HOWE (1835), *DIXON* (1920) AND *MCLACHLAN* (1923): COMPARATIVE PERSPECTIVES ON THE LEGAL HISTORY OF SEDITION

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"Then there is Howe, who was prosecuted by the corrupt magistrates whom he exposed in his day. By the way, he successfully defended himself, and I hope to perhaps follow his glorious example. He is now proclaimed as Nova Scotia's noblest son."

— F.J. Dixon, 1920

"When they tried Joseph Howe for sedition, they erected a monument to him in the shadow of the County jail [*sic*: Province House yard]."

— J.B. McLachlan, 1924

"I am not a prophet, nor the son of a prophet, but I tell you that what happened to Howe will happen to McLachlan."

— J.S. Woodsworth, 1924

In Halifax, in 1835, Joseph Howe, a newspaper proprietor and editor, was tried for seditious libel for publishing the second of two pseudonymous letters critical of local government. In Winnipeg, in 1920, F.J. (Fred) Dixon, an independent labour member of the Legislative Assembly of Manitoba, was tried for seditious libel for publishing in the strike bulletin which he briefly edited during the General Strike of 1919, articles critical of the strike's suppression. In Halifax, in 1923, J.B. McLachlan, communist secretary of United Mine Workers of America District 26, was tried for seditious libel for having written an official letter critical of the violent actions of the provincial police in Sydney. These three "state trials" document the important historical conflicts out of which they arose, reflect the politico-legal contexts in which they occurred and illustrate the meaning of the "misrule of law" as it developed through the repressive exercise of state power during both the colonial and the national periods. This article is an attempt at a

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comparative legal historiography of sedition trials, which were fairly regular occurrences in colonial times and during the "Red scare" of the inter-war period.[1]

In a seminal article published in 1974, Kenneth McNaught described *R.* v *Howe* and *R.* v *Dixon* as Canada's "two most significant cases involving political freedom of the press."[2] The link between *R.* v. *Howe* and *R.* v. *Dixon*, and between *Howe* and *McLachlan*, is well established in scholarship, while the link between *Dixon* and *McLachlan* — by far the most obvious — has yet to be forged. Though David Frank, in his important sixtieth-anniversary article about McLachlan's 1923 trial for seditious libel, alludes to the seditious libel charge against J.S. Woodsworth,[3] he says nothing about the 1920 trial of Fred Dixon on the same charge. Paul MacEwan, in his study of labour in Cape Breton, also ignores *Dixon*[4] and John Mellor's sole reference to *Dixon*, throughout the whole of his lengthy popular biography of McLachlan, is an unsourced quotation from the *Western Labor News Strike Bulletin*.[5]

McNaught, for his part, avoids drawing any comparison between *Dixon* and *McLachlan*, despite the fact that they were strike leaders charged with the same crime and for much the same reasons. Furthermore, both *Dixon* and *Howe* are discussed in the context of freedom of the press, not seditious libel, while the "case of J.B. McLachlan shows how the definition of seditious libel was ... broadened,"[6] so that even the restricted circulation (among District locals) of a privileged official communication could in law be deemed a publication.

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[1]As *Howe*, *Dixon* and *McLachlan* will all be treated in due course in the Canadian State Trials Series, I take the liberty of quoting the editorial statement included in the official announcement of the series from The Osgoode Society for Canadian Legal History. For *Howe* see *infra* note 57; *Dixon* is tentatively scheduled to be the subject of Chapter 7 and *McLachlan* the subject of part of Chapter 8 in Volume Five ("War, Totalitarianism and Labour Repression, 1900-1939") of F.M. Greenwood and B. Wright, eds., *Canadian State Trials Series*, to be published by The Osgoode Society in association with UTP.

[2]K. McNaught, "Political Trials and the Canadian Political Tradition" (1974) 24 U.T.L.J. 149 at 161, 161 n. 37, 164, 165-6.

[3]D. Frank, "The Trial of J. B. McLachlan," Canadian Historical Association, (1983) *Historical Papers = Communications historiques* 208 at 209; repr. as Chapter 11 in D. Frank and G.S. Kealey, eds., *Labour and Working-Class History in Atlantic Canada: A Reader* (St. John's: ISER, 1995) at 279.

[4]P. MacEwan, *Miners and Steelworkers: Labour in Cape Breton* (Toronto: Samuel Stevens/Hakkert & Company, 1976), Chapter 9 ("J.B. McLachlan: Crime and Punishment"), *passim*.

[5]J. Mellor, *The Company Store: James Bryson McLachlan and the Cape Breton Coal Miners 1900-1925* (Toronto: Doubleday, 1983) Chapter Ten, *passim*. The quotation, which appears between the Preface and Chapter One, is drawn from [Winnipeg Defence Committee], *Dixon's Address to the Jury in Defence of Freedom of Speech* (Winnipeg: *s.n.*, 1920) at 67-8.

[6]McNaught, *supra* note 2 at 161 n. 37.

Michael Earle's critical historiographical study of J.B. McLachlan's legacy, published in the special issue of *New Maritimes* commemorating the fiftieth anniversary of McLachlan's death in 1937,[7] shows that the "myth" of the working-class anti-hero can be "manipulated" by misrepresenting those aspects of the "legacy" which tend to reclaim the radical political character of labour's history of resistance. The same holds true for the attempt to reclaim the legal context and character of this history. Indeed, not until the pioneering work of C.B. Wade in 1950[8] and, much later, of Paul MacEwan and McLachlan's biographer, David Frank, was sustained attention paid to the criminal justice aspects of capital's war against labour.

The same is true of the most famous strike in Canadian history. "Until very recently," writes J.M. Bumsted in his seventy-fifth anniversary narrative, "the post-strike sedition trials of the arrested strike leaders were a relatively unexplored dimension of the Winnipeg General Strike."[9] The sedition trials of the leaders of the Winnipeg General Strike were a significant escalation in the capitalist state's assault on organized labour. Ten years earlier, sedition law was not only different but, as a rule, it was not applied in the realm of "industrial illegality". In September 1909, for example, during the strike by Nova Scotia coalminers for recognition of the UMWA, District 26 president, Dan MacDougall, was arrested and charged with defamatory libel for having published a statement critical of the Dominion Coal Company's operations in industrial Cape Breton, in *La Patrie* (Montreal). Though the Crown entered a *nolle prosequi* and MacDougall was

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[7]M. Earle, "The Legacy: Manipulating the Myth of McLachlan" in I. McKay and S. Milsom, eds., *Toward a New Maritimes: A Selection from Ten Years of New Maritimes* (Charlottetown: Ragweed Press, 1992) at 84. Reprinted from Issue Number 55 of *New Maritimes*, 6:4/5, Dec. 1987 - Jan. 1988, which was "A Special Commemorative Issue" subtitled "J.B. McLachlan : The Trial; The Image; The Legacy," on the occasion of the fiftieth anniversary of McLachlan's death (3 November 1937). The first part was D. Frank, "The Trial: *The King* v. *J.B. McLachlan*" at 3.

[8]C.B. Wade, "History of District 26, United Mine Workers of America, 1919-1941" [ca. 1950], typescript, 299; see [Chapter 4], "1923: Steel - Coal Strike," *passim*. In the autumn of 1944, Claude Bates Wade, a chartered accountant and formerly tutor in accounting at Queen's University, was engaged as director of research and education for District 26 of the UMWA: MacEwan, *supra* note 4 at 267, 283. The draft of Wade's unfinished official history, suspected of being unseasonably left-wing at a time when anti-communist paranoid hysteria far exceeded anything seen in 1919-24, is thought to have led to Wade's summary dismissal from his post in 1950. (I am grateful to Paul Banfield, Associate University Archivist, Queen's University, Byron Wall [son-in-law] and Maureen Williams, Curator, Special Collections, St Francis Xavier University Library, for sharing with me information concerning the late C.B. Wade.)

[9]J.M. Bumsted, *The Winnipeg General Strike of 1919: An Illustrated History* (Winnipeg: Watson & Dwyer, 1994) at 65.

never tried, ten years later he would likely have been charged with sedition rather than defamation.[10]

The year 1919, when District 26 of the UMWA was re-constituted after having been dissolved in 1915, witnessed what Gregory Kealey called "the Canadian labour revolt"[11] against labour's repression by a coercive state acting in the interests of corporate finance capitalism. The identification of corporate interest with public interest — big business with government — meant that industrial action would thereafter be viewed from within the criminal justice context as virtual crime against the state. The legality of resistance to employer hegemony became harder to contest when the machinery for administering criminal justice — especially the public prosecution service — was systematically applied by government to limit or defeat the workers' right to organize.

David Frank and Don MacGillivray characterize the trial of J.B. McLachlan for seditious libel as a watershed which transformed industrial relations,[12] leading in the short term to the criminalization of industrial action for bargaining-unit recognition, and in the long term to a bridge "across the great divide separating the era of 'labour's war' from the age of 'industrial legality'."[13] In order to reclaim *McLachlan* for legal history in general, and state trials historiography in particular, it is necessary to recontextualize McLachlan's 1923 trial for seditious libel in relation to both *Dixon* and *Howe*. Howe, Dixon and McLachlan were all tried for the same crime — seditious libel — which was even more solidly entrenched in Canada's *Criminal Code* as a result of rigorous post-Winnipeg General Strike enhancements,[14] than it had been in English common law for the two centuries preceding 1892, when the *Criminal Code* was enacted. Yet traditional state trials historiography, represented by McNaught, misconstrues

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[10]"General Summary" *Labour Gazette* [Ottawa] 10 (1909) at 533; Mellor, *supra* note 5 at 62-5; MacEwan, *supra* note 4 at 35. MacDougall had not published anything criticizing the government directly or even by implication — unlike Joseph Howe, who is nevertheless assumed to have been charged with criminal defamation rather than sedition.

[11]G.S. Kealey, "1919: The Canadian Labour Revolt" (1984) 13 *Labour/Le Travail* 11; see *infra* note 59.

[12]D. Fraser, *Echoes from Labor's Wars : The Expanded Edition : Industrial Cape Breton in the 1920s : Echoes of World War One : Autobiography & Other Writings*, D. Frank & D. MacGillivray, eds. (Wreck Cove N.S.: Breton Books, 1992) at xvi.

[13]*Supra* note 3 at 225. For a trenchant neo-Marxist critique of the industrial relations system as lowering working-class consciousness and strait-jacketing political radicalism, see M. Earle and I. McKay, "Introduction: Industrial Legality in Nova Scotia" in M. Earle, ed., *Workers and the State in Twentieth Century Nova Scotia* (Fredericton: Acadiensis Press, 1989) at 9 et seq.

[14]The *Criminal Code Amendment Act*, S.C. 1919, c. 46 — was passed within days of the end of the Winnipeg General Strike and came into force on 1 October 1919. It raised the maximum sentence on conviction for seditious libel from two to twenty years' imprisonment. (The punishment for seditious offences was again reduced to two years maximum in 1930.)

McLachlan by supposing that the *Criminal Code Amendment Act 1919* "was to prove convenient in obtaining convictions, amongst others, of J.B. McLachlan for his role in the extended industrial conflict in Nova Scotia in the early 1920s."[15] The amendment, though pertinent, was not brought to bear on the charge as laid against McLachlan or on the sentence imposed after his conviction.

Ironically, the industrial action which led to the prosecution of McLachlan did not originate with the Cape Breton coalminers. In June 1923, Sydney steelworkers struck again for recognition of their union. When mounted provincial police, who had been summoned at the behest of the British Empire Steel Corporation (Besco), made a bloody charge against the Sunday evening crowd on Victoria Road in Sydney on July 1, McLachlan, in his capacity as secretary of District 26, authorized a wildcat strike. "This was a fateful decision," writes David Frank, quoting McLachlan's official letter (see *Appendix 1*),

> one that brought down the wrath first of the provincial government and then of the international union. For his call to arms McLachlan was charged with seditious libel and subsequently sentenced to two years in jail. For his violation of international union policy in calling the sympathetic strike he was removed from office by John L. Lewis [president] of the United Mine Workers.[16]

McLachlan was prosecuted because he was the leader of an illegal sympathetic strike. The seditious libel for which he was convicted was an official letter signed and ordered circulated by McLachlan in his capacity as secretary of District 26 of the UMWA. McLachlan did not authorize publication of the letter which was undertaken without his knowledge or permission.[17]

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[15]*Supra* note 2 at 161.

[16]D. Frank, "The 1920s: Class and Region, Resistance and Accommodation" in E.R. Forbes and D.A. Muise, eds., *The Atlantic Provinces in Confederation* (Toronto: University of Toronto Press, 1993) 233 at 246-7.

[17]See *infra* Appendix 1. The District official letter was not, contrary to both Paul MacEwan's and John Mellor's assertion, published in the *Maritime Labor Herald* [Glace Bay]. Interestingly enough, McLachlan was not charged with publication in the pro-company, pro-government newspapers, the *Post* and the *Record* [both Sydney], where the alleged seditious libel appeared the same day as in the *Morning Chronicle* [Halifax]. Had this occurred, it would have been difficult to justify the Attorney-General's decision not to have McLachlan tried in Sydney, where the Supreme Court sat for criminal proceedings but where O'Hearn feared a knowledgeable grand jury would throw out the indictment. "Cape Breton County, with a population composed so largely of men, women and children affected by the [coalminers'] strike," stated the Attorney-General in Assembly debate several months later, "was not the best place to hold the trial from the standpoint of the administration of criminal justice": *infra* note 55. The full extent of the press conspiracy was not known until long after McLachlan's trial: "The correspondent for the Associated Press at Sydney was a reporter for the Sydney Record, and that paper ... was generally understood to be owned by the [British Empire Steel] corporation": *Halifax Herald* (19 Feb. 1924) 9 (Assembly debates).

Ironically, the trial of J.B. McLachlan for seditious libel in 1923 has less in common with the trial of Fred Dixon for seditious libel in 1920 than *Dixon* does with *Howe*.[18] *Howe* and *Dixon* were magnificent, single-handed acquittals, while Attorney-General Walter J.A. O'Hearn — an able and experienced criminal lawyer — personally prosecuted McLachlan and obtained a conviction. The chief difference between *Howe* and *Dixon* on one hand, and *McLachlan* on the other, was that McLachlan was neither editor of nor in any way connected with the newspapers in which the alleged seditious libel was published. Yet, because the government's true aim was not to suppress sedition but to repress working-class political radicalism, there was never any question of the Crown's proceeding against anyone other than the author and authorized distributor.

The parallels to Howe rest with Fred Dixon, who was acquitted after defending himself in a great forensic address purposely modelled on Howe's. McLachlan, on the other hand, was dissuaded from defending himself, did not testify on his own behalf and was perfunctorily convicted. "[C]ivil libertarians, then and since," according to Howe's biographer, Murray Beck, "have excoriated the [McLachlan] trial for its alleged unfairness."[19] Yet, Beck too refuses to acknowledge any parallels between Howe and McLachlan. He forbears describing *Howe* as "seditious libel," a technical term he uses in relation to *McLachlan*, and does not confront the suspicion that chief counsel for the defence, Gordon Sidney Harrington K.C., (in David Frank's words) "deliberately exploited the case to promote the fortunes of the Conservative Party and prove the iniquity of the Liberal government."[20] Beck also fails to identify "McLachlan's lawyers" as two politically ambitious Conservative barristers — the other was Halifax labour lawyer, John Archibald Walker — both of whom were elected to the Assembly in the Conservative sweep of 1925 and appointed to the cabinet. Harrington, a former mayor of Glace Bay, which was also home town to McLachlan and headquarters of District 26 of the UMWA, was counsel to the union.[21]

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[18]R. St.G. Stubbs, *Prairie Portraits* (Toronto: McClelland & Stewart, 1954) 85 at 108 presents the clearest statement of Dixon's dependence on *Howe*. (This study was written by the son of the "radical lawyer," Lewis St. George Stubbs, who had offered to defend Dixon.) As both Joseph Howe and Fred Dixon were charged with seditious libel, the similarities between the two cases are more numerous and striking than McNaught realizes; Howe too "had achieved political literacy from the bottom up": *supra* note 2, *loc. cit.*

[19]J.M. Beck, *Politics of Nova Scotia : Volume Two : Murray-Buchanan 1896-1988* (Tantallon N.S.: Four East Publications, 1988) at 97.

[20]D. Frank, "The Trial: The King vs. J.B. McLachlan" *New Maritimes*, *supra* note 7 at 7.

[21]Beck, *supra* note 19 at 100, 115; Frank, *supra* note 7 at 7. Harrington's watching brief as UMWA District counsel brought him to Halifax to supersede John A. Walker, who originally held the brief and who was afterwards retained as Harrington's junior.

McLachlan — unlike *Howe* and *Dixon* — was a gross miscarriage of justice, in which the accused was "framed", charged, tried, convicted and imprisoned for having published a seditious libel when in neither the legal nor the ordinary sense of the word had he published anything at all. Before the "fixed" publication, the Crown did not have even a prima facie case against the accused. The obvious motive for the government's conniving at newspaper publication was not only to lay the basis for the charge of seditious libel, but also to give some reason for McLachlan's incarceration and transportation to Halifax, which Attorney-General O'Hearn was later to characterize as "a neutral [safe?] county." The very possibility of contesting the legal repression — by achieving a counter-hegemonic success *à la* Howe and Dixon — was precluded by the careful manner in which the government stage-managed the proceedings against McLachlan from beginning to end.

Circumstantial evidence suggests that the McLachlan prosecution was the result of a conspiracy involving the Red-baiting provincial Liberal government, the management of Besco and the proprietor of the *Morning Chronicle* — the only Halifax newspaper in which McLachlan's official letter was published. The District circular appeared verbatim on the front page of the edition of 6 July 1923 — a mere two days after it was issued — under the incendiary sub-headline, "McLachlan's War Whoop." Publication in Halifax had been arranged by Andrew Merkel, Maritime superintendent of The Canadian Press, whose vice-president, George Frederick Pearson, was also hereditary president of the Chronicle Publishing Company Limited. A lawyer and highly influential political insider — Beck describes him as "long a mastermind of the Liberal Party" — G. Fred Pearson was also Besco's solicitor.[22]

Though McLachlan's conviction for publication in Halifax was eventually struck down on appeal, at the time of the trial even the strongest legal defence would have been ineffectual against a government partial to Besco, a mass-circulation morning newspaper complicitously toeing the government's line, an "anti-Bolshevik" Attorney-General prosecuting in person, a manipulable jury altogether unacquainted with labour-management relations in industrial Cape Breton, and an highly interested judge. Presiding over *McLachlan* was Justice Humphrey Mellish, a corporate lawyer and former solicitor for the Dominion Coal Company — who was elevated to the bench in 1918, so that he could more effectively protect the interests of his former corporate clients. The fact that Mellish's law firm, McInnes Jenks Lovett & Macdonald [now McInnes Cooper &

[22]On the [Halifax] *Chronicle's* "corporationism" and working-class radicalism as a political football kicked back and forth between the Liberal *Chronicle* and the Conservative *Herald*, see W.D. March, *Red Line: The Chronicle-Herald and The Mail-Star 1875-1954* (Halifax: Chebucto Agencies, 1986) at 208. See also Beck, *supra* note 19 at 92. It is worth noting that The Halifax Herald Limited purchased advertising in the *Maritime Labor Herald* (see, for example, issue of 30 June 1923).

Robertson], was in Besco's pocket — the senior partner, Hector McInnes, was a director of the corporation — was sharply emphasized by J.S. Woodsworth MP in House of Commons debate in March 1924, following the announcement of the government's decision to parole McLachlan.[23] Woodsworth, who toured Nova Scotia in January 1924 at the invitation of the Nova Scotia Workers Defence Committee, enquired "concerning the judges of the supreme court, and ... was told that the corporation influence on the bench was so strong that the court is looked upon by labour as a company department."[24] Charges of seditious libel against Woodsworth, a former editor of Winnipeg's *Strike Bulletin*, were indefinitely stayed when Fred Dixon was acquitted of the same charge. Woodsworth read into *Hansard* the words uttered by Joseph Howe before the jury while introducing his discussion of *The Libel Act 1792*:

> It is ninety years since in Nova Scotia a man was tried for sedition. Then a man was haled before the courts and accused of being "a wicked seditious and ill-disposed person, a person of most wicked and malicious temper and disposition." That man is now regarded as one of Canada's greatest sons, Joseph Howe. But he was able to say at that time, in connection with his trial:
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> "And here I may be permitted to thank heaven and our ancestors, that I do not stand before a corrupt and venal court and a packed and predetermined jury."[25]

Joseph Howe's trial for seditious libel, eighty-eight years before McLachlan's, has never been excoriated for unfairness by civil libertarians or anyone else, because Howe was tried by an impartial, disinterested judge — Chief Justice Brenton Halliburton — and acquitted by an enlightened jury. Indeed the canonical, politico-biographical interpretation of Howe does not consider the possibility that this too was a trial for sedition, lest it be compared with the trial of the politically

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[23]*House of Commons Debates* (4 March 1924) at 64-5. The best, and most enlightening sketch of Justice Mellish is found in the official history of the downtown Halifax law firm of which he was a partner from 1907 to 1918: H. Flemming, *McInnes Cooper & Robertson - A Century Plus* (Halifax: *s.n.*, 1989) at 40-2. In addition to Mellish's being "an outstanding corporationist on the bench" (per Woodsworth), the senior partner in his former law firm, Hector McInnes K.C. — a former Conservative MLA — was a director of Besco and, as senior Halifax director of the Bank of Nova Scotia, had been heavily involved in floating the Besco merger in 1920. See D. Frank, "The Cape Breton Coal Industry and the Rise and Fall of the British Empire Steel Corporation" in P.A. Buckner and D. Frank, eds., *The Acadiensis Reader: Volume Two = Atlantic Canada After Confederation*, 2nd ed. (Fredericton: Acadiensis Press, 1988) 204 at 221.

[24]*House of Commons Debates* (4 March 1924) at 64.

[25]*Ibid.*; quoting J.A. Chisholm, rev. & ed., *The Speeches and Public Letters of Joseph Howe* (Halifax: *s.n.*, 1909) at 1:31, 36-7. Woodsworth was reprising a theme which he had developed during a speech at a mass meeting in Halifax on 13 January 1924, at the conclusion of his week-long, eight-town lecture tour, during which he appealed for the release of McLachlan and the six other working-class political prisoners: *The [Halifax] Citizen* (18 Jan. 1924) at 1 and 5; *Maritime Labor Herald* [Glace Bay] (19 Jan. 1924) at 3 (text of Woodsworth's Halifax speech).

persona non grata working-class radical, J.B. McLachlan. Repeated ad nauseam is the canard that Howe was tried for "criminal" libel, suggesting that the dual character of defamation as crime and tort could disprove the self-evident truth that Howe too was tried for seditious libel. Indeed the very success of Howe's self-defence accounts for this misunderstanding of his trial, which resulted in an acquittal despite the fact that the truth of a libel was not pleadable except as a defence to an action, and that neither truth nor public benefit could be pleaded in justification of a seditious libel. McLachlan, unlike this secular Saint Joseph, was neither acquitted nor rewarded with post-trial electoral success.[26] Howe's unanticipated forensic triumph had the incidental effect of downgrading not only the seriousness of the charge against him, but also the profoundly legal, Erskinian character of his defence.

In many respects, of course, Howe and McLachlan were not on an equal footing. Unlike Howe, McLachlan had written and signed the letter and authorized its circulation; unlike Howe, he had not *published* it, and even if he had, the statutory civil defence of qualified privilege, set up by Nova Scotia's *Libel Act 1900*[27] might have been pleadable. Private communications were privileged, and the restricted circulation of McLachlan's official letter exclusively among the locals comprising District 26 did not amount to publication in the narrow legal sense. Unlike Howe, who was unsuccessfully prosecuted for having published the alleged libel, McLachlan was successfully prosecuted despite *not* having published it. Even if McLachlan's counsel, Harrington, was correct in his view that sedition law was unaffected by the passage of the jury-enhancing *Libel Act 1792*, which ensured a verdict according to conscience, there still was not even a prima facie case against the accused. In 1923, as in 1835, it was publication which constituted the offence,[28] and there was no evidence that McLachlan was involved in the publication of the official letter, not even as an accessory. As District 26 official historian C.B. Wade recognized in 1950, "McLachlan had actually committed no offen[ce;] ... the circular was privileged if sent only to the members of the locals,

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[26]McLachlan, the perennial also-ran, stood unsuccessfully as Labour candidate for Cape Breton South in the federal election of 1925, taking 20 per cent of the vote and trailing the Liberal — who lost heavily to the Conservative — by a mere 893 votes out of 17,760: *Fifteenth General Election 1925 : Report of the Chief Electoral Officer* (Ottawa, 1926) at 317-8. McLachlan's opponents were both lawyers, one of whom — the Liberal, Lauchlin Daniel Currie — a future Attorney-General and Chief Justice of the province, was to act for ten years as solicitor of UMWA District 26. See D. Frank, "Working-Class Politics: The Election [Campaigns] of J.B. McLachlan, 1916-1935," in K. Donovan, ed., *The Island: New Perspectives on Cape Breton's History, 1713 - 1990* (Fredericton: Acadiensis Press, 1990) 181 at 200-2, 217.

[27]R.S.N.S. 1923, c. 230; predecessor of the modern *Defamation Act*.

[28]This point was made by James F. Gray, Crown Attorney, opening for the Attorney-General in *R. v. Howe*: Chisholm, *supra* note 25 at 1:25.

as it actually was."[29] With no case for the defence to answer or the jury to consider, an impartial judge — which ex-Dominion Coal Company solicitor Humphrey Mellish palpably was not — would have been obliged to direct a verdict of acquittal.

Just as *Howe* has always been treated circumspectly — more in iconographic than in historical terms — so too has *R.* v. *McLachlan*. None of *McLachlan*'s students have drawn attention to the fact that "Red Dan" Livingstone, who was president of District 26 at the time of his and McLachlan's arrest, though twice remanded, was never tried because he agreed to turn king's evidence against McLachlan before the grand jury. The motive behind Livingstone's volte-face is suggested by his being the only one of the Crown witnesses against McLachlan not to testify at the trial. Livingstone denounced McLachlan in return for an indefinite stay of proceedings, which lasted the remaining fourteen years of his life. Yet Livingstone, who had neither composed nor signed the official letter, was inculpated as an accessory before the fact. The only crime he had committed was the courtesy of informing the management of the Dominion Coal Company that the miners were being called out in response to the emergency at the Sydney steelworks.

Joseph Howe — it needs to be said — was neither arrested nor jailed, though he expected to be and arranged for bail to be posted by his friends, while McLachlan and Livingstone were not only arrested, transported to Halifax and imprisoned, but were initially denied bail at the instance of the Crown. Nor was Howe's venue changed from Halifax to Sydney, to be tried by a jury of coalminers, who had as little understanding of abuses in the administration of local government in the District of Halifax as the jury of Halifax petit-bourgeois who convicted McLachlan had of labour relations in industrial Cape Breton. The Crown failed to make its case in *Howe* and *Dixon* and would have failed to do so in *McLachlan* had he too been tried by a jury of his peers. Howe — tried and acquitted by sympathetic friends and neighbours and readers of his reformist newspaper, the *Novascotian* — was thought by the Halifax bar, who to a man refused his retainer, to be foredoomed. Conversely, McLachlan's lawyer, seeing in his client a latter-day Howe, was overconfident of victory. G.S. Harrington, who

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[29]Wade, *supra* note 8. "The defences of absolute and qualified privilege appear to apply to a charge of seditious libel": *Halsbury's Laws of England*, 4th ed. [reissue] (London: Butterworths, 1990) 11(i) at 78, para. 90. Wade further states, "The opinion of a very conservative-minded lawyer in Cape Breton who was familiar with the McLachlan case was obtained by the writer." The unnamed source is almost certain to have been James William Maddin K.C. (1874-1961), who as a criminal counsel in Sydney was active defending coalminers charged with offences during the "Company Stores Raids" at New Aberdeen (within the town of Glace Bay) in 1922. Maddin, a prominent Cape Breton criminal lawyer and former Conservative MP, was one of three lawyers who filed affidavits on behalf of McLachlan, supporting Harrington's unsuccessful application for a change of venue from Halifax to Sydney: PANS RG 39 'C' (HX) box 706 file B-164 (affidavit of James W. Maddin, 8 Sept. 1923).

had never practised in Halifax and was far from being the "noted barrister" of John Mellor's rose-coloured romance, was facing one of the leading criminal counsel of the Halifax bar in Attorney-General O'Hearn. Harrington nevertheless aimed to achieve, without any help from his client, whom he did not call to testify in his own defence, what Howe and Dixon had achieved by unassisted advocateship. The upshot was that Howe immediately became a "folk hero,"[30] and ultimately a figure of Olympian myth. His trial became the defining moment in the political history of the province. Dixon was overwhelmingly re-elected to the Manitoba legislature in the general election held four months after his acquittal. McLachlan, however, remained a working-class anti-hero, whose trial and unsuccessful appeal, in David Frank's words, "passed on into the untapped obscurity of legal history."[31]

Scholars of Howe have failed to acknowledge the resemblance of the McLachlan sedition trial to the Howe sedition trial. They seem unaware that seditious libel at common law is sedition not libel, and that Howe was not on trial for defamation, but for a crime against the state. The politically and socially dangerous implication for the historiography is that Howe, the petit-bourgeois "conservative reformer,"[32] would be coloured by association with McLachlan, the working-class radical and Bolshevik pariah. Yet, at the time of his own sedition trial Howe did not consider himself, nor did his friends or enemies consider him to be conservative in any sense of the word. That Howe stood four-square in the English radical whig tradition is clear from a close, impartial reading of the stenographic report of his courtroom address in his own defence.[33] In that sense, J.B. McLachlan no less than Fred Dixon was a legatee of Joseph Howe, as well

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[30]See, for example, the title of Chapter 5 of M. Byers and M. McBurney, *Atlantic Hearth: Early Homes and Families of Nova Scotia* (Toronto: University of Toronto Press, 1994) at 37: "The Trial That Launched a Folk Hero."

[31]Frank, *supra* note 3 at 222. Schmeiser, for example, argued that *McLachlan* did not contain "any test of sedition": D.A. Schmeiser, *Civil Liberties in Canada* (Oxford: Oxford University Press, 1964) 205 at 207. In fact this was not so; the rule propounded in *McLachlan*, namely that publications other than the alleged libel were admissible for the purpose of establishing seditious intention, was simply not followed or applied in *Boucher* (1950), where the full bench of the Supreme Court of Canada, dividing five to four — and almost evenly along ethno-religious lines — overrode the existing case law "in favour of a test which is the most liberal ever adopted by a common law court": *ibid.* 209; *Boucher* (1950), [1951] S.C.R. 265. *McLachlan* was not cited in *Boucher*, though there had not been any other successful prosecutions for seditious libel in the interim, while the liberal test adopted by the Supreme Court of Canada was articulated nearly forty years earlier in J. King, *The Law of Criminal Libel* (Toronto: Carswell, 1912) at xxiv [Addenda]. On Canadian case law generally see *Crankshaw's Criminal Code of Canada*, 8th ed. G.P. Rodrigues, ed. (Toronto: Carswell, 1979) fasc. 1, part ii at 31 et seq.

[32]The epithet forms the subtitle of the first of Beck's two-volume definitive biography, *Joseph Howe: Volume I: Conservative Reformer 1804-1848* (Kingston and Montreal: McGill-Queen's University Press, 1982).

[33]*Supra* note 25 at 1:30 et seq.

as the provider of a legacy of working-class political radicalism — and his forerunners were the radical reformers of a century earlier.

Excepting only *McLachlan*, the study of sedition in Nova Scotia has been obfuscated by the "criminal libel" misnomer such that the seditious libel prosecutions of William Wilkie in 1820 and Joseph Howe in 1835 are not seen for what they undoubtedly were: show trials staged by the ruling class to counter the perceived threat to the established order posed by ancillary crimes against the state.[34] Just as Howe implicitly compared himself to the English radicals of the period of extreme Tory reaction in the late eighteenth and early nineteenth centuries — many of whom were tried and convicted of seditious libel — so the comparison with *Howe* was advocated by McLachlan's senior counsel, the Conservative lawyer-politician Harrington. If the radical pamphleteer William Wilkie — tried and convicted of seditious libel in 1820 after an unsuccessful self-defence conducted along the same lines as Howe's fifteen years later — was a forerunner of Joseph Howe,[35] then Howe was a forerunner of J.B. McLachlan, who assumes a place of honour within the century-old tradition of political protest and trials for sedition in Nova Scotia. *McLachlan*, writes David Frank, "was a political trial, part of a Canadian tradition we have found it all too easy to forget. These kinds of trials, such as Joseph Howe's in 1835, had long pitted the forces of change against the forces of continuity."[36]

Though in the last twenty years the trial of J.B. McLachlan for seditious libel has received closer scrutiny than the essentially seditionary character of the trial

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[34]See, for example, McNaught (*supra* note 2 at 164-6), who assumes rather than argues that Howe was charged not with seditious libel but "with criminal [i.e., defamatory] libel (for clearly political purposes) ..." — a distinction having no basis either in Nova Scotian or in English law as it stood at the time of the Howe sedition trial. See, for example; *The Criminal Libel Act 1819*, which addressed "blasphemous and *seditious* Libels" [author's italics] but not defamation. McNaught's apparent purpose was to contrast *Howe* in this respect with *Dixon*, where the accused "was charged with seditious, rather than criminal libel": McNaught, *supra* note 2 at 165. (Elsewhere in the same article, however, McNaught states that Howe and Dixon "each defended himself successfully against substantial charges of politically libellous publication" (at 156 n. 22) — a rather obvious circumlocution for seditious libel. Not even an unscholarly "goodread" biography of McLachlan, such as Mellor's, shrinks from denominating *Howe* "seditious libel": *supra* note 5 at 203, 223-4

[35]This thesis was first propounded by G.V.V. Nicholls, "A Forerunner of Joseph Howe" (1927) 8 *Can. Hist. Rev.* 224; cf. J.A. Roy, *Joseph Howe: A Study in Achievement and Frustration* (Toronto: Macmillan Press, 1935) at 49-50. See now also B. Cahill, "Sedition in Nova Scotia: *R.* v. *Wilkie* (1820) and the Incontestable Illegality of Seditious Libel before *R.* v. *Howe* (1835)" (1994) 44 Dalhousie L.J. 458.

[36]*Supra* note 7 at 3. As long ago as 1912 John King identified three "State prosecutions for defamatory libel" in Upper Canada: *Durand* (1817), *Collins* (1828) and *Mackenzie* (1828): *supra* note 31 at 71 et seqq. Chapter 4 of King's 400-page treatise — the first, and still the only, Canadian text on the subject — deals with "Seditious Libels", as do the "Addenda". As the son-in-law of William Lyon Mackenzie — not to mention the father of the future prime minister — King was nothing if not well-placed to discuss sedition in Upper Canada.

of Joseph Howe was ever accorded, it remains unclear why McLachlan was charged with libel rather than conspiracy. The latter was easier to prove than the former, as the convictions of R.B. ("Bob") Russell and six of the Winnipeg Seven — not to mention the acquittal of Fred Dixon — made clear. The mystery deepens in view of the fact that the impetus behind the trial appears to have been the successful seditious conspiracy prosecutions arising from the Winnipeg General Strike, most notably *R.* v. *Russell.*

David Frank has rightly drawn attention to the dual aspect of Attorney-General O'Hearn's prosecutorial strategy, which embraced both the new *Criminal Code* offences relating to unlawful association and seditious literature, and the promising *Russell* precedent.[37] Yet McLachlan was not charged under section 98 [formerly ss. 97A, 97B] of the *Criminal Code*, which greatly enlarged the scope of ancillary crimes against the state ("promoting changes by unlawful means'), nor was he charged with seditious conspiracy — though the same circumstantial exhibit evidence which helped convict Russell of conspiracy also helped convict McLachlan of libel. McLachlan was originally charged with the medieval and long-disused common-law misdemeanour of "spreading false news" — then section 136 of the Code — which had to be changed to seditious libel, for the obvious reason that the "news" which McLachlan was allegedly "spreading" was not "false."[38] The Crown could not risk prosecuting McLachlan for an offence against which justification might be pleaded. Furthermore, the maximum sentence on conviction for spreading false news was one year, while that for seditious offences had been increased from two to twenty years by the *Criminal Code Amendment Act 1919*. Thus McLachlan was tried and convicted for seditious libel, the very charge on which Fred Dixon, who indeed published at his peril, was acquitted a mere three years before.

The key to this paradox lies in what David Frank has called the incoherence of McLachlan's lawyers' "line of defence in the course of the trial."[39] Because *Howe* and *McLachlan* were interconnected legally as well as historically, *Howe* could have been judicially considered in relation to *McLachlan*. By adducing *Howe* as a precedent, however, defence counsel impliedly conceded the most important part of the Crown's weak and perfunctory case: that the accused had "published" an alleged seditious libel, just as Howe had done. The Crown was thus relieved of the burden of proving seditious intention and false defamation, which together constituted the offence with which McLachlan was charged. This

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[37]Telegram, W.J. O'Hearn to E.H. Armstrong, 20 May 1923: quoted in Frank, *supra* note 3 at 211.

[38]See the exordium to Dawn Fraser, "Hey, Jim [McLachlan] and Dan [Livingstone]": *supra* note 12 at 38: "The ridiculous charge of 'spreading false news' was inspiring."

[39]Frank, *supra* note 3 at 221.

line of defence, though perhaps misguidedly over-sanguine and ultimately ineffectual, can hardly be described as incoherent.

Defence counsel plainly did not believe that *The Libel Act 1792* — "the first statute dealing with sedition" — which affirmed the jury's broad fact-finding powers, applied to seditious libel, even though both Howe and Dixon relied upon it in their defence.[40] Therefore, in order to constrain the jury to convict McLachlan, the Crown was at liberty to confine their attention to proving publication by the accused. It was as if *The Libel Act 1792* did not exist or was not in force. The difference between *Howe* and *McLachlan* lies in the operation, not of the *Criminal Code* but of *The Libel Act*, which, according to McLachlan's lawyers, had no application to sedition law. Even if *The Libel Act* did not exist, however, McLachlan might still not have been convicted. Though the fact-finding powers of the pre-1792 libel jury did not extend to seditious intention or ascriptive innuendo, the jury alone adjudged the fact of publication. McLachlan had not published the District 26 official letter; what he had written was not intended for publication, nor did he clandestinely arrange for its publication.[41] He was neither the principal nor an accessory before the fact.

The roots of the *Howe* typology of *McLachlan* are to be found at the trial in Harrington's defence of McLachlan. Unlike Howe, who could find no lawyer willing to defend him, McLachlan "was anxious to conduct his own defence,"[42]

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[40]See, for example, Dixon, *supra* note 5 at 9; Law Reform Commission of Canada, *Crimes against the state* [Working Paper 49] (Ottawa: LRC, 1986) at 7. With the latter may be contrasted the view of G.S. Harrington and J.A. Walker — counsel and solicitor, respectively, for the appellant — who argued during *McLachlan* v. *R.* (1924), 56 N.S.R. 413 at 417 (N.S.S.C. in Banco) that the "law in regard to seditious libel is as it was before the passage of Cox's [*sic*: Fox's] Libel Act". The legal position in 1923 was not thought to be quite so forward as it had been in 1835, when the Crown attorney and the accused-defender in *Howe* agreed that *The Libel Act*, (1792) 32 Geo. 3 c. 60, settled the question that finding seditious intention was not for the judge but for the jury. The effect of *The Libel Act 1792* was to sharpen the distinction between law and fact, which had been blurred through the judicial "doctoring" of seditious libel, and to emphasize the defamatory over the seditionary aspects of the offence. The Canadian leading case on the reception of *The Libel Act 1792* is *R.* v. *Dougall* (1874), 18 L.C. Jurist 85 at 87 and 89 (Que. B.R.), *per* Ramsay J, who ruled that the act was in force everywhere because it was declaratory of the common law.

[41]According to English case-law, most of which antedated 1832, "If the manuscript of a seditious libel is proved to be in the handwriting of the accused, and it is also proved that the same libel was in fact published, this is prima facie evidence for the jury of a publication by the accused, though no evidence is adduced that he directed the publication": Halsbury, *supra* note 29 at 79, para. 91. These are the very grounds on which McLachlan was convicted, and on which two out of the three counts of his conviction were upheld on appeal.

[42]McNaught, *supra* note 2 at 166. MacEwan, *supra* note 4 at 116. It is possible that McLachlan's original intention was to emulate the triumphant acquittal of Fred Dixon, who had so recently and so spectacularly emulated the triumphant acquittal of Howe. McLachlan probably met Dixon in Winnipeg during his cross-country lecturing and fund-raising tour with Cape Breton County Labour MLA, Forman Waye; the pair spoke in Winnipeg on 2 September 1923: "Says Mine Workers Betrayed

as Fred Dixon had done during his sensational trial for seditious libel in 1920. Yet McLachlan allowed his lawyer to defend him. He did not offer himself as a witness on his own behalf nor, unlike Howe, did he volunteer to testify for the Crown. In *McLachlan*, like *Howe*, the defence called no witnesses. If Harrington realized that *Howe* was indeed the model for *McLachlan* — referring to the "coherent line of defence in the course of the trial," which David Frank considers the defence lawyers not to have presented — then he should have perfected the analogy by withdrawing from the case and encouraging McLachlan to defend himself. If McLachlan, or his lawyers, had read "Dixon's address to the jury in defence of freedom of speech," which was published by the Winnipeg Defence Committee shortly after Dixon's acquittal in February 1920, they might have seen the wisdom of McLachlan's trying to recreate Dixon's triumphant emulation of Howe. Instead, Harrington persisted in the attempt to achieve for his client what McLachlan perhaps could have better achieved for himself.

The advice that Dixon received from Edward James McMurray, "one of Winnipeg's leading criminal lawyers" and solicitor for the eight arrested General Strike leaders, was very different from and more astute than the advice which McLachlan received from his counsel. Recognizing in Dixon the "tribune" type, McMurray had shrewdly "urged him to study the biography of Howe."[43] The sedition trials of Joseph Howe and Fred Dixon demonstrated that the best defence was self-defence, but Harrington could not have billed the Nova Scotia Workers' Defence Committee for his services as counsel for advising McLachlan to defend himself. Fred Dixon successfully replicated *Howe*, but McLachlan, despite his well-deserved reputation as a platform orator, was not given the opportunity to do likewise. His lawyer interposed himself to the detriment of the defence. What ultimately scuttled Harrington's attempt to resurrect Howe, the dual personality — at once the nervous defendant and the brazen defence counsel — was that *Howe*, the politically dangerous sedition trial, had been transformed by pre-Confederation political history into triumphalist hypermyth. *Dixon*, moreover,

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by Lewis," in *Manitoba Free Press* [Winnipeg] (3 Sept. 1923) at 6. MacEwan (*ibid.*, 117), on the authority of Waye and one of McLachlan's sons, states that McLachlan was dissuaded by the Nova Scotia Workers' Defence Committee (which was footing the bill for McLachlan's legal expenses) from conducting his own defence. David Frank states, on the authority of the accused's solicitor and junior counsel, J.A. Walker, "that McLachlan did not speak in court because he did not want to": *supra* note 3 at 219.

[43]McNaught, *supra* note 2 at 166; Bumsted, *supra* note 9 at 102. McMurray, who in 1921 became a Liberal MP and afterwards solicitor-general in the first King ministry, was doubtless influenced by the fact that Russell and all but one of the Winnipeg Seven — only three of whom were represented by counsel — were convicted of seditious conspiracy. (It is worth noting that McMurray's immediate predecessor as federal solicitor-general was the Cape Breton Liberal MP, Daniel Duncan MacKenzie K.C., who was appointed to the Supreme Court of Nova Scotia in April 1923 and sat for the *McLachlan* appeal. Previous to his appointment to the bench, according to Woodsworth, MacKenzie was "the local solicitor for the Nova Scotia Steel [and Coal] Company, at North Sydney, and was very closely in touch with Besco": *supra* note 23 at 65.)

would only have been relevant had McLachlan been defending himself. McLachlan had no choice but to acquiesce in the losing strategy devised by counsel whom the Workers Defence Committee had unwisely retained on his behalf. In any case, those in power in Nova Scotia were not about to concede that there had ever been a trial for sedition in the province — certainly not Howe's. The wisdom of hindsight not only made his acquittal look inevitable but led to the *reductio ad absurdum* that Howe, the tribune, "the voice of Nova Scotia," could not have been subjected to a state trial — a fate reserved in the popular imagination for rebels and traitors like Upper Canada's William Lyon Mackenzie.

In preparing his defence of McLachlan, Harrington, like Dixon, availed himself of *The Speeches and Public Letters of Joseph Howe*, a new and complete edition of which had been produced in 1909 in a commendably bipartisan manner. The publisher was the *Halifax Chronicle*, the Liberal Party organ founded in 1844 and once edited by Joseph Howe, while the reviser was the prominent Conservative lawyer and municipal politician, Joseph Andrew Chisholm K.C. Chisholm, who in 1916 acceded to a puisne judgeship, played a significant collateral role in the proceedings against McLachlan.[44] In June 1923, he presided at the criminal assizes in Sydney, when, according to Attorney-General O'Hearn, "in the neighbourhood of twenty-odd bills of indictment against strikers for their criminal activities in February 1923, were thrown out" by the grand jury for lack of witnesses willing to testify.[45] Chisholm was also, according to J.S. Woodsworth, one of only two of seven judges of the Supreme Court of Nova Scotia who had had no "known relations" with Besco or its constituent operating companies.[46] Though Chisholm was not the trial judge for *McLachlan*, his decision in chambers to grant *habeas corpus* and then bail in favour of McLachlan and Livingstone, both of whom were denied bail by the stipendiary magistrate who committed them for

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[44]A brother-in-law of the late Prime Minister Sir John S.D. Thompson, former law partner of Prime Minister Sir Robert Borden and twice-failed federal Conservative candidate, Chisholm was nothing if not well-connected. He was also well-known as a "labour conciliator": MacEwan, *supra* note 4 at 50. In 1917 and 1918, Justice Chisholm chaired two federal royal commissions inquiring into industrial relations in the coalmining and steelmaking industries in Nova Scotia, which led to the re-establishment of District 26 of the United Mine-Workers of America in 1919.

[45]*House of Assembly Debates*, quoted in *Halifax Herald*, 20 Feb. 1924 at 5. Here the Attorney-General betrayed the real reason for transporting McLachlan and Livingstone to Halifax. The Crown anticipated — probably rightly — that any indictments preferred against them in Cape Breton would not be returned by the grand jury.

[46]*Supra* note 23 at 65. The other was Russell J., the senior puisne, who in December 1921 granted the union's application for an interim injunction to prevent Besco's unilaterally imposing a wage cut. The corporation appealed against the injunction, and it was lifted: *Dominion Coal Company Limited et al.* v. *District 26, UMWA et al.* (1922), 55 N.S.R. 121 (N.S.S.C. in Banco), per Mellish J. Chisholm was one of the three judges sitting for the appeal. Counsel for the respondents were L.A. Forsyth and J.A. Walker: *supra* note 21; solicitors for the appellants were Mellish's former law firm.

trial, was upheld by the Supreme Court in Banco against an appeal by the Crown.[47]

Harrington, for his part, must have read at least the second chapter of the 660-page-tome edited by Justice Chisholm fourteen years earlier, but he was living too far in the mythological past of 1835. The mere fact that the first trial for sedition in Nova Scotia since Howe's was once again taking place in Halifax did not mean that the rules in *Howe* applied. McLachlan, in view of the recent verdict in *Dixon*, and perhaps confident enough of acquittal, chose neither to defend himself, as both Howe and Dixon had done, nor to testify in his own defence.[48] Harrington supposed that McLachlan would be acquitted because Howe was, and there had not been any prosecutions for seditious libel in the interim. The Halifax bar of 1835 thought that Howe would be convicted because William Wilkie was, and there had not been any prosecutions for seditious libel in the interim. The operative factor was not what had changed in Nova Scotia between 1835 and 1923. What mattered were the changes in Canada between 1919 and 1923. By the latter date, sedition law was being used systematically against working-class radicals in general and strike leaders in particular, regardless of their lack of socialist credentials — a tendency strikingly illustrated by the prosecution of Fred Dixon MLA. Not only had new repressive state security laws been introduced, but also the state's determination to repress working-class radicalism had been renewed since 1919 and the range of potential uses of existing sedition law accordingly broadened.

If the significance of *Howe* for *McLachlan* relates more to the forensic use of history than to the forensic use of law, then *McLachlan* is an object lesson in the failure of legal history as legal argument. It is not a question of the uses or sources of law, however, because *Howe*, as a jury trial resulting in an acquittal did not form a legal precedent. *Howe* in relation to *McLachlan* concerns the historical uses of law versus the juridical uses of history, and in either respect depends upon a mutually agreed, authoritative and analytically sound reconstruction of the leading case. When the Crown denied the existence of any previous trials for sedition in Nova Scotia, the defence attempted unsuccessfully to adduce *Howe* as a precedent. This move led to comparisons and contrasts being drawn without the benefit of a proper contextual analysis of the uses and instrumental applications of case-law. A proper analysis depends on knowing how the law, both substantive

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[47]*R.* v. *Mitchell, ex parte McLachlan* (1923), 56 N.S.R. 380 (N.S.S.C. in Banco). Chisholm also concurred in the dismissal of the appeal against McLachlan's conviction, and spoke for the court in the bizarre decision to allow the *ultra vires* application for leave to appeal the disallowance to the Judicial Committee of the Privy Council — which it was beyond the court's power to grant and which was really a constitutional reference on the legality of *per saltum* criminal appeals.

[48]The evidence on this point, which depends heavily on oral tradition, is ambiguous; a final determination will have to await publication of David Frank's biography of McLachlan.

and procedural, affected the institution and the resolution of legal proceedings, and must avoid not only the lawyer's fallacy of misconstruction, but also the historian's fallacy of "presentism". Attempts by historians to link *McLachlan* to *Howe* have thus far proved no more successful than Harrington's attempt to do so during the trial; however, the reason for this failure is more historical than legal.

The failure of the McLachlan trial defence is attributable not to his lawyer's ignorance of the law, contemporary or historical, but to the prevailing abuse and mythification of legal history. It proved impossible for Harrington to displace the Howe libel trial myth in favour of the Howe sedition trial precedent; the mythology was too solidly entrenched for deconstruction or demythologization to be achieved during the course of the trial by counsel for the defence. McLachlan's lawyer, while trying to exploit the Howe sedition trial in the interests of his client, found himself enchained by the Howe libel trial myth. Even before *McLachlan*, it was too traumatic to contemplate the possibility that Howe had been tried for sedition, which, in the collective consciousness of government and people alike, lay much closer to treason than to libel.

Clearly a line of defence which did not result in a verdict of not guilty was "an ineffectual one"; however, to criticize it as incoherent, as David Frank does, is *ex post facto* rationalization. Just as scholars of *Howe* have disposed of some archetypal myths — such as that the verdict established freedom of the press — only to replace them with others, so students of *McLachlan* fail to recognize that one of the lessons of that case is that criminal law and criminal justice history are not necessarily combinable in the context of legal proceedings. Political trials, however significant they may be in other respects, are not necessarily significant sources of law. Frank, for example, argues that counsel for the defence in *McLachlan* "probably unreasonably, accepted the argument that truth was no defence in a case of seditious libel."[49] Harrington's acceptance of what had long been a settled principle of the common law can hardly be considered unreasonable for a lawyer pleading in a criminal court. Moreover, Harrington's failure to recognize that one of the lessons of *Howe* was that the restriction on truth as a defence "could be easily evaded in the process of clarifying the defendant's intentions"[50] is fully consistent with his argument on appeal that seditious libel law was unaffected by the passage of *The Libel Act 1792*. There the jury's right to "find" intention as a matter of fact was explicitly affirmed. The problem with Harrington's defence was not incoherence but error of law. *The Libel Act 1792*

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[49]Frank, *supra* note 3 at 221. "If words spoken or published are seditious, it is no defence that they are true, and evidence to prove their truth is inadmissible": Halsbury, *supra* note 29 at 79, para. 91; cf. King, *supra* note 31 at xxiv [Addenda]. It was up to the jury to determine not only whether the accused was responsible for publishing the alleged libel, but also whether the publication *was* a libel and, if so, whether the legal or true innuendo evidenced seditious intention.

[50]Frank, *supra* note 3 at 221.

was the very statute which enabled Howe to evade this common law restriction on defence pleading in the course of clarifying his innocent intentions.

As John Mellor correctly states, Harrington "had based his whole case on the famous Joseph Howe and his acquittal on a similar charge of seditious libel."[51] Harrington either did not understand or failed to elucidate the legal justification for Howe's acquittal. He not only misunderstood the implications of *The Libel Act 1792* for sedition law, but also mistook the legal heart of Howe's defence. Harrington nevertheless believed that he could defend McLachlan in the same manner and with the same success as Howe had defended himself. Despite the fact that McLachlan was *not* defending himself, and that Howe had called no witnesses, there seemed to Harrington little point in putting the accused in the witness-box, to be exposed to a withering, ideologically perverse cross-examination by the Attorney-General. "It was generally believed," according to Mellor's hearsay:

> that if Harrington had arranged for defence witnesses to give evidence for McLachlan at the trial, he could quite possibly have won an acquittal, but instead, Harrington had based his whole defence on drawing an analogy between the famous Joseph Howe case, which had ended in acquittal, and the McLachlan case with its communist overtones.[52]

This is an aspect in which *McLachlan* and *Dixon* differ; Dixon was a non-socialist, while McLachlan was a revolutionary socialist who could scarcely have been permitted to speak candidly in his own defence in open court.[53] Moreover, to

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[51]Mellor, *supra* note 5 at 230.

[52]*Ibid.* at 234-5. A similar question was pointedly asked of J.S. Woodsworth by O.D. Skelton (then Dean of Arts at Queen's University), who "wondered why it was that strong statutory declarations [*sic*: affidavits] prepared on behalf of the defendant regarding the disturbances in Sydney had not been offered in evidence": Frank, *supra* note 3 at 223 n. 42, paraphrasing Skelton to Woodsworth, 28 Mar. 1924. Attorney-General O'Hearn — doubtless playing devil's advocate — asked the same question in the House of Assembly in February 1924; he was replying to Cape Breton Labour MLA Forman Waye, who narrated the eight (or ten?) affidavits during debate and named the deponents; *infra* note 55. The post-trial rhetoric (some of it tongue-in-cheek) obfuscated the procedural axiom — well-known to both the Attorney-General and counsel for the defence — that evidence to prove the truth of a seditious libel was not admissible. The old maxim, "The greater the truth the greater the libel," which did not apply to criminal defamation after *The Libel Act 1792*, continued to apply to sedition. The legal defence to seditious libel, as the acquittals of both Howe and Dixon attest, was not proving the truth of statements made in the alleged libel but disproving seditious intention.

[53]McLachlan had joined the fledgling Workers' Party of Canada in 1922, while Dixon is dismissed by Bryan Palmer as "middle class": B. Palmer, *Working-Class Experience: Rethinking the History of Canadian Labour, 1800-1891,* 2nd ed. (Toronto: Butterworths, 1992) at 178. Though Dixon and McLachlan were both radicals and strike leaders, Dixon was anti-socialist while McLachlan was a revolutionary socialist, or communist. Though the two strike leaders were divided by ideology, McLachlan had nevertheless helped to found the Independent Labour Party in Nova Scotia in 1920, while Dixon was its leader in Manitoba.

have called witnesses would have broken the magic spell which Harrington was trying to weave, for Howe had exemplarily called none.

Harrington, to his credit, knew the historical law relating to the defence. While Attorney-General O'Hearn believed that there had been no other trials for sedition in Nova Scotia, Harrington saw a unique connection with *Howe*. There had been a few others — *Hoffman* (1754), *Houghton* (1777) and *Wilkie* (1820) — all resulting in convictions and all superseded by *Howe* (1835), which not only resulted in a sensational acquittal, but also prescribed a test of seditious libel so modern in its exclusiveness that it anticipated *Boucher* (1950) — the leading Canadian case. While the Attorney-General professed ignorance of any *other* trials for sedition in Nova Scotia's history, his role as Crown prosecuting counsel — though long obsolete by the 1920s[54] — was fully continuous with that of Attorney-General Samuel George William Archibald, who closed for the Crown at the trial of Howe. O'Hearn, for his part, not only both opened and closed for the Crown at the trial of McLachlan, but also examined most of the twelve Crown witnesses. Further repeating history, O'Hearn exercised the law officer's prerogative right of addressing the jury last, a custom which also had fallen into disuse. So exceptional was O'Hearn's tactic that it was made a ground for McLachlan's subsequent unsuccessful appeal from his conviction. O'Hearn's long-dead predecessor, Archibald, had exercised the same prerogative right at a time when the law officers still routinely acted in person as Crown prosecutors.

The chief difference between the two Attorneys-General was that Archibald (a friend of the Howe family) was extremely reluctant to prosecute Howe on a trumped-up charge, while O'Hearn had been purposely brought into the government in December 1922 and into the Legislative Assembly by acclamation the following month, in order to deal with troublesome "labour covenanters" (*per* J.S. Woodsworth) such as McLachlan. O'Hearn, opening for the Crown, declared that seditionists were more dangerous criminals than murderers. However intemperate his rhetoric and unsound his grasp of legal history, O'Hearn understood more clearly than Harrington that the *Criminal Code Amendment Act*

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[54]The circumstances of this anachronism are fully explained by J.M. Beck, "The Rise and Fall of the Attorney General in Nova Scotia" in J. Yogis, ed., *Law in a Colonial Society: The Nova Scotia Experience : Dalhousie / Berkeley Lectures on Legal History* (Toronto: Carswell, 1984) 125 at 136-7. For further information concerning O'Hearn's brief tenure as Attorney-General, Dec. 1922 - July 1925, see J. Doull, *Sketches of Attorney Generals [sic] of Nova Scotia 1750—1926* (Halifax: the author, 1964) at 121-3. John Doull, a contemporary of O'Hearn's and himself Attorney-General in the Conservative government of Premier G.S. Harrington (1930-3), wrote, "An Attorney General had not appeared in a criminal court for some twenty years, but O'Hearn conducted prosecutions in important cases, not only in Halifax but in other counties [e.g., Cape Breton]. He had some outstanding successes — for example, he had James McLaughlin [*sic*] convicted of sedition — though I doubt whether McLaughlin, who was head [*sic*] of the Union, was saying any worse things than other opponents of corporations."

1919 had reverted the role of juries and the rights of those accused of seditious libel to a time before the passage of *The Libel Act 1792*, when jury verdicts in seditious libel trials were not "according to conscience" but practically directed by the judge. "No attempt has ever been made by the prisoner's counsel," declaimed O'Hearn after the *McLachlan* appeal had been disallowed, "to show that McLachlan was not guilty of the offense of seditious libel, or that he was entitled to any consideration. The appeals in his interest have all been on technicalities."[55] Even though truth was no defence to a charge of *seditious* libel — there was no plea of justification or exemption from criminal liability as in defamatory libel — the Crown took pains to prove, through the testimony of witnesses, not only that McLachlan was legally responsible for publication, but also that the statements which McLachlan had made in the alleged seditious libel were untrue. Thus false defamation was the basis on which the Crown attempted to prove seditious intention.

Harrington's failure to penetrate the legal heart of Howe's defence and realize its promise for *McLachlan* makes one wonder whether Howe was not the better, or at least the better-prepared lawyer. Though *Howe* usefully demonstrates the counter-hegemonic uses and propaganda benefits of an unsuccessful show trial, this leading case on sedition has been viewed neither as part of the common law nor as integral to the *legal* history of Nova Scotia. *Howe* was undoubtedly a "great trial", yet somehow it is irrelevant to criminal justice history and state security law. This admittedly political trial has been almost exclusively subjected to the discipline of political and politico-biographical analysis and so belongs fully neither to law nor to legal history.[56] On those rare occasions when legal analysis was undertaken, it was desultory and wrong-headed in the extreme. Even Chief Justice Chisholm, who contributed to the *Canadian Bar Review* a centenary memento of

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[55] *[Halifax] Morning Chronicle* (20 Feb. 1924) at 1. O'Hearn's retrospective reappraisal of *McLachlan* occurred in connection with his rejoinder to Forman Waye, chief whip of the Farmer-Labour opposition in the Assembly and secretary of the Amalgamated Association of Iron, Steel and Tin Workers of America. At the legislative session which began in February 1924 Waye moved an amendment to the address in reply to the speech from the throne, calling for the "revocation of Besco's charter" (Besco's "charter" was federal, not provincial). Needless to say the motion was defeated, but the debate received extensive coverage in the Halifax press, *Hansard* being suspended at the time: *Halifax Herald* and *Morning Chronicle*, 19 and 20 Feb. 1924. (For the impact of 'Forman's filibuster' — which made its perpetrator famous — on working-class consciousness in industrial Cape Breton, see Dawn Fraser, "To Forman Waye" *supra* note 12 at 46-8.)

[56] See, for example, J.M. Beck, *Politics of Nova Scotia: Volume One: Nicholson-Fielding 1710-1896* (Tantallon N.S.: Four East Publications, 1985) at 109: Howe "faced a Supreme Court jury charged with criminal libel in what was to be the most celebrated of all Nova Scotian trials. The law was completely against him." Such statements mask ignorance of the law, which is no excuse for bad history. If the law had been completely against Howe, then he could scarcely have defended himself with such forensic brilliance as to procure an acquittal on legal grounds.

Howe,[57] achieved little more than unnecessary confusion between sedition and defamation. The agenda of the political rehabilitation of Howe, that lapsed anti-confederate, which Chisholm had been assiduously cultivating since 1909, triumphed, while a contextual analysis of the legal meaning of 1835 was consigned to the rubbish-bin of history. Chisholm's article, which, despite both factual and legal errors continues to be cited deferentially, leaves one with the suspicion that his innocuous statements about *Howe* were delimited and conditioned by his too-intimate personal knowledge of *McLachlan*. Chisholm went in fear of the obvious parallel being drawn between the two tribunes.

The wisdom of hindsight enables post-*McLachlan* students of *Howe* to recognize that Harrington, however grossly he miscalculated the effectiveness of the argument from historical law as a defence to sedition, was justified in adducing *Howe* as a precedent. A question remains, however, as to whether the major premise of Harrington's syllogism was sound. No one would dispute that analogy is a species of forensic argument; yet if the offence for which Howe was tried was seditious libel, then the conclusion — that McLachlan ought likewise to have been acquitted — does not necessarily follow. If the Howe libel trial myth had been successfully appropriated by the defence for legal purposes, as it was by the Conservatives for political purposes, then the Crown in 1923 could not have conceded without loss of face that Howe was unsuccessfully prosecuted for sedition in 1835. The credibility of the defence turned on whether Howe was acquitted of sedition or defamation.

Just as *McLachlan* is not referred to as a libel trial, so *Howe* is not referred to as a sedition trial — except by McLachlanites. There is more to this optical illusion than the interposition of the *Criminal Code 1892*, which codified security law while at the same time discreetly omitting to define sedition. Under the common law, seditious libel was always part of sedition, not defamation. Moreover, if seditious intention had been positively defined, the 1919 repeal of section 133, which defined seditious intention negatively, would have been less endangering to the fundamental, "ante-legal" freedoms of thought and expression, peaceful assembly and association. (All were at stake in the as yet unrealized legal right of employees to organize.) Between 1919 and 1930, when section 133 was restored, a new seditious offence might have been created every time a case was successfully prosecuted and upheld on appeal. Existing judicial precedents did not

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[57] J.A. Chisholm, "*The King* v. *Joseph Howe*: Prosecution for Libel" (1935) 13 *Can. Bar Rev.* 584. This article was cited by Frank (*supra* note 3 at 221 n. 35), who also cites J.M. Beck's influential study, "'A Fool for a Client': The Trial of Joseph Howe" in P.A. Buckner and D. Frank, eds., *The Acadiensis Reader: Volume One = Atlantic Canada Before Confederation*, 2nd ed. (Fredericton: Acadiensis Press, 1990) at 243. Beck's article, substantially unaltered, forms Chapter 9 of the first volume of his biography of Howe: *supra* note 32 at 129. See also B. Cahill, "*R.* v. *Howe* for Seditious Libel (1835): A Tale of Twelve Magistrates" in F.M. Greenwood and B. Wright, eds., *Canadian State Trials Series, Volume One: The Early Period, 1608-1837* [forthcoming 1996].

deter activist judges from filling statutory lacunae with oppressive new case-law which enlarged the scope of seditious offences. This is clear from Judge J.T. Metcalfe's conduct in the sedition trials of Russell and the Winnipeg Seven, which greatly enlarged the scope of seditious conspiracy. After the repeal of section 133, in which seditious intention was defined, albeit negatively, bona fide intentions were no longer exempt from seditiousness. The most dangerous consequence of this legislation was that it left the definition of seditious intention entirely in the hands of judges, such as Metcalfe in Manitoba and Mellish in Nova Scotia. Each relied on English procedural writers, such as Archbold, to invent substantive sedition law, when they could not find what they were looking for in English or Canadian case law.[58]

Just as the legal argument from analogy failed to obtain an acquittal for McLachlan, so the argument from legal history has failed to obtain recognition of *McLachlan* as a case which merits judicial reconsideration. As recently as 1990, the authors of an essay on the historiography and sources for the study of *Russell* could claim that "[t]he *legal* history of the Winnipeg General Strike trials has yet to be written."[59] The same may be said for the legal history of working-class

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[58]In his charge Justice Mellish committed the faux pas of misdirecting the jury that section 133, repealed four years since, was still in force. Though afterwards made a ground of appeal by the defence, this was rejected by the appeal court for the preposterous reason that the section was declaratory of the common law and its repeal "could not possibly prejudicially affect the accused": (1924), 56 N.S.R. 413 at 425 (N.S.S.C. In Banco), per Harris CJ. If the "Exception" had not ameliorated the rigours of the common law and qualified its application, however, then there would have been no reason to repeal section 133 in the first place.

The source of Mellish's definition of sedition — the same offered by Metcalfe in *Russell* — was *Archbold's Pleading, Evidence, & Practice in Criminal Cases*, 25th ed. (London: Sweet & Maxwell, 1918) at 1070; Archbold was — and is — the definitive guide to criminal procedure in the English Crown Court. For Metcalfe, see Bumsted, *supra* note 9 at 117. It is perhaps odd that Canadian judges would not have cited an authoritative Canadian text, such as King on Criminal Libel (*supra* note 31), but King was an academic lawyer liberal by comparison. It is odder still that they did not cite the nearly contemporaneous Canadian judicial definition of sedition provided in *R.* v. *Bainbridge* (1917), 28 C.C.C. 444 at 445 (Ont. S.C.), per Riddell J. With these authorities may be contrasted the extreme position taken by Attorney-General O'Hearn, who contended that at common law seditious libel was tantamount to a felony: *R.* v. *Mitchell, ex parte McLachlan* (1923), 56 N.S.R. 380 (N.S.S.C. in Banco).

[59]K. Kehler and A. Esau, comp., *Famous Manitoba Trials: The Winnipeg General Strike Trials - Research Source* (Winnipeg: Legal Research Institute, 1990) at 1; [author's italics]. Exceptions to the general rule are L. Katz, "Some Legal Consequences of the Winnipeg General Strike of 1919" (1970) 4 Man. L.J. 39; P.R. Lederman, "Sedition in Winnipeg: An Examination of the Trials for Seditious Conspiracy Arising from the General Strike of 1919" (1976) 3 Queen's L.J. 3; and D.H. Brown, "The Craftsmanship of Bias: Sedition and the Winnipeg Strike Trial 1919" (1984) 14 Man. L.J. 1, which deals exclusively with *Russell* but places it within its proper historical context of the development of sedition law in England and Canada. According to Lederman (*supra*, at 18 and n. 47), in "assessing the justifiability of these convictions [for seditious conspiracy], it may be helpful to compare them with other trials involving charges of sedition, held before and after the events in Winnipeg. There are several cases in which alleged communists were charged with sedition" — one such being *McLachlan*.

radicalism in Nova Scotia. If one is to take seriously David Frank's claim that *McLachlan* has "intrinsic interest as one of the more dramatic events in Canadian labour history in the 1920s," then "the significance of historical context in the study of legal questions" posed by *McLachlan* is underlined by *Howe* and *Dixon*, especially the latter. Unlike J.S. Woodsworth, "who was charged with seditious libel during the Winnipeg General Strike in 1919,"[60] Fred Dixon was not only charged but also tried (cf. Howe, McLachlan) and acquitted (cf. Howe). The trial of J.B. McLachlan on charges of seditious libel did not begin to receive rigorous academic scrutiny until sixty years after it took place, while comparisons and contrasts between *Dixon* and *McLachlan*, which were less than four years apart, have yet to receive serious study at all.

Strictly speaking, *Howe* and *Dixon* (unlike *Russell*) cannot help to delineate the legal context of *McLachlan* because, as acquittals rather than appeals from convictions, they established no new principle of law and were not officially reported. Yet the legal context also has an historical dimension. Though as "an episode in the history of Canadian law," *McLachlan* "clearly demonstrates the very broad applications of a loosely defined offence such as sedition,"[61] so too did every sedition trial over the two centuries separating *Hoffman*[62] in early 1750s Nova Scotia from *Boucher* in early 1950s Quebec. Despite the *Criminal Code Amendment Act 1919*, Dixon and McLachlan, like Howe before them, were charged with the old, pre-*Code* common law misdemeanour of seditious libel, to which the repeal of the exemptive section 133 gave sharper teeth. Both the law and its uses had changed, but it was the new uses for old law which ultimately mattered.

To paraphrase David Frank, the historiography of *McLachlan* reminds us that there is still a need for greater attention to the establishment of juridical context in studying Canadian sedition trials and the development of judicial doctrinism through case-law. The historical basis for the comparison between *Howe* and *McLachlan* is that sedition law had been used not only to curtail "fundamental freedoms," such as freedom of the press, but also to contest the legality of working-class activism and political radicalism. Unfortunately, the attempt to use *Howe* as pertinent case law was defeated by the popular misconception of the case as one of criminal defamation rather than sedition. In *Howe*'s case, a meaningless scholastic distinction remains between sedition and libel, though there was no doubt in the minds of contemporaries that *Howe*, like *Wilkie* fifteen years before and *McLachlan* eighty-eight years after, "was above all a political trial."[63]

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[60]Frank, *supra* note 3 at 208-9.

[61]*Ibid.*

[62]*R.* v. *Hoffman* (1754), N.S. Gen. Ct. — for seditious conspiracy.

[63]Frank, *supra* note 3 at 222.

Counsel for McLachlan attempted unsuccessfully to raise the construction and pertinence of *Howe* as a legal issue, but instead discovered that its value as a precedent was really neither historical nor legal, and that its "politically correct" interpretation had the status of received law.

The most enduring mystery of the trial of J.B. McLachlan, more so even than the elected silence of the accused, is why Harrington based his defence on the historic precedent of *Howe*, while altogether ignoring the role which the latter had played in *Dixon*. The Crown had closely studied — and argued — the *Russell* seditious *conspiracy* precedent, while the defence overlooked the very material *Dixon* seditious *libel* precedent. This sin of omission has been carried over into the historiography of *McLachlan*, from which *Dixon* is also conspicuously absent. Harrington failed to integrate *Howe* successfully into his defence of McLachlan because he did not use *Howe* to the same effect as did Dixon. But Harrington was not on trial; he was not defending himself nor was he advising McLachlan to do so. As counsel for the accused, he would speak to the materiality of *Howe* rather than letting Howe speak for himself through McLachlan. The success of the Howe defence in *Dixon* proved that the same elements could be recombined to cause history to repeat itself. Neither Dixon nor McLachlan needed a lawyer, while Howe, who thought he needed one, tried desperately but in vain to find one. Self-representation, which was accidental but fortuitous in Howe's case — calculated in Dixon's — was probably the best course for McLachlan to have followed.

One may dissent from Paul MacEwan's (and David Frank's?) opinion of Harrington as a self-serving, opportunistic attorney who "conducted an exceedingly inept defence."[64] These scholars prefer to blame McLachlan's conviction on the lawyer who tried to defend him rather than on the judge who allegedly misdirected the jury, or the panel who found him guilty. In so doing they disserve the working-class history of resistance by failing to explain correctly the legal defence to seditious libel. Legal history is more context and perspective than narrative content, and post-trial analysis of *McLachlan* leads one to the conclusion that the verdict was more O'Hearn's triumph than Harrington's defeat. The better advocate won.

MacEwan, like all other scholars of the trial of J.B. McLachlan, maintains a deafening silence about the trial of Fred Dixon, which occurred less than four years earlier. Whatever the nature of the relationship between the two, it remains curious that no discussion of the trial of J.B. McLachlan for seditious libel in 1923 adverts to the trial of Fred Dixon for seditious libel in 1920. This lacuna in comparative legal history may be attributed to the embarrassment of ideological impurity. McLachlan was deprived of the heroic example of Dixon simply because

[64]MacEwan, *supra* note 4 at 116.

McLachlan was a revolutionary socialist, while Dixon remained an independent labourite and harsh critic of socialism in all its forms — including social democracy. What McLachlan's historians do not realize, any more than his defenders of seventy years ago, is that *Dixon* was the precedent, legal and historical, which would have made the *Howe* defence sustainable. It would have been better had McLachlan emulated Dixon's example — and gone down fighting regardless — than for him to have a nostalgic Tory for a lawyer caricaturing Howe's historic defence of himself.

Appendix 1: Text of J.B. McLachlan's Alleged Seditious Libel

Official Letter DISTRICT NO. 26,
United Mine Workers of America.

Glace Bay, N. S.

July 4th, 1923.

To Officers & Members of Local Unions,

Brothers:-

This Office has been informed that all [New] Waterford, Sydney Mines and Glace Bay Sub-Districts are out on strike this morning as a protest against the importation of Provincial Police and Federal troops into Sydney to intimidate the Steel Workers into continuing work at 32¢ per hour.

On Sunday night last [1 July] these Provincial Police in the most brutal manner rode down the people at Whitney Pier [within the City of Sydney] who were on the street, most of whom were coming from church. Neither age, sex nor physical disabilities was proof against these brutes. One old woman over seventy years of age was beaten into insensibility and may die. A boy nine years old was trampled under the horses' feet and had his breast bones crushed in. One woman beaten over the head with a police club gave premiture [*sic*] birth to a child. The child is dead and the mother's life despared [*sic*] of. Men and women were beaten up in side their own homes.

Against these brutes, the miners are on strike. The Government of Nova Scotia is the guilty and responsible party for this crime. No miner or mine worker can remain at work while this Government turns Sydney into a jungle, to do so is to sink your manhood and allow [Liberal Premier Ernest Howard] Armstrong and his miserable bunch of grafting politicians to trample your last shred of freedom into the mud. Call a meeting of your Local at once and decide to spread the fight against Armstrong to every coal mine in Nova Scotia. Act at once – tomorrow may be too late.

Fraternally yours,

[Signed] J. B. McLachlan Sec'y

Dist. 26.

Source: stencil-plate copy, criminal case file (infra Appendix 2)

Appendix 2: Note on the Disposition of Archival Court Records

The Supreme Court of Nova Scotia criminal case file, *R.* v. *McLachlan*, as now constituted, is a "fat file" containing thirty-three items, some of which are multipart: RG 39 'C' (HX) box 706 file B-164, Public Archives of Nova Scotia [PANS]. Its contents include not only the transcripts of the preliminary hearing and the trial, but also both of the exhibits admitted into evidence at the trial, as well as records relating to the *habeas corpus* application, the disallowed appeal and the application for leave to reappeal from the Supreme Court of Nova Scotia in Banco to the Judicial Committee of the Privy Council — all three of which proceedings were reported in 56 N.S.R. The top copy of the criminal appeal book (76 p.) is not extant, having probably disappeared in the course of preparing and publishing the official report of *McLachlan* v. *R.* : (1923) 56 N.S.R. 413 (S.C. in Banco). The carbon copy belonging to Russell J — one of the five justices of the Supreme Court in Banco "sitting as a criminal court of appeal" — now forms part of the McLachlan case file in the Remissions Branch record series in the Department of Justice fonds at NA: RG 13 C2 box 1233 file 25777, National Archives of Canada. (NB This document, which includes the "stenographic report of the trial" quoted verbatim by Harris CJ, delivering the judgment of the appeal court on 8 January 1924, was consulted by both David Frank and John Mellor.)