of industrial relations in the various provinces. It would, for instance, lead to competition among industrialists to situate factories where labour could be obtained at the cheapest cost and could be made to work for the longest hours. Obviously, to combat such undesirable competition nation-wide legislation, which only the Dominion could enact, was essential. "If it is of national concern," this part of the factum concluded, "then there should be uniformity of law in hours of toil and cessation from toil, and minimum wages so that there will be equality as between the Provinces."<sup>64</sup> The conclusion was inescapable: since only the Dominion could legislate comprehensively to regulate labour conditions from one end of the country to the other, and since regulation was necessary in the light of present conditions, the federal government could enact the labour legislation under section 91, but not under section 132, which did not apply. Section 132 did not apply, because the *Treaty of Peace* contained mere precatory words—or terms of "pious hope"—and did not impose a binding duty on Canada to enact the legislation.<sup>65</sup> It was only prior international obligation which created federal jurisdiction, and since no obligation could be demonstrated it was not possible to ground jurisdiction on section 132.

The British Columbia factum was adamantly opposed to the treaty legislation, not on the merits of the treaty legislation, but because of the alleged attempt of the Dominion to invade provincial jurisdiction.<sup>66</sup> Counsel for British Columbia, in fact, contended that social legislation had been enacted in the Province "far in advance of many of these draft conventions."<sup>67</sup>

The factum rigorously set out the procedure according to which the Dominion was to secure the consent of the provinces when a draft convention involved provincial subject matter. In such a case, the Dominion had merely to bring the convention to the attention of the appropriate provincial authorities. If in this case, the province took no action, the matter was ended. If, on the other hand, the provinces gave consent and formal ratification of the convention by the Dominion followed, the Dominion could enact legislation, but only if the provinces had failed to do so after a reasonable time. In the present case, however, the essential preliminary consent of the provinces had not been obtained.<sup>68</sup>

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<sup>63</sup> *Factum of Ontario*, 15.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 3.

<sup>66</sup> *Factum of British Columbia*, dated December 20, 1935, 4.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

In the face of this provincial unanimity that the I.L.O. statutes could not be upheld under the treaty power, the factum of the Attorney-General of Canada maintaining the contrary was bound to present an appearance of isolation. Although the factum relied on three grounds to uphold the statutes, principal reliance was placed on the capacity of Parliament to implement them under section 132, once they had been duly ratified. The other grounds urged for sustaining the statutes were the residuary clause, as suggested in the Ontario factum, and the trade and commerce power.

The Dominion factum recited that under the British Constitution the prerogative of treaty-making resided solely with the Crown. The Sovereign had absolute discretion, in theory, on the making of treaties. The prerogative of the Sovereign had, however, through constitutional usage become the privilege of his ministry in Great Britain, and of the respective ministries in the various British self-governing states. The famous declaration of equality made at the Imperial Conference of 1926<sup>69</sup> implied a co-ordinate distribution of executive as well as legislative power. Accordingly, the responsible Canadian ministry could advise the Sovereign concerning the conclusion of treaties equally with the British ministry at Westminster. There was no derogation of treaty-making capacity consequent on the transfer of full sovereignty from Westminster to Ottawa.<sup>70</sup>

Once ratified, the conventions became binding on Canada as a whole and even if they were not considered "treaties" under section 132, they were still internationally binding agreements which the Dominion could implement legislatively under the residuary power in section 91. There followed a brief invocation of the residuary power,<sup>71</sup> the force of which was insignificant when contrasted with the pages of detailed argument devoted to the validation of the statutes under section 132.

The brevity with which the federal factum dealt with the alternative grounds involving the residuary and trade and commerce clauses left no doubt that the federal case rested substantially on sustaining the statutes under the treaty power. The later disposition of the case suggests that the alternative arguments did little to reinforce the strength of the federal position. In this and other New Deal cases, court procedure had a significant influence in crystallizing the issues and selecting certain points from those presented by counsel for special consideration. In a recent study for the *Royal Commission on Bilingualism and Biculturalism*, Professor Peter H. Russell has sharply contrasted the effect of oral and written argument by counsel in several countries with common law traditions. Insistence on systematic written pleadings and extensive oral argument in the Supreme Court of Canada has resulted in a situation

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<sup>69</sup> Self-governing Dominions were defined at the Conference as "... autonomous communities within the British Empire, equal in status and in no way subordinate one to another in any aspect of their domestic or external affairs..." IMPERIAL CONFERENCE, 1926, SUMMARY OF PROCEEDINGS, 9.

<sup>70</sup> *Factum of Canada*, 15-17.

<sup>71</sup> *Id.* at 22.

where the judges in that forum rely mainly on opposing counsel to define the main issues.<sup>72</sup> The situation is quite different in the United States Supreme Court where counsel are normally permitted only one hour for oral argument.<sup>73</sup> American judges, moreover, are quick to direct counsel to discard arguments which appear to be of only secondary importance, and to concentrate on the real issues, as perceived by the bench rather than by counsel. More exhaustive research into the definition of the issues and the merits of the case, in the interests of the development of a significant *corpus* of public law rather than merely satisfying the claims of private litigants, is made possible in the United States through the assistance of able law clerks, who play no part in the work of Canadian tribunals.

In the *Labour Conventions* case the Canadian bench substantially accepted the issue as defined in the factums. And federal counsel had opted, in effect, to have the validity of the statutes depend primarily on the treaty power. It may be suggested that this was a major tactical error. Had federal counsel relied primarily on supporting the legislation under the residuary clause, they would have achieved two important benefits. First, they would have blunted some of the strong provincial opposition to the validation of the legislation, which, as has been mentioned, was attributable not so much to the substantive provisions of the legislation as to the apprehension that a federal treaty power sustained under such circumstances might be used indiscriminately in future to appropriate other supposed provincial subject matter. (The sole objection to the legislation by the prairie provinces, it should be remembered, as far as can be seen from their factums, was that the Dominion was seeking to uphold it under the treaty power.<sup>74</sup>) Second, they could have achieved a closer alliance with Ontario—the largest industrial province—which had urged that the legislation could be sustained under the residuary power. This tactic could well have relieved the courts of the impression of provincial solidarity against the New Deal. Reliance on the residuary power by the Dominion in the *Labour Conventions* and unemployment insurance cases, in fact, could have resulted in a confrontation between Canada and Ontario on the one hand and Quebec, New Brunswick and British Columbia, on the other, or three jurisdictions against two, rather than seven against one. In such a case, needless to say, the judges would not have had such a strong impression of intransigent provincial opposition to the legislation.

#### *The Supreme Court's Judgment in the I.L.O. Case*

As might have been deduced from the emphasis in the respective factums, the judgments in the I.L.O. case turned mainly on the

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<sup>72</sup> RUSSELL, *supra* note 29, at 211.

<sup>73</sup> *Id.* at 210, and *cf. Id.* at 224, “. . . It might be appropriate for the Court to develop procedures which concentrate more of its energies on carefully researching the problems which come before it and less on umpiring the points raised by lawyers. . . .”

<sup>74</sup> *Vide supra.*



validity of the legislation as implementing Canadian treaty obligations. The Court was evenly divided with Duff, Kerwin and Davis upholding the statutes and Rinfret, Cannon and Crocket strongly contending that the I.L.O. legislation was *ultra vires*.

Speaking for what might be termed (at least in this case) the centralist members of the Court, Duff expressed the view that on Canada's recent accession to sovereignty the Canadian executive had acquired full treaty-making powers, as plenary in every respect as the corresponding powers held by the British executive. Whilst it was true that the evolution to full nationhood was accomplished through convention rather than strict law, Duff held that the usage by which Great Britain and the Dominions entered into various international agreements ". . . must be recognized by the courts as having the force of law."<sup>75</sup> Accordingly, there was no impediment incapacitating the federal government from entering into international treaties or less formal agreements.

Turning to Article 405 of the Treaty of Versailles, Duff contended that a reading of paragraphs 5 and 7 together showed that the "competence" postulated to give effect to labour conventions was the competence to enact legislation in furtherance of a treaty obligation and, under the circumstances, the treaty obligation was one falling under section 132. Only the federal government could legislate to implement such an obligation. Duff based this conclusion on two considerations: (1) Section 132 of the B.N.A. Act confided full legislative and executive powers for giving effect to any treaty to the federal government; the provinces had no power to legislate for such a purpose, the Privy Council itself having held that the federal power was exclusive in the *Radio* and *Aeronautics* cases; (2) the evolution of Canada to full sovereignty in the last twenty years had conferred upon her the capacity to enter into and to incur obligations through all kinds of international agreements.<sup>76</sup>

Duff discussed, at considerable length, a 1923 case decided by the Judicial Committee<sup>77</sup> in order to rebut a statement by provincial counsel that matters ordinarily falling within section 92 of the B.N.A. Act were excluded from the ambit of Dominion authority under section 132. In this case the British Columbia Legislature purported to validate by statute certain orders-in-council barring Chinese and Japanese from employment under provincial contracts, leases and concessions. Such intra-provincial agreements would ordinarily fall under the provincial head of property and civil rights. Notwithstanding normal provincial jurisdiction, the Judicial Committee held that the B.C. statute was invalid for violating the principle laid down in a prior federal statute, the *Japanese Treaty Act*, 1913, the enactment of which was authorized under section 132.<sup>78</sup> The corollary was clear,

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<sup>75</sup> [1936] S.C.R. 477.

<sup>76</sup> *Id.* at 495-496.

<sup>77</sup> *Attorney-General of British Columbia v. Attorney-General of Canada*, [1924] A.C. 203.

<sup>78</sup> [1936] S.C.R. 482-483.

if provincial agreements ordinarily falling under section 92 could be overridden by the treaty-making power, or by federal legislation enacted thereunder, it was not of much significance whether the matters covered by the I.L.O. conventions, and the federal statutes enacted to implement them, "ordinarily" fell under provincial jurisdiction.

The judgments given by the Quebec and New Brunswick judges holding that the statutes were *ultra vires* agreed that the legislation encroached in a radical fashion on property and civil rights in the provinces.<sup>79</sup> The three judgments asserted that essential formalities of international law were lacking in the manner in which the federal government had secured ratification and this made the supposed treaty obligations, in effect a nullity. Mr. Justice Rinfret and Mr. Justice Cannon both asserted, the former explicitly and the latter implicitly, that an international agreement dealing with provincial subject matter could not validly be ratified by the federal power without the prior authorization of the provinces.<sup>80</sup> If this doctrine were accepted without qualification, then any state entering into international agreements with Canada would have to ascertain whether or not domestic constitutional requirements had been satisfied before it could rely on the binding force of an undertaking by the Dominion.

The point raised by Rinfret and Cannon in this regard was of great importance. The federal government in its factum and the provinces in theirs had both dwelt lengthily on the question of whether a valid international obligation existed which Ottawa might implement under section 132. The Quebec judges were, accordingly, confronting the central issue raised by the factums when they dealt with the validity of the purported international obligation under the ratified I.L.O. conventions. If they were correct in their legal analysis, the principal thrust of the whole federal case collapsed.

If the premises of the Quebec judges be granted, it must be conceded that they could find some support for their position among eminent publicists. Dr. Charles G. Fenwick, for example, has this to say about the general issue they raise:

... The majority of writers . . . maintain that foreign governments should be held to a knowledge of the constitutional prerequisites of ratification in each country with which they are dealing; and they insist that a treaty which has been ratified without the proper observance of these requirements is *ipso facto* invalid, whatever the proclamation of the head of state may assert in that respect.<sup>81</sup>

<sup>79</sup> Cf. [1936] S.C.R. Rinfret at 511-512; Cannon at 520 and Crocket at 522.

<sup>80</sup> Cf. Rinfret at [1936] S.C.R. 513: "It follows from all that I have said that, in my opinion, the draft conventions on which is based the legislation now submitted to us have not been properly and competently ratified, that they could not be ratified without the consent of the legislatures in each province . . ." And cf. Cannon *Id.* at 522: "Before accepting as binding any agreement under section 405 of the Treaty of Versailles, foreign powers must take notice that this country's constitution is a federal, not a legislative union."

<sup>81</sup> FENWICK, INTERNATIONAL LAW, (3rd ed., New York, 1949) 435-436. Fenwick cites *five* authorities to the effect that a treaty ratified unconstitutionally is valid and *eight* to the opposite effect, see *Id.* footnotes 47 and 48 at 436.

And Professor Lauterpacht, in his latest edition of Oppenheim's *International Law*<sup>82</sup> affirms that because of their constitutions, federal states may often be unable to enter into international agreements, or unable to perform international agreements which they have purportedly assumed. Lauterpacht of course, is dealing with the situation after the New Deal, but his observations on subsequent developments tend to confirm Rinfret's and Cannon's viewpoint that the implementation of international agreements in federal states can be made complex because of peculiar constitutional requirements.

Mr. Justice Crocket based the invalidity of the legislation on the fact that Canada had not observed the eighteen month time-limit established by the I.L.O. for the submission of draft conventions to the ratifying authority, and he held, therefore, that the purported ratification of the three labour conventions in 1935—long after the time-limit had expired—was irregular and not binding.<sup>83</sup> Crocket's view is certainly tenable, although a case for the contrary view can also be made. Crocket was resorting to a rather narrow, technical interpretation concerning a draft agreement contrived to confer an important international benefit, and one might argue that in such a case the relevant language in Article 405 would be construed as directory rather than mandatory.<sup>84</sup> This was especially the case when the international body entitled to rely on the supposed mandatory language impliedly waived such a right by registering the Canadian ratifications in Geneva.

The issue in the *Labour Conventions* case as conjointly defined by federal and provincial factums made the federal case particularly difficult to sustain. Largely because of the emphases in the factums, a decision was facilitated on vulnerable side-issues and the judiciary never came to grips with the real problem—who has jurisdiction to enact wide-ranging social legislation, especially in a period of economic depression. The mechanics of treaty-making, in this context, was surely a secondary issue. The factums, however, defined the principal issue of the case as the legality of implementing the three labour conventions under section 132 by the statutes in dispute. Provincial unanimity against such a procedure, especially with seven of nine provinces submitting briefs, placed federal counsel in a position of friendless isolation. The confrontation, from the perspective of the bench, must have seemed like a crisis of Canadian federalism. Under these circumstances, there were bound to be judicial doubts about

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<sup>82</sup> H. LAUTERPACHT, ed., *OPPENHEIM'S INTERNATIONAL LAW*, (8th ed.) 179-180.

<sup>83</sup> [1936] S.C.R. at 538.

<sup>84</sup> The relevant paragraph 5 of Article 405 of the Treaty of Peace reads: "Each of the members undertakes that it will, within the period of one year at most from the closing session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the Conference bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action."

federal jurisdiction, about the regularity of ratification, and about the *bona fides* of the federal government in proceeding thus indirectly to implement the statutes under the treaty power. The federal choice of ground was bad. The factums gave a misleading emphasis to the importance of upholding the legislation under the treaty power, where the statutes might have been upheld more directly and with greater plausibility, as the factum of Ontario suggested, under the peace, order and good government clause.

#### *The Disposition of the Other Cases*

Indirection, if not outright deviousness, was also a feature of the argument of federal counsel in the unemployment insurance reference. It is not meant to suggest that counsel were deliberately trying to deceive the courts by the manner in which they argued, but in both the I.L.O. and social insurance references they tended to put their cases obliquely—not arguing that the subject matter was in the federal domain necessarily, but that the invocation of other powers, the treaty power or the taxing power, made the proposed statutes a valid subject-matter for federal enactment. It may have been felt that these manoeuvres were tactically advisable, but quite apart from the intentions of counsel it tended to present an aspect almost of stealth to the federal argument. It was also an irritant to the provinces, whose spokesmen would feel that such tactics, if successful, could be invoked repeatedly in future to abolish completely the division of powers in the Constitution, and hence the viability of Canada as a federal state.

Federal counsel tried to uphold Mr. Bennett's unemployment insurance statute under three distinct heads, but principal reliance was placed upon sustaining the enactment under the general taxing power. The alternative grounds urged were (a) the peace, order and good government clause; (b) the exclusive federal power to regulate trade and commerce and (c) the power to raise money by any mode or system of taxation and the related power to appropriate public moneys so raised for any public purpose.<sup>85</sup> In connection with the residuary clause, counsel argued that the sheer dimensions of unemployment during the depression made what was once a local problem a national one.<sup>86</sup> In its anticipated effects, the statute would have a general regulatory effect on trade across the whole Dominion, and hence the trade and commerce power was invoked.<sup>87</sup> Last, compulsory contributions were "taxes" within the intention of section 91(3) of the B.N.A. Act, and were imposed by Parliament for a public purpose.<sup>88</sup>

The provinces stressed in their factums that no obligation existed under the Treaty of Versailles or other international agree-

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<sup>85</sup> *Factum of the Attorney-General of Canada*, passim. (Social Insurance file, Supreme Court Library, Ottawa).

<sup>86</sup> *Id.* at 8.

<sup>87</sup> *Id.* at 11.

<sup>88</sup> *Id.*

ments for the implementation of an unemployment insurance scheme by Canada.<sup>89</sup> Beyond their assertion that there was no authorization for the enactment of the statute under the federal treaty power, the prairie provinces made no submission as to the validity of the legislation. British Columbia,<sup>90</sup> Quebec,<sup>91</sup> and by inference New Brunswick,<sup>92</sup> all attacked the legislation as being unwarranted under the residuary power, as well as under the treaty power. Counsel for Ontario acknowledged the need for the legislation, conceded that the Dominion was the only law-making authority which could achieve the desired purpose on a nation-wide scale and sought the upholding of the legislation under the residuary clause.<sup>93</sup>

Mr. Justice Patrick Kerwin joined the three judges who had opposed the validity of the I.L.O. statutes to give a majority to those on the bench who held that the insurance statute was *ultra vires*; only the Chief Justice and Mr. Justice Davis voted to uphold the measure. Speaking for the majority of the Court Mr. Justice Rinfret rejected federal counsels' argument in its entirety: "Insurance of all sorts," he averred, "including insurance against unemployment and health insurance, have always been recognized as being exclusively provincial matters under the head 'Property and Civil Rights,' or under the head 'Matters of a merely local and private nature in the Province.'"<sup>94</sup> Referring to the recitals in the preamble of the Act he rejected almost with scorn the federal contention that the Dominion in the exercise of its unlimited taxing powers could create a national fund which could be used for the specific purpose of setting up an unemployment insurance scheme:

. . . the provisions for levying contributions for the creation of the national fund were nothing more than provisions to enable the carrying out of the true and only purpose of the legislation. The Act is one dealing with and regulating employment service and unemployment insurance. The contributions (or the taxes, if we are to call them so) are mere incidents of the regulation.<sup>95</sup>

If he had been speaking with complete candour, Rinfret might have said that the attempted validation of the legislation under the taxing power was a mere façade by which counsel were trying to circumvent the obstacle of Judicial Committee precedent.

In his dissenting opinion, the Chief Justice would have upheld the measure under the taxing power,<sup>96</sup> and the double aspect doctrine.

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<sup>89</sup> See the *Factums* of British Columbia, pp. 1-2; Quebec, p. 10 (and therefore also New Brunswick); Alberta, p. 1; Manitoba, p. 1; Saskatchewan, p. 1, and Ontario, pp. 3-4. (Social Insurance file, Supreme Court Library, Ottawa).

<sup>90</sup> *Factum of British Columbia*, 2.

<sup>91</sup> *Factum of Quebec*, 11.

<sup>92</sup> New Brunswick adopted the entire pleadings of Quebec.

<sup>93</sup> *Factum of Ontario*, 6.

<sup>94</sup> 1936 S.C.R. at 451.

<sup>95</sup> *Id.* at 453.

<sup>96</sup> *Cf. Duff, Id.* at 438, ". . . it is entirely competent to Parliament to resort, as sources for the provision of the unemployment fund, to taxes levied on employers and employees and to taxes levied 'by any mode or system' which Parliament may in its discretion adopt."

An unemployment insurance scheme might incidentally trench on property and civil rights so long as, in its paramount aspect, it was dealing with subject matter of national scope and importance.<sup>97</sup>

Running through the majority opinion was the notion expressed so lucidly by Rinfret that all types of insurance without exception belonged to the provincial domain; Duff's dissenting view is interesting in that, although he professes to disagree with Rinfret, he does place so much emphasis on upholding the contentious measure under the taxing power, or the double-aspect doctrine, rather than as an ordinary insurance statute. Both factions of the court appear to have agreed that the insurance precedents were of great importance. Rinfret's sweeping generalization that insurance as a category belonged to provincial jurisdiction might have been more effectively questioned had counsel for the Dominion drawn a sharper distinction between the ordinary classes of commercial insurance and the proposed unemployment insurance measure which belonged, surely, to a newer category of social insurance. Ordinary commercial insurance, whether it guarded against fire, theft, loss of life or property was essentially a contract of indemnity protecting contracting individuals against stipulated risks upon the voluntary payment of a premium. Unemployment insurance, on the other hand, was designed to protect a large segment of the entire labouring force from a social evil which had faced them with increasing severity since 1929, by compulsorily levying a tax which everyone within the specified class had to pay. There was a comprehensiveness and a broad social purpose in unemployment insurance which ordinary commercial insurance lacked. To draw an analogy between the two, as Rinfret did for the purpose of asserting jurisdiction over the whole class of insurance, was dubious.

Counsel who were attempting to sustain the validity of a federal unemployment insurance measure were labouring under a grave difficulty. Neither the Supreme Court of Canada nor the Judicial Committee were noted for taking the broad social implications of legislation into account when deliberating on its validity. An innovating measure like this new type of insurance, according to the prevailing judicial conservatism, was most likely to be dealt with as were other types of insurance. This was especially the case where the statute was not framed expressly to meet the exigencies of a particular emergency, but by its own terms was a permanent measure—it could not, in other words, be upheld under the “emergency” doctrine enunciated by Lord Haldane (although in retrospect it is highly questionable whether the residuary power is invocable only in an emergency, as Haldane appeared to hold<sup>98</sup>). It seems obvious that federal counsel

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<sup>97</sup> *Id.* at 443-444.

<sup>98</sup> *Toronto Electric Commissioners v. Snider*, [1925] A.C. 396. It is noteworthy that in an *obiter-dictum* in *Proprietary Articles Trade Association v. Attorney General for Canada*, [1931] A.C. 310, Lord Atkin, who subsequently wrote four of the five judgments in the New Deal cases, sharply questioned Haldane's apparent narrowing of the extension of the residuary clause in the above case.

who were not prepared to argue that the insurance measure was called forth by exceptional circumstances to meet a great social evil would be confronted with great difficulty in persuading the courts that the Act was valid. However, despite the *Snider* precedent, the composition of the Judicial Committee shifts from case to case and Haldane was now gone. If federal counsel had not succumbed to undue timidity in the face of the recent *Snider* precedent and had invoked the broader version of the dimensions doctrine in vogue before that precedent was fashioned, they might have convinced either the Supreme Court of Canada or the Judicial Committee that Haldane's 1925 test was unduly narrow. Had the courts in 1936 and 1937 applied the broader test of the validity of federal enactments under the residuary power that Lord Simon applied in 1946,<sup>99</sup> it is possible that more of the New Deal legislation could have been upheld, despite the fact that it was framed as *permanent* in duration:

To legislate for prevention appears to be on the same basis as legislation for cure. A pestilence has been given as an example of a subject so affecting, or which might so affect, the whole Dominion that it would justify legislation by the Parliament of Canada as a matter concerning the order and good government of the Dominion. It would seem to follow that if Parliament could legislate where there was an actual epidemic it could do so to prevent one occurring and also to prevent it happening again.<sup>100</sup>

In so far as the different New Deal measures were designed to prevent the recurrence of adverse economic conditions, for example, the *Natural Products Marketing Act* and section 14 of the *Dominion Trade and Industry Commission Act*, both of which were found invalid, Lord Simon's 1946 test would have done much to sustain them.

In the *Natural Products Marketing Act* reference, Duff spoke for a unanimous court in holding the Act *ultra vires*:

. . . this statute attempts and, indeed, professes, to regulate in the provinces of Canada, by the instrumentality of a commission or commissions appointed under the authority of the statute, trade in individual commodities and classes of commodities. The powers of regulation vested in the commissions extend to external trade and matters connected therewith and to trade in matters of interprovincial concern; but also to trade which is entirely local and of purely local concern.

Regulation of individual trades, or trades in individual commodities in this sweeping fashion, is not competent to the Parliament of Canada and such a scheme of regulation is not practicable

"in view of the distribution of legislative powers enacted in the Constitution Act, without the cooperation of the provincial legislatures" (1922 1 A.C. 191 at 201).

to quote from the judgment of the Judicial Committee in the *Board of Commerce* case.<sup>101</sup>

In the above reference, two strong precedents suggested that the legislation under review was invalid. The *Board of Commerce* case<sup>102</sup>

<sup>99</sup> A.-G. for Ontario v. Canada Temperance Federation, [1946] A.C. 193, and see P. RUSSELL, LEADING CONSTITUTIONAL DECISIONS, (Toronto, 1965) 51 ff.

<sup>100</sup> A.-G. for Ontario v. Canada Temperance Federation, [1946] A.C. at 207-208.

<sup>101</sup> [1936] S.C.R. 426.

<sup>102</sup> [1922] 1 A.C. 191.

and *The King v. Eastern Terminal Elevator Co.*<sup>103</sup> had both declared federal legislation regulating local transactions to be unconstitutional, even if the local regulation were merely incidental to a larger purpose. It was only in the 1950s in certain marketing references that the Court adopted a more permissive attitude towards marketing regulation by the federal government.<sup>104</sup>

Speaking again for a unanimous bench, Duff held that the agreements envisaged by section 14 of the *Dominion Trade and Industry Commission Act*, to prevent undue competition, were *ultra vires*. Their invalidity stemmed from the fact that like some of the agreements contemplated by the *Natural Products Marketing Act* they would involve purely intra-provincial transactions under the jurisdiction of the provinces.<sup>105</sup> The brief judgment also struck down the federal power to create a Dominion trade mark "C.S." or "Canada Standard" (contrived to assure the public of minimum standards in marketed commodities) on the ground that as a 'novel civil right' it invaded the sphere of section 92(13).<sup>106</sup>

The measures which were upheld by the Court in their entirety were the *Farmers' Creditors Arrangement Act*, 1934,<sup>107</sup> and section 498A of the Criminal Code.<sup>108</sup> In the case of the *Farmers' Creditors Arrangement Act*, the court held that Parliament was dealing substantially with the same class of persons whom it customarily dealt with when exercising its undoubted power over "bankruptcy and insolvency", and was dealing with situations closely analogous to the traditional category of bankruptcy under English or Canadian law. In the case of the amendment to the *Criminal Code*, having regard to the impossibility of defining what constituted a crime *in vacuo* (notwithstanding the learned demurrers, proceeding almost from natural law premises, of Cannon and Crocket), the majority held that Parliament was here dealing with certain behaviour which in its own judgment it deemed to be manifestly undesirable, and to which it attached penal consequences. The Court found this not dissimilar to other criminal prohibitions and had no difficulty in upholding the new section.

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Taking a general view of the New Deal litigation before the Supreme Court, it would appear that with Mr. Justice Lamont absent through illness the remaining six members of the Court were about evenly divided between provincialist-leaning members, consisting of Cannon, Crocket and Rinfret, and the moderates, Duff, Davis and

<sup>103</sup> [1925] S.C.R. 434.

<sup>104</sup> Cf. *Reference re the Farm Products Marketing Act* (Ontario), [1957] S.C.R. 198, and see RUSSELL, LEADING CONSTITUTIONAL DECISIONS, *supra* note 99, at 101-102.

<sup>105</sup> [1936] S.C.R. at 381-382.

<sup>106</sup> *Id.* at 382-383.

<sup>107</sup> *Id.* at 384.

<sup>108</sup> *Id.* at 363.



Kerwin, who could not really be classified as "centralists", but who were more disposed than their brethren to uphold federal legislation if, in their opinion, the weight of precedent was not an undue barrier. The previous political affiliations of members of the Court cannot be completely discounted, but provincialist bias was decidedly more important as a determinant of the decisions. Crocket, for example, with a strong Conservative background, and Cannon and Rinfret with equally strong Liberal ones, were ranged alike against the economic centralism they perceived in the statutes. It is noteworthy, too, that Duff's own Liberal background did not cause him to vote against a Tory legislative programme in the case of the more far-ranging statutes, namely, the treaty legislation and the unemployment insurance statute.

A court with leanings like the foregoing, moreover, was bound to be influenced negatively by certain features of the Dominion's pleadings, some unavoidable and others avoidable. The virtual capitulation of federal counsel to Haldane's view that the residuary power was applicable only in "emergencies" can be seen in their exertions to circumvent precedent by invoking the treaty power to uphold the labour legislation and the taxing power to uphold unemployment insurance. The relegation of the peace, order and good government clause to a distinctly secondary place in the factums and the failure to urge the "dimensions" doctrine in their oral or written pleadings, along with their strong urging of other more circuitous grounds, appeared almost to be a concession that the peace, order and good government clause was of little assistance to the federal case.

The credibility of the federal argument was seriously affected by the indirection with which the I.L.O. statutes and the unemployment insurance statute were defended by federal counsel, with the treaty power being the *deus ex machina* in the former case and the taxing power in the latter one. The emphasis in the factums, especially in the *Labour Conventions* case, tended to crystallize the legal argument not around the basic issue of the validity of the contentious legislation, but around the mechanics by which federal counsel thought they might avoid the treacherous ground of property and civil rights. These devices, moreover, instead of making the federal case more plausible, made it more vulnerable by exposing side-issues to attack by a Court half of whose members were biased in favour of the provinces to begin with. Had federal counsel avoided the irritant of the treaty power, and relied mainly on the peace, order and good government clause, invoking the dimensions doctrine, they would have found a stronger ally in Ontario and presented a more forceful case before the Court.

#### *The New Deal Before the Judicial Committee*

In the second stage of the New Deal litigation, which took place before the Judicial Committee in November, 1936, almost all of the

legislation which had been placed in issue before the Supreme Court of Canada earlier in the year was before the Board.<sup>109</sup>

Siting on the Judicial Committee panel which heard the appeals were Lord Atkin of Aberdovey, who delivered all but one of the ultimate New Deal decisions; Lord Macmillan, Lord Wright, Lord Thankerton<sup>110</sup> and Sir Sidney Rowlatt. It should be noted that except for Lord Macmillan, who had served as standing counsel for Canada before the Judicial Committee when a practicing barrister,<sup>111</sup> and who headed Prime Minister Bennett's *Royal Commission on Canadian Banking and Currency*, none of the Board was well versed in Canadian constitutional law, or had much local knowledge of Canadian social conditions. Lord Atkin's field of expertise were commercial law and the law of tort—he was particularly known for his thorough knowledge of the London Stock Exchange.<sup>112</sup> Thankerton had served as a Unionist M.P. for South Lanarkshire from 1913-1918, and during his later parliamentary career had served as Solicitor General for Scotland.<sup>113</sup> Lord Wright had served as a judge of the High Court (1925-1935) and as Master of the Rolls (1935-37),<sup>114</sup> and Sir Sidney Rowlatt was a 'taxing judge' who in 1917-18 was chairman of the *Indian Sedition Committee*,<sup>115</sup> and whose career discloses a closer association with India than with Canada.

There was no noteworthy change of emphasis in either forensic tactics or argument by federal or provincial counsel before the Judicial Committee. Counsel for the Dominion continued to invoke the treaty and taxing powers in an effort to have the three labour conventions and the unemployment insurance upheld. There was still a marked reluctance by federal counsel to invoke serious economic

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<sup>109</sup> An important exception was section 14 of the Dominion Trade and Industry Commission Act, which permitted agreements among industrialists to eliminate "wasteful or demoralizing" competition, and which was declared *ultra vires* by the Supreme Court of Canada for encroaching on the provincial head of property and civil rights. When Ontario appealed certain sections of the Act which had been found valid by the Supreme Court, the Dominion cross-appealed with respect to sections 18 and 19, but not respecting section 14. It is noteworthy that section 14 had been severely criticized by the Liberals in Parliament, notably by J. L. Hsley (Official Report of Debates, June 11, 1935, p. 3525) and F. A. McGregor, the registrar of the Combines Investigation Act and an influential associate of Mackenzie King complained in vigorous terms about the statute's proposed displacement of the Act of which he was overseer to both Mr. King and Mr. Bennett (interview with Finlayson, March 23, 1966).

<sup>110</sup> Lord Thankerton was born William Watson, and was the third son of the Lord Watson who had delivered so many important decisions some forty years earlier on the Canadian Constitution.

<sup>111</sup> LORD MACMILLAN, *A MAN OF LAW'S TALE*, (London, 1953) 140.

<sup>112</sup> The New York Times, Monday, June 26, 1944, at 15.

<sup>113</sup> The London Times, Monday, June 14, 1948, at 7.

<sup>114</sup> Atkin and Wright were both incensed by German brutality during the Second World War, see Wright, *The Killing of Hostages as a War Crime*, in *THE BRITISH YEARBOOK OF INTERNATIONAL LAW* (1948).

<sup>115</sup> The London Times, Saturday, March 3, 1945, at 7.

conditions as a ground for upholding the legislation.<sup>116</sup> In the ultimate hearings R. S. Robertson, K.C., (who himself was later appointed Chief Justice of Ontario) replaced Rowell, who had been elevated to the bench, as St. Laurent's associate before the Judicial Committee. It might be suggested that Rowell, with his relevant political experience and his presence at the I.L.O. Convention in Washington in 1919, could have argued the ultimate appeals more forcefully than did Robertson, who was engaged principally in the fields of municipal and corporation law. There is little question that Rowell was a more learned constitutional lawyer than Robertson.<sup>117</sup> Argument by federal counsel before the Board was not always trenchant or persuasive. In the I.L.O. case, for example, Robertson initially admitted that the subject matter of the statutes "ordinarily" came within section 92 but contended that it could be taken out of that section by the federal treaty power. When Atkin observed that this was a "far-reaching doctrine" which could seriously affect provincial rights, Robertson rather blandly replied, without attempting to negate the thrust of Atkin's question, that such a power could not be exercised by Canada alone but that another country would have to be found to complete the bargain.<sup>118</sup>

In his judgment in the I.L.O. case, Lord Atkin held that the subject-matter of the labour conventions under review fell under provincial jurisdiction. Ratification of the applicable international agreements, moreover, did not enlarge the Dominion's legislative capacity:

... the legislative powers remain distributed, and if in the exercise of her new functions derived from her new international status Canada incurs international obligations, they must, so far as legislation be concerned, when they deal with provincial classes of subjects, be dealt with by the totality of powers, in other words, by co-operation between the Dominion and the Provinces. While the ship of state now sails on larger ventures and into foreign waters she still retains the water-tight compartments which are an essential part of her original structure.<sup>119</sup>

Atkin, accordingly, rejected the constitutional validity of all three I.L.O. statutes on the ground that section 132 did not apply, the conventions in question not being 'Empire' treaties. The assumption of an international obligation by the Dominion, he held, did not modify the distribution of powers in the B.N.A. Act—where provincial subject

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<sup>116</sup> *Cf.*, "I am not of the opinion now, nor was I when I was retained with Hon. N. W. Rowell to submit such reasons as might seem appropriate to support the legislation, that it would have made any difference in the result to invoke for instance the serious economical depression of the thirties to justify the hours of work and minimum wages legislation . . ." Rt. Hon. L. S. St. Laurent to author, December 28, 1965.

<sup>117</sup> R. K. Finlayson vouches for the authenticity of an incident during the I.L.O. case in which a member of the Board asked Robertson whether the Dominion could be changed into a unilingual state by the ratification of an agreement like those under study. His answer was reportedly an unqualified affirmative. Such a reply would apparently be incorrect because of the 'entrenchment' of French by, for instance, section 133.

<sup>118</sup> The London Times, Saturday, November 14, 1936, 4, and 1937 [A.C.] 330.

<sup>119</sup> [1937] A.C. 354.

matter was involved in a treaty, the legislative cooperation of the provinces was essential before the treaty could be implemented. In arriving at his decision Lord Atkin distinguished the *Aeronautics*<sup>120</sup> and *Radio*<sup>121</sup> cases, two precedents which had been greatly relied on by federal counsel, from the instant case. In the former case, an 'Empire' treaty was involved, in the latter one, he contended, the subject matter was federal apart from the treaty and hence the Dominion could pass the required legislation without difficulty.<sup>122</sup>

The judgment of their Lordships, was, moreover, not free from serious factual error, as Mr. Robertson later pointed out in his memorandum to the Deputy Minister of Justice.<sup>123</sup> Speaking of the lower court judgment in the *Labour Conventions* case Atkin said:

... No obligation to legislate in respect of any of the matters in question arose until the Canadian executive, left with an unfettered discretion, of their own volition acceded to the conventions, a *novus actus* not determined by the treaty. For the purpose of this legislation the obligations arose under the conventions alone. *It appears that all the members of the Supreme Court rejected the contention based on s. 132 and their Lordships are in full agreement with them.*<sup>124</sup>

But Duff had said expressly in his judgment, concurred in by Davis and Kerwin, "... this treaty obligation is an obligation under section 132 and consequently ... authority to make the convention effective exclusively rests in the Parliament and Government of Canada."<sup>125</sup> Far from the unanimity against the applicability of section 132 asserted by Atkin, there was an equal division of judges, half of whom contended that section 132 did apply. This was a major error on the part of the Board. One can see here perhaps, the psychological impact of three concurring judgments each of which asserted the inapplicability of section 132 alongside one judgment only, endorsed however by three judges, holding the opposite.

Because of the tradition of Privy Council secrecy, and the convention that advice to His Majesty must never be conflicting, which still prevailed in 1937, it is difficult to discover how the Board divided in its *in camera* deliberations. However it is probable, as he later in-

<sup>120</sup> [1932] A.C. 54.

<sup>121</sup> [1932] A.C. 304.

<sup>122</sup> While there is general agreement that Lord Atkin was correct in dismissing the *Aeronautics* case as a governing precedent, there is more doubt concerning his distinguishing of the *Radio* case. In the latter case, Lord Dunedin had apparently based the treaty-implementing power on the residuary clause (see [1932] A.C. at 312), see the remarks by Lederman in *Legislative Power to Implement Treaty Obligations in Canada*, in J. H. ATTCHISON ed., *The Political Process in Canada*, (Toronto, 1963). And federal counsel were not convinced by Atkin's reasoning, see "R. S. Robertson K.C., to Deputy Minister of Justice, re Constitutional Conventions," March, 1937, Lapointe Papers, (P.A.C.): "... the most careful reading of the language used by their Lordships in the *Radio* case suggests that their Lordships were not prepared to accept all that their Lordships said on that occasion as binding on them."

<sup>123</sup> See the work by Robertson cited in footnote 122 *supra*.

<sup>124</sup> [1937] A.C. 350, emphasis added.

<sup>125</sup> [1936] S.C.R. 500.

timated,<sup>126</sup> that Lord Wright dissented in both the *Labour Conventions* and unemployment insurance cases. In an obituary of Sir Lyman Duff, Lord Wright first reviews the findings of both tribunals, and then refers to the ultimate bestowal of unemployment insurance on the federal power in 1940, with provincial consent, adding: "All this seems to justify Sir Lyman's practical sense, and it may be his legal sense, of what was the correct construction and effect of the legislative measures involved."<sup>127</sup>

In the other cases, Atkin found the unemployment insurance statute invalid for reasons very similar to those enunciated in the Supreme Court by Rinfret,<sup>128</sup> and the opinion of the Board invalidating the *Natural Products Marketing Act* explicitly endorsed the reasoning in the Court below by Chief Justice Duff, at least respecting the attempt to uphold the legislation under the residuary power.<sup>129</sup> While the Board was cognizant that all nine provinces had enacted complementary legislation so that both local and interprovincial marketing could be regulated in a comprehensive scheme, it still found that the marketing scheme was invalid. Referring to the need for legislative cooperation, Atkin observed, ". . . the legislation will have to be carefully framed, and will not be achieved by either party leaving its own sphere and encroaching upon that of the other."<sup>130</sup> The invalidity in this case stemmed from the fact that the federal statute purportedly authorized the regulation of purely local marketing transactions.

In the *Dominion Trade and Industry Commission Act* appeal, their Lordships agreed with the Court below, except for finding ss. 18 and 19 *intra vires*.<sup>131</sup> These sections vested the national trade-mark "Canada Standard" in the Dominion. As has been mentioned, there was no appeal by the Dominion respecting section 14, which was found invalid by the Supreme Court.<sup>132</sup>

Like the Supreme Court of Canada, the Privy Council upheld the constitutionality of both Section 498A of the *Criminal Code* and the *Farmers' Creditors Arrangement Act*. Atkin rather sharply rejected Crocket's dissent in the former case which was based almost on natural law premises in that the New Brunswick judge asserted that an intent to do wrong was the *characteristic* feature of crime. Atkin held, contrarily, on the basis of the *Proprietary Articles* case,<sup>133</sup> that "there is no other criterion of 'wrongness' than the intent of the legislature in the public interest to prohibit the act or omission made criminal."<sup>134</sup>

<sup>126</sup> Lord Wright of Durley, *Rt. Hon. Sir Lyman Poore Duff, 1865-1955*, (1955) 33 CAN. B. REV.

<sup>127</sup> *Id.* at 1129.

<sup>128</sup> *Cf.* ". . . But assuming that 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*." [1937] A.C. at 366.

<sup>129</sup> [1937] A.C. at 387.

<sup>130</sup> *Id.* at 389.

<sup>131</sup> [1937] A.C. at 418.

<sup>132</sup> *See supra* note 109.

<sup>133</sup> [1931] A.C. 310.

<sup>134</sup> [1937] A.C. at 375.

Speaking for the Board, Lord Thankerton rejected the provincial contention that the *Farmers' Creditors Arrangement Act* was 'confiscatorial legislation' allowing debtors, in effect, to force a new contract on their creditors, secured and unsecured alike.<sup>135</sup> He asserted that ". . . it cannot be maintained that legislative provisions as to compositions, by which bankruptcy is avoided, but which assumes insolvency, is not properly within the sphere of bankruptcy legislation."<sup>136</sup> The statute therefore came within head 21 of section 91 and was valid legislation respecting 'Bankruptcy and Insolvency.'

As a result of the appeals, the Judicial Committee found five statutes of great social importance unconstitutional, namely, the three I.L.O. statutes (which had *not* been declared invalid by the lower court); the *Natural Products Marketing Act* and the *Employment and Social Insurance Act*. The Board agreed with the Supreme Court, however, that section 498A of the Criminal Code and the *Farmers' Creditors Arrangement Act* were constitutional. Although the Judicial Committee did not rehabilitate sections 18 and 19 of the *Dominion Trade and Industry Commission Act*, it manifested a more severe attitude toward the New Deal than did the lower court by invalidating the I.L.O. statutes in such terms that some scholars felt that the federal treaty power would be permanently curtailed, as well as the federal power to enact social legislation.<sup>137</sup>

Although precedent played an important part in the outcome of the decisions, there is some indication that extra-legal factors also had an impact on the result. None of their Lordships, save possibly Lord Macmillan, had any extensive acquaintanceship with Canadian constitutional law or Canadian social conditions. None of them, for example, had sat on the Board which disposed of the *Radio* case just five years previously,<sup>138</sup> although Atkin and Macmillan did serve on the *Aeronautics* Board.<sup>139</sup> From a distance of thousands of miles it must have seemed to their Lordships, with the provinces ranged intransigently against the Dominion, that a states' rights conflict was raging in Canada which might well tear the country asunder.

In addition to the general lack of familiarity with Canadian Law and Canada, the personal backgrounds of some members of the Board could well have inclined them towards adopting a provincialist position. No less a jurist than Duff himself reportedly attributed the result of the *Labour Conventions* appeal to Atkin's experience with Australian federalism<sup>140</sup> (Atkin's father was a member of the Queensland state

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<sup>135</sup> See the argument of I. A. Humphries, K.C., for the Attorney-General of Ontario [1937] A.C. at 396.

<sup>136</sup> [1937] A.C. 403.

<sup>137</sup> See, e.g., Scott, "Centralization and Decentralization in Canadian Federalism," (1951) 29 CAN. B. REV. and Szablowski, "Creation and Implementation of Treaties in Canada," (1956) 34 CAN. B. REV.

<sup>138</sup> The members of the Board in the *Radio* case were Viscount Dunedin, Lord Blanesburgh, Lord Merrivale, Lord Russell of Killowen and Sir George Lowndes.

<sup>139</sup> Along with Lords Sankey, Dunedin and Russell of Killowen.

<sup>140</sup> The remark was made to a mutual acquaintance of Duff and R. K. Finlayson.

legislature). In abstract theory, at any rate, Australia possessed a more decentralized federalism than the Canadian form.<sup>141</sup> Atkin's experience with the Australian residuary power, for instance, might lead him to draw inferences about a federal structure of government which were inapplicable to the Canadian context.

The relative forensic abilities of opposing counsel would also be a not inconsiderable factor in the result. Where judges are relatively ignorant of local law, as most members of the 1937 panel were, one of the duties of counsel was surely to instruct and enlighten their Lordships on the compatibility of the New Deal statutes with the Canadian Constitution. Searching questions by the Board, especially from Atkin and Macmillan, emphasized that they were leaning heavily on counsel in order to grasp the diverse ramifications of the New Deal measures. In such a case, the absence of Rowell, recently elevated to the Ontario bench, would have a noticeable impact. Not only was he the superior as a constitutional lawyer to anyone appearing before the 1937 Board, but also he had had actual experience at the 1919 I.L.O. Conference in Washington as a Canadian representative. His replacement was a municipal lawyer.

A final extra-legal element in the *Labour Conventions* case which could have been of decisive importance was Atkin's egregious blunder in his statement that none of the Canadian judges in the Court below had held that s. 132 was applicable. In fact, three out of six had so held.

#### *The Practical Effects of the Decisions*

One fairly immediate result of the judicial nullification of the *Employment and Social Insurance Act* was the securing from Westminster in August, 1940, of an amendment to the B.N.A. Act transferring jurisdiction over unemployment insurance to the Dominion.<sup>142</sup>

The apparent restriction of the treaty power by the Judicial Committee has caused anxiety to many Canadian jurists since 1937. More expansive judicial interpretation of the peace, order and good government clause, for example in the case of *Johanneson v. Rural Municipality of West Saint Paul*,<sup>143</sup> has led some legal scholars to see in the residuary clause a possible source of rehabilitation of the federal treaty-implementing power.<sup>144</sup> In that case, there was a jurisdictional conflict over the respective capacities asserted on behalf of the Manitoba Legislature and of Parliament to regulate the location of aerodromes. The respondents, who sought to uphold the provincial power, argued that the federal legislation rested on the *Aeronautics Convention* (an 'Empire' treaty) which had been superseded by the *Chicago Convention*. From the moment the *Chicago Convention* was in force, they

<sup>141</sup> Cf. K. C. Wheare, however, in *FEDERAL GOVERNMENT* (4th ed., London, 1963) at 109 ff. where he discusses 'centralizing' tendencies in both Australia and Canada.

<sup>142</sup> M. OLLIVIER, *PROBLEMS OF CANADIAN SOVEREIGNTY*, (Toronto, 1945) 377-378.

<sup>143</sup> [1952] S.C.R. 292.

<sup>144</sup> See Szablowski *supra*, note 137, at 58-59 .

argued, the Dominion ceased to have the power to enact implementing legislation under section 132, which was applicable only to the earlier agreement. The Supreme Court of Canada held, however, that federal implementing legislation under the later agreement was valid by virtue of the residuary clause, because of the *national* importance of civil aviation. Concerning this case, Professor Peter H. Russell has observed that although the Court could apparently remain within the doctrine of *stare decisis* by "referring to Lord Simon's formulation of the national aspect test and Lord Sankey's allusion to the national importance of Aeronautics in the Aeronautics Reference of 1932" that actually the court might equally well have decided to frustrate the federal legislation by invoking Atkin's *Labour Conventions* decision as a precedent.<sup>145</sup>

Dr. T. W. L. MacDermot, a former Canadian ambassador to Israel and Greece and High Commissioner to Australia and South Africa, whose diplomatic appointments followed Atkin's judgment, has noted that there were no undue difficulties presented in negotiating or implementing treaties because of the I.L.O. precedent, largely because many such treaties relate, clearly, to matters falling within Article 91, such as agreements on Defence, trade and commerce and the like.<sup>146</sup>

The Department of External Affairs, however, has been wary of provincial susceptibilities since Atkin's judgment and has inserted a 'federal-state clause' in some international agreements, advising other countries of Canada's incapacity to legislate on matters lying within provincial jurisdiction, even though a treaty involving them has been negotiated.<sup>147</sup> The apparent lack of federal-provincial friction over treaty making noted by Dr. MacDermot, accordingly, may have been due to some extent to the exercise of restraint on behalf of the federal government over the type of treaty that will be negotiated.<sup>148</sup>

The quashing of the *Natural Products Marketing Act* has taxed the ingenuity of draftsmen seeking to overcome the difficulties presented to any co-operative marketing scheme by the judgment. As Mr. Justice Rand has remarked: "What has emerged so far 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."<sup>149</sup> As Rand has suggested, this rather cumbersome device does not facilitate the centralized control of the economy that is rapidly becoming necessary.<sup>150</sup>

With respect to the other statutes, the *Dominion Trade and Industry Commission Act* remained technically in effect (except for sec-

<sup>145</sup> Russell, *The Supreme Court's Interpretation of the Constitution Since 1949*, in P. FOX, *POLITICS: CANADA* (Toronto, 1963) 67.

<sup>146</sup> Interview with Dr. MacDermot, March 1, 1966.

<sup>147</sup> See J.-G. CASTEL, *INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED IN CANADA* (Toronto, 1965) 865 ff.

<sup>148</sup> The recent assertion of a qualified treaty-power by Quebec, of course, has revived the issue.

<sup>149</sup> Rand, *Some Aspects of Canadian Constitutionalism*, (1960) 38 CAN. B. REV. 158.

<sup>150</sup> *Id.*



tion 14) until December, 1949, when it was repealed, but in the interim the Liberals virtually ignored it, preferring to work through their own *Combines Investigation Act*. An amended version of the *Farmers' Creditors Arrangement Act*<sup>151</sup> is in operation in the prairie provinces alone,<sup>152</sup> while section 498A of the *Criminal Code*, subsequently incorporated in section 412 of the revised *Code*, has been, ironically, consolidated in the *Combines Investigation Act*.<sup>153</sup>

The principal result of the invalidation at one stroke by the Judicial Committee of five Canadian statutes of such broad social significance was to make the judicial review of Canadian cases by a non-Canadian tribunal a political issue. After most of the New Deal statutes were invalidated by the Privy Council, the controversy passed from the judicial to the political forum and Canadians were confronted starkly with the question of whether they should — or could — establish an ultimate court of appeal in Canada.

### *The Agitation to Abolish Overseas Appeals*

Although the agitation for the abolition of Canadian appeals to the Judicial Committee existed long before the 1937 decisions,<sup>154</sup> adverse reaction in Canada to the decisions gave the movement for abolition a new impetus as it provided a graphic current illustration of the disadvantages of a transoceanic appellate body, emphasizing the remoteness and lack of local *rapprochement* of the Board.

In the House of Commons Hon. C. H. Cahan, Bennett's former Secretary of State, deplored what he considered to be the whole provincialistic tendency of interpretation of the Privy Council, especially the judgments of Watson and Haldane which, he said, had virtually obliterated the residuary clause as a meaningful source of federal power. While he was not noted as an advocate of social reform, he vigorously condemned the decisions invalidating most of the New Deal, charging that the action of the Board was both highhanded and careless.<sup>155</sup> The logical answer, according to Cahan, was the abolition of overseas appeals. Accordingly, he presented his Bill for this purpose to the House of Commons on April 10, 1938. His sponsorship of a private member's Bill for this purpose was facilitated by Ernest Lapointe, who had privately shown sympathy towards Cahan's proposal. It was, however, agreed between them that the Bill would be withdrawn temporarily until professional advice on its merits could be obtained from various bar associations.<sup>156</sup> The co-operation between Lapointe and

<sup>151</sup> S.C. 1943-44, c. 26; R.S.C. 1952, c. 111.

<sup>152</sup> Under the amended statute only *one* application can be made by an individual farmer under the Act, and a decision by a board of review is appealable to the provincial supreme court, see the amendment referred to in footnote 151 *supra*.

<sup>153</sup> Brecher, *Combines and Competition: A Re-Appraisal of Canadian Public Policy*, (1960) 38 CAN. B. REV. 588.

<sup>154</sup> Cf. e.g., Ewart *Canada's Political Status* (1928) 9, *The Canadian Historical Review*, and Scott, *The Privy Council and Minority Rights*, (1930) 382 *Queen's Quarterly*, and concerning Justice Minister Fournier's attempt to abolish appeals in 1875 see RUSSELL *supra*, note 29, at 37-38.

<sup>155</sup> *Official Report of Debates*, April 8, 1938.

<sup>156</sup> Cahan to C. M. Woodsworth, 15 June, 1938, Cahan Papers (P.A.C.).

Cahan shows that by 1938 both major parties had come to the conclusion that overseas appeals were an anachronism.<sup>157</sup> Cahan's sponsorship of the Bill, in fact, was convenient for Lapointe since, had he, as a prime originator of the New Deal references, personally sponsored a Bill for this purpose it would have looked almost like a confession of wrongdoing; he would have been subject to the taunt that he was the author of his own misfortunes. By giving covert encouragement to Cahan<sup>158</sup> and maintaining an ambiguous posture in Parliament he could make it appear as if he were a disinterested spectator weighing the merits and demerits alike of a decision that was possibly now required in view of Canada's recent accession to sovereignty.

In the following year, Cahan reintroduced his Bill with the private concurrence of Lapointe. He informed Professor W. P. M. Kennedy of Lapointe's interest and assistance in a letter sent just before the second reading of the Bill:

I have discussed Bill number 9 with Mr. Lapointe, the Minister of Justice, and he has promised that when I move the second reading of the bill on Friday evening next, he will announce that the government has decided to refer the bill to the Supreme Court of Canada and thence to the Judicial Committee for an opinion as to whether the terms of the bill are within the legislative jurisdiction of Parliament.<sup>159</sup>

Cahan, therefore, agreed to suspend temporarily further action on his Bill on the understanding that the government would proceed with references to determine the legality of the abolition of appeals.<sup>160</sup>

A serious question existed, however, about whether Parliament, by federal legislation, could cut off appeals to the Judicial Committee from provincial courts, or on points of provincial law. Provincial appeals had been envisaged in some cases by local laws passed before Confederation and continued in effect by section 129 of the B.N.A. Act. It might be contended, also, that the provinces could provide for their own appellate system under their power to provide for the "Administration of Justice in the Province."<sup>161</sup> The effect of Clause 3 of Cahan's Bill,<sup>162</sup> as P. B. Mignault, a former judge of the Supreme Court

<sup>157</sup> The Canadian Press reported that, outside the Social Credit group, Vincent Pottier, Liberal M.P. for Shelburne-Yarmouth-Clare, was the only opponent of abolition in the House of Commons. *See* The Fort William Times-Journal, Wednesday, February 9, 1938, at 1.

<sup>158</sup> *See* W. P. M. Kennedy to Cahan, February 13, 1938, where, on the basis of private information the former said concerning Cahan's Bill: "I believe you will have Mr. Lapointe's 'unofficial' approval and that time will be given to you." *See also* Kennedy to Cahan, 11 May, 1938, and Cahan to Alexander Johnson, 25 April, 1938, Cahan Papers.

<sup>159</sup> Cahan to W. P. M. Kennedy, 13 April, 1939, Cahan Papers.

<sup>160</sup> Order-in-Council P.C. 908 dated 21 April, 1939 initiated a reference to the Supreme Court of Canada to determine the legal capacity of Parliament to abolish Canadian appeals to the Privy Council.

<sup>161</sup> *See* section 92(14) of the B.N.A. Act.

<sup>162</sup> Clause 3 reads: "Notwithstanding any royal prerogative or anything contained in the Interpretation Act or the Supreme Court Act or in any other Act of the Parliament of Canada no appeal shall lie or be brought from any judgment or order of any court in Canada, in relation to any matter within the competence of the Parliament of Canada, to any court of appeal, tribunal or authority by which, in the United Kingdom of Great Britain and Ireland, appeals and petitions to His Majesty in Council may be heard."

pointed out to Cahan, would be to abolish appeals on Dominion laws only. "By the very general language of section 3, and the words 'any Court in Canada'," Mignault asked, "do you propose to take away the appeal, by leave or statute, from Provincial Courts? Can Parliament do so?"<sup>163</sup> Cahan admitted that his reticence in failing expressly from precluding provincial appeals in his Bill was dictated by prudence: "If I sought by express terms to abolish appeals to the Judicial Committee from provincial courts, I would raise such a storm of opposition from provincial governments that the Bill would probably have to be abandoned."<sup>164</sup> Cahan's reference here to the abolition of "appeals . . . from provincial courts," showed his appreciation of the constitutional difficulties involved in purporting, through purely federal legislation, to cut off appeals from either provincial courts or from any Canadian courts on questions of provincial law.

In the wake of the New Deal decisions, Cahan's agitation to abolish appeals stirred a vigorous constitutional debate in Canadian journals. Several influential newspapers favoured retention. The *Montreal Gazette* which had emphatically opposed Bennett's legislation, castigated abolition as 'unsportsmanlike.'<sup>165</sup> The *Hamilton Spectator* hailed the lack of political bias of the Judicial Committee,<sup>166</sup> and the *Toronto Telegram* suggested not abolition but reform: ". . . critics of the Privy Council would be better employed in endeavouring to secure a reconstitution of that body in a form more in keeping with the present status of members of the Commonwealth."<sup>167</sup> The *Toronto Globe and Mail* suggested that even "fuller use" of "the Empire's ability and genius" should be employed, instead of abolition.<sup>168</sup>

There was, however, a growing call for abolition. *The Ottawa Journal* criticized their Lordships' lack of local knowledge: "In recent years in particular Privy Council decisions have shown hardly an inkling of things in Canada in consequence of modern and Empire change . . . Privy Council appeals weaken rather than strengthen the British connection."<sup>169</sup> The *Toronto Daily Star* advocated abolition on grounds of nationalism: "The Judicial Committee of the Privy Council was established as a colonial court and Canada is not a colony but a self-governing dominion."<sup>170</sup> The *London Free Press* decried the lack of local knowledge of British judges,<sup>171</sup> and the *Winnipeg Free Press*, along with most other Western newspapers, advocated abolition.<sup>172</sup>

The predominant note among those who desired to retain appeals was that the Judicial Committee was a valuable link binding together

<sup>163</sup> P. B. Mignault to Cahan, 14 February, 1939, Cahan Papers.

<sup>164</sup> Cahan to P. B. Mignault, 15 February, 1939, Cahan Papers.

<sup>165</sup> The *Montreal Gazette*, Saturday, February 12, 1938, at 6.

<sup>166</sup> The *Hamilton Spectator*, Wednesday, February 9, 1938 at 6.

<sup>167</sup> The *Toronto Telegram*, Friday, April 11, 1938, at 6.

<sup>168</sup> The *Toronto Globe and Mail*, Friday, April 11, 1938, at 6.

<sup>169</sup> The *Ottawa Journal*, Friday, April 11, 1938, at 4.

<sup>170</sup> The *Toronto Daily Star*, Monday, April 21, 1938, at 6.

<sup>171</sup> The *London Free Press*, Monday, April 11, 1938, at 6.

<sup>172</sup> Editorial in the *Winnipeg Free Press* reprinted in the *Moose-Jaw Times Herald*, Wednesday, April 23, 1938, at 6. See also the *Calgary Albertan*, Tuesday, April 12, 1938, at 6, and the *Regina Star*, Monday, April 18, 1938, at 6.

the British Commonwealth, that British judges were more qualified than Canadian judges and that the Committee was a more likely guardian of provincial rights. Opponents of retention generally considered that independence implied an entirely Canadian judiciary, that judges on the Judicial Committee were 'out of touch' with local circumstances, and that a Canadian judiciary would be just as competent and qualified as the bench in Britain to hear ultimate appeals. In connection with all of these last-mentioned points, the results of the New Deal cases could be cited persuasively as evidence by Canadian proponents of abolition.

In January, 1940, the Supreme Court of Canada decided that in view of the *Statute of Westminster*, the abolition of appeals was within the constitutional powers of the Dominion.<sup>173</sup> The majority, comprising Duff, Rinfret, Kerwin and Hudson, held that the Judicial Committee was essentially a court of appeal, and contended that by section 101 of the B.N.A. Act<sup>174</sup> and the residuary clause final jurisdiction could be conferred on the Supreme Court of Canada. The Court held that appeals to the Judicial Committee, even from provincial courts and on provincial points of law, could be prohibited. Crocket and Davis dissented from the majority opinion, both contending that the Dominion was incompetent to cut off appeals from provincial courts.

After the War, several provinces appealed the decision of the Supreme Court. Ontario, New Brunswick, British Columbia and Quebec argued that the continuation of appeals was a vested provincial right. On behalf of the Judicial Committee, however, Lord Chancellor Jowett rejected this contention:

... To their Lordships it appears reasonably plain that, since, in the words used by Lord Robertson in delivering the opinion of the Board in the *Crown Grain Co.* case (1908 A.C. 507): "The subject in conflict belongs primarily to the Dominion Parliament, namely, the establishment of the Court of Appeal for Canada," to that Parliament also must belong the power not only to determine in what cases and under what conditions the appellate jurisdiction of that court may be invoked, but also to deny appellate jurisdiction to any other court. . . .<sup>175</sup>

The judgment clarified the right of Parliament, since the enactment of the *Statute of Westminster*, 1931, to provide for a wholly Canadian system of appeals, which comprised the right to determine which judicial tribunal would hear ultimate appeals in Canadian cases. The decision had a highly centralist thrust in as much as it affirmed the right of the federal government to establish an exclusively Canadian system of appeals, with the ultimate tribunal being set up under federal law and having federally-appointed judges. The result, it may be suggested,

<sup>173</sup> [1940] 1 D.L.R. 289.

<sup>174</sup> Section 101 reads: "The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada."

<sup>175</sup> *Attorney-General for Ontario v. Attorney-General for Canada*, [1947] A.C. 153.

would tend to produce uniformity of law rather than the diversity characteristic of a more decentralized federalism.

Following the judgment, the Liberals at their national convention in Ottawa in 1948 pledged to abolish appeals. Before appeals could be abolished, the general election of 1949 intervened, with the Liberals winning 193 seats to 42 for the Progressive Conservatives. Although abolition was not a major issue in the election campaign, the government's position was clear and on September 19, 1949, Bill No. 2 was introduced in the House to make the Supreme Court of Canada the final court of appeal for the Dominion. A feature of the ensuing parliamentary debate was the attempt by some English-speaking Progressive Conservative M.P.'s, led by Mr. Drew, to have the binding authority of Judicial Committee decisions formally acknowledged in the *Supreme Court Act*. This attempt proved abortive, however.<sup>176</sup> On December 10, 1949, Bill No. 2 received royal assent; its provisions went further than Cahan's earlier Bill in that it cut off appeals from *all* Canadian courts.<sup>177</sup> The controversy following the result of the New Deal judgments had played a highly significant role in the constitution of an ultimate domestic court of appeal for Canada.

#### *The Interplay of Judicial and Political Processes*

The judicial disposition of the New Deal, because of its political ramifications, affords an opportunity for the study of the interplay of judicial and political process in developing the Constitution. The effect of policy considerations on constitutional development has long been acknowledged, even by those who, like Mr. Justice Frankfurter, may often deplore the fact that the policy views of judges become crystallized in judicial decisions.<sup>178</sup>

First, as was suggested above, the mechanism of the reference, which is peculiar to Canada in the Anglo-American legal world, lends itself to political exploitation. The political overtones will naturally vary from instance to instance, but with Prime Minister Bennett's New Deal the genesis of the programme could hardly be ignored by the judges when they were deliberating on how to deal with the statutes. Finlayson has recounted that he often acted as emissary from Bennett, now leader of the opposition, to Chief Justice Duff in order to explain to the latter different features of the programme. Finlayson added that while Bennett himself would have considered it improper to approach Duff, he felt no compunction about using his executive secretary as an intermediary and apparently Duff welcomed the informa-

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<sup>176</sup> See RUSSELL, *supra* note 29, at 96.

<sup>177</sup> Cf. section 54(2) of the *Supreme Court Act*, R.S.C. 1952, c. 259, enacted by 1949 (Can. 2d sess.), c. 37, s. 3: "Notwithstanding any royal prerogative or anything contained in any Act of Parliament of the United Kingdom or any Act of the Parliament of Canada or any Act of the legislature of any province of Canada or any other statute or law, no appeal lies or shall be brought from or in respect of the judgment of any court, judge or judicial officer in Canada to any court of appeal, tribunal or authority by which, in the United Kingdom, appeals or petitions to Her Majesty in Council may be ordered to be heard."

<sup>178</sup> See Frankfurter's judgment in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624.

tion this made available. In addition to clarifying the purposes of the various statutes, Mr. Finlayson tactfully advised Duff of the reasons why Bennett considered the legislation *intra vires*. During his conversations with Duff, Finlayson became aware that the atmosphere of the Court was saturated with politics — the judges talked of little else during the hearings and, indeed, this would be hardly surprising in view of their political backgrounds.<sup>179</sup>

When the circumstances of the New Deal references are considered, it seems obvious that in sending the statutes to the courts for review the government was implicitly asserting that the legislation was not wanted. The legislation had been criticized by the Liberals both in Parliament and during the 1935 election campaign, and it constituted almost a defiant manifesto by which the Conservatives hoped to snatch probable victory from their opponents in the general election. The tendency of the Liberals up to 1935 had not been in the direction of social reform through state intervention in the economy but of *laissez-faire*, and this would not be the kind of programme that would appeal to them. The acceptance of the programme, in fact, would alienate some of their strongest supporters such as Premier Taschereau of Quebec. It should have been manifest, at least to the Canadian judiciary, that the executive which had placed the New Deal in question through the reference device was not a body anxious to have the statutes sustained.

The launching of references on the New Deal was a purely discretionary step which it was clear that Bennett himself would not have taken had he been re-elected in 1935. He had said in Parliament, in fact, when pressed by the opposition, that he was satisfied of the validity of the proposed legislation and felt no need for a reference. The important constitutional consequences which flowed from the references, therefore, were by no means inevitable. Viewed against the history of constitutional interpretation of the courts in question, the decision was one which would at least delay and, very probably, largely frustrate the implementation of the New Deal. Various alternatives which were open to the Liberals in 1935 have already been briefly mentioned.<sup>181</sup> The judicious employment of some of these alternatives would have enabled the government to confer the benefits of Bennett's social legislation on the Canadian people without appearing to accept the programme of their defeated rivals in a servile fashion.

Once the decision to initiate references had been taken, assuming that it was not eager to have the statutes upheld, the government could rely on a Supreme Court bench which was both politically astute and largely sympathetic. Four members of the seven-man bench had Liberal backgrounds, and three of these four — Rinfret, Cannon and Lamont — had participated actively in partisan politics. Whereas Crocket, Kerwin and Davis were Conservatives, only Crocket had a keenly partisan background and he, of course, although this was

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<sup>179</sup> Interview with R. K. Finlayson, March 23, 1966.

<sup>180</sup> *Official Report of Debates*, January 29, 1935, at 281.

<sup>181</sup> See, *The Initiation of the References*, *supra*.

probably not known to the King government, disliked both Bennett and Duff and had been deeply antagonized by the Conservative New Deal, which he considered a contradiction in terms. In the case of an ultimate appeal to the Judicial Committee it would be impossible to rely on any significant partisan bias among their Lordships, but the historical provincialist tendencies of the Board would suggest that federal counsel would be at a disadvantage when arguing the cases in London.

In retrospect, it would appear that both Duff and Atkin attempted to persuade their colleagues to endorse their respective views of judicial policy and that, on the whole, Atkin was more successful. As Atkin delivered the decisions in all of the major cases, his views were probably the chief ones behind the more important decisions. Duff, of course, had to be satisfied with an even division of judges in the treaty case and defeat in the unemployment insurance reference. Duff's efforts at judicial leadership were thwarted by hard-core autonomist opposition from Crocket, Cannon and Rinfret, none of whom would budge from their strong provincialist positions.

When respective counsel for the Dominion and the provinces are considered, it should be emphasized that the provinces — especially Ontario, New Brunswick and British Columbia — were represented by highly competent counsel who held deep convictions on the correctness of their stand. Roebuck, McNair and Farris were not only able advocates, they shared an unshakeable conviction that a federal victory in the New Deal litigation would involve a major erosion of provincial power. Dominion counsel, on the other hand, except for Rowell who was absent during the Judicial Committee hearings, were not noted for their pre-eminence as constitutional advocates, and had been retained by a government which was apparently lukewarm concerning their success; their success, indeed, would present the government with more problems than their failure. Federal counsel faced an additional difficulty in that the arguments of the provinces were mutually supporting whereas they stood alone. The obliqueness of their argument, moreover, appeared to have a negative effect on the judges, exposing further vulnerable areas of the federal case to attack by the bench, and facilitating adverse decisions on side issues.

It is obvious that overseas judges like Thankerton, Rowlatt, Wright and Atkin,<sup>182</sup> who had an excellent knowledge of Scots or English law would not be equally adept at Canadian constitutional law. Neither their political background nor their training fitted them for the exacting task of rendering competent decisions on the Canadian Constitution. In adumbrating the large policy component in constitutional cases, for instance in the treaty cases, British judges would be at an even greater disadvantage than in attempting to arrive at

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<sup>182</sup> Lord Macmillan, as has been mentioned, was more conversant than his brethren with Canadian law and social conditions. It is not altogether impossible, however, that Scottish 'autonomists' like Macmillan and Thankerton might have had considerable sympathy for provincial autonomists like McNair, Roebuck and Farris.

legal decisions in the more restricted sense. It may be argued, in fact, that in the elaboration of policy, local political and social experience is of inestimably greater importance than academic knowledge of the law.

The administrative disposition of the statutes which were upheld may provide an important indication of the government's attitude to the New Deal as a whole. In the case of the *Farmers' Creditors Arrangement Act*, the government first restricted the operation of the statute to the three prairie provinces, and by a further amendment provided that any farmer might invoke the Act only once. And the other major statute which was upheld, *The Dominion Trade and Industry Commission Act*, was invoked only sporadically, since the Liberals preferred to work through their own *Combines Investigation Act*, and was finally repealed in 1949. Those New Deal statutes which were not nullified during the adjudicative phase of the litigation, accordingly, were curtailed or frustrated entirely during the post-adjudicative phase.

Throughout the whole New Deal process, from the inception of the programme in 1934 and 1935 to its virtual invalidation in 1937 the intermingling of legal and political factors was manifest. This is inevitable in constitutional development, for although politics and law can be conceptually segregated, in any constitutional evolution they are inseparable. Since constitutional law in a federal state reflects compromises among various regional groupings, along with a common acknowledgment that certain functions are best performed by the central authority, perhaps the most important lesson to be learned from the New Deal is the need to have jurists on the highest court who are both proficient judges, and broad enough in outlook to balance national against regional interests. While particular evaluations of the New Deal judgments will fluctuate with the varying policy views of the observer, it might be suggested that certain of the New Deal judges had a fixity of viewpoint that precluded the realistic balancing of regional against national interests.

The New Deal is surely one of the most instructive examples of how politicians, political parties and courts may operate conjointly in the development of a federal constitution. In certain respects, however, it is not typical of other constitutional litigation and one should not make broad generalizations carelessly from the New Deal example. It is set apart from some other cases, for example, because it commenced with references under section 55 of the *Supreme Court Act* whereas other constitutional cases were adversary proceedings of the more usual type between the Dominion and the provinces.<sup>183</sup> The almost clinical detachment from concrete social circumstances that was present in the New Deal litigation, and the general public apathy concerning its fate, sets it apart from other constitutional issues embedded in a real, rather than a hypothetical, context. The sharp-

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<sup>183</sup> This is not to say, however, that constitutional references have been infrequent. Professor Russell has found that nearly half of the constitutional adjudication by the Judicial Committee in the three decades before 1949 involved reference cases, See RUSSELL, *supra* note 99, at xxv.



ness of the political controversy on the subject matter before the litigation and the decisive defeat of the government sponsoring the legislation just before the references were sent to the courts are other elements setting it apart from more prosaic constitutional quarrels. However, the co-mingling of legal and extra-legal factors, of law and politics, is characteristic of most constitutional disputes. The composition and the social and political sympathies of the judiciary, the forensic abilities of opposing counsel, the precise definition of the issues in the factums and oral argument, the care and skill with which judiciary approaches its task, along with the actual configuration of the political forces supporting and opposing the legislation may have a significant effect on the result. While these variables will differ in every case, an examination of the New Deal supplies instructive examples of the influence of some of these factors on constitutional decision-making.