

## SOME LEGAL CONSEQUENCES OF THE WINNIPEG GENERAL STRIKE OF 1919

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### The Setting

For many Canadians, the year 1919 brought back with a sickening rush the realization of the harshness of their lives. For the previous few years this thought had been submerged by another even more basic than that of the quality of life, namely life's very continuation. But now freed from this concern by the successful end of "the war to end wars" many began to recontemplate the belief they had suspended during war time that they were somehow entitled to more of society's riches than they habitually received.

Twenty years after that fateful year the Rowell-Sirois Report<sup>1</sup> recited two of the causes of this country-wide malaise of 1919 aside from the psychological let-down attendant on the end of the war. First, "inflation [had] held down the real income of large sections of the laboring . . . groups . . . There was general alarm and resentment, as well as actual suffering over the steep and continuous rise in prices".<sup>2</sup> In connection with this point it should be noted that while prices had increased as much as 80% since 1914, wages had risen only 18%.<sup>3</sup> Secondly, not only was there not enough "to go around", but even worse from most people's point of view, what there was was being divided inequitably. As the Report said, "Canada's participation in [the war] brought rewards as well as sacrifices, and both were unequally distributed among the population . . . There was widespread evidence of large profits having been reaped from war prosperity. Popular belief magnified both the size of these profits and the number of people who had shared in them."<sup>4</sup> To add to these difficulties the war's end meant the end of a period of expansion in the economy while at the same time it released a flood of several hundred thousand returning soldiers in search of jobs that would no longer be readily available, facts which raised fears both in the unemployed and the employed.

Within the ranks of labor in the immediate post-war years various views as to the solution of the workers' plight were held. Virtually everyone believed in the power of organization, so much so that in the years between 1914 and 1919 trade union membership increased from about 165,000 to about 250,000. (By the end of 1919 it was up to 380,000,<sup>5</sup> largely as a result of the Winnipeg General Strike). But the real question was, "To what ends labor was to organize?" Was it to be done to obtain economic

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1. *Report of the Royal Commission on Dominion-Provincial Relations*, Ottawa: 1940.

2. *Ibid.*, Book 1, pp. 109-110.

3. *The Winnipeg General Strike*, A. Balawyder. Toronto: 1967. Unpaginated introduction.

4. Footnote 2 *supra*.

5. Figures obtained from *The Trade Union Movement in Canada, 1827-1939*, Charles Lipton. Montreal: 1966. p. 185.

concessions from the capitalists without challenging the justice of the system under which they operated? Or, was it rather to organize to attain the broader goal of the replacement of the capitalist system? Further, if the end was the latter, how was this end to be brought about? Methods had been suggested by many theoreticians, among whom three of the most prominent were Lenin, Bernstein, and Sorel. Each had advocated the destruction of the capitalist system, the first by violence, the second by parliamentary means and the third by the use of the general strike, and each had his advocates among Canadian laborites of the time, as did those who merely wished concessions within the system.

What was the view of the Canadian elites towards organized labor? As within labor itself, there was a spectrum of opinion. It ran from sympathy to outright hatred. Those of the more extreme school had evidence to support their hostility, though this evidence may not have been as significant as they thought. Leaving aside questions of pure self-interest, first, there was undoubtedly a group within labour circles which advocated the violent overthrow of the existing governmental system. Secondly, such a group had recently been successful elsewhere, namely in Russia, while groups of the same ilk were attempting in other European countries to duplicate the Bolsheviks' success. Thirdly, there were foreigners within Canada who might have had experience in revolutionary activities and who might provide leadership for similar activities in Canada. A combination of these factors had led many of the privileged classes to view all organized labor stereotypically as a purely revolutionary force and hence suitable only for extermination. One indication of official opinion may be gleaned from the fact that, much to the consternation of organized labor, the federal government had supported the Allied intervention in Russia after the revolution of October 1917, even to the extent of sending troops.

Into this supercharged atmosphere came the events which led to a situation that Canada has not seen repeated in the intervening fifty years. In April of 1919, Winnipeg building trades and metal trades employees presented wage demands to their employers which were refused. To exacerbate the situation the employers refused even to deal with the Metal Trades Council, which the metal trades workers viewed as their bargaining agency. Faced with this situation the Winnipeg Trades and Labour Council instructed its affiliated unions to call a vote regarding a general strike in support of the building trades and metal trades employees. This vote was overwhelmingly in favour of such a strike and a general strike therefore began on May 15, 1919. It continued until June 25, 1919, enduring a total of six weeks. Its collapse was the result of the arrest by federal authorities of the strike leaders. My intention is to discuss both the reported litigation and the legislation which followed the end of that strike.

## The Cases

On the night of June 16-17, 1919, federal authorities arrested in Winnipeg ten people, six of whom were leaders of the general strike. These six were Russell, Ivens, Queen, Heaps, Bray and Armstrong. All had been born in the British Isles except Armstrong, who was a native born Canadian. They were not, therefore, the widely-reviled "foreigners". Arrested in Montreal and Calgary respectively were Johns and Pritchard, two more of the strike leaders, each of whom had been born in England. All eight had been charged with seditious conspiracy, contrary to the Criminal Code.<sup>6</sup> On the 21st of June the six leaders arrested in Winnipeg were released on bail, while the others remained in custody. The Crown chose eventually to proceed against only these eight strike leaders on this particular charge and a preliminary inquiry was held in July and August of 1919. All were committed for trial and then arraigned in November, at which time the Crown elected to try Russell separately and hold over the trial of the others until January of 1920.

The law reports contain two decisions involving the eight accused which were handed down between their committal and arraignment. In the first,<sup>7</sup> Cameron J.A. of the Manitoba Court of Appeal, sitting as an *ex officio* Justice of the Court of King's Bench, refused an application to continue the defendants' bail from their committal for trial until their trial. In his judgment he set forth what he considered to be "some of the grounds on which bail may be properly refused".<sup>8</sup> I think it worth noting that the learned Justice's choice of words was rather unfortunate. It gave the impression that he was seeking reasons to deny the defendants' application. In any event, he set forth a number of grounds he presumed sufficient for such refusal. He said

I must here consider the nature and gravity of the charge; recent events in the history of this community and its present circumstances; the character of the evidence brought out at the preliminary hearing, and the conduct of the accused from the time they were released from custody after their arrest . . .

. . . [I]n view of the vitally important issues from the standpoint of the public that are involved and having in mind the attitude and conduct of the accused throughout, I am of the opinion that I must decline to make the order sought on this application.<sup>9</sup>

The accused then got on the usual bail-hunting merry-go-round and got off at the door of Chief Justice Mathers of the King's Bench. This

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6. S.C. 1906, cap. 146, s. 134.

7. *R. v. Russell et al* [1919] 29 MR 511.

8. *Ibid.*, p. 512.

9. *Ibid.*, pp. 513-514.

second application<sup>10</sup> by the accused was heard in almost incredible circumstances. As Mathers, C.J.K.B., explained it in his decision:

Because of the great public interest involved in this prosecution and because bail had once been refused by a brother Judge, I asked my brothers Macdonald and Metcalfe to sit with me while hearing this application, and I have the satisfaction of knowing that they both concur with me in the views here expressed.<sup>11</sup>

In this second attempt to obtain bail the accused were successful. Mathers, C.J.K.B., had been told by defence counsel that the only matter to be considered in bail applications was whether the accused would be likely to appear when required. While he certainly agreed that this question was important, the Chief Justice was not prepared to hold that he "would not be justified in refusing the application upon the sole ground that the public safety might be endangered by permitting the accused to be at large".<sup>12</sup> Without ruling on the validity of this ground for refusing bail or referring to any other decisions on the matter, Chief Justice Mathers held that in the case before him the public safety would not be endangered by permitting the accused to be at large, so that even if this ground for refusing bail were valid, it did not apply in this case. He also characterized Cameron J.A.'s refusal to grant bail as having been based on just such a fear.

While it is now firmly established in Canada that the question of whether the accused will appear when required is the basic question to be considered in a bail application, the importance of the possibility of public danger consequent upon the accused's release has still not been settled. For instance, in the leading Manitoba case on bail applications,<sup>13</sup> decided in 1964, Monnin J.A. (probably the most conservative of the present superior court judges in Manitoba) said, "Bail is not punitive but to secure the attendance of the accused at trial. Yet courts must be concerned with the protection of the general public as well as with the rights of individuals."<sup>14</sup> Any attempt to realize this principle, however, would seem likely to offend against the clear statement in the Canadian Bill of Rights, and its common law and Criminal Code predecessors, that "no law of Canada shall be construed or applied so as to deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty . . .".<sup>15</sup> If a person is refused bail merely because it is feared that he might repeat the acts which form the basis of the offence with which he has been charged if permitted to be at large, he has obviously been presumed to have done the acts originally complained of, and hence an element of

10. *R. v. Russell et al* [1919] 3 WWR 306.

11. *Ibid.*, p. 309.

12. *Ibid.*, p. 308.

13. *R. v. Rodway & Okipnik* (1964) 44 CR 327.

14. *Ibid.*, p. 329.

15. S.C. 1960, cap. 44, s. 2(f).

guilt, namely the *actus reus*, has been presumed to be present before his trial. If on the other hand he is refused bail merely because it is feared that he might repeat crimes of which he has previously been convicted then it is obvious that the punishment which he received for his previous convictions was not sufficient to ensure that he is no longer a public danger. However, to refuse him bail now because of his previous convictions would amount to an *ex post facto* punishment for these previous convictions.

Thus, the decisions regarding bail for the Winnipeg general strike leaders expressed an uncertainty in the law which appears to continue to this day and one which should be rectified by a clear pronouncement that there is just one criterion as to whether or not an accused should be granted bail, namely the probability of his appearance when required. To hold otherwise would be to affect the accused injuriously without justification.

As mentioned above, Russell was tried separately on the seditious conspiracy charge in November of 1919. The elements of the offence with which he was charged were not defined in the Criminal Code though the Code did exempt certain acts from the ambit of the offence. In fact when the first Criminal Code was introduced in 1892 it had contained a definition of seditious intent, but the House had rejected this definition, apparently preferring to leave the definition of the offence to the courts.<sup>16</sup> Russell was convicted of the offence at trial and appealed. His appeal was unanimously dismissed by the five members of the Manitoba Court of Appeal.<sup>17</sup> In their reasons for judgment, the judges made no attempt to define "sedition", nor did they refer to any cases which had done so. Perdue, C.J.M., for instance, merely stated

To aid a brother trade union in its strike for higher wages, or to obtain higher wages for all, was not the real object of the combination. What took place before the strike shews that the accused and his associate "Reds" aimed at something much more drastic. Their ultimate purpose . . . was revolution, the overthrow of the existing form of government in Canada and the introduction of a Socialist or Soviet rule in its place. This was to be accomplished by general strikes, force and terror and, if necessary, by bloodshed.<sup>18</sup>

Cameron, J.A., added

The general strike . . . was . . . an insurrectionary attempt to subvert the authority of our Governments, Municipal, Provincial and Dominion and substitute for them an irresponsible 'strike committee,' . . . It was a bold attempt to usurp the powers of the duly constituted authorities and to force the public into submission through financial loss, starvation, want and by every possible means that an autocratic junta deemed advisable. I cannot

16. 1919 House of Commons Debates Canada, p. 3289.

17. *R. v. Russell* (1920) 51 DLR 1. According to W. P. M. Kennedy in his book, *The Constitution of Canada, 1922*, at p. 398, the J.C.P.C. pursuant to its policy not to receive criminal appeals refused "to admit an appeal on behalf of the rioters recently condemned at Winnipeg—*Russell v. Rex* (the Times, June 22nd, 1920)".

18. *Ibid.*, p. 12.

see how it is possible to speak of such a revolutionary uprising as a mere "sympathetic" or "general strike."<sup>19</sup>

It seems to me to be very difficult for one to comment upon the holdings by the Court on the law of sedition since they do not appear to have made any. They merely imputed an intention to the accused and proceeded to convict him thereon. I do not suggest that if the accused in fact intended what the Court imputed him to intend, he was not guilty of a seditious intention; I merely suggest that it would have been far more useful had the Court first defined what a seditious intention was and then proceeded to determine whether the accused had such an intention (before convicting him).

Since the question of whether or not the accused's intention was revolutionary is not one which training in the law renders one uniquely qualified to answer, it is interesting to see what historians with rather more temporal perspective than the Manitoba Bench was able to assume have said about the strike leaders' intentions. W. L. Morton, in his excellent *Manitoba: A History*,<sup>20</sup> calls them "a very mixed bag of idealists, solid Labour men and radicals"<sup>21</sup> and says of Russell's trial that "the evidence submitted by the Crown was of a general nature and much of doubtful validity, except on the unproven assumption that the strike was an attempt to seize power".<sup>22</sup> D. C. Masters, in his book<sup>23</sup> which is considered to be the definitive account of the strike, devotes a whole chapter to the question, "Strike or Revolution?" and concludes, "It is therefore the opinion of the author that there was no seditious conspiracy and that the strike was what it purported to be, an effort to secure the principle of collective bargaining."<sup>24</sup> Even H. A. Robson, who at the time conducted a Royal Commission into the causes of the strike for the Manitoba Government, said before the trials that ". . . the general widespread Strike was the result of the determination to support by mass action the demand for . . . collective bargaining. . ."<sup>25</sup> In my opinion, the Court of Appeal entertained a rather simplistic view of the motives of all the strikers and especially of those of Russell and his fellow defendants, but I do not wish to dwell upon this aspect of the aftermath of the strike because the Court of Appeal decision does not appear to have added significantly to the law of sedition, except perhaps to hold implicitly that one who intends to overthrow by force a legally constituted government has a seditious intention, surely not a startling departure.

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19. *Ibid.*, pp. 19-20.

20. 2nd ed. Toronto: 1967.

21. *Ibid.*, p. 371.

22. *Ibid.*, p. 372.

23. *The Winnipeg General Strike*, Toronto: 1950.

24. *Ibid.*, p. 134.

25. *Report of the Royal Commission to Enquire into the Causes and Effects of The Winnipeg General Strike*, Winnipeg: 1919, p. 14.

The last of the four reported cases which I can discover relating to the strike deals with Reverend William Ivens,<sup>26</sup> one of the seven strike leaders tried in January of 1920. After Russell's trial, but before his own, Ivens made a speech in which he claimed that "Bob Russell was tried by a poisoned jury, by a poisoned Judge, and he is in jail tonight because of a poisoned sentence".<sup>27</sup> Ivens also added that he expected to go to prison himself though "to arrest men who are doing their best lawfully and peacefully to carry on a strike and charge them with seditious conspiracy is a farce and a travesty".<sup>28</sup> The Attorney General of Manitoba then moved for an order of contempt against Ivens which the Court of King's Bench sitting *en banc* (excluding the "poisoned" Judge) granted. Their reasons for judgement were two: first, Ivens had scandalized the court by suggesting that its decision in the Russell case was unfair, secondly, he had prejudiced his upcoming trial by stating that it would not be fair either. While there is not much to be said concerning the latter reason for judgement, the former one provides some interesting material for discussion. Ivens claimed in his defence that when he referred to the judge and jury as poisoned, he was not insulting them. People who are poisoned are victims, and he was suggesting that the judge and jury were the victims of poisoning by the local press. It was this poisoning by the press which had caused the court to decide as it did. While Mathers, C.J.K.B., who delivered the judgement of the court in the contempt case, agreed that the strike leaders would have been justified in complaining of their treatment at the hands of the press, yet he apparently believed that Ivens' statements rendered him guilty of contempt regardless of his intentions. He said

Whether or not that was his meaning [speaking of Ivens' use of the word 'poisoned'], the fact remains that his words were calculated to create in the minds of those who heard them, and were no doubt intended by him to have the effect of creating in the minds of the audience, the impression that Russell had been unjustly and unfairly dealt with by the Judge and jury who tried him. The tendency of such a speech could only be to shake the confidence of the public in the fair and impartial administration of justice through the Courts.<sup>29</sup>

The implication of these remarks is that the defendant's intention is irrelevant when considering the offence of contempt of court by scandalizing it and that merely to criticize any decision of the courts must be contemptuous. While it appears that the law in this area is still unclear,<sup>30</sup> I would suggest that the defendant's intention when making the remarks

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26. *R. v. Ivens* (1920) 51 DLR 38.

27. Quoted in the Report cited above at p. 40.

28. Quoted in the Report cited above at p. 41.

29. *Ibid.*, p. 43.

30. A recent pronouncement on the matter is the adoption in *obiter* by McRuer, C.J.H.C., in *R. v. Glanzer et al* (1963) 38 DLR (2nd) 402 of Lord Atkin's words in *Amard v. A.-G. for Trinidad and Tobago* [1936] AC 322 at 335 to the effect that "no wrong is committed by any member of the public who exercises the ordinary right of criticizing in good faith, in private or public, the public act done in the seat of justice . . . provided that [he] abstain from imputing improper motives to those taking part in the administration of justice. . . ." But see *R. v. LaRose* [1965] Que. S.C. 318, for a contrary view.

objected to should certainly be considered. Given Ivens' subsequent interpretation of his remarks, he was doing nothing more than pointing out that a wrong decision had been rendered, not through any malice on the part of the court but rather because it had been misled by the newspapers. To argue that this suggestion by Ivens was in itself enough to scandalize the court seems to me to be clearly wrong because that would mean that it is impermissible to suggest that a court could be misled. But the belief that a court can be misled is the very justification for one of the types of contempt of court, namely the prospective type of which Ivens was also considered to be guilty. Therefore I would contend that the mere fact that a person makes a statement alleging a decision to be incorrect should not be enough to render him guilty of contempt by scandalizing; he must also intend by his statement to bring the court into disrespect, as by suggesting that it entertained malice towards him.

These then are the four reported decisions which followed the conclusion of the Winnipeg general strike. Together these cases involved eight of the eleven superior court judges in the province in an official capacity and two in an unofficial capacity (at the second reported bail application), omitting only one King's Bench judge from the activity. All in all it must be said that the Bench did not perform as well as might have been hoped. In the Russell appeal none of the five Justices of Appeal chose to define the indefinite offence with which the accused had been charged, while in the first bail application one of these justices refused the application on seemingly incorrect grounds. In this error he was later officially joined in effect by the Chief Justice of the King's Bench while two puisne King's Bench judges concurred unofficially. Subsequently the Chief Justice of the King's Bench, joined officially this time by two other of the puisne King's Bench judges, appears to have made another legal error in the contempt proceedings. W. L. Morton, after mentioning the eventual conviction of the strike leaders, said: "Thus shamefacedly closed a shameful episode; the trials and sentences were an abuse of the processes of justice by class fear and class rancour."<sup>31</sup> While this assessment may be too harsh, the performance of the judiciary in dealing with the Winnipeg general strike leaders certainly appears to have left something to be desired.

### The Legislation

If the performance of the Manitoba Bench is to be judged unkindly, still its actions are positively glowing compared to those of the Dominion Parliament when confronted with the strike. The Rowell-Sirois Report, certainly not a document seeking to aggrandize labor and one of the co-authors of which was J. W. Dafoe who was editor of the *Winnipeg Free*

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31. Footnote 20 *supra*, p. 372.



*Press*<sup>32</sup> and one of the most violent opponents of the general strike, attributes directly to the strike the amendments to The Immigration Act and to the Criminal Code<sup>33</sup> which followed upon its heels.

During 1919, but prior to the outbreak of the Winnipeg General Strike, on April 7, the government had introduced in the House of Commons a bill to amend the Immigration Act. When this bill was introduced the Minister of Immigration and Colonization, the Hon. J. A. Calder, explained one of the purposes of the bill as the inclusion in the classes of immigrants prohibited from entering into Canada of "persons who believe in, or advocate, the overthrow of constituted Government by force or violence or who advocate the unlawful destruction of property".<sup>34</sup> However, as the House went into Committee on the bill, the government realized that it had not dealt with the situation in which such persons were already in the country and so on May 9, the Minister moved two amendments to the bill to ensure that immigrants already in Canada who engaged in such activities could be deported. The first enlarged the classes of immigrants liable to deportation by including one who "advocates or teaches the unlawful destruction of property, . . . or who is a member of or affiliated with any organization entertaining or teaching disbelief in or opposition to organized governments".<sup>35</sup> The second amendment ensured that persons who were in prohibited or undesirable classes of immigrants could not acquire a Canadian domicile, because as the law stood at the time, once an immigrant had lived in Canada for five years and had acquired a Canadian domicile, he could not be deported thereafter. This second amendment, said the Minister, would allow an undesirable to be deported at any time, as long as he had not yet become a Canadian by naturalization. If this happened, the Minister explained that "the only way they could be got at afterwards would be under the Criminal Code."<sup>36</sup> After this bill had passed the Commons on May 12th, the Senate amended it further and so it returned to the Commons. The Senate had noted that the second amendment proposed in Committee only prohibited the acquisition of domicile, but did not provide for the loss of one already acquired. This omission it corrected and the Commons accepted.

Then during the strike, on June 6, the Minister of Immigration and Colonization introduced another bill relating to immigration. This bill's purpose was to amend the bill which had just been passed to amend the Immigration Act. The circumstances of its introduction make it clear that it was introduced purely in response to the situation in Winnipeg, or else the purposes for which it was introduced could have been incorpo-

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32. Formerly the *Manitoba Free Press*.

33. Footnote 2 *supra*, p. 110.

34. 1919 House of Commons Debates Canada, p. 1207.

35. *Ibid.*, p. 2283.

36. *Ibid.*, p. 2286.

rated in the first amending bill on May 9, when the Minister had proposed the changes in the first amending bill. In introducing the second amending bill the Minister said with respect to the extension of classes liable to deportation that "the matter has been inquired into further and the law officers of the Crown have advised that the section as it stands does not really cover all that was intended".<sup>37</sup> Perusal of the differences between the first and second amending bills indicates that it is far more likely that the reason for the introduction of the second bill was not that the first did not cover all that was intended, but rather that the government's intentions had changed since May 9, a week before the beginning of the strike. This second bill passed the Commons in what would appear to be record time. In his memoirs, Robert Borden, who was then Prime Minister, said, "The Bill was read first, second and third times and adopted with unanimity in about twenty minutes."<sup>38</sup> On the same day it also received Senate approval and Royal Assent. In what ways did this new amendment change the law respecting deportation of prohibited classes from that under the first amendment and under the old law?

The Act in force until 1919 was that of 1910.<sup>39</sup> It had provided<sup>40</sup> for the deportation of immigrants who engaged in Canada in any of five types of activity: first, the advocacy of the overthrow by force or violence of the government of any member of the British Empire; second, the advocacy of the overthrow by force or violence of "constituted law and authority" (presumably within members of the British Empire also); third, the advocacy of the assassination of any official of any government; fourth, the creation or the attempt to create riot or public disorder by word or deed; and fifth, the belonging to any secret society which attempted to control Canadian residents either by extortion of money, force or threat of bodily harm. With respect to the last prohibited activity, proof that the immigrant belonged to such an organization was that he was "suspected of belonging" or did so "by common repute", hardly a difficult burden of proof. In addition, the Act also provided in a separate section<sup>41</sup> for the deportation of immigrants convicted of criminal offences, so that presumably, if there was not enough evidence to convict an immigrant of an offence as a result of one of the five types of activity forbidden above in a trial, he could nevertheless be deported. As if this pernicious sort of provision were not exhaustive enough, the first amendment in 1919<sup>42</sup> had added, as mentioned previously, these additional grounds for deportation: the advocacy or the teaching of the unlawful destruction of property and the membership in or the affiliation with any organization entertaining or

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37. *Ibid.*, p. 3211.

38. Quoted in *Masters, op. cit.*, p. 104.

39. S.C. 1910, cap. 27.

40. *Ibid.*, s. 41.

41. *Ibid.*, s. 40.

42. S.C. 1919, cap. 25.

teaching this belief in or opposition to organized government. Then, after the beginning of the strike the government decided that the list of seditious activities it had concocted was still not sufficient and so that when it introduced the second amending Bill<sup>43</sup> it retained the new prohibited activities outlined in the first amendment as well as those in the Act of 1910 and added the following prohibited activities: the defence of the unlawful destruction of property and the assumption without lawful authority of any powers of government in Canada or in any part thereof. In addition, it was made clear that the first two prohibited activities retained from the Act of 1910 were grounds for deportation even when directly against provinces of Canada rather than against the federal government and that such activities could be implied from a person's deeds as well as from his statements. Further the second amending bill provided that proof that a person had acted so as to bring himself within the definition of a prohibited immigrant at any time since 1910 was *prima facie* proof that he still belonged to such class and hence was liable to deportation unless he could prove that he no longer held those views.

But, even though the Act with its second amendment of 1919 was unfair because it allowed deportation of persons who had not been, and perhaps could not have been, convicted of any crime, and even though it allowed wide latitude in drawing inferences from their actions, and even though it cast the burden of proof on the immigrant in some cases, yet these defects are nothing when compared to one other change made by the second amending Act. The Act of 1910 and the first amending Act of 1919 had provided for the deportation of any person engaged in the prohibited activities "other than a Canadian citizen". The second amending Act had stated the liability for deportation of all who engaged in these activities and then added the following proviso, "Provided, that this section shall not apply to any person who is a British subject, either by reason of birth in Canada, or by reason of naturalization in Canada." A "Canadian citizen", the term which had been used in the first two Acts, had been defined<sup>44</sup> as either a native born Canadian, a naturalized Canadian, or "a British subject who has Canadian domicile". The distinction between these latter two types of Canadian citizen was that persons who were not British subjects went through a form of naturalization before becoming Canadian citizens, while British subjects did not and in fact were not even able to until the passing of the Canadian Citizenship Act of 1946.<sup>45</sup> The proviso in the second amending act, therefore, by exempting only native born and naturalized Canadians, allowed for the deportation of the third type of Canadian citizen, namely the British subject with Canadian domicile, who could not have become naturalized even if he had thought it necessary.

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43. S.C. 1919, cap. 26.

44. Footnote 38 *supra*. s. 2(f).

45. S.C. 1946, cap. 15.

It will be recalled that seven of the eight strike leaders who were charged with seditious conspiracy had been born in Britain and hence fell into the newly deportable class. Was this then not the real purpose behind the flurry of parliamentary activity regarding the Immigration Act, the deportation of Canadian citizens without the need for a trial? In fact, as subsequently revealed, the acting Minister of Justice had wired his agent in Winnipeg the morning after the arrests, "I feel that rapid deportation is the best course now the arrests are made."<sup>46</sup> This course, however, was never pursued, a fact which may salvage something for the federal government in its reaction to the strike. Nevertheless, this provision did remain in force until 1928, at which time the infamous amendment to the section dealing with the deportation of prohibited classes was repealed and the provision of 1910 which had been replaced by it was re-enacted in its entirety. This provision remained in force until the passage of the new Immigration Act in 1952.

The federal government also reacted to the strike by passing amendments to the Criminal Code. As has been mentioned in connection with Russell's seditious conspiracy case, Canada's first Criminal Code, that of 1892, had made sedition an offence but had left its definition to the courts excepting from the definition at the same time certain acts. On May 1, 1919, (rather ironically because it was May Day) the government initiated a special committee to study the need for new legislation in the area. This committee's report was presented to the House on the same day, namely June 6, 1919, as was the second bill to amend the Immigration Act and was adopted four days later. Legislation based on the report was read a first time on June 27, received its second reading on July 1, and its last on the next day. After amendments made by the Senate were accepted by the Commons on July 5, the Act received Royal Assent on July 7.<sup>47</sup> During its rather hasty passage into law the bill's propriety was questioned by no one in the House or Senate. What were its terms?

First, it repealed the part of the old law which had stated that certain acts were not to be considered seditious, while still not offering a definition of sedition.<sup>48</sup> Secondly, it increased the maximum penalty for sedition from two to twenty years.<sup>49</sup> Lastly, it deemed certain types of associations unlawful.<sup>50</sup> It is this last provision, which was a copy of a war time Order-in-Council that had recently been rescinded, with which I wish to deal particularly. First, the provision outlawed associations of the type which advocated or used force to bring about change in the country. Then it made it an offence to be a member of such an organization. However

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46. Quoted in Masters, *op. cit.*, p. 105.

47. S.C. 1919, cap. 46.

48. *Ibid.*, s. 4.

49. *Ibid.*, s. 5.

50. *Ibid.*, s. 1.

there was a presumption of membership established if the person had "attended meetings of an unlawful association" or had "distributed literature of an unlawful association". Of such provisions, what can be said for they so clearly contravene one's sense of justice? Persons might have attended meetings of such associations purely by mistake or out of curiosity or distributed their literature not knowing the contents thereof. To cast the burden of disproving membership on such persons was surely unjust. Further, it was provided that:

any property, real or personal, belonging or suspected to belong to an unlawful association, or held or suspected to be held by any person for or on behalf thereof may, without warrant, be seized or taken possession of any person threunto authorized by the [federal police].

Thus the police, who under normal circumstances would have to apply to a judicial officer for a warrant to search and seize were under this provision themselves constituted with judicial discretion to allow *anyone* to search and seize! The amendment<sup>51</sup> further made it unlawful and punishable by imprisonment of up to twenty years to distribute seditious material regardless of whether or not the person charged knew the contents of the material he was distributing. While these provisions might perhaps have been understandable in time of war, there was certainly no defence for them after its conclusion.

This provision remained the law of the land until 1936 and unlike the amendment to the Immigration Act was invoked on a number of occasions. In 1936 when the unlawful association provisions were repealed a partial definition of "seditious intention" was placed in the Code for the first time, the section reciting the acts excepted from the definition of the offence having been returned to the Code in 1930. These two provisions were re-enacted in the Criminal Code of 1954.

### Conclusions

The reported decisions which followed the Winnipeg general strike are interesting for three reasons. First, they form a significant part of a unique event in Canada's history. Secondly, they raise two points of law that are as yet unsettled: whether the probability of the accused's appearance when required is the sole criterion to be used when deciding whether bail should be granted, and whether a defendant's intention is relevant when deciding whether his words constitute the offence of contempt of court by scandalizing it. Thirdly, and most importantly from my point of view, they illustrate the need for careful legislative definition in matters relating to the criminal law. The cases dealt with three matters: the criteria for bail, the elements of seditious conspiracy and the elements of contempt of court. Though all these matters were dealt with by statute, in the first instance the criteria

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51. *Ibid.*, s. 1.

were not set out in the statute while in the latter two instances the elements of the offences were not defined. Now some fifty years afterwards these problems have still not been settled, except that a partial definition of seditious intent has appeared in the Code. While I do not suggest that if fuller legislation had existed at the time the result for the strike leaders would have been different (it probably could not have been, given the situation in Winnipeg at the time), nevertheless clear legislation on the matter would have forced the Bench to bring far more rigour to its deliberations and might perhaps have prevented some injustices which have surely occurred in the intervening fifty years because of the vagueness of the law in these areas.

Having made a plea for greater legislative action in the criminal law area, I now turn to the question of the importance of the legislation which followed the strike and find myself forced to query the wisdom of my plea. While it is true that greater legislative initiative would bring greater certainty to the law, at the same time it might make the law less just, as it most certainly did after the strike. Whom should we trust — the judiciary that can bend a vague law to its own purposes (unconsciously or otherwise) or the legislature that can be panicked by the giant shadows thrown by a minuscule and powerless group into passing legislation which could deprive certain Canadians of their citizenship and create probably the widest powers of search and seizure granted in recent history in any country in the common law tradition? Here one might introduce the question of the need for a bill of rights which, though it could not prevent a thoroughly determined legislature from pressing on, might by the very publicity generated by conflict with its provisions deter one less set on its course. But in the final analysis it seems difficult for civil libertarians to know which way to turn and the lesson of the events following the Winnipeg general strike seems to be that in a time of real or perceived crisis neither way can be the right way.

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