PROSCRIBING UNLAWFUL ASSOCIATIONS:

THE SWIFT RISE AND

AGONIZING DEMISE OF SECTION 98

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Submitted to
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May, 1984

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Introduction

Section 98 of the Criminal Code,[1] enacted in 1919 and repealed in 1936, has received very little attention in scholarly journals and historical accounts of that period. This is surprising.

Section 98 created a crime of membership in an unlawful association, punishable by twenty years' imprisonment. An unlawful association was one that sought "by any means" to bring about "any governmental, industrial or economic change within Canada by the use of force, violence, terrorism, or physical injury to person or property, or by threats of such injury...." Membership was to be presumed on mere proof of attendance at a meeting of the association or distribution of its literature. Property suspected to belong to an unlawful association could be seized without warrant and forfeited to the Crown.

Section 98 was a major legislative response to the Winnipeg General Strike and the post-World War I labor upsurge. It was extremely unpopular with the labor movement; each year, the Trades and Labor Congress called for its repeal in the Congress's annual submission to the federal Cabinet. The House of Commons voted five times during the 1920s to abrogate the section, and five times was overruled by the Senate.

There were few prosecutions under section 98, and still fewer were successful, but the call for repeal became a major civil liberties issue in the 1930s, after section 98 had been used to outlaw the Communist Party in Ontario. Section 98 played an important role in the 1935 election

defeat of the Bennett government. Even after its repeal, section 98 continued to be echoed in federal and provincial legislation: Quebec's 1937 Padlock Law and the 1970 Public Order (Temporary Measures) Act, for example, bear its imprint.

The debate on section 98 focussed conflicting approaches on how to deal with the appearance of socialist and revolutionary organizations, and more broadly the challenge to Canada's social order posed by massive immigration, industrialization, unionization of the workforce, and large-scale unemployment. Yet, although it is frequently mentioned in social histories of the period, there is no major study of section 98 as such. A survey of the available literature turns up an article in a law journal,[2] a few articles by Prof. F.R. Scott in the early 1930s,[3] and a graduate thesis that deals with it in part.[4] Section 98 receives only passing mention in the major Canadian study of sedition law,[5] and a three-page discussion in a book-length study of "National Security" law for the McDonald Royal Commission on the RCMP.[6]

In the beginning: sedition and PC 2384

When Parliament first enacted the Criminal Code in 1892,[7] it based the sedition provisions on those in the English Draft Code, which in turn were modelled on articles 114 and 115 of Stephen's Digest on Criminal Law.[8] They are substantially reproduced in sections 60 to 62 of the present Code. While setting out the offences of seditious words, seditious libel, and seditious conspiracy, they do not define seditious intention, a necessary ingredient in each of those offenses. The Criminal Code Bill of 1891 contained a definition of seditious intention, modelled on Stephen's definition, but MPs chose to delete it, leaving the definition of sedition to the common law. However, they did include a "saving clause,"

section 133 (now section 61 in the Code), which provided that

> no person shall be deemed to have a seditious intention by reason only that he intends, in good faith,
>
> (a) to show that Her Majesty has been misled or mistaken in her measures,
>
> (b) to point out errors or defects in
> (i) the government or constitution of Canada or a province,
> (ii) the Parliament of Canada or the legislature of a province, or
> (iii) the administration of justice in Canada,
>
> (c) to procure, by lawful means, the alteration of any matter of government in Canada, or
>
> (d) to point out, for the purpose of removal, matters that produce or tend to produce feelings of hostility and ill-will between different classes of persons in Canada.

The penalty under the sedition sections has varied widely over the years, apparently in accordance with the political and social climate of the day: from two years in 1892, it was raised to twenty in 1919, reduced to two in 1930, and raised to seven in 1951 and to fourteen in 1955.[9]

Stephen thought his list of seditious offenses--words, libel, and conspiracy--to be comprehensive: "It is, indeed, difficult," he wrote, "to understand how a seditious purpose could be carried out other wise than by one or more of the three methods enumerated."[10]

Apparently little use was made of these sections until the First World War, when a flurry of cases appeared in the reports. In most, the accused was alleged to have expressed pro-German or pacifist sentiments, usually in a casual remark to one or two bystanders.

> R. v. Felton (1915),[11] convicted of uttering seditious words: "I would like to see the Germans come across the Channel and wipe England off the map. England put Russia into the war and is letting them get licked."
>
> R. v. Cohen (1916),[12] convicted of uttering seditious words: Reading a newspaper in a tobacco shop, he said it was "good news" that Canadians were getting badly beaten and "You are slaves, you have to do what King George and Kitchener say." The words, it was held,

were "likely to weaken the firmness of the person addressed in his adherence to his country's cause."

R. v. Giesinger (1916),[13] convicted of seditious libel: He wrote in a German newspaper published in North Dakota but distributed in Canada that if some Canadians saw a German soldier in a dream "they would die of fright before morning." He was given a new trial because the jury had not made a finding on intention.

R. v. Trainor (1916),[14] convicted of uttering seditious words: in a drug store conversation he had exulted at the sinking of the Lusitania. His conviction in a new trial was ultimately quashed.

R. v. Barron (1919),[15] convicted of uttering seditious words: "Everyone who gives to the Red Cross is crazy. If no one would give to the Red Cross the war would stop. The other country would beat this country if no one would give to the Red Cross."

Having been left to define seditious intention, judges and juries were clearly applying themselves with vigor.

However, there were many other sedition proceedings at this time that went unreported, and their victims included members of the socialist, immigrant, and labor organizations. In 1915, for example, members of the Socialist Party in Red Deer, Alta. and Saint John, N.B. were jailed for sedition. Isaac Bainbridge, editor of Canadian Forward, the newspaper of the Social Democratic Party, was arrested repeatedly and served a number of short prison terms for publishing articles critical of the war.[16] One such conviction, for seditious libel, was reported: Mr. Justice Riddell of the Ontario Supreme Court instructed the grand jury that

> One of the articles complained of urged revolution on the part of the masses, and if by that it was intended to urge a revolution against his Majesty that was perilously near treason, if not treason itself, and in any event it was sedition.
>
> A seditious libel is a seditious article which is likely to cause, or is intended to cause, discontent with the Government of the country.... (17)

Riddell J's rather broad interpretation of sedition doubtless reflected a shared perception among Canadian authorities as the war

drew to a close. Labor unrest was increasing, and there were doubts about the capacity of the economy to absorb the flood of returning war veterans. The left, torn by deep divisions over the attitude to take to the war, was beginning to revive, inspired in part by news of the Russian Revolution, which was popular with many Canadian workers although they as yet knew little about it.

Police, employers, and government officials agitated for restrictions on radical literature and the banning of meetings in foreign languages. Prime Minister Robert Borden appointed C.H. Cahan, a Montreal lawyer who later served as a minister in R.B. Bennett's government, to investigate the situation and make recommendations "in respect to the existing regulations for safe guarding the public interests against enemy aliens."[18] Cahan reported that the regulations, which forced "enemy aliens" (immigrants from Germany and Austria-Hungary) to register and made them subject to internment, were effective, but suggested that they be extended to cover other groups:[19]

> The Russians, Ukrainians and Finns, who are employed in the mines, factories and other industies in Canada, are now being thoroughly saturated with the Socialistic doctrines which have been proclaimed by the Bolsheviki faction of Russia.... I have before me a mass of literature, filled with most pernicious and seditious teaching, which is even now, in large quantities, being secretly circulated in Canada.... Since the outbreak of the present war, revolutionary groups of Russians, Ukrainians and Finns have been organized throughout Canada, and are known as The Social Democratic Party of Canada, the Ukrainian Revolutionary Group, the Russian Revolutionary Group, and others....

The report, submitted in mid-September 1918, urged that these "alien" groups be compelled to register. Less than two weeks later, the Borden government implemented measures even more severe than those recommended by Cahan. Order-in-Council PC 2384, issued under authority of the War Measures Act on September 28, 1918, banned fourteen organizations. One month later two more were added to the list.

The list had obviously been drawn up in haste and with little thought for consistency. Ian Angus comments:[20]

> It included major organizations such as the Social Democratic Party alongside virtually non-existent ones, such as the Workers International Industrial Union, an adjunct of the tiny Socialist Labor Party. Many of the names were badly garbled. The two Chinese organizations were not even remotely Bolshevik in sympathy: they were Canadian extensions of the nationalist Kuomintang. The Socialist Party of Canada, which was at least as large as the SDP, was not mentioned at all.

Of equal significance were the other provisions of PC 2384, which "deemed unlawful"--"while Canada is engaged in war"--any association whose purpose

> is to bring about any governmental, political, social, industrial, or economic change within Canada by the use of force, violence, or physical injury to person or property, or by threats of such injury, or which teaches, advocates, advises or defends the use of force, violence, or physical injury to person or property or threats of such injury in order to accomplish such change or for any other purpose, or which shall by any means prosecute or pursue such purpose....

Under PC 2384 it was an offense, punishable by one to five years' imprisonment, to be a member of any such organization, or to "sell, speak, write or publish anything" as its representative, to contribute funds to it, or to wear any badge or insignia of it. Any property, real or personal, belonging to an unlawful association might be seized without warrant and forfeited to the Crown. Anyone who knowingly permitted a meeting of such association to take place in premises he owned or rented was liable to a fine of $5,000 and imprisonment for up to five years. No meetings were to be allowed in the languages of any country with which Canada was at war or in the language of Russia, Ukraine, or Finland, "except church meetings or meetings for religious services only."

Finally, the onus was on an accused to disprove membership in an unlawful association once the Crown had adduced evidence that

he had attended its meetings, distributed its literature, or spoken publicly in its support.[21]

An additional subsection (8), which did not refer to unlawful associations, provided that

> Any person who, while Canada is engaged in war, knowingly prints, publishes, edits, issues, circulates, sells, offers for sale, or distributes any book, newspaper, periodical, pamphlet, picture, paper, circular, card, letter, writing, print, publication or document of any kind in which is taught, advocated, advised or defended or who shall in any manner teach, advocate, advise or defend the use, without authority of law, of force, violence, or physical injury to person or property, or threats of such injury as a means of accomplishing any governmental, political, social, industrial or economic change or otherwise

was liable to imprisonment for up to five years.

The regulation was a licence for local police forces to launch an all-out drive to smash the left. Roundups of radicals began within days of its proclamation. Literally hundreds of socialists were soon behind bars.[22]

However, the left quickly recovered from its initial shock and rallied to defend the victims. In some cases they were successful. In Winnipeg, the Trades and Labor Council established a defense committee on behalf of Michael Charitonoff, editor of Robochy Narod (Working People), who had been sentenced to three years; the government eventually dropped the proceedings. In Toronto, large public meetings and demonstrations initiated by trade unions won reduced jail terms and fines for arrested socialists. The Social Democratic Party mounted sufficient pressure on the government that in November 1918, over the protest of Cahan (who had been appointed Director of Public Safety) the party was removed from the list of banned organizations.[23] Most immigrant associations and their members were not so fortunate. Excluded from all legal political action, they were driven underground.

'War-time' restrictions become permanent

The war ended on November 11, 1918, but PC 2384 remained on the books until April 1, 1919.[24] It was a major item on the agenda at the Walker Theatre meeting of socialists and trade unionists in Winnipeg on December 22, 1918 that later figured prominently in the sedition indictments against leaders of the Winnipeg General Strike.[25]

And with good reason.Although PC 2384, as a "war time" order, was repealed, the Borden government lost no time in moving to establish a permanent replacement. On May 1, 1919, two weeks before the Winnipeg strike began, a special committee of the House of Commons was established to review the law of sedition and propose amendments to the Criminal Code. The committee met briefly and on June 6, in the midst of the Winnipeg strike, tabled its report. It called for an amendment to the Code in terms similar to PC 2384. The report was adopted on June 10 with almost no debate.[26] Sir Hugh Guthrie, the Solicitor General, denied that the amendments were being proposed in response to the events in Winnipeg. He insisted they were not directed at the lawful activities of trade unions. He acknowledged that there was "practically no Canadian case law on the subject of sedition." Why, then, the proposed legislation?

> In normal, unwarlike times, the good common sense of the masses appeared a sufficient safeguard of the Throne, of the Constitution, of the institutions of the country, and of the rights and privileges of the people.
>
> But a change has undoubtedly come over the face of the world.... Many new schools of thought have been established, many new ideals of government have been set up, many former idols have been overthrown only to expose feet of clay. The serenity and tranquility of the former era has been succeeded by a period of unrest....
>
> There was, at this moment,
>
> an organized, concerted, and sustained effort to spread false and pernicious doctrines, designed in the first instance to cause

> dissatisfaction amongst His Majesty's subjects, to set class against class, to hamper, injure or destroy the public service and designed in their ultimate end, to subvert constituted authority and to overturn government itself.

Since this propaganda was "chiefly carried on by means of associations or societies which have come into existence in great numbers and during very recent times in this country," Sir Hugh stated, new measures were required. Although the provisions of the present law were adequate to deal with the literature, it was necessary to outlaw the associations themselves. And section 133 of the Code, which provided that no one would be deemed to have a seditious intention only because he intended in good faith to point out errors or defects in the government or the constitution, was "too broad." It would be removed altogether. The proposed legislation was not excessive; in the United States, Congress had recently imposed penalties of up to 30 years for sedition, and a Bill currently before the House of Representatives proposed the death penalty for membership in an anarchist society.

> Whether much will be accomplished by changes in the Criminal Code in lessening the gravity of the situation, it is hard to say, but I believe it the duty of this Parliament to make ample and adequate provisions for the situation.

As a defense of the proposed provisions, Guthrie's speech was scarcely overwhelming. But apparently the trauma of the Winnipeg events had muted any potential critics on the parliamentary benches. Only one committee member, Charles Murphy, a Liberal, spoke in dissent. He revealed that the Committee had sharply divided on the necessity of amending the Criminal Code and that a majority had actually opposed bringing in a report at all, for fear of aggravating the tense situation in Winnnipeg. The report had been approved by the committee by a majority of only one. However, Murphy said, there was to be no minority report in order to avoid a debate at this time.

On June 27, two days after the Winnipeg strike ended, sections 97A and 97B were introduced as part of an omnibus Criminal Code amendment bill. They incorporated the major provisions of PC 2384 almost literally, but the maximum penalty was now increased to twenty years' imprisonment. In addition, it was made an offense to import into Canada or send through the mails any literature that advocated force or violence, and a duty was imposed on the post office and other federal government departments to intercept and seize any such literature.

At second reading, on July 1, there was almost no debate. On July 2 the new sections were adopted without recorded opposition. The Senate duly ratified the bill.

With its sweeping definitions and reverse-onus clause, section 98 (as sections 97A and 97B became in the 1927 revision and consolidation of the statutes) was a remarkable innovation in Canadian legislation. Until then a conviction for sedition had required proof of seditious intent, for which the test, as articulated in the leading English decision, R. v. Aldred,[27] was whether the accused had used language "calculated to advocate or to incite others to public disorders." Section 98, however, imposed criminal liability for mere status--membership, or presumed membership, in an association--and identified the unlawful association not by its deeds but by its words.[28]

In contrast to PC 2384, section 98 did not single out or name any particular organization as "unlawful." It was not used against any of the leaders of the Winnipeg General Strike; they were tried under the traditional sedition provisions of the Code. In fact, no charges were laid under the new section for a decade after its passage through Parliament.

A 'period of unrest': the Winnipeg General Strike

This was preventive, anticipatory legislation. It reflected a widely held conviction among the legislators and those they represented that the end of the war signalled, as Guthrie put it, not a return to "normal unwarlike times" but the opening of a new "period of unrest" that would bring with it new challenges to the "constituted authority," this time from within Canada.

While section 98 clearly did not originate in the Winnipeg events or in the massive strike wave that accompanied it in major cities across the country,[29] there is no doubt that the six-week shutdown of virtually all industry in the largest city in Western Canada served to underscore the fragility of the social order. The strike began as a demonstration of solidarity with building trades and metal trades workers striking for the right to industry-wide bargaining in the city. At its high point the strike involved as many as 35,000 workers out of a total population of 175,000, although the Trades and Labor Council comprised only 12,000 unionized members at the outset. Essential services such as milk deliveries, waterworks and fire protection were maintained at a minimum level, "by authority of the Strike Committee." Norman Penner summarizes the major events:

> The strike quickly became a confrontation between the strikers and a committee representing the business interests of Winnipeg, the Citizens' Committee of 1,000. This committee had the complete support of the federal government, and made it clear that there would be no bargaining of any kind unless the general strike was called off.
>
> The Citizens' Committee launched a massive propaganda war against the strike....
>
> The strikers, for their part, organized a series of demonstrations to show their strength and to protest the arrest on June 17 of their leaders. A "silent parade" held on June 21 was attacked by special police armed with baseball bats, and by the mounted police and units of the militia and regular armed forces with small-arms fire. One person was killed and dozens were injured.

> The arrest of the main leaders, the intransigence of the federal government, the power of the Citizens' Committee and, finally, the use of armed force, made it impossible to continue the strike; accordingly, it was called off by the Strike Committee on June 25, 1919. (30)

It is now generally recognized, even by the federal Department of Labor, that the "main bones of contention" in the strike were "collective bargaining and industrial unionism."[31] The strikers genuinely believed that a general shutdown would force the employers to negotiate, and win industry-wide agreements. Although their leaders were socialists of various persuasions (many were Christian socialists, affiliated with the Labour Church), none saw the strike as even the first stage in a more generalized insurrectionary conspiracy intended to transfer governmental power into the hands of the working class.[32]

Yet it is equally clear that the Citizens' Committee, the federal government, and the major part of the Canadian business and political establishment of the day saw the Winnipeg events as the assertion of a new revolutionary challenge that for six weeks had deprived them of control of one of Canada's biggest cities. The strike, said the Citizens' Committee, had "defied the constituted authority of the government of Canada," and some of the leaders "were more concerned in setting up the Russian Soviet form of government in Canada than in settling any trades dispute."[33] This interpretation was echoed by the inimitable J. Castell Hopkins, editor of the Canadian Annual Review.[34]

> The struggle was not an ordinary Labour fight for better wages or improved conditions; it was a deliberate effort by an extremist element in the Labour ranks to acquire control of Labour organizations and capture the government of Winnipeg by means of a general strike....
>
> The Central Strike Committee took charge of the Labour Temple and whether actually called a soviet or not, it certainly acted as one, and asserted distinct authority as the ruling factor in the situation.

A more sober and astute assessment came from Judge J.H. Robson, a one-man royal commission appointed by the provincial government to examine the background and events of the strike. Robson, a member of a previous Citizens' Committee of One Hundred in 1918, maintained that although the situation had been influenced by socialist ideas and syndicalist values, the roots of the dispute lay in economic grievances:

> ...the mind of Labour was in a state of discontent:...many of the active leaders of unions in and about Winnipeg perceived this condition and decided that it afforded a favourable opportunity to apply what has come to be known as direct action or mass action to bring the pressure of Government and the community upon the Metal Masters to concede the plan of collective bargaining demanded by the Metal Trades Unions. (35)

The fact was, however, that in the course of the prolonged shutdown the workers had by necessity to assume some governmental functions. As Masters points out:

> ...the strike committee was assuming functions which tended to make it the ad hoc government of Winnipeg. This is the dilemma created by a general strike. It so undermines the whole structure of ordinary society that some direction becomes necessary to ameliorate its worst effects. Yet if that direction, even with the best will in the world, is assumed by a strike committee, it is arrogating to itself the functions of government. (36)

Putting aside the patronizing tone, that is a fairly accurate statement of what was happening in Winnipeg. It was just this aspect that so terrified the traditional rulers. They had, for a short time to be sure, lost control of the situation in the city. De facto power appeared to be in the workers' hands--symbolized by the milk cart signs: "By authority of the Strike Committee." This memory of their temporary helplessness--and the specter of revolution that it conjured up--was to remain, and to color the debates over section 98, for many years to come.

An inauspicious beginning

Yet section 98 lay unused on the statute books for years after its enactment. One reason is to be found in the immediate aftermath of the Winnipeg events. The Crown succeeded in securing the conviction of many strike leaders, but not all. In December 1919 R.B. Russell was sentenced to two years imprisonment after a trial lasting almost one month. Six other were sentenced to lesser terms in April 1920, following a ten-week trial. But Ald. A.A. Heaps was acquitted, as was F.J. Dixon, following which the Crown declined to proceed against Rev. J.S. Woodsworth, accused of seditious libel on the basis of, among other things, quotations from the prophet Isaiah. (Other strikers were successfully prosecuted on such charges as unlawful assembly, disorder, riotous conduct and interference.)[37]

Much of the prosecution case in the sedition trials rested on proving a conspiracy by linking the accused to the syndicalist One Big Union movement, which was at that time in the process of formation as a more militant western split-off from the Canada-wide Trades and Labor Congress. Yet only four of the accused were members of the OBU and two of these, Pritchard and Johns, had played little role in the strike.[38] The other accused were not associated in any way with the OBU. A prosecution under section 98 might have obviated this problem by making the strike committee--to which all the accused belonged--an unlawful association. But section 98 had been adopted only after the arrests. Moreover, the government had insisted all along that section 98 was not intended to be used against the trade unions as such, and the strike committee was, after all, formed under the aegis of the Winnipeg unions' labor council. The distinction was in practical terms

a moot one by the time the cases came to trial; only three weeks after the stike was crushed, in July 1919, the Winnipeg Trades and Labor Council voted in favor of the OBU by 8,841 to 705, and requested its affiliates to join the new organization.[39] It was not easy to prove seditious conspiracy when the evidence revealed that most of the alleged conspirators were not members of the conspiratorial organization while thousands of others were clamoring to join it.

Furthermore, as often happens in political trials, the prosecutions backfired on their initiators. The indicted leaders became martyrs in the eyes of many working people. Several were afterwards voted into public office by a grateful electorate. Woodsworth was elected to the House of Commons in 1921, joined by Heaps in 1925. Three other accused--Ivens, Queen, and Armstrong--were elected to the provincial legislature by large majorities while still in prison, and Dixon held the seat he had secured in 1914. Many other labor and socialist members were elected as a section of the working class shifted sharply to the left. "You will have noted the results of the Manitoba Election," wrote J.W. Dafoe, editor of the Manitoba Free Press, to a friend. "The outstanding feature, of course, was the strength displayed by labor. They will have nearly 25% of the membership of the next legislature and, with perhaps one exception, all the labor members elected are reds."[40]

This was not an auspicious beginning for those savoring more political prosecutions.

The radicalization was episodic and shortlived, of course. The 1920s were years of expansion for Canadian capitalism and decline for Canadian labor. Trade union membership began to drop in 1920, and

by 1924 was almost a third below the 1919 peak. Beginning in 1922 the number of strikes each year was far below the prewar average. Throughout the decade Canada experienced a net migration to the United States of 700,000 workers, many of them skilled workers no longer able to practice their trades in the declining industries such as coal mining and craft production.[41] The coal miners were the most militant sector of labor. But when Nova Scotia Mineworkers leader J.B. McLachlan was prosecuted in 1924 for seditious libel, it was under the traditional provisions of the Criminal Code, not section 98, although McLachlan was a well-known leader of the Workers (Communist) Party.[42]

Trade unions lobby for repeal

It was the trade union movement, however, that mounted the most determined and consistent opposition to section 98. There was ample evidence that the conservative leaders of the Trades and Labor Congress led by Tom Moore, had not been unhappy at the suppression of the Winnipeg strike, which was led by their left-wing opponents within the labor movement and was fought primarily in defense of a militant form of industrial unionism that was counterposed to the narrow craft unions that dominated the TLC. But they could hardly fail to note the ominous implications that section 98 held for a broad range of working class organizations, including the TLC. This had been driven home by Judge Metcalfe's charge to the jury in the Russell sedition trial, which had virtually instructed the jury to convict on grounds that a sympathetic strike necessarily involved the application of "force" and "terror."

> Mr. Russell gave us his idea of a sympathetic strike. He said, "When a dispute originates between an employer and his employees,

> and when the labour organizations see that organization being beat, they come to their assistance by calling a strike to force their employers to bring force to bear upon the original disputants to make settlement." That is Russell's definition given in the box.... Force, force, force.
>
> And
>
> To walk around about, for instance, to a place where people are employed in large numbers, and to "boo," gentlemen of the jury, as much terror may be inspired through that as by two or three fighting chaps coming along with bludgeons. Take it from me, in strikes you can incite terror without hitting a man over the head. You can incite terror of starvation; you can incite terror of thirst. Is not that quite as effective as inciting by bodily violence?... If it is possible that picketing can be done in this country, then the lawful method of picketing is so ineffective that it is a reasonable inference that in strikes of this class, unlawful means would be intended to be applied. (43)

Yet section 98 made it an offense punishable by twenty years' imprisonment for any person or organization to advocate the use of force or terrorism to bring about "any governmental, industrial or economic change within Canada." Whatever the validity of Judge Metcalfe's charge (and it was upheld in the Manitoba Court of Appeal[44]), section 98 added legislative sanction to this judicial definition.

At its 1920 convention, the Trades and Labor Congress discussed a special report prepared by J.G. O'Donoghue, its legislative lobbyist, on the legal status of the trade union movement, both in its civil and criminal law aspects. The report dealt at length with the subject of picketing. The Congress resolved to press for insertion in the Criminal Code of the provisions of the criminal law establishing the legal right of peaceful picketing that had been left out of the Code when it was consolidated in 1892.[45] Section 98 was seen as closely related to the matter. As H.A. Logan notes,[46]

> Special attention was called to the dangerous possibilities involved in the free use of the words "force" and "terrorism" as methods of "industrial and economic change", which these amendments [to the

> Code] put under the ban....It was the contention of Mr. O'Donoghue that these terms were too ambiguous and included too much. As likely to be interpreted by the courts, their possibilities of inclusiveness would practically make striking of any kind illegal.

The TLC leaders were not eager to engage in strikes or other militant forms of action. But they understood that curtailment of the right to picket and strike would deprive them of necessary weapons in the fight for union recognition and collective bargaining. Moreover, they were coming under increasing pressure from within the labor movement to justify their longstanding policy of collaboration with the Liberal and Conservative parties, which was yielding remarkably little in the way of legislative gains. The unions' status in law was still, as the O'Donoghue report documented, uncertain. The TLC therefore put repeal of section 98 near the top of its legislative agenda throughout the 1920s and early 1930s.

Their campaign was taken up in the House of Commons by J.S. Woodsworth, elected in 1921 as a member of the Independent Labor party in Winnipeg. Woodsworth annually moved repeal, and in 1925 he and Heaps made repeal of section 98 one of their three conditions for supporting the Liberals led by Mackenzie King, who were teetering on the brink of parliamentary defeat.[47]

Commons votes for repeal

In 1926, returned with a clear majority in the Commons, the Liberals brought in a bill to repeal sections 97A and 97B and re-introduce the "saving" clause s. 133 removed in 1919. Introducing the bill, Ernest Lapointe, the minister of justice, noted that "labour in general, but especially organized labour, has continually and strongly complained about these two sections.

> Every year since I have been a member of the government, representatives of the Trades and Labour Congress, when they came annually to present their suggestions to the government, have asked that these two sections might be repealed leaving the situation as it was prior to 1919.

Lapointe's remarks were brief. He concluded that he was "firmly convinced" that the sections were "not at all necessary."[48] He did not mention that he had been among those voting for them in 1919.

It was left to Woodsworth to explain the unions' concern with the section. He pointed to the potential abuse to which the open-ended criteria of "force," "violence," and "terrorism" could be put, and how such terms had been employed in the Russell trial. He went through the sections clause by clause, objecting in particular to the powers of search and seizure without warrant, the ban on importing of literature, and the "outrageous" presumption of membership clause.

> If an association is holding a street meeting and someone comes along to listen to what has been said, he is then presumed to be a member of such association and the burden of proof lies with him. We used to be taught that a man ought to be regarded as innocent until he was proven guilty. According to this legislation the thing is reversed....

Woodsworth concluded his remarks by saying that those who had enacted this legislation had been "carried away" by fear in much the same way that the "influential classes" of England had been after the French revolution and the Napoleonic wars.[49]

The Conservatives defended section 98. H.H. Stevens said that the section was

> intended to deal with...the heart and kernel of the attempt that was made not only in Winnipeg, but also in Vancouver, in Calgary and in other centres of Canada where it did not really come to light. The section was drafted to cover the type of organization actually in existence in the form of corporate bodies, deliberately intending to wreck the governmental institutions of this country by violence.

The sections were there "to meet a possible contingency which may arise...." Stevens and other Tories warned darkly of the growing danger of Communism and "Russian money." Repeal would simply encourage the "Third Internationale," they said.[50]

The Progressive Party MPs made little contribution to the debate. They voted for repeal.

The resolution passed the House only to be defeated in the Senate, where the Conservatives still held a majority. Similar bills were presented to the House in 1927, 1928, 1929, and 1930--each time going down to defeat in the Senate, on one occasion by only three votes.[51] Each year the debate covered the same terrain. Sometimes the only argument Lapointe made for repeal was that the trade unions opposed it. By 1930 he was simply stating: "This has been debated so many times that I presume I need not again give the purpose of this clause."[52] In the 1929 debate, R.B. Bennett, now Tory opposition leader and soon to be prime minister, spoke up. Section 98 has been on the books for ten years, he said. Why abandon it now? "It has prevented the extremist from carrying on the operations which he might have carried on, and no injustice has been worked to any person."[53] Three years later Bennett was to find section 98 a very useful tool, although by then he was less sanguine about its preventive effect.

Two features of these debates are worth noting in particular. One is the equation the Conservative opposition continually made between sedition and "aliens."[54] This was most explicit in the debates that took place each year on a parallel government proposal (also in response to pressure from Woodsworth) to repeal the amendments to the Immigration Act adopted in June 1919 during the Winnipeg General Strike. An amend-

ment had permitted deportation without trial of non-British subjects accused of sedition; when it was discovered that most of the strike leaders were in fact British subjects, a second amendment on June 6, 1919 permitting deportation without trial of persons of British birth was rushed through the House and Senate and given vice-regal assent in less than 45 minutes, an all-time record.[55] In 1926 Arthur Meighen, who had piloted this legislation through the House seven years earlier as minister of justice, defended the action.

> All that was done in 1919 was to add another class to those who were not entitled to jury trial. The class we added were those who came from the Old Country and were anarchists. In a word we added anarchists to prostitutes and beggars. (56)

Anti-alien sentiment was a prominent feature of the opposition to the strike. Here is a typical expression, from an editorial in the Manitoba Free Press[57] on June 26, 1919:

> The most obvious thing about the strike headquarters is the way the alien--naturalized or otherwise--abounds. His name is legion, and he is everywhere.... The situation is not unlike that which prevails in Russia. According to reports from there Lenine [sic] and Trotsky and the rest of the soviet junta have special body-guard battalions of Letts and Chinamen, who, upon occasion, intimidate, slug, or if necessary murder followers of the dictators when they become lukewarm or question their loyalty. It is through the solid fanatical alllegiance of the Germans, Austrians, Huns and Russians in the labor unions that the "Red Five", Russell, Veitch, Robinson, Ivens and Winning, have climbed to power in the labor organizations.... The surest way to break the hold of the anachist five upon labor is to clean the aliens out of this community.

On the day the Immigration Act amendments were adopted, huge advertisements appeared in the Winnipeg dailies calling on the government to deport "the undesirable alien and land him back in the bilgewaters of European Civilization from when he sprung and to which he properly belongs."[58]

A storm of protest by labor prevented the deportation of

the arrested strike leaders who qualified under the Act.[59] But, as the Meighen quotation indicates, these sentiments lingered on in high places, and the contemporary reader at least is struck by the virulence of the xenophobic comments made by many MPs in the 1920s debates. In a very real sense it was the moves to repeal the Immigration Act amendments that aired the ongoing debate on the Winnipeg events of 1919. The terminology is coded, but it becomes clear that the objectionable "alien" is very often a synonym for worker. "His name is legion, and he is everywhere...."

Also to be discerned in these debates is the working out of a deliberate Liberal strategy to placate the leaders of the Trades and Labor Congress through the ritual of the annual motion for repeal of section 98. The Liberals were not opposed in principle to the legislation; they had all voted for it in 1919, despite whatever tactical misgivings some might have expressed. But their lacklustre opposition to section 98--which, as noted earlier, sometimes simply amounted to saying that the TLC opposed it--reflected a policy of appeasing the TLC leaders and strengthening their credibility against more militant, and potentially stronger, contenders in the labor movement.

The Liberals' approach was outlined by William Lyon Mackenzie King in a speech to the Empire Club in Toronto in April 1919, only months before he became Liberal leader.

> It is coming to be seen that the control of labour by its leaders is wholly dependent upon its organization into conservatively directed unions; that it is among the unorganized and undisciplined workers that Bolshevism and I.W.W.ism recruit their armies of terror and destruction. In a union of the organized forces of labour and capital, against a common enemy which menaces all human society lies the hope of the future. (60)

Of course King had no intention of uniting labor and capital around anything other than a program in the interests of capital. But

in attempting to make the Liberal party the instrument to further the "control of labour by its leaders" it did not hurt to be seen each year attempting to implement one of labor's key demands--especially when, as Lapointe continually assured the House, section 98 was "not necessary." The Liberals were also mindful that the opposition to section 98 was being spearheaded by MPs who were also in the forefront of efforts to win the unions to a political course independent of the Liberals.

The policy also jibed neatly with the larger Liberal strategy under King of building the Liberal party as the party of all who opposed Tory Empirism and support for high tariffs. Although Woodsworth and his co-thinkers in the ILP resisted King's blandishments, the latter was successful in splitting the agrarian Progressives and winning most of them to the Liberal fold. As King explained to a correspondent in 1929:[61]

> The supreme effort of my leadership of the party has been to keep its aims and purposes so broad that it might be possible to unite at times of crisis under one banner those parties, which for one reason or another, have come to be separated from the Liberal party, though in reality belonging thereto, and to make the Liberal party such that, in the course of time, third parties would fade out altogether, and a united front be presented to a very determined foe by those who seek a larger liberty.

King failed in the larger objective, of course. But it was not for lack of trying. And the promise to repeal section 98 was a keystone in his strategy.

Cops, courts and communists: the first prosecution

The House of Commons had already voted four times for repeal when, in 1929, the first prosecution under section 98 occurred. In Toronto four young women, supporters of the Communist Party, were accused of distributing leaflets advocating the use of force, violence,

and terrorism to effect governmental, industrial or economic change. The printer of the leaflets was also indicted. The prosecution was unsuccessful; the five defendants were acquitted.[62]

The Toronto prosecution arose out of a peculiar anticommunist and anti-alien campaign initiated by the city's Board of Police Commissioners, with the full support of at least two of the city's four daily newspapers. In January 1929 the Board issued two edicts intended to curtail communist propaganda. The first, published on January 23, enacted that "all proceedings and addresses at all public meetings are to be in the English language, and no disorderly or seditious reflections on our form of government or the King, or any constituted authority will be allowed." The second, issued eight days later, stated that if owners of public halls and other places of public amusement rented their premises for "Communist or Bolshevist public meetings" their licences would be cancelled immediately.[63]

The police lost no time in implementing their new powers. The Canadian Labor Defense League, an organization established under CP initiative in 1925, reported that in January and February 1929 it handled 88 cases in the police and county courts of Toronto.[64] The Canadian Forum described the police tactics during the next two years:

> When the communists, unable to secure rooms, attempted to hold open-air meetings the police refused to permit them to use public parks, and when they met on street-corners they were arrested for "obstructing the traffic," "creating a public disturbance," "vagrancy" and sundry other charges. The police found no difficulty in obtaining convictions in the local courts.... (65)

The police repression struck the small Communist Party at a difficult time. Its influence in the labor movement was at the lowest point in its ten-year history. Party members had been driven out of the Toronto and District Labor Council in October 1927. The Canadian

Labor Party, in which the CP had been particularly influential, had collapsed. The party had just expelled its leading intellectual, Maurice Spector, for "Trotskyism," and was on the verge of a major schism and dispute with its affiliated foreign-language groups that would result in the expulsion of its national secretary, Jack MacDonald, and the departure of at least 75 percent of its members within two years.[66] In early 1929 the party was in the process of shifting over to the new ultraleftist "Third Period" line of the Communist International, which predicted the immanent collapse of capitalism and set as the immediate task for every Communist party the "conquest of the streets." This new line was fastened on the party at its July 1929 convention.

In the months preceding the party's definitive adoption of the new line, its response to the Toronto police harassment was uneven and contradictory. At first it appealed to trade unions and other organizations for assistance. But active support was slow to develop, and the ultraleft tactics of confrontation favored especially by the party's Young Communist League, headed by Lenin School graduate Stewart Smith, soon became predominant. Smith had given a provocative interview to the Toronto Star in December 1928 predicting that "in a very short time the streets in Toronto will be running with blood."[67] Smith's statement was not repudiated by the party, and within a few months the YCL and other CP members were not only actively combatting the police but disrupting meetings of "social fascists" such as J.S. Woodsworth. The "conquest of the streets" reached its apogee in August 1929 when the CP attempted to hold a series of mass demonstrations in Queen's Park--the first to mark the Comintern's "International Red Day," the subsequent actions to protest the massive police repression encountered in the first. All

were broken up by the police, using considerable brutality. It was during the leafleting for one of these demonstrations that the four young Communists were arrested and subsequently charged under section 98.

Although the CP clearly played into police hands through its sectarian adventurism, it is less easy to discern why the police chose this particular time to go after the party. The Chief of Police, Brig.-Gen. Dennis Draper, apparently sincerely believed that "the political and economic system of the nation was being undermined by communists."[68] Some Toronto dailies echoed similar views. But the city's political establishment was by no means unanimously in favor of the police campaign. It was vigorously opposed by the Toronto Star and a large segment of middle-class public opinion.

Again, counter-subversive repression was closely linked to anti-alien prejudice. Mayor Samuel McBride declared that "our stopping of communistic meetings shows that we are truly British." The Telegram declaimed that "The loyalty of the British-born from the slums of London or Toronto is to be preferred to the mongrel internationalism of a transported Europe." Yet the material basis of this apprehension is rather insubstantial. According to the 1931 Census, "British-born" in Toronto outnumbered the "foreign-born" by a ratio of seven to one.[69]

Historian Michiel Horn suggests that the anti-Communist campaign in Toronto originated in vague but deeply-felt concerns about the overall direction in which Canada itself was heading.

> Concern about the impact that foreigners might have on Canada may have been compounded by a nagging sense that all was not as it should be with the Empire and Canada's place in it.... During the interwar years there was a good deal of uncertainty. When in January 1929 the Telegram warned of the severing of Empire links of which it saw a possible portent in the removal of the King's

> name from the Post Office Act, was there not a certain apprehension that these links were already weaker than one hoped? Was there not something forced about the Mail and Empire's repeated assertions of underlying imperial unity? The Government's actions were ambiguous enough that they could be interpreted as doing too little to establish Canadian autonomy but also as weakening imperial ties. They did little to reassure those who were suspicious of where Canada was going and who were not sure what was happening to the Empire. To people like these the Communists may have become a scapegoat, and interfering with their meetings a way of stilling their apprehensions about foreigners and the state of the Empire. (70)

Section 98 was not an issue in this agitation. Although there were hundreds of convictions on relatively minor charges like "obstructing traffic," the Weir prosecution under section 98(8) stands alone. Moreover, it was a notable failure. County Court Judge Denton, following a close perusal of the offending leaflet (it is reprinted in full in the published report), said he could not "find in it anything which advocates force, violence or terrorism." It called for a "mighty, fighting demonstration against police terrorism," and advocated the "overthrow of capitalism and the establishment of a workers' and farmers' government in Canada."

> It may be contended that in advocating the overthrow of capitalism the circular advocates an industrial or economic change. But before there can be a conviction it must also also be shown that it advocated the use of force or violence or terrorism to accomplish this purpose....
>
> However one may dislike or even abhor the views advocated by the communists, the advocacy of their cause is not unlawful unless it is done in a manner contrary to law. (71)

There was no appeal. Unknown to the defendants and their counsel, J.L. Cohen, the deputy attorney-general had advised the Crown prosecutor that the defendants would probably be acquitted in the Supreme Court, if not at first instance.[72]

One of the high points of the free speech debate in Toronto was a public meeting of prominent members of the Fellowship of Reconcilia-

tion with members of the Board of Police Commissioners and the Mayor, in January 1931. Board member Mag. Emerson Coatsworth argued that the Toronto bylaw closing halls to communists was consistent with the spirit of the Criminal Code prohibition on leasing premises for the use of unlawful associations. Dr. Salem Bland, spokesman for the delegation, professed ignorance of any such provision in the Code. In fact, Coatsworth had misquoted the Code section as "99."[73] But the exchange confirms that section 98 was simply not present in the minds of those protesting the police treatment of the Communists. It also suggests that the police were well aware of section 98's potential usefulness, notwithstanding their rebuff in the Weir case.

The Communists themselves virtually ignored this free speech debate in their press, apparently thinking it of no significance. Nor did they raise the issue of section 98 at any time during this period. In fact, the party had never campaigned against section 98. When the Canadian Labor Defense League was established in 1925, section 98 was not mentioned in its statement of aims.[74] The party's position was apparently not for repeal of the section, as sought by Woodsworth and the Trades and Labor Congress, but for its amendment; in 1926, a directive transmitted to party branches by the Central Executive Committee outlining sample resolutions to be submitted to the forthcoming convention of the Canadian Labor Party called for

> Elimination of the word [sic] "force" "terrorism" and "industrial or economic" change, in section 79b [97B] and other sections [of the Criminal Code], all of which were inserted by amendments passed in the panicky session of Parliament, 1919; and the repeal of those sections referring to "sedition," "seditious conspiracy," etc. (75)

In May and June of 1931 the House of Commons debated a resolution by J.S. Woodsworth, prompted by the events in Toronto, to

add to the Criminal Code's prohibition of "unlawful assembly" a clause safeguarding the right to assemble "unless the general nature and character" of the speeches or discussion "would be likely, in the opinion of firm and reasonable persons to cause an immediate breach of the peace." The amendment was defeated. But during the debate it was revealed that several MPs--including E.J. Garland (United Farmers of Alberta), Agnes MacPhail (United Farmers of Ontario), and A.A. Heaps (Labor)--had been unable to speak at public meetings in Toronto because sponsoring organizations such as the Fellowship of Reconciliation had been barred from renting halls by the police bylaw.[76] Members also provided evidence that other cities were beginning to follow Toronto's example.[77]

The 'Dirty Thirties': Bennett plays dirty

Unemployment was now reaching epic proportions. There was no unemployment insurance, and more than half a million workers were on relief.[78] "The three levels of government--federal, provincial, and municipal--seemed unprepared and incapable of coping with the unemployment and destitution of the Depression Thirties," writes Stuart Jameson in his study for the Woods Task Force on Labor Relations.

> Standards for relief varied widely among provinces and municipalities, ranging from as low as $10.00 monthly plus a 98lb. sack of flour for a family of five in Saskatchewan.
>
> The most pressing problem, in some respects, was the plight of single, homeless unemployed men, who in 1931 were estimated to number some 70,000. In their aimless wanderings about the country, hard-pressed provincial and municipal relief agencies were reluctant to meet their needs, and they suffered serious deterioration in physical condition and morale. And, from the official viewpoint in Ottawa, they constituted a danger to established authority. As stated by a government spokesman in Parliament: "Their morale low, they were very susceptible to the contagion

of communist ideas and to the influence of subversive organizations."[79]

Demonstrations of the unemployed in Winnipeg, Calgary, and Sudbury in the first half of 1931 erupted in violence when the police charged their ranks, making dozens of arrests. In Edmonton and Windsor the militia was called out to suppress jobless rallies in June. Communist Party militants and the CP-led Workers Unity League were in the forefront of many of the demonstrations, as they were in organizing the unemployed in many cities and towns.[80] Police chiefs across the country began to call on Ottawa for action. They were joined by municipal councils and like-minded organizations across the country.

> "Everyone is wondering how much longer the federal government [is] going to permit the communistic organizations in all their different guises to continue creating discontent...," Mayor Webb wrote to Justice Minister Guthrie on March 22. "Something has got to be done in the near future. The situation is getting serious here in Winnipeg." The Employers Association of Manitoba; the Provincial Grand Lodge of the Manitoba Loyal Orange Order; the Imperial Order of the Daughters of the Empire; the British Empire Loyalists; the premiers of Saskatchewan, Alberta, and British Columbia; several mayors; and a number of ordinary citizens all urged Prime Minister Bennett to take the same action: deport the "Reds." (81)

Sudbury's city council voted on April 20 to demand that the federal government deport the communists and mailed copies of the resolution to every city and town council in Canada with a request that it be endorsed and forwarded to the prime minister. Eighty-three councils did so.[82]

It is not hard to trace the source of this pressure. The Depression created an intolerable strain on public finance, and nowhere was it felt more acutely than at the municipal level. The major burden of unemployment relief fell on the municipalities. The Rowell-Sirois Commission later described the impact:

Over the whole period 1931-37 the relief expenditures amounted to

> more than 25 per cent of the total municipal-provincial revenues. ...In not one province in any year following 1930 did the municipal-provincial revenues left over after provision for ordinary services meet the total cost of relief. The amount of borrowings necessary to pay for the whole of the remaining requirements would have bankrupted most of the provinces and municipalities in the country....
>
> The [federal] grant-in-aid policy was based on the premise that the province (with its municipalities) was constitutionally responsible and that it should, therefore, carry as much of the burden of relief within its area as possible. The province in turn tended to hold the municipalities responsible and to push the financial burden as far as possible on their shoulders. As a consequence nearly all the provinces and many municipalities were drawn to the edge of financial solvency and some were pushed over and became bankrupt.... In 1937, one-fifth of the total municipal-provincial revenues was absorbed by the interest on non-self-supporting debts. (83)

Understandably, the municipal politicians and some provincial governments were anxious for almost any measure that would alleviate this problem. Since many of the unemployed were foreign-born, deportation seemed to be a quick, easy--and inexpensive--solution. A red scare could be used to create the appropriate political atmosphere, while depriving the jobless of their new-found leaders.

Prime Minister Bennett was not unresponsive to these representations. Early in March 1931 he met with Canada's chief law enforcement officers in Ottawa to discuss the growing threat to law and order. There is no record available of what was decided at that meeting.[84] The prime minister then instructed the Immigration Department to expedite proceedings against communists and other "undesirables," and requested that those who were complaining about communist activities send him the names of the guilty upon their convictions.[85] In fact, deportations were already being conducted on a quite sweeping scale. Not only did section 41 of the Immigration Act, adopted in June 1919, permit deportation of any non-citizen not born in Canada on grounds that he advocated the overthrow of constituted authority by force,

but under section 42, immigrants who had been in Canada less than five years could also be deported if they became "public charges." Public trials were not necessary; proceedings under these sections of the Act were in camera. The Depression brought a sharp increase in such deportations. Between 1903 and 1928 a total of 17,600 immigrants were deported, an average of slightly more than 1,000 annually. But in 1930 there were 4,025 cases of deportation; and in 1931 the figure rose to 7,000.[86]

Pursuant to Bennett's orders, the RCMP compiled a list of Communists who had been convicted of even minor offenses--and there were a considerable number of these among the veterans of skirmishes with local police forces. Many were deported--according to R.A. Adams, "probably no more than 200 party members,"[87] out of a total party membership in the spring of 1931 of at most 4,000![88]

Last but not least, Bennett took steps to bring section 98 into play. The strategy was apparently to carry out what in contemporary terms would be called a "surgical" assault on the Communists, limited in scope but with devastating effect, an exemplary prosecution that might then be emulated on a wider scale once all the political repercussions had been analyzed. The federal government could itself have prosecuted the Communists with the consent of the provincial authorities. But possibly because of the public opposition encountered by Toronto police in their repression of the CP, the federal government preferred to leave the formal initiative to the province. On March 19, 1931, Justice Minister Guthrie wrote to his Ontario counterpart, Attorney General Price, suggesting that "some definite action should be taken to prosecute the "various communistic organizations" and assuring him of "the fullest co-operation on the part of this department and also

of the RCMP."[89]

Although Price had previously maintained that he would not dignify the "Reds" with a prosecution, he now proceeded to prepare the indictment of selected CP leaders. The arrests were scheduled to be made on June 15, but at the last minute were called off because of the debate in the federal House on the Toronto police restrictions on free speech.[90] In late June, following violent police riots against unemployed workers in a number of cities,[91] Price instructed Joseph Sedgwick, his director of legal offices, and Ontario Provincial Police Commissioner Victor Williams to prepare the raids. On August 4, the day after the House had adjourned for its summer recess, they arranged the cooperation of the RCMP and Toronto police forces. On August 11, a combined force of the three police agencies swept down on the homes and offices of the CP and arrested eight party leaders: Tim Buck, Tom Ewen (McEwen), Malcolm Bruce, Tom Hill, John Boychuk, Sam Carr, Matthew Popovich, and Tom Cacic. (A ninth party member was later released.) The eight were tried before a jury in November 1931, convicted, and sentenced to terms varying from three to five years. They were released from Kingston penitentiary in 1934, when they became eligible for parole.

The King against Buck: a test case

Although the prosecution achieved its major goal, it was not without some difficulty. Before the matter came to trial, the Crown ran into a preliminary hurdle.[92] The main point of the prosecution was to use the trial to have the CP declared an unlawful association and convict the accused as members thereof; this precedent could then be used to prosecute individual members of the party as need be in

future. To convict the eight defendants, it was necessary to proceed under section 98(3) of the Code, which reads in part:

> Any person who acts or professes to act as an officer of any such unlawful association, and who shall sell, speak, write or publish anything as the representative or professed representative of any such unlawful association, or become and continues to be a member thereof...shall be guilty of an offence and liable to imprisonment for not more than twenty years. (emphasis added)

With this objective in mind, Sedgwick and Norman Sommerville KC, the chief prosecutor, drafted an indictment that charged the accused with being members of an unlawful association, the Communist Party of Canada, section of the Communist International.

Then a remarkable thing happened, which sheds some light on the substance--and the very real limits--of the independence of the judiciary. Chief Justice Rose asked for a copy of the proposed indictment. When Sedgwick and Sommerville presented it to him, he objected, as Sedgwick explained in a memorandum to Price,[93] that

> as he read the section, mere membership in an unlawful association was not constituted an offence, he contending that the first "and" in the section was conjunctive, and, therefore, it was only an offence for a person to be an officer, and then do one of the other enumerated things.

The two Crown attorneys suggested to the chief justice that although his "grammatical" reading of the section was "probably correct," the only way in which the whole of the section could be made effective was by reading it as though the "and" referred to was a disjunctive "or."

> His Lordship could not be convinced, however, and insisted that if the indictment was presented at the Assizes, he would have to instruct the Grand Jury that as drawn it did not disclose a crime, and they would, therefore, in all probability have brought in no bill.

The Crown law officers then took their problem to Ottawa; the federal deputy minister of justice prepared a brief for Rose CJ on the history of section 98. Although there is no copy on record of

this brief, its substance probably corresponds to extensive notes prepared by the prosecution for use in the Appeal, which are available in the Attorney General's files in the Provincial Archives. The major argument in the notes refers back to PC 2384, which used the word "or" where section 98 used "and":

> Any person who while Canada is engaged in war shall act or profess to act as an officer of any such unlawful association, or who shall sell, speak, write or publish anything...or become or continue to be a member thereof....

Obviously, so the argument went, the legislators had intended to repeat the wording of PC 2384; the change in wording was a slip. (Since the object of the section was to proscribe membership, it was unlikely the change was deliberate.)

Rose CJ remained unconvinced. Sedgwick continues:

> We discussed at length possible solutions, and His Lordship suggested that a bill be not presented at the present Assizes, that negotiations be had with the Minister of Justice with a view to making the necessary slight change in this section as soon as Parliament opens, and that the accused be then tried at the Spring Assizes. I know how anxious you are to have the trial take place this Fall, and I pointed that out to His Lordship but he said the situation would have to be faced, and could see no other solution that would be satisfactory. He points out that even if he is wrong in his construction of the law, if the point is raised it will probably becloud the whole issue. The accused would demur to the indictment, and even if the Judge held in our favour, the same point would probably be taken on appeal, and as there is always a possibility of one Appellate Judge dissenting, it may then go further to the Supreme Court of Canada, and in the result this prosecution instead of being decided on its merits and the facts, would become a prolonged piece of litigation on a technical point of Statute construction. This result nobody desires.

Sedgwick proposed a solution.

> ...we should charge all the present accused with being both officers and members of the named association. That would bring them within the statute even if the Chief Justice is right in his interpretation. We may have some difficulty in proving, firstly, what is an officer, and secondly, that all these accused are officers, but I do think that as to most of them we could convince the Jury that they are officers of this association. In any event that would permit of

> our evidence being presented, and the whole story being told to the Jury, with a verdict on the facts. Then the necessary amendment could be made at the next session of Parliament, and if that is done, presuming our prosecution succeeds, the fruit of it would be saved in that it would establish the unlawfulness of the association, and future proceedings could be taken against those who are mere members of the association, as was always intended.

And so the final indictment handed down by the grand jury contained three counts: the accused were members of an unlawful association; they were officers of an unlawful association; and "From 1921 to 1931, the accused were parties to a seditious conspiracy." The last count was added in the event that the Communists managed to win acquittal on the untested first two.

A further precaution was taken. In place of Rose CJ it was decided to assign the trial to Mr. Justice William H. Wright, 73 years old, a former prominent Liberal and a pillar of the United Church, who had made a name for himself in legal circles in 1930 for refusing to accept a jury's not guilty verdict in a murder trial. Wright J in 1929 had sentenced Finnish Canadian Communist editor Aarvo Vaara to six months in prison for making rude remarks about King George V.

At trial, the prosecution strategy was to link the Communist Party of Canada to the Communist International (since the CPC described itself as "section of the Communist International," this was not difficult), to demonstrate that the Comintern dictated CPC actions,[94] and to prove that either one or both advocated the use of force and violence to bring about revolution in Canada. The case was mainly built on lengthy extracts from documents of the CPC and the Comintern, especially the latter, which were read into the record. The Canadian party's documents yielded very little that could be construed, even by a zealous prosecutor, as advocacy of violent action. The Comintern documents were

somewhat less discreet. Some of the more colorful parts are published at length in the judgment of Mulock CJ in the Court of Appeal.

The defendants explained in their testimony that they were not advocating force or violence, nor was the Communist Party. "There is no ruling class that ever let go of its power without a struggle," said Tom Ewen.[95] The party was simply predicting that the bourgeoisie would respond with violence if the workers seized power and advising the working class to prepare for that eventuality. It was the classic defense of every revolutionist facing similar accusations.

In the Queen's Quarterly, Prof. Frank Scott of McGill University's Faculty of Law accurately described the gist of the evidence:[96]

> There was no evidence of any reliable sort to show that the party had ever committed any overt act of violence within Canada....
>
> The accused were tried, not for past or present violence, but for membership in an organization that, it was contended, aimed at and advocated the use of violence to effect changes in Canada some time in the future....
>
> It was Russian documents rather than Canadian which constituted the bulk of the evidence dealing with revolution.

A key prosecution document was a pamphlet authored by a Comintern functionary named Vasiliev, which purported to issue instructions to national sections on precautions to be taken in view of the "collapse of capitalist stabilization." It included some rudimentary counsel against the aimless stone-throwing of the "proletarian self-defence detachments."

> It is not enough to pick up a stone and throw it, but it is important that the stone hit its target...and that some effect be seen from the blow.... If members of the proletarian self-defence organizations systematically train themselves in throwing stones...at a target 25 paces away, we can say beforehand that in two weeks the results of such training on any attack would be quite different. (97)

Evidence was then adduced that stone-throwing had occurred at a CP-sponsored demonstration.

The star witness for the Crown was RCMP Sgt. John Leopold, who had operated inside the CP for seven years as an undercover agent under the name Jack Esselwein. When his true role was discovered by the party in 1928, he was expelled. Although Leopold had never played more than a minor role in the party, he testified for three days as an expert witness on all aspects of the party's program and policies. His most relevant testimony is reproduced in the Appeal decision.[98]

> Q. When MacDonald organized the Communist Party of Canada at Regina, what were the objects and aims of the Party that was organized? A. The aims and objects of the party that was organized was to organize the working class of Canada for the overthrow of the existing conditions in this country. Q. What was stated as to the existing conditions, to overthrow the existing conditions? A. By existing conditions I mean the economic institutions, the state and the social order in general. That is the governmental as well as the industrial or economic order. Q. In what manner? A. By the application of violence and force.

Comrade Esselwein had evidently read section 98.

This, with Vasiliev's stone-throwing advice, constituted the most direct evidence in the 767-page transcript as to the Canadian party's advocacy of force and violence for the purpose of effecting governmental, industrial or economic change.

Wright J's charge to the jury[99] contained a clear direction to convict, and no small measure of judicial theatre. Quoting Leopold's "violence and force" testimony, the judge asked "is there any such evidence here that they [the party] did recede from the objects as stated by the organizer?"

The defense, he said, had attempted to distinguish between the direct teaching of force and violence and the ultimate result

> in years to come when the doctrines of the communist party shall

> have so saturated people in this country that the present system will be destroyed.... I say to you, as a matter of law, they are just as responsible for teaching force and violence as if they were to go on the street today or tomorrow.... It is not a question of time, it is a question of what the real intent and meaning of the teachings and doctrine is, and that is what you have to determine. (100)

As to section 98, Wright J had the following comment:

> Something has been said here about this being an unusual law, a harsh law, and that a jury should struggle against convicting a man for violation of an unreasonable law. Is it an unreasonable law, a harsh law, to prohibit force and violence; or does the very nature of a free country demand that any changes in its constitution or in its economic systems shall be brought about not by force and violence but by reason, by argument, by legitimate means? Is it a harsh law, or is it but a reasonable law?... It is the collective wisdom of our representatives in the Parliament of Canada.

But the elected representatives had voted five times to repeal the law. And the charge against the defendants was not that they had used force and violence; if it were, the evidence could not possibly support a conviction. Nor was it the purpose of section 98 to outlaw force and violence; many other sections of the Code did that. The issue was, rather, whether the accused should be convicted, by the terms of section 98, of advocating the use of force and violence because of their membership in an organization that, it was suspected, might use violence at some time in the future. Was that a "reasonable" legal standard?

In sentencing the eight, the judge was particularly critical of their "special appeals to those who were not born in Canada and who were not versed perhaps in the spirit of Canadianism." This, he said, was "an exceedingly dangerous procedure." The defendants were not "criminals in the ordinary sense," he conceded,

> but I do not regard you as political criminals. Your offence is of an entirely different nature from that of a political

> criminal; it strikes at the very foundation of our social and governmental fabric in this country. It is a species of treason, which is one of the most detestable offences of which any person can be found guilty.

Seven of the defendants were sentenced to five years; Cacic received two years. (On the recommendation of the judge, Cacic was deported at the conclusion of his sentence.[101])

Sedgwick and Sommerville then drafted an Order declaring the Communist Party to be an unlawful association within the meaning of section 98, and ordering the forfeiture to the Crown of all the documents seized by police in the raids. In an exchange of memoranda the Crown attorneys sought to find a way to have all the property of the CP forfeited, but could find no authority for this in section 98. And they were chagrined when Wright J refused to order the forfeiture of seized property belonging to the Young Communist League and Workers Unity League.[102]

The appeal was heard in January 1932. Its outcome was a foregone conclusion. Only months earlier, Chief Justice Mulock, who headed the appeals panel, had called publicly for stamping out the "treasonable communist virus" that would "destroy the sacredness of marriage, nationalize women, extinguish the love of parents for their children, and abolish home life."[103] The Court of Appeal held that the third count of the indictment, seditious conspiracy, failed for insufficiency.[104] Thus the defendants were convicted solely for being members and officers of an unlawful association.

A 'fair trial'?

With one notable exception, the mass-circulation newspapers

and magazines greeted the verdict. Across the country editorials congratulated Attorney General Price for taking decisive action against the Reds. Saturday Night, which had been critical of the Toronto police campaign against the CP, declared that it

> was a trial so fair in every sense that...charges that the accused were "railroaded" will fall to the ground.... The records of the case will probably be more widely reviewed than those of any Canadian trial within the present century and the most prejudiced investigator will be unable to discern anything that shows even remotely the color of prejudice.... (105)

The Toronto Star, which had been especially critical of the police for forcibly dispersing Communist meetings, had often pointed out to Chief Draper and the police commission that the CP had never been declared an illegal association under section 98. Now it proclaimed that the conviction was just.

> All through the troubles of the past three years with the communists in Toronto the contention of this paper has been that the proper procedure against them was lawful procedure in the courts, instead of assaults upon them in the streets. If they held a meeting and it was an unlawful assembly, we urged that they should be prosecuted....
>
> During the trial there occurred for the first time a clear inquiry into the conduct, words and teachings of these men. All the violence of three years led to nothing and only when lawful procedure had been resumed was any result obtained. (106)

However, the Canadian Forum argued that the decision jeopardized the civil liberties of all Canadians.[107] "Only in decadent and backward countries like Great Britain, the United States, France, Norway, Sweden, Denmark, Holland, and the other British Dominions can the horrid plots of Marxist idolators be carried out in the broad light of day," wrote Frank Scott.

> Our parlour Bolsheviks had better understand what they are in for if the present law is to be enforced to the full. Canada doesn't need to put up with their nasty ideas if she doesn't want to. Section 98 creates so many new crimes and establishes

> so many presumptions of criminality that lots of people who are not actually comunists are liable to prosecution....

Scott noted that mere attendance at a meeting of an "unlawful association" or a favorable comment about it created a presumption of membership "in the absence of proof to the contrary."

"Just imagine that for a moment, all you red college professors," he jibed.

> None of your old-fashioned ideas that a man is presumed innocent until he is proved guilty.... You won't escape gaol unless you can prove that you are not a member of the party. And think what it will be like trying to make this proof! Obviously no member of the party will dare to testify that you are a non-member, because by coming forward he would at once give notice to the police that he is a criminal. [Section 98] really gets down to business and should rid our radicals forever of the obsolete idea that under the Canadian constitution the personal liberties of the subject give the subject personal liberties.
>
> Has any Canadian bookseller ever sold a copy of the Communist Manifesto? Twenty years for him. Has any Canadian professor ever taught a class of students in political science that there are occasions when revolution is morally justifiable? Clap him in gaol with the Communists: defending the use of force in any manner is a crime even if it is done in the privacy of the classroom or home. Has any Canadian citizen ever brought into Canada any book in which the use of force to effect political or industrial change is defended under any conditions whatsoever? Let him shiver in his shoes: Sergeant Leopold, disguised as a friend, may be after him, and a long spell in the penitentiary awaits him.
>
> ...The best thing for every good Canadian to do, if he wants to keep out of gaol, is to cling to the stock of reliable and well-tried ideas which have made Canada exactly what she is today. If he is built so queerly that he finds he cannot agree with the Conservatives, try as he will, then let him be radical with the Liberals. But that is as far as he can expect to be allowed to go. Canada is a country which has inherited British traditions of law, of justice and of government. It is a land of golden opportunity, where everyone who can do a good day's work will get along fine. We have admitted a lot of foreigners to build our railways and dig up our minerals, but they ought to be grateful to us for letting them live here, and not go about organizing to alter the present system in any way.... We won't have it, that's all. (108)

In The Queen's Quarterly, Scott pointed out that even within the terms of the law, the sentence was "extremely harsh."

The trial was a test case; the accused were first offenders; and the police had acquiesced in the CP's existence for twelve years.[109] "Canada is now faced with a new social problem," he concluded, "how to deal with a large number of persons whose beliefs make them outlaws. The present remedy appears to be mass deportations."[110]

On February 22, 1932, three days after the Ontario Court of Appeal had rendered its decision, J.S. Woodsworth moved in the House for leave to introduce a bill to repeal section 98. Led by Prime Minister Bennett, who thundered "No!," the Tory majority refused unanimous consent for first reading--normally a formality.[111] On March 7 Woodsworth tried again, this time with a bill "to clarify or remove some of the more objectionable subsections of section 98." It proposed to insert the word "physical" before the word "force," to allow seizure of property only after the charges had been proven and a search warrant issued, to remove the burden of proof of innocence from the accused, and to repeal the section allowing post office interception of mail. Woodsworth was allowed to explain the contents of the bill--and then the House voted to deny it first reading.[112]

In Toronto, the government hastened to publish a small book, entitled Record of Proceedings, The King v. Buck et al. (Communist Party of Canada). The introduction, by Sedgwick, outlined in detail all the proceedings, from the issuing of warrants, through the committal, the grand jury indictment, to the preliminary motions at trial. Sedgwick explained the book's purpose:

> In view of the wide-spread interest in this trial, and also bearing in mind the fact that it is the first determined prosecution under Section 98 of the Code, the Attorney General for Ontario, The Honourable W.H. Price, who authorized and directed the proceedings in this case, has had prepared and

published this brief containing the following documents which may be of interest to Crown officers in other jurisdictions. (113)

More prosecutions

Yet there were very few further prosecutions under section 98 in the years before its repeal in 1936. Of these only two were successful.

In March 1934 the British Columbia Court of Appeal upheld the conviction of Arthur Evans, a Mine Workers Union of Canada organizer, charged under section 98(8) with having advocated the use of force or violence as a means of accomplishing governmental change. During a strike at Princeton, Evans was alleged by police officers to have said at meetings such things as

> o "that the Communist Party had been declared an illegal organization in Canada, and he wanted to say he was not a member of that party, but that did not prevent him speaking about it and its work,--which was to overthrow the capitalist Governments, through the world, and replace them by proletarian-controlled Governments, and that no other party were of any use to the workers--neither the social democrats nor anyone else, but only the Communist Party...."
>
> o "that the change could not be done by the ballot box; but only by force, and a united front on the part of the workers."
>
> o "that they did not advocate the destruction of property, but it almost always occurred, when these demonstrations took place, due to the brutality of the police. He said the workers would rather take the places over, intact, and have them for their own use. He also said, at that meeting, that it was remarkable, with conditions as they were, and people only separated by glass from the things they needed, that they did not take them from the stores." (114)

Statements like these earned Evans one year in Oakalla Penitentiary.[115] The Court ignored the relatively narrow construction of section 98(8) in the Weir case; Macdonald J.A. said that "Even indirect language carefully selected in the hope of avoiding a breach

of the Act may on their [sic] fair interpretation be regarded as an advocacy of force." (emphasis in original)[116]

The other case, in Montreal, was reported to the House of Commons by J.S. Woodsworth during the debate on repeal of section 98, in June 1936.[117] The accused, a brother and sister, were charged in January 1934 under section 98(8) with selling seditious literature in their book shop. They were found guilty; he was sentenced to one month in jail, and his sister received a suspended sentence. As a result he was expelled from the art school he was attending. In his charge to the jury Loranger J said

> We are here in Canada, inhabiting a Christian country, and we have been brought up in that way, and we have no need of those doctrines which are godless, such as communism and all such doctrines, which are spread before our youth....

As in the Buck trial, the jury was given misleading information about the history of section 98:

> It has been decided by the court of appeal in Ontario, and you will have seen it in the papers, that these men of the Communist party have tried again and again to have this article removed from our criminal code by the parliament of Canada, but up to the present parliament has refused to strike out article 98 of the code, which is the protection of our people against such doctrines.

Loranger J told the jury that the accused "were openly offering [the seized literature] to the people, and that is against the law," and put the issue to the jury as follows:

> ...if you are convinced that the papers are of such a character as I have already said, and that they should not be published and circulated, it is your duty to say so.

On the application of this test, a jury could outlaw literature simply at its whim.

Other references to section 98 prosecutions are few in

number and provide few details. In Toronto Joe Derry, a Young Communist League activist, was indicted under section 98 in April 1933 as a result of an antiwar speech; he was acquitted.[118] In his fascinating eyewitness account of the unemployed demonstrations of the 1930s, Ronald Liversedge refers to the arrest in Vancouver under section 98 of one Cumber, the secretary of a relief camp workers' union affiliated to the Workers Unity League, but provides no information on the particulars of the charge or the outcome.[119] During the On-to-Ottawa Trek of unemployed relief camp strikers in 1935, a number of their leaders, including Arthur Evans of R. v. Evans fame, were arrested and charged under section 98 during an attempt by the men to move east of Regina in defiance of a federal cabinet order-in-council that they be halted in that city. In this case, the charge was under subsection (3), the same subsection used in the Buck indictment; the "unlawful association" was the Relief Camp Workers' Union. The Canadian Annual Review reports that on February 28, 1936, the Saskatchewan Attorney General, "after studying the matter, decided there was not enough evidence to warrant proceeding with the charges."[120] (A new government had been elected in Ottawa pledged to repeal section 98.) A.E. Smith lists those accused as "Evans, Edwards, Cosgrove, Black, Shaw and others."[121] It is unclear whether there were in fact "others" (the C.A.R. states five were indicted), but it may be said that Arthur Evans has the dubious distinction of being the only person ever charged twice under section 98.

There were, of course, many other arrests and charges--and convictions--during this period, for seditious libel, seditious conspiracy, unlawful assembly, and lesser charges.[122]

'A rallying point for the forces of unrest'

Why were there not more prosecutions under section 98? In a memorandum to the Ontario attorney general dated July 7, 1933, Joseph Sedgwick drew attention to an article in the June 24 issue the Worker, the CP newspaper, and suggested that "quite possibly the author, publisher and distributors of the article may have brought themselves within section 98." But he added:

> Whether further prosecutions are advisable at this time is another matter, however. One effect of the Communist trial has been to make martyrs of the eight who were convicted, and their incarceration has furnished a rallying point for the forces of unrest.... (123)

Indeed it had. Despite the apparently unanimous support for the convictions in the mass media, demands for release of the eight and for repeal of section 98 were rapidly gaining support. The CP-initiated Canadian Labor Defense League took the lead in organizing protests. Immediately after the convictions the CLDL began to campaign against section 98.[124] On February 22, 1932, the same day that Woodsworth moved for repeal in the House, a CLDL delegation went to Ottawa with a petition carrying 66,617 signatures calling for repeal of section 98 and the deportation provisions in the Immigration Act.[125] By September 1932, when the CLDL held a Repeal Conference in Port Arthur, it was reported that 876 organizations representing 171,315 persons had endorsed the demand for release of those imprisoned under section 98.[126]

In October 1932 prisoners in Kingston penitentiary, where the eight CP leaders were incarcerated, revolted; Tim Buck was later convicted of "inciting to riot" and nine months were added to his sentence. This gave a new impetus to the campaign for release. According to the Communist Party press, 500,000 pamphlets and leaflets were

issued and distributed throughout Canada; and 50,000 printed postcards addressed to the minister of justice were circulated, signed, and sent to Ottawa. A petition carried 459,000 signatures; another had 200,000.[127] By July 1933, when Sedgwick penned his memorandum to Price, the CLDL boasted 17,000 individual members in 350 branches.[128] The Communist Party was growing again, too. An internal report to the Central Committee in December 1934 stated that the party had 9,500 members--a notable increase from the 4,000 cited at the trial three years earlier.[129]

These efforts had an impact. Federal Justice Minister Guthrie, speaking in answer to Woodsworth's motion for repeal of section 98 in 1933, admitted that the CLDL campaign was winning broad support, and attempted to intimidate and discredit its sympathizers.

> I learn of the activities of this association through petitions from every quarter of this dominion. I am not overstating the case when I say that I have hundreds and hundreds of them. I have now ceased to acknowledge receipt of them. I merely hand them over to the mounted police in order that a record may be kept of the names and addresses of the people who sign them, and I make this statement so that the petitioners may know what I do with them.... I can assure the house that in long petitions there does not appear a single Anglo-Saxon or French-Canadian name--nothing but names of foreigners, unpronounceable names for the most part....
>
> No sooner did the disturbance take place in Kingston penitentiary... than I was flooded with telegrams and petitions from every quarter of Canada almost before the riot was well under way. (130)

Guthrie was adamant, however: section 98 would remain in force. Almost repeating the words he had used in 1919, when introducing the section, he told MPs that

> [T]here is very serious unrest in the Dominion of Canada to-day, and in some instances of a very alarming nature.... I submit, Mr. Speaker, that if there ever was a time in the history of this country when section 98 was justifiable as a part of the criminal law of this country, this is certainly the time. (134)

Woodsworth's motion was talked out, but not before a major

debate took place. Bolstered by the defense campaign outside the House, the Labor member for Winnipeg North Centre made one of his most vigorous speeches on the subject, going through section 98 paragraph by paragraph to demonstrate how it undermined democratic rights and flouted traditional concepts of jurisprudence. He quoted liberally from critics of the provision, ranging from Frank Scott to the Montreal and Ottawa conference of the United Church of Canada. He cited a press report of a speech some years previously by a prominent Winnipeg lawyer at a high-society St. George's night dinner; the speaker had stated that "No nation ever became truly great save by successful sedition and revolution," referring to the wrenching of the Magna Carta from King John, the beheading of King Charles I, and the corn law riots.

> My point [said Woodsworth] is that if the use of force under certain circumstances is so well recognized by our own leading men, and has been so generally recognized all down through the years, it seems very like persecution to set up a law that permits a certain group of men whose opinions are repugnant to the majority of people in Canada to be persecuted simply for holding that in certain contingencies resort must be had to force. (132)

In any event, he pointed out,

> the men in Kingston penitentiary are not convicted of having advocated force. They are convicted of belonging to an organization affiliated with certain organizations in Russia, and it is alleged that these organizations in Russia...are in favour of the use of force. ...these men, as individuals, were not convicted either of using force themselves or of advocating the use of it. (133)

Although Woodsworth's bill made no headway in Parliament, the trial a year later of the Rev. A.E. Smith, general secretary of the Canadian Labor Defense League, on a charge of seditious libel indicated the sharp change in public opinion that had occurred since the 1931 trial. At the trial of the Kingston penitentiary rioters in October 1933, it was revealed that a prison guard--never named--had

fired into Tim Buck's cell three days after the disturbance,[134] in an attempt to kill him. Smith fired off a letter to the prime minister, indignantly charging that "your government stands indicted before the Canadian working class as the instigator of this murderous plot." In November 1933 Smith led a delegation to Ottawa to demand a public investigation into the Kingston disturbance; that the eight Communists be regarded as political prisoners with special treatment; and that the prisoners and their leaders be exempted from punishment because they were seeking long overdue reforms. Bennett's answer, as reported by Smith, was unyielding:

> There will be no investigation into the shooting. There will be no repeal of Section 98. It is needed on the statute books. And finally (pounding the desk with clenched fist and with face suffused with rage) there will be no release for these men. They will serve every last five minutes of their sentences. That's all there is to be said. Now get out! (135)

On January 17, 1934, the Progressive Arts Club held a public meeting in Toronto to protest a police ban on its play "Eight Men Speak," which dramatized the situation of the eight Section 98 convicts. The police had closed it down after one performance, claiming it was "distasteful." Among the play's severest critics was R.B. Bennett, who obtained a copy of the script; he vowed that "the time has come when we must no longer allow Smith and his followers to spread propaganda of gross misrepresentation...." Thus, when Smith, the featured speaker at the Toronto protest meeting, took the rostrum, the police were ready. A few days later, Smith was charged with seditious libel for having allegedly stated: "I say deliberately that Bennett gave the order to shoot Buck in his cell in cold blood with intent to murder him." (Smith claimed he was misquoted.[136])

In 1931 the Communist Party had a hard time finding a

lawyer prepared to take their case.[137] In 1934, however, Smith had no difficulty retaining the services of E.J. McMurray KC of Winnipeg, a former federal solicitor general. Expressions of support for Smith came from all parts of Canada. Even the press was relatively sympathetic. The Toronto Star asked, "If a man slanders the prime minister he can be tried for slander. Why should he be charged with sedition, which is in a wholly different category?"

The trial--Chief Justice Rose presiding, this time--was a minor sensation. Tim Buck was a key witness for the defense. He managed to get out the statement that on October 20, 1932 "I was shot at--" before being ruled out of order, and transported back to his Kingston cell. The police witnesses were largely discredited: they claimed to have taken down everything Smith said in a 45-minute speech in their notes, which took three minutes to read to the jury.[138]

McMurray made a "very eloquent" summation to the jury--"a bourgeois liberal speech, since it dealt with free speech in an abstract way, ignoring completely class issues," as a CLDL pamphlet described it.[139] The jury brought in a verdict of not guilty.

Impact on the CCF

The campaign against section 98 played a major role in discrediting the Bennett government. But it had other repercussions, some quite unanticipated. One of the strangest was its impact on the Ontario section of the newly formed Cooperative Commonwealth Federation (CCF).

When the CCF was founded, at the 1933 Regina convention, it was a federated party as its name implied. This reflected its origins

in a loose association of labor, farmer, and socialist parties. In Ontario, there were three main components: the Ontario Labor Conference (which included the Socialist Party of Canada-Ontario section, and the Ontario Labor Party, consisting largely of trade unionists), the Associated CCF Clubs, and the remnants of the United Farmers of Ontario--the last group affiliating without accepting the full CCF program.[140]

At the Regina convention, the delegates had almost unanimously rejected an appeal from the Canadian Labor Defense League for joint action to secure the release from prison of the eight CP leaders. "We believe in constitutional methods" to achieve governmental power, said the adopted reply. "On that point there is a fundamental cleavage between us and the leaders of your organization.... We propose to pursue our campaign for repeal of Section 98, the release of political prisoners, and the prevention of arbitrary deportations by methods approved and adopted by our organization."[141]

In Ontario, however, the Labor Conference component was much more receptive to the CLDL's overtures. It saw the issue as one of united action with others in the left on matters of common concern. The party's right wing, for its part, denounced "Communist" influence in the committee[142] and moved to abolish the party's federated structure, which they saw as the main source of that influence. The Labor Conference responded by calling an emergency conference on October 29, 1933, with A.E. Smith of the CLDL as the first speaker, on section 98.[143] Soon after this the United Farmers, their leaders alleging Communist influence in the new party, indicated their intention to withdraw from the CCF.

The CCF was grappling with this setback, and its trouncing at the municipal polls in early 1934, when it was struck, as Gerald Caplan describes it, by "a new crisis...destined, in one short month, to lead to the shattering of the entire CCF provincial structure."[144] The "new crisis" was the arrest of A.E. Smith and his sedition trial. Smith, says Caplan,

> was accurate...when he wrote: "The CCF leaders could not stem the tide of united-front sentiment in their own ranks. CCF clubs sent delegates to our defence conferences in spite of the official [CCF] ban." ...To the Communists' undoubted delight the real victims of the Smith affair were the dreaded "social fascists" in the CCF. (145)

At a February 17 meeting of the CCF provincial council in London, the CCF Club and UFO delegates combined to make their position official Council policy. Representatives of the Labor Conference angrily declared it would do "whatever it pleased, regardless of Council rulings." The UFO delegates appointed a committee to "take whatever action they may find necessary in view of the events of the next few weeks."

The following day, February 18, the CLDL held a mass protest rally against section 98 in Toronto's Massey Hall, at which Smith "launched a savage attack upon Woodsworth, charging him and his colleagues in the House with the responsibility for the sedition charge against him." [146] Seizing the attack as a pretext, Woodsworth threatened to expel any member of the CCF who cooperated with the CLDL. Matters came quickly to a head, as the various groupings traded accusations. At a March 10, 1934 meeting of the Provincial Council--"the most crucial in the CCF's short history"--the CCF Clubs and the Labor Conference were deadlocked, the UFO having left the party. The council asked the

national executive to take responsibility, but members of the executive in attendance--Woodsworth, E.J. Garland, and Angus MacInnis--urged further discussion by the Council. Finally, Woodsworth pulled out a detailed statement prepared in advance by the national executive, which denounced the party's federated structure as being too vulnerable to Communist tactics.

> Two steps, the national executive had concluded, were urgently needed: each CCF local must rid itself completely of Communist influence, and a complete reorganization of the party in Ontario must be undertaken. For this reason, Woodsworth informed a stunned meeting, it had been decided to take the most drastic action possible: the immediate suspension of the Provincial Council and the reorganization of the provincial party by the National Council. The new structure would be based on a single cohesive unit, with actual control in a central council, instead of three autonomous groups joined in a loose federation.
>
> That was all. In ten short minutes, much of the original CCF was destroyed. (147)

From then on, the CCF was a party, not a federation. Within a year, the CCF and the CP comprised virtually the entire organized left in Canada.

Repeal at last: One step forward--and a new step back?

The Liberals, too, felt the pressure of the anti-section 98 campaign. In 1933, when a major debate took place in the House on a motion by Woodsworth for the formation of a "cooperative commonwealth," Liberal leader Mackenzie King used the occasion to develop a new party platform. Among its fourteen points was repeal of section 98.[148]

In the 1935 election King campaigned against section 98 and used Bennett's imprisonment of the CP leaders as an example of his government's dictatorial tendencies. The Conservative campaign,

especially in Quebec, relied heavily on anti-communism: the Liberals were accused of "unconsciously aiding and abetting communism" by criticizing "our treatment of the Regina rebellion" (the suppression of the On-to-Ottawa Trek) and by insisting on repeal of section 98. The Tory line was unsuccessful. The Liberals won by a large majority, taking 60 of Quebec's 65 seats.[149]

In June 1936 Liberal Justice Minister Ernest Lapointe introduced a bill to repeal section 98. Just before the Liberals' defeat in 1930, Parliament had voted to restore the "saving clause" and to reduce the penalty from twenty to two years in the traditional sedition offenses.[150] Now, however, Lapointe introduced a new subsection to the basic sedition section, which provided that

> ...everyone shall be presumed to have a seditious intention who publishes, or circulates any writing, printing, or document in which it is advocated, or who teaches or advocates, the use, without the authority of law, of force, as a means of accomplishing any governmental change. (151)

Friedland comments:

> In some respects this provision is stronger than section 98 because most active members of what would have been an illegal association would now be caught as persons who circulated "any writing that advocates the use...of force as a means of accomplishing a governmental change" and, unlike section 98, this is a conclusive and not a rebuttable presumption. But at least it did not make mere membership, however casual or innocent, a crime. (152)

Lapointe described the proposed subsection as not "necessary" but said it was being added "to make it clearer that nobody can by words or writing preach the use of force to bring about governmental changes."[153] He maintained that the changes he was proposing were simply consistent with the British law of sedition, which was that "it has to be something constituting an overt act, not merely an

opinion which people might hold" to constitute sedition.

The prosecution of the Communists had shown the futility of section 98, he argued.

> What good did that do? ...Did section 98 prevent communist candidates from appearing against other candidates in the last election? If the section is useless, why keep it? (154)

Woodsworth followed Lapointe in the debate. He went over the familiar arguments against section 98, and then criticized Lapointe for introducing the new subsection. Hadn't Lapointe said many times before that the Code provisions were sufficient without section 98? Was it not true that Joseph Howe, William Lyon Mackenzie, and others now honored in the history of this country had been considered subversives in their day?

> I suggest that the reversals in judgment which history brings about warn us to consider carefully the legislation we propose to place on the statute book. (155)

Lapointe interjected that if Opposition leader Bennett would support Woodsworth's position, he would "probably consider" dropping the proposed subsection.[156]

The Conservatives were having none of that, however. C.H. Cahan, the godfather of PC 2384, section 98's predecessor, speaking for the first time in the debates on the section, declared that in his view the proposed presumption of intent was not sufficiently broad to prohibit the actual use of force for the purpose of overturning the government.[157]

J.R. MacNicol, on the other hand, supported the proposed subsection because, he said, it "puts back into the criminal code a great deal of what has been taken out of it by the repeal of section 98."[158] He predicted that all the opponents of section 98 would now

"howl their heads off" against subsection (4).[159]

R.B. Bennett disagreed with MacNicol: the proposed subsection did not deal with unlawful associations. Yes, he agreed with Lapointe, Russia had changed somewhat; it was now allied with France. But who was to say it would not change again--and was it not unwise to leave the country "without any provision against that type of unlawful assembly and those who constitute its membership?"[160]

But the Tory leader had obviously been chastened by his government's recent election defeat. He signalled the Conservative-dominated Senate that it should not block the bill:

> The evidence of history is that after the commons house of parliament has acted in a matter five or six times, or after a government which has come fresh from the people with a great majority has passed certain legislation, neither in England nor on the continent or elsewhere has there ever been manifest a desire on the part of another chamber differently constituted as to views upon public issues to take action sharply different from that taken by the commons. (161)

After accepting an amendment by Woodsworth to add the words "in Canada" after "governmental change" in the new presumption clause,[162] the House passed the bill without division on June 19, 1936. The Senate adopted it, also without division, the following day.

Contrary to Tory MP MacNicol's prediction, there was little "howling" against the new presumption of guilt clause. Section 98 was dead, as far as most of its opponents were concerned, and for some years thereafter--in English Canada, at least--there were few political trials for allegedly subversive acts.

The spirit lives on

The exception was Quebec. In 1937 the provincial Liberal opposition joined with the Union Nationale government in both houses to pass the Act to Protect the Province Against Communistic Propaganda, better known as the "Padlock Law." Under this Act Premier Maurice Duplessis, as attorney general, was given extensive powers to close, or padlock, any premises used "to propagate communism or bolshevism." The Act also made it

> unlawful to print, or publish in any manner whatsoever, or to distribute in the Province any newspaper, periodical, pamphlet, circular, document or writing whatsoever propagating or tending to propagate communism or bolshevism. (163)

The definitions of "communism" and "bolshevism" were left to the discretion of the attorney general.

The Act bore more than a passing resemblance to some of the provisions of section 98, but the federal Liberal government refused to take action against it--although they had recently moved to disallow Alberta legislation that was disliked by the banks. Lapointe said the Quebec law was not a direct invasion of federal jurisdiction[164]--an argument rejected by the Supreme Court of Canada in 1957 when the Act was finally ruled unconstitutional.[165]

Under the Act the tiny Communist party in Quebec was forced underground; the offices of its newspaper Clarté were padlocked. A party member in Quebec City, F.-X. Lessard, who broke the police padlock on the door of his home, was sentenced to two years in prison.[166]

Three years after the repeal of section 98, many of its provisions were re-enacted in substance in the Defense of Canada Regulations pursuant to the War Measures Act. Under these Regulations,

which were not discussed in Parliament, sixteen organizations were declared illegal in June 1940.[167] One was the Jehovah's Witnesses, who, along with the Doukhobors, were major victims of sedition prosecutions after World War II.[168] Another banned organization was the Canadian Labor Defense League. The CLDL had already become relatively inactive after the release of the eight CP leaders and the repeal of section 98, but had attempted to resume activity against the war regulations.[169]

The War Measures Act was invoked again in 1970 to ban the Front de Libération du Québec (FLQ). The 1970 Regulations revived the concept of guilt by association, making it an offense to belong to the FLQ or to any group of persons or association advocating the use of force or the commission of crime to accomplish any governmental change in Canada. They also reversed the presumption of innocence and in part had retroactive effect.[170] The Regulations were later replaced by a temporary statute, the Public Order (Temporary Measures) Act, 1970, specifically directed at the FLQ, and likewise incorporating many features--in some clauses taken literally--from section 98 and PC 2384. This time, however, the crime was related to advocating

> the use of force or the commission of crime as a means of or as an aid in accomplishing the same or substantially the same governmental change within Canada with respect to the Province of Quebec or its relationship to Canada as that advocated by the said Le Front de Libération du Québec.... (171)

More recently, the federal government has introduced draft legislation to establish a "Canadian Security Intelligence Service," with authority to "collect, by investigation or otherwise... and analyze and retain information and intelligence respecting activities that may on reasonable grounds be suspected of constituting

threats to the security of Canada...." Among these "threats" are

> activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada....

including "lawful advocacy, protest or dissent" if "carried on in conjunction with" the above activities.[172]

A political victory

It is beyond the scope of this study to examine in detail the sequelae of section 98. However, the persisting reappearance of the legislation in bits and pieces after 1936--whether to meet alleged external or internal threats to the security of the state--indicates a readiness on the part of the authorities to resort to far-reaching restrictions on speech and association whenever deemed necessary. As "emergency," "war-time," legislation, PC 2384 has enjoyed a remarkably long life.

Moreover, there is accumulating evidence that since the mid-1930s the state has resorted increasingly to extra-legal methods of repression as an alternative to overt legislative restrictions. The McDonald inquiry into unlawful activities of the RCMP reported that between 1950 and 1970 "the R.C.M.P.'s manpower specializing in security intelligence activities had increased more than fifty-fold."[173] The RCMP's domestic subversion branch, it said, "is roughly equivalent in size to the two counter-intelligence branches combined."[174] Since the 1960s, this counter-subversion activity "began to extend far beyond Communist groups."[175] Sgt. Leopold was only a pioneer.

How meaningful, then, was the defeat of section 98? In

legal terms it was a very qualified victory for democratic rights. The 1936 bill abrogated the permanent legislative prohibition on unlawful associations, the arbitrary powers of search and seizure without warrant, the presumption of membership clause, and the twenty-year maximum penalty for contraventions. But at the same time Parliament replaced these with a new sedition provision that took certain activity prohibited in section 98--the advocacy in any way of the use of force to effect governmental change--and turned it into a conclusive presumption of seditious intent. It was precisely this activity that had been charged, under subsection (8) of section 98, in Weir, Evans, and Feigelman, with mixed results.

Moreover, the opening words of the new subsection ("Without limiting the generality of the meaning of the expression 'seditious intention'") mean that it operates notwithstanding the decision in Boucher, in which the Supreme Court of Canada held that "seditious intent" required a finding of an intention to incite violence.[176]

By 1936 it was evident that a permanent ban on an association, or on membership in an association, independent of any evidence of otherwise unlawful activity by the association, carried a heavy political price. The Buck trial stands alone as the only prosecution, successful or otherwise, under those provisions of section 98. In legal terms it was not giving up much to abandon them; after all, there were many other ways to hamstring the activities of the CP or any other group short of a blanket prohibition on the organization.

However, it is noteworthy that there has been no attempt since 1936 to legislate a permanent proscription of unlawful associations or to prohibit by law the expression of opinion in terms as

sweeping as those in section 98.

In political terms, the repeal of section 98 was an important victory for democratic rights. Almost from the outset there was significant opposition to the section, and it was mass public opposition that brought about its ultimate repeal. The point is minimized in the only academic study of section 98, which appeared in the 1972 Queen's Law Journal. The author, J.B. Mackenzie, deplores that

> any general public recognition of the issues raised by s. 98 only came shortly before the repeal of s. 98, after debate had been joined successively by the trades unions, the Progressive Party, the Liberal Party and the Communist Party, sometimes for strikingly different reasons. (177)

The list of organizations itself suggests that the author has an unduly restrictive conception of the "public." Mackenzie's study looks only at the legislative and judicial record; a wider survey of the surrounding context indicates that legislators and judges alike were reacting and responding to substantial social pressures.

It required a major struggle to defeat section 98. The Conservative Party was solidly committed to it. Although the Liberals were on record in opposition to it after 1925, theirs was not an opposition in principle. They were silent in 1931 when section 98 was used with devastating effect against the Communist Party, and in 1937 in relation to Duplessis' Padlock Law. They collaborated with the Tories in 1936 in adding the presumption of intention clause to the Code. It was a Liberal government that reproduced the essentials of section 98 in 1970, and that continues in the same vein today with Bill C-9.

As Mackenzie notes, only the trade unions (and their parlia-

mentary representatives) posed a consistent opposition to section 98. That tells us something about the class nature of the struggle for democratic liberties under a mature capitalism. And it was the depth of the opposition that eventually developed against section 98 that determined the lasting defeat of its most blatantly undemocratic provisions.

It is hardly surprising that middle-class public opinion, with few exceptions, mobilized against section 98 only some time after it had been used in a successful prosecution. Until then the section was not a conspicuous threat to anyone. More significant is the small number of prosecutions, which probably reflects a sensitive gauging of public opinion by the law officers of the crown and their political masters.

Ron Adams argues that the prosecution of the CP leaders in 1931 was an aberration based on a misestimation of the political relationship of forces; if Attorney General Price had been better informed, he says, he would have realized that the CP in its weakened state was incapable of mounting a serious challenge to the security of the Canadian state.[178] (Adams then turns this point into a defense of police informers. "Undercover intelligence work," he says, "gave the RCMP a realistic appreciation of the weaknesses of the CPC."[179])

Section 98 was never intended to be used only against "strong" revolutionary organizations. Probably few if any of the groups outlawed by PC 2384 in 1918 enjoyed even the support the CP had in 1931. The legislation of 1919 was preventive, as Guthrie explained--to be used as a deterrent to revolutionary action, an authorization of police harassment of dissidents, and an instrument for exemplary,

prosecution and criminalization. Section 98 was used for all of these purposes. The prosecution of the CP in 1931 was obviously intended to decapitate a nascent leadership in the militant unemployed movement. The trial of the eight was intended as a precedent for further prosecutions, across the country; those designs were largely frustrated by a shift in opinion that made it politically infeasible to continue.

In fact, if the Communist Party had been significantly larger, with substantial influence in the labor movement, it is unlikely that the government would have proceeded by way of judicial repression. As Kirchheimer notes, to suppress the rights and privileges of a political group representing a large segment of the population (on a scale, say, of the Italian or French CPs) risks jeopardizing the democratic legitimacy of the regime itself.[180] The small size of the CP, its isolation, and the esoteric nature of its politics for most Canadians facilitated the prosecution. But the government was nonetheless treading a thin line. In the public perception of political justice, it may not take much to turn a solemn process upholding societal norms into an unjustified persecution of a political minority. If courts are perceived in the latter role, it may devalorize the state institution with the strongest claim to impartiality, and discredit the government as well.

This is especially true when judicial repression is cast in the form of permanent restrictions on political activity and freedom of association and speech. What passes muster in a time of perceived emergency--and PC 2384 was used with much greater effect than section 98 without attracting the same degree of opposition outside the labor

and socialist movement--may be quite unacceptable outside that context.

The political establishment seemed to be acutely aware of this problem in the case of section 98. They had an ongoing debate over its utility, reflected in the parliamentary exchanges between Liberals who saw it as a political liability and the Tories who saw it as insurance against insurrection. When the federal and Ontario governments were plotting the prosecution of the CP leaders they acted with some caution, attempting at every step to minimize the rise of adverse public reaction. In 1931 they got away with it, notwithstanding the reservations of Chief Justice Rose; in 1934, when they overplayed their hand in the A.E. Smith sedition prosecution, their fingers were burned.

Section 98 was defeated when it had become politically too costly to keep it on the books. Its repeal may have changed the law far less in substance than many thought at the time. But it was nevertheless a significant setback for those who would use the criminal law to suppress the expression of ideas.

APPENDIX

SECTION 98 OF THE CRIMINAL CODE

(1) Any association, organization, society or corporation, whose professed purpose or one of whose purposes is to bring about any governmental, industrial or economic change within Canada by use of force, violence, terrorism, or physical injury to person or property, or by threats of such injury, or which teaches, advocates, advises or defends the use of force, violence, terrorism, or physical injury to person or property, or threats of such injury, in order to accomplish such change, or for any other purpose, or which shall by any means prosecute or pursue such purpose or professed purpose, or shall so teach, advocate, advise or defend, shall be an unlawful association.

(2) Any property, real or personal, belonging or suspected to belong to an unlawful association, or held or suspected to be held by any person for or on behalf thereof may, without warrant, be seized or taken possession of by any person thereunto authorized by the Chief Commissioner of Dominion Police or by the Commissioner of the Royal Northwest Mounted Police, and may thereupon be forfeited to His Majesty.

(3) Any person who acts or professes to act as an officer of any such unlawful association, and who shall sell, speak, write or publish anything as the representative or professed representative of any such unlawful association, or become and continue to be a member thereof, or wear, carry or cause to be displayed upon or about his person or elsewhere, any badge, insignia, emblem, banner, motto, pennant, card, button or other device whatsoever, indicating or intended to show or suggest that he is a member of or in anywise associated with any such unlawful association, or who shall contribute anything as dues or otherwise, to it or to any one for it, or who shall solicit subscriptions or contributions for it, shall be guilty of an offence and liable to imprisonment for not more than twenty years.

(4) In any prosecution under this section, if it be proved that the person charged has --

(a) attended meetings of an unlawful association; or,
(b) spoken publicly in advocacy of an unlawful association; or,
(c) distributed literature of an unlawful association by circulation through the Post Office mails of Canada, or otherwise;

it shall be presumed, in the absence of proof to the contrary, that he is a member of such unlawful association.

(5) Any owner, lessee, agent or superintendent of any building, room, premises or place, who knowingly permits therein any meeting of an unlawful association or any subsidiary association or branch or committee thereof, or any assemblage of persons who teach, advocate, advise or defend the use, without authority of the law, of force, violence or physical injury to person or property, or threats of such injury, shall be guilty of an offence under this section and shall be liable to a fine of not

more than five thousand dollars or to imprisonment for not more than five years, or to both fine and imprisonment.

(6) If any judge of any superior or county court, police or stipendiary magistrate, or any justice of the peace, is satisfied by information on oath that there is reasonable ground for suspecting that any contravention of this section has been or is about to be committed, he may issue a search warrant under his hand, authorizing any peace officer, police officer, or constable with such assistance as he may require, to enter at any time any premises or place mentioned in the warrant, and to search such premises or place, and every person found therein, and to seize and carry away any books, periodicals, pamphlets, pictures, papers, circulars, cards, letters, writings, prints, handbills, posters, publications or documents which are found on or in such premises or place, or in the possession of any person therein at the time of such search, and the same, when seized may be carried away and may be forfeited to His Majesty.

(7) Where, by this section, it is provided that any property may be forfeited to His Majesty, the forfeiture may be adjudged or declared by any judge of any superior or county court, or by any police or stipendiary magistrate, or by any justice of the peace, in a summary manner, and by the procedure provided by Part XV of this Act, in so far as applicable, or subject to such adaptations as may be necessary to meet the circumstances of the case.

(8) Any person who prints, publishes, edits, issues, circulates, sells, or offers for sale or distribution any book, newspaper, periodical, pamphlet, picture, paper, circular, card, letter, writing, print, publication or document of any kind, in which is taught, advocated, advised or defended, or who shall in any manner teach, advocate, or advise or defend the use, without authority of law, of force, violence, terrorism or physical injury to person or property, or threats of such injury, as a means of accomplishing any governmental, industrial or economic change, or otherwise, shall be guilty of an offence and liable to imprisonment for not more than twenty years.

(9) Any person who circulates or attempts to circulate or distribute any book, newspaper, periodical, pamphlet, picture, paper, circular, card, letter, writing, print, publication, or document of any kind, as described in this section by mailing the same or causing the same to be mailed or posted in any Post Office, letter box, or other mail receptacle in Canada, shall be guilty of an offence, and shall be liable to imprisonment for not more than twenty years.

(10) Any person who imports into Canada from any other country, or attempts to import by or through any means whatsoever, any book, newspaper, periodical, pamphlet, picture, paper, circular, card, letter, writing, print, publication or document of any kind as described in this section, shall be guilty of an offence and shall be liable to imprisonment for not more than twenty years.

(11) It shall be the duty of every person in the employment of His Majesty in respect of His Government of Canada, either in the Post Office Department, or in any other Department to seize and take

possession, of any book, newspaper, periodical, pamphlet, picture, paper, circular, card, letter, writing, print, publication or document, as mentioned in the last preceding section, upon discovery of the same in the Post Office mails of Canada or in or upon any station, wharf, yard, car, truck, motor or other vehicle, steamboat or other vessel upon which the same may be found and when so seized and taken, without delay to transmit the same, together with the envelopes, coverings and wrappings attached thereto, to the Chief Commissioner of Dominion Police, or to the Commissioner of the Royal Northwest Mounted Police.

NOTES

1. Sections 97A and 97B, as enacted in S.C. 9-10 Geo. V, c. 45. Renumbered s. 98 in R.S.C. 1927, c. 36.

2. J.B. Mackenzie, Section 98, Criminal Code and Freedom of Expression in Canada (1972), 4 Queen's L.J. 469.

3. see references in notes 88, 90 and 108 infra. Also article in Canadian Unionist, August 1933.

4. R.A. Adams, The Communist Party of Canada Confronts Canadian Authorities, 1928-1932 (1977).

5. Mark R. MacGuigan, Seditious Libel and Related Offences in England, the United States, and Canada. Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada (Ottawa: 1966), at 119.

6. M.L. Friedland, National Security: The Legal Dimensions, A Study prepared for the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police (Ottawa: 1980), at 22-24.

7. S.C. 55-56 Vict. c. 29.

8. Boucher v. The King [1950] 1 D.L.R. 657, at 674 (per Taschereau J).

9. See note in Martin's Annotated Criminal Code 1955 (Toronto: 1955), at 136.

10. Stephen, A History of the Criminal Law of England (1883), (reprinted New York: 1964), Vol. 2, at 298.

11. 25 C.C.C. 207.

12. 25 C.C.C. 302 (Alta. C.A.).

13. 27 C.C.C. 53 (Sask. S.C.).

14. 27 C.C.C. 232 (Alta. C.A.).

15. 30 C.C.C. 326 (Sask. C.A.).

16. Ian Angus, Canadian Bolsheviks: The Early Years of the Communist Party of Canada (Montreal: 1981), at 14-15.

17. R. v. Bainbridge (1917), 28 C.C.C. 444, at 445.

18. quoted in Angus, supra note 16, at 27.

19. ibid., at 27-28.

20. ibid., at 28-29.

21. PC 2384, 28 September 1918, Can. Gaz. 1 October 1918.

22. Angus, supra note 16, cites the following cases culled from a random survey of the labor and socialist press:

> In Sault Ste. Marie, seven Social Democrats were charged with membership in a banned organization. They were fined a total of $16,700 and sent to prison for terms ranging from three to five years. In Southern Ontario the police conducted coordinated raids the weekend of October 19-20. They arrested thirteen socialists in London, twenty-two in Stratford, twenty-three in Toronto. Forty-four members of the Chinese Nationalist Association in Toronto were arrested the same weekend. A report by Dominion Police Sergeant B.H. James, dated March 24, 1919, listed twenty Ontario cities in which arrests and raids took place.... (at 29)

23. ibid., at 30-32.

24. PC 702, April 2, 1919.

25. Penner (ed.), Winnipeg 1919: The Strikers' Own History of the Winnipeg General Strike (Toronto: 1973), at 10-12.

26. House of Commons Debates, June 10, 1919, at 3285 et seq.

27. 22 Cox C.C. 1, at 4.

28. Cf. remarks by Hon. Ernest Lapointe, H of C Debates June 19, 1936, at 3900:

> What I find in those decisions [The Queen v. Jones (1848) 6 State Trials N.S. 784] is rather that in Great Britain it has to be something constituting an overt act, not merely an opinion which people might hold.

Ernest Jones, a barrister and Chartist leader, was convicted of seditious speech in 1848 for making a speech "urging the people to form themselves into unlawful associations, and inciting to insurrection, unlawful assemblies, breaches of the peace, and the forcible obstruction of the execution of the law...." This case, Lapointe said, was the beginning of the offense of unlawful association, albeit defined differently than in section 98.

29. Angus, supra note 16, at 54.

30. Penner, supra note 25, at x.

31. Labour Gazette, July 1969, at 374.

32. The strikers published their own account in a booklet entitled Saving the World from Democracy: The Winnipeg General Sympathetic Strike, re-published in Penner, supra note 25.

33. Citizens Committee of One Thousand, The Activities and Organization of the Citizens Committee of One Thousand (Winnipeg: n.d.), cited in K. McNaught and D.J. Bercuson, The Winnipeg Strike: 1919 (Don Mills: 1974), at 100.

34. Canadian Annual Review of Public Affairs, 1919 (Toronto: 1920), at 460.

35. Royal Commission to Enquire Into and Report on the Causes and Effects of the General Strike Which Recently Existed in the City of Winnipeg for a Period of Six Weeks, Including the Methods of Calling and Carrying on Such Strike, Report of H.A. Robson, KC, Commissioner, at 10.

36. D.C. Masters, The Winnipeg General Strike (Toronto: 1950), at 52.

37. ibid., at 126.

38. ibid., at 133.

39. ibid., at 139.

40. quoted in ibid., at 147.

41. Angus, supra note 16, at 134-37.

42. ibid., at 125.

43. cited by J.S. Woodsworth, H of C Debates, June 4, 1926, at 4073.

44. R. v. Russell [1920] 1 W.W.R. 624.

45. H.A. Logan, Trade Unions in Canada (Toronto: 1948), at 402-408.

46. ibid., at 409-10.

47. H of C Debates, February 2, 1926, at 643.

48. ibid., June 4, 1926, at 4071-2.

49. ibid., 4073-5.

50. ibid., 4077-8.

51. Three senators consistently led the opposition to repeal of section 98. They were Senator Robertson, who had been federal minister of labor during the Winnipeg General Strike; Senator Griesbach, who had been commander of the First Infantry Regiment at Passchendaele in 1917, when revolutionary Russia withdrew from the war; and Senator Beaubien, a director of the Dominion Steel and Coal Co. (DOSCO) during the 1923 strike in Cape Breton. (Adams, supra note 4, at 41-2.)

52. H of C Debates, May 28, 1930, at 2741.

53. ibid., June 10, 1929, at 3503.

54. This is not unique to Canada. In the United States the Smith Act of 1940, which creates the crime of unlawful associations, is entitled The Alien Registration Act, 54 Stat. 670 (1940), now 18 U.S.C. para. 2385-86.

55. Penner, supra note 25, at 4n.

56. H of C Debates, June 2, 1926, at 3996.

57. cited in A. Balawyder, The Winnipeg General Strike (Toronto: 1967), at 20.

58. Winnipeg Telegram, June 6, 1919. Cited in Penner, supra note 25, at xviii.

59. ibid., at 5, 169-70.

60. quoted in B. Ostry and H.S. Ferns, The Age of Mackenzie King: The Rise of the Leader (Toronto: 1955), at 310. Emphasis added.

61. quoted in H.B. Neatby, William Lyon Mackenzie King, 1932-35: The Prism of Unity (Toronto: 1976), at 7-8.

62. R. v. Weir (1929) 52 C.C.C. 111. The decision is discussed infra.

63. cited in J. Petryshyn, Communists, Courts and Campaigns: The Origins and Activities of the Canadian Labour Defense League, 1925-1940 (unpublished manuscript, 1977), at 6.

64. ibid., at 7.

65. J.F. White, "Police Dictatorship," Canadian Forum, February 1931.

66. M. Robin, Radical Politics and Canadian Labour (Kingston: 1968), at 258-264; Angus, supra note 16, at Part III, "The Destruction of a Party." The following account is based on Petryshyn (note 63), Angus, and Adams (note 4).

67. quoted in Angus, supra note 16, at 258.

68. Petryshyn, supra note 63, at 6.

69. cited in M. Horn, "Keeping Canada 'Canadian': Anti-Communism and Canadianism in Toronto 1928-29," in Canada: An Historical Magazine, September 1975, at 44.

70. ibid., at 46.

71. R. v. Weir, supra note 62, at 118. Denton CCJ quoted extensively from the judgment of Coleridge LJ in R. v. Aldred, supra note 27, in reaching this conclusion.

72. Adams, supra note 4, at 241.

73. This account is based on Adams, supra note 4, at 311-19. Part of the lengthy exchange between Coatsworth and Bland, which was extensively reported in the Toronto press, was reproduced in H of C Debates, 1931, at 3751-2.

74. The statement is reproduced in Petryshyn, supra note 63, at 4.

75. PAO (Provincial Archives of Ontario) Box 28, Env. L0001. General Report by RCMP, March 1931. This report was prepared, as its preface

states, "with a view to establishing whether or not the Communist Party of Canada is an illegal organization within the meaning of Section 98 of the Criminal Code of Canada." (at 16).

76. H of C Debates, 1931, at 1277, 1984, 1987, and 1988.

77. ibid., at 1989.

78. By November 1932 the number of people on relief was officially 850,000; by February 1935, it was 1,230,000. S.M. Jameson, Times of Trouble: Labour Unrest and Industrial Conflict in Canada, 1900-66. Study No. 22 for Task Force on Labour Relations (Ottawa: 1968), at 234.

79. ibid., at 234-5.

80. R.A. Adams, The 1931 Arrest and Trial of the Leaders of the Communist Party of Canada, paper submitted to the 1977 convention of the Canadian Historical Association, Fredericton (henceforth Adams II), at 7-11; Jameson, supra note 78, at 235. As Jameson notes, the CP was stepping into the vacduum. The established trade union movement, which had suffered general decline during the 1920s, almost disintegrated during the early years of the Great Depression. See his discussion, at 214.

81. Adams, supra note 4, at 342.

82. ibid., at 342-3.

83. D.V. Smiley (ed.), The Rowell-Sirois Report, an Abridgement of Book I of the Royal Commission on Dominion-Provincial Relations (Toronto: 1963), at 176-79.

84. Adams II, supra note 80, at 4.

85. ibid., at 5.

86. Petryshyn, supra note 63, at 10.

87. Adams, supra note 4, at 345.

88. F.R. Scott, The Trial of the Toronto Communists, Queen's Quarterly, August 1932, at 522.

89. Adams II, supra note 80, at 5. Jameson, supra note 78, at 235-6, describes the plan to indict the CP leaders under section 98 as one of the "two major steps" taken by the Bennett government in response to the "threats" posed by the unemployed and the CP's influence among them. (The other step was the establishment in 1932 of a federal system of work relief camps for single unemployed males under the administration of the Department of National Defense.)

90. Adams, supra note 4, at 346-7. Montreal police did not feel similarly constrained. In June 1931 five YCL members, including future MP Fred Rose, were charged with making seditious statements at an unemployed meeting, convicted, and sentenced to one year at hard labor "as a warning to others." F.R. Scott, The Montreal Sedition Cases (1931) 10 C.B.Rev. 756.

91. Adams, supra note 4, at 362.

92. The following account is based in part on Adams II, supra note 80, at 21-23, and in part on materials filed in the Provincial Archives of Ontario, Box 30 of A-G's materials on the Communist Party of Canada. This comprises documents seized in the August 11, 1931 raids as well as some of the documents relating to the 1931 trial.

93. AG 30L0923-0927. Re Rex vs. Buck et al., Sedgwick memorandum to Attorney General, October 17, 1931.

94. PAO AG materials. Bill of Particulars, para. 6.

95. Adams II, supra note 80, at 32.

96. Scott, supra note 88, at 516-7.

97. This account is based on Adams II, supra note 80, at 28-9. According to Adams, Tom McEwen dismissed the Comintern author as a "bright young enthusiast with more imagination than common sense." (30).

98. R. v. Buck (1931), 57 C.C.C. 290, at 311.

99. PAO AG materials.

100. Adams II, supra note 80, at 35.

101. T. Buck, Thirty Years: The Story of the Communist Movement in Canada (Toronto: 1952), at 90.

102. PAO AG 30L0943, Armour to Sedgwick, November 20, 1931; 30L0945, Sommerville to Sedgwick, November 23, 1931: "very regrettable that he should have struck out the Young Communist League and the Workers Unity League. I am at a loss to understand how we can proceed by way of appeal."

103. quoted in Adams II, supra note 80, at 11. Ironically, it was Sir William Mulock, now 89 years of age, who in 1892 had spoken most strongly against adding Stephen's definition of seditious intention to the Criminal Code: "I will oppose anything which will prevent a man from expressing his views in regard to any matter against the state or in the state." H of C Debates, 1892, at 2837. See Friedland, supra note 6, at 17.

104. R. v. Buck, supra note 98, at 293.

105. quoted in Adams II, supra note 80, at 37.

106. quoted in Adams II, at 38. Thirty years later, when Star reporter Ross Harkness wrote the official biography of the Star's publisher, J.E. Atkinson of the Star (Toronto: 1963), a little revisionism was deemed appropriate. "To tell the truth," said Harkness, "The Star was more than a little shocked at the result of its appeal to the rule of law. ...Hereafter The Star was to appeal to justice more often than to law." (at 293-4).

107. Adams II, supra note 80, at 38, says the Forum was the only

non-communist publication to oppose the verdict. However, it is unclear whether he examined labor newspapers or ethnic publications for commentary on the trial. The Trades and Labor Congress came out against the conviction of the CP leaders and continued to vote in annual convention throughout these years for repeal of section 98. H of C Debates, February 16, 1933, at 2186, per Hon. E. Lapointe. See also Petryshyn, supra note 63, at 13 on the TLC resolution.

108. F.R. Scott, "Communists, Senators and All That," Canadian Forum, January 1932, at 127-9.

109. Scott, supra note 88, at 514.

110. ibid., at 526.

111. H of C Debates, February 22, 1932, at 380.

112. ibid., March 7, 1932, at 845.

113. PAO AG files.

114. R. v. Evans (1934), 62 C.C.C. 29, at 29-30.

115. Adams, supra note 4, at 486.

116. R. v. Evans, supra note 114, at 37. Possibly the Buck trial record was consulted; a letter to Ontario Attorney General Price from H.W. Galbraith, a barrister in Vernon, B.C., dated 13 June 1933, asks for the trial materials. "I am interested in a similar case which comes on for hearing at the Assizes adjourned to September 6th." PAO AG 30L0953.

117. R. v. Feigelman (Que. K.B., unreported). H of C Debates June 19, 1936, at 3904.

118. Adams, supra note 4, at 486; Rev. A.E. Smith, All My Life: An Autobiography (Toronto: 1977), at 147.

119. R. Liversedge, Recollections of the On to Ottawa Trek (Toronto: 1973), at 197.

120. Canadian Annual Review, 1935-36 (Toronto: 1939), at 312-14. Jameson, in Times of Trouble, supra note 78, at 246, provides a garbled account of the incident, citing the same source; according to him, five truckloads of men were arrested and charged under section 98.

121. Smith, supra note 118, at 181.

122. Smith, ibid., at 146, reports that "In 1931 there had been 720 arrests and 155 convictions. In 1932 there were 839 arrests and over 200 convictions with sentences totalling 115 years of imprisonment." Those were presumably cases known to the Canadian Labor Defense League. There were probably others, and it is unlikely that the pace of arrests slackened appreciably before the mid-1930s.

123. PAO AG 30L0954.

124. Petryshyn, supra note 63, at 12.

125. ibid., at 14.

126. ibid., at 13.

127. ibid., at 15.

128. ibid., at 17.

129. Adams, supra note 4, at 487.

130. H of C Debates, February 14, 1933, at 2102-3.

131. ibid., at 2101-2.

132. ibid., at 2098.

133. ibid., at 2411-2.

134. The following account is based on Petryshyn, supra note 63, at 16 et seq., unless otherwise indicated.

135. Smith, supra note 118, at 165.

136. ibid., at 166.

137. J.L. Cohen, who normally defended party members, declined to take the case.

138. Smith, supra note 118, at 173.

139. Mass Unity Wins!--The Story of the A.E. Smith Trial, reprinted in Smith, ibid., at 250.

140. L. Zakuta, A Protest Movement Becalmed: A Study of Change in the CCF (Toronto: 1964), at 42-44.

141. G. Caplan, The Dilemma of Democratic Socialism (Toronto: 1973), at 38.

142. Caplan, ibid., at 57 says there were only two people of CP background in the committee, William "Moriarity" (Moriarty) and Jack MacDonald. He says Moriarty was a "Trotskyite" and MacDonald a "Lovestoneite"; in fact the labels should be reversed. See Angus, supra note 16, at Part III at 199 et seq. It should be recalled that the CP was still slandering the CCF as "social fascist" in this period, not having shifted yet from its ultraleft phase into the "People's Front" strategy of programmatic alliances with liberals and capitalists.

143. Caplan, ibid., at 42-3.

144. ibid., at 50.

145. ibid., at 50-1.

146. This account is based on Caplan, ibid., at 51-6.

147. ibid., at 56.

148. Neatby, supra note 61, at 36.

149. ibid., at 113-6.

150. Logan, supra note 45, at 411.

151. H of C Debates, June 19, 1936, at 3908-9. The subsection is now substantially reproduced in ss. 60(4) of the present Code.

152. Friedland, supra note 6, at 23-4.

153. H of C Debates, June 19, 1936, at 3901.

154. ibid., at 3902.

155. ibid., at 3908.

156. ibid., at 3909.

157. ibid., at 3910.

158. ibid.

159. ibid., at 3911.

160. ibid., at 3923.

161. ibid.

162. ibid., at 3929.

163. S.Q. 1937, c. 11, ss. 3, 4, 12, 14. See H. Quinn, The Union Nationale: A Study in Quebec Nationalism (Toronto: 1963), at 126.

164. Neatby, supra note 61, at 235-6, 267-8.

165. Switzman v. Elbling [1957] S.C.R. 285. Five judges held that the Act was tantamount to the creation of a new crime and therefore within federal jurisdiction as a matter of criminal law, and three judges classified the Act as in relation to speech and on that ground a matter of federal jurisdiction.

166. M. Fournier, Communisme et anticommunisme au Québec 1920-1950 (Laval: 1979), at 55-6.

167. Petryshyn, supra note 63, at 26.

168. See, for example, R. v. Lebedoff (No. 2) (1950), 98 C.C.C. 117 (B.C.C.A.), affirming conviction under s. 133 (seditious conspiracy) of a Doukhobor leader for "emphatic exhortation to refuse to register births, deaths and marriages under provincial law." In Boucher v. The King, supra note 8, the accused, a Jehovah's Witness, had published a pamphlet attacking the administration of justice in Quebec, its courts, judges, and clergy, in intemperate language, but without

advocating violent means. The majority of the Supreme Court of Canada held that in the absence of an intention to incite violence, or violent resistance to or violent defiance of lawful authority, there could not be a seditious intent. It is of interest that the Court's major decision circumscribing the scope of seditious intent came in a case that had nothing to do with a revolutionary political challenge to the government or state.

169. Petryshyn, supra note 63, at 25-26.

170. Public Order Regulations, 1970/SOR/70-444, proclaimed October 16, 1970.

171. S.C. 1970, c. 2, s. 3.

172. House of Commons, 32nd Parliament, Bill C-9 (First reading January 18, 1984), ss. 12(1), 2(d).

173. Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, Second Report, Vol. 1: Freedom and Security Under the Law (Ottawa: 1981), at 63.

174. ibid., at 72.

175. ibid., at 66.

176. See note 168, and Friedland, supra note 6, at 24.

177. Mackenzie, supra note 2, at 480.

178. Adams II, supra note 80, at 13.

179. ibid., at 47.

180. O. Kirchheimer, Political Justice: The Use of Legal Procedure for Political Ends (Princeton: 1961), at 160.

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