

Lawyers in the ‘Slammer’ and in Hiding: The Pitfalls of Advocating for Unpopular Causes at the British Columbia Bar, 1900-1925

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PURPOSE OF STUDY

This study is part of a larger project that seeks to build upon the work of Wes Pue on the history of the legal profession in other parts of Western Canada. Our aim is to determine the effects on legal practice in British Columbia (BC) of elite lawyers’ expectations of members of the profession, during the period from 1900 to 1925, expectations shared with their counterparts in other Provinces.¹ Pue argues that these expectations stressed gentlemanly conduct, Christian values, and loyalty to British legal culture and principles of governance.² Although the epicentre of discussion and promulgation of these expectations, and the anxieties in the elite realms of the profession that inspired them, was the Prairies, and Manitoba in particular, they were shared in other parts of the country, including BC. The anxieties reflected concern among business leaders, the professional classes and mainstream politicians about

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¹ Wes Pue, *Lawyers Empire: Legal Professions and Cultural Authority, 1780-1950* (Vancouver: UBC Press, 2016), especially chapters 8, 9, and 12.

² *Ibid* at 425-39.

increasing ethnic diversity in the Canadian population resulting from liberal migration policies, and labour unrest in the wake of World War I.³ The latter concern was connected to the uncertainties of international politics and domestic harmony created by the Bolshevik Revolution in Russia and its seemingly insidious spread outside that country. In what was seen as an increasingly uncertain world, Canada and its economy could only flourish, it was believed, by adhering to the principles of British governance and English law on which the country was founded, as well as the importance of the Dominions in upholding and protecting the British imperial mission.⁴

In terms of legal professional values, it was felt that the emphasis in practice should be on the freedom of the individual, the protection of property, and encouraging legitimate commerce. Control and guidance should be exercised not by the state but by Provincial law societies, self-governing professional bodies which would ensure lawyers were subject to codes of ethics, had satisfied common and trusted educational requirements, and proven and maintained their fitness to practice.⁵ These attitudes, although clothed in the language of uplift and a desire to guarantee professional competency, also reflected both racist and nativist sentiment within the profession and society at large.⁶ To those who adhered to the elitist vision, the implication was that those who came from societies and cultures which did not share and cherish British culture and values should either be excluded from access to legal practice (true of Asian aspirants to the profession), or, if admitted, watched to ensure that their activities remained true to the “British” ideal (for example, a range of

³ Pue, *supra* note 1 at 77-78, 430-49. For a more comprehensive analysis of these geopolitical and domestic anxieties, see Dennis C. Molinaro, *An Exceptional Law: Section 98 and the Emergency State, 1919-1936* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2017) at 19-56.

⁴ Pue, *supra* note 1 at 77-78, 427-30. Pue argues that these pro-British sentiments were combined with a sense that as Canada was also a North American nation, United States models of professional governance were relevant to the Canadian situation (*ibid* at 87-92).

⁵ *Ibid* at 79-87.

⁶ For these attitudes, see *ibid* at 91-92, 343-44, 425. See also *ibid* at 436-39 for discussion of the views and ideology of the leader of the reform movement, the Manitoban, Sir James Aikens.

non-British European immigrants).⁷ What is less clear is how practitioners fitting the model of “respectable” lawyers representing unpopular causes, considered to one degree or another as subversive, fit into this ideological matrix.

Our objective in this piece is to determine how lawyers in BC representing clients with radical or socially progressive agendas fared in light of these suppositions and unanswered questions. Although the BC legal profession seems to have been a follower rather than a leader on the issue of institutionalizing self-governance and the control of practice, the sentiments outlined above were shared by the elite, especially among the Benchers of the Law Society.⁸ During this period, that body, aided and abetted by Vancouver law students, barred both Asian and Indigenous aspirants to the profession from entering its portals. The ethnic composition of both the Benchers and the judiciary then and in the following decades indicates a profession fitting the desired Anglo Celtic pedigree and warmth to British values, at least in its upper reaches.⁹ The fact that, in the Province at the time, the articling system was central to

⁷ For a classic example of the exclusionary policy as it played out in BC, see Dawna Tong, “A History of Exclusion: The Treatment of Racial and Ethnic Minorities by the Law Society of British Columbia to the Legal Profession” (1998) 56:2 *The Advocate* 197-210; Joan Brockman, “Exclusionary Tactics: The History of Women and Visible Minorities in the Legal Profession in British Columbia” in Hamar Foster & John McLaren eds, *Essays in the History of Canadian Law: Vol. VI, British Columbia and the Yukon* (Toronto: Osgoode Society for Canadian Legal History, 1995) at 519-22. For the problematic assumptions and exclusions underlying the concept of professionalism, see Constance Backhouse, “Gender and Race in the Construction of ‘Legal Professionalism’: Historical Perspectives” in Adam Dodek & Alice Woolley, eds, *In Search of the Ethical Lawyer* (Vancouver: UBC Press, 2016). Exactly how monitoring would work out, other than in the case of normal disciplinary processes (for instance defalcation or sharp practice), is unclear. Presumably, professional pressure was to be relied on.

⁸ In the official history of the BC Law Society, Alfred Watts, *History of the Legal Profession in British Columbia 1869-1984* (Vancouver: Law Society of BC, 1984) 38-9, the author indicates that during the years of World War I the Society was under severe stress because of unwise investments. On how the Society followed the lead on reform of the profession, see Pue, *supra* note 1, at 85-86 and notes 40-41.

⁹ For a group portrait of the judges of the BC Court of Appeal during its first 30 years, and of the appellate bar in BC during that period, see Christopher Moore, *The British Columbia Court of Appeal: The First Hundred Years, 1910-2010* (Vancouver: UBC Press for the Osgoode Society, 2010) at 29-33.

education for practice suggests strongly that the pattern of admissions to the bar and the homogeneous ethnic character of the legal profession reproduced itself over several generations.

In the first part of our project, we are examining the comparisons and contrasts of the careers of two Vancouver practitioners. The first is J Edward Bird who was in practice in Vancouver between 1902 and 1938.¹⁰ The second is Israel Rubinowitz. He enjoyed a much shorter career, practicing there between 1912 and 1923.¹¹ Both individuals included in their legal practice the representation of what are described as unpopular causes during the era. They represented labour interests and ethnic minorities – social and cultural groups that were mistrusted and even vilified by important segments of the dominant settler community in BC. Moreover, their practice and careers overlapped during the 1910s and early 1920s.

Part of the value of treating these two men and their careers together is that they came from different ethnic and social backgrounds, and their connections with elite members of the profession differed. It is therefore possible to get some hint of whether who they were and where they came from may have affected how they were received as lawyers by those who administered and worked within the legal and justice systems of the day, by politicians, and by the press of that era. This project remains ongoing; consequently, the picture that emerges is in some places incomplete and in others impressionistic.¹²

Focussing on these two men and sharing this work and its findings is important in following through on the promise and inspiration of the

¹⁰ J Edward Bird, *Memoir* (Vancouver: Unpublished, 1940). We are grateful to J.E. Bird's grandson, Richard Bird Q.C., for allowing us to copy and use the memoir [Bird, *Memoir*]. See also Janet Mary Nicol, "'Not to be Bought, Nor for Sale': The Trials of Joseph Edward Bird" (2016) 78 *Labour/Travail* 219.

¹¹ Janet Mary Nicol, "'Like a Bolt from the Blue': Spotlight on Israel Rubinowitz, Buried in the Jewish Section of Mountain View Cemetery" (2017) 36 *The Scribe: The Journal of the Jewish Museum and Archives of British Columbia*: 97. Thanks are due to Janet Mary Nicol who has written separately on both men and helped us focus by both correspondence and in person.

¹² One area in which there has been frustration, is in getting access to Law Society of British Columbia records that may be related to the two men, other than the dates of their admission to practice, and removal from the membership rolls at death or retirement.

work of Pue, as well as several other scholars across Canada, in opening up both the institutional history of the legal profession and its accommodation or otherwise of atypical aspirants and practitioners.¹³ It also points to the relevance of that research elsewhere in Canada, not least that relating to history of the profession in times of political and social turmoil.

WHO WERE THESE MEN?

Bird was an Anglo-Canadian who grew up in a comfortable middle-class home in Barrie, Ontario, where his father owned a shoe factory, employing a number of craftsmen.¹⁴ He later moved to Toronto for post-secondary education at Trinity College, and then articulated for the Ontario Bar.¹⁵

By contrast, Rubinowitz's father, Louis, was of Lithuanian-Jewish heritage and an immigrant to the US, who subsequently migrated to the west coast of Canada in 1890 and set up a dry goods store selling clothing,

¹³ For Manitoba, see Reinhold Kramer & Tom Mitchell, *When the State Trembled: How A.J. Andrews and the Citizens' Committee Broke the Winnipeg General Strike* (Toronto: University of Toronto Press, 2010); Harold Dick, "Cultural Chasm: Mennonite Lawyers in Western Canada" in W Wesley Pue & David Sugarman eds, *Lawyers and Vampires: Cultural Histories of Legal Professions* (Oxford: Hart Publishing, 2003) at 329-366. For Ontario, see Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press for the Osgoode Society, 1999), especially ch 6; Susan Lewthwaite, "Ethelbert Lionel Cross: Toronto's First Black Lawyer" in Barrington Walker ed, *The African Canadian Legal Odyssey: Historical Essays* (Toronto: University of Toronto Press for the Osgoode Society, 2012) at 49-83; Julius Isaacs, "Delos Rogest Davis K.C." (1992) 26 *Law Society of Upper Canada Gazette* 293; Laurel Sefton MacDowell, *Renegade Lawyer: The Life of J.L. Cohen* (Toronto: University of Toronto Press for the Osgoode Society, 2001); Christopher Moore, *The Law Society of Upper Canada and Ontario's Lawyers 1797-1997* (Toronto: University of Toronto Press, 1997) 175-80, 199-201. For Saskatchewan, see W H McConnell, "Peter G. Makaroff, Q.C.; Canada's First Doukhobor Lawyer" (1992) 44 *Saskatchewan History* 85; Bill Weiser, "Wiping out the Stain: The On-to- Ottawa Trek, the Regina Riot and the Search for Answers", in Barry Wright, Eric Tucker & Susan Binnie, eds., *Security, Dissent, and the Limits of Toleration in Peace and War: Volume IV, Canadian State Trials* (Toronto: University of Toronto Press for the Osgoode Society, 2015) .

¹⁴ Bird, *supra* note 10 at 1.

¹⁵ *Ibid* at 11.

shoes and boots in Vancouver's Gastown.¹⁶ Rubinowitz, who shone academically in high school while helping at his father's store, headed east to take a degree in politics at McGill (there being no University of British Columbia to attend in 1901). With an honours B.A. to his name, he returned to Vancouver in 1904 to commence articles with the firm of Tupper and Griffin. On receiving word that he had been awarded a Rhodes Scholarship, he sailed for England that same year.¹⁷

Both men seem to have been primarily motivated to secure their professional qualification as lawyers. Bird did not complete his B.A. in the process of qualifying for the Bar.¹⁸ Rubinowitz failed his Oxford BCL in 1908, while the same year ranking 12th of 129 in the English Bar Finals. He was admitted to practice as a member of the Inner Temple in 1910.¹⁹ He likely preferred life in London, the hub of legal practice in England, and probably participated in the vigorous debate over Zionism going on within the Jewish community in the metropolis.²⁰

After practice in Toronto and Rat Portage (i.e. Kenora), Bird and his young family, persuaded by the favourable reports of his sister, the wife of a young Victoria lawyer, Lyman Poore Duff, moved to the west coast in 1902. Bird opened a practice in Vancouver.²¹ Rubinowitz, after continuing articles for a time in Vancouver, spent time in chambers in London with the thought of working at the English Bar. However, he returned to Vancouver in 1911 and was called to the British Columbia Bar in 1912.²²

¹⁶ Nicol, *supra* note 11 at 101-02. Nicol notes that the family would have been among the first Jews to settle in the newly established city.

¹⁷ *Ibid* at 102-03.

¹⁸ Bird, *supra* note 10 at 11. Bird describes himself as "not a student" and had not "earned" academic distinction. Moreover, it would have been a strain on the family's finances for him to continue. So to articles he turned.

¹⁹ Rhodes Trust, Transcript for Israel Rubinowitz, Queen's College, Oxford. The transcript reveals that the scholar was fined by the trust in 1905, following complaints about his work by his College.

²⁰ For the details of this story, see Jonathan Schneer, *The Balfour Declaration: The Origins of the Arab-Israeli Conflict* (Toronto: Anchor Canada, 2012) at 107-64.

²¹ Bird, *supra* note 10 at 46, 48, 59, 62-64. Bird writes about his time in Toronto and Rat Portage at 25-31. He married Caroline Irwin while in that community. He set up a solo practice in Vancouver, struggling to make a living, and in the early stages benefitting from remittances from Rat Portage {Kenora}.

²² Nicol, *supra* note 11 at 103, n 27. Nicol's footnotes reveal that Rubinowitz's file kept

Bird's practice soon attracted other lawyers, so that his experience was primarily within a firm of lawyers; Rubinowitz's comparatively short career was that of a solo practitioner.²³

WHAT INTERESTS DID THEY REPRESENT?

In discussing the history of the engagement of the English Bar in representing unpopular causes, Wes Pue indicates that this does not seem to have been the reflection of any deeply held and widespread belief among barristers about the primacy of their role in seeking justice.²⁴ Rather, it flowed from the exertions of a limited number of individuals holding progressive views, who understood their role as one of upholding the rule of law in the face of the authoritarian exercise of political and economic power – men such as Thomas Erskine, Henry Brougham, and, for a time, William Garrow.²⁵ The pattern in British Columbia seems to have been similar, although less well-defined because of the joining of the two branches of the profession, barrister and solicitor, and the demands of general practice and its economic realities on the majority of practitioners.²⁶ Both Bird and Rubinowitz fit into this pattern of legal service, taking on more conventional causes and clients, including business clients (Bird was, for instance, on a retainer for Woodward's Department Store) as well as civil rights cases.²⁷ Rare was the example of Arthur O'Meara who, as Hamar Foster has suggested, was almost uniquely

by the Law Society has him resuming articles briefly with the same firm, Tupper and Griffin in 1908 (after the Oxford disappointment) and then later that year into early 1909 with HWC Boak, before returning to London. The Rhodes Trust record notes that he was in chambers in London with JB Matthews and reports that he "hopes to be able to get work at English Bar."

²³ Nicol, *supra* note 11 at 103. The author refers to Rubinowitz occupying various office suites at 470 Granville Street and residing with his parents in Gastown.

²⁴ Pue, *supra* note 1 at 36-73.

²⁵ *Ibid* at 49-50, 53-54.

²⁶ It seems that from the early days in the colony of Vancouver Island, the paucity of lawyers on the West Coast was recognized as a problem, and that whether they were qualified as barristers or solicitors they had a right of audience before the courts. See Watts, *supra* note 8 at 2-3.

²⁷ Bird, *supra* note 10 at 76-81.

a “cause lawyer,” i.e. one committed to a particular social cause in his legal work; in O’Meara’s case, it was to Indigenous rights.²⁸

In the turbulent climate of industrial and race relations which marked the history of BC during the first quarter of the 20th century, both these men were atypical in being among the few practitioners who willingly took on the defence of labour and minority ethnic interests out of a sense that these interests deserved dedicated representation. As Robert McDonald has noted of the legal profession and business in his study of the early growth of Vancouver, “[l]awyers melded into the capitalist class with particular ease because their interests and expertise led them to serve as agents and facilitators of business or to become entrepreneurs themselves.”²⁹ McDonald notes that the mining and salmon canning industries became more heavily capitalized at the turn of the 19th century, and that this, along with the external corporate control of banking, transportation and utilities, “[a]ll brought lawyers into the mainstream of business promotion or management.”³⁰

Bird from his early days in Vancouver represented unions, the more assertive general or industrial unions (the Industrial Workers of the World – the Wobblies, and the United Mine Workers of America), as well as more conservative craft unions, such as members of the Vancouver Trades and Labour Council. During the first two decades of the 20th century, while capital was consolidating in one way or another into larger and more powerful units, labour was organizing both organizationally within, and, in some instances, outside the political system. It was a period of both excitement and instability, as various ideologies (e.g. Marxist, socialist, anarchist, and social democratic) and plans for a way forward jockeyed, sometimes uncomfortably, with each other.³¹

²⁸ Hamar Foster, “If Your Life is a Leaf: Arthur Eugene O’Meara’s Campaign for Aboriginal Justice” in Constance Backhouse and W Wesley Pue, eds, *The Promise and Perils of Law: Lawyers in Canadian History* (Toronto: Irwin Law, 2009) at 225-241.

²⁹ Robert McDonald, *Making Vancouver: Class, Status and Boundaries 1863-1913* (Vancouver: UBC Press, 1996) at 115-16.

³⁰ *Ibid.*

³¹ *Ibid* at 90-119. For insight into the Vancouver Labour Council and its history, see Mark Leier, *Red Flags and Red Tape: The Making of a Labour Bureaucracy* (Toronto: University of Toronto Press, 1995).

Bird advertised his legal services in the socialist press.³² This willingness to represent workers' interests was for him politically rooted. Disturbed by what he perceived to be manipulation of a nomination meeting for the Liberal candidate for the federal seat of Vancouver in the 1902 federal election, Bird supported and acted as an agent for the Labour interest candidate.³³ He left the Liberals and became a member of the Socialist Party of BC (later of Canada).³⁴ In his role as counsel, Bird was not afraid of defending his clients vigorously, despite the fact that his own socialism was moderate in belief and tone. In appearing before the 1903 Royal Commission on Industrial Disputes in British Columbia, on behalf of the United Brotherhood of Railway Employees who had struck the Canadian Pacific Railway in a bitter dispute, he expressed sympathy for the privations and aspirations of the workers. Moreover, he openly criticized the often virulent anti-labour policies of business in the use of "scabs" and armed "special police."³⁵ In 1909, when representing members of the Wobblies (I.W.W.) who had been arrested for exercising a "right of free speech" on the streets of Vancouver, he had no patience with a magistrate's suggestion that during an adjournment in the hearing his clients undertake to desist from their activities.³⁶ Bird was equally critical of legalized discrimination against racialized and ethnic minorities, especially migrants from the Indian subcontinent whom he represented both before and during the *Komagata Maru* crisis in 1914.³⁷ Moreover, he uniquely tried to open the practice of law to an Asian Canadian, Gordon

³² Nicol, *supra* note 10 at 222. The author reports that the advertisement appeared weekly from August 2, 1903 to February 1, 1908 in *Citizen and Country* (later named *Canadian Socialist* and then *Western Clarion*).

³³ Bird, *supra* note 10 at 64-66.

³⁴ For the development of socialism in British Columbia through party structures during this period, see A Ross McCormack, *Reformers, Rebels and Revolutionaries: The Western Radical Movement 1899-1919* (Toronto: University of Toronto Press, 1977-1991 reprint) at 18-34, 53-76.

³⁵ See Bird, *supra* note 10 at 66-67, and the minutes of evidence of the *Royal Commission on Industrial Disputes in British Columbia*, Department of Labour, Canada Session Papers (Ottawa: Queen's Printer, 1904).

³⁶ Mark Leier, *Where the Fraser River Flows: The Industrial Workers of the World in British Columbia* (Vancouver: New Star Press, 1990) at 65-66.

³⁷ Hugh Johnson, *The Voyage of the Komagata Maru: The Sikh Challenge to Canada's Colour Bar* (Vancouver: UBC Press, 2014) at 38-106; Bird, *supra* note 10 at 88-95.

Won Cumyow, who he attempted to employ under articles, but which the Benchers of the Law Society refused to countenance.³⁸

In comparison, we know little of Rubinowitz's politics and personal feelings as he left no memoir, and therefore, is a more enigmatic subject than Bird. Consequently, his story requires some reading between the lines of the references of others to him and his exploits. Janet Mary Nicol reports that, apart from his advocacy, Rubinowitz was active in the wider community. She notes that he was a Mason, and a leading member of the Red Cross in Vancouver during World War I, service for which he earned praise from the reputable Charles Hibbert Tupper, KC, a leader at the Vancouver Bar.³⁹ Along with his Anglo connections he was an active Zionist, indeed a founding and board member of the Vancouver Zionist Society.⁴⁰ As well, he possessed what is often described as the strong Jewish humanitarian tradition in his makeup, which dictated that he be ready to defend and protect the underdog.⁴¹ Amidst his more general legal work, Rubinowitz's commitments led him to act for mine workers on Vancouver Island, who were being victimized by employers (originally in competition with Bird).⁴² Later, during the "Red Scare" in Canada in the wake of World War I, associated with the Bolshevik Revolution in Russia, he represented alleged left wing Russian "anarchists" faced with deportation from Canada. In his encounters with power and authority, and speaking to them as an advocate, Rubinowitz pressed strongly (some felt

³⁸ Joan Brockman, *supra* note 7 at 519-22.

³⁹ Nicol, *supra* note 11 at 103. Tupper was quoted in an obituary to Rubinowitz, *Vancouver Daily Province* (15 August 1923) at 22 as saying of the lawyer's work for the Red Cross "few could have done so much and so well in that cause than he did."

⁴⁰ See First Zionist Executive, Vancouver, BC online: *BC Archives* <search-bcarchives.royalbcmuseum.bc.ca/first-zionist-executive-vancouver-bc> [perma.cc/ELB3-F6BX].

⁴¹ Nicol, *supra* note 11 at 109, endnote 3 quotes from a statement about the young Israel Rubinowitz after his graduation from McGill: "[his] aim and ambition is to work among his fellow-men and do his utmost to alleviate the misery and suffering of his co-religionists in Russia, Romania and Galicia." The writer added that "he plans to become a lawyer"; Lawrence F. Tapper, *A Biographical Dictionary of Canadian Jewry, 1897-1909*, (taken from the *Canadian Jewish Times* 14 July 1905).

⁴² Nicol, *supra* note 11 at 97-101.

intemperately) for respect for the rule of law and against perceived biases of judicial officers.⁴³

HOW WERE THESE LAWYERS VIEWED IN THE COMMUNITY?

The fact that both Bird and Rubinowitz represented labour interests did not endear them to mainstream opinion in the Province, which was sympathetic to economic expansion at almost all costs and to industrial "progress."⁴⁴ This body of opinion included a majority of newspapers within BC, although given the flourishing of the urban, rural and special interest press during this era, there were also dissenting and counter voices. The expansionist mainstream view of progress and the virtues of the capitalist enterprise was shared by most, if not all, judges and elite lawyers in the Province. As we have already noted, lawyers were committed to representing and facilitating the interests of business. Many lawyers who were engaged in more modest practices, whether urban or rural, would likely have shared in these opinions.⁴⁵ Despite other interests he represented, Bird was also known during the years between 1902 and 1914 as a lawyer ready to work with, and on behalf of, unions which were often seen as disruptive forces in society, as politically committed to socialism, and one not afraid to speak his mind from time to time publically in support of both.⁴⁶ Unsurprisingly, he was not welcome as a member of the Vancouver Club.⁴⁷ He was, however, respectably connected

⁴³ On his defence of the "anarchists", see *ibid* at 104-6.

⁴⁴ Jean Barman, *The West Beyond the West: A History of British Columbia*, 3rd Ed (Toronto: University of Toronto Press, 2007) at 189-215.

⁴⁵ McDonald, *supra* note 29 at 115; quotes with approval from an essay by Jonathan Swainger on the Prairie small town lawyer who he describes as being one who "like most of the adventurers and settlers who came to the west subscribed to the image of an individualistic entrepreneur prospering in a new land." Swainger, "Ideology, Social Capital and Entrepreneurship: Lawyers and Businessmen in Red Deer, Alberta 1900-1920" in Carol Wilton, ed, *Lawyers and Business on Canada 1830-1930* (Toronto: Osgoode Society, 1990) 377-402 at 392.

⁴⁶ See Minutes of Hindu Mass Meeting held in Dominion Hall, Vancouver, 21 June 1914, at 250, Vancouver City Archives, MS 69, H. H. Stevens Papers, Volume I, Hindu Immigration 1912-1916.

⁴⁷ He was, however, a member of the Terminal City Club and a Freemason's lodge - Nicol, 'Not to be Bought', *supra* note 10 at 224. On the significance of fraternal organizations in Vancouver during this period, see McDonald, *supra* note 33 at 193-6.

through his relationship with Duff (appointed in quick succession to the BC Supreme Court and the Supreme Court of Canada). Moreover, as his memoir reveals, he had an impeccable middle-class lifestyle.⁴⁸

Rubinowitz, perhaps for a time because of youthful zeal but possibly also because of his ethnicity and religion, tended to attract more open criticism, particularly from conservative judges and the right of centre media.⁴⁹ Anti-Semitism and more general resistance of the legal profession to entry from minority communities has been explored in Ontario, and clearly existed.⁵⁰ The records of those who were enrolled in programs of advanced education in BC at the opening of the 20th century suggests that there was miniscule representation from minority groups in the community in post-secondary programs.⁵¹ Although BC attracted lawyers from other jurisdictions, the demographics of the Jewish community in Vancouver in the first two decades of the century indicates that the large majority of those who settled were tradespeople, artisans or unskilled, and from outside North America.⁵² David Freeman, a veteran Vancouver Jewish lawyer, remarked in comments in 1994 at a ceremony to honour him, that his recollection was that he could not recall anti-Jewish feeling in

⁴⁸ See Bird, *supra* note 10 at 85-87 on housing the family. Nicol, *supra* note 11 at 224 which notes the family lived on the fashionable west end of downtown Vancouver and employed a live-in servant.

⁴⁹ McDonald, *supra* note 29 at 116 notes a revealing comment from the MP for New Westminster, Aulay Morrison, that there appeared to be “a [political] ... movement on the part of Labor People to ‘Laborize’ ... British Columbia.” Morrison who was subsequently appointed to the BC Supreme Court tussled with Rubinowitz on a number of occasions over the latter’s criticism of the justice system as he represented workers and “anarchists.”

⁵⁰ See *supra* note 13.

⁵¹ In the Calendar of the Vancouver College, 1902-03 (Vancouver: Evans & Hastings, Printers, 1903) an institution of further education that seems to have administered the senior matriculation system in Vancouver, as well as being a feeder for degree programs at McGill University, mentions one name that is undeniably non-Anglo-Celtic and that is “Israel Rubinowitz.” He is referred to as Head of School for 1899-1900. That designation meant that he had achieved the best matriculation results for the city and had earned the Governor General’s Medal.

⁵² See Haim F Ghiuzeli “The Jewish Community in Vancouver”, online: <bh.org.il/the-jewish-community-in-vancouver/> [perma.cc/LA7R-B6SU].

Vancouver in the 1920s and 1930s.⁵³ He added ruefully that racist sentiment in society in those days was deflected towards Asians. It was only when he went to study law at Osgoode Hall in Toronto and sought articles in that city that he ran up against anti-Semitism. In a later set of interviews, Freeman did comment that as a lawyer in Vancouver in the mid-1930s there was a view held by some in the profession that Jewish lawyers were to be tolerated unless they became too “assertive” in choosing clients and in their advocacy.⁵⁴ As Wes Pue argued in his study of the history of legal education in BC, the fact that there were no institutional barriers to admission did not preclude the existence of informal ones.⁵⁵ The gate keepers of the profession, actual and self-styled, could be numerous.

Whatever the reasons, the fact that Rubinowitz practised alone, whether out of choice or necessity, may have generated a mistrust of him in certain quarters as a “lone wolf,” indiscreet in his attitudes and comments and too ready, it was thought, to wrap himself in an “extreme” rhetoric of the rule of law. On the one hand his involvement in a Masonic Order and the Red Cross suggests the importance he placed on bonding with and providing service to the wider community. On the other, the fact that he resided with his parents in a predominantly commercial area of the city during his professional career, suggests that convenience, connection to his roots and commitment to Zionism were as important to him in his private life as status in his profession. As an advocate, trained in the peculiar combination of individualism and professional tradition or mythology that characterized the English Bar,⁵⁶ Rubinowitz clearly believed in an ideal of the courts as forums for justice for his clients, he was forthright in argument and he expected the respect of fellow counsel and

⁵³ *Jewish Western Bulletin* (17 March 1994) at 1, 6. Freeman was the honoree of the Jewish National Fund. On the exclusionary record of the Law Society of British Columbia against racial and ethnic minorities, see Tong, *supra* note 7 at 197-210.

⁵⁴ See Neil J Hain, “British Columbia’s Jewish Bar in the 1930-1940s”, University of Victoria Faculty of Law, unpublished paper in Canadian Legal History course, 1997 (based on interviews with David Freeman, QC).

⁵⁵ W Wesley Pue, *Law School: The Story of Legal Education in British Columbia* (Vancouver: UBC Faculty of Law, 1995) 216-22.

⁵⁶ See Pue, *supra* note 1 at 36-73. For the pressure on non-English aspiring lawyers to conform by ‘imitating the English style’, see Backhouse, *supra* note 7.

judicial officer alike. Our guess is that he believed that a Jewish gentleman lawyer was every bit as principled, and could be as accomplished as his Christian brethren.

BIRD AND RUBINOWITZ AND THE VANCOUVER ISLAND COAL STRIKE

Both Bird and Rubinowitz were involved in the representation of striking coal miners in the progressively more confrontational and violent Vancouver Island Coal Strike that ground on during 1912-14.⁵⁷ At the core of this dispute were workers' concerns about mine safety and working conditions, and the mine owners' rejection of unionization of the miners by the United Mine Workers of America.⁵⁸ Bird, along with prominent Liberal lawyer, Wallace Debeque Farris, was retained by the union to represent the large number of men arrested and charged with riot, assault and intimidation in Ladysmith and Nanaimo.⁵⁹ These activities were associated with growing frustration among the strikers faced with unyielding employers and the tacit support the latter received from the "do nothing" Provincial Tory government of Richard McBride.⁶⁰ Locked out, watching their jobs taken over by "scabs," mine owners who refused to bargain, and faced with the strong arm tactics of "special police," tempers had flared.⁶¹ The government's reaction was to show its true stripes and summon the militia in aid of the civilian power, to bring "law and order" to the coalfields.⁶²

⁵⁷ See John Hinde, *When Coal Was King: Ladysmith and the Coal-Mining Industry on Vancouver Island* (Vancouver: UBC Press, 2003) at 148-260, for a detailed and engaging discussion of the strike, its origins and outcomes. For a contemporary account of the strike from the view of labour, see Jack Kavanagh, *The Great Vancouver Island Coal Strike of 1913* (Nanaimo: Red Lion Press, 2008 - pamphlet originally published by the Miner's Liberation League).

⁵⁸ Hinde, *supra* note 57 at 148-51, 158-59.

⁵⁹ *BC Federationist Weekly Newspaper* (3 October 1913) at 1, 10. The column features photos of both men.

⁶⁰ Hinde, *supra* note 57 at 153-55.

⁶¹ *Ibid* at 173-206.

⁶² *Ibid* at 173, 184-92.

Most of those arrested, following union advice, chose Bird or Farris as counsel, but several, reflecting a local spirit of independence among some strikers, opted to retain the newly-minted lawyer Israel Rubinowitz as their advocate.⁶³ On September 23, 1913 the young lawyer together with two clients, Walter Pryde and William Moore, were arrested on the streets of Nanaimo while discussing the charges against them. The trio were accosted by Special Constable Maguire and refused to move on when he ordered them to do so. He charged them with watching and besetting (or intimidating) substitute workers who had alighted incidentally from a train nearby. Despite Rubinowitz's remonstrations daring the officer to do so given his status as a lawyer, the constable arrested them and consigned all three to the Nanaimo Jail.⁶⁴ In the justice system and the press, the fur quickly began to fly.⁶⁵

The threesome appeared the next day, September 24, for a preliminary hearing before Magistrate J.H. Simpson whose reputation in union circles as a supporter of the mine owners was well-known.⁶⁶ Simpson was drawn into a verbal altercation with Rubinowitz who described the charge against him as "preposterous and fantastic" and reproved the judge for seeking to silence him. On the suggestion of Thomas Shoebottom, the prosecutor, the hearing was adjourned to two days later. Rubinowitz and his clients were returned to the jail for a further two nights. In the meantime, the lawyer wrote to Judge Frederick Howay who was in town to sit on the trials

⁶³ Nicol, *supra* note 10 at 224. A report in the *BC Federationist* (3 October 1913) quotes the senior lawyers as disapproving of Rubinowitz's involvement because of his lack of experience, being only recently called to the Bar; Hinde, *supra* note 57 at 159, notes that the local miners in this dispute were quite ready to exercise independence from the UMWA when it suited their interests.

⁶⁴ The initial report of the encounter is contained in the *Nanaimo Daily Herald* (24 September 1913) at 1.

⁶⁵ The *Nanaimo Daily Herald*, a pro industry newspaper, speculated that Rubinowitz was perhaps an *agent provocateur* representing the "Socialist Party" (25 September 1913) at 1. The *BC Federationist* (3 October 1913) at 1, 10 insisted that it was the right of individual miners, if they wished, to retain counsel of their choice. Several had done so.

⁶⁶ See for a searing indictment of Simpson from the left, *BC Federationist* (3 October 1913) at 2, in which Simpson is described variously as "Judas Iscariot," "the tool of the coal barons," "an anarchist," and "breeder of anarchy," being castigated for his hypocrisy for purporting to be a Christian gentleman while imprisoning good workers for vagrancy.

of miners from Ladysmith charged with various “riotous offences,” seeking bail for him and his clients.⁶⁷ In this missive he argued the importance of the rule of law, protested vigorously the arrest, the charges, being paraded through the streets in custody, and detention in the deplorable conditions in the jail. He went on to allege that this treatment was an attempt to prevent him as a lawyer from representing his clients.⁶⁸ Howay heard the bail application on Friday, September 26. Rubinowitz was no more charitable about the system in which he was embroiled at that hearing. Although bail was granted, the judge publicly reprimanded the lawyer for having complained to him by letter.⁶⁹ Later that day, over the protests of Rubinowitz at the charges lodged against him and his clients and the presence of Simpson on the Bench, and despite the absence of any probative evidence other than that of Constable Maguire of their “offence,” the magistrate committed all three for trial.⁷⁰

The press followed the saga with rapt interest from different points on the political spectrum. Rubinowitz had not only written to Justice Howay about his treatment. He had also advised members of the progressive and left wing press in Vancouver of his fate. An editorial in the *BC Saturday Sunset* reacted quickly to his account of his experiences, arguing the affront to British notions of justice in the actions of the police and justice officials in Nanaimo in arresting a lawyer and his clients and consigning them to prison, not to mention the deplorable state of the jail.⁷¹ The right wing press could not resist a rejoinder. In an editorial in the *Nanaimo Daily Herald*, R.R. Hindmarsh accused the Vancouver paper of listening to a biased story by someone whose presence in Nanaimo had not been explained. Rubinowitz, Hindmarsh asserted, was guilty of making wild and baseless charges against the administration of justice in the city. The lawyer had favoured the dramatic over the truth, had libelled the Nanaimo

⁶⁷ Letter from Rubinowitz to Howay (24 September 1913) in UBC Rare Books and Special Collections, Frederick Howay Fonds, Box 5-25.

⁶⁸ Nicol, *supra* note 11 at 98-99.

⁶⁹ See the report of the hearing in the *Victoria Daily Colonist* (26 September 1913). The lawyer was released on the surety of \$500. Pryde and Moore were released a day later on recognizances of \$500 and \$300 respectively.

⁷⁰ *Nanaimo Daily Herald* (27 September 1913) at 1, 3.

⁷¹ *BC Saturday Sunset* (27 September 1913) at 9. This was a weekly associated with the *Vancouver Province*.

jail, and was engaged in "grandstanding," in the process violating every tradition of the British Columbia Bar.⁷²

Meanwhile strikers in Ladysmith had followed the advice of Bird and Farris and opted to plead guilty to the charges against them for offences during the riot, in the hope that their cooperation in a speedy trial might result in mild sentences.⁷³ Judge Howay had other ideas. This unbending and anti-labour establishment figure consciously sought to make a public example of them for having committed "acts of terrorism" by imposing a range of jail sentences: two years for "ringleaders," one year for the "general run of rioters," to several months for those "slightly interwoven."⁷⁴ The judge saw to it that his sentences, comments on the sentences, and his impulses were reported fully in the Press.⁷⁵ At this news, other strikers from Nanaimo whose cases were pending opted for trial by jury instead.⁷⁶ The hearing of these cases was ultimately moved to the mainland because of concerns and embarrassment over Justice Howay's conduct during the earlier trials.⁷⁷ There represented by Bird and in a minority of cases by Rubinowitz, overall the strikers fared better before Justice Aulay Morrison and juries, with fewer jail sentences, consideration of time served and several acquittals.

⁷² *Nanaimo Daily Herald* (27 September 1913) at 2 under the heading 'Gallery Play'.

⁷³ Mentioned in the *BC Federationist* (3 October 1913) at 1, 10; Nicol, *supra* note 10 at 109, n 13 suggests concern on the part of the defence team when advised that Judge Howay would be replacing Charles Barker in presiding over the Ladysmith trials.

⁷⁴ On the remarkable and controversial career of Howay - lawyer, judge, historian, and the rightist conscience of BC, see "#57, F.W. Howay" (21 June 2016) online: *BC Booklook* <bcbooklook.com/2016/01/21/57-f-w-howay/> [perma.cc/9EN4-9QS7].

⁷⁵ Hinde, *supra* note 57 at 191-94. For Judge Howay's "Remarks Relative to Sentencing of the Ladysmith Strikers", see BC Archives, GR 1325, B2101, 7529-16-13, File 174. Judge Howay, although not ready to allow them to proceed to trial, was no more charitable in his views to women involved in the protests - see John Hinde, "Stout Ladies and Amazons: Women in the British Columbia coal mining community of Ladysmith 1912-14" *BC Studies* (1997) No. 114, 23-57, 33-4. One of the miners, Joseph Mairs, a twenty one year old with previous problems of bowel obstruction, who was sentenced to sixteen months in prison, died in Oakalla Jail of peritonitis, after a misdiagnosis by the prison doctor - see Mark Leier, "Joseph Mairs", *Dictionary of Canadian Biography*, Vol. XIV, online.

⁷⁶ *Nanaimo Daily Herald* (8 October 1913) at 1.

⁷⁷ Hinde, *supra* note 57 at 192.

The case against Rubinowitz and his clients for watching and besetting had also been remitted to the mainland, on the Crown's claim that a Nanaimo jury would be biased in favour of the miners.⁷⁸ The prosecution fell apart when a grand jury refused to issue a bill of indictment.⁷⁹ This did not deter Justice Morrison who openly chided the lawyer for his overly assertive advocacy. The judge's criticism notwithstanding, the latter must have felt doubly vindicated when he succeeded in a subsequent libel action against the owner of the *Nanaimo Daily Herald*, J.T. Matson, for Hindmarsh's editorial of September 27, that had accused him of "playing to the gallery" and dishonesty in describing prison conditions during the remand process. Damages of \$1000 and costs were awarded to Rubinowitz.⁸⁰

BIRD AND THE KOMAGATA MARU

Bird seems to have avoided open hostility from the public in the fraught circumstances of the coalfields. Indeed, the account above suggests that in right wing press circles he and Farris were viewed as the only legitimate counsel for the labour interest. However, he faced different reactions when as solicitor for the Khalsa Diwan Society he sought to represent immigrants from India faced with refusal to admit or attempts to deport them by the Dominion immigration authorities.⁸¹ The Diwan was institutionally the centre of both religious and social support of the Sikh community of Vancouver, but also open to Hindus and Muslims.⁸² The actions of the Immigration Department were taken under an evolving statutory regime under the *Immigration Act* and Orders in Council reflecting the visceral racism that infected large parts of BC society at the

⁷⁸ *Nanaimo Daily Herald* (2 October 1913) at 1. This suited Rubinowitz as he could finish his work in Nanaimo before returning home for the mainland trial, but he could not resist the temptation to distance himself from the prosecution's aspersions directed at Nanaimo juries.

⁷⁹ *Nanaimo Daily Herald* (23 October 1913) at 1.

⁸⁰ *Vancouver Daily World* (11 June 1915) at 13.

⁸¹ Bird, *supra* note 10 at 88.

⁸² Kalwant Singh Nadeem Parmar, *The Incident of Komagata Maru and the Role of the Khalsa Diwan Society* (Vancouver, BC), Section 1 "A Brief History of the Khalsa Diwan Society" 6-7.

time that were consciously designed to enshrine a "white Canada" policy.⁸³ The key regulations required that those arriving from India come on a "continuous journey" from their homeland (no such service existed), and with no less than \$200 on their person (a significant sum at the time). Racist and in particular anti-Asian sentiment was widespread in the Province, often crossing class lines. It brought together upper and middle class people who rarely came in contact with Asian migrants, unless they employed them as servants, but who detested the thought of a multi-racial Canada, and working people who as well as favouring a "white" country feared that an influx of "Asiatics" would jeopardize their jobs.⁸⁴ Chinese and Japanese immigrants to Canada's west coast were already the legal targets of racist sentiment in BC, reflected in a legislated head tax in the case of the Chinese, and a restrictive diplomatic accord in the case of Japanese migrants.⁸⁵ Anti-Asian sentiments were promoted by BC politicians at all levels of government.

Like several other lawyers, Bird had been successful in challenging the restrictive regulations against migrants from India under the *Immigration Act* in earlier litigation before the BC Supreme Court.⁸⁶ They had argued

⁸³ Johnson, *supra* note 37 at 10-37. For the legislation, see *Immigration Act* (1906) Stat Canada, c 19; *Immigration Act* (1910) Stat Can, c 27, ss 37, 38(3). The original Orders-in-Council were respectively: Canada, Order in Council, no 27, 8 January 1908, and Canada, Order in Council, no 1255, 3 June 1908. For analysis and critique of this episode in the context of imperial geography, law and politics, see Renisa Mawani, *Across Oceans of Law: The Komagata Maru and Jurisdiction in Times of Empire* (Durham: Duke University Press, 2018).

⁸⁴ David Goutor, *Guarding the Gates: The Canadian Labour Movement and Immigration, 1872-1934* (Vancouver: UBC Press, 2007) at 35-86; Robert A Huttenback, *Racism and Empire: White Settler, and Colored Immigrants in the British Self-Governing Colonies* (Ithaca: Cornell University Press, 1976) at 139-94. Bird, *Memoir*, *supra* note 10 at 88-89 stressed the role of organized labour in anti-Asian politics. Ironically, it was often large industrial, transportation or resource companies that favoured Asian migration as source of cheap or "substitute" labour, typically based on indenture.

⁸⁵ Patricia Roy, *A White Man's Province: British Columbia's Politicians and Chinese and Japanese Immigrants, 1858-1914* (Vancouver: UBC Press, 1989); *The Oriental Question: Consolidating a White Man's Province, 1914-41* (Vancouver: UBC Press, 2003); John P S McLaren, "The Burdens of Empire and the Legalization of White Supremacy in Canada, 1860-1910" in WM Gordon and TD Fergus, eds, *Legal History in the Making: Proceedings of the Ninth British Legal History Conference, Glasgow 1989* (London: Hambledon Press, 1991) at 187-200.

⁸⁶ Johnson, *supra* note 37 at 38-52.

in applications for *habeas corpus* on behalf of the migrants that the Department had misdrafted regulations under the *Immigration Act*, and had acted outside or in abuse of its legislative powers, or was seeking to apply legislation retroactively.⁸⁷ In a case in 1913 when 38 Sikhs on the *Panama Maru* were refused entry at the Vancouver port, Bird represented the would-be immigrants. In *Re Hindus and the Immigration Act*,⁸⁸ he made abuse of process arguments on behalf of his clients: that the Orders in Council on continuous journey and the entry fund requirement did not accord with the language in the *Immigration Act*. However, he also argued that they were the targets of discriminatory and exclusionary policies by the Department, embodied in the immigration law regime itself. He asserted that the court should rule on the validity or otherwise of these too.⁸⁹ In his judgment Chief Justice Hunter picked on the dubious drafting of the exclusionary orders that he found did not accord with wording of the statute as the reason for granting the writ and ordering the landing of the migrants. He rejected as a ground for his decision the charges of legislated racial discrimination urged by counsel. This he did explicitly by pointing to accepted constitutional doctrine in Canada that courts had no right to second guess Parliament on the substance of legislation validly enacted.⁹⁰

In July 1914, at the urging of the Khalsa Diwan Society, Bird sought to take up the case of Gurdit Singh and the 375 other passengers on the *Komagata Maru* who, buoyed by earlier judicial decisions, especially by that

⁸⁷ See *Re Bahari Lal* (1908) 13 BCR 415 (SC) and *In Re Rahim* (1911) 16 BCR 471 (SC). In *Rex v Narain* (1908) 7 WLR 781 (BCSC), affirmed by the Full Court in *In Re Narain Singh* (1908) 13 BCR 477, per Hunter C.J. the action was against the provincial immigration authorities. The BC legislature had attempted on an annual basis from 1900 to incorporate a European language test (based on that in Natal) into its immigration policies. In each instance the legislation had been disallowed by Ottawa, or in one instance reserved by the Lieutenant Governor of the province. In this instance the provision was struck down by a court.

⁸⁸ *Re the Hindus and Immigration Act* (1913), 18 BCR 506 (SC).

⁸⁹ *Ibid* at 507. That Bird was right in his assertions about the purpose of the Order in Council is confirmed by an article written almost two decades later by one of the legal team who represented the Department of Immigration in Vancouver, see Robie L. Reid, "The Inside Story of the "Komagata Maru" (1941) 5 *BC Historical Quarterly* 1-21 at 3.

⁹⁰ *Re the Hindus supra* note 88.

in 1913, were out to test Canada's restrictive immigrations laws as they affected Indian migrants.⁹¹ They were, like Canadians, "British subjects." When they arrived in Vancouver harbour the vessel was not allowed to dock and was forced to lay at anchor. Apart from a small number of 20 individuals landed who were returning to Canada and had domicile, and the ship's doctor and his family, the majority (353) were denied entry into Canada.⁹² Barring their way was the local immigration office led by the aggressive Chief Officer, Malcolm Reid. The fires of fear of a new "Asian invasion" were being stoked by federal politicians from the Province and local counterparts unalterably opposed to migration from Asia to BC.⁹³ Leading the pack was Reid's sponsor, the Conservative M.P. for Vancouver and exclusionist, Henry Herbert Stevens.⁹⁴ The result was a two month stand-off in Vancouver Harbour in which the passengers were held on the ship in what can only be described as exiguous conditions.

Reid and his men, fearful of a replay of earlier judicial "interference" with immigration decisions, wanted to ensure that Singh was denied the opportunity to challenge the Department's actions in the Supreme Court by seeking writs of *habeas corpus*. Quarantining the passengers on the vessel in straightened circumstances and inducing them to sail back to Asia was the objective.⁹⁵ There was at the same time another dimension to the story and the desire to stop Gurdit Singh in his tracks. The governments in Ottawa, London and Delhi, primed by reports from William Hopkinson, an Anglo-Indian informer working with Officer Reid, were aware of and afraid of connections between a Punjab-based independence movement and Indian expatriates in North America, including some in BC.⁹⁶ Their

⁹¹ Bird, *supra* note 10 at 90.

⁹² See Johnson, *supra* note 37 at 68-81, for a full account of the bar to entry and its impulses. On reaction in the Indian community on shore, see Husain Rahim, "Welcome to the *Komagata Maru*" (1914) 1: 5 *The Hindustanee* at 2-3.

⁹³ Huttenback, *supra* note 84 at 139-94

⁹⁴ Johnson, *supra* note 37 at 38, 89-91.

⁹⁵ See *supra* note 46 at 216-17.

⁹⁶ Johnson, *supra* note 37 at 32-37. Hopkinson had previously served in Kolkata as a sub-inspector of police. Having migrated to Vancouver he was taken on by the immigration office in that city to, among other things, keep tabs on the activities and statements of Indian immigrants. Before long, his value became apparent to the Dominion, imperial and Indian governments as a source of information for them about those communities, their political leanings and the threat they might pose.

concern was that these men, especially members of the *Ghadr* or “Mutiny” Party as the North American initiative was known, would proselytize and organize to fan the flames of rebellion in India, as well as infect the thinking and actions of Indian residents of Canada.⁹⁷

Despite Bird’s hope that he might be able to work the legal magic again and land the passengers successfully, by the summer of 1914 the legal goalposts had shifted. Chastened by several of the earlier judicial rebuffs, the government in Ottawa had first of all in 1910 updated the *Immigration Act* to specifically bar immigration from India, and taken steps to ensure that the courts were excluded from any realistic review of the actions of immigration boards of inquiry.⁹⁸ Furthermore, the Department, faced with the embarrassing reverse in the BC Supreme Court in the 1913 *Re Hindus* decision, had finally, they believed, fool proofed the continuous journey and special landing fee regulations.⁹⁹ Moreover, they had added a new one that sought to bar anyone classified by the Department as a “labourer” from landing in any BC port.¹⁰⁰

Both the context and scale of the attempt to land the passengers made it difficult, if not impossible, to confine the issue to neatly reasoned legal arguments. Here was a clear and highly publicized attempt by Gurdit Singh, on behalf of several hundred Asian migrants, to challenge the country’s white Canada policy.¹⁰¹ It was not a situation in which Bird’s involvement as counsel for passengers could be insulated from the surrounding politics. Successive barriers were put in his way of taking instructions from Singh. Bird’s only discussion with his “client” was conducted on June 12, across a few feet of water, each man on a separate launch, in the midst of department officials listening to every word.¹⁰² At the same time Bird was the subject of unfavourable reports by the

⁹⁷ Johnson, “The Komagata *Maru* and the Ghadr Party: Past and Present Aspects of an Historic Challenge to Canada’s Exclusion of Immigrants from India”(2013) 178 BC Studies at 9-31.

⁹⁸ *Immigration Act* (1910) Stat Can, 27, ss 37, 38(c), 23.

⁹⁹ Canada, Order in Council, no 23 (7 January 1914); Canada, Order in Council, no 24, (7 January 1914).

¹⁰⁰ Canada, Order in Council, no 897, (31 March, 1914). This replaced Order in Council, no 2642 (8 December, 1913).

¹⁰¹ Johnson, *supra* note 37 at 53-67.

¹⁰² Minutes, *supra* note 46 at 248.

Dominion officials managing the stand-off in Vancouver Harbour and their lawyers, as well as the nemesis of Asian settlers or would-be immigrants, H.H. Stevens.¹⁰³ As much as he may have wished to stress the legal character of his challenges to the barring of the migrants, he was in fact at the eye of a political storm which made it tempting to resort to the more political rhetoric against the racism and discrimination which he correctly divined was at the root of the refusal to land the passengers from the *Komagata Maru*. He made his true feelings known in a speech at a public meeting organized by the leaders of the Indian community in Vancouver during the standoff, but clearly directed to his white listeners.¹⁰⁴ He made no bones about what Reid and his men were up to in keeping the passengers at bay; decried the discrimination shown to decent migrants to Canada who, like many from the British Isles, had come to improve their lot in life; railed against Ottawa's attempts to insulate immigration decisions from the scrutiny of the courts; and complained about his own treatment as counsel to Singh and the passengers. This type of rhetoric which he knew well enough from and had used in his advocacy for workers reflected a deeply held commitment to civil rights. The question was whether these arguments would fly in a Canadian appellate court of law. He was soon to find out.

Despite the objections of Gurdit Singh who refused to settle for anything other than access to the Supreme Court on applications for writs of *habeas corpus* for individual passengers nominated by him, Bird and his clients in the Indian community ashore ultimately agreed to what amounted to a test case to be determined by the BC Court of Appeal.¹⁰⁵ The process was one dictated by the senior legal advisers to the immigration office in Vancouver, William Ritchie K.C. and Robie Reid

¹⁰³ See e.g. a letter from Bowser, Reid & Wallbridge to J E Bird at MacNeill, Bird, Macdonald & Darling (19 June 2014), reproving him for criticizing Malcolm Reid and the hearing system in letter, dated 17 June 1914 - Vancouver CA, MS 69, Stevens Papers, Vol 1, Hindu Immigration, 222-3, 182. For an account of Stevens' animus towards Bird at a meeting of 1000 (the former had helped to organize to oppose the entry of the passengers) see *Vancouver Sun* (24 June 1914.) At the same meeting, Stevens made a statement critical of the BC judiciary - Johnson, *supra* note 37, 91-92.

¹⁰⁴ Minutes, *supra* note 46 at 238-252.

¹⁰⁵ Johnson, *supra* note 37 at 74-75.

K.C..¹⁰⁶ A candidate from the passengers selected by Bird would appear before an immigration board, and if, as anticipated, he was ordered deported, his counsel would seek a writ of *habeas corpus*. This would be denied by a judge of the Supreme Court and an appeal allowed to the Court of Appeal on the legitimacy of the Department's actions under the *Immigration Act* and its regulations, and, if the court wished to go there, the immigration board's handling of hearing. In effect the plan was to shift the juridical focus from the department's handling of the admissions and deportation process to the legislative validity of the immigration regime under Dominion jurisdiction. The candidate selected was Munshi Singh.¹⁰⁷ Little time was provided to Bird and his co-counsel, Robert Cassidy K.C. to prepare their case (effectively two days). Ominously, two senior counsel in Vancouver had already turned down the opportunity of arguing the case for Munshi Singh, one of whom characterized the issue as a political and not a legal matter.¹⁰⁸

It is highly doubtful that Bird and Cassidy had much, if any, room for maneuver legally, once the immigration board had made its pre-ordained decision and Justice Denis Murphy of the BC Supreme Court had refused to grant a writ of *habeas corpus* to their client.¹⁰⁹ The interpretive loopholes in the continuous journey and special entry fees regulations had been closed by Ottawa, and the court was not prepared to second guess the immigration board on the designation of Munshi Singh as a "labourer," especially given the broad terms of the privative section in the *Immigration*

¹⁰⁶ Ritchie was the Department's senior counsel in Vancouver and Reid a senior lawyer with the firm that looked after most of the Dominion government's legal work in the city - *ibid* at 74. On motivation, see the revealing article published much later by Robie Reid *supra* note 89.

¹⁰⁷ Munshi Singh was chosen by Bird from the passenger list, because in addition to his non-continuous journey, he had arrived with far less than the required landing fee of \$200 - Johnson, *supra* note 37 at 93.

¹⁰⁸ The first was TRE McInnes, followed by the firm of McCrossan & Harper members of which expressed reservations over whether the court was the right place to try and resolve the stand-off, see Johnson *supra* note 37 at 99.

¹⁰⁹ See Hamar Foster & John McLaren, "For the Better Administration of Justice: The Court of Appeal of British Columbia, 1910-2010" (2009) 162 BC 5 at 19-20.

Act.¹¹⁰ Moreover, the desperate attempt by Bird in particular to persuade the judges that they had a responsibility to strike down the unjust and discriminatory system of excluding from Canada residents of India who were British subjects fell on deaf ears. This, he tried to argue, was *ultra vires* the Dominion parliament's jurisdiction over the immigration of "aliens," and thus both offensive to individual rights in the Province, and an affront to the Crown.¹¹¹ All the judges found that the immigration regime developed under the relevant legislation as it related to Indians fell clearly within the jurisdiction of the Dominion government over immigration, and that Ottawa had occupied the field.¹¹² As Chief Justice Hunter had signalled earlier, Canadian courts were not willing to pass judgment on the equitable or moral quality of legislation that was legal in a formal sense – a position buttressed in 1914 in the Supreme Court of Canada decision in *Quong Wing v The King*.¹¹³ That Court had upheld a Saskatchewan statute denying Chinese restauranters the right to hire white female employees as within the Province's power over employment and public health. In its decision in *Re Munshi Singh* the Court stressed too that it was not in the court's power to judge the purpose of and motivations for the legislative regime in question. Only one of the judges, Justice McPhillips, clearly ventured into substantive territory, not to castigate the policy of exclusion, but rather to suggest that the cultural differences between Indians and Canadians warranted Parliament barring the former from

¹¹⁰ *Supra* note 98, s 23; in *Re Munshi Singh* (1914) 20 BCR 243 at 253-55 the lawyers for the Department argued *a propos* Order No. 897 that however, much Singh might claim to be a farmer before the Board, which he did and had plausibly been such in the Punjab, his realistic prospect in BC was as a "labourer."

¹¹¹ *Re Munshi Singh*, *supra* note 110 at 249-50 for the arguments of Cassidy and Bird.

¹¹² See *Re Munshi Singh*, *ibid*, per MacDonald CJC at 255-56, 258-59; per Irvine JA at 259-61; per Martin JA at 264-70; per Gallihier JA at 277; per McPhillips JA at 285-9.

¹¹³ *Quong Wing v The King* (1914) 49 SCR 44, *ref'd* to by Martin JA at 272 and McPhillips J.A. at 288.

Canada. They could serve the Empire better by staying home.¹¹⁴ In its comments on the privative provision in the *Immigration Act* (Section 23) the court followed the second judicial tendency of the era. This was to avoid challenging legislative attempts to curtail their jurisdiction, except in clear cases of egregious abuse or illegality by the institution in question. The British Columbia Court of Appeal found neither in the conduct of the department and its officials on the record and evidence before them.¹¹⁵

If Bird is to be faulted from our vantage point it is that he did not seek to excoriate the immigration officials for ensuring that he was denied proper access to his shipboard clients, and when they were allowed to consult, invading the privacy of his communications. He also missed the opportunity to attack their highly dubious delaying tactics in preventing the passengers from landing physically and having their cases heard by an immigration board.¹¹⁶ A full substantive and cogent argument on why British subjects had a claim at law to freedom of travel within the Empire was lacking too. But this is to be wise well after the event. The short rather anodyne account in his memoir, penned twenty-five years later, perhaps speaks to the embarrassment he felt at not being able to pull out more stops. What is particularly notable, however, in that account is that he also reveals that after the hearing he left the field of conflict in Vancouver on vacation when he received threats to his life and that of his family for his temerity in arguing the case at all, and his life insurers refused to maintain coverage.¹¹⁷

Both the Vancouver Island Coal Strike (in the case of Rubinowitz) and the *Komagata Maru* crisis (in that of Bird) illustrate the existence of ill-

¹¹⁴ James W St G Walker, *Race, Rights and the Law in the Supreme Court of Canada* (Toronto: Osgoode Society for Canadian Legal History, 1997) at 12-23 has argued plausibly that views like those of McPhillips accord with notions of “common sense” about the existence of a racial hierarchy during this era. Justice Martin in his judgment remarked more obliquely that it would be difficult to give special status to Indians as British subjects in Canada when its Indigenous population had fewer rights than other Canadians; *Re Munshi Singh*, *supra* note 110 at 275-76. The other three justices steered clear of any such comments.

¹¹⁵ Per MacDonald CJA at 258; per Irvine JA at 263-65; per Martin JA at 268-71; per Galliher JA at 277-78; per McPhillips JA at 284-85.

¹¹⁶ Interestingly, he had stressed his profound annoyance with both in his 1914 public address; see *supra* note 46 at 244-49. See also Bird, *supra* note 10 at 90-92.

¹¹⁷ Bird, *supra* note 10 at 93-95.

will towards lawyers associated with the representation of high profile clients whose activities were receiving widespread public discrimination, fuelled by the state and its agents, or were offensive to elite social and economic interests. Assessing the effects of these respective experiences of three nights in the Nanaimo Jail, or death threats to oneself and one's family on these individuals is speculative.

We do know through his memoirs that Bird and his closest colleagues took the threats seriously enough that he removed himself from Vancouver and the immediate field of conflict. He was, as noted, at the eye of a political storm during the *Komagata Maru* crisis and the subject of criticism from both local immigration bureaucrats and such populist, anti-Asian leaders as H.H. Stevens, and thus in the public eye in a community containing its share of rabid racists. He and his friends had cause to be worried. His temporary removal from practice likely affected his earning capacity and the firm's bottom line for a period. The experience, we think, may well have sown the seeds of doubt in his mind about his personal commitment to cause advocacy.

Rubinowitz's experience with the law enforcement and judicial authorities in Nanaimo and his incarceration, were palpably galling to a twice qualified barrister such as himself, and likely disruptive of his solo practice in the short term. Moreover, it put him in the position of one who had been marked in certain quarters of the bench and press as a loud-mouth and trouble-maker. Whether this meant in the final analysis that he paid a material price is an intriguing question. Again, any answer is necessarily speculative. Given his successful defamation suit, it could be argued that he came out of the experience well. Moreover, his ultimately successful representation of his mining clients charged with watching and besetting could have raised his profile within labour and leftist circles. What evidence we have suggests that alongside firms, such as Bird's, he was an alternative go-to advocate for those who the mainstream system classified as subversive.

CONTINUING THE BATTLE

For neither man were these events the end of the line in their taking on unpopular causes and attracting both the elite's and the state's attention, and in the process suffering criticism for their actions.

J. Edward Bird participated in the defence of Robert Boyd Russell for sedition in the wake of the Winnipeg General Strike in 1919 in which the latter had taken a lead, and which had galvanized the political and economic establishment into believing that the coils of Bolshevism were present in Canada.¹¹⁸ This was the test prosecution that the so-called Citizens' Committee of One Thousand, representing the city's business and professional elite, had pressed upon the Dominion Department of Justice, and then effectively ran through the advocacy of one of its most aggressive leaders, Alfred Andrews K.C., leading for the Crown.¹¹⁹ Bird along with his partner, Robert Cassidy K.C., Wallace Lefeaux, a junior in the Bird firm, and W. J. McMurray, solicitor for the Labour Party, appeared for the defence in this trial.¹²⁰ Their strategy was to argue that the strike leaders were not conspiring to overthrow the state violently, and that Russell as a paid union official was merely doing his job.¹²¹ In his arguments Bird stressed that union organizing and socialist activities were legal, and that the Crown in panic mode had overreacted. In attempting to demolish the prosecution's case against his client he sought to raise the alleged perjury of a secret operative of the Royal North West Mounted Police (RNWMP), Harry Daschaluk, whose evidence was important to the Crown's case. Bird sought to bring in evidence that the operative had been offered \$500 by the Crown to give false evidence against his client.¹²² Justice Metcalfe of the Manitoba Court of Queen's Bench, considered by historians to have been sympathetic to the government's case, abruptly closed that line of the challenge.¹²³ Bird left town before Russell's conviction by a jury, and the imposition of a sentence of one year's

¹¹⁸ For a recent helpful analysis of this period, see Molinaro, *supra* note 3 at 19-56.

¹¹⁹ This story of the involvement of the Winnipeg elite, not least the legal elite, in management and control of the business community's reaction to the Strike, but even more so its hijacking of the state's response to it, is the focus of the remarkable study by Kramer and Mitchell, *supra* note 13.

¹²⁰ Bird, *supra* note 10 at 105.

¹²¹ Nicol, *supra* note 10 at 230, citing the *BC Federationist* (19 December 1919).

¹²² *BC Federationist* (19 December 1919) at 1,5. The weekly published copies of several letters from witnesses.

¹²³ Kramer & Mitchell, *When the State Trembled*, *supra* note 13 at 63 on Metcalfe's sympathies.

imprisonment. He took no part in the trial of Russell's colleagues as strike leaders, all but one of whom were convicted and imprisoned.

In his memoir Bird ruefully comments on the inevitability of the outcome in the Russell trial.¹²⁴ The sense is that the circumstances and trajectory of the strike, and the climate in which the trial was heard dictated the outcome, and so he had no "heart" in it.¹²⁵ This was despite his sympathy for Russell and those like him, socialists whose objective was "the bettering of the condition of the worker."¹²⁶ It is noticeable that after this experience Bird removed himself from any sort of leading role in this type of cause advocacy, leaving it to younger colleagues such as the leftist activist, Wallace Lefaux.¹²⁷ He did continue during the 1920s to let his conscience lead him to take on cases or causes in which the representation of the underdog was paramount, whether: the victims of corporate negligence of a lumber company causing a fire that devastated their newly built homes;¹²⁸ an Indigenous client on death row on the basis of a dubious confession;¹²⁹ two private detectives who were, arguably, the fall characters in a notorious botched murder investigation into the death of a Scots domestic servant, Janet Smith;¹³⁰ and in answering the pleas of the rump of the Finnish socialist community of Sointula on Malcolm Island (the Kalavan Kansa Colony), that had been devastated by fire, for advice on rebuilding it and its economy.¹³¹

Bird retired in 1938. Still proud of his advocacy on behalf of unpopular clients, he took some pains to record in his memoirs the offer to him of the status of King's Counsel. The condition was that he would temper his cross-examination of the Attorney General, Alexander Manson,

¹²⁴ Bird, *Memoir*, *supra* note 10 at 105-07.

¹²⁵ *Ibid* at 107.

¹²⁶ *Ibid* at 106-07.

¹²⁷ On Lefaux's left wing political career, see Nicol, *supra* note 10 at 230.

¹²⁸ *McIntyre v Comox Logging and Railway Company* [1924] BCJ No 119, [1924] 2 WWR 118 (SC); Bird, *Memoir*, *supra* note 10 at 107-12.

¹²⁹ *Rex v Joseph Sankey* [1927] SCR 436, [1927] 4 DLR 245; Bird, *Memoir*, *supra* note 10 at 125-31.

¹³⁰ Bird, *Memoir*, *supra* note 10 at 131-35. For an exhaustive account of the background story, see Edward Starkins, *Who Killed Janet Smith* (Vancouver: Anvil Press, 2011), and for the trial of the private detectives 291-314.

¹³¹ Bird, *Memoir*, *supra* note 10 at 96-103.

during his defence of the two private detectives in the Smith case. They had been charged with kidnapping Smith's alleged murderer, Wong Foo Sing, in order to force a confession from him. One of the accused had given evidence that Manson had approved this stratagem. Bird refused the offer and its condition. He was, he reported, "not to be bought, nor for sale."¹³² The offer was never repeated. In the terse obituary in *The Advocate* when Bird died in 1948 he was described as "energetic, capable and forceful and exemplified that success follows persevering work and service."¹³³

Meanwhile, after his work during the Vancouver Island Strike, Israel Rubinowitz seems to have shifted into a pattern of more conventional practice. He was not afraid, however, of taking briefs in cases the context of which others would have found disconcerting even repellent. For example, in his criminal law work he took on the defence of two people charged with procuring abortions.¹³⁴ In one of these cases, *R v Iremonger*, Rubinowitz was able to secure an acquittal of the accused, a female nurse, who had been charged with causing death by administering drugs designed to cause an abortion. The prosecution had agreed to the lesser charge of administering a noxious drug to the deceased and aiding and abetting an abortion. Appearing before Justice Morrison sitting with a jury, Rubinowitz used medical evidence to suggest that the deceased might have committed the act herself, and the jury acquitted his client.¹³⁵ He was, moreover, not afraid to lobby the legal authorities where he noted an injustice in the existing legal system. So when he was approached by clients who had registered their marriage, but failed to go through a marriage ceremony, which under provincial legislation left them unmarried and their two children 'bastards,' he went to bat for them.¹³⁶

¹³² *Ibid* at 134.

¹³³ Bird obituary, *The Advocate* (1948) at 181-82.

¹³⁴ Nicol, *supra* note 11 at 103-04. On the outcome of the case, see *Vancouver Daily World* (30 October 1913).

¹³⁵ He was less successful in defending Joseph Kallenthe of the charge of procuring an abortion. Justice Murphy labelled this accused as a professional, the jury found guilt, and the man was sentenced to three years imprisonment - Nicol, *supra* note 11 at 103-04.

¹³⁶ Chris Clarkson, *Domestic Reform: Political Vision and Family Regulation in British Columbia, 1862-1940* (Vancouver: UBC Press, 2007) at 260-61, n 132.

He was able by some adroit lobbying, including a letter to the editor page of a local newspaper under the pen of "a Vancouver barrister," to succeed in pressing and persuading the Attorney General to amend the statute to legitimate the births of children of such unions.¹³⁷

Rubinowitz's other experience with cause advocacy reflected the social and economic turmoil that Canada experienced during and in the wake of the First World War, and fears among the political and business establishment of widespread labour unrest. These anxieties had been magnified by the Bolshevik Revolution in Russia and communist uprisings in Germany and Hungary, and the thought that those doctrines had taken root in Canada.¹³⁸

The Winnipeg General Strike began in May, 1919 and its early momentum was to further convince the political and economic establishment that the country was in peril from subversive and dangerous forces, and that the law needed to be strengthened and vigorously applied to those endangering the state.¹³⁹ The English-speaking leaders of the strike were prosecuted under the broad and imprecise sedition provisions of the *Criminal Code*, while several "foreign provocateurs" were deported speedily under very recent and retroactive revisions to the *Immigration Act*.¹⁴⁰ The latter changes enlarged the scope of that power to include in the term "prohibited or undesirable person," any person other than a Canadian citizen who advocates in Canada the overthrow by force or violence of the government of Canada.¹⁴¹ It also targeted anyone "who is a member of or affiliated with any organization entertaining or teaching

¹³⁷ *Marriage Act Amendment Act, 1919*, SBC 1919, c 52, s 5.

¹³⁸ After the armistice of November 1918, the Dominion Union government under Sir Robert Borden had abrogated wartime measures legislation. However, during 1919 Ottawa effectively replaced it with an amendment to the *Criminal Code* in section 98 that made membership of a range of political organizations, not surprisingly along the left reaches of the spectrum, a criminal offence. Although the immediate purpose was seen as dealing with the "state of emergency" and labour unrest in the wake of the War, recent scholarship suggests the creation of a more permanent tool for dealing with future peacetime subversion as a strong motivation - see Molinaro, *supra* note 3 at 3-18.

¹³⁹ Kramer & Mitchell, *supra* note 13.

¹⁴⁰ *Vancouver Daily Sun* (22 July 1919) at 1.

¹⁴¹ *An Act to Amend the Immigration Act, 1919*, Ottawa: SC 9-10, George V, c 25, ss 15, 41 (see section 41 as amended).

disbelief in or opposition to organized government.”¹⁴² The amended provision was declared retroactive to 1910.¹⁴³ The deportation expedient was acted on in other Canadian communities in which the establishment wished to be rid of individual “alien trouble-makers.” In Vancouver, the target was members of a “subversive group.” The spotlight fell on so-called “Russian anarchists,” specifically members of the Russian Workers’ Union.¹⁴⁴ The twenty-one arrested and processed without trial were accused of preaching and working towards the destruction of ordered government in Canada. Unsurprisingly, the labour movement in Vancouver reacted quickly to the arrests. A protest meeting was organized by union federations and leftist political parties, a defence committee formed, funds sought and raised, and the Bird firm retained to represent the immigrants.¹⁴⁵

Although the Bird firm, led by Henry Irvine Bird, the nephew of its founder, represented most of the potential deportees, Rubinowitz appeared for three of them.¹⁴⁶ The twenty-one men were all put summarily and quickly through the immigration hearing process, and the board ordered fourteen deported. These men were sequestered in a holding camp in Vernon while their ultimate destination was figured out.¹⁴⁷

While those ordered deported cooled their heels in detention, Rubinowitz proved active in attempts to derail the process of deportation through the courts and have three of the men, his clients Boris Zukoff, George Chekoff, and Elizear Butseff, released.¹⁴⁸ In one initiative he

¹⁴² *Ibid.*

¹⁴³ *Immigration Amendment Act*, Stat Can, 1919, c 26, s. 1 amending s 41 of the Act.

¹⁴⁴ *BC Federationist* (25 July 1919) at 1. See also Henry F Drystek, “‘The Simplest and Cheapest Mode of Dealing with them’: Deportation from Canada Before World War II” (1982) 15 *Social History/Histoire Sociale* 407 at 425-26.

¹⁴⁵ *BC Federationist* (25 July 1919) at 1 and (1 August 1919) at 1, 8. At the meeting President Jack Kavanagh of the BC Federation of Labour pointed to the paranoia of the Dominion government in seeking to link union activity in Canada with the Russian Bolsheviks, the danger to all working people in the country represented by Section 41 of the *Immigration Act* now including all those members not born in Canada, and the predictably grim fate of the Russians if handed over to White Russian forces. The Bird firm was Bird, McDonald and Co.

¹⁴⁶ Drystek, *supra* note 144 at 425.

¹⁴⁷ *BC Federationist* (31 October 1919) at 1.

¹⁴⁸ *BC Federationist* (14 November 1919) at 4.

sought a writ of *habeas corpus*, arguing that the immigration board in hearing their cases had abused its powers under the Act. This it had done, firstly by effectively trying the men for crimes (e.g. robbery and gambling) over which only a court had jurisdiction. Secondly, the board had erred in preventing him from introducing evidence that both Bolshevism and Socialism constituted forms of organized government, while allowing in evidence from “professional witnesses” based on hearsay or “worse.” With a broader flourish, he described the process under the *Immigration Act* as iniquitous and subversive of rights recognized by both the *Magna Carta* and the law of *habeas corpus*. The Board was a creature of government, ignorant of law and legal procedures, and embodied the functions of both prosecutor and judge, an affront to the rules of natural justice. Justice Morrison, following what seemed to him to be the effective denial of judicial intervention under the Act following the BC Court of Appeal opinion in *R v Munshi Singh*, concluded that he had no power to grant the writ.¹⁴⁹ In the process he chided counsel for his pointed and ill-chosen comments about the parody of justice involved and the incapacity of the decision makers in the immigration hearings to recognize, let alone apply, the rule of law. The judge, as an aside, seems to have recognized the connection between the process and “war measures” legislation, necessary, he thought, for “the preservation of the nation.” That Rubinowitz could be conciliatory in defeat and mindful of maintaining respect for courts and defending them in the face of unjust criticism is evident in the fallout from this decision. When Morrison was publicly taken to task as the running dog of the capitalist oppressor by labours’ weekly, the *BC Federationist*, Rubinowitz came to his defence, arguing that, given the state of the law, the judge’s hands were effectively tied by a “Star Chamber” system that only Parliament could rectify.¹⁵⁰

But Rubinowitz had taken another legal tack in the cause of his clients’ release. He had launched a private prosecution against two of the RNWMP’s “secret agents,” Barney Roth and A. Durasoff, alleging that they had committed perjury in their evidence before the Board of Inquiry about his clients and their allegedly subversive activities and

¹⁴⁹ *BC Federationist* (28 November 1919) at 1.

¹⁵⁰ Compare *The Weekly’s* roasting of the judge on November 28 at 1, as an example of an archaic imperialist mindset, and its full report of Rubinowitz’s defence of him on 5 December 1919 at 1.

connections.¹⁵¹ The prosecution proceeded in the name of the provincial Attorney General, but with Rubinowitz taking the lead. At the preliminary hearing counsel sought to prove that, contrary to their testimony before the board, the accused had endeavoured to set up his clients as political subversives by falsely claiming attempts by them to suborn members of the local Russian community, had applied pressure so that Butseff would testify against the other two, and endeavoured to introduce evidence of attempts at witness tampering by them during the trial.¹⁵² After hearing evidence led by Rubinowitz, Magistrate Shaw remitted the case for trial by the Supreme Court.¹⁵³ After a trial of a week and a half, Justice Cayley dismissed the charges against Roth and Durasoff on the ground that a fair trial had become an impossibility, because of the contradictory evidence of and bickering between members of the Russian community in their testimony.¹⁵⁴

It was no doubt of some solace to Rubinowitz (as well as to the Bird firm) to learn that the detainees were not moved out of the country. Attempts to hand them over to the representative of the White Russians failed, and there were no diplomatic channels with the Soviet government that could be deployed. Meanwhile the camp at Vernon was closed early in 1920, and twelve of the thirteen were moved to the New Westminster Penitentiary to await further negotiations about their fate. After further initiatives through the American, British and Japanese governments proved abortive, the men were released on parole in December of that year.¹⁵⁵

Sadly, Rubinowitz was not long for this life, as he contracted and died of bronchial pneumonia in 1923 at the age of 41.¹⁵⁶ In his obituary in the *Vancouver Daily Province* he was described as a shrewd lawyer, quick to spot

¹⁵¹ *BC Federationist* (31 October 1919) at 1.

¹⁵² *BC Federationist* (21 November 1919).

¹⁵³ *BC Federationist* (15 January 1919) at 12.

¹⁵⁴ *Vancouver Sun* (14 May 1920) at 10.

¹⁵⁵ Drystek, *supra* note 144 at 425-26. One canny Vancouver labour leader had prophetically mused: who was going to accept them in their homeland in the midst of a civil war in which Canada had been implicated on the side of the White, Anti-Bolshevik, forces? See comments of “Comrade” Harrington at the deportation protest meeting, *BC Federationist* (1 August 1919) at 8.

¹⁵⁶ Nicol, *supra* note 11 at 106.

a weakness in an opponent's argument, as well as considerate, courteous and kindly "even in the heat of battle."¹⁵⁷

The involvement of Rubinowitz and the Bird firm in these immigration proceedings did not go unnoticed by the nascent secret service apparatus in Canada. Both were on the surveillance list of the Royal Canadian Mounted Police (from 1920 the first permanent secret service agency in Canada) of those suspected of being or consorting with dangerous leftists. Their movements, activities and words were recorded when they associated with such people and their supporters, at least in public forums.¹⁵⁸

CONCLUSION

What insights does one draw from these accounts? Earlier we drew upon Wes Pue's insights on the record of the English Bar historically to make the point that BC lawyers committed to cause lawyering that reflected personal ideological commitments existed, but were few in number.¹⁵⁹ This study in its present iteration indicates that on the Canadian west coast, lawyers who like Bird and Rubinowitz took up unpopular causes through conviction during this period could expect criticism and even threats from within the larger community, and from organs of the capitalist and racist state, as well as disdain, or at least indifference, among some of the judges and other lawyers. This accords with studies from other Provinces on the lives and times of lawyers committed to similar causes out of a profound belief in protecting workers' rights or what later became known as civil liberties.¹⁶⁰ In this there are echoes in the later experience of BC lawyers who committed themselves to representing labour, such as John Stanton and Harry Rankin,¹⁶¹ or Indigenous and minority ethnic

¹⁵⁷ *Vancouver Daily World* (15 August 1923) at 1, 22.

¹⁵⁸ Gregory S Kealey & Reginald Whitaker eds, *RCMP Security Bulletins: The Early Years, 1919-1929* (St. John's: Canadian Committee on Labour History, 1993) at 227 (Bird - File 45) and (Rubinowitz - File 36).

¹⁵⁹ See above pages 65-66.

¹⁶⁰ See *supra* note 13.

¹⁶¹ John Stanton, *Never Say Die: The Life and Times of a Pioneer Labour Lawyer* (Ottawa: Steel Rail Publishing, 1987); Harry Rankin, *Rankin's Law: Recollections of a Radical Lawyer* (Vancouver: November House, 1975).

interests, such as Thomas Berger.¹⁶² As the experiences of most lawyers of this ilk likely suggest, association with the politics of the left was often a negative factor both outside and within the justice system. Evidence from this study of press reaction and that of some of the judges to vigorous advocacy of lawyers, such as Rubinowitz, who were themselves from minority ethnic communities, suggests that racist sentiment may have been at work as well. Although more work needs to be done on this line of research in BC, the musings of a later generation of Jewish lawyers in Vancouver from the mid-1930s on, of a feeling that they were tolerated unless they became too “assertive” in choosing their clients and their advocacy, may support this feeling.¹⁶³

What is clear is that research of this kind and its sharing is an important step, first of all, in challenging the ahistorical claims of official Bar histories in Canada of promoting protection of civil rights as a motivating force in the collective experience of the profession.¹⁶⁴ As in the case of the English barristers strongly committed to rights advocacy studied by Pue,¹⁶⁵ the numbers in Canada, and in BC in particular, were very few. Secondly, it represents an addition to the developing literature on the realities at ground level of other forms of practice than that which occupied the time and energies of most lawyers, and the existence, if not of an alternative bar, of lawyers whose ideological proclivities led them into advocating for unpopular causes and clients. Thirdly, it suggests that the choice to engage in advocacy of this type brought with it institutional and personal challenges that added sources of stress to practice. Finally, it points to the importance of an understanding of the often slender thread of civil rights advocacy within the Common Law tradition and how much is owed to hardy and relatively isolated pioneers, such as Bird and Rubinowitz, who had the courage to try and thicken and so strengthen that thread.

¹⁶² Thomas R Berger, *Fragile Freedoms: Human Rights and Dissent in Canada* (Toronto: Clarke, Irwin, 1982); *One Man's Justice: A Life in the Law* (Vancouver: Douglas & McIntosh, 2002).

¹⁶³ See Hain, *supra* note 54 at 58.

¹⁶⁴ Pue, *supra* note 1 at 3-35.

¹⁶⁵ *Ibid* at 36-75.