

RESEARCH NOTE

Law, Constitutional Convention, and the Union of Newfoundland and Canada*

IT IS, TO SAY THE LEAST, unusual for court decisions within the Commonwealth dealing with important constitutional questions to go unreported for over 30 years. It is all the more extraordinary when the issues at stake concern the very identity and future of a territory. Such, however, was the fate of the 13 December 1948 decision of Mr. Justice Dunfield, of the Newfoundland Supreme Court, and the 22 January 1949 judgment of the Newfoundland Court of Appeal in the case of *Currie v. Macdonald*.¹ For the legal community these decisions were rescued from archival obscurity only as a consequence of the revival of interest in the pre-Confederation constitutional position of Newfoundland brought about by the recent federal-provincial dispute concerning continental shelf rights.² It is the purpose of this paper to examine some of the important issues raised in this abortive attempt to use the legal process in Newfoundland to frustrate union with Canada.

The system of responsible government, as implemented in Newfoundland in 1855, was not intended to constitute a grant of complete self-government. Not only was it confined as to subject matter but the Imperial authorities retained an impressive variety of methods through which control could continue to be exercised. The subsequent gradual emancipation of the self-governing Dominions, including Newfoundland, took the form of the progressive relaxation and eventual abandonment of the means available to the United Kingdom to exercise its authority.³ This movement culminated, at the 1926 Imperial Conference, in the oft quoted Balfour Declaration which defined the Dominions as "*autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations*".⁴ That

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1 Now reported in (1981) 29 Nfld. & P.E.I.R. 294.

2 See, e.g., G. Marston, "The Newfoundland Offshore Jurisdictional Dispute", *Journal of World Trade Law*, 18 (1984), p. 335.

3 See generally, W.C. Gilmore, *Newfoundland and Dominion Status* (Toronto, 1988).

4 Original emphasis. *Imperial Conference, 1926: Summary of Proceedings*, Cmd. 2768 (1926), p. 14.

Newfoundland was covered by the terms of this formulation is beyond doubt. Not only was this the view of the Newfoundland and British governments of the day, but it was subsequently authoritatively confirmed by the Newfoundland Court of Appeal in February 1983 and the Supreme Court of Canada in March 1984.⁵

In 1931 the Statute of Westminster was enacted, after the request and the consent of the Dominions, including Newfoundland, had been first obtained, in order to bring their technical legal position into line with that declaration of equality of status. That Act conferred upon the Dominions the power to repeal or amend Imperial statutes, “declared and enacted” the power to legislate with extraterritorial effect and, by section four, provided that no subsequent Act of the United Kingdom Parliament would extend to a Dominion “unless it is expressly declared in that Act that that Dominion, has requested, and consented to, the enactment thereof”. By virtue of section one, Newfoundland was defined as a Dominion and under section 11 the term “colony” was deemed not to include Newfoundland in any subsequent United Kingdom enactment.⁶ At a late stage, the Newfoundland legislature decided to follow the example set by Australia and New Zealand and requested that sections two to six of the Statute should not apply to it automatically. Instead, these three Dominions were left free, by section ten of the Statute, to adopt by action of their respective legislatures any or all of these sections at any time they might choose. Australia did so in 1942 (with retrospective effect to September 1939), followed by New Zealand in 1947. Newfoundland, however, took no similar action prior to uniting with Canada in 1949. In the post-Statute period, therefore, Newfoundland’s status continued to be based, primarily, on constitutional conventions.

In 1933 Newfoundland, faced with unparalleled financial difficulties, turned to the United Kingdom for assistance. A Royal Commission was established “to examine into the future of Newfoundland” and in its report of 4 October 1933, it recommended the suspension of the existing form of government and its replacement by a specially appointed Commission of Government placed under the supervisory control of the United Kingdom government. The latter was “to assume general responsibility for the finances of the Island” although “as soon as the Island’s difficulties are overcome and the country is again self-supporting, responsible government, on request from the people of Newfoundland, would be restored”.⁷ Faced with the absence of a more desirable alternative, the Newfoundland legislature requested that the proposed scheme be brought into

5 See *Reference re Mineral and other Natural Resources of the Continental Shelf* 145 D.L.R. (3d), 9 at 25 and *Reference re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland*, 5 D.L.R. (4th), 385 at 401.

6 1931 c.4 (U.K.).

7 *Newfoundland Royal Commission, 1933: Report*, Cmd. 4480 (1933), p. 224.

effect by the Westminster Parliament. The Newfoundland Act, 1933,⁸ was passed for this purpose and the system of Commission of Government came into effect on 16 February 1934.

How as a matter of Imperial Constitutional Law, let alone international law, this form of government should be characterised was not the subject of detailed analysis at the time. In its report the Royal Commission merely noted that its proposals “would inevitably detract for the time being from Newfoundland’s status as a Dominion. But considerations of constitutional status were regarded more as a matter for discussion than as a practical issue”.⁹ The international position was not mentioned at all. Nor was it possible to seek detailed guidance from practice elsewhere in the Empire since the form of Commission of Government was unique. As a Dominions Office memorandum, approved by Lord Cranborne in September 1944, admitted: “The present form of Government was in its very nature an emergency form of Government. It has no precedent in the Empire and constitutionally was a retrograde step, forced upon us by the necessity of saving Newfoundland from the disaster that threatened to overwhelm her”.¹⁰

A number of important constitutional questions had to be addressed by the Dominions Office even before the new system entered into force. Thus, a Whitehall memorandum entitled “Phraseology in relation to Newfoundland” suggested that, as no action had been taken to amend the Statute of Westminster so as to exclude Newfoundland, it would continue in strict law to be a Dominion by virtue of section one of the Act. Similarly, the Dominions Office recognised that by virtue of section 11 the expression “Colony” in any future legislation “will not include Newfoundland”. However, it was felt that “It is doubtful whether, so long as the new regime in Newfoundland continues, there will be any body which could properly be described as ‘the Parliament of Newfoundland’”. For this reason the memorandum concluded that Newfoundland would not be in a position to adopt sections two to six of the Statute or to participate in the conventional process concerning alteration of the law relating to Succession to the Throne or the Royal Style and Titles since both would require Parliamentary involvement. In so far as the convention restraining United Kingdom legislative power to instances where it had been requested and consented to by the Dominion in question was concerned the following view was proffered: “As a matter of practice, the Government of Newfoundland would in all probability be consulted before any United Kingdom Act were made applicable to Newfoundland but the question also arises....whether the altered circumstances may not

8 1933 c.2 (U.K.).

9 *Newfoundland Royal Commission, 1933*, p. 196.

10 “Note: Newfoundland”, September 1944, DO 35/1344, Public Record Office, London [hereafter PRO].

have rendered the convention inapplicable for the time being".¹¹

Subsequent developments were broadly in line with those expectations and understandings. Thus, no effort was made to adopt the operative sections of the Statute of Westminster and the Commission of Government had no formal involvement in the legislative changes surrounding the Abdication of the King.¹² Similarly, as the Newfoundland Court of Appeal was to state in 1983, "Throughout the period of 1934-1949, as the record establishes, the United Kingdom Government generally, and with but few exceptions, respected the constitutional conventions declared by the Imperial Conferences, 1923, 1926 and 1930, which are in part embodied in the preamble to the *Statute of Westminster, 1931*".¹³ Whether this was merely a reflection of British self-restraint and evidence of the requirements of practical politics or a situation dictated by the constitutional conventions of the Commonwealth was to be examined in depth only in the context of the legal debate over the proper procedures to terminate the Commission of Government and give effect to Confederation with Canada.

With the onset of the Second World War the financial and economic position of Newfoundland underwent a profound transformation for the better and by 1941 it could be argued that the territory was "again self-supporting" within the meaning of the Report of the Royal Commission and the Newfoundland Act of 1933.¹⁴ However, the section of the Report which contemplated a "request from the people of Newfoundland" before responsible government would be restored posed a difficulty for the British authorities since, as Clement Attlee, then deputy Prime Minister, was to remind the Cabinet on 19 November 1943, neither the Report nor the Act made "provision as to how this request should be expressed".¹⁵ The solution was to set up an elected National Convention in Newfoundland to review the courses of action open to them and pave the way for a national referendum.¹⁶ The delegates to the Convention were elected in June 1946 and commenced their deliberations, which were to last for some 16 months, in

11 Appended to Secretary of State for the Dominions to Governor, 2 February 1934. Reproduced in "Documents filed by the Attorney-General of Newfoundland" (Supreme Court of Newfoundland, Court of Appeal, 1982, No. 23), Vol. II-5, pp. 108-17. (Unpublished materials lodged with the Court).

12 See e.g., Commonwealth Relations Office minutes of 18 and 21 February 1949, PRO, DO 35/3200.

13 *Reference re Mineral and other Natural Resources of the Continental Shelf*, 145 D.L.R. (3d), 9 at 32.

14 See, e.g., "Note: Newfoundland", September 1944, PRO, DO 35/1344.

15 War Cabinet 158(43)2, PRO, CAB 65/36,

16 See, P. Neary, "Great Britain and the Future of Newfoundland, 1939-45", *Newfoundland Studies*, I (1985), p. 29. See, generally, D. MacKenzie, *Inside the Atlantic Triangle* (Toronto, 1986). See, also, C.P. (45) 234, PRO, CAB 129/3.

September. Although the Convention recommended that only the options of retention of Commission of Government and return to responsible government should be placed before the people in the referendum, the Secretary of State for Commonwealth Relations, Philip Noel-Baker, insisted on the addition of Confederation with Canada to the ballot paper. The outcome, on 3 June 1948, was that the responsible government option attracted 44.5 per cent of the votes cast, followed by confederation with 41.1 per cent. Retention of Commission of Government was favoured by a mere 14.3 per cent of the turnout. Because "The British government, had stipulated that a clear majority was required for victory, and that if a second ballot should be necessary the form of government receiving the smallest number of votes should be dropped from the ballot paper",¹⁷ a run-off poll was fixed for 22 July and Confederation with Canada secured a narrow overall majority. Following this victory the Newfoundland government sent a seven strong delegation to Ottawa to negotiate the final terms of union which were signed on 11 December 1948.¹⁸ Term 50, regulating the entry into force of the agreement, reads:

These Terms are agreed to subject to their being approved by the Parliament of Canada and the Government of Newfoundland; shall take effect notwithstanding the Newfoundland Act, 1933, or any instrument issued pursuant thereto; and shall come into force immediately before the expiration of the thirty-first day of March, 1949, if His Majesty has theretofore given His Assent to an Act of the Parliament of the United Kingdom of Great Britain and Northern Ireland confirming the same.¹⁹

Well before 11 December 1948 detailed attention had been paid to the technical legal procedure to be used to give effect to the union. Indeed, discussion of this question within governmental circles in Ottawa can be traced back to 1946. Two serious possibilities presented themselves. The first was to utilise the procedure contained in section 146 of the British North America Act 1867 (renamed the Constitution Act 1867 by the Constitution Act 1982) which made provision for the United Kingdom to admit Newfoundland into the Canadian confederation by an Order in Council after Addresses were received from the Canadian Parliament and from the Houses of the Legislature of Newfoundland. The second alternative was for a statute of the British Parliament to be passed which would give effect to the union and the agreed terms. Although there was no elected legislature in Newfoundland to make the required Address

17 S.J.R. Noel, *Politics in Newfoundland* (Toronto, 1971), p. 257.

18 See, e.g., W. Eggleston, *Newfoundland: The Road to Confederation* (Ottawa, 1974), pp. 82-95.

19 British North America Act, 1949, Sched. 1949 c.22 (U.K.).

this was the procedure which was initially favoured by London. Motivated by a desire to avoid putting the detailed terms of union through the Westminster Parliament, the British suggested that section 146 be amended to provide that the Commission of Government was competent to take the required action. Ottawa, however, was opposed to any direct amendment of the British North America Act 1867 since this would raise the difficult question of provincial participation in the constitutional amendment process.

The Canadians also sought, at an early stage, to influence the Newfoundland authorities on the question of procedure. An opportunity to do so was provided by the presence in Ottawa of two influential members of the Newfoundland delegation in August 1948. Both Joseph Smallwood and Gordon Bradley were attending the Canadian Liberal Party Convention and met Canadian officials informally on 9 August 1948. A majority, including both Newfoundlanders, agreed that a statute by the British Parliament giving effect to the union and its terms "offered the least difficulties and would probably meet the wishes of both Canadian and Newfoundland interests". Under this procedure "Addresses from the Parliament of Canada and from the Commission of Government of Newfoundland would be forwarded to the United Kingdom requesting that a British Statute be enacted effecting Newfoundland's entry into Confederation".²⁰

By early October officials within the Commonwealth Relations Office acknowledged that it was "fruitless" to pursue the section 146 option. As one insider was to minute on 11 October: "The most straightforward alternative is to have an Act providing for the incorporation of Newfoundland with Canada on terms as agreed between the Canadian Government and the Newfoundland delegates which would be scheduled to the Act".²¹ This procedure was formally accepted by the Secretary of State for Commonwealth Relations in a meeting with Mr. St. Laurent on 22 October while the latter was in London substituting for Mackenzie King at the Conference of Commonwealth Prime Ministers.²² This decision merely substituted one set of problems for another for it raised the issue of the nature of the involvement of the Commission of Government in this procedure. The view of the Governor was that the Commission should be as little involved in the process as possible.²³ The initial British reaction was that "whatever form of legislation is passed here, we shall no doubt, in order to meet constitutional proprieties, require a recommendation from the Newfoundland Government in support of such legislation".²⁴ Indeed, early Canadian consideration was also based on the

20 "Newfoundland: Notes on Legal Procedures to Effect Union", Memorandum by Privy Council Office, Ottawa, 13 August 1948, in P. Bridle, ed., *Documents on Relations Between Canada and Newfoundland* (Ottawa, 1984), Vol. 2, Part II, pp. 1605-6.

21 PRO DO 35/3465.

22 See, Commonwealth Relations Office memorandum of 25 October 1948, PRO, DO 35/3465.

23 See Minute by Tait of 11 October 1948, PRO, DO 35/3465.

24 Minute by Tait of 8 September 1948, PRO, DO 35/3465.

need for an expression of the request and consent of the Commission. This matter was discussed by the Secretary of State for Commonwealth Relations and St. Laurent on 22 October and shortly thereafter the Governor was informed by London that "we should require a formal request from the Commission of Government for the enactment of United Kingdom legislation, but such a request could be based on the result of the referendum in Newfoundland, and would not of course purport to represent merely the views of the Commission".²⁵

The Newfoundland delegation to Ottawa, however, wished "to minimize the role played by the Commission of Government and would not want it to take any legislative action or do more than approve the terms and transmit them to the United Kingdom Government".²⁶ Future discussion of this issue took place primarily in Ottawa where the interests of the Commonwealth Relations Office were entrusted to William (later Sir William) Dale who had been assigned, by agreement, to the staff of the United Kingdom High Commission to ensure that the draft Bill complied with British Parliamentary practice. Dale, who was then Deputy Legal Adviser,²⁷ was sympathetic to the position of the Newfoundland delegation on constitutional grounds. In a letter to the Canadian Deputy Minister of Justice of 1 December 1948, enclosing a "provisional draft United Kingdom Bill" and detailed notes on the same, he recorded the view of the Newfoundland delegation, on which his draft was based, that the Commission "should not actually request the enactment of this Bill". The preamble to the draft Bill recorded the approval of the Terms by the Canadian Parliament, and the Commission, and the request and consent of the Canadian Parliament, but not that of the Newfoundland government. As Dale explained, such a reference was "not necessary because Newfoundland never adopted the Statute of Westminster and therefore the 'request and consent' of Newfoundland under Section 4 of the Statute is not required. This must be the correct view in spite of the clause in the Preamble to the Statute of Westminster and the definition of Dominion in Section 1".²⁸

In proffering this view Dale was fully aware of the wide ranging court action which had been initiated in St. John's on 13 November by the Hon. John Stewart Currie and five other members of the last Newfoundland Parliament against the Governor, Sir Gordon Macdonald, and all six members of the

25 Telegram of 28 October 1948, PRO, DO 35/3465.

26 Telegram of 21 October 1948 from Secretary of State for External Affairs to High Commissioner in Great Britain, Bridle, ed., *Documents on Relations Between Canada and Newfoundland*, pp. 1606-7.

27 Subsequently to become Legal Adviser and a noted scholar. See, e.g., W. Dale, *The Modern Commonwealth* (London, 1983).

28 Materials reproduced in Bridle, ed. *Documents on Relations Between Canada and Newfoundland*, pp. 1610-3.

Commission.²⁹ Currie and the others sought a declaration:

That under the constitutional law of the Commonwealth, including Newfoundland, the Imperial Parliament has no power to make a law providing for the confederation of Newfoundland and Canada except at the request of a parliament elected by the people of Newfoundland, that under the Letters Patent or otherwise the Commission have no power to request the Imperial Parliament to make such a law and that if such a law is made otherwise than at the request of a Parliament elected by the people of Newfoundland it will not be binding upon the people of Newfoundland.

Dale was clearly unimpressed by this line of reasoning and in his 1 December memorandum concluded that the "point is clearly a bad one in relation to Newfoundland". He also noted that:

Mr. Walsh (chairman of the Newfoundland delegation) is of the opinion that no request should come from the Newfoundland Government for the enactment of this Bill. He feels that the present Commission of Government is not concerned with the future of Newfoundland and it will be preferable if the terms of Union are to rest on the agreement of the authorized representatives of Newfoundland, approval by the Commission (which will be signified to the United Kingdom Government without making any request) and thereafter the confirmation by the United Kingdom Parliament by means of this Bill.³⁰

Dale's view was widely shared by the legal advisers in London. As Sir Kenneth Roberts-Wray, subsequently to write the much acclaimed work *Commonwealth and Colonial Law*, (London, 1966), minuted on 24 November: "I cannot believe that the Plaintiffs have any chance of success".³¹ Consequently the British and Canadian authorities agreed that the involvement of the Commission was to be restricted to the mere approval of the Terms of Union,³² an action taken on 26 January 1949.³³

In the meantime, the Governor and Commissioners requested the Newfoundland Supreme Court to strike out the Statement of Claim on the ground that it disclosed no reasonable cause of action and was frivolous and vexatious. The

29 The full text is reproduced in *The Daily News* (St. John's), 15 November 1948.

30 Bridle, ed., *Documents on Relations Between Canada and Newfoundland*, p. 1612.

31 PRO, DO 35/3468.

32 See Memorandum of 4 December 1948 by the Canadian Assistant Deputy Minister of Justice, in Bridle, ed., *Documents on Relations Between Canada and Newfoundland*, pp. 1608-10.

33 Reproduced at note 11, Vol. RI, pp. 196-9.

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matter came before Mr. Justice Dunfield who delivered his judgment on 13 December 1948. It represented a total victory for the defendants. With a firm commitment to legal orthodoxy he held that constitutional conventions were not law and were not enforceable by the courts and that "The Imperial Parliament is supreme in the Empire, subject to the observation that in the cases of Canada, and some other Dominions, it has by the Statute of Westminster abdicated the right to legislate for them without their consent". Since Newfoundland, had "the status of a pure Crown Colony", he determined that the Imperial Parliament could legislate for it regardless of the wishes of its people. If it enacted a statute to give effect to Confederation, that law "will most certainly be binding upon the people of Newfoundland regardless of whether or not we have a Parliament of our own".³⁴ Dunfield's judgment, described by Tait of the Commonwealth Relations Office as "caustic, unloving and precise",³⁵ concluded with the following words of warning for Currie and the other plaintiffs:

I have listened to Counsel at some length; but this Statement of Claim is a dead horse, and flogging it will not bring it to life, or make any difference to their position. The action is based on fundamental errors of law and logic which are apparent on the face of the papers, and which are fatal to it no matter what Counsel may say. Legally, logically and practically, it seems to me to be nonsense.³⁶

In London the judgment was well received. The text was brought to the attention of the Secretary of State, Noel-Baker, with the comment that "it is completely pulverising".³⁷

In Newfoundland Currie and his colleagues appealed. The action was heard by the Newfoundland Court of Appeal consisting of Chief Justice Emerson, and Justices Winter and Dunfield, and judgment was delivered on 22 January 1949. Their appeal was unanimously dismissed without the Attorney-General of Newfoundland even being called upon to speak,³⁸ and there was little to encourage their arguments over either the nature of constitutional conventions or the legislative power of the Westminster Parliament. For example, Mr. Justice Winter held to the line that conventions were not rules of law enforceable by the courts: "Not merely has a court of law no power to redress directly a violation of a genuinely constitutional rule, but it is, I should think, the last place in which redress should be sought". In so far as the Imperial Parliament was concerned he

34 (1981) 29 Nfld. & P.E.I. R. 294, at 315, 330, 323 and 328.

35 Minute of 22 December 1948, PRO, DO 35/3468.

36 (1981) 29 Nfld. & P.E.I. R. 294, at 330.

37 Minute of 15 January 1949, PRO, DO 35/3468.

38 See Lord Ammon, 15 March 1949, *PD*, 5th Ser., House of Lords, Vol. CLXI, col. 317.

concluded that “that body is free, and cannot be trammelled to act as it pleases”.³⁹ In spite of this setback Currie and his colleagues sought and obtained leave to appeal to the Privy Council.

Shortly after the Court of Appeal judgment was handed down Prime Minister Attlee instructed the Secretary of State to consult the Imperial Law Officers. He did so not to clarify the decision of the court but in response to the legal arguments advanced in a highly critical article in the *Toronto Globe and Mail* of 14 January.⁴⁰ In their Opinion of 2 February 1949 the Attorney-General and Solicitor General examined the question of whether Parliament was legally competent to enact the proposed legislation. Having noted the doctrine of the sovereignty of parliament and the fact that, consequently, the enactment would be valid in British municipal law, they continued: “Its effectiveness and validity extra territorially and especially within the Commonwealth must depend on the Constitutional Doctrines embodied in the Statute of Westminster 1931”. The Law Officers admitted that “The declaration of Conventional Equality of Status in 1926 had embraced Newfoundland” as had the principle that no law should be passed to extend to a Dominion save at its request and with its consent. Although Newfoundland had never adopted the operative sections of the 1931 Statute, including section four, “the constitutional doctrine of complete and equal sovereignty no doubt applied to Newfoundland”. This fact had been recognised by the procedure used to give effect to the Newfoundland Act, 1933. In their view, however, the constitutional position had been radically altered by the introduction of Commission of Government. “During that period...the United Kingdom Parliament had full power to substitute whatever form of Government it thought expedient and Newfoundland was, although in name a Dominion, in substance a Colony”. This conclusion followed from the fact that after 16 February 1934 the conventional doctrine of equal sovereignty, embodied in the Statute of Westminster 1931, had “no application” to Newfoundland.⁴¹

On 3 February the British Cabinet discussed a memorandum, dated 1 February, from the Secretary of State for Commonwealth Relations, which sought approval for the policy embodied by the Newfoundland Bill and outlined the basis on which opposition to it could be expected in Parliament. Curiously the memorandum made no reference to the Newfoundland court decisions.⁴² Similarly, there is no indication in the minutes that the relevant judicial proceedings, or the Opinion of the Law Officers, were discussed. The Cabinet agreed that “on receipt of a request from the Canadian Parliament, the Secretary of State for Commonwealth Relations should introduce the British North

39 (1981) 29 Nfld. & P.E.I. R. 294, at 309, 312.

40 See draft letter of 29 January 1949, PRO, DO 35/3473. The author of the article is unknown.

41 PRO, DO 35/3473,

42 CP (49) 17, PRO, CAB 129/32.

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America Bill in the terms of the draft".⁴³ Ironically on the same day (and seemingly prior to the Cabinet meeting) Noel-Baker, an able student of Empire and author of an impressive text entitled *The Present Juridical Status of the British Dominions in International Law* (London, 1929), wrote a lengthy letter to the Attorney-General on this very subject. Having outlined the progress of *Currie v Macdonald* through the courts he stated:

My own feeling is that we cannot contemplate delaying our Bill because of an appeal to the Privy Council which might take a considerable time before it is disposed of and the result of which, whatever it was, could not affect the right of the United Kingdom Parliament to legislate.⁴⁴

In adopting this stance the Secretary of State was, no doubt, encouraged by the written legal advice which had been tendered by Sir Kenneth Roberts-Wray who noted the "high probability" that the appeal would fail and characterised as "absurd" any notion that it would succeed on all points. Even in the case of an "entirely favourable outcome" from the point of view of the appellants, Roberts-Wray felt that "this would not appear to make it legally necessary for His Majesty's Government to change their minds".⁴⁵ A copy of this note along with the text of the judgment of Dunfield and other relevant materials were enclosed for the information of the Attorney-General.

Despite the Opinion which had already been proffered by the Law Officers Shawcross was less than enthusiastic. He replied on 4 February that:

In view of the steps which have already been taken, I can see no alternative but to going ahead with the Bill since we are very fully committed to this course and the advice of the Privy Council could not affect the right of the United Kingdom Parliament to legislate. At the same time, I am bound to say that I felt that there are legal and constitutional problems involved which cannot be completely dismissed and although in the opinion I gave the other day I arrived at the conclusion that the proposed action was both in accordance with the law and custom of the constitution, I did so not without doubt and I think there is quite a formidable argument that we have departed from what was, at any rate, one of the conventions of the constitution in the action which has been taken. But there it is. I can see nothing to be gained now by delaying the implementation of the policy which the Government adopted three years ago.⁴⁶

43 Cabinet 9 (49) 3, PRO, CAB 128/15.

44 Secretary of State for Commonwealth Relations to Attorney General, 3 February 1949, PRO, DO 35/3468.

45 See, undated "Note" appended to the Secretary of State's letter of 3 February 1949, *ibid.*

46 Attorney General to Secretary of State, 4 February 1949, *ibid.*

The initial departmental reaction was to focus not on the reservations expressed by the Attorney-General but on his conclusion that nothing was to be gained by delaying implementation of the policy.⁴⁷ No doubt it was for this reason that Noel-Baker simply wrote "Good" on the face of the letter when it was first received.

Before long, however, attention focused on the reservations which had been expressed, and on 15 February the Secretary of State expressed his dissatisfaction in a minute in his hand:

1. I cannot resist the feeling that the A.G. has spoken without due reflection in saying that we have 'departed from what was one of the conventions of the Constitution'. I know of no precedent for the present situation; still less of any 'convention'.
2. I think we must have a stronger case than the A.G.'s letter gives us to answer an attack that we are legislating while The Privy Council is deciding on our right to do so. I am sure it can be defended in more persuasive language.
3. Could we ask Mr. Dale for an opinion on these two points?⁴⁸

After his return from Ottawa, Mr. Dale obliged in an extensive analytical minute of 17 February, in which he identified the relevant convention as that requiring the request and consent by a Dominion in advance of British legislation being applied to it. In his view that "convention or practice was one relating to self-governing Dominions only and Newfoundland has not been a self-governing Dominion since 1933.... It is really absurd to say that a government which consists of a Governor and Commission all appointed from here has to give its consent to Imperial legislation". He noted that Parliament had on occasion legislated directly for Newfoundland, particularly at the time of the outbreak of war in 1939 and that "so far as I am aware no one ever thought of taking the formal request and consent of the Newfoundland Government in regard to them though in fact I imagine the views of the Commission were obtained as, indeed, they have been in this case". Since by this time leave to appeal to the Privy Council had been granted, Dale suggested a defence based on the grounds that interests of public policy in this instance dictated the need for legislative action even though litigation was still in progress, especially since "The advice of the Privy Council could not affect the right of Parliament here to legislate as it wishes; and that this legislation must have complete effect in Newfoundland is clear from the fact that they never adopted the Statute of Westminster".⁴⁹

47 See, e.g., Commonwealth Relations Office minutes of 10 and 14 February 1949, PRO, DO 35/3468.

48 PRO, DO 35/3468.

49 *Ibid.* There is no evidence that his attention was brought to the correspondence between the

Noel-Baker was both pleased and impressed by Dale's minute which he regarded as "conclusive, & I believe the H of C will think so, too".⁵⁰ At a Cabinet meeting on 24 February, 1949, both the Secretary of State and the Attorney-General advised their colleagues to proceed with the Bill notwithstanding the appeal. The minutes of this meeting reveal that:

In discussion it was stated that the Judicial Committee would probably dismiss the appeal, but there was a remote possibility that they might hold that the Bill conflicted with the provisions of the Statute of Westminster and that, as a matter of law, the Statute of Westminster was a conveyance of rights to the independent countries of the Commonwealth which could not now be withdrawn by the United Kingdom Parliament.⁵¹

When the Bill received its second reading in the Commons on 2 March 1949 opposition to it was headed, as expected, by the junior Burgess for Oxford University, Sir A. Herbert, who had been a member of the 1943 Parliamentary mission to Newfoundland and had subsequently taken a personal interest in its future. Again as anticipated, the objections to it were couched primarily in constitutional terms. The Bill itself was proposed by the Secretary of State and his treatment of the legal and constitutional issues drew heavily on the advice he had received from Roberts-Wray and Dale, but there was no hint of uncertainty or conflicting legal views. Indeed, at one point the Under-Secretary of State, Mr. Gordon Walker, stated: "I think it is right and fair to say that the Government's action is legally correct, that we have a perfectly legal case, and that ours was a political decision".⁵² When the House divided the government secured a majority of 217 votes to 15.

During the committee stage, on 9 March, the defence of the government's interests was entrusted to the Attorney-General who rested his case on the proposition that the legislation under discussion did not "depart from the law, the practice or the spirit of our constitutional doctrines". Noting that Newfoundland had never adopted the operative sections of the Statute of Westminster including section four, he advised the House "that there is nothing contrary to the Statute of Westminster in what is now being done". He admitted that the conventional position, in particular that which required Dominion request and consent to Imperial legislation, had applied to Newfoundland in spite of its

Commission and the Dominions Office in 1939 in which the former objected strongly to the legislative action which had been taken. See, "Factum of the Attorney-General of Newfoundland" (Supreme Court of Newfoundland Court of Appeal, 1982 No. 23), Part II, pp. 138-40. (Unpublished material lodged with the Court.)

50 PRO, DO 35/3468,

51 Cabinet 15 (49) 1, PRO, CAB 128/15.

52 See 2 March 1949, *PD*, 5th Ser., House of Commons, cols. 371-8, 470.

failure to adopt sections two to six of the 1931 Statute. That position, however, had been altered by subsequent developments:

What happened was that Newfoundland abdicated her position of equal sovereignty as a member of the Commonwealth and it was only to those countries in the Commonwealth which enjoyed equal sovereignty with each other that the convention ever applied as a constitutional doctrine or was ever intended to apply by the Preamble to the Statute of Westminster.

Since during the period of Commission of Government the “conventional doctrine of sovereign equality” had no “possible application to Newfoundland”, it followed that “the United Kingdom Parliament enjoyed complete sovereignty, unfettered sovereignty over Newfoundland and that Newfoundland, although in name a Dominion, was in fact a Colony”. Even if a request from Newfoundland was required by convention it “could *ex hypothesi* not have been a request from the Legislature of Newfoundland for the Legislature of Newfoundland had gone”. In these circumstances it was proper that the request should, as in this case, come directly from the people. In view of this conception of the entitlement of the Westminster Parliament to legislate for Newfoundland, one fortified by the decisions in the Newfoundland courts, and the practical disadvantages of delay, he advised the House to pass the Bill. At the same time he gave the following undertaking:

If the Privy Council do take a different view, and do so advise His Majesty, the position would not really be much worse than if we were to delay the present legislation. If the Privy Council did take that view we should at once accept it, and we here, and Canada and Newfoundland, would have to start all over again.⁵³

The House again divided in favour of the government by an overwhelming majority. Opposition to the measure in the House of Lords, was less intense.⁵⁴ It completed its Parliamentary passage on 22 March and on the following day the British North America Act 1949 (now the Newfoundland Act) received the Royal Assent. The Union of Newfoundland and Canada took place immediately before midnight on 31 March 1949. On 6 May the appeal to the Privy Council was withdrawn and the proceedings initiated by Mr. Currie and his colleagues were thereby terminated.

It is easy to understand why legal uncertainty surrounded the issue of Newfoundland’s entry into Confederation. The system of Commission of

53 *Ibid.*, 9 March 1949, cols. 1261, 1263, 1265-7, 1272.

54 See St. J. Chadwick, *Newfoundland: Island into Province* (Cambridge, 1967), pp. 223-4.

Government was unique within the Empire and the suspension of full self-government was without precedent. Little guidance as to the constitutional consequences which flowed from these events could be gleaned from either the Report of the Royal Commission or from the terms of the 1933 Act. Newfoundland's failure to fully adopt the Statute of Westminster, 1931 was a further and significant complicating factor.

Since analysis of the situation had to be from basic principles a case could be marshalled in respect of a variety of conclusions. That this is so was clearly demonstrated by the division of judicial opinion in the recent Canada-Newfoundland offshore dispute. While the Newfoundland Court of Appeal in 1983 could conclude unanimously that the introduction of Commission of Government had not reduced it "to the status of a Crown Colony" or "destroyed Newfoundland's *de jure* sovereignty as a coastal State", in 1984 the Supreme Court of Canada could hold, again unanimously and on essentially the same facts, that "during the period of suspension Newfoundland did not even have internal sovereignty, much less external sovereignty".⁵⁵ What is, however, both surprising and profoundly disturbing is that as late as February 1949, 15 years into the experiment, the Whitehall authorities had no agreed view as to the constitutional nature of the system which had been created by the 1933 legislation.

In so far as the Newfoundland courts are concerned it can be said that the judgments rendered, under severe pressure of time, on questions of extreme political importance and legal complexity were well written and were not manifestly defective. If the judges are subject to criticism it must be on the ground that they were so wedded to orthodox legal thought that they disguised the very complexity of the subject matter. For example, in the treatment afforded to the doctrine of the supremacy of the Imperial Parliament there is only the barest hint that the issue has been the subject of active academic controversy from at least the time of the introduction of Gladstone's Irish Home Rule Bill in 1886. Similarly the examination of the nature of and relationship between rules of law and constitutional conventions failed to do full justice to a complex issue. The ultimate contrast in this regard would be with the 1982 Canadian Supreme Court Reference in the 'Patriation' controversy.⁵⁶

It would also be unfair to be overly critical of the views of the departmental legal advisers in London or the Imperial Law Officers. They too were discussing the same range of complex issues and seemingly doing so in a Newfoundland

55 *Reference re Mineral and other Natural Resources of the Continental Shelf*, 32-3; *Reference re the Seabed and Subsoil of the Continental Shelf Offshore Newfoundland*, 406.

56 *Reference re Amendment of the Constitution of Canada (Nos. 1, 2 and 3)* 125 DLR (3d) 1. For a brief overview see, E.C.S. Wade and A.W. Bradley, *Constitutional and Administrative Law* (10th ed, London, 1985), pp. 730-3. For a detailed discussion of the subject matter, including the 'Patriation' issue, see generally, G. Marshall, *Constitutional Conventions* (Oxford, 1984).

context for the first time. In one respect at least, however, they appear to have fallen into an elementary error which added unnecessarily to the legal controversy. They apparently assumed that if the conventional requirement for Newfoundland's request and consent to British legislation still applied it must emanate from its Parliament. This was a central contention of the writ issued by Currie *et al.* and reflected the actual procedure used in respect of the passage of the Newfoundland Act, 1933. The problem was, of course, that it was widely believed that no such body could be said to exist in Newfoundland at the relevant time, though given the extent of the legislative power of the Commission of Government such a contention is itself not entirely free from doubt.⁵⁷

What appears to have been missed in the internal discussions and the subsequent Parliamentary debate was the fact that there is sound constitutional authority for the proposition that both by constitutional convention, and even under section four of the Statute of Westminster, governmental rather than legislative request and consent alone was required. This was the considered view of the Law Officers in 1932,⁵⁸ and of the Dominions Office in the particular context of Newfoundland in 1934.⁵⁹ It was on this basis that the government and not the Parliament of Canada signified its request and consent to the Declaration of Abdication Act in 1936. It follows that a request from the Commission acting in its executive capacity would have satisfied the technical constitutional requirements. Indeed, given the absence of specific agreed details as to the form which such a request must take there may be merit in the suggestion, advanced by the Attorney-General for Newfoundland at the time of the Offshore References, that "The approval of the Terms of Union by the Commission of Government implied agreement with the legislation necessary to give them legal effect".⁶⁰

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57 See *Dillon v Canning & the St. John's Housing Corp.* (1941-46) Nfld. L.R. 386.

58 See Opinion of the Law Officers of 20 October 1932 and related documents in D.P. O'Connell and A. Riordan, eds., *Opinions on Imperial Constitutional Law* (Sydney, 1971), pp. 404-7.

59 See P. Gerin-Lajoie, *Constitutional Amendment in Canada* (Toronto, 1950), pp. 146-8.

60 "Factum in Reply of the Attorney-General of Newfoundland" (Supreme Court of Newfoundland, Court of Appeal, 1982 No. 23), p. 110. (Unpublished materials lodged with the Court.)