

# A BRIDLE FOR LEVIATHAN: THE SUPREME COURT AND THE BOARD OF COMMERCE

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The so-called Board of Commerce cases mark a watershed in the history of the Supreme Court of Canada. For the first time, Court decisions compromised a major regulatory initiative.<sup>1</sup> Of course the Supreme Court — influenced by a domestic provincialism as well as by decisions of the Judicial Committee of the Privy Council in London — had by 1920 already ruled *ultra vires* certain federal regulatory statutes and had occasionally constrained key regulatory commissions.<sup>2</sup> The fate of the Board of Commerce was nonetheless a significant departure from the earlier pattern. In creating the Board, the Union Government of Sir Robert Borden had attempted to address two fundamental problems troubling both business interests and the public at large. First, how were commercial concerns to be organized so as to maximize efficiency and stimulate production while protecting both business and the public from monopolistic abuses? Second, how was the soaring post-war cost of living to be brought under control? Legislation purporting to meet these challenges differed qualitatively from regulatory statutes relating to, say, the insurance industry which the Supreme Court had struck down in the past. If analogies are required, the *Acts* establishing the Board of Commerce were more akin to legislation on the regulation of railways or on emergency measures and government war powers, legislation which in previous years had been introduced to meet equally pressing and significant public and private demands.

Unlike those statutes, however, the Board of Commerce legislation and the regulatory agency it created faltered in the judicial forum — indeed faltered so badly as to compromise the policy initiative and

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<sup>1</sup> In 1896 the Supreme Court of Canada [hereinafter referred to as Supreme Court] ruled *ultra vires* an Ontario statute on prohibition in *Re Prohibitory Liquor Laws* (1895), 24 S.C.R. 170, but the decision did not in the end have a compromising effect on the political initiative involved — the Judicial Committee of the Privy Council subsequently upheld the legislation to the extent that it did not actually conflict with the provisions of the federal *Canada Temperance Act, 1878*, S.C. 1878, c.16.

<sup>2</sup> See, e.g., *Re Insurance Act, 1910* (1913), 48 S.C.R. 260, 15 D.L.R. 251; and *Re Canadian Northern* (1909), 42 S.C.R. 443.

lead in fairly short order to the dissolution of the Board. Instinctively one seeks an explanation: why? It is the contention of this paper that the fate of the Board of Commerce in the Supreme Court of Canada is to be explained not simply as a manifestation of the provincialism inherent in the constitutional doctrine of the time, but also — and more importantly — as the result of a collision between an interventionist instrument of government and a particular set of judicial attitudes about law, the state and the individual which resisted the increasing encroachment of public power into the sphere of private rights. The Board of Commerce cases were, granted, not the first in which the Supreme Court or key members thereof had evinced these attitudes. The context and the political significance of the decisions nonetheless caused those rulings to represent — as had no others — the vanquishing of the competing vision which had to that point sustained major regulatory initiatives. At the same time they marked a Canadian “catching up” with the more individualistic mode of legal thought which by 1920 had prevailed in the higher courts of England and the United States for some time. Yet one hesitates to consider the cases as unequivocal triumphs in Canadian judicial history. The Board of Commerce decisions signalled the end of an era of co-operation in matters of social and economic policy between the senior Canadian court and the national government. From that point until the outbreak of the Second World War, the leaders of the the Canadian judiciary would be less the friends of reform than of reaction.

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The essay which follows is divided into five sections. Section I provides the necessary social, economic and political context for the present study: it explores the circumstances and considerations surrounding the creation of the Board of Commerce, analyses the statutory powers and responsibilities of the new institution and traces its history up to March, 1920, when the challenges to its jurisdiction and constitutional legitimacy were heard in the Supreme Court. Section II of the paper consists of an extended review of *Re Price Brothers*<sup>3</sup> and the *Board of Commerce Reference*,<sup>4</sup> the two Supreme Court cases dealing with the Board. Section III seeks to demonstrate that the differing approaches evident within the Court in both decisions were reflective of broader philosophical and conceptual disagreements, and in turn seeks to place those within the historical contexts of English and Canadian legal thought. Section IV describes how the decision of the Supreme Court, particularly in the *Reference*, set in motion a chain of

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<sup>3</sup> (1920), 60 S.C.R. 265, 54 D.L.R. 286 [hereinafter *Price Brothers* cited to S.C.R.].

<sup>4</sup> *Reference Re The Board of Commerce Act and the Combines and Fair Prices Act of 1919* (1920), 60 S.C.R. 456, 54 D.L.R. 354 [hereinafter *Reference* cited to S.C.R.].

events leading to the demise of the Board. It also includes a discussion of the Privy Council judgment in the case and shows how that resolved the conflicts both of result and approach in the Canadian high court. Section V of this paper, the conclusion, will briefly relate the Board of Commerce cases to the development of Supreme Court jurisprudence in the area of regulation during the later 1920s and the 1930s.

## I

The Great War had been like no other conflict in history. The struggle had been one not merely of armies, but of entire nations harnessed to the single goal of victory. Governments had been forced to make unprecedented military and economic commitments to sustain their strategies and, indeed, themselves. When the guns finally fell silent it was discovered that along with millions of men, women and children had perished an entire world.

Canada had been spared the ravages of the fighting, but it nonetheless emerged in 1918 profoundly changed. Among the more obvious and important consequences of the war had been a phenomenal expansion of government and a concomitant increase in the extent of governmental intervention in the daily economic life of the citizenry.<sup>5</sup> This is not to suggest that prior to 1914 the Canadian state or economy could have been adequately described in terms of *laissez-faire*; on the contrary, Canada had been remarkable for the tendency of governments throughout its history to direct the course of economic and national development from above and to control or indeed displace private enterprise in the public interest. Traditional Canadian conceptions of the state had nonetheless proven inadequate to meet the challenges posed by a total war in the twentieth century. Within a few months of the outbreak of hostilities the Borden Government had moved to mobilize the capacity of the nation in a more efficient manner.

The details of this mobilization are not important for present purposes. What is important is the impact of the government initiatives and instrumentalities that resulted — among them the Fuel Control Office, the War Trade Board, the War Purchasing Commission, the Food Control Office, the Food Board, the Munitions Resources Commission, the Railway War Board, and the Board of Grain Supervisors<sup>6</sup> — on the intellectual outlooks of businessmen as they contemplated the uncertainties of the post-war period. McGill's Stephen Leacock voiced the thoughts of many when he wrote in 1917:

The war has brought with it a new conception of society. . .It has shown us in concrete form, in the shape of the war machine itself, a vast

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<sup>5</sup> See generally J.A. Corry, *The Growth of Government Activities in Canada, 1914-1921* (1940) CANADIAN HISTORICAL ASSOCIATION REPORT.

<sup>6</sup> A detailed description of these bodies and their functions may be found in *Expansion of Government* (1919) 62 MONETARY TIMES 23.

economic organization drawn to a scale never before imagined. The co-ordination of resources rendered necessary by the war, the united efforts made in production, manufacture and transport, suggest boundless possibilities for a time of peace. . . .<sup>7</sup>

By this point it was already apparent that it would be peace, not the war, that would ultimately pose the greater danger to Canadian prosperity and economic well-being. The scale of the existing conflict presaged the extent of the disruption that would follow an armistice. Hundreds of thousands of men would return from the Front looking for work. Entire industries which had grown up during the conflict and which had fueled the economic growth of the period — munitions being an obvious example — would atrophy or collapse almost overnight. Consumer demand patterns would change as the expectations and desires of the populace returned to what they had been in peacetime. Canadian trade abroad stood to suffer to the extent that foreign buyers would no longer need to depend as heavily on Canadian supplies of both raw materials and manufactured goods; at the same time it was feared that Canadian concerns would be exposed to competition from foreign — including, ironically, German — cartels.

In this context organization and co-operation became business by-words. Only through efficient combinations of plant and capital and/or co-ordination of marketing strategies did the country's commercial leaders believe that Canada's prosperity could be preserved. The president of the Canadian Bank of Commerce called on industrialists to unite, insisting that "we must have plant and capital on a scale adequate to compete with other nations".<sup>8</sup> In the federal Department of Trade and Commerce, the Deputy Minister, reporting in March 1918, declared that "the time has arrived to prepare for every possible eventuality by widespread organization of industry in Canada".<sup>9</sup> He continued:

Co-operation in export trade will be necessary to meet similar foreign export syndicates. Such combinations develop men of initiative and constructive genius, men of big business, men who acquire a grasp of the details of foreign trade exchanges, banking, transportation, and competition. . . .<sup>10</sup>

What was good for the export trade was regarded by many in the commercial community as good for the domestic marketplace as well. Government officials had recognized the economic benefits of domestic

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<sup>7</sup> *Fallacy of War-Time Prosperity* (1917) INDUSTRIAL CANADA at 735.

<sup>8</sup> Sir E. Walker, *Judge Men of Wealth by the Use They Put It To* (1918) INDUSTRIAL CANADA at 1317.

<sup>9</sup> Canada, Department of Trade and Commerce, *Report of the Deputy Minister (1918)* SESSIONAL PAPER NO. 10 (1919) at 9.

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

combination during the war;<sup>11</sup> before the end of the conflict prominent businessmen had formed a new organization, the Canadian Industrial Reconstruction Association (later simply the Canadian Reconstruction Association) to co-ordinate business and commercial strategy and to impress upon government the needs of enterprise in the new era.<sup>12</sup>

One of these needs was a change in the combines laws. The pre-war legislation on combines had been passed in 1910 in the midst of the first great merger movement to sweep Canadian business. It had not been a harsh statute — its prohibitions had been limited to unreasonable or harmful combinations, leaving open the possibility of lawful combines found not to be harmful. It had nonetheless proved unsatisfactory to business interests for two reasons. First, it had left the determination of a combine's "reasonableness" or "harmfulness" to the courts, considered by many businessmen to be somewhat out of touch with commercial realities. Despite their best efforts, they were seen as unreliable adjudicators, especially at a time when economic conditions demanded an unorthodox approach to business practice.<sup>13</sup> Secondly, the lack of litigation under the old *Act* meant that while few combinations had been declared illegal, few had by judicial fiat been legitimized, with the result that business leaders continued to be criticized for many of their co-ordinative actions. In this context they felt themselves to be the poorer for the lack of any responsible, informed, respected and independent authority to which they could turn for approval. Business leaders contemplating post-war co-operation realized that a certain degree of public support would be necessary to the success of their strategy, and encouraged the government to pass

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<sup>11</sup> "[I]t has become my experience that all combines so-called are not necessarily either of evil intent or of evil influence from the commercial standpoint or from that of the public generally." Canada, *Report on Sugar* by W.F. O'Connor (Acting Commissioner) in SESSIONAL PAPER No. 189 (1917) at 37. This comment was made in the context of a wartime Order-in-Council (P.C. 2777) which, superseding the previous law under *The Combines Investigation Act*, S.C. 1910, c.9, had declared *all* trade combinations illegal.

<sup>12</sup> On the Canadian Reconstruction Association, see J. Kirkwood, *Solving our Reconstruction Problems* (1918) INDUSTRIAL CANADA 42; Sir J. Willison, *Canada Must Prepare for Reconstruction* (1918) INDUSTRIAL CANADA 46. For a modern perspective, see T. Traves, *THE STATE AND ENTERPRISE: CANADIAN MANUFACTURERS AND THE FEDERAL GOVERNMENT, 1917-1931* (Toronto: University of Toronto Press, 1979) at 15-28.

<sup>13</sup> "To determine what is and what is not prejudicial to the interests of the country as a whole requires very exceptional insight into economic conditions and the nature of commercial transaction . . . Judges are more to be trusted as interpreters of the law than as expositors of public policy." Canadian Wholesale Grocers' Association, *CANADA'S BOARD OF COMMERCE: THE BUSINESS MAN'S COURT* (Toronto: 1919) at 2.

new legislation which would help to create a more receptive public constituency.<sup>14</sup>

Altogether apart from this, many businessmen desired the creation of a forum in which they could work out their own disputes in an expeditious and effective manner.<sup>15</sup> That serious disputes existed there could be no doubt. Manufacturers and retailers differed on the issue of resale price agreements; wholesalers and retailers differed on methods and terms of product distribution; farmers' co-operatives complained that many manufacturers refused to deal with them under threat of boycott by retailers, and that they were having difficulty buying from wholesalers as the latter refused to grant the "co-ops" retail standing. Again, the court system was perceived to be inadequate — litigation (assuming that commercial grievances represented valid causes of action in the first place) was expensive and, as noted above, businessmen were not convinced that judges had the commercial sensitivity required in the circumstances. In this context, business looked to the state to provide it with an institution which could, by its decisions, not only mute public criticism of its co-ordinative efforts, but could also facilitate post-war commerce by resolving the differences that created friction and disruption within the business community itself. In addition, many small businessmen hoped that such a tribunal would protect them from discrimination and other so-called unfair practices engaged in by the monopolistic "big interests" against which their own trade associations could be but a partial defence.<sup>16</sup>

Such problems became more pressing as businessmen and consumers alike found themselves swept along by a rapidly rising cost of living. Wholesale and retail prices had skyrocketed during the war. Department of Labour statistics indicated, for example, that the price

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<sup>14</sup> "What is required is that some action be taken which will tend to educate the people to a fair and reasonable understanding of the advantages of organized business in manufacture and distribution in the interests of the consumers." *Financial Post* (5 July 1919).

<sup>15</sup> See e.g., Canada, House of Commons, *Report of the Special Committee on the Cost of Living* in JOURNALS OF THE HOUSE OF COMMONS (1919), Appendix VII, at 202, 433.

<sup>16</sup> One Hamilton wholesale grocer complained:

By reason of unbridled methods in merchandising, unchristianlike, unfair and unprincipled practices among wealthy, grasping, self-centered business men, Canada is suffering as a result and the distributing trades of the country are getting into the control of a few powerful monopolists who, from their point of view, think it good business, perfectly legitimate and will continue to do so until some controlling machinery steps in and prevents it.

of a pound of pork had risen from 19.2 cents in 1915 to 36.4 cents in 1918.<sup>17</sup> A pound of butter which had cost 25.6 cents in 1915 cost 42.3 cents three short years later.<sup>18</sup> Bread prices were way up. Sugar was more expensive. So were the coal and wood so necessary for home heating in the Canadian winter. Virtually all the staple commodities the Government indexed cost more in 1918 than they had in 1915; indeed, Government figures showed that the 1918 cost of living was the highest since 1890, the first year for which the Government had comparable statistics. In the face of this inflation, embittered members of the public accused businessmen of having conspired to suppress competition that would have kept prices down, and of having made undue profits in the process. In an atmosphere of increasing urgency exacerbated by widespread labour unrest (in particular the Winnipeg General Strike), the Government decided in May 1919 to appoint a special Parliamentary committee to look into the problem and report as soon as possible. This committee, chaired by Conservative MP George Nicholson, sat through the month of June, hearing witnesses from government, business, labour and consumer groups. Reporting on July 5, it suggested that the allegations of profiteering were generally without foundation: “[i]ndividual cases of high profits have been discovered, but these are probably no more numerous or excessive than during ordinary times of peace”.<sup>19</sup> Prices were high, but reasons for the wartime increases were to be found less in unfair or exploitative business practices than in consumers’ wasteful buying and the general industrial expansion due to munitions making. Recognizing the need to act or at least be seen to act, a majority of the Committee nonetheless suggested that the Government establish a Board of Commerce which would continue and extend the investigative work of the Committee, as well as that done by the various special Boards and controllers which the Government had appointed to orchestrate the national economy in wartime. More particularly, the tribunal would have:

power to investigate mergers, trusts, monopolies or aggregates of any kind or nature which tend to limit facilities for transporting, providing, manufacturing, supplying, storing or preserving, limiting or lessening manufacturing or production, or fixing a common price or resale price, or a common rental, or a common cost of storage, or preventing or lessening competition in or substantially controlling within any particular district, or generally, production, manufacture, purchase, barter, sale, transportation, insurance or supply, or otherwise restraining or imposing commerce, or unduly enhancing the price of the necessaries of life, also with regulative power in connection with discrimination in price between

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<sup>17</sup> *Prices of Commodities in Canada* CANADA YEAR BOOK 1920 (Ottawa: King’s Printer, 1921) at 549.

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

<sup>19</sup> *Supra*, note 15 at 12.

different purchasers of commodities, exclusive purchase and sale arrangements, intercorporate shareholding and interlocking directorates and unfair methods in commerce.[sic]<sup>20</sup>

Castig about for policy alternatives and becoming increasingly desperate in the last days of the Parliamentary session, the Government embraced the Committee recommendation and introduced implementing legislation even before the Committee's final report had been officially released. Not coincidentally, one suspects, the proposals appeared to offer a means by which the Government could satisfy the expressed needs of consumers and businessmen alike. The former would get a commission which in appropriate circumstances could act to limit profits and to a certain extent fix prices so as to stabilize and perhaps even reduce the cost of living; the latter would get their businessman's court which could legitimize business associations and co-ordinative practices while providing a forum for dispute settlement. Two Bills were in fact brought into the House: the first, the *Board of Commerce Bill*,<sup>21</sup> setting up the Board of Commerce more or less along the lines proposed, and the second, the *Combines and Fair Prices Bill*,<sup>22</sup> essentially setting out its powers.

Regarding the first of these, it was clear that the Board itself was modelled — at least in its structure — on the example of the Board of Railway Commissioners, the first and most successful of the existing Canadian federal administrative agencies. Like that Board it would have the status of a court of record. It would be composed of a Chief Commissioner (a judge or lawyer of at least ten years standing) and two Assistant Commissioners (section 3). It would be mobile, empowered to hold hearings wherever necessary in the public interest (section 11). Its procedures would be less fixed than required in a court of law (section 12), but an appeal would lie from it to the Supreme Court on questions of law or jurisdiction (section 41). Alternatively, the Board could state a case for the Court's consideration (section 32). All decisions, of course, were subject to review by the Governor-in-Council on application or of its own motion (section 41), thereby enabling the government to maintain, as with the Railway Board, some measure of executive control over administrative matters.

Looking at the *Combines and Fair Prices Bill*, however, it was also clear that the actual power in the hands of the Board of Commerce far exceeded that possessed by its counterpart. This *Bill* was divided into two parts. Part I gave the Board power to restrain and prohibit

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<sup>20</sup> *Ibid.* at 6-7. In short, what was being proposed was a rather more powerful equivalent of the U.S. Federal Trade Commission which President Woodrow Wilson's administration had set up in 1915.

<sup>21</sup> Bill C-166, *The Board of Commerce Act, 1919*, 2d Sess., 13th Parl., 1919.

<sup>22</sup> Bill C-167, *The Combines and Fair Prices Act, 1919*, 2d Sess., 13th Parl., 1919.

the formation and operation of “combines”, broadly defined under section 2 of the *Bill*. It was given power to act of its own motion as well as on complaint (section 5). The burden was on the person or group complained of to show why a restraining order should not be made (section 5). Failure to abide by an order constituted an indictable offence, making the person or group concerned liable to a penalty of up to \$1000 and costs per day of non-compliance, or, alternatively, a prison term of up to ten years (section 11). Part II of the *Bill* was known as the “fair prices” section. It gave the Board power to control “necessaries of life”, and in particular to control the prices at which those were sold and the profits made by individuals selling them. What constituted an “unfair” price or profit was left entirely up to the discretion of the Board (section 18), as was the definition of “necessary of life” (section 16). The penalties for non-compliance with Board orders made according to this Part of the *Bill* were the same as those set down in Part I (section 20). In bowing to public demands in the face of the high cost of living, the Government was taking pains to ensure that its new Commission would not be regarded as a toothless wonder. Unfortunately, a Board with teeth like this was not exactly what the business community had in mind.

In the House, reaction to the proposed legislation was mixed. Some members complained that such an initiative demanded more careful consideration than could be accorded it in the few days remaining until prorogation. Others reminded Arthur Meighen, the acting Minister of Justice responsible for introducing the Bills, that the Government itself had said in the past that control of the cost of living was beyond it, being in fact an international problem the resolution of which had to await a stabilization of global economic conditions. The legislation before the House was therefore either pointless or a fraud. Still other members complained of the creation of yet another commission.<sup>23</sup> Finally, there were those who expressed concern at the powers the Board would exercise, and who in particular took issue with the notion of price-fixing, an undertaking which they considered neither practicable nor desirable in peacetime. Predictably, however, none of these criticisms dissuaded the Government from its course, and after a relatively short debate for a matter of such importance, the

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<sup>23</sup> The complaints were remarkable as many of them focussed on the expense of another commission rather than on theoretical problems potentially associated with such an instrument. Typical were the following comments by Member of Parliament R.L. Richardson (Springfield):

Many of our commissions in the past have been farces of the worst type, and thousands, if not millions, of dollars of the people's money has been literally squandered on them. No wonder there is great public contempt for such commissions. . . .

Bills passed the House, were sent to the Senate, and received royal assent on July 7, 1919. For good or ill, Canada had a Board of Commerce.

The Government quickly named three commissioners to carry out the Board's responsibilities. Heading the new tribunal was Judge H.A. Robson, a former member of the Manitoba bench who five years earlier had served as a one-man commission investigating the operation of that province's public utility board. Named to sit with Judge Robson were Nova Scotia lawyer, W.F. O'Connor, the wartime cost of living commissioner, and James Murdock, Vice-President of the Brotherhood of Railway Trainmen. Together these men seemed to represent a formidable combination of expertise and determination.

The public greeted the creation of the Board with enthusiasm; as the *Montreal Gazette* later put it, it was "expected to provide a panacea for a host of economic ills".<sup>24</sup> Business was generally supportive as well,<sup>25</sup> despite some misgivings about the extent of the Board's powers over prices and profits. Notably ambivalent was the Bar. The leading domestic legal periodical, the CANADA LAW JOURNAL, welcomed the establishment of another specialized Court (in addition to the Railway Board) for the handling of problems which, it acknowledged, were matters urgently requiring resolution. "Farmers, manufacturers, wholesalers and retailers", it declared in an editorial,

have taken advantage of the situation to embark on a voyage of misrepresentation as to the cost to them of the articles which they have for sale which is without excuse and without parallel in history.<sup>26</sup>

Soon afterwards, however, the LAW JOURNAL ran an article which betrayed rather different sentiments. Speaking generally, its author, H.P. Blackwood, complained:

Recent Acts of Parliament in Canada have given judicial and quasi-judicial authority to certain government officials. . . The decision of certain questions has been expressly removed from the domain of Courts of Law and given to authorities appointed to carry out the purpose of certain

<sup>24</sup> *Montreal Gazette* (25 June 1920).

<sup>25</sup> Note, e.g. the following resolution passed at the December 1919 convention of the Ontario Section of the Canadian Wholesale Grocers' Association:

The members [of the Section] heartily endorse the action of the Federal Government for introducing and passing the Acts cited as "The Board of Commerce" and the "Combines and Fair Prices" Acts of 1919 which, in the opinion of the trade, is the most advanced legislation enacted by the Federal Government in the past 20 years. . . . [W]e are also pleased with the . . . personnel of the Board and have every confidence in their ability for sound and fair reasonings in the adjustment of trade difficulties and the adoption of findings, rules or regulations as a moral uplift to those engaged in mercantile pursuits and as a protection to the consumer.

*Supra*, note 13 at 3.

<sup>26</sup> *The Board of Commerce* (1919) 55 CAN. L.J. at 285.

Acts. Whether these changes are convenient from the point of view of the man of business is problematical. A businessman possibly could not effectively carry out the business if tied down by the rules, some of which are artificial, but for which there is strong reason, which check and rightly check the actions of a judge. But that is not an argument that these rules should be abolished and others substituted for them, which do not afford the check, which centuries of experience have disclosed are necessary. It is in these rules that the private citizen finds his most effective protection against arbitrary government. To remove the occasional fetters which the Courts have imposed upon the acts of official persons, we have deprived ourselves of our very last safeguard against official tyranny. . . . [T]he ancient veneration of the rule of law. . . has suffered a marked decline.<sup>27</sup>

Given the trend, Blackwood looked to the future with considerable trepidation:

As rights of decision are conferred upon Commissioners in a large number of matters now, it is quite impossible to say where it will end. The people seem to be running mad on it. We may get so far soon that the country will be governed by commissions and the people will find themselves divested of political power.<sup>28</sup>

Notwithstanding such fears in the legal community, the new agency got down to work in August 1919. Acting on its own motion, it launched investigations into the price of foodstuffs, the sugar trade, the footwear business, and the retail clothing trade. Elements in the agricultural and business communities were alarmed by the Board's aggressive approach, and complained of Commissioners, especially W.F. O'Connor, pre-judging their cases by going about the country openly declaring an intention to "drive rivets in the prices, and see they don't go any higher, and to help bring them down".<sup>29</sup>

Retail merchants in particular complained of victimization. Their worst fears were realized when, on December 15, the Board issued an order fixing the profits of Toronto retail clothiers at 26 percent on goods selling at prices up to \$25, and at 33 1/3 percent on goods selling above that price. The Board further indicated that these restrictions would be made Dominion-wide in January 1920. The retailers exploded. An Ottawa meeting of clothiers resolved that "the whole policy of fixing prices or profits for retail merchants is wrong".<sup>30</sup> Delegations of merchants came before the Board arguing that the profit margin allowed barely covered their overhead costs, and that this was

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<sup>27</sup> *Constitutional Safeguards - How Far Can Delegates Delegate?* (1919) 55 CAN. L.J. at 367-69.

<sup>28</sup> *Ibid.* at 368.

<sup>29</sup> J.C. Hopkins, ed., *CANADIAN ANNUAL REVIEW OF PUBLIC AFFAIRS*, 1919 (Toronto: The Canadian Annual Review, 1920) at 428.

<sup>30</sup> *Clothiers of Canada Appeal Against Order of Board of Commerce* (February 1920) MEN'S WEAR REVIEW at 36.

particularly true for merchants outside the Ontario capital. The clothiers' trade journal, the *MEN'S WEAR REVIEW*, called for the establishment of a special clothiers' organization that would "move in a common phalanx against any unwarranted encroachments on the freedom of merchandising".<sup>31</sup> The Dominion Secretary of the Retail Merchants Association demanded the abolition of the Board's price-fixing powers and a revamping of the Board's membership so as to include representatives of consumers, producers, retailers and manufacturers (the Board's membership at this time notably consisting of but two lawyers and a former labour leader). In the face of this onslaught of opposition the Commerce Commissioners reconsidered their plan to extend the Toronto orders, and decided not to proceed as scheduled. Their experience convinced them that their legal right to decide such matters required vindication; with this in mind they submitted a stated case to the Supreme Court of Canada on January 9, 1920, consisting of six questions relating to the constitutionality of their authority under the *Combines and Fair Prices Act*<sup>32</sup> to impose a profit margin and to prohibit the selling of goods at prices reflecting a margin in excess of that authorized.

Within a few short weeks, the Board ran into trouble again, this time with a leading pulp and paper firm. Paper control in Canada had proved troublesome from its beginnings in 1917.<sup>33</sup> Pulp and paper concerns had repeatedly challenged the legitimacy of regulation with a vigour that distinguished them from other enterprises. Intensive lobbying during the war itself had led to the creation of a Paper Control Tribunal sitting in review over the orders of R.A. Pringle, the federal Paper Controller. With the end of hostilities the paper manufacturers became even more dissatisfied with their regulatory lot. An editorial in the July 10, 1919 issue of the *PULP AND PAPER MAGAZINE OF CANADA* complained that the paper makers had been prevented from "doing business along the lines followed by all other businesses. . . . Some people think that Canada has had war enough, yet here [in the post-war extension of paper controls] is a deliberate effort to prolong its effects."<sup>34</sup> The last straw came in December 1919. By this time the relaxation of wartime regulations in the American newsprint market had driven contract prices for newsprint there up to \$90 a ton, with spot prices ranging around \$100. Pringle, however, set the Canadian price at \$80 a ton (up from \$69), and ordered Canadian firms to supply newsprint to their customers at that price. One of the larger Quebec pulp and paper companies — Price Brothers — decided that it would not stand for the new ruling, and refused to comply with it.

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<sup>31</sup> *Get Together* (February 1920) *MEN'S WEAR REVIEW* at 40.

<sup>32</sup> *The Combines and Fair Prices Act, 1919*, S.C. 1919, c. 45.

<sup>33</sup> On the problems of newsprint control during and following World War I, see Traves, *supra*, note 12 at 29-54.

<sup>34</sup> *The Unfathomable Mind of Parliament* (1919) *PULP AND PAPER MAGAZINE OF CANADA* at 543.

Sir William Price, the millionaire President of the company, explained his position:

As businessmen, the whole question for us is as to whether we, manufacturers of paper, of all other producers, are to be restricted in our constitutional dealings with whom we choose and [in] our right of freedom of contract.<sup>35</sup>

To tangle with Price was the last thing that the already beleaguered Board of Commerce needed, but that was exactly what it was forced to do when, in the course of the Government's dismantling of the wartime control bureaus, it was required by an Order-in-Council of January 29, 1920<sup>36</sup> to assume the Paper Controller's jurisdiction pending a Royal Proclamation officially ending the war.

On February 6 the Board attempted to bring Price to heel.<sup>37</sup> Declaring newsprint to be a "necessary of life" it made an order prohibiting his company from charging, up to March 15, 1920, more than the control price (\$80/ton) for lots of newsprint sold to Canadian newspapers (in particular, the *Montreal Star*); the same order prohibited the company from withholding paper from sale at that price. The Board scheduled a hearing for February 24 at which company representatives might show cause why the order against it should not be made permanent. Price refused to appear, his counsel indicating that he would instead seek leave to appeal to the Supreme Court from the February 6 order on a question of law. The Board refused this leave so long as Price Brothers continued to disobey its order. It set February 27 as the date for a further hearing, at which time, if Price still did not appear, steps would be taken to compel his attendance or otherwise punish him for failing to heed the Board.

The February 27 hearing came and went; Price continued to defy regulation in general and the Board in particular. True to the Board's threat, Board counsel applied to the Exchequer Court of Canada for an order citing Price Brothers for contempt. While this order was being sought, however, counsel for Price Brothers obtained special leave from the Supreme Court (per Anglin J.) to appeal the Board's order of February 6 on a question of jurisdiction and was subsequently able to get a stay of proceedings in the Exchequer Court pending the outcome of the Supreme Court case. In the meantime, Price Brothers would comply with the Board's order as a term of the leave. For the Board this was but a Pyrrhic victory; apart from the damage it had sustained in this unprecedentedly bitter confrontation, its authority was

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<sup>35</sup> Quoted in Hopkins, *supra*, note 29 at 184.

<sup>36</sup> Order in Council P.C. 230, Jan. 29, 1920.

<sup>37</sup> The greater part of the information which follows on the Board's dealings with Price Brothers is derived from the *Montreal Star* (27 February 1920) and material relating to the newsprint controversy to be found in PAC, *Board of Commerce Papers* RG 36/6, v.83.

now up for judicial review for a second time, and on this occasion on a legal question not of its own choosing. In this situation it hardly seemed possible that things could get any worse. Nonetheless, in the midst of the Price Brothers crisis, they did. On February 25 it was announced that Judge Robson, the Board's Chief Commissioner, had resigned.

Robson had been intimately involved in the Board's efforts at paper control, and his resignation shook the Board — perhaps deliberately — at a most inopportune moment. "Price-fixing and profit restrictions on the products of the country," he declared in a statement to the press, "while well for war-time, should not in my view be part of the present statute law."<sup>38</sup> Indeed the stimulation of Canadian production (and hence Canadian prosperity) in his opinion required high prices. In this light he regarded the Board's activities as economically harmful and derided them as being apt to "harrass [sic] and discourage business men".<sup>39</sup> His words left little doubt of his view of the Price Brothers affair.<sup>40</sup>

Robson's resignation was headline news. Editorial writers, describing his exit as "spectacular", used that as an excuse to consider the position and likely fate of the Board of Commerce as a whole. Some regarded the resignation as foreshadowing the Board's demise. Others declined to go so far, but acknowledged that the Board was

<sup>38</sup> See *supra*, note 29 at 486-87.

<sup>39</sup> Letter of resignation from Judge Robson to Sir George Foster, *quoted in* Canada, *H.C. Debates*, [1920] Vol. I 85 at 86 (3 March 1920).

<sup>40</sup> Robson had apparently been considering resignation for some weeks. According to fellow-Commissioner James Murdock, he had spoken of quitting the Board as early as January 16 in the midst of the difficulties over the retail clothing order. On February 5 he had suggested to Murdock that all three members of the Board resign together at least as Paper Controllers and, if thought desirable, as Board members. On February 18, with the storm over paper control already raging, Robson had again suggested resignation en masse. When neither of his colleagues seemed inclined to agree with him, he decided to take action himself, the result of which was, of course, the resignation made public on February 25.

It was later revealed that prior to making his February 18 proposal Robson had gone so far as to prepare a draft memo to Cabinet on the Board and paper control. The memo suggested how uncomfortable he was with the unseparated powers in the hands of the Board:

I am directed by the Board of Commerce to inform you that the board does not consider that the duty of seeing that specific compliance with its orders [should] attend [sic] to the duty of seeing that specific compliance with its orders be made by the various newsprint companies affected. The Board, in its judicial capacity, makes such orders as it seems proper, but the enforcement thereof or the punishment of breach are matters to which the board cannot attend. Proceedings of that character more fittingly belong to Crown law officers and police authorities.

See J. Murdock "Judge Robson's Resignation as Chairman", February 27, 1920, PAC, *Meighen Papers*, MG 26 I v.15; *Toronto Star* (25 June 1920).

becoming problematic. The editor of the CANADA LAW JOURNAL commented darkly (in apparent reference to wrangling within the Board made public by Robson's exit) that "the condition of things [as regards] the functions of the Court. . . is most unsatisfactory and unseemly".<sup>41</sup> Few publications, however, called for the Board's outright abolition. The *Toronto Telegram* suggested that despite the Board's mixed record, abolition "might be a dangerous move" in the face of continued public concern about the cost of living.<sup>42</sup> Even reputable business journals like the *Financial Post* counselled caution, albeit for reasons that had less to do with the public good as the good of the business community:

We have criticized heartily many of the orders which the Board has issued, and we have objected to the fact that its personnel has not embraced a man with practical experience in business and industry. But in this unsettled period, with public opinion aroused to such a pitch against the cost of living, alleged combines and so-called profiteering, a board to intelligently settle differences and disputes between the wholesaler, the manufacturer, the retailer and the consumer should be able to accomplish much to allay dissatisfaction and apprehension. . . [T]he abolition of the Board at this time by the Government would be followed by an upheaval of public opinion [and] by the far-flung cry that this was the work of the "big interests".<sup>43</sup>

In the result the Government did nothing, preferring merely to appoint Commissioner O'Connor as Acting Chief until such time as the fate of the Board was decided in the courts and a new head for the Board could be properly appointed. O'Connor doubtless regarded his promotion as a mixed blessing. It burdened him with new responsibilities just as he was preparing what he likely regarded as the most important legal argument of his career. By Cabinet order, O'Connor had been selected to represent the Attorney General in the *Reference* case on the Board's constitutionality before the Supreme Court.<sup>44</sup>

O'Connor likely realized that the timing of the case — scheduled to be heard in Ottawa March 6 — would do the Board no good. Little more than a week before his defence was to begin, the Board's internal disagreements, the doubts of its erstwhile Chairman and the dubious record of its past were being publicly paraded in the press. The Board was the topic of renewed debate in Parliament, on the streetcorners, and in businessmen's clubs. In such a context could the Board get a

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<sup>41</sup> *The Board of Commerce* (1920) 56 CAN. L.J. 95 at 96.

<sup>42</sup> *Toronto Telegram* (26 February 1920).

<sup>43</sup> *Financial Post* (28 February 1920).

<sup>44</sup> *Board of Commerce Reference*, *supra*, note 4. The selection did not necessarily represent the Cabinet "picking on" O'Connor as was rumoured by the press at the time. At the Government's request O'Connor had in fact drafted both *Acts* relating to the Board of Commerce, and was therefore a logical choice to defend their *vires*. There is every reason to believe, moreover, that he was an advocate of some competence; he had been created a K.C. in Nova Scotia some years earlier.

fair trial? Mercifully for both the Board and O'Connor himself, the hearing was postponed for nine days. March 15th, nonetheless, came all too soon. In a dark wood-panelled chamber packed with lawyers, reporters and the curious, an anxious O'Connor rose to address the six judges of the Supreme Court of Canada. He did not know it, but the beginning of the end had come.

## II

Ranged against O'Connor that morning in March were some of the most prominent and formidable counsel in the Dominion. Eugene Lafleur was there, appearing for the Attorney General of Alberta. So was W.N. Tilley, appearing for the Retail Merchants' Association, the Canadian Manufacturers Association, and the Industrial and Development Council of Canadian Meat-Packers. H.J. Symington represented the Winnipeg Grain Exchange and the Terminal Elevator Company, and A.B. Hudson (as fate would have it, a future judge of the Supreme Court) represented the Canadian Council of Agriculture. For the better part of two days they argued. O'Connor defended the fair prices provisions of the *Combines and Fair Prices Act* as criminal law, a valid subject of federal legislation under section 91(27) of the *British North America Act*.<sup>45</sup> He asserted that Parliament had the right to establish the Board of Commerce under section 101, which gave the federal government power to establish "additional courts for the better administration of the laws of Canada". He further submitted that the Board had been validly constituted by virtue of the federal power over trade and commerce, statistics, weights and measures, and peace, order and good government. O'Connor's opponents denied these assertions, relying on provincial powers over property and civil rights and the administration of justice, and arguing that Parliament's attempt to delegate what they alleged to be legislative functions to the Board of Commerce was contrary to general constitutional principles.<sup>46</sup>

No sooner had arguments in the *Reference* been concluded than the Court began hearing the *Price Brothers* case (having scheduled the two Board of Commerce cases in tandem in the interests of convenience). Here Eugene Lafleur and Aimé Geoffrion, for Price Brothers, faced O.M. Biggar for the Attorney General of the Dominion. At issue, of course, was the Board of Commerce order of February 6, 1920 prohibiting Price Brothers from selling newsprint at any price in excess of that authorized by the Board (\$80/ton). Of the two Board of Commerce cases, this was the one most urgently in need of resolution,

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<sup>45</sup> *Constitution Act*, 1867 (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act*, 1867) [hereinafter *B.N.A. Act*].

<sup>46</sup> See the *factums* submitted in the case, PAC, RG 125, Supreme Court case no. 4349 (*Reference*).

given the intensity and rancour of the dispute over paper control. Counsel for Price Brothers challenged the Board order on two principal grounds. First, they asserted that the Order-in-Council appointing the Board Paper Controller had been beyond the jurisdiction of the Cabinet acting under the authority of the *War Measures Act*.<sup>47</sup> They submitted that the order could not properly be said to have been made by reason of any real or apprehended war or other defence purpose (an armistice having been declared three months prior to the Order) and was therefore *ultra vires*. Secondly, they denied the Board's own jurisdiction on the basis that newsprint was not a "necessary of life" within the meaning of section 16 of the *Combines and Fair Prices Act*. "Newsprint", Geoffrion declared in argument, "is as far from the necessities of life as the stars from the earth."<sup>48</sup> Straying into practicalities, Geoffrion moreover disputed that it was any part of a newsprint manufacturer's responsibility to in fact subsidize the newspapers, which he said had been the result of the Board order.<sup>49</sup>

Responding to the first point made by counsel for Price Brothers, O.M. Biggar warned the Court that it was "difficult to suggest any safe principle upon which the court could exercise the discretion of Parliament, or of the Governor-in-Council acting for it, to determine what was an act necessary for defence".<sup>50</sup> The Court, he suggested, would interfere with such determinations at its peril. On the second point he could not understand why newsprint could not be regarded as a necessary of life. The *Combines and Fair Prices Act* had left the definition of that entirely up to the Board; in any event, he argued,

the importance of the supply to the public through the newspapers of the information and instructions necessary for the proper conduct of a democratic war can hardly be over-stated, and, if the question is a proper one for forensic discussion, the . . . regulating of the supply of newsprint paper must . . . be held to be strictly and necessarily a condition of effective defence.<sup>51</sup>

By late afternoon on March 19, the arguments had finished. With the fate of the Board hanging in the balance, the ensuing days at the Commission offices in Ottawa were relatively quiet ones. The Board pressed on with an inquiry into an alleged wholesale grocers' combine in Hamilton, but launched no new investigations. Judgments were expected shortly and it seemed that the Board was willing to be patient before taking any major action — especially with regard to the paper situation — so long as its powers were *sub judice*. While the Board

<sup>47</sup> *War Measures Act, 1914*, S.C. 1914, c. 2.

<sup>48</sup> *Ottawa Journal* (18 March 1920).

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

<sup>50</sup> *Factum* for the Attorney General of Canada, PAC, RG 125, Supreme Court case no. 4380 (*Price Brothers*) at 2.

<sup>51</sup> *Ibid.* at 3.

waited, however, certain newspapers (who were of course immediately interested in the outcome of the *Price Brothers* case) began to voice their concerns publicly. The *Northern Messenger* prophesied on March 26 that "if Price Brothers wins against the Government order to supply paper other mills will follow their example and there will be a newspaper famine across Canada".<sup>52</sup> In part at least, the *Messenger's* fears proved to be well founded. On April 6 the Supreme Court ruled that in making the paper order of February, the Board of Commerce had acted without jurisdiction.<sup>53</sup>

The decision was a disaster for the Board. A clear majority of judges (Brodeur, Anglin, Idington and Duff JJ., Mignault J. dissenting) concluded that in appointing the Board of Commerce Paper Controller on January 29, 1920 the Governor-in-Council (that is, the Cabinet) had exceeded its jurisdiction under the *War Measures Act* to

. . . make from time to time such orders and regulations as [it] may by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable for the security, defence, peace, order and welfare of Canada. . . .<sup>54</sup>

A majority of slightly different composition (Idington, Duff, Anglin and Mignault JJ., Brodeur J. expressing no opinion) declared as well that newsprint could not properly be considered a necessary of life under section 16 of the *Combines and Fair Prices Act*. Brodeur J. even went so far as to hold that the *Act* was *ultra vires* the federal Parliament, it being an attempt to regulate a particular trade ("the trade of necessaries of life") and therefore not within the proper sphere of federal power over "the regulation of trade and commerce" as this had been previously interpreted.<sup>55</sup> Chief Justice Davies notably offered no decision at all, explaining that in the absence of the Governor General from the country, he had been sworn in as Administrator of Canada during the argument.

A closer examination of the five individual judgments in the case nonetheless reveals a far lesser degree of unanimity than the mere result indicated. The approaches of Idington and Brodeur JJ. on the one hand, and Anglin and Mignault JJ. on the other to the problem of whether the January 1920 Order-in-Council was within the jurisdiction of Cabinet under the *War Measures Act* were, for example, significantly different. Looking at section 6 of that *Act*, quoted *supra*, neither Idington nor Brodeur JJ. could understand how paper control could possibly be viewed as "necessary for the security, defence, peace, order and welfare of Canada" in wartime. Idington J. acknowledged that the section made reference to subjects ("trading, exporta-

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<sup>52</sup> *Northern Messenger*, (26 March 1920).

<sup>53</sup> *Price Brothers*, *supra*, note 3.

<sup>54</sup> *War Measures Act, 1914*, S.C. 1914, c. 2, s. 6.

<sup>55</sup> *Price Brothers*, *supra*, note 3 at 289.

tion, importation, production and manufacture” per subsection (e)) intended to be within the purview of the legislation and thus Cabinet jurisdiction. He nonetheless complained:

I have much difficulty in seeing how anything in subsec. (e) [sic] can apply to the mere direction of selling newsprint paper by a manufacturer thereof to a person wishing to use it. . . . I cannot think how that purely business transaction of a very ordinary type can be said to have any relevancy to the matters therein specified of possibly vital importance in many ways conceivable in a state of war.

. . .

The entire item certainly does not cover anything comprehended in what we have to consider in way of regulating the private dealings between parties carrying on their respective businesses.<sup>56</sup>

Brodeur J. was similarly puzzled:

The “War Measures Act” of 1914 on which the order in question is based was very wide. But it never contemplated that the price at which newspapers would be supplied with their raw material should be fixed by the Government or by some other authority.

The Act contemplated measures that would be rendered necessary for the defence of the country, as the censorship of the news, the arrest, detention and deportation of undesirable persons or of enemy subjects, the levy of an army, the control of the transport by land, air and water, the control of the food for war purposes and maintaining the forces. But it seems to me that it requires a great deal of imagination to include in those war measures the supply of newsprint to the press, and especially the exact price at which the newspapers should be supplied with paper.<sup>57</sup>

This concern was notably absent from the judgment of Anglin J., who preferred to rest his decision on this point on the fact that in January 1920 there could not have been said to exist any “real or apprehended war” within the meaning of section 6 of the *War Measures Act*. He commented:

Advisability or necessity, however great, arising out of post-war conditions is not the same thing as, and should not be confused with advisability or necessity “by reason of the existence of real or apprehended war.” Real war had long since ceased. . . .<sup>58</sup>

The Government, moreover, had acknowledged this in recitals in subsequent Orders-in-Council repealing the greater part of its emergency war regulations.

<sup>56</sup> *Ibid.* at 270.

<sup>57</sup> *Ibid.* at 288.

<sup>58</sup> *Ibid.* at 279.

Different yet again was the dissenting judgment of Mignault J. He openly disagreed with Idington and Brodeur on the relationship of paper control to war measures. He contended that “[i]t is indeed conceivable that paper control may be very important in the national interest in the case of an emergency like war”.<sup>59</sup> Unlike Anglin, on the other hand, he was not predisposed to question the Cabinet Order despite the fact that the war had, objectively speaking, ceased by the time of its issue. He pointed out that in law a state of real or apprehended war had existed in Canada since the Royal Proclamation of August 4, 1914, which Proclamation had moreover declared that such war should be deemed to exist until the Governor-in-Council issued a further Proclamation in the *Canada Gazette* declaring otherwise. No such Proclamation having been issued, the jurisdiction of the Governor-in-Council to make the Order of January 29, 1920 on paper control “by reason of the existence of real or apprehended war” and so on could not be disputed.<sup>60</sup>

The Judges displayed a somewhat greater unanimity on the question of whether or not newsprint was a “necessary of life” within the sense of section 16 of the *Combines and Fair Prices Act*, but even here opinions and reasoning diverged in rather interesting ways. Section 16 read as follows:

16. For the purposes of this part [Fair Prices] of this Act, the expression “Necessary of life” means a staple and ordinary article of food (whether fresh, preserved, canned, or otherwise treated) clothing and fuel, including the products, materials and ingredients from or of which any thereof are in whole or in part manufactured, composed, derived or made, and such other articles of any description as the Board may from time to time by special regulation prescribe. [emphasis added]<sup>61</sup>

Idington and Duff JJ. showed little hesitation in reading down the last part of this very wide provision according to the *ejusdem generis* rule. Idington J. cited that expressly; Duff applied it implicitly in saying that in light of the rest of section 16, “the category ‘necessaries of life’ [does] not comprehend articles which are not necessarily by reason of their value required for some purposes connected with the physical life of the individual”.<sup>62</sup>

Anglin J. relied on the *ejusdem generis* rule as well, but seemed to demonstrate considerable concern in so doing. Unlike Idington and Duff JJ., he admitted that the wording of section 16 resisted such a construction:

At first blush the words “of any description” appended to the general words “other articles” would almost seem to have been inserted to indicate

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<sup>59</sup> *Ibid.* at 301.

<sup>60</sup> *Ibid.* at 296.

<sup>61</sup> *The Combines and Fair Prices Act, 1919*, S.C. 1919, c. 45, s. 16.

<sup>62</sup> *Price Brothers, supra*, note 3 at 273.

an intention to exclude the application to this section of the *ejusdem generis* rule. . .<sup>63</sup>

He nonetheless went ahead. He declared himself justified in his course for three reasons. First, there was precedent for “reading down” even the most expansive formulas granting apparently unlimited discretion; Anglin J. focussed in particular on a number of English decisions applying *ejusdem generis* to the word “whatsoever”. Second, Parliament had gone to the trouble of specifying at least some particular articles within the category “necessary of life”; Anglin J. reasoned that if Parliament had intended that the Board should be able to declare any article a “necessary” no such specifications would have been included. Third, and perhaps most significantly, he was convinced that Parliament could not have intended that a body such as the Board of Commerce would have unrestrained discretion to declare articles “necessaries” thereby rendering individuals potentially subject to criminal proceedings for accumulation or withholding of those articles under section 17:

It is to me inconceivable that Parliament meant to confer such wide and unheard of powers. I rather think that no one would be more surprised and shocked than the legislators themselves were they informed that they had done so.<sup>64</sup>

His own resolution of the problem was not ideal; even applying the *ejusdem generis* rule he recognized that the Board had the discretion “by its mere declaration to constitute criminal offences in regard to matters not specified by Parliament. . .”.<sup>65</sup> On the other hand, that was “certainly much less objectionable than the unlimited and unqualified power for which counsel representing the Attorney General contended”.<sup>66</sup>

Mignault J., although he had dissented from his fellows on the validity of the Order-in-Council appointing the Board as Paper Controller, agreed with them on the necessities point. His reasoning, however, was distinctive. Looking at section 16 he decided that, while Parliament had clearly regarded necessities of life as being *primarily* articles necessary to *sustain* life, it had appreciated that life’s requirements were in fact of infinite variety and were therefore impossible to enumerate — thus the power vested in the Board to declare to be necessities “such other articles of any description” as it might prescribe.<sup>67</sup> Application of the *ejusdem generis* rule would render this power of definition entirely meaningless and would defeat the general

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<sup>63</sup> *Ibid.* at 283.

<sup>64</sup> *Ibid.* at 286.

<sup>65</sup> *Ibid.* at 287.

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

<sup>67</sup> *Ibid.* at 292-93.

scheme of the *Act*. Yet this was not to say that the Board's discretion was necessarily unlimited. While refusing to confine necessities of life to the items (or, presumably, the types of items) specifically set out in section 16, Mignault J. asserted that the Board's power of definition had to be exercised *reasonably*. This was a rather happy compromise which appeared to preserve a wider discretion in the Board while perhaps avoiding Anglin J.'s nightmare of an arbitrary and unrestrained power creating criminal offences at whim. In the event, however, it proved fatal to the Board. Try as he might, Mignault J. could not bring himself to regard newsprint as a necessary of life:

. . . I fail to discover any possible connection between the requirements of human life and newsprint paper. It even appears almost an abuse of language to call it a necessity of life. Whatever place newspapers may occupy in modern society, . . . and however indispensable newsprint may be for educational and other like purposes, it certainly does not proximately or even remotely come within the class of things that can be used for the requirements of human life.<sup>68</sup>

Reaction to the Supreme Court decision was decidedly mixed. Newsprint manufacturers were of course elated. The trade journal of the industry lauded the outcome, commenting that "it [was] surely ridiculous to attempt a restriction of legitimate business. There are natural laws which must rule in the end."<sup>69</sup> Not so pleased were various newspapers, who — not without some conceit — queried the Court's finding that newsprint (and hence newspapers) were not necessities of life. Montreal's *La Patrie* (in an editorial conveniently translated and reprinted by the *Montreal Star*, the newspaper which had been the immediate beneficiary of the original Board order against Price Brothers) declared that without the newspaper,

the life of each individual would soon be restricted to his own surroundings. Nobody would continue to have any idea of the life of the nation. It would be returning to primitive times. There would be no more commerce, which is built up on newspaper publicity and industry would soon be ruined. It would be impossible to promulgate the laws of the legislature and of parliament without the newspapers, and without them the schools would lose half their usefulness. A man would be happier without a shirt to his back than without a newspaper.<sup>70</sup>

Yet such views were hardly unanimous. The *Montreal Gazette* (not incidentally, the *Star's* principal business rival) praised the judgment, and called for an end to "repressive regulation" in general and the repeal of the January 29 Order-in-Council in particular "so as to

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<sup>68</sup> *Ibid.* at 294.

<sup>69</sup> *Newsprint Not a Necessary of Life* (8 April 1920) PULP AND PAPER MAGAZINE OF CANADA at 365.

<sup>70</sup> *Montreal Star* (15 April 1920).

permit the business of paper manufacturers to proceed untrammelled as to prices by any other than the economic law of supply and demand". The Order, it claimed, had been a mistake in the first place - the price of newsprint "scarcely touched" the cost of living. Its editorial of April 7 declared unequivocally that the Cabinet had committed a "tactical blunder" in interposing "at the behest of a few newspaper publishers between the manufacturers and their legitimate profits".<sup>71</sup>

The members of the Board of Commerce itself put on a brave face, noting that the decision affected only the Board's jurisdiction over paper control. That the Board had been dealt something of a body blow nonetheless became evident in the House of Commons where, within a mere matter of days, a motion was introduced calling for the Board's abolition.<sup>72</sup> The motion was defeated, but comments made in the course of debate indicated that its reputation had suffered in the Price Brothers episode.

In the meantime, the *Reference* continued to hang in the balance. That it was proving problematic for the Supreme Court was already apparent. On April 6, the same day that the Court had handed down its decision in *Price Brothers*, it had ordered a partial re-hearing on the basis of a revised stated case.<sup>73</sup> The arguments made in March, it would seem, had left the Judges decidedly unhappy.

In fact, the *Reference* had proved a headache from its beginnings. Mr Justice Idington had originally refused to even set it down for hearing, denying that it reflected the circumstances of any concrete fact situation and was therefore not a proper "stated case" within the meaning of section 32 of the *Board of Commerce Act*. He had, however, referred the problem to the full court for their determination. At this stage "[a] long discussion ensued resulting in the matter being left to all those so concerned to try and agree upon the selection of a case upon which argument could properly take place".<sup>74</sup> Counsel at length agreed to proceed on the basis of the facts in a specific dispute between the Board of Commerce and particular retail clothiers in Ottawa whom the Board had ordered — in the midst of the January trouble — to desist from charging prices which, in the judgment of the Board, would yield unfair profits. O'Connor, for the Attorney General of the Dominion, stuck an appropriate typewritten memo into his original factum and the case went to argument. At the end of this the Court nonetheless remained dissatisfied, desiring a still firmer factual basis for the issues. Under the pressure of the Court's insistence, O'Connor recast his case and reduced the six original questions to two: 1) Did the Board have lawful authority to make the Ottawa Order under section 18 of the *Combines and Fair Prices Act*? and 2) Did

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<sup>71</sup> *Montreal Gazette* (7 April 1920).

<sup>72</sup> Canada, *H.C. Debates*, [1920] Vol. II at 1139-52 (12 April 1920).

<sup>73</sup> *Toronto Star* (7 April 1920).

<sup>74</sup> *Reference, supra*, note 4 at 477 (*per* Idington J.).

the Board have lawful authority to require the Registrar or other proper officer of the Supreme Court of Ontario to cause that Order to be made a rule of the Court? A re-hearing was granted to the parties on the basis of this revision.

The necessity for a re-hearing — which eventually took place on May 5 and 6 — at once complicated the Board's position in two ways. In the first place certain Judges (and in particular Idington J.) held O'Connor responsible for the procedural problem; the affair did nothing for the Court's already less than favourable perception of the Board's competence. Second, the re-hearing necessarily postponed the date of decision in the case. For the operations of the Board, the consequences of further delay were obvious. As the *Ottawa Journal* noted, "until a decision is reached, the Board is seriously handicapped in its work, the operation of several rulings it has made being held over pending the Supreme Court judgment".<sup>75</sup>

Finally, on June 1, the Supreme Court put an end to the waiting. It turned out that O'Connor had not actually lost, but neither had he won. In an unprecedented display of internal dissension on a issue of fundamental national importance, the Court split 3-3.

On the basis of the judgments which had been offered in *Price Brothers*, the alignments in the *Reference* turned out to have been somewhat predictable. Anglin, Mignault JJ. and Chief Justice Davies (the first two of whom had shown a relatively greater degree of sympathy for the Board and its empowering *Act* in the earlier case, although only Mignault J. had gone so far as to partially support the Board's jurisdiction) found that under the *B.N.A. Act* the federal Parliament had validly passed section 18 of the *Combines and Fair Prices Act*, empowering and directing the Board of Commerce (per subsection 1) to:

inquire into and to retain and prohibit, —

- (a) any breach or non-observance of any provision of this Act;
- (b) the making or taking of unfair profits for or upon the holding or disposition of the necessities of life;
- (c) all such practices with respect to the holding or disposition of necessities of life, as, in the opinion of the Board, are designed or calculated to unfairly enhance the cost or price of such necessities of life.<sup>76</sup>

and declaring per subsection 2 that:

For the purposes of this Part of this Act, an unfair profit shall be deemed to have been made when, pursuant to and after the exercise of its powers by this Act conferred, the Board shall declare an unfair profit to have

<sup>75</sup> *Ottawa Journal* (3 May 1920).

<sup>76</sup> *The Combines and Fair Prices Act, 1919*, S.C. 1919, c. 45, s. 1.

been made, and an unfair enhancement of cost or price shall be such enhancement as has resulted from the making of an unfair profit.<sup>77</sup>

Idington, Duff and Brodeur JJ. (each of whom had been decidedly cool toward the Board in *Price Brothers*) disagreed vehemently with their colleagues, holding section 18 to have been *ultra vires* the federal Parliament as an encroachment on powers constitutionally conferred on the provincial authorities.

Anglin J., speaking on behalf of Mignault J. and Chief Justice Davies as well as himself, spent the greater part of his judgment reviewing the validity of section 18 as federal legislation relating either to criminal law, to the regulation of trade and commerce or to peace, order and good government. Anglin J. notably rejected the first contention. He acknowledged that perhaps sections 17 (prohibiting the unreasonable hoarding/accumulation of the necessities of life) and 22 (imposing penalties, *inter alia*, for breach of section 17) were properly matters of criminal law; he suggested at the same time that that part of section 18 authorizing the Board to inquire into the unfair practices, the making of unfair profits or into other breaches of the *Act* might properly be regarded as ancillary criminal legislation. On the other hand, he could not bring himself to characterize as criminal or ancillary those other provisions of section 18 empowering the Board to restrain and prohibit prospective breaches of the *Act* in general, and unfair practices and profits in particular. Such provisions, he contended, involved an invasion of provincial powers over property and civil rights.<sup>78</sup>

Turning to the question of whether the same provisions of section 18 were *intra vires* the federal jurisdiction over the regulation of trade and commerce, Anglin was quick to admit that that heading had been invoked in the past "usually without success".<sup>79</sup> The Privy Council had read it down almost so far as to suggest that valid federal legislation under it could not even *affect* property and civil rights in the province. Anglin J. hesitated to adopt this view himself: ". . .if that be its real meaning 'the regulation of trade and commerce' would

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<sup>77</sup> *The Combines and Fair Prices Act, 1919*, S.C. 1919, c. 45, s. 2.

<sup>78</sup> Perhaps what really concerned Anglin J. here was what had concerned him in *Price Brothers*, *i.e.* the power of the Board of Commerce to potentially proliferate criminal offences at will. *Price Brothers* itself had established certain limits on the Board's power to do this regarding the "necessaries of life" insofar as it had decided that "necessaries" had to be restricted to the physical requirements of existence. As regards the prohibition of unfair profits or trade practices, however, no such specific categorical limits had been — or could be (at least by *ejusdem generis*) — imposed; the Board remained empowered to define those things as it wished. In this context the potential range of offences the Board could create in purporting to prohibit or restrain these things was limitless.

<sup>79</sup> *Reference, supra*, note 4 at 462.

cease to be effective as an enumerated head of federal legislative jurisdiction".<sup>80</sup> Seeking a test on which to found some sort of independent application (and by which to clearly distinguish section 91(2) from "property and civil rights in the province" under subsection 92(13)), he focussed on Viscount Haldane's words in *John Deere Plow Co. v. Wharton*,<sup>81</sup> where his Lordship had made reference to "a question of general interest throughout the Dominion".<sup>82</sup> *In abstracto* this was attractive; in practice, however, the test constituted something of an assault on the Privy Council decision in *Citizens Insurance Company v. Parsons*,<sup>83</sup> wherein it had been said that the federal power over trade and commerce was not such as to permit legislation regarding a particular trade or business.

It was nonetheless convenient in the context of the *Reference*. Anglin J. declared:

[T]he regulation of prices of necessities of life. . . may under certain circumstances well be a matter of national concern and importance — may well affect the body politic of the entire Dominion. Moreover, "necessaries of life" may be produced in one province and sold in another.

. . .

Effective control and regulation of prices so as to meet and overcome in any one province what is generally recognized to be an evil — "profiteering" — an evil so prevalent and so insidious that in the opinion of many persons it threatens to-day the moral and social well-being of the Dominion — may thus necessitate investigation, inquiry and control in other provinces. . . No one provincial legislature could legislate so as to cope effectively with such a matter and concurrent legislation of all the provinces interested is fraught with so many difficulties in its enactment and in its administration and enforcement that to deal with the situation at all adequately by that means is, in my opinion, quite impracticable.<sup>84</sup>

Anglin J. admitted that regarded in this way it would appear that section 18 of the *Combines and Fair Prices Act* might also be supported under the peace, order and good government clause. Insofar as the provision undoubtedly affected subject matters of provincial jurisdiction, however, he preferred to rely on one of the enumerated heads of federal power rather than the residual clause.

Having dealt with the jurisdiction of the federal Parliament to enact the legislation at issue, Anglin J. turned at the end of his judgment to questions pertaining to the Board itself. First, he addressed

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<sup>80</sup> *Ibid.* at 464.

<sup>81</sup> (1914), [1915] A.C. 330 at 340, 84 L.J.P.C. 64 at 71.

<sup>82</sup> *Reference, supra*, note 4 at 464.

<sup>83</sup> (1881), 7 App. Cas. 96, 51 L.J.P.C. 11 [hereinafter *Parsons*].

<sup>84</sup> *Reference, supra*, note 4 at 466-67.

the delegation problem which Symington and Hudson had raised in the March arguments. He denied that there had been any abdication of legislative jurisdiction so as to make the delegation of powers to the Board of Commerce constitutionally objectionable. What delegation there had been was moreover necessary to the legislation's purpose:

The unfairness of profits and the unreasonableness and injustice of prices, depends so largely on local conditions which vary from day to day and from place to place that Parliament could not itself deal with them by general legislation. Effective regulation of such matters can be accomplished only by some body such as the Board of Commerce endowed with the powers bestowed upon it and ready from time to time to deal promptly with the problems involved as they arise.<sup>85</sup>

Second, Anglin J. denied that the Board had been improperly constituted as a Court. He acknowledged that the obstacles to it as a court of criminal jurisdiction were formidable (given the respective wordings of subsection 91(27) — "The Criminal Law except the Constitution of Courts of Criminal Jurisdiction. . ." — and subsection 92(14) — "The Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction. . ." — of the *B.N.A. Act*), but contended that there could be no valid objection to the federal government creating such a court under section 101 ("better administration of the laws of Canada") for the enforcement of provisions relating to the regulation of trade and commerce. In the result, he deemed the Board's orders against the Ottawa clothiers at issue in the stated case to have been valid; they could, moreover, be made orders of the provincial superior court under section 26 of the *Board of Commerce Act*.

Idington J. disagreed. It was clear that the procedural problems associated with the case had troubled him considerably, and had even tempted him to dismiss it out of hand for lack of an appellant. His colleagues had nonetheless persuaded him to pass on the substantive questions. Here too, however, Idington J. turned out to be no friend of the Board of Commerce.

He began his judgment by attacking the assertion that section 18 of the *Combines and Fair Prices Act* on the one hand, and the Board on the other, were valid creations of the federal Parliament under subsection 91(27) of the *B.N.A. Act*. As to the former he denied that the existence in the ancient English criminal law of provisions against forestalling, regrating and engrossing established in the Canadian constitutional context the "criminal" nature of the legislation in dispute. Those laws had been repealed in England for almost 100 years and had been obsolete before that, having been considered, as he noted, "unsuited to a free people".<sup>86</sup> As to the Board, it could not have been

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<sup>85</sup> *Ibid.* at 472.

<sup>86</sup> *Ibid.* at 481.

validly established by the Dominion as a court of criminal jurisdiction as the Dominion had no power to establish such a thing, its power over the administration of the criminal law being restricted to the particularization of offences and of procedure. Section 101 of the *B.N.A. Act* could be of no assistance, as it could not by general words bestow upon the Dominion a power of which subsections 91(27) and 92(14), when read together, had explicitly deprived it.

As a purported court of criminal jurisdiction the Board was objectionable for yet another reason, a reason which made it, in Idington J.'s words, "quite repugnant to the ideals of British law and justice".<sup>87</sup> "This enactment which we have under consideration", he declared (referring to the *Combines and Fair Prices Act*),

constitutes the Board of Commerce the sole investigator, the sole prosecutor, and the judge to determine the facts it has discovered, or imagines it has discovered. . . .<sup>88</sup>

This was anathema, endangering individual rights and liberties to an extent which Idington J. felt was frightening. He moreover warned that "the clear separation of the legislative power from the administration of its products in relation to criminal law was not born of accident but design",<sup>89</sup> implying that to meld the two in a single body like the Board threatened the very fabric of the nation.

The *Combines and Fair Prices Act* fared little better when Idington J. considered it as federal legislation pertaining to the "regulation of trade and commerce". That claim, he said, was "extravagant". The attempt to regulate such things as the prices charged in the tailor shop and in the corner grocery required not only the exercise of powers available to the Dominion under subsection 91(2), but also all of those held by the provinces under subsection 92(13). The Dominion could not be allowed to effectively "wipe out" the entirety of the provincial jurisdiction by legislating in this manner.<sup>90</sup> The wide legislative powers delegated to the Board under section 39 of the *Board of Commerce Act* (declaring that once published for three weeks in the *Canada Gazette*, orders of the Board made on the basis of section 18 of the *Combines and Fair Prices Act*, or otherwise, should have the same force as an Act of Parliament) posed an even greater threat to the provincial jurisdiction. "Is there," Idington J. wondered out loud, "any sumptuary law or socialistic conception of organized society which could not be made to fall within the power of Parliament" by this means?<sup>91</sup> The "Confederation Act" had not been intended to be a mere

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<sup>87</sup> *Ibid.* at 487.

<sup>88</sup> *Ibid.*

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

<sup>90</sup> *Ibid.* at 488.

<sup>91</sup> *Ibid.* at 489.

sham, but an “instrument of government” assigning substantive — indeed absolute — rights to the provinces. Of those, “none were supposed to be more precious than those over property and civil rights”.<sup>92</sup>

So far as Idington J. was concerned, the “property and civil rights” aspect of the *Combines and Fair Prices Act* similarly proved fatal to the argument for federal jurisdiction based on the residual clause. “Peace, order and good government” powers could not be invoked in such circumstances, the application of the clause being confined in Idington’s view to “the extreme necessity begotten of war conditions”<sup>93</sup> and to “territory not yet given the status of a province”.<sup>94</sup> The war, however, had ended before the legislation had been passed; the rights affected were those of traders not — as Idington J. put it — in Dawson City in the Yukon, but in Ottawa, a part of the province of Ontario. In the result, the counsel for the Attorney General had no basis for his contentions; the federal Government had had no jurisdiction to pass the section of the *Combines and Fair Prices Act* in dispute, and the order of the Board pursuant to that *Act* had been made without authority.

Duff J. agreed with Idington J.’s conclusions, but his concerns and his approach differed somewhat from those of his colleague. He spoke only briefly on the lack of justification for the legislation as relating or ancillary to the federal power over criminal law. To his mind, the key issues in the *Reference* were the range of the federal “trade and commerce” and “peace, order and good government” powers respectively.

Duff J. acknowledged that as regards the scope of subsection 91(2), “[n]o precise definition of that authority has . . . been given or even attempted”.<sup>95</sup> He emphasized, however, that the thrust of the Privy Council’s decisions on the clause had been to restrict the plain meaning of its words so as to preserve some independent meaning for certain of the provincial heads of power; from these decisions could be deduced certain rules. Duff J. focussed on two of these: first, that under the section the Dominion could not regulate or legislate with regard to a particular trade or business, and second, that neither could it legislate with regard to matters substantially of local or private interest.

Turning to section 18 of the *Combines and Fair Prices Act*, Duff J. made a number of submissions. First, he noted that the provisions of that section pertaining to the accumulation or withholding of necessities extended to traders and non-traders alike. The implied sweep of the section was prodigious. He said:

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<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.* at 491.

<sup>94</sup> *Ibid.* at 490.

<sup>95</sup> *Ibid.* at 494.

it applies to accumulations by the house-holder of articles of food produced by the house-holder himself, the small farmer's pork and butter, as well as to his cordwood. It applies to the stock of coal accumulated by a railway or shipping company, or of coal or coke by a gas company or a smelting company, as well as to the coal accumulated by a coal mining company or the gas produced by a gas company; to the dairyman's as well as to the rancher's herd.<sup>96</sup>

In this context the legislation seemed to Duff J. to have less to do with the regulation of trade and commerce and more to do with property, clearly under the constitutional jurisdiction of the provinces:

Insofar as the Act authorizes the Board of Commerce to compel persons who are not engaged in trade to dispose of their property subject to conditions fixed by the Board and persons who are traders to dispose of property in respect of which they are not engaged in trade. . . I am unable to distinguish such an enactment from an enactment authorizing a Board established by Parliament to take over such property on terms to be fixed by the Board and to dispose of it itself.<sup>97</sup>

That part of section 18 dealing with the prohibition of unfair profits and trade practices did not of course have this problem. On the other hand, it ran contrary to the rules of interpretation for subsection 91(2) of the *B.N.A. Act* which Duff J. had reviewed at the beginning of his judgment. The powers of the Board under section 18 were highly specific, not just as to trades, but as to — potentially — particular traders within a trade. Duff J. found it impossible to reconcile such powers with the decided jurisprudence:

I cannot discover any principle consistent with [the conclusions in the case law] upon which an enactment delegating to a commission the authority to regulate the terms of particular contracts of individual traders in a specified commodity according to the views of the Board as to what may be fair between the individual trader and the public in each transaction, can be sustained as an exercise of [the power granted under subsection 91(2)].<sup>98</sup>

In effect, Parliament was attempting to legislate not with regard to trade and commerce but with regard to property and civil rights. Moreover, the Board's purported jurisdiction under section 18 of the *Combines and Fair Prices Act* enabled it, as Duff J. put it, to interfere with the management of local works and undertakings, properly speaking subjects of provincial jurisdiction under subsection 92(10). In this

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<sup>96</sup> *Ibid.* at 501. Looking back on the *Reference in Lawson v. Interior Tree Fruit and Vegetable Committee of Direction* (1930), [1931] S.C.R. 357 at 367, Duff J. commented: "There are few incidents of the daily economic life of private persons which the powers of the Board were not capable of reaching."

<sup>97</sup> *Reference, ibid.*

<sup>98</sup> *Ibid.* at 503.

context, the Dominion could not legitimately rely on subsection 91(2) as establishing the constitutionality of the legislation.

Federal jurisdiction over peace, order and good government was deficient here as well. Valid reliance on the residual clause presupposed first that the matter dealt with was one of “unquestioned Canadian interest and importance” as distinguished from matters merely local in one of the provinces, and second, that the legislation not trench upon provincial powers under section 92. Duff J. felt the legislation at issue in the *Reference* failed to meet these conditions, and in particular the latter. The fact that it may not have been *intended* so to operate did not alter this:

The ultimate social economic or political aims of the legislator cannot I think determine the category into which the matters dealt with fall in order to determine the question whether the jurisdiction to enact it is given by sec. 91 or sec. 92. The immediate operation and effect of the legislation, or the effect the legislation is calculated immediately to produce must alone, I think, be considered.<sup>99</sup>

Duff J. flatly refused to entertain the notion that the importance of a matter to the Dominion warranted federal legislation in areas which would otherwise be under provincial jurisdiction. That jurisdiction had to be respected and accounted for, or there would be no end to the federal power:

The scarcity of necessities of life, the high cost of them, the evils of excessive profit taking, are matters affecting nearly every individual in the community and affecting the inhabitants of every locality and every province collectively as well as the Dominion as a whole. The legislative remedy attempted by section 18 is one of many remedies which might be suggested. One could conceive, for example, a proposal that there should be a general restriction of credits, and that the business of money lending should be regulated by a commission appointed by the Dominion Government with powers conferred by Parliament. Measures to increase production might conceivably be proposed and to that end nationalization of certain industries and even compulsory allotment of labour. In truth if this legislation can be sustained under the residuary clause, it is not easy to put a limit to the extent to which Parliament through the instrumentality of commissions (having a large discretion in assigning the limits of their own jurisdiction, see sec. 16), may from time to time in the vicissitudes of national trade, times of high prices, times of stagnation and low prices and so on, supersede the authority of the provincial legislatures.<sup>100</sup>

The third Judge to find against the Board was Brodeur J. Like all of his colleagues, he denied that section 18 of the *Combines and Fair Prices Act* could be legitimately regarded as having been enacted by virtue of, or ancillary to, the federal jurisdiction over criminal law. If

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<sup>99</sup> *Ibid.* at 509-10.

<sup>100</sup> *Ibid.* at 512-13.

Parliament had intended to pass the section under this heading, it would, he suggested, have passed it as an amendment to the *Criminal Code*. In any event, the Dominion had no power to set up the Board of Commerce as a court of criminal jurisdiction, that being within the scope of provincial authority under subsection 92(14) of the *B.N.A. Act*.

Section 18 similarly failed as legislation relating to the regulation of trade and commerce. Here Brodeur J. made essentially the same point as Duff J., noting that Privy Council decisions, and especially the *Parsons* case, had indicated that that head of power was to be read restrictively so as to exclude the regulation of particular trades. Parliament could not therefore legislate with regard to trade in the "necessaries of life". Moreover, the particularity of the order at issue — relating to certain merchants in a single city — moreover precluded that from being justified under the federal residual power, as it could not be claimed to be of "Canadian interest or importance". In the result — once again — the federal legislation and the consequent order were both *ultra vires*.

The split within the Court led both sides in the litigation to claim victory. O'Connor, speaking as the Acting Chairman of the Board of Commerce, declared that the result virtually placed the matter of the Board's jurisdiction back in its own hands; the Board would continue to exercise its powers until such time as the Court could marshal a majority against it.<sup>101</sup> E.P. Trowern, the Dominion Secretary of the Retail Merchants Association, took a somewhat different lesson from events, commenting in the press that "the fact that six eminent judges of the Supreme Court. . .are unable to come to a decision upon the powers consigned by the Act creating the Board of Commerce shows that the Act is badly muddled and requires amendment at once".<sup>102</sup>

Most observers, however, could make little of the judgments. Many had expected the case to clarify the Board's status and powers and were as a result sorely disappointed. The *Toronto Star* complained that the split left "the fate of the Board as clouded in mystery as it ever was".<sup>103</sup> The *Winnipeg Free Press* referred in an editorial to "confusion worse confounded".<sup>104</sup> The *Ottawa Journal* declared that the Board was on a "legal merry-go-round".<sup>105</sup> The next step, it seemed, would be an appeal to London.

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<sup>101</sup> *Ottawa Journal* (1 June 1920).

<sup>102</sup> *Ibid.*

<sup>103</sup> *Toronto Star* (1 June 1920).

<sup>104</sup> *Winnipeg Free Press* (2 June 1920).

<sup>105</sup> *Supra*, note 102.

## III

The outright split in the *Reference* and the variations in approach which had been evident in *Price Brothers* reflected philosophical and conceptual differences among members of the Supreme Court going far beyond the level of disagreements as to the *vires* of particular legislation or the jurisdiction of a particular Board. Beneath the veneer afforded by the circumstances of the cases, the Court was divided on such fundamental issues as the appropriate functions of the state, the rights of the individual, the nature of Canadian federalism, the role of the courts and the task of law. The divisions, granted, were not always hard and fast and sometimes individuals appeared inconsistent. The Board of Commerce decisions nonetheless made it clear that the Judges of the Court were not altogether of one mind. Regarded in a broader context, the decisions further suggested that far from being a static institution, the Court in this period was in the process — albeit by now in the last stages — of a transformation which was having an important impact on its behaviour, and in particular on its relationship with government.

Ultimately, the differences among the members of the Court were differences about values — in particular, the respective worths of Man (the individual) and the state (the community). Idington, Duff and Brodeur JJ., for instance, were very much animated by faith in the capacity of individuals to advance and benefit themselves and society and by a concomitant concern for their rights.<sup>106</sup> In the *Board of Commerce Reference*, these things had revealed themselves directly as an aversion to compulsion of the individual by the state and a willingness to confine the power and discretion of state instrumentalities so as to limit the potential extent of that compulsion. Similar considerations had encouraged the same men to deny federal authority over such undertakings in favour of provincial jurisdiction.

The aversion to compulsion was most apparent in the *Reference*. It will be recalled that Idington J. had spoken of the old English criminal laws of forestalling, regrating and engrossing — the trading laws which O'Connor had cited as precedent for the alleged “criminal” nature of the *Combines and Fair Prices Act* — as having been “unsuited to a free people”.<sup>107</sup> He had raised the spectre of a “socialistic conception of organized society” realized through the actions of the Board.<sup>108</sup> Duff J. explicitly characterized section 18 of the *Combines and Fair Prices Act* as compelling traders and non-traders alike to

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<sup>106</sup> In *Weidman v. Shragge* (1911), 46 S.C.R. 1 at 27, *e.g.*, Idington J. had written: “every step taken in the past to enlarge the bounds of human freedom of thought and action has stimulated discovery and invention”.

<sup>107</sup> See *supra*, note 4 at 481.

<sup>108</sup> *Ibid.* at 489.

dispose of their property on terms to be decided by the Board, such amounting in fact to confiscation. He referred repeatedly to the "interference" in the management and contracts of local undertakings represented by the *Act*, and even went so far as to suggest that its application could lead ultimately to "nationalization of certain industries and even compulsory allotment of labour".<sup>109</sup> Brodeur J. as well referred to the legislation as "forcing the merchants to sell their goods at a certain price".<sup>110</sup>

The threat to individual autonomy posed by the substantive aspect of the legislation was exacerbated by the range of powers apparently allowed the Board for implementation of it. Idington J. in particular emphasized the combination of functions in the hands of the Board. Parliament had delegated to it the power to make regulations and, in addition, had designated it "the sole investigator, the sole prosecutor and the judge" of the facts constituting breach of those regulations. Idington J. found this association of legislative and administrative authority objectionable.<sup>111</sup> Duff J. was concerned as well, although less by this problem than by the general notion of commissions "having a large discretion in assigning the limits of their own jurisdiction".<sup>112</sup>

Coincident with their desire to protect individual rights was the desire of Idington and Duff JJ. (and Brodeur J. as well) to protect provincial jurisdictions from federal encroachment, and in particular the provincial jurisdiction over "property and civil rights" which they feared might be (recalling Idington J.'s words) "wiped out" by the operation of the *Combines and Fair Prices Act*.<sup>113</sup> Immediately at stake here was a vision of Canada. Idington, Duff and Brodeur JJ. clearly regarded the country in provincialist terms — Duff J. had once gone

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<sup>109</sup> *Ibid.* at 513.

<sup>110</sup> *Ibid.* at 519.

<sup>111</sup> *Ibid.* at 487. Idington J.'s concern for separation of functions and powers was typical of his thought. In *Re References by the Governor-in-Council* (1910), 43 S.C.R. 536 at 582, he insisted that "[t]he legislative, executive and judicial functions of government must be kept separate if we are to maintain the principles of government we enjoy". Compare Idington J. in *Re Legislation Respecting Abstinence from Labour on Sunday* (1905), 35 S.C.R. 581 at 603. Idington J., however, was alone on the Court in his insistence — his concerns, derived primarily from American legal philosophy, were not obviously shared by either Duff or Brodeur JJ., and certainly not by Anglin, Davies or Mignault JJ. See *infra*, note 128.

<sup>112</sup> See *supra*, note 4 at 513.

<sup>113</sup> *Ibid.* at 488.

so far as to explicitly characterize the *B.N.A. Act* as a “compact”.<sup>114</sup> Like individual autonomy, provincial autonomy required that set boundaries be strictly respected, this time between federal and provincial jurisdictions as much as between the spheres of the state and the individual. The elimination of these boundaries would bring chaos and, perforce, the destruction of the political system as “autonomy” would no longer be a meaningful concept.

In the face of the Board of Commerce legislation, Idington, Duff and Brodeur JJ. had looked to common and constitutional law doctrines for the purpose of setting limits to power. This was not, however, a simple matter of cynical manipulation of legal precepts for personal philosophic ends. Duff and Brodeur JJ. in particular believed in doctrine, insisting that it mattered and was in fact determinative. Answers to legal questions could be found in the case law if it were analyzed with a view to sifting out rules and principles which could then be applied to new situations. To this extent, law was a scientific enterprise in the sense of being an internally coherent logical construct. Thus, Duff J.’s judgment in the *Reference* had begun with a ringing declaration that “some definite limiting rules are deducible from the decided cases”.<sup>115</sup> These rules as much as any substantive biases (presuming these things to be separable for the moment), informed Duff J. and his colleagues that the Board of Commerce had to be restrained. In *Price Brothers* Idington and Duff JJ. had achieved this

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<sup>114</sup> *Reference re Marriage Laws* (1912), 46 S.C.R. 132 at 397. In *C.P.R. v. Ottawa Fire Insurance Co.* (1907), 39 S.C.R. 405 at 438, Idington J. argued that “Confederation was begotten of the intense desire, perhaps need, of Upper and Lower Canada, for provincial autonomy”. In *Bonanza Creek Gold Mining Co. v. R.* (1915), 50 S.C.R. 534 at 558 he noted that:

The vast extent of Canada and diversity of its natural resources, render in many cases the promotion at Ottawa of legislation only subservient to local needs, almost an impossibility, and even where not impossible, very likely to lead to something less efficacious than what might be obtainable if a local legislature were appealed to.

Speaking more generally, he concluded in *Anderson v. South Vancouver (Municipality of)* (1911), 45 S.C.R. 425 at 432:

if any one who had made a study of our whole frame of government were asked to point out in what single feature it is most distinguishable from all forms that have gone before he would put his finger on the distribution and decentralization of its powers and the localization thereof so as to bring each part, in such measure as may be practicable, as near to the people to be served as it is possible to do.

This last *dictum* reflected the link between provincialism and individualism in the minds of Idington J. and his colleagues — a government which was closer to the people in this way would be more responsive to the wants and needs of individual electors, and would at the same time be more easily held in check by them.

<sup>115</sup> See *supra*, note 4 at 494.

in part by applying the *ejusdem generis* rule to the Board's literally complete power to define the "necessaries of life", thereby confining the potential subjects of its authority to life's "physical requirements".<sup>116</sup> On the constitutional level, as regards the Board's powers over prices and profits at issue in the *Reference*, Idington, Duff and Brodeur JJ. had found limits in Privy Council decisions confining the meaning of "trade and commerce" so as to give substance to the provincial head of "property and civil rights within the province". Provincial autonomy was preserved; in the absence of any provincial scheme like that contemplated by the federal legislation, individual rights were protected.

Justices Anglin, Davies and Mignault had been rather less concerned with such rights and provincial autonomy. Their judgments contained no paeons to the state, but they had nonetheless been prepared to allow the legislature and its instrumentalities a greater degree of "interference" in the lives and business of the citizenry. In sum, they seemed less convinced of the individual's social omnipotence and omnicompetence, more concerned with the efficient solution of important social problems and more prepared to defer to authority purporting to be engaged in such solution. In *Price Brothers*, for instance, it will be recalled that both Anglin and Mignault JJ. (implicitly and explicitly, respectively) had supported paper control and price fixing as a legitimate wartime function of government where Idington and Brodeur JJ. most certainly had not. Mignault J. had even been willing to tolerate a continuation of controls despite the fact that in objective terms the war had ceased. In the *Reference*, Anglin J. (on behalf of himself, Davies and Mignault JJ.) had emphasized the danger posed to the community by profiteering ("an evil so prevalent and insidious that in the opinion of many persons it threatens today the moral and social well-being of the Dominion"<sup>117</sup>) and had insisted upon effective action to remedy the situation. His finding that the *Combines and Fair Prices Act* fell within the range of federal rather than provincial jurisdiction had been, at least in part, explicitly dependent on the consideration that "[n]o one provincial legislature could

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<sup>116</sup> See *supra*, note 3 at 273.

<sup>117</sup> See *supra*, note 4 at 467.

cope effectively with such a matter".<sup>118</sup> In a more general sense, the broad construction given to the federal powers over trade and commerce and peace, order and good government had similarly been an attempt to ensure that social needs did not go unattended for want of a sufficiently powerful agent to meet them in the public interest. Anglin J. and his fellows exploited apparent indeterminacies in the case law so as to avoid precedents which threatened to defeat this end. The sense of a need for limits, so strong in the judgments of Idington, Duff and Brodeur JJ., was for the most part absent.

Yet the apparent alignments were not entirely opposed. Justices Anglin, Davies and Mignault shared a basic language of legal discourse with their colleagues, subscribed to a broadly similar (if sometimes not quite as rigorous) common law methodology and had at least some of the same substantive concerns, although relatively graver perils to the individual were required to provoke them into action. In *Price Brothers*, for example, both Anglin and Mignault JJ. had been wary of absolute discretion in the hands of a single administrative Board, at least as that threatened to result in the indiscriminate imposition of criminal sanctions on individuals. As well, Anglin J. had appeared to demonstrate a limit to his willingness to have individual rights of contract and property subject to government control; in focussing in that case on the fact of the war's end he had perhaps implied that paper control at least was not a legitimate function of the

<sup>118</sup> *Ibid.* Compare e.g., Anglin J.'s approach to the problems of regulation and federalism in the *Reference* with his approach in *Montreal Street Ry. Co. v. Montreal (City of)* (1910), 43 S.C.R. 197 at 254. Speaking on the control of "through traffic" on rail lines, he said:

It seems clear that a provincial legislature cannot alone deal with this subject, because in no circumstances can it legitimately enact "railway legislation" affecting a federal railway. . . . Joint or concurrent legislative control. . . would be so uncertain and subject to so many difficulties and contingencies that it might often result in failure to make provisions necessary for the regulation of such traffic. It seems to follow that only legislative jurisdiction vested exclusively in Parliament can effectually provide for "through traffic".

Contrast with this the separation of functional and legal considerations evident in the following excerpt from Duff J.'s judgment in *Reference re Natural Products Marketing Act*, [1936] S.C.R. 398 at 422-23, wherein he recalled the *Board of Commerce Reference*:

Nobody denied the existence of the evil [of hoarding and high prices]. Nobody denied that it was general throughout Canada. Nobody denied the importance of suppressing it. Nobody denied that it prejudiced and seriously prejudiced the well being of the people of Canada as a whole, or that in a loose, popular sense of the words it "affected the body politic of Canada." Nevertheless, it was held that these facts did not constitute a sufficient basis for the exercise of jurisdiction by the Dominion Parliament . . . in the manner attempted.

state at peace. Clearly, however, the similarities had not gone so far as to negate the differences; those remained significant, and therefore call for some measure of explanation.

It may be argued that the inconsistencies in approach manifest among members of the Supreme Court in the Board of Commerce cases reflected a confrontation within the Court between two competing visions of law; one newly dominant, the other in decline. The dominant vision — that shared by Idington, Duff and Brodeur JJ. — had been imported to Canada from late nineteenth century England, and was the more modern of the two. The other view of law — arguably apparent in the judgments of Anglin, Davies and Mignault JJ., but even in them somewhat qualified by aspects of the dominant vision — was more traditional, being principally a philosophic holdover from the colonial past.

The older vision could be traced back to the country's juristic beginnings. In Upper Canada, for example, men such as Sir John Beverley Robinson, Chief Justice of the colony from 1829-1862, had shared a conception of law and the judicial enterprise which did not insist on harsh distinctions between "law" and "policy" or between "public" and "private".<sup>119</sup> They interpreted legislation more on the basis of its spirit than its text, and were as much concerned with implementation as construction.<sup>120</sup> They regarded the common law as more a manifestation of a robust natural reason than a simply positivist aggregation of specific decisions, and demonstrated a significant eclecticism in their reception of American and even civil law jurisprudence.<sup>121</sup> They relied less on "binding" as on "persuasive" authority — precedent for them was not so much the law itself as it was evidence of law, to be parted from if suspected of error.<sup>122</sup> Principles in this context were not purely a distillation of decided cases — in sum, the system of legal decision was more deductive than inductive.

Judges educated in this tradition demonstrated faith in and deference to the authority of the state, and insisted upon the priority of the public good in the interpretation and application of law when that good conflicted with individual rights. "Private interests and convenience", Robinson J. asserted in *Phillips v. Redpath*, "must. . .yield to the public welfare."<sup>123</sup> Robinson J. and his colleagues were notably

<sup>119</sup> For extended considerations of Robinson J.'s legal thought, see P. Brode, *SIR JOHN BEVERLEY ROBINSON: BONE AND SINEW OF THE COMPACT* (Toronto: University of Toronto Press, 1984); D. Howes, *Property, God and Nature in the Thought of Sir John Beverley Robinson* (1985) 30 *McGILL L.J.* 365; B.J. Hibbitts, *Progress and Principle: The Legal Thought of Sir John Beverley Robinson* (1989) 34 *McGILL L.J.* 454.

<sup>120</sup> See, e.g., *Bell v. Ley* (1844), 1 U.C.Q.B. 9 at 11.

<sup>121</sup> See, e.g., *Starr v. Gardner* (1843), 6 O.S. 512 at 523; *Bank of British North America v. Ross* (1844), 1 U.C.Q.B. 199 [hereinafter *Ross*]; *McKinnon v. Burrows* (1834), 3 O.S. 590.

<sup>122</sup> See, e.g. *Ross*, *ibid.* at 210.

<sup>123</sup> (1830), *Draper's Reports* 68 at 72.

supportive of public officials and tribunals exercising discretion in the discharge of a legislative mandate. In *Doe Dem. Malloch v. H.M. Ordnance*, for example, Robinson J. considered military officers' discretion over appropriation of property for the construction of the Rideau Canal:

We cannot doubt that the legislature intended, that the[ir] discretionary powers. . .should be such as would enable them to carry out the design. . . . Although there might possibly be such an evident abuse of the powers given by the statute. . .it has always appeared to me, that wherever there could be said to be any room for question as to the necessity [of action], it ought to be assumed that the public officers had used their discretion fairly and in good faith, in which case, the question of the land being necessary or not necessary [for the project] must be governed by their judgment and not by the judgment of any court. . . .<sup>124</sup>

In another case, *Mittleberger v. By*, Sherwood J. had come to a similar conclusion:

The powers conferred on the agents of the government, for the purpose of constructing the Rideau Canal, are certainly very great, for they may take the property of private persons without their consent, to advance the public service. Many consider this law unjust. . . . I cannot say that I am of this opinion; I think the canal, when completed, will give general satisfaction, and no public work based on such an extensive plan could ever be accomplished, without vesting the servants of the government with powers in some degree proportionate to the difficulty of its execution, and the importance of its objects.<sup>125</sup>

The Judges' support for the state and their concern for policy was reinforced by the social position which they enjoyed in the colony. Most were part of the Family Compact, that group of tightly-knit (and oftentimes related) individuals who in fact ran the colony. Robinson J. was the very "bone and sinew" of that group.<sup>126</sup> In the result, neither he nor his colleagues on the bench possessed a keen sense of "separation of powers". The judicial-executive alliance made the judges — in the prevailing intellectual climate which predisposed them to the

<sup>124</sup> (1848), 3 U.C.Q.B. 387 at 388-89. Compare with *Re Barclay and the Municipality of Darlington* (1855), 12 U.C.Q.B. 86 at 92:

the tribunals of the country. . .must be relied upon for exercising a just and sound discretion. It will not often be found difficult to draw the line, and it may be safely assumed that wherever there is fair ground of doubt. . .the inclination will always be to let the by-law operate, and leave it to the legislature to interpose, if they see a necessity.

<sup>125</sup> (1832), 2 O.S. 379 at 381.

<sup>126</sup> The phrase "bone and sinew. . .of the. . .compact" was originally applied to Robinson by W. Reid writing to Robert Baldwin in 1849. See Brode, *supra*, note 119 at 249.

state in the first place — even more sensitive to matters of public as opposed to private concern. Not incidentally, legal decisions were made in the process which advanced the interests of the colonial elite.

By the 1870s, however, this approach and the structure of values and attitudes that underlay it was beginning to come apart. The challenge came from an English legal liberalism responding to a rising socialist challenge at home.<sup>127</sup> Under the pressures of the extended franchise the English State — after a period of comparative quiescence in mid-century — had come alive, and had begun to intervene in the nation's social and economic life to an extent not seen since the seventeenth century. With Leviathan stirring, liberal-minded legal academics — such as Frederick Pollock and A.V. Dicey — began an attempt at systematization of the somewhat piecemeal liberal-individualist achievement in law that could withstand and perhaps even turn back the rush of the oncoming state. This systematization had a profound impact. Suddenly the law was more cohesive, rational, scientific. This was a boon to the legal profession, for which the systematization represented a new source not only of pride in the scientific age but of power as well. More importantly, the consolidation of law on firm individualist principles created a considerable potential obstacle to state action in the interests of the collectivity.

In the new liberal vision of law the role of the judiciary was limiting and restraining. Its duty (now more than ever) was to protect the individual, the ultimate creative and responsible force in society, against the state. Law was the critical boundary between the two, shielding the one from the power of the other and defining the parameters of their respective spheres. This was accomplished by the rigorous application of fixed rules and principles derived from precedent and practice. State legislation affecting the rights of individual parties was to be construed strictly according to these rules. Statutes using specific words were to be read according to the plain and natural meanings of those words. Statutes more broadly phrased were to be interpreted in light of individualist common law presumptions; Parliament was not to be presumed to have limited or restricted private rights unless the contrary was made absolutely clear. Administrative discretion was to be restrained in the name of the rule of law.<sup>128</sup> On the level of federalism, jurisdictional boundaries between the two

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<sup>127</sup> On the late nineteenth century revolution in English legal thinking, see, e.g., D. Sugarman, *The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science* (1983) 46 MOD. L. REV. 102; see also Sugarman, *Legal Theory, the Common Law Mind and the Making of the Textbook Tradition* in W. Twining, ed., *LEGAL THEORY AND COMMON LAW* (Oxford: Basil Blackwell, 1986) 26.

<sup>128</sup> See, e.g., A.V. Dicey, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION*, 8th ed. (London: Macmillan & Co., 1915).

principal levels of government were to be strictly enforced so as to preserve the necessary degree of constitutional "balance".<sup>129</sup> In this context it became clear that judges were not to concern themselves with actual legislative intent above and beyond the statutory language used to express it. They were not to have regard to the general aims of the legislator or to the social consequences of particular interpretations. They were, in sum, to separate considerations of law and policy and keep them separate.

The new legal liberalism had a profound impact on the colonial juristic tradition. Three factors contributed to this impact. First, the new legal philosophy proved as potent in Canada as in England as a scientific construct and an appeal to professional power. Second, it was coincident with a newly vigorous English imperialism which, taking advantage of new technologies such as steam transport and the trans-Atlantic telegraph, drew Canada closer to England and English ideas in the last quarter of the century. Third, it provided an ideological refuge for jurists concerned with the progress of democracy in Canada and the redistributive implications of that for future social and economic policy. In the result, traditional Canadian legal conceptions began to give way. To an increasing extent those became but a philosophic undercurrent in the thinking of judges who could only be described as basically "liberal" in their legal methodology and jurisprudential orientation.<sup>130</sup>

Yet the old ideas did not disappear. Some Canadian judges continued to insist upon the importance of a broad approach to matters of legislative policy and perceived national importance, refusing to blind themselves to social needs and rely solely on individualist-oriented rules of statutory interpretation and construction. Continued trust in legislative authority and the beneficent power of the state was facilitated by an ongoing close social and professional association between key members of the political and judicial elites.

Both English legal liberalism and the Canadian pre-classical tradition were arguably apparent in judgments of the Supreme Court of

<sup>129</sup> *Ibid.*

<sup>130</sup> In the particular context of Ontario, Blaine Baker has recently suggested that:

During the decades straddling the turn of this century the provincial bar quickly was being transformed into a pillar of Empire characterized by zealous transcription of English legal literature, mechanical jurisprudence. . . and an apparently rudderless "search for authority".

G.B. Baker, *The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire* (1985) 3 L. AND HISTORY REV. 219 at 274-75. See also D. Howes, *Book Review*, (1986) 35 U.N.B.L.J. 231 at 234, wherein Howes, following Baker, commented that between 1890 and 1920 "[a] veritable 'celebration of precedent and particulars' (case law and fact patterns) replaced the thoughtful exposition of principles characteristic of Robinson and his cohort".

Canada from the establishment of the Court in 1875. Traditionalism seemed influential in such early constitutional judgments as *Severn v. R.*,<sup>131</sup> *Fredericton (City of) v. R.*<sup>132</sup> and *Reference re Prohibitory Liquor Laws*.<sup>133</sup> In these cases most members of the Court — and in particular Justices Richards (Chief Justice, 1875-1879), Taschereau (1878-1902; Chief Justice 1902-1906), Gwynne (1879-1902) and Sedgewick (1893-1906) — showed a faith in the state (in its most powerful federal aspect) and a sensitivity to legislative intent, to economic, political and social conditions, to American case law and to the consequences of their decisions which compared favourably with the approach adopted by such judges as Strong (1875-1892; Chief Justice 1892-1902) and, to a lesser extent, Ritchie (1875-1879; Chief Justice 1879-1892), both of whom seemed more concerned with the preservation of an abstract “balance” between the federal and provincial levels of government and the meanings of isolated words in the *Imperial Act*. Time and the Judicial Committee nonetheless combined to undermine the traditional position; doctrine hardened to the point where even judges with traditional sympathies found it difficult to avoid “liberal” conclusions. In fields more constitutionally secure — such as railway regulation — certain justices (notable among them, Anglin and Davies JJ.) continued to demonstrate a sensitivity to external conditions and public need, and a concomitant faith in the State and its instrumentalities,<sup>134</sup> but even here they were forced to struggle with others (notable among them, Idington and Duff JJ.) who wished to place stricter limits on the power of government in the interest of individual rights of property and contract.<sup>135</sup> By the eve of the Great War the pre-classical Canadian legal tradition was very much a philosophy in retreat.

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<sup>131</sup> (1878), 2 S.C.R. 70.

<sup>132</sup> (1880), 3 S.C.R. 505.

<sup>133</sup> *Supra*, note 1.

<sup>134</sup> See, e.g., Anglin J. in *Montreal Street Ry. Co. v. Montreal (City of)*, *supra*, note 118; and in *Hamilton (City of) v. Toronto, Hamilton and Buffalo Ry. Co.* (1914), 50 S.C.R. 128 at 148. Compare Davies J. in *Grand Trunk Ry. Co. v. McKay* (1903), 34 S.C.R. 81 at 94; and in *Grand Trunk Ry. Co. v. Department of Agriculture of Ontario* (1910), 42 S.C.R. 557 at 563. For an extended analysis of the railway cases and their place in the transformation of Canadian legal thought discussed here, see B.J. Hibbitts, *A Change of Mind: The Supreme Court of Canada and the Board of Railway Commissioners, 1903-1929* (1990) 40 U.T.L.J. [forthcoming].

<sup>135</sup> See, e.g., Idington J. in *Montreal Street Ry. Co. v. Montreal Terminal Ry. Co.* (1905), 36 S.C.R. 369 at 386 and in *Montreal Street Ry. Co. v. City of Montreal*, *ibid.*; see also Duff J. in *Grand Trunk Ry. Co. v. Department of Agriculture of Ontario*, *ibid.* at 570; and in *Hamilton (City of) v. Toronto, Hamilton and Buffalo Ry. Co.*, *ibid.* at 139. It would be wrong, however, to suggest that despite their basic philosophic sympathies with one another, Idington and Duff JJ. were identical in their legal thinking. They clearly were not. Intellectually Idington J. was a mid-nineteenth century domestic Reformer whose legal liberalism was more American and less methodologically sophisticated than Duff J.'s, although he often took similar advantage of the late nineteenth century individualist achievement in English law to make his legal points.

The War itself — as would perhaps have been expected — was something of a turning point. The exponential growth of government which took place from 1914 to 1918 posed a fundamental threat to the values of legal liberalism.<sup>136</sup> Criticism and judicial censure were, granted, restrained somewhat during the actual conflict (although in July 1918 both Idington and Brodeur JJ. showed a willingness in *Re Gray*<sup>137</sup> to limit the powers granted to the Cabinet under the *War Measures Act*). In the aftermath, however, liberal judges were keen to ensure the restoration of individual rights as soon as possible.

In this context the Board of Commerce legislation was passed at precisely the wrong time. The Board and its powers represented an unprecedented peacetime challenge to individual rights of contract and property. In practice (and one may safely assume that the Judges read the papers) the Board had demonstrated aggressiveness in the discharge of its mandate to the obvious detriment of a variety of private interests. Legal liberals like Idington, Duff and Brodeur JJ. — already troubled

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<sup>136</sup> Legal liberalism's perceived predicament was expressed by Sir James Aitkins, President of the Canadian Bar Association, in his address to the 1919 Annual Meeting:

State paternalism is increasing. . . [G]overnment or laws regulating in detail the individual's conduct are being substituted for personal character and responsible will. . . . [F]or Canadians, the law should fix the minimum demands of social and business duties. [A]ll requirements between that and the perfect law of liberty should be left to the enlightened conscience and Christian character of the individual. If, in the ultimate, Christian democracy rests upon the moral character and the individual qualities of its citizens, clearly the first aim of all law should be to develop the highest hope of human entity, and as far as is consistent with the rights of others leave him unfettered in thought and action.

Sir James Aitkins, K.C., *Address of the President* 4 MINUTES OF PROCEEDINGS OF THE CANADIAN BAR ASSOCIATION, 1919 (Winnipeg: Douglas-McIntyre Printing and Binding, 1920) at 84. The concerns of liberal-minded lawyers and judges were but indicative of more general fears arising from the scientific and philosophical turmoil of the age. In particular, legal liberals looked with foreboding on the incipient collapse of an intellectual universe based — as was their law — on fixed principles and certainties. In the same 1919 speech, Aitkins lamented:

Mathematics and physics are in danger of losing their reputation for exactitude. In economics, professors have arisen who declare [that] the principles of Adam Smith and Mill are quite unsound. Moral philosophy is being invaded by such revolutionary ideas as "there are no definite absolute rights".  
*Ibid.* at 81.

<sup>137</sup> (1918), 57 S.C.R. 150. *Per* Idington J. at 165:

The delegation of legislation in way of regulations may be very well resorted to. . .but a wholesale surrender of the will of the people to an autocratic power is exactly what we are fighting against.

by the experience of the war and further alarmed by the rise of international Bolshevism (as suggested by their references to socialism and nationalization) — were nothing short of aghast. Even Anglin J., generally of a more traditional persuasion, had difficulty reconciling himself with the range of powers at the Board's disposal.

While the Board of Commerce posed a challenge to the liberal vision of law, however, it equally posed a challenge to the traditional vision — or at least what remained of it. Here was legislation which aimed at the resolution of important economic, social and even moral problems of national dimension. That the solution proposed was rather extreme in its impact on individual rights there could be no doubt, but the community good arguably necessitated such measures. Traditional legal values dictated that the legislation be supported for the betterment of all.

The failure of the Board of Commerce to garner the support of a majority of Judges before the Supreme Court in the *Reference* represented the ultimate failure of the Canadian pre-classical tradition. In the wake of the cases it was clear that that tradition was no longer even capable of rallying in successful defence of the most significant public-interest legislation. For the very first time, legal liberalism had shown itself sufficiently strong to compromise a major regulatory initiative. The "tie" in the *Reference* may have seemed innocuous enough, but coming on the heels of the Court's treatment of the Board in *Price Brothers*, and in a political environment where the Board was being subjected to increasing criticism, the failure of the Court to actually support the Board rapidly proved fatal.

#### IV

Despite his public proclamation of victory, W.F. O'Connor realized that the uncertainty caused by the split in the Supreme Court would do the Board of Commerce no good. In particular he appreciated that an appeal to the notoriously-provincialist Privy Council would probably result in rejection of the Board's jurisdiction. In the days following the Supreme Court decision (if such it could be called), such considerations prompted him to recommend revisions to the *Combines and Fair Prices Act* which would place the Board on a firmer footing. Writing to Prime Minister Borden on June 5, he asked that an amending Act be introduced in the House of Commons which would, as he put it,

solve the deadlock in the Supreme Court of Canada as to the jurisdiction of the Board. If the legislation had been enacted on its face as criminal law and part of the Criminal Code it would never have been questioned. . . . In order to save the effect of the opinions of the Chief Justice and Justices Anglin and Mignault that the Combines and Fair Prices Act may be supported as well as an Act for the regulation of trade and commerce, I recite in the legislation recommended that the Act is one for the

regulation of trade and commerce which is designed to be administered under the sanctions of and as part of the criminal law.<sup>138</sup>

O'Connor's proposal was remarkable for its simplicity, not just of execution but arguably also of mind. It would seem that O'Connor had read the Supreme Court judgments but had not understood them, and in particular had not understood that the objections to the legislation went far deeper than a mere declaration of purposes could remedy. Determined judges such as Idington, Duff and Brodeur JJ. — or their counterparts on the Privy Council — would hardly have been placated so easily. Rather, they would likely have noted the declaration of purpose, proceeded to examine the substance of the statute, decided that in fact it was but a colourable attempt under the guise of the criminal law to legislate with regard to property and civil rights in the province, and would once again have found the provisions of the *Act ultra vires* Parliament.

Whether or not Borden appreciated the shortcomings of O'Connor's proposal is not entirely clear; in any event, he was not predisposed to intervene. The Board had already proved to be something of an embarrassment to the Government; in this context the Prime Minister seemed perfectly willing to let the Board's empowering legislation stand until such time as a court decision could extricate him from the situation. O'Connor found Borden's attitude unacceptable, and rather than stay on as captain of a sinking ship, resigned his office as acting Chief Commissioner on June 15.

O'Connor's resignation left the one remaining Commissioner, James Murdock, feeling exposed and beleaguered. Within ten days he too was gone. His exit caused quite a stir, and once again the Board became a subject for debate in the House<sup>139</sup> and controversy in the press. The Government nonetheless felt that in the face of public opinion, the actual abandonment of the experiment was premature. It therefore decided to appoint three new Commissioners to the Board, giving it life for a second time. Very much aware of their predecessors' fate, the new Commissioners undertook to be as innocuous as possible. They acknowledged that the attack on the Board's jurisdiction under the fair prices section of the *Combines and Fair Prices Act* and the appeal of the *vires* of that legislation to London forced (at least in the short-term) a "certain re-shaping of policy".<sup>140</sup> Until such time as the Privy Council rendered a decision, the Board decided to concentrate on enforcing the *Act's* anti-combines provisions rather than those pertaining to prices and profits. They concurrently declared in a press statement that "it will be the policy of the Board to refrain from

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<sup>138</sup> PAC, *Board of Commerce Papers* RG 36/6, v.13.

<sup>139</sup> Canada, *H.C. Debates*, [1920] Vol. V at 4467-4501 (29 June 1920).

<sup>140</sup> PAC, *Board of Commerce Papers* RG 36/6. Undated press notice.

needlessly harassing the financial and commercial interests of the country".<sup>141</sup>

Unfortunately, circumstances conspired to thwart the Board yet again. Insofar as the *Combines and Fair Prices Act* remained on the statute-book in full force pending the Privy Council decision, the Board could not entirely avoid acting under its fair prices sections. On October 15, the Board exercised its powers under Part II of the *Act* and set the price of sugar at 21 cents a pound. This, however, was an order with a difference. It was intended not to prevent a price increase, but rather to forestall a price drop. Members of the Board doubtless realized the trouble such an order might cause, but they felt themselves compelled to act under the terms of an order which had been issued by O'Connor and Murdock in June in which they had committed the Board to protecting traders in a falling market as well as consumers in a rising one.<sup>142</sup>

The Board's action unleashed a veritable torrent of public protest. Criticism poured in from across the country, calling not only for the Government to rescind the order of October 15, but furthermore for it to abolish the Board. The new Meighen administration was shaken. The Cabinet suspended the order and publicly expressed doubt as to whether it had been properly made within the range of the Board's jurisdiction. In sum, it attempted to distance itself from the Board and its decision as much as possible.

The Government's action forced the Board's hand. Bereft of support from either Cabinet or public, the new Commissioners resigned *en masse* on October 22. This time, the Government showed itself disinclined to persist in the charade of profit and price-fixing. Rather than appoint a third set of Commissioners, Meighen instructed the Board's erstwhile head, William White, to wrap up outstanding business and dispense with superfluous office help. The appeal to London was still undecided, but in a sense it no longer mattered; for practical purposes, the Board of Commerce was no more.

Why had the Board failed? By October 1920 it was of course painfully obvious that it had by its action or inaction succeeded in alienating businessmen, the public, and even the politicians who had created it.<sup>143</sup> The reasons for its failure differed with each dissatisfied constituency. The Board had been a disappointment in the eyes of the business community as it had not turned out to be a "businessman's court" for the resolution of their own problems and the general advancement of commerce. Instead, it had been "subverted" by individuals intent on (to quote the *Financial Post*) "silly gallery-playing

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<sup>141</sup> *Ibid.*

<sup>142</sup> Traves, *supra*, note 12 at 64.

<sup>143</sup> See generally W.C. Clark, *The Board of Commerce (1920-21)* 28 QUEEN'S QUARTERLY 304.

and appeals to the mob”<sup>144</sup> and had undertaken an aggressive price and profit-fixing role which was considered to be not only harmful to business but, in a broader economic sense, “fundamentally unsound” as well.<sup>145</sup> The public was disappointed as the Board had in fact achieved little or no reduction in the high cost of living, and in the end had the gall to keep prices up instead of trying to keep them down. The Government found the Board an embarrassment to the extent that the commission’s performance had disappointed the other groups.<sup>146</sup> The Government had, however, brought its problems on itself insofar as the legislation establishing the Board had reflected rather ambivalent aims, and had not been part of a coherent plan either for economic reconstruction or post-war commercial initiative.<sup>147</sup>

From a legal perspective, it was also apparent that the Supreme Court decision against the Board in *Price Brothers* and its split in the *Reference* had proved problematic and had hastened the end. *Price Brothers*, although a decision of limited application, had created an atmosphere of serious legal doubt concerning the legitimacy of the Board and its actions and had encouraged further criticism and challenge which might have been muted by a more supportive outcome. In the words of Chief Commissioner Robson, writing to Sir George Foster prior to the argument in that case,

until tribunals of this nature have been supported in their jurisdiction by judgments of our Supreme Courts, they are not apt to receive the desired respect from the classes affected. [This is] particularly so in the case of [a] radical enactment such as that administered by the Board of Commerce.<sup>148</sup>

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<sup>144</sup> *Financial Post*, (9 July 1920).

<sup>145</sup> *Ibid.*

<sup>146</sup> In June 1920, in the wake of the Murdock resignation, Sir George Nicholson, the former Chairman of the Commons Special Committee which had recommended the establishment of the Board, complained:

[T]he members of that board, particularly Mr. O’Connor and Mr. Murdock, totally misapprehended its proper functions. . . . [T]he conclusion [of the Committee] was that it should be a board functioning along lines similar to the Board of Railway Commissioners; that, if any citizen of this country had a grievance against another citizen, or against a group of citizens, with regard to matters of trade and commerce, in regard to matters of fair dealing as between man and man in matters of trade, it could be referred to the Board of Commerce and be adjudicated by that board. It was never thought that when the Board of Commerce was created it was to establish an inquisition going up and down this land probing amongst all kinds and classes of people and asking them to do things that were utterly impossible so far as business dealings were concerned.

Canada, *H.C. Debates*, [1920] Vol. V at 4484-85 (29 June 1920).

<sup>147</sup> *Winnipeg Free Press*, (28 June 1920).

<sup>148</sup> Robson to Foster, (1 March 1920). PAC, *Meighen Papers*, MG 26, I v.15.

The existing doubts were only encouraged by the Supreme Court's failure in the *Reference* to muster a majority in the Board's favour. This case in turn led directly to the resignations of Commissioner O'Connor and, subsequently, Commissioner Murdock. With their departure the Board's serious work was more or less terminated; the period under White's leadership was but a rather pathetic postscript.<sup>149</sup>

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<sup>149</sup> Viewed from a somewhat different perspective, the Court's reaction to the Board suggests another possible reason for the Board's downfall. Two of its three original members (Robson and O'Connor) were legally trained; so was White, the second Chief Commissioner. In the early disagreements between Robson and O'Connor, the former's resignation, and the opinions of White concerning the Board's institutional shortcomings, there is evidence that within the Board as well as within the Court the two views of law described in this paper were in competition, with unfortunate results.

What little one can tell about Robson on the basis of his short career on the Manitoba Court of Queen's Bench suggests that he shared what has herein been described as the "dominant vision". He seemed to be constantly engaged in a search for rules and principles. In his capacity as a one-man commission of inquiry into the Manitoba public utilities board, he had demonstrated such a solicitous attitude towards the electric companies that later commentators would write: "private enterprise could. . .count on a sympathetic hearing from Judge Robson". C. Armstrong & H.V. Nelles, *MONOPOLY'S MOMENT: THE ORGANIZATION AND REGULATION OF CANADIAN UTILITIES, 1830-1930* (Toronto: University of Toronto Press, 1988) at 195. His behaviour on the Board suggested a similar concern for private rights of contract and property. He believed that price and profit restraint came precariously close to expropriation (*see ibid.*). He was uncomfortable with the "administrative" aspect of the Board's mandate. He decried "inquisitorial" practice. He felt that matters of enforcement and punishment were matters with which the Board should have nothing to do. He doubted the *vires* of the federal undertaking. In the end, he resigned from the Board because he was "out of sympathy with the Act" (*see supra*, note 39). In the context of these observations one doubts that he was very far removed in his own conception of the functions of government, law and the role of courts from that of Justices Idington, Duff and Brodeur.

O'Connor, on the other hand, seemed to have much more in common with Anglin, Davies and Mignault J.J. Sensitive to what he regarded as serious social and economic problems, he favoured an aggressive role for the Board. He did not seem at all afraid of discretionary justice, or proceeding administratively as opposed to judicially. He certainly had no doubt of either the fact or the importance of federal jurisdiction in the area of combines and fair prices. In later life, as Parliamentary Counsel, he would argue strongly against the Privy Council's subversion of the intent of the framers of the *B.N.A. Act* to create a strong central government to cope effectively with national concerns and needs; he would moreover call on the federal government to take full advantage of the generally dreaded prerogative power to extricate itself and Canada from the Privy Council's constitutional bind. *See Canada, Senate, REPORT RELATING TO THE ENACTMENT OF THE BRITISH NORTH AMERICA ACT 1867 ANY LACK OF CONSONANCE BETWEEN ITS TERMS AND JUDICIAL CONSTRUCTION OF THEM AND COGNATE MATTERS* (Ottawa: King's Printer, 1939) [The *O'Connor Report*].

White's outlook seemed to resemble Robson's more than O'Connor's. White, like Robson, was concerned with unseparated powers and functions in the hands of the Board. In March 1921 he wrote to the Minister of Justice: "It was impossible for complete success to attach to the Board of Commerce. . .in view of the fact that

Within the Supreme Court itself, the actual demise of the Board was a victory for Idington, Duff and Brodeur JJ. The triumph, however, was tentative. So long as the legal issues involved continued to hang in the balance in London, there remained at least a possibility that the federal government might at some point either resuscitate the Board itself, or might create an analogous commission of a similarly intrusive and hence objectionable nature.

A year passed. Finally, in November 1921, judgment was handed down in the appeal of the *Reference*. The Judicial Committee, speaking through Viscount Haldane, declared the *Combines and Fair Prices Act* to be *ultra vires* the Dominion Parliament.<sup>150</sup> Viscount Haldane's approach to the problem of the Board of Commerce and its empowering legislation was highly reminiscent of, and doubtless to some extent influenced by, that taken by Duff J. in the Supreme Court. Viscount Haldane began by denying that the *Combines and Fair Prices Act* had been validly passed within the federal jurisdiction over peace, order and good government. While acknowledging that the subjects of undue combination and hoarding were matters in which the Dominion might have a great practical interest, and that in times of war that interest might become so paramount and overriding as to draw them within the federal sphere, he held that those considerations were not sufficient to save the *Act* in dispute:

it is quite another matter to say that under normal circumstances general Canadian policy can justify interference, on such a scale as the statutes in controversy involve, with the property and civil rights of the inhabitants of the Provinces. It is to the Legislatures of the Provinces that the regulation and restriction of their civil rights have in general been exclusively confided, and as to these the Provincial Legislatures possess quasi-sovereign authority. It can, therefore, be only under necessity in highly exceptional circumstances, such as cannot be assumed to exist in the present case, that the liberty of the inhabitants of the Provinces may be restricted by the Parliament of Canada. . . .<sup>151</sup>

Viscount Haldane further denied that the *Act* was justified under the federal trade and commerce power. That power, although it might

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the Board was required to perform three incongruous duties: inquisitorial, judicial and administrative." (Letter from White to C.J. Doherty (4 March 1921), PAC, *Board of Commerce Papers*, RG 36/6, v. 14).

In the context of such comments the Board's demise is not surprising even apart from its more publicly obvious misfortunes. Fundamental philosophical tensions existed between key members of the Board; with regard to Robson and White, the two Chief Commissioners, there appear to have existed in addition not inconsiderable tension in their own minds between their legal beliefs and their official responsibilities. Perhaps the most remarkable thing about the Board of Commerce was that, given the cross-currents evident in the thinking of its own members, it ever worked at all.

<sup>150</sup> *Re The Board of Commerce Act, 1919 and The Combines and Fair Prices Act, 1919* (1921), [1922] 1 A.C. 191.

<sup>151</sup> *Ibid.* at 197-98.

confer authority on the federal Parliament to gather statistical and other information valuable to the Dominion as a whole, did not confer upon Ottawa jurisdiction to regulate particular trades. Such a broad construction of the federal jurisdiction threatened, in his words, "to oust the exclusive character of the Provincial powers under s. 92".<sup>152</sup>

Finally, the *Combines and Fair Prices Act* could not be saved under subsection 91(27) of the *B.N.A. Act* ("criminal law"). Viscount Haldane insisted on distinguishing the legislation before him from a law which "by its very nature belongs to the domain of criminal jurisprudence".<sup>153</sup> Dominion legislation on property and civil rights could, moreover, not be legitimized by ancillary provisions designated as "new phases of Dominion criminal law".<sup>154</sup>

In the result, the Board of Commerce had acted without jurisdiction in making the Ottawa retail clothing order immediately at issue. That Viscount Haldane found this conclusion philosophically satisfying there could be little doubt. He had no love for the Board as an administrative tribunal. He in fact devoted an entire paragraph of his judgment to detailing the wide range of its powers, stressing not only its authority over individuals of every stripe (traders and non-traders alike) and its control of prices and profits, but also its sweeping discretionary powers. As he put it (not without some disapproval, one suspects), "[t]he Board is empowered to inquire into individual cases and to deal with them individually, and not merely as the result of applying principles to be laid down as of general application".<sup>155</sup>

If Viscount Haldane's judgment represented vindication for Duff J. and his colleagues, however, it equally represented a crushing defeat for Anglin J. and those who had agreed with him. This latter group had had their legal contentions (in particular on the scope of "trade and commerce" and "peace, order and good government") expressly contradicted by higher authority. More important, the Privy Council had once again — and this time at an especially critical juncture — rejected by example any approach to legislation which emphasized the problems to be addressed, the importance of effective regulation or the practical difficulties involved in "co-operative" solutions between different levels of government. The Privy Council had in fact refused to deal in economic or political reality at all, and had instead focussed in the abstractions of a balanced constitution, limited administrative discretion and individual rights. In the context of arguably the most important regulatory legislation yet to come before the Privy Council, this must have been profoundly disappointing to Anglin J. and his colleagues. Not only had they lost the battle, but it seemed they had lost the war as well.

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<sup>152</sup> *Ibid.* at 198.

<sup>153</sup> *Ibid.* at 198-99.

<sup>154</sup> *Ibid.* at 199.

<sup>155</sup> *Ibid.* at 199-200.

## V

In the history of institutions there may be focal points — moments in time at which particular decisions or events separate the past from the future, change the direction of the institution or otherwise affect, in a unique and important way, the shape of things to come. The Board of Commerce cases may plausibly be regarded as constituting such a focal point in the history of the Supreme Court. It has already been suggested that they marked the failure of the pre-classical tradition of Canadian legal thought. Afterwards, it was as if the forces of tradition on the Court had spent themselves in one last effort to control events, and having lost — and having been chastised in the bargain — were too weak and disheartened to carry on with any measure of success.

In the two decades following the Privy Council decision in the *Reference*, the Supreme Court appeared to take a decidedly liberal swing. Under Duff J.'s leadership (first *de facto* and then *de jure* after he became Chief Justice in 1933) the Court declared *ultra vires* virtually every substantial regulatory initiative — federal or provincial — the constitutionality of which was debated before it.<sup>156</sup> In 1925, for instance, in *R. v. Eastern Terminal Elevator Co.*<sup>157</sup> an overwhelming majority of the Court (Duff, Idington, Mignault and Rinfret JJ.) denied the constitutional validity of that part of the *Canada Grain Act* which under certain conditions enabled the Board of Grain Commissioners to dispose of the surplus crop. Duff J., repeating in an analogous context the argument he had made in the *Board of Commerce Reference*, said that in fact the provision impugned was only one of a series designed to regulate grain elevators and the occupations of persons who operated

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<sup>156</sup> During this period the Court did of course approve various federal combines laws. See, e.g., *Reference re Validity of the Combines Investigation Act and of Section 498 of the Criminal Code*, [1929] S.C.R. 409 [hereinafter *Reference re Validity of the Combines Act*]; *Reference re Section 498A of the Criminal Code*, [1936] S.C.R. 363. These statutes, however, were rather weak in their regulatory aspect and were therefore acceptable within the parameters of the “dominant vision”. In *Reference re Validity of the Combines Act*, e.g., Duff J. stressed the difference between the old *Combines and Fair Prices Act* and the new legislation:

The [former] statute. . .conferred upon the Board of Commerce, a Board created by Dominion legislation, composed of persons named by the Dominion Government, the authority and the duty to inquire into the existence of combines and plans for the formation of combines, and to suppress, by order of the Board, the combines themselves. . .in so far as the Board might think it right and in the public interest to do so. The present Act gives no such power of regulation.

*Ibid.* at 418.

<sup>157</sup> [1925] S.C.R. 434 [hereinafter *Eastern Terminal Elevator*].

them. In its degree of particularity it was therefore beyond the limits of the federal trade and commerce power. Anglin J. (now Chief Justice) tried one last time to take a stand for federal authority exercised in the public interest, but found himself in lonely dissent. Abandoning the trade and commerce jurisdiction, he focussed on the residual clause, emphasizing the grain trade as "a matter of national concern and of such dimensions as to effect [sic] the body politic of the Dominion".<sup>158</sup> But even he had lost hope by this point. "No good purpose," he complained, "will be served by an elaborate exposition of [my] reasons."<sup>159</sup>

In the early 1930s, provincial attempts at regulation likewise came to grief in two cases, *Lawson v. Interior Tree Fruit and Vegetable Committee of Direction*<sup>160</sup> and *Spooner Oils Ltd v. Turner Valley Gas Conservation Bd*<sup>161</sup> In the former, the Court, again led by Duff J., denied the constitutionality of a British Columbia fruit marketing scheme. The Court held that the scheme aimed at control of interprovincial trade to such a degree that it was outside the scope of provincial power. Duff J. carefully shied away from the question of whether the statute could, conversely, be lawfully enacted by the Dominion Parliament alone, implicitly suggesting that it could not. In *Spooner Oils* the disinclination of the Court towards all but the most limited or traditional forms of regulation was even more pronounced. Here the Court rejected provincial legislation setting up a special board for the conservation of natural gas. Particularly objectionable here was the power of the Board to interfere with terms of a lease already granted to the applicant company. Duff J. characterized the statute as

limiting arbitrarily the gross production of the field, and subjecting the lessee, in respect of the production of gas, to the "uncontrolled discretion" of an administrative Board, in this respect radically alter[ing] the status of the lessee under the terms of his lease.<sup>162</sup>

In 1936, confronted by the "Bennett New Deal", the Court turned on the federal government again. Repeating the by-now-familiar doctrinal incantations, Duff J. ruled *ultra vires* Dominion legislation setting up a Trade and Industry Commission to supervise industrial competition on the grounds that the legislation "contemplates action. . .in respect of individual agreements which may relate to trade that is entirely local".<sup>163</sup> The *Natural Products Marketing Act* was similarly rejected, Duff J. holding that it was in fact an attempt:

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<sup>158</sup> *Ibid.* at 442.

<sup>159</sup> *Ibid.* at 436.

<sup>160</sup> *Supra*, note 96.

<sup>161</sup> [1933] S.C.R. 629 [hereinafter *Spooner Oils*].

<sup>162</sup> *Ibid.* at 638.

<sup>163</sup> *Reference re Dominion Trade and Industry Commission Act*, [1936] S.C.R. 379 at 382.

[T]o regulate in the provinces of Canada, by the instrumentality of a commission or commissions. . . trade in individual commodities and classes of commodities. . . . Regulation of individual trades, or trades in individual commodities in this sweeping fashion, is not competent to the Parliament of Canada.<sup>164</sup>

In none of these cases was there any evidence of a viable pre-classical legal tradition such as had appeared to animate Justices Anglin, Davies and Mignault in 1920. Anglin J.'s dissent in *Eastern Terminal Elevator* had been but a somewhat embittered last stand which the Privy Council had not even dignified with an appeal. Legal liberalism, with its concern for limits, balance and autonomy, reigned supreme — and essentially unchallenged — within the Supreme Court. Duff, assisted by the Judicial Committee's endorsement of his approach in the *Board of Commerce Reference* had co-opted, persuaded and even over-awed the opposition. In the result, the state had been contained, at least to the extent that substantial regulatory initiatives had come up for reviews. Individual rights of contract and property had been protected. Inspired by the late nineteenth century vision of the common law, Duff J. and his liberal colleagues had crafted a bridle for Leviathan.

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<sup>164</sup> *Reference re Natural Products Marketing Act, 1934*, [1936] S.C.R. 398 at 426.

