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THE PRINCE EDWARD ISLAND TRADE UNION ACT, 1948

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The Prince Edward Island Trade Union Act of 1948 is unquestionably one of the most extraordinary statutes ever passed by a Canadian legislature. The restrictions it imposes on trade unions are so severe as to amount almost to total prohibition. This is the more remarkable in that the pre-existing provincial legislation gave the Lieutenant-Governor in Council powers of control over trade unions far beyond those in any other province. The original Act of 1945 was little more than a transcript of the Nova Scotia Act of 1937. But in 1946 the Legislature of Prince Edward Island added a new section, 15, empowering the Lieutenant-Governor in Council to make regulations, inter alia, (a) "prescribing the manner in which a Trade Union may be formed" and (b) "prescribing the method of election of officers". It might have been supposed that this would be ample to prevent any abuses; indeed, even these powers constitute so marked an invasion of the traditional liberties of trade unions that it is surprising they drew no protest. It might also have been supposed that the Government would at least use its existing powers before seeking fresh ones; but in fact, no regulations have ever been issued.

The packinghouse strike of 1947, however, seems to have convinced the Provincial Government that something more drastic was needed. In March 1948, without even notifying the unions, let alone consulting them, the Government introduced an amending bill which received second reading on March 16th after a brief debate, third reading on March 17th and royal assent on March 25th.

The chief features of this amending Act are:

(1) It excludes "employees of a National Railway system" (section 6 of the amending Act).

(2) It forbids any "closed shop contract" (section 4), defined as "a clause in any collective bargaining agreement whereby the employer agrees to employ only trade union members" (section 1). This clearly covers not only the closed shop (where

the employer agrees to *hire* only persons already members of the union) but also the union shop (where the employer may hire anyone he likes, but all employees must, after a probationary period, become and remain members of the union, as a condition of employment, for the life of the agreement).

(3) It prohibits "any strike action" and "any lockout action", and any strike vote "unless and until all differences which may arise or exist between any employer concerned in such strike and his employees shall have been submitted to arbitration in conformity with the provisions of The Arbitration Act"; and "His Majesty shall be deemed to be a party to every such arbitration" (section 6).

(4) It prescribes that every union must file with the Provincial Secretary a certified statement that all its members are "employees" (section 5(2)), defined to exclude "any non-resident of the Province" (section 3).

(5) It prescribes that the certified statement must also declare that the union "is autonomous, and that no action, deliberation, or decision of such trade union is directly or indirectly controlled or directed by any other person or group of persons" (section 5 (2)).

(6) It provides that the Provincial Secretary, "upon such filing. . . .*may* grant a license to such trade union for *such period or periods* as he *in his discretion* may deem advisable, and any such license *may be revoked or cancelled at any time* in the *discretion of the Provincial Secretary*" (section 5 (3); italics mine).

(7) It provides that "any person who represents himself to be a member of, or who purports to act directly or indirectly on behalf or under the authority of, any trade union, except for the purpose of complying with the provisions of subsections (1) and (2) hereof" (filing of certified statements), "during any period when such license is not in force with respect to such trade union, shall be liable upon summary conviction to a fine not exceeding One Hundred Dollars for each such offence and in default to thirty days' imprisonment" (section 5 (4)).

The combined effects of the provisions summarized under clauses (4) to (7) are four:

(a) to prohibit even purely provincial unions with full-time paid officers or officials, unless such officers or officials are on leave of absence from an employer;

(b) to prohibit all national and international unions, since such unions include non-residents of the province and cannot file the required statement of "autonomy";

(c) to prohibit even purely provincial unions made up exclusively of "employees", except such as the Provincial Secretary may see fit to license;

(d) to place even licensed unions at the mercy of the Provincial Secretary.

The Act raises three main questions:

(1) Assuming that it is *intra vires*, is it so drawn as to be operative at all, or to operate as intended?

(2) Is it *intra vires?*

(3) Should it, as a matter of public policy, be left to such operation as it may have?

Under the first head, six questions arise:

(a) Are the prohibitions enacted by section 5 of the 1948 Act operative at all, operative only as against national and international unions, local unions with non-employee members and unlicensed local unions, or operative against all unions whatsoever?

Under the definition section (section 2 (1) of the 1945 Act as amended), the term "trade union" is restricted to organizations "licensed as hereinafter provided". Under section 4, it is "lawful for employees to form themselves into a trade union". But of course they will have to get a license first. In order to get the license, they will have to file with the Provincial Secretary (a) a copy duly certified by the officers of the union (which cannot exist till it is licensed) of its "constitution, rules and by-laws, or other instruments or documents containing a full and complete statement of its objects and purposes", and (b) a statement duly certified by the officers of the still non-existent union that such non-existent union is autonomous, etc. (section 9 (1) and (2) of the 1945 Act as amended). Any person who represents himself to be a member of, or who purports to act directly or indirectly on behalf, or under the authority, of a licensed union during a time when it is not licensed, except for the purpose of filing the documents required to secure the license, is subject to the penalties prescribed in section 9 (4). No wonder Dr. Cecil Wright, in the legal opinion accompanying the disallowance petition of the Trades and Labor Congress, the Canadian Congress of Labour and the Railway Operating Brotherhoods, declared that "from one standpoint, the Act renders itself open to an interpretation which makes it meaningless, . . .[and] would make the sanction in section 9 (4) equally incomprehensible because it has the result of making it an offence for a person to be active in any *licensed* traded union" (italics Dr. Wright's).

On a strict construction, therefore, the prohibition of national and international unions, of local unions with non-employee members, and of all unlicensed local unions, would appear to be in fact a total prohibition of all unions whatsoever.

(b) Are closed and union shops really prohibited?

Section 4 of the 1948 Act purports to prohibit any "closed shop contract". But the Acts of 1945, 1946 and 1948 nowhere provide any penalties for breach of this section. Presumably a closed or union shop clause in a collective agreement would not be enforceable in the courts; but since no provision of any collective agreement is enforceable in the courts in Prince Edward Island, this section seems to be mere surplus verbiage.

(c) Are lockouts conditionally prohibited, or absolutely?

Section 6 of the 1948 Act was apparently intended to prohibit lockouts as well as strikes until the matters in dispute have been submitted to arbitration. But what it actually says is that no "lockout action shall be taken by any employer unless and until all differences which may arise or exist between any employer concerned in such *strike* and his employees shall have been submitted to arbitration", etc. (italics mine). It would seem, therefore, that lockouts are prohibited unconditionally.

(d) Do the provisions of section 6 dealing with strikes make all strikes illegal, or only strikes before arbitration?

Since awards under the Arbitration Act are final and binding, it might be held that the section makes all strikes illegal. On the other hand, the section explicitly says that "no strike action shall be taken nor shall any vote be taken or held with respect thereto *unless and until*" the matters in dispute have been submitted to arbitration (italics mine). This would seem clearly to contemplate two classes of strikes: before and after arbitration, the first illegal, the second not. This would have the curious incidental result that the award under the Arbitration Act would be binding on the employer, but not on the employees or the union, and that the employer could be proceeded against for breach of the award while the employees and the union could not.

(e) How would the prohibition of illegal strike votes and illegal strikes be enforced?

The section itself provides no penalties; there is no general penalty section; there are no Regulations prescribing penalties; there is no procedure laid down for applying penalties. Presumably, the only sanctions would be by injunction or civil action.

(f) Against whom would any sanctions be applied? Are unions *personae juridicae* for the purposes of the Act?

On the one hand, since there is nothing corresponding to section 45(1) of the Dominion Act, and since the penalties in section 9(4) of the 1945 Act as amended apply only to individuals, it might be held that it was clearly not the intention of the legislature to make unions legal entities.

On the other hand we have the provisions of section 2(1), which restrict the use of the term "trade union" to organizations licensed by the Provincial Secretary under section 9(3); the elaborate filing and licensing and penalty provisions of section 9 itself; the requirement that unions must file financial statements (section 10); the elaborate provisions with respect to union treasurers, funds, audits, etc. (section 11); and the provisions of section 15(a) and (b) already noted. These seem clearly to indicate that it was the intention of the legislature to confer on licensed unions a quasi-corporate status. If the courts hold that the latter interpretation is the correct one, then any proceedings to enforce the prohibition of strike votes, as well as strikes, would clearly be greatly facilitated.[1]

Some of these questions, however, are mere matters of draftsmanship, which could be cleared up by amendments. Much more serious is the second main question, Is the Act *intra vires?* Can a province legally do what Prince Edward Island set out to do in this Act? Can it enact total prohibition of trade unions, or certain classes of unions, within its jurisdiction?

There are solid reasons for thinking that it cannot. They have been admirably and fully stated by Dr. Wright in the opinion already referred to, and may be summarized as follows:

(a) Every Canadian citizen is free to do what is not prohibited by law. This freedom can be taken away by a provincial legislature only by legislation coming within the enumerated heads of section 92 of the British North America Act. "Thus Prince Edward Island cannot seal up its boundaries to exclude national or international trade unionism where such exclusion is not clearly related to and conditioned on promotion of an object within provincial legislative authority. . . . If the Act had purported merely to confer benefits on trade unions qualifying thereunder while witholding them from other trade unions there could be little quarrel with its constitutionality. . . . This, how-

[1] For advice on this part of the article, I am deeply indebted to Mr. Maurice W. Wright, LL.B., of the Ontario and Manitoba Bars; who, however, is in no way responsible for any legal "howlers" I may have committed.

ever, is not what the Act does." It makes membership in or activity on behalf of unlicensed unions punishable "for no other reason than mere membership or activity. This liability to prosecution is unrelated either to the purposes or objects of a trade union or to any regulatory scheme for trade unions. . . . Section 9(4) appears to have a substantive effect in and of itself unrelated to any specific object within provincial legislative competence. Thus, for example, it is not made a condition of employment in Prince Edward Island that a person abstain from membership in an affiliated trade union. Nor are the provisions of section 9(4) related to any scheme of regulation either of business or property in the province. They stand alone and unanchored."

Under the Act, says Dr. Wright, "an international union officer or member risks a fine if he enters Prince Edward Island to make a speech. Members of a national or international trade union who might wish to visit Prince Edward Island to make a study of labour conditions in any industry therein risk prosecution. No educational institution, no service club, no political party, no 'legal' trade union in Prince Edward Island can ask an international trade unionist to make an address. A British trade unionist or an American trade unionist cannot as such visit Prince Edward Island. It is possible that a musical artist, member of an international trade union, would subject himself to a charge under the Prince Edward Island Act if he dared to perform there while professing his unionism. . . . It would be illegal for any 'outside' unionist, whether resident in or out of Prince Edward Island, to dare as such to make representations to the provincial government to have the Act amended or repealed. . . .

"The pith and substance of the Act becomes very clear indeed if we substitute a religious denomination or a political party for proscribed trade unionism. If the Act is valid, it is competent for a provincial legislature to make it an offence for a person to profess Roman Catholicism or Judaism or atheism. . . [or] Progressive Conservatism or Liberalism. . . to be a Kiwanian, a Rotarian or a member of a college fraternity. . . . No head of power in section 92 of the B.N.A. Act justifies a provincial legislature in baldly making it a condition of entry into the province that a person refrain from professing certain principles or certain affiliations; nor can the provincial legislature require this of a person in the province. The present Act cannot rest on section 92(13) because . . . it is not connected either with the exercise of property or other rights in the province. It amounts only to a naked prohibition. . . . If freedom of debate

and discussion in relation to the functioning of newspapers in a province is beyond the competence of a province to abridge (as indicated by Duff C.J., Davis and Cannon J.J. in *Reference re Alberta Statutes*, [1938] S.C.R. 100), how much more incompetent is it to a province to prevent the dissemination therein of any religious or political or philosophical or trade unionist principles espoused by persons elsewhere in Canada! . . . To concede the competency of such divisive legislation is to admit the power of a province to destroy Canadian federalism under the B.N.A. Act."

(b) "In prohibiting the association in trade unions of persons in Prince Edward Island with persons outside", the Act "interferes with property and civil rights *outside* the province. . . . It is not legislation in relation to property or civil rights *in the province*. . . . It is permissible in construing the constitutionality of legislation to envisage the enactment as it will operate in practice (see *Reference re Alberta Statutes*, [1938] S.C.R. 100, per Duff C.J. at p. 127), . . . and to adduce evidence as to the effect of the challenged legislation (see *Attorney-General for Alberta* v. *Attorney-General for Canada*, [1939] A. C. 117, at p. 130). . . . The effect of the Act is to outlaw presently existing trade unions which operate in Prince Edward Island as affiliated or chartered locals of national or international trade unions. Persons in Prince Edward Island who are members of such . . . trade unions become liable to penalties. The Act . . . requires them, on pain of continuous penalties, to sever their contractual relationships in respect of association with persons outside the province and in respect of their property interests as members of trade unions operating outside the province. That it is incompetent for the province to destroy or interfere with contractual rights outside the province is made evident in the opinion of the Privy Council in *Royal Bank of Canada* v. *the King*, [1913] A.C. 283, and by the judgments of the Ontario Court of Appeal in *Ottawa Valley Power Company* v. *Hydro Electric Power Commission*, [1937] O.R. 265, and *Beauharnois Light, Heat and Power Company* v. *Hydro Electric Power Commission*, [1937] O.R. 796."

(c) There must be no conflict between provincial legislation and "competent Dominion legislation, and in so far as there is, the Dominion enactment prevails". "Section 2(h)(vi) of the Immigration Act, R.S.C., 1927, c. 93, as amended . . . includes in the list of 'non-immigrant classes', accredited representatives of international trade unions entering Canada for the temporary exercise of their calling. Suppose the Dominion permits Philip

Murray of the C.I.O. to enter Canada and he wishes to make a speech in Prince Edward Island. To say that the Trade Union Act subjects him to a fine is to nullify the exercise of the federal immigration power. Again, suppose a member of a postal employees' union wishes to visit Prince Edward Island in connection with his union's affairs. To say that the Trade Union Act can prevent him is to permit Prince Edward Island to invade federal legislative authority in relation to postal services. The same argument holds for banking institutions, radio broadcasting, aviation, fishing and shipping. None of these industries and activities are excluded from the Act."

(d) "As a bare prohibition of the association of persons within Prince Edward Island in any trade union having membership or affiliation outside of the province, the Act strikes at the conduct of such persons, and accordingly invades the exclusive legislative jurisdiction of the Dominion in relation to criminal law. (See *Rex* v. *Hayduk*, [1938] O.R. 653; also *A.-G. Ont.* v. *Koynok*, [1941] 1 D.L.R. 548.) Furthermore, as a bare prohibition, the Act would seem to conflict with ss. 2(41) and 590 of the Criminal Code because it makes mere activity in an affiliated union punishable, while s. 590 forbids prosecution on account of simple affiliation unrelated to acts falling outside its protection. It is true that s. 590 deals with conspiracy but the Prince Edward Island Act would expose to prosecution any person therein who acted with any other person on behalf of an affiliated trade union."

(e) "The Act is also vulnerable in so far as it purports to prohibit the operation in Prince Edward Island of trade unions which, while unlicensed by the Province, are federal creatures. It is well established law that Dominion companies are 'at home' in every province, and that provincial legislation cannot, by a licensing requirement, prevent federally incorporated companies from engaging in business in any province (see *John Deere Plow Company* v. *Wharton*, [1915] A.C. 330; *Great West Saddlery Company* v. *The King*, [1921] 2 A.C. 191). The exclusive federal authority to incorporate companies with Dominion objects is found in the opening words of section 91 of the British North America Act . . . (see *Great West Saddlery Company* v. *the King*, *supra*). This head of legislative authority would seem to be equally applicable to vest in federally chartered associations the same privileges that apply to federally incorporated companies. It would follow then that the status conferred by competent Dominion legislation, whether it be full corporate status or quasi-corporate status, cannot be interfered with by provincial licensing

legislation. Thus, for example, the Canadian Brotherhood of Railway Employees and Other Transport Workers, being registered under the Trade Unions Act, R.S.C., 1927, c. 202, ought to be able to function in Prince Edward Island despite the Trade Union Act of that province."

(f) "There is also the possibility of urging against the constitutionality of the Act the dicta of Duff C.J. (Davis J. concurring) and Cannon J. in *Reference re Alberta Statutes*, [1938] S.C.R. 100, at pp. 133-5 and 146). The learned justices were there concerned with freedom of debate and discussion as related to a provincial statute directed against newspapers. . . . But their remarks on the subject, revolving around the preamble to the B.N.A. Act, which speaks of 'a constitution similar in principle to that of the United Kingdom', would seem to be equally applicable to freedom of association with which the Trade Union Act interferes so severely."

If the Act is *ultra vires*, then, strictly, the third main question does not arise. The legislation is not law at all, and has no operation.

But, with great respect to Dr. Wright, the question of the Act's validity is, I think, not free from difficulty. Dean Vincent MacDonald, K.C., has said: "There can be little doubt that (except as to its own servants and possibly as to industries and works falling under section 92(10)) the Dominion is unable to legislate in relation to collective bargaining".[2] (Presumably Dean MacDonald would admit that the Dominion has jurisdiction also in relation to collective bargaining in the Territories.) If this view is correct, then, with the exceptions noted, collective bargaining might be held to be within the exclusive jurisdiction of the provinces. If it were so held, would Dr. Wright's arguments against the validity of this particular Act prevail? Even if they did, thanks to the fact that the provisions of section 9(4) "stand alone and unanchored, . . . a naked prohibition", might not the province get around that difficulty by making it "a condition of employment in Prince Edward Island that a person abstain from membership in an affiliated trade union", or relating the prohibitions in the Act to some "scheme of regulation of business or property in the province"? As a mere layman, I do not feel confident that we can rely upon the courts to protect us against legislation of this kind.

I suspect that the tendency, even among lawyers, to believe that we can is partly a result of the proximity and influence of

[2] (1948), 26 Can. Bar Rev. 42-3.

the United States. But the United States Constitution has a Bill of Rights; the British North America Act has not, and I question whether the attempt to import one into it *via* the preamble of that Act, as in the *Alberta Statutes Reference* case, will ultimately be successful. It seems to me perfectly possible that the courts may hold that a provincial legislature can, by properly drafted legislation, prohibit trade unions, or certain classes of trade unions, or subject them to control as drastic and arbitrary as the legislature thinks fit. To the argument that such a view would permit a legislature to prohibit a person from professing Roman Catholicism, the courts might reply that Roman Catholicism, and perhaps other denominations, are protected, by implication, by section 93. To the argument that a legislature might prohibit the profession of various political, philosophical or scientific principles in a province, they might reply simply, "Yes, subject to the Dominion's power to instruct a Lieutenant-Governor to reserve provincial bills, and its power to disallow provincial Acts". To the argument that "to concede the competency of such divisive legislation is to admit the power of a province to destroy Canadian federalism under the B.N.A. Act", they might reply, "Not at all. The power of the Governor-General to instruct a Lieutenant-Governor to reserve any provincial bill, and the power to disallow any provincial Act within one year of its receipt at Ottawa, provide, in the words of Mr. Justice Ramsay, 'a complete check on any practical inconvenience arising from the abuse of the powers confided to the Provincial Legislatures'.[3] The proper remedy lies not in recourse to the courts but in the powers of reservation and disallowance."

Should the Dominion disallow such Acts as the Prince Edward Island Trade Union Act of 1948?

(a) The Fathers of Confederation certainly meant the power to be used against unjust, oppressive or even unwise legislation. George Brown said it "secured that no injustice shall be done without appeal in local legislation", and his words were received with cries of "Hear, hear". Sir Narcisse Belleau said it could and would be used to protect the rights of Protestants in Quebec. Sir George Cartier said it would undoubtedly be used to protect the English-speaking population of Quebec against a gerrymander.[4] Sir John A. Macdonald, in his report of June 8th, 1868, laid it down that the Dominion Government, in deciding whether to disallow an Act, must consider "whether it be unconstitutional",

[3] *Angers* v. *The Queen Insurance Company* (1878), 22 L.C.J. 307, at pp. 309-10.

[4] Confederation Debates, 1865, pp. 102, 183, 407.

and "whether it exceeds the jurisdiction conferred on local Legislatures"; whether it is "altogether illegal or unconstitutional", or "illegal or unconstitutional in part".[5] Both from the report itself and from Macdonald's later practice, it is clear that he sharply distinguished between "illegal" and "unconstitutional", using "illegal" to mean *ultra vires*, and "unconstitutional" in its British sense, to cover legislation contrary to the conventions of the Constitution, or, more generally, inequitable or unjust.[6]

The courts have held that the power may be used against "any law contrary to reason or to natural justice and equity",[7] or "to prevent any practical inconvenience or mischief arising from the abuse of provincial legislative powers or from hasty or unwise legislation";[8] that it is "the true check for the abuse of powers as distinguished from an unlawful exercise of them".[9] Constitutional authorities of unquestioned eminence have laid down the same principle. Todd called disallowance "the only power which can legitimately be put forth . . . to secure the adoption of sound principles of legislation in the various provinces".[10] Dicey said it was "surely intended to be exercised to prevent the enactment of unjust laws".[11] Kennedy says it was "inserted in the British North America Act to cover, in general terms, unjust, confiscatory or *ex post facto* legislation, against which there are express safeguards in the constitution of the United States".[12]

Practice also supports this view. The Department of Justice says, "The precedents furnish instances of disallowance on four main grounds", of which the first is, "because the . . . Act . . . is an abuse of power and contrary to sound principles of legislation, as e.g., amounting to spoliation or a violation of property and vested rights, under contract or otherwise".[13] Macdonald himself disallowed the three Ontario Streams Acts partly because they were contrary to reason, justice and natural equity, and "it devolves upon this Government to see" that provincial legislative

[5] Provincial Legislation, vol. 1, pp. 61-2.
[6] Memorandum on Dominion Power of Disallowance of Provincial Legislation (hereinafter referred to as Disallowance Memorandum), Department of Justice, 1938, p. 15. The Memorandum says Macdonald used "illegal" and "unconstitutional" in the opposite senses, but this is clearly a misprint. Anyhow, it does not affect the essential point.
[7] *Re Goodhue* (1872), 19 Grant's Chan. Rep. 366, at p. 384.
[8] *Severn* v. *The Queen* (1878), 2 S.C.R. 70, at pp. 108-109; *Angers* v. *The Queen Insurance Company, supra, loc. cit.*
[9] *Corporation of Three Rivers* v. *Sulte* (1882), 5 Leg. News 330, 334, 335.
[10] 18 Can. Law Jour. pp. 265-7.
[11] 45 Can. Law Jour. pp. 457-62.
[12] Constitution of Canada (2nd ed.) p. 416.
[13] Disallowance Memorandum, p. 15.

power "is not exercised in flagrant violation of private rights and natural justice".[14] The Manitoba Act 50 Vict., c. 28 was disallowed partly because it was unusual, extraordinary, contrary to reason and justice, and manifestly interfered with private rights.[15] Sir Lomer Gouin, in the famous MacNeil case, disallowed an Act clearly *intra vires* on the grounds, among others, that it was "so extraordinary and so opposed to principles of right and justice, . . . without parallel in the history of Dominion and Provincial legislation," "that it clearly fell within the category of legislation with respect to which it had been customary to invoke the powers of disallowance"; and that he was not aware of "any circumstance whatever, moral, equitable or legal", which could be pointed to in justification of the Act.[16] The Alberta Acts 2 Geo. VI (first session), cc. 7 and 29, were disallowed partly because they were "unjust" and constituted "the central part of the scheme of oppression and repudiation".[17] The Alberta Acts 2 Geo. VI (first session), c. 28, and 3 Geo. VI, c. 80, were disallowed partly because they were part of "the central part of the scheme of oppression and repudiation" and provided for "wholesale repudiation".[18] The Alberta Act 5 Geo. VI, c. 41, was disallowed partly because it was "part and parcel of the unconstitutional scheme of debt repudiation", and enabled "the executive, contrary to constitutional principles, to deny access to the courts". Chapter 62 of the same session was disallowed partly because it appeared to be "part and parcel of a scheme of debt repudiation and oppression of long term creditors".[19]

It is true that in all these cases the constitutional rights involved were rights of property, or connected with property. But I hope it will not be contended that the Dominion should disallow Acts that injure property rights, but should not disallow Acts that totally deny a fundamental constitutional liberty of the subject.

Moreover, the fact that an Act is "discriminatory" has in at least fourteen cases been assigned as one of the reasons for disallowing it.[20]

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[14] Provincial Legislation, vol. 1, pp. 177-8.
[15] *Ibid.*, pp. 856-7.
[16] S.P. No. 144 of 1923, Compar. Leg. Third Series (1924), pp. 86-9.
[17] Report of the Minister of Justice, June 13th, 1938. These and other recent reports have been made available through the kindness of the Clerk of the Privy Council.
[18] Reports of the Minister of Justice, March 25th, and September 28th, 1939.
[19] Report of the Minister of Justice, March 27th, 1942. Note also various Reports of Mr. Doherty, Memorandum, pp. 25-7.
[20] Provincial Legislation, vol. I, pp. 1092, 1099; vol. II, pp. 594, 604, 637, 643, 659, 664, 676, 691; Reports of the Minister of Justice, June 13th, 1938, March 27th, 1942.

Mr. Lapointe, in recommending disallowance of the three Alberta Acts I Geo. VI (second session), cc. 1, 2 and 5, gave as one reason "the arbitrary powers vested in bodies responsible only to the Government of Alberta".[21]

The Prince Edward Island Trade Union Act of 1948 is certainly "extraordinary" and "without parallel in the history of Dominion and Provincial legislation". There would appear to be solid ground for describing it as "unconstitutional" and "opposed to principles of right and justice". It is a "scheme of oppression of workers". It is discriminatory. It discriminates against citizens of Prince Edward Island by depriving them of rights enjoyed by citizens of all other provinces. It discriminates in favour of employees of the Canadian National Railways as against all other employees. It discriminates against Prince Edward Island workers as compared with other groups of citizens by forbidding them to belong to national or international unions, while leaving farmers, lawyers, doctors, manufacturers, business men perfectly free to belong to their national or international organizations. It even leaves Prince Edward Island citizens free to belong to national political parties, not excepting the Labour-Progressive party. It discriminates flagrantly between employers and workers. It vests arbitrary powers in the Provincial Secretary, to be exercised in his absolute discretion.

(b) The Fathers also meant the power of disallowance to be used to protect the general interests of the Dominion as a whole. Macdonald, in the same report of June 8th, 1868, laying down the general principles governing the exercise of the power, gave first place to the question, "whether it affects the interest of the whole Dominion", and went on to add: "Where a measure is considered . . . *objectionable, as being prejudicial to the general interests of the Dominion,* . . . communication should be had with the Provincial Government . . . , and in such case the Act should not be disallowed, *if the general interests permit such a course,* until the local government has had an opportunity of considering and discussing the objection taken, and the local legislatures have also an opportunity of remedying the defects found to exist" (italics mine).[22] In 1889, Sir John added that if an Act was *intra vires,* "it must, as a matter of course, be allowed to go into operation . . . *unless in the opinion of the Government of the Dominion the Act,* however much within the competence of the province, *was injurious to the Dominion as a whole. . . . The provision was put into the British North America Act to meet*

[21] S.P. No. 221 of 1938.
[22] Provincial Legislation, vol. I, pp. 61-2.

such cases, so that if in any case the Government of the Dominion should believe that an Act within the competence of a Province was *injurious to the whole Dominion, it was their duty as well as their right to disallow that measure"* (italics mine).[23]

Here again, and even more completely, practice supports Sir John's position. Mr. Blake, in 1882, observed: "There may be cases in which *such a general confusion and disturbance of the general interest of the Dominion* may occur, from the continuance on the Statute book of an Act which is *ultra vires,* long before the question can be decided in the Courts—*that it may be a reason for exercising the power of disallowance.* . . . Strong reasons of *general interest* ought . . . to exist before resort be had to disallowance" (italics mine).[24] Again, in 1890: "It is now generally agreed that void Acts should not be disallowed but should be left to the action of the courts. . . . Nevertheless, . . . circumstances of *great general inconvenience or prejudice from a Dominion standpoint,* and involving difficulty, delay, or the impossibility of a resort to law, *may justify the power of disallowance,* even in cases in which the Act is *ultra vires"* (italics mine).[25] Mr. Mills, in 1889, said there was "no doubt about the soundness" of Macdonald's principle that Acts should be disallowed if they were *"injurious to the interests of the whole Dominion.* . . . With that position we have never quarrelled, to the principle laid down on that occasion we unreservedly subscribed, and to that principle we have ever since adhered" (italics mine).[26] This is particularly notable because Mr. Mills, when Minister of Justice, steadfastly refused to disallow Acts *intra vires* on the ground that they were unjust or confiscatory. But he was always careful to base his refusal on the ground that they did not affect *"any matter of Dominion policy"* (italics mine).[27] Sir Louis Davies, in 1897, said: "I think it is pretty well established . . . that in all cases, even when the subject matter is within the jurisdiction of the provincial legislature, *if there is clear interference with Dominion interest or if the vital interest of Canada as a whole,* clearly and imperatively calls for interference, *that interference ought to take place.* . . . We must be satisfied that there is a great and manifest necessity pressing upon this Dominion Government to . . . disallow" (italics mine).[28] Sir Allen Aylesworth, like Mr. Mills a stout

[23] Commons Debates, 1889, p. 905. See also *In re Companies Reference* (1913), 48 S.C.R. 331, *per* Idington J. at p. 380.
[24] *Ibid.,* 1882, p. 912.
[25] *Ibid.,* 1890, p. 4085.
[26] *Ibid.,* 1889, p. 876.
[27] Provincial Legislation, vol. II, pp. 605-06.
[28] Commons Debates, 1897, p. 544.

champion of provincial rights,[29] not only quoted with approval the report quoted above, but himself affirmed that Acts *intra vires* ought not to be disallowed if they did not *"affect any matter of Dominion interest"* (italics mine).[30] Sir Wilfrid Laurier, recommending disallowance of three Saskatchewan Acts, said that "while great care should be taken to see" that disallowance did not "unduly interfere with the operation of provincial laws, competent to the legislatures *and consistent with the general interest*, it is equally the *duty* of Your Excellency's Government when persuaded by authority or upon due consideration that a provincial enactment is *ultra vires* . . . to see that *the public interest* does not suffer" (italics mine).[31] Mr. Lapointe, refusing to disallow the Quebec Act I Geo. VI, c. 11, said that for many years Ministers of Justice had "manifested a definite reluctance to recommend disallowance merely on the ground" of *ultra vires;* but he was careful to add, "except when such legislation involves . . . *injurious interference with Dominion property, interests or policies*" (italics mine).[32]

Thirty-two Acts have been disallowed on the ground, among others, that they were contrary to the interest of the Dominion as a whole, eight of them by Mr. King's Governments.[33] At least thirteen have been disallowed partly on the ground of conflict with Dominion policy.[34]

Is the Prince Edward Island Trade Union Act of 1948 contrary to Dominion interest and policy? It is contrary to Dominion interest for the following reasons:

(*i*) The free functioning of trade unionism has been recognized as in the public interest of Canada as a whole at least ever since the passage of the Trade Unions Act of 1872. No provincial Act has ever before so much as questioned it, and it has been repeatedly evidenced in Dominion legislation: by the Act of 1872 itself, by the explicit exemption of trade unions from the successive anti-combines Acts and the anti-combines provisions of the Criminal Code, and by section 502A of the Criminal Code.

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[29] He even said that the Dominion should not disallow even if a province undertook to "repeal Magna Charta itself", or the Habeas Corpus Act (Commons Debates, 1909, p. 1754).

[30] Provincial Legislation, vol. II, pp. 80-3.

[31] *Ibid.*, p. 786.

[32] Report of July 5th, 1938.

[33] Provincial Legislation, vol. I, pp. 262, 842, 850, 1092, 1099; vol. II, pp. 455, 457, 466, 471, 513, 515, 536, 555, 566, 583, 594, 604, 637, 643, 659, 664, 676, 691; S.P. No. 143 of 1923; S.P. No. 179 of 1924; S.P. No. 221 of 1938; Report of the Minister of Justice, June 13th, 1938.

[34] Provincial Legislation, vol. I, pp. 827, 829, 855, 857, 1082; vol. II, pp. 455, 457, 627; S.P. No. 179 of 1924.

(*ii*) One of the prime objects of the British North America Act was to promote free trade between the provinces: free trade in ideas, no less than in goods and services. But the effect of this Act is to break off all trade in ideas between Prince Edward Island and the rest of the Dominion, so far as trade unionism is concerned, except for employees of the Canadian National Railways.

(*iii*) Mr. Geoffrion, counsel for the Dominion in the *Alberta Press Bill Reference* case, pointed out that the object of the British North America Act was to give Canada a "Constitution similar in principle to that of the United Kingdom"; that the British Constitution was democratic; and that all history showed that freedom of the press was one of the great cornerstones of democratic institutions.[35] All recent history shows that freedom of association, and especially freedom of trade unionism, is also one of the great cornerstones of democratic institutions. One of the first acts of totalitarian governments is always either to abolish trade unions or to bring them under the control of the Government and destroy their freedom. This Act abolishes national and international unions in Prince Edward Island (indeed, on a strict construction, all unions), except on the Canadian National Railways, and brings all other unions under the absolute control of the Provincial Secretary.

To adapt the argument of the Dominion factum in the *Alberta Press Bill* case, "The policies and activities" of trade unions "are matters of concern to the whole of Canada. . . . If the Government for the time being in power in any province has the authority to dictate" that certain kinds of unions shall not exist at all in the province, and that all other kinds shall exist only at the pleasure of a provincial Minister, "the public's ability to judge, influence and possibly dismiss that Government will be destroyed or at any rate seriously impaired. The Central Government, the Central Parliament and the people of every part of Canada have also an interest in this matter. They are interested in knowing what is happening in any province for the purpose of remedying any evils which may arise there or of supporting or combating theories of government there advanced". The trade unions, and their press, are "a powerful agency for the dissemination of news and information"— the more so since they represent interests and present views which, though highly important, are inadequately represented and presented by the ordinary press — "and their freedom to fulfil this important service is of vital importance to the peace, order and good govern-

[35] Montreal Star, January 5th, 1938.

ment of the nation. More than that, the security of the nation, its capacity to present a united front in time of emergency, may well depend upon it". Trade unions "should therefore be free, or controlled, if at all, only by one central authority".[36]

Mr. Justice Cannon, in his opinion in the *Alberta Press Bill* case, said: "Freedom of discussion is essential to enlighten public opinion in a democratic state; it cannot be curtailed without affecting the right of the people to be informed through sources independent of the Government concerning matters of public interest. . . . Democracy cannot be maintained without its foundation: free public opinion and *free discussion throughout the nation of all matters affecting the State within the limits set by the Criminal Code and the Common Law. Every citizen of Alberta is also a citizen of the Dominion. . . . The province cannot interfere with his status as a Canadian citizen and his fundamental right to express freely his untrammelled opinion about Government policies and discuss matters of public concern. The mandatory and prohibitory provisions of the Press Bill . . . have a tendency to nullify the political rights of inhabitants of Alberta, as citizens of Canada. . . The Federal Parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press and the equal rights in that respect of all citizens throughout the Dominion. . . . No province has power to reduce in that province the political rights of its citizens as compared with those enjoyed by the citizens of other provinces of Canada*" (italics mine).[37] All this is just as applicable to trade unions as to the press, to Prince Edward Island as to Alberta.

If this legislation is allowed to stand, it will constitute a precedent that would virtually debar the Dominion from exercising the power of disallowance in any future case of the same sort. But legislation of this kind in one of the major industrial provinces would affect hundreds of thousands of workers and their families, would destroy national and international unions or drive them underground, would plunge the country into turmoil, would make a mockery of Canada's support of the proposed International Labour Convention on freedom of association and the right to organize, and would strengthen subversive forces here and throughout the world.

If this legislation is allowed to stand there is nothing to prevent Prince Edward Island or any other province from outlawing the Canadian Federation of Agriculture, the Canadian

[36] Montreal Star, January 5th, 1938.
[37] [1938] S.C.R. 100, at pp. 145-7.

Manufacturers' Association, the Canadian Chamber of Commerce, the Canadian Bar Association, the Canadian Medical Association, various service clubs, or other national or international organizations, and prohibiting similar local bodies except by licence from a provincial Minister. It is by no means inconceivable that some provincial Government might find the activities of the Canadian Manufacturers' Association or the Canadian Chamber of Commerce highly obnoxious, and might persuade its legislature to pass an Act similar to the Act now under consideration but applying to these organizations instead of to trade unions.

The Trade Union Act is contrary to Dominion policy as set out notably in the Trade Unions Act of 1872, section 502A of the Criminal Code, the Wartime Labour Relations Regulations, the Industrial Relations and Disputes Investigation Act, 1948, and in the Charter of the United Nations, the Constitution of the International Labour Organization and the decisions of the International Labour Conference of 1947.

(*i*) The Trade Unions Act of 1872 clearly contemplates and sanctions the existence and functioning of unions extending beyond the limits of a province, and makes elaborate provision for them. But, under the Prince Edward Island Act, a union registered under the Dominion Act of 1872 might find itself absolutely prevented from functioning in Prince Edward Island except on the Canadian National Railways.

(*ii*) Section 502A of the Criminal Code, the Wartime Labour Relations Regulations, and the Dominion Act of 1948, also clearly contemplate and sanction the existence and functioning of national and international unions, and the two latter explicitly permit the closed and union shop.

(*iii*) The United Nations Charter, Chapter IX, Article 56, says: "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55", two of which are stated to be "universal respect for, and observance of, human rights and fundamental freedoms for all". Freedom of association is certainly a fundamental freedom. It is no less certainly denied by the Prince Edward Island Act. Canada is a Member of the United Nations, and therefore bound by Article 56. The difficulties of divided jurisdiction in a federal state may place some obstacles in the way of positive implementation of this obligation by the Dominion Government. But they do not prevent the Dominion Government from acting negatively, by disallowance, to stop a

province from introducing restrictions upon freedom of association so drastic as to amount to abolition.

(*iv*) The obligation upon the Dominion Government to do everything it can to maintain freedom of association throughout Canada is even clearer under the Constitution of the International Labour Organization, to which Canada has been a party from the beginning; under the amended Constitution, which Canada has approved; and under the decisions taken by the International Labour Conference, with Canada's approval, in July 1947. The Conference unanimously affirmed "the inviolable right of employers and workers to establish or join organisations of their own choosing without previous authorisation. These organizations should have the right to draw up their constitutions and rules, to organise their administration and activities and to formulate their programmes without any interference on the part of the public authorities which would restrain this right or impede its lawful exercise; they should not be liable to be dissolved or to have their activities suspended by administrative authority and should have the right to establish federations and confederations, as well as the right of affiliation with international organisations of employers and workers."[38] The International Labour Office sent out a questionnaire to Governments, and, in accordance with their replies, drafted a Proposed Text for a Convention concerning freedom of association and protection of the right to organize.

The Canadian Government, in its replies, gave its unequivocal adherence to the following principles:

"Workers and employers, without distinction whatsoever, shall have the inalienable right to establish or join organisations of their own choosing without previous authorisation.

"Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

"The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

"Workers' and employers' organisations shall not be liable to be dissolved or have their activities suspended by administrative authority.

[38] International Labour Review, vol. LVI, No. 3, September 1947, p. 278.

"Workers' and employers' organisations shall have the right to establish federations and confederations and to affiliate with international organisations of workers and employers."[39]

The Prince Edward Island Act runs counter to every one of these statements of Dominion policy.

(c) A third ground for disallowance laid down by Macdonald in 1868 was conflict with Dominion legislation. At least twenty-six Acts have been disallowed for this reason among others.[40]

The Prince Edward Island Trade Union Act of 1948 conflicts with the Trade Unions Act of 1872 and Section 502A of the Criminal Code.

One of the reasons given for disallowing the Alberta Home Owners' Security Act of 1938 was that it "imposed such a burden on Dominion corporations as [would] drive them out of Alberta, thus depriving Canadian citizens in Alberta of the services rendered by such corporations".[41] The Act now under consideration does not impose any "burden" on Dominion trade unions. It simply extinguishes them. It drives them out of Prince Edward Island, thus depriving Canadian citizens in Prince Edward Island of the services rendered by such unions.

Mr. Justice Cannon, in the *Alberta Press Bill* case, described that legislation as "enacting penalties . . . and prohibitions for actions which, after due consideration by the Dominion Parliament, have been declared innocuous and which, therefore, every citizen of Canada can do lawfully and without hindrance or fear of punishment. It is an attempt by the Legislature to amend the Criminal Code in this respect and to deny the advantages of section 133(a) to the Alberta newspaper publishers."[42] The Act now under consideration enacts penalties and prohibitions for actions which, after due consideration by the Dominion Parliament, have been declared innocuous and which, therefore, every citizen of Canada can do lawfully and without hindrance or fear of punishment. It is an attempt by the Legislature to amend the Criminal Code and to deny the advantages of section 502A to the Prince Edward Island workers and their organizations. If this legislation is allowed to stand, a strange situation

[39] Report VII, International Labour Conference, Thirty-First Session, San Francisco, 1948, Freedom of Association and Protection of the Right to Organize, pp. 11, 12, 15, 18, 24, 26, 31, 32, 35, 36, 38, 39, 47, 48, 100.

[40] Provincial Legislation, vol. I, pp. 110, 119, 194, 731-2, 799, 827, 829, 855, 857, 941, 946, 1005, 1009, 1082, 1096, 1108, vol. II, pp. 89, 577, 583; S. P. No. 221 of 1938; Reports of the Minister of Justice, March 27th, 1942, and April 7th, 1943.

[41] Report of the Minister of Justice, June 13th, 1938.

[42] [1938] S.C.R. at p. 145.

will result: the Criminal Code will penalize employers and their agents for mere interference with rights that the Prince Edward Island Legislature has totally destroyed.

This by no means exhausts the reasons for disallowance in this case,[43] but it is, I think, enough.

Against Acts of this kind which have actually come into force, disallowance affords the quickest and most effective, and, if they are *intra vires*, the sole remedy. But is the remedy adequate? If the Dominion always acted as fast as it did in disallowing the three Alberta Acts of 1937, it might be. On that occasion, assent was given August 6th, authentic copies reached the Governor-General on August 10th, and disallowance took place on August 17th. But such celerity is extremely rare, if not unparalleled. Under his Instructions the Lieutenant-Governor is required to forward authentic copies of all Acts within ten days after assent.[44] But in 1938, though the Lieutenant-Governor of Quebec assented to the Padlock Act on March 31st, it reached Ottawa only on July 8th. But even if the Lieutenant-Governor and the Post Office both do their duty, disallowance will ordinarily be a slow process. The Dominion Government ordinarily, and properly, will not act until petitioned, and until the provincial Government has had a chance to reply to the objections and to consider Dominion suggestions for amendment or repeal. All this will usually take some time; it may, legally, take a year from the date the Act reaches Ottawa. Meanwhile, the damage wrought by the legislation may be irreparable.

Against this, the only remedy would appear to be the Dominion's power to instruct a Lieutenant-Governor to reserve bills for the Governor-General's pleasure. The British North America Act, section 90, gives the Lieutenant-Governor power to reserve any bill "according to his discretion but subject to the provisions of this Act and to His Excellency's Instructions". Neither the Act nor the Instructions place any limitations on the "discretion". But orthodox constitutional doctrine, laid down by Macdonald in 1873 and 1882 and reaffirmed by Mr. King in 1924,[45] says that the Lieutenant-Governor should never reserve except in his capacity as a Dominion officer and, even then, except "in a case of extreme necessity", only on instructions from the Governor-General.

The power is, as the Department of Justice remarked in 1938, "a statutory power in full vigour, and it cannot be said to

[43] A more complete list may be found in the petition of the two Congresses and the Railway Brotherhoods.

[44] Department of Justice Memorandum on the Office of Lieutenant-Governor, 1938, pp. 7-9.

[45] Provincial Legislation, vol. I, pp. 78, 105; S.P. No. 276 of 1924.

have become inoperative through non-user. For even if it were the case (and it is not . . .) that this power had never been exercised, or had been infrequently exercised, . . . the continued legal existence of the power and the legal right of the responsible authorities, in the exercise of a sound discretion, to exercise it would be wholly unaffected by that fact."[46]

There have been sixty-nine cases of reservation (as against one hundred and twelve disallowances),[47] twelve since 1896, and five in the last thirty years. But in most, if not all, cases, and notably in the last three, the 1937 Alberta bills,[48] the Lieutenant-Governor seems to have ignored orthodox doctrine and reserved without any instructions. This is certainly improper and undesirable, for the reasons Macdonald and Mr. King gave. But it would be perfectly proper for the Dominion Government to instruct Lieutenant-Governors to reserve any bills that the Governor in Council has *prima facie* evidence to believe would seriously abridge the fundamental rights of the citizen. Just as it is possible to secure a temporary injunction, to prevent irreparable damage by a person or corporation, so it should be possible to secure from the Dominion Government an instruction to reserve, to prevent irreparable damage by a provincial legislature. The Canadian Congress of Labour actually invoked this power in the case of the Prince Edward Island Trade Union Act of 1948, but without success.

This may appear a large invasion of provincial autonomy. Actually, it would not be. The whole history of disallowance, especially in recent years, is proof that no Dominion Government would dare use such a power except in cases of the clearest and most pressing necessity. Besides, reservation on such instructions would not kill the bill. It would simply ensure that it should not go into effect until the provincial Government had shown that it did not seriously abridge fundamental rights. Disallowance of such legislation is good; but prevention would be better.

The use of extraordinary remedies like disallowance and reservation would be less necessary if the Dominion's legislative powers were what the Fathers of Confederation intended them

[46] Memorandum on the Office of Lieutenant-Governor, 1938, p. 29.

[47] The Memorandum gives 56; but two are not reserved bills at all, and one was reserved before Confederation. It omits two recorded in Provincial Legislation, vol. II, 11 others not recorded in either volume of that work, and, of course, the three Alberta bills of 1937. See notes by E. A. Forsey and Frank Milligan, in Canadian Journal of Economics and Political Science, vol. 14, pp. 94, 247-8. Professor Frank MacKinnon has drawn my attention to two further cases in Prince Edward Island.

[48] Commons Debates, 1937, p. 1067.

to be,[49] or if we had a Bill of Rights on the American pattern.[50] The Fathers thought even their much more centralized federalism needed the powers of reservation and disallowance. But now we are in danger of breaking up into what one of Mr. Duplessis' supporters has called "a free association of sovereign provinces". Now some provinces are claiming a quasi-Dominion status as "autonomous communities, in no way subordinate to the Dominion, though united by a common allegiance to the Crown, and freely associated in the Canadian Commonwealth of Nations".[51] If the powers of reservation and disallowance were necessary in 1867, how much more now! The Fathers, as Sir Lyman Duff has said, "deliberately rejected the American system of constitutional limitations. So far as provincial legislation is concerned they adopted the safeguard of investing the Governor in Council with a power of disallowance".[52] But there is no safeguard unless the power is used. Nine years ago, the contrast between the Dominion's eager zeal in disallowing the Alberta Acts of 1937 and 1938, and its refusal to disallow the Quebec Padlock Act or even to refer it to the Supreme Court, prompted me to write: "He would be rash indeed who would now venture to suggest that the power of disallowance is any safeguard except for the liberties of those who are as a rule well able to look after themselves. The Dominion Government will be on the side of the big battalions. The revival of Dominion control over the provinces is really the revival of Dominion control over such provinces as try to do things which the dominant economic interests of Canada dislike."[53] The history of the Prince Edward Island Trade Union Act of 1948 has as yet shown no reason for modifying this gloomy conclusion.

[49] For example, labour legislation would be a Dominion field; see my Note on the Dominion Factory Bills of the 1880's, Canadian Journal of Economics and Political Science, vol. 13, pp. 580-3.

[50] Either of these, incidentally, would mean a far greater invasion of provincial powers.

[51] See my articles in Saturday Night, vol. LXIII, February 28th, March 20th, April 24th, May 15th and June 26th, 1948.

[52] *In re Companies Reference* (1913), 48 S.C.R. 331, *per* Duff J. at p. 424.

[53] Canada and Alberta: The Revival of Dominion Control over the Provinces, in Politica, vol. IV, June 1939, p. 123.