The Abolition of the Legislative Council of Nova Scotia, 1925-1928

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December 7, 2011

A thesis submitted to McGill University in partial fulfillment of the requirements of the degree of Master of Laws.

Abstract

From 1758 to 1928, Nova Scotia had a bicameral Legislature made up of the House of Assembly and the Legislative Council. In the period following Confederation, the Legislative Council came under increasing fire as unnecessary, expensive, and anachronistic. Yet, for a period of half a century, all efforts to abolish it failed. Following the landslide Conservative victory in the provincial election of 1925, however, incoming Premier Edgar Nelson Rhodes led a crusade to abolish the Legislative Council once and for all, a crusade that ultimately led to the Judicial Committee of the Privy Council in Westminster. Armed with a Privy Council opinion permitting him to dismiss existing members of the Legislative Council and appoint an unlimited number of replacements, on February 24, 1928, Rhodes was able to push through an abolition bill. At the end of the 1928 session, the Legislative Council ceased to exist, its powers devolved upon the House of Assembly and Lieutenant-Governor. This thesis examines the history of this battle, including the nature of the Nova Scotia constitution, Rhodes' initial push for abolition, his appeal to Ottawa when that proved unsuccessful, the litigation before the Supreme Court of Nova Scotia and the Judicial Committee of the Privy Council, and the final abolition of the Legislative Council.

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De 1758 à 1928, la Nouvelle-Écosse a eu une législature bicamérale constituée de la Chambre d'assemblée et du Conseil législatif. Au cours de la période suivant la Confédération, le Conseil législatif fut incessamment attaqué, accusé d'être inutile, coûteux et anachronique. Cela étant, durant une période d'un demi-siècle, tous les efforts pour l'abolir faillirent. Suite à l'écrasante victoire des Conservateurs aux élections provinciales de

1925, cependant, le Premier Ministre entrant Edgar Nelson Rhodes lança une croisade pour abolir définitivement le Conseil législatif, qui arriva jusqu'au comité judiciaire du Conseil privé à Westminster. Armé d'une opinion du Conseil privé lui permettant de démettre les membres existants du Conseil législatif et de nommer un nombre illimité de remplaçants, Rhodes put faire voter un projet de loi d'abolition le 24 février 1928. A la fin de la session législative de 1928, le Conseil législatif cessa d'exister, et ses pouvoirs furent dévolus à la Chambre d'assemblée et au lieutenant-gouverneur. Ce mémoire étudie l'histoire de cette bataille et se penche notamment sur la nature de la constitution de Nouvelle-Écosse, l'impulsion initiale donnée par Rhodes à la bataille pour l'abolition, son appel à Ottawa lorsque l'impulsion initiale fut infructueuse, le litige à la Cour suprême de Nouvelle-Écosse et au comité judiciaire du Conseil privé, et enfin sur l'abolition finale du Conseil législatif.

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Cover Image: Harry J Moss, composite photograph depicting members of the last Legislative Council (1928), Halifax, Province House Collection/CNS.

Acknowledgements

I would like to thank everyone who has provided assistance in bringing this thesis to a successful conclusion, most especially my supervisor, Tina Piper, who provided invaluable advice and support and who never turned me away from her office when I had a problem; my classmate and friend Mathilde Groppo for translating my abstract into French; the dedicated personnel at the Nova Scotia Legislative Library, Nova Scotia Archives & Records Management, and the McGill University Library Government Information Service for the assistance in locating the documents without which this story could not have been told; and the McGill University Faculty of Law for providing me with the research funding that enabled me to travel to Halifax, without which this thesis would not have been possible. Finally, I would like to thank Shannon and Thessaly for bringing joy to the half of my life that does not involve musty old documents.

I. Introduction

Visitors to Province House in Halifax, Nova Scotia, are likely to find three rooms of interest on the second floor. At the north end of the building is the power centre of the province: the Green Chamber, home of the Nova Scotia House of Assembly, where government and opposition have faced off since before the introduction of responsible government in 1848. Down the hall, across from the grand centre stairway, is the chamber formerly belonging to the Nova Scotia Supreme Court, where Joseph Howe defended himself against charges of seditious libel in 1835, now home to the beautiful Legislative Library. Finally, at the end of the hall, at the south end of Province House, is the Red Chamber, a room without a purpose since 1928, when its prior occupant, the Legislative Council, was abolished. In contrast to the still-living Green Chamber and Legislative Library, visitors will find the table and chairs of the Red Chamber blocked off by rope. It is, in essence, an empty museum to an unmourned entity.

Figure 1

The Red Chamber, photograph by Charles Paul Hoffman

From the origins of British government in Nova Scotia, there had been a council. The first, established in 1719, combined the roles of cabinet, court of appeal, and upper house

of the provincial Legislature. Known simply as the Council or the Council of Twelve (for the twelve members of which it was customarily composed), it came under increasing attack. In 1838, the British Government, finally giving in to popular demands for reform, split the Council of Twelve into separate Executive and Legislative Councils (the judicial functions having for the most part earlier been transferred to the Supreme Court of Nova Scotia).

Although the Legislative Council was initially accepted as an integral component of Nova Scotia government, as decades passed it came to be seen as increasingly antiquated and unnecessary, especially after Confederation transferred many of the most important (and controversial) concerns to the Dominion Parliament. While an appointed upper house might have served an important role when the Nova Scotia Legislature had to face questions of international trade, national defence, criminal justice, and navigation, it seemed an extravagance when the Legislature's jurisdiction had been circumscribed to matters such as education, public health, and management of public lands. Confederation also took a second toll on the Legislative Council, as it suddenly found its benches empty as Councillors left to take up seats in the Dominion government, House of Commons, or, especially, Senate. Robbed of its most important functions and its most respected members, the Legislative Council of Nova Scotia suddenly seemed a lot less important.

Even under these circumstances, the Legislative Council might have been able to survive, a vestige of an earlier time when all British-inspired governments had bicameral legislatures. But, one final fact militated against the Council: from the grant of responsible government in 1848 until the 1950's, the Liberal Party dominated Nova Scotian politics. During that hundred years, Conservatives held a majority in the Assembly only four times, from 1857-1860 (under Premier James W. Johnston), 1863-1867 (Premiers Johnston/

Charles Tupper/Hiram Blanchard), 1878-1882 (Premiers Simon H. Holmes/John Sparrow Davis Thompson), and 1925-1933 (Premiers Edgar Nelson Rhodes/George S. Harrington), for a total of less than nineteen years. As the Legislative Council consisted of members appointed for life by the Lieutenant-Governor on the advice of the Premier, this meant the Council was strongly dominated by the Liberals for almost the entire period. In 1882, for instance, the moment of greatest Conservative strength in the Council prior to 1928, the Liberals still held a majority of three.[1] This naturally created a situation in which the Conservative Party, never able to gain a majority in the Legislative Council, became vocal proponents of abolition, while the Liberals, the reforming party that had brought responsible government to Nova Scotia, were reticent defenders of the Council at best. The Legislative Council thus frequently found itself as its sole genuine defender, an awkward position for a house without democratic legitimacy.

While other Canadian provinces had also had Legislative Councils, none found it as difficult to achieve abolition. New Brunswick's Legislative Council was abolished within the ten years of the Andrew Blair administration (1882-1892) after Blair decided to delay any appointments to the Council until a majority of pro-abolition members could be named all at once.[2] Prince Edward Island, which had experimented with an elective Legislative Council, merged the two houses of its legislature in 1893, with half elected as assemblymen (by the electorate at large) and half councillors (by landowners).[3] Manitoba's Legislative Council, which had existed for only a brief six years, was abolished in 1876 after the

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[1] J Murray Beck, *The Government of Nova Scotia* (Toronto: University of Toronto Press, 1957) [Beck, *Government*] at 245.

[2] See Michael Gordon, *The Andrew G. Blair Administration and the Abolition of the Legislative Council of New Brunswick, 1882-1892* (MA Thesis, University of New Brunswick Department of History, 1964) [unpublished].

[3] Frank MacKinnon, *The Government of Prince Edward Island* (Toronto: University of Toronto Press, 1951) at 210-217. The "two houses in one" system continued until 1996.

Dominion government refused to subsidize the province unless it cut expenditures, the majority of which were spent on maintaining the Legislature.[4] The Legislative Council of Québec, which survived forty years longer than Nova Scotia's, did not come under serious critique until the Quiet Revolution of the 1960s; although it initially refused to abolish itself and the provincial government petitioned Westminster to amend the British North America Act to remove the upper house, the Council ultimately agreed when the the Union Nationale government offered to pay annual pensions to the councillors.[5] Other provinces lost their Legislative Councils at the same time as broader constitutional changes: the Colony of Vancouver Island lost its Council during its merger with mainland British Columbia; Ontario was created without a Council, though it had previously had one as part of the Province of Canada; and Newfoundland, which had a Council prior to the suspension of responsible government in 1933, lost it upon joining Canada in 1949.[6]

Nova Scotia, however, was different. For the better part of half a century, from 1879 to 1928, the Province sought to abolish its Legislative Council without success, with only a brief period of quiescence in the first decade of the Twentieth Century. Initially championed by Conservatives, Liberals soon jumped onto the abolition bandwagon, with Premier (and later federal Finance Minister) William Stevens Fielding submitting an address

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[4] G William Kitchin, "The Abolition of Upper Chambers" in Donald Cameron Rowat, ed, *Provincial Government and Politics: Comparative Essays* (Ottawa: Carleton University, 1973) 61-82 at 66-68.

[5] Kitchin, supra note 4 at 74-79. Some efforts had been taken in earlier years to abolish Québec's Legislative Council, but they were less focused than those in Nova Scotia and other provinces. See Sister Maura Ann Cahill, *The Legislative Council of Quebec: Attempts to Abolish or Reform, 1867-1965* (MA Thesis, McGill University Department of Economics and Political Science, 1966) [unpublished]. Indeed, when Nova Scotia abolished its Council in 1928, the Québec press strongly endorsed the continued existence of the province's own Legislative Council. See, e.g., "The French Press: Is Mr. Rhodes Right?", *The [Montreal] Gazette* (24 October 1927) 12 (reprinting and translating article originally appearing in *L'Action Catholique*); "The French Press: Nova Scotia and Its Legislative Council", *The [Montreal] Gazette* (24 October 1927) 12 (reprinting and translating article originally appearing in *La Presse*); "Nova Scotia Elections", *The [Montreal] Gazette* (7 September 1928) 12.

[6] Kitchin, supra note 4 at 61.

to the Queen asking for an amendment to the British North America Act to accomplish what was seen as otherwise impossible.[7] It was only after Westminster refused to act that Nova Scotia's political elite grudgingly accepted the Council's continued existence.[8] But even this temporary ceasefire would shatter with the passage of the imperial *Parliament Act, 1911*.

Like all upper houses in the British Empire, the Legislative Council had been modelled on the House of Lords; indeed, it was frequently referred to as the provincial "Lords".[9] While it was impossible to recreate the Lords in Canada, as there was no hereditary aristocracy from which to draw members, the desire was to create an unelected body composed of societal elites who might "arbitrate between the opposite tendencies of the Monarchical and the Democratic Branches of the Constitution, and when necessary, to control and harmonize both."[10] But, this theoretical foundation for the Council's existence was dramatically undercut when, in 1911, the House of Lords formally accepted the Commons' preeminence.

Coming after a prolonged battle between the Commons and Lords over a number of issues, notably Irish Home Rule and the Lloyd George "People's Budget" of 1909, that

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[7] Beck, *Government*, supra note 1 at 247-248; *Journals and Proceedings of the House of Assembly of the Province of Nova Scotia*, 30th Parl, 5th Sess (1894) at app 17

[8] See, e.g., "The Legislative Council", Editorial, *The [Halifax] Morning Chronicle* (1 April 1901) ("We might have to dispense with the Council if we could not afford it; but, now that we can afford it, we cannot afford to dispense with it. There is important and valuable work constantly on hand for the Council to do. And even were there not, there is always the possibility of conditions arising, in anticipation of which the Council more than justifies its existence. A man may not need a defensive weapon often in this happy country, and yet he may feel the lack of one very sorely upon occasion. The average intelligent Nova Scotian, we are convinced, will sleep much more tranquilly during Legislative sessions for the knowledge that the Council exists, and is available in case of necessity.").

[9] See, e.g., JG Cooper, "'House of Lords' Must Go, Premier Declares", *The Halifax Herald* (11 February 1927) 1.

[10] Letter from Lord Stanley to Viscount Falkland (20 August 1845), in *Journals and Proceedings of the Legislative Council of the Province of Nova Scotia*, 17th Parl, 4th Sess (1846) app 1 at 3-4; see also Beck, *Government*, supra note 1 at 102.

culminated in Prime Minister Asquith's threat (backed by King George V) to pack the Lords with Liberal peers,[11] the *Parliament Act, 1911* significantly reduced the Lords' power, effectively reducing what had been an absolute veto on legislation to merely a suspensory one.[12] Now, legislation passed by the Commons in three successive legislative sessions (separated by at least two years) would go into effect notwithstanding the lack of the Lords' assent; the Lords could delay proposed legislation for two years, but could no longer block it forever.

With the Lords neutered, it was only natural that Canadians would ask why their own upper houses remained "unreformed".[13] While the bulk of attention was dedicated to the Canadian Senate, the Legislative Council of Nova Scotia also came under fire. In 1916, Liberal-Conservative William Lorimer Hall (Queens County) introduced a bill designed to implement the *Parliament Act* in Nova Scotia.[14] Though Hall would have preferred to see the Legislative Council abolished, he was willing to accept reform as a next-best substitute.[15] Hall's bill was endorsed by Premier George Murray,[16] and was eventually

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[11] For detailed accounts, see Lucas Prakke, "Swamping the Lords, Packing the Court, Sacking the King" (2006) 2:1 European Constitutional Law Review 116; Roy Jenkins, *Mr Balfour's Poodle: Peers v. People* (New York: Chilmark Press, 1954).

[12] *The Parliament Act, 1911* (UK), 1 & 2 Geo V, c 13.

[13] See, e.g., Robert A Mackay, *The Unreformed Senate of Canada* (London: Oxford University Press, 1926).

[14] *Journals and Proceedings of the House of Assembly of the Province of Nova Scotia*, 35th Parl, 5th Sess (27 April 1916); see also "On Election Eve", Editorial, *The Halifax Herald* (17 April 1925) 6.

[15] See "Opposition 'Suspicions' Completely Dissipated by Premier Murray", *The [Halifax] Morning Chronicle* (3 May 1916) 2. The Assembly *Debates* omitted Hall's speech "owing to copy having gone astray." Nova Scotia, *Debates and Proceedings of the House of Assembly*, 35th Parl, 5th Sess (2 May 1916) at 553.

[16] Nova Scotia, *Debates and Proceedings of the House of Assembly*, 35th Parl, 5th Sess (2 May 1916) at 553 (George Murray) ("He had long regarded the constitution of the Province of Nova Scotia as one which should perhaps to some extent be remedied, and there could be no doubt as to his attitude in respect to the position that the voice of the elected representatives of the people of Nova Scotia in this branch of the Legislature should, under reasonable conditions, prevail, and he would be sorry to oppose any legislation which would have that general effect."); "Opposition 'Suspicions' Completely Dissipated by Premier Murray", *The [Halifax] Morning Chronicle* (3 May 1916) 2 ("It would be regrettable, he said, if the time should come when the wishes of the duly accredited representatives of the people could not be carried out. No impediment should be placed in the way of the elected representatives of the people.").

passed unanimously by the Assembly.[17] The Legislative Council, however, viewed the bill as a serious insult and issued a scathing response criticizing the Assembly for sending it the bill only "a day or two before prorogation" and noting that "no circumstances whatsoever have arisen within the knowledge of any member of the Council to warrant the introduction of such a measure at this time."[18] Unsurprisingly, the Legislative Council killed the bill, deferring its debate for three months, by which time the Legislature would have been prorogued[19] (referred to as the "three months hoist," this was—and continues to be—a favourite parliamentary technique to kill off undesirable bills, used not only by Council and Assembly, but also by the Dominion Parliament and other provincial legislatures). A bill introduced the following year by Robert M. McGregor (Pictou County), a member of the Executive Council without portfolio, passed unanimously by the Assembly with the full support of the Murray Government, almost instigated a strike by the Legislative Council; Murray quickly backed down, killing the bill, rather than permitting the threatened constitutional crisis.[20]

Eventually, however, reform would come to the Legislative Council—in 1925, after four years of dialogue between the Assembly and Council, the Legislature passed a reform bill that implemented the *Parliament Act, 1911* (with limited exceptions), reduced the tenure of office of future appointees to ten years, and imposed an age limit of seventy-five on future members. The act did not, however, permit the Council to be abolished by reliance on the

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[17] *Journals and Proceedings of the House of Assembly of the Province of Nova Scotia*, 35th Parl, 5th Sess (10 May 1916) at 217.

[18] Nova Scotia, *Official Report of the Debates and Proceedings of the Legislative Council,* 35th Parl, 5th Sess (11 May 1916) at 61.

[19] *Ibid.*

[20] See J Murray Beck, *Politics of Nova Scotia* (Tantallon, NS: Four East Publications, 1985) vol 2 [Beck, *Politics*] at 67.

new procedure; abolition would still require the assent of both Houses.[21]

This seemed to resolve the debate on abolition, and most likely would have but for the remarkably poor timing of the reform. The product of four years of negotiations between the the Assembly and Council, the act was passed in the final days of the 37th Assembly; less than two months later, the forty-three year old Liberal government would finally fall, toppled in a landslide defeat to the Conservative Party led by Edgar Nelson Rhodes.[22] Facing a Liberal-dominated Legislative Council and with the ink barely dry on the reform act, Rhodes acted almost immediately to try to abolish the Council, before reform led to renewed popular legitimacy that could threaten his legislative agenda.

This thesis will tell the story of Rhodes' battles with the Legislative Council and the provincial Liberals over abolition; of his attempts to exploit a constitutional "nuclear option" (to borrow a more recent phrase) to expand the Council beyond the traditional twenty-one; of how the matter was sent first to the Law Officers in Ottawa, then to the Supreme Court of Nova Scotia and to the Judicial Committee of the Privy Council; and finally, of the Council's last days before abolition. All the while, it will explore the major themes surrounding abolition: the nature of Nova Scotia's prerogative constitution, the meaning of responsible government, and the conflict between tradition and progress.

The remainder of this chapter will survey the existing literature relating to the Legislative Council of Nova Scotia and establish the methodology I have used throughout this thesis. Chapter Two focuses on the development of the Legislative Council's constitution, including its origins in the royal prerogative and attempts to impose something

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[21] *An Act to Amend Chapter 2, Revised Statutes, 1923, 'Of the Constitution, Powers and Privileges of the Houses'*, SNS 1925, c 15.

[22] "Nova Scotia Returns to Responsible Government: Great Opposition Victory", *The Halifax Herald* (26 June 1925) 1.

more permanent on that foundation of sand. Chapter Three then turns to the Conservatives' victory in the 1925 Nova Scotian election and Rhodes' first attempts in 1926 to abolish the Legislative Council. Chapter Four continues with the 1926-1927 litigation before the Supreme Court of Nova Scotia and the Judicial Committee of the Privy Council. Chapter Five then backtracks slightly to the 1927 legislative session before moving on to the Council's final days in 1928 and the aftermath of the abolition battle. Finally, Chapter Six seeks to draw what conclusions may be drawn from the abolition battle.

A. Survey of Existing Literature

The Legislative Council of Nova Scotia has largely been ignored by scholars and general historians. Indeed, I originally chose to research the Council due to the dearth of existing literature, a dearth confirmed both by my comprehensive search for materials and my discussions with other legal historians and historians of Atlantic Canada.

1. J Murray Beck

The most comprehensive treatment of the Legislative Council is in J. Murray Beck's *The Government of Nova Scotia*. Published in 1957, Beck's study dedicated twenty-two pages to the constitution of the Legislative Council, its functioning, and its abolition,[23] though the historical chapters on Nova Scotian government prior to Confederation provide additional information,[24] and Beck also provided two appendices detailing the ages of Councillors[25] and the legislative record of the Council.[26] Because the entire history of the Council is squeezed into these limited pages, however, there is much that is glossed over. The efforts

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[23] Beck, *Government*, supra note 1 at 231-252.

[24] *Ibid* at 44-62, 100-127 (historical chapters on the legislative function).

[25] *Ibid* at app J.

[26] *Ibid* at app K.

to abolish the Council from 1878 to 1882 are dealt with in two paragraphs;[27] those from 1882 to 1896 in four;[28] and the 1896 to 1925 period, in which the Council was substantially reformed, is given only five paragraphs.[29] Even the final abolition, achieved after great effort in 1928, is given only five paragraphs.[30] This is not to denigrate Beck's work, which has proved exceptionally helpful in my own study of the Legislative Council, but to show the limited nature of even the most complete existing literature.

While Beck's two volume *Politics of Nova Scotia*[31] does not contain a section dedicated exclusively to the Legislative Council, there are scattered references to it throughout the historical narrative. In some cases, it includes information not provided by *The Government of Nova Scotia*. Unfortunately, Beck's later work was written more for a general than an academic audience, and many of the referenced details are not cited to any sources, or insufficient information is provide to locate the original source (as where he claimed information came from the *Halifax Herald*, but did not provide a date). But, the two volume set was invaluable in providing historical context for many of the events under consideration.

Insofar as other writers have considered the Legislative Council at any length, Beck's work has been highly influential. For example, in a chapter on the abolition of legislative councils in Canada, G. William Kitchin relied entirely upon Beck's *Government of Nova Scotia* for his description of the Nova Scotia abolition.[32] Thus, the existing literature on the

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[27] *Ibid* at 245.

[28] *Ibid* at 245-248.

[29] *Ibid* at 248-249.

[30] *Ibid* at 249-252.

[31] Beck, *Politics*, supra note 20.

[32] Kitchin, supra note 4 at 71-73.

Legislative Council is even more restricted than it initially appears, as several works are largely derivative.

2. *Other Literature on Legislative Council Abolition*

Very little scholarship relating to the Legislative Council exists from the period prior to abolition. The most significant was a presentation by constitutional scholar John George Bourinot during the 1896 annual meeting of the Royal Society of Canada. The presentation, entitled "Some Contributions to Canadian Constitutional History: The Constitution of the Legislative Council of Nova Scotia", focused largely on the Commissions and Instructions of Nova Scotia's colonial governors, but ultimately shifted to the effects of the 1845-46 correspondence between the Colonial Office and the Legislative Council.[33] In Bourinot's view, the 1845-46 correspondence was a moral contract between the sovereign and the Legislative Council, which had become a customary part of the Province's constitution; but, while the changes wrought were as much a part of the constitution as the recognition of responsible government, Bourinot recognized they were just as unenforceable in court.[34] Somewhat surprisingly given his stature in late Nineteenth-Century constitutional law, his article was not referenced directly in either of the court decisions concerning the Legislative Council's constitution, nor in the 1926-1928 abolition debates; either his article had been forgotten in the intervening years or neither side in the debate viewed it as helping their cause significantly, as it argued the Councillors' tenure was for life under constitutional convention, but that that convention could not be enforced in court.

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[33] JG Bourinot, "Some Contributions to Canadian Constitutional History: The Constitution of the Legislative Council of Nova Scotia" (1896) 2 Proceedings and Transactions of the Royal Society of Canada (Second Series) Section II 141.

[34] *Ibid* at 170.

Bourinot's arguments were cited by Arthur Berriedale Keith's later *Responsible Government in the Dominions*, the second edition of which was written while the Privy Council appeal was pending.[35] While Berriedale Keith dismissed the argument that the 1845-46 correspondence took precedence over subsequent royal instructions, he agreed that life tenure had become constitutionally protected "seeing that the practice of life appointments has so long endured."[36] In total, however, Berriedale Keith dedicated less than four pages over two chapters to the Legislative Council of Nova Scotia, though this was substantially better coverage than that offered to the Legislative Council of Québec.[37]

The period immediately preceding and following the Legislative Council's abolition would also see several articles concerning abolition in legal and academic journals. The first, a "Case and Comment" appearing in *The Canadian Bar Journal* after the Judicial Committee of the Privy Council's decision, but before the abolition vote itself, began as a standard recitation of the Privy Council decision, but ended with a curious aside that the "case may fairly be regarded as another instance of the complete frustration of the actual objects of confederation by judicial decision", but that this might not be a bad thing, given the need for a constitution to be "constantly and continually developed by judicial interpretation so as to conform with the needs and desires of the ages which it serves."[38]

A year after the Council's abolition, an article by University of Toronto Professor Norman Mackenzie appeared in the *Journal of Comparative Legislation & International Law*.[39]

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[35] Arthur Berriedale Keith, *Responsible Government in the Dominions*, 2d ed (Oxford: Clarendon Press, 1928) vol 1 at 470.

[36] *Ibid* at 471.

[37] *Ibid* at 428-429, 470-472.

[38] JE R, "Case and Comment" (1928) 6:1 Can Bar J 60 at 64-65.

[39] Norman Mackenzie, "Constitutional Questions in Nova Scotia: The Attorney General of Nova Scotia v. The Legislative Council of Nova Scotia" (1929) 11 Journal of Comparative Legislation & International Law (Third Series) 87.

Effectively a case comment, the article focused on the Supreme Court of Nova Scotia and Privy Council decisions, citing each at length (and apparently drawing from the two cases most of the other information in the article; no citations are provided). While the article provides a serviceable summary of the issues and a brief background of the situation, it provides little genuine commentary on the decisions; instead, it merely reports on what had happened, with a final note that "it is in accordance with the principles of responsible government that the elected chamber should ultimately control the form of government and the destinies of a country".[40]

Finally, future Senator Eugene Forsey, then serving as Director of Research for the Canadian Labour Congress and Visiting Professor at Carleton University, published a 1967 article on provincial requests to amend the British North America Act, written in response to Québec's attempts to abolish its own Legislative Council.[41] While the brief article provides little substantive information and discusses only the early attempts to abolish the Nova Scotia Council that are outside the scope of this thesis, it does highlight a similarity between the abolitions of Canada's last two remaining Legislative Councils.[42]

Considered together, the existing literature on the Legislative Council is highly disappointing. While some studies, notably Bourinot's and Beck's, provide significant analysis of aspects of the Council abolition debates, none provides the complete story of abolition or offers a comprehensive analysis. This thesis attempts to fill in that missing gap, at least for

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[40] *Ibid* at 87.

[41] Eugene A Forsey, "Provincial Requests for Amendments to the B.N.A. Act" (1967) 12 McGill LJ 397.

[42] A brief anecdotal aside: while reviewing the late Nineteenth-Century journals and debates, I was surprised to discover underlining in one of the volumes covering the petitions to Westminster to amend the British North America Act. Initially surprised that someone else had used this very copy to conduct research on the Legislative Council, I quickly remembered Forsey's article. Almost certainly I was looking at Forsey's own underlining, or perhaps the underlining of someone assisting him.

the 1926-1928 period.

B. Methodology

Initially, I had planned to draft a thesis focused on one aspect of the Legislative Council's abolition—specifically, the competing discourses on the nature of responsible government and what it meant to be British in the debates surrounding the abolition battles. Upon discovering the dearth of existing scholarship and the limited availability of primary sources relating to the Legislative Council, however, I reassessed my plan. In order to prepare a careful analysis of these discourses, I would first have to reconstruct the debates themselves, a significant task in its own right. As such, my ultimate methodology is largely a narrative one, albeit a narrative interlaced with analysis meant to wrestle with the questions of why and how.

1. Legal History

Although the abolition of the Legislative Council could be viewed as solely a political history, I believe it is better thought of (and treated as) a legal history. First, the questions underlying the abolition battle were fundamental questions of provincial constitutional law. Though these questions—what is the nature of the Legislature, who has the power to make appointments, what is the nature of those appointments, etc.—relate to the structure of government rather than to rights, this makes those questions no less *constitutional*. Indeed, until 1982, the bulk of Canadian constitutional law focused on these sorts of questions (especially the distribution of powers between the federal and provincial governments).[43] While these questions are no doubt political, they are also constitutional.

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[43] See, e.g., Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977). The book, which totals 548 pages, dedicates less than thirty pages to civil liberties. *Ibid* at 417-443. Moreover, half of this focuses on the statutory Canadian Bill of Rights, which had only a quasi-constitutional status as to federal legislation. *Ibid* at 431-443.

Second, the particular history of the Nova Scotia constitution makes a legal analysis of these questions necessary. Unlike earlier or later colonies, Nova Scotia's constitution was largely unwritten; it was instead based on royal prerogative, as expressed through Commissions and Instructions to its governors. These instructions changed over time, were potentially modified by other correspondence between the Sovereign and the involved parties, and were in fact limited by imperial and provincial statute. Determining the nature of the constitution thus becomes a legal question, as the various documents comprising the provincial constitution must be interpreted and balanced against each other to ascertain the rules governing the Legislative Council and the individual Councillors. This interpretation is better suited for a legal than for a strictly political analysis.

Finally, insofar as the abolition battle played out in the courts (first the Supreme Court of Nova Scotia and later the Judicial Committee of the Privy Council), it is incontestably legal history. In a limited view, this entire study could be seen as providing the background and context to the two judicial decisions. Instead, however, I see it as examining the broader constitutional debates in the Legislature and in the courts. Though those debates took on a political tone, they were fundamentally questions of constitutional law.

Having established that this is to be a work of *legal* history, I will now explain my specific choice of methodology.

2. *Legal History Methodologies*

Building on the earlier work of Harvard Law School Professor William W. Fisher, III,[44] R. Blake Brown developed a taxonomy of six methodological approaches to Canadian legal history. Brown's six methodologies are: (1) descriptive economic analysis, which "argues

[44] See, e.g., William W Fisher, III, "Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History" (1997) 49:5 Stan L Rev 1065.

that legal rules, such as those in contract and tort law, have developed toward pre-ordained and allocatively-efficient ends";[45] (2) styles of legal thought, which "is essentially a form of internal legal history that explains the development of the law by linking legal change to broad shifts in the ways in which lawyers think about the law";[46] (3) progressive evolutionary functionalism, which theorizes that the law has developed in response to social needs, changing when prior norms became insufficient for present conditions;[47] (4) narrative, which tells stories about from or about the past, often with a focus on specific individuals or groups of individuals, especially the "'victims' of the legal system";[48] (5) dialectical materialism, which is a Marxist-influenced methodology that examines the "relationship between class and legal change";[49] and (6) intellectual legal history, which seeks to view legal history through the prism of intellectual history, such as through Edward Said's work on Orientalism.[50]

As noted above, I had originally intended to engage in an intellectual legal history of the abolition debates, relying in part on Foucault's work on discourse; in essence, I wanted to show the competing conceptions of responsible government and what it meant to be British offered by both sides of the abolition debate. It quickly became apparent, however, that this would not be possible until significant work had been done to reconstruct the debates themselves.

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[45] R Blake Brown, "A Taxonomy of Methodological Approaches in Recent Canadian Legal History" (2004) 34:1 Acadiensis 145 at 146.

[46] *Ibid* at 147.

[47] *Ibid* at 147-148.

[48] *Ibid* at 151-152.

[49] *Ibid* at 149.

[50] *Ibid* at 152-153.

3. Problems Faced in this Project

The first significant issue relating to this project was the absence of scholarly work relating to the Legislative Council, especially recent scholarly work, as noted above. While Beck's *Government of Nova Scotia* provided something of a background, it did not offer the comprehensive overview of abolition that would could serve as a foundation for a more theoretical approach to the debates. On its own, however, this would not have barred a theoretical approach to the abolition debates; it would simply have made it more difficult.

Of much greater concern was the disappearance or non-existence of key primary sources. As my research was to focus largely on the arguments raised in the legislative debates, I naturally turned to the printed House of Assembly and Legislative Council debates. Unfortunately, I soon discovered that Nova Scotia had ceased publication of the Assembly debates after 1916 and the Council debates after 1922, with publication picking up only in the 1950s. There were thus no published legislative debates from which I could draw these competing discourses.

Fortunately, the Halifax newspapers of the era were generally very good at covering any Assembly debates considered "important"; the abolition of the Legislative Council, a major change to the provincial constitution, was seen as important, and the debates were covered regularly and in fair depth. However, neither the *Halifax Herald* nor the *Morning Chronicle* (later the *Halifax Chronicle*) published anything that could be considered authoritative; both papers had strong partisan biases (the *Herald* being connected with the the Conservative Party and the *Chronicle* with the Liberals), meaning information was emphasized or left out depending on how it fit the papers' agendas. Moreover, if something else important was taking place, the papers would dedicate far less time to the Council

question. (During the first World War, for instance, the debates on reforming the Legislative Council were barely covered by either paper, which instead focused almost exclusively on news from the front; there is thus almost no record of the 1917 constitutional crisis.) Thus while the *Herald* and *Chronicle* provided significant records of the abolition debates, they had to be considered in tandem in order to arrive at something approaching the real turn of events. In effect, I was forced to reconstruct the legislative debates from the incomplete reports of two biased newspapers. This reconstruction was made all the more difficult by the fact that neither paper is indexed or is available online; I have thus been required to review on microfilm the entire run of each paper during the months when the Nova Scotia Legislature was in session, looking for any article, editorial, or letter to the editor that might be related to the Legislative Council. (In the case of the *Herald*, I reviewed the entire run from January 1925 through March 1928.)

To make matters worse, very few documents relating to Legislative Council abolition have been maintained in archives or governmental files. Nova Scotia Archives and Records Management (NSARM, previously the Public Archives of Nova Scotia) was established by an act of the Legislature in 1929, the year after the Legislative Council was abolished.[51] While NSARM holds a fairly comprehensive collection of Premier Edgar Nelson Rhodes' papers from late 1927 on, there are substantial gaps in the earlier period of his premiership (beginning in mid-1925). As such, Rhodes' papers provide fairly comprehensive coverage of the Legislative Council's final days, *after* the Judicial Committee of the Privy Council decision, but there is very little regarding Rhodes' decision to push for abolition, his negotiations with the Councillors in 1926-1927, his efforts to appoint in excess of twenty-

[51] *An Act Respecting the Public Archives,* SNS 1929, c 1.

one Councillors in March 1926, or the Supreme Court of Nova Scotia decision and appeal to the Privy Council.

While disappointing, these gaps in Rhodes' files might not have been critical but for the disappearance of other materials, notably the records of the Office of the Attorney General. NSARM's catalog lists among the Attorney Generals' files a folder identified "Legislative Council: re: legal matters, appointments, 1926-40".[52] Unfortunately, when I requested this file, I was informed that it had been missing since at least 1982, when NSARM moved into its present location. While the archivists were kind enough to attempt to locate the folder in other areas (e.g., RG10 F44), it was not and may never be located. As such, what may have been the best compilation of materials relating to the Legislative Council litigation, carefully collected into a single location for future researchers, is lost and inaccessible.

Other materials, while theoretically in existence, have proven inaccessible for other reasons. Any records of the Judicial Committee of the Privy Council relating to the litigation would be located at either the British Library or the National Archives of the United Kingdom.[53] Accessing these records would require a research trip for the sole purpose of attempting to locate documents which may or may not exist, may or may not

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[52] Office of the Attorney General of Nova Scotia, Legislative Council: re: legal matters, appointments (1926-1940), Halifax, Nova Scotia Archives & Records Management (NSARM) (RG10 E44) (missing since 1982).

[53] According to Maxwell Barrett, many of the Privy Council's pre-1940 records were destroyed when the Privy Council's offices in London were bombed during the Second World War. See Maxwell Barrett, *The Law Lords: An Account of the Workings of Britain's Highest Judicial Body and the Men who Preside over It* (London: Macmillan, 2001) at 169-170. However, according to Nandini Chatterjee, copies were sent to the House of Lords' library, since transferred to the British Library, and whatever documents survived in the Privy Council's office have recently been transferred to the National Archives of the United Kingdom, though these latter documents remain inaccessible as they are currently being processed. See Chatterjee, Nandini, "Records of the Judicial Committee of the Privy Council", Judging Empire: The Global Reach of the Judicial Committee of the Privy Council, online: University of Plymouth Centre for Humanities, Music and Performing Arts Research <http://www.plymouth.ac.uk/pages/view.asp?page=33168>.

be available if they do exist, and may or may not contain any information beyond that available through other sources. As such, the Privy Council records were not prioritized, though I hope to be able to review them at a future date.

I have, on the other hand, been able to confirm that Library and Archives Canada holds documents from the Office of the Secretary of State relating to Rhodes' 1926 request to appoint in excess of twenty-one members to the Legislative Council. These materials, however, have been designated as Restricted under the Privacy Act.[54] Although I have submitted an Access to Information Act request for the materials, on July 22, 2011, I received written notification that the confidentiality review of the documents would take up to a further ninety days. While I may ultimately gain access to these documents, it will not be in time to include in this thesis.

4. Choice of Methodology

Given these difficulties with accessing sources and the need to reconstruct the events leading up to abolition from the materials available, I have ultimately chosen to adopt a narrative approach for this thesis, with the goal of setting the foundation for future work regarding the Legislative Council, whether it be my own scholarship or that of others. But while I regard this thesis as foundational, that does not minimize its own scholarly value.

As noted above, narrative is a recognized methodology of Canadian legal history, albeit a methodology discouraged as insufficiently rigorous until the past two decades. More recently, however, narrative has become an important part of Canadian legal history, especially as a tool to tell the stories of marginalized groups, though its utility is not limited

[54] Department of Secretary of State, Proposed abolition of the Legislative Council of Nova Scotia, Ottawa, Library and Archives Canada (RG13 vol 2187) (designated as Restricted).

to them.[55]

According to Constance Backhouse, narrative

> is an effort to reconstruct and make sense of history through a close examination of discrete events, with identifiable protagonists, dramatic plot, scenic backdrop, and ideological perspectives that transform the endings. Above all, it is an effort to recapture the flavor of history through the microscopic dissection of historically critical moments. . . . Narrative legal history attempts to pique readers' interest with accounts of particularly traumatic and contentious legal disputes. It is deliberately accessible, a form of plain speaking, which self-consciously attempts to make legal history understandable to readers from various disciplines and to expand its audience beyond professional scholars.[56]

In many ways, this description fits perfectly the story of the Legislative Council's abolition: there are identifiable parties, battling against each other over the Council's future; the abolition battle itself is rather dramatic, with behind the scenes plotting, attempted pay-offs, and appeals to Ottawa and to London to resolve the issue; and the ideological implications go hand-in-hand with the events themselves—it would, in fact, be impossible to consider abolition in non-political terms. The abolition battle is thus a prime candidate for a narrative approach, especially considering the lack of an existing comprehensive account of the Legislative Council's demise.

And yet, the abolition battle remains highly technical in places, especially when considering the specifics of the Nova Scotia constitution. As such, I have adopted a modified narrative approach. This thesis is, for the most part, a reconstruction and a retelling of the story of the Legislative Council's demise. But, where appropriate, I have included commentary to provide context or to seek to elucidate unclear aspects of the record. Readers will no doubt find that the specifically "legal" chapters (i.e., those relating

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[55] See Constance Backhouse, "The White Women's Labor Laws: Anti-Chinese Racism in Early Twentieth-Century Canada" (1996) 14:2 Law & Hist Rev 315 at 316.

[56] *Ibid* at 315-316.

to the development of the Legislative Council's constitution or the court decisions surrounding abolition) are more consistent with doctrinal work, while the chapters detailing the legislative debates adhere more strictly to the narrative approach. All chapters, however, contain aspects of narrative and aspects of doctrinal analysis.

C. A Note on Terminology

Throughout this thesis, I have attempted to use the historical terms that would have been used by individuals engaged in the abolition debates. Notably, I have used "British North America Act" rather than "Constitution Act, 1867", as well as the historical adjective "Dominion" (as in, "Dominion government") to refer to federal Canadian institutions. In both cases, the older terms emphasize the connection between Nova Scotia, Canada, and the Empire, a connection that is exceptionally important to some aspects of the abolition debate (e.g., the question of whether the power to dismiss Councillors remained with the Sovereign or had been transferred to the Lieutenant-Governor of Nova Scotia, or, indeed, the need to appeal to the Judicial Committee of the (Imperial) Privy Council).

In addition to maintaining a sort of historical accuracy, using these terms also provides a consistency to the text; I have been able to avoid situations where the terminology changes depending on whether a statement is in my own voice or in the voice of others.

Similarly, I have adopted the practice of the period of referring to the Legislative Council as simply "the Council," except where this would create confusion. Unless in a direct quotation, the term "Council" is never used by itself to refer to the Executive Council, or to the Legislative Councils of other provinces, although it is used in some circumstances to refer to the pre-1838 Council of Twelve (though only where context makes it absolutely clear which council is intended); in all other circumstances, the term

refers to the Legislative Council of Nova Scotia.

To avoid changing terms, I have also used "Sovereign" throughout to refer to the British Monarch unless the reference is to a specific individual. This was done as avoid switching between Queen and King, depending on the time in question. I have used "Sovereign" rather than "Crown," as this latter term would in some cases be ambiguous, as it is often used to mean something analogous to "the state" rather than "the monarch".

Finally, for the sake of brevity, I have frequently referred to the *Halifax Herald* as simply the *Herald* and the *Morning Chronicle* (later, the *Halifax Chronicle*) as the *Chronicle*. In all cases, however, full citations are provided in the footnotes.

II. The Legislative Council in the Nova Scotia Constitution

Unlike the Canadian federal government or the governments of Ontario, Quebec, and other provinces created in or after 1867, there is no single document or set of documents to which one can look to ascertain the Nova Scotian constitution. While the British North America Act, 1867, included detailed constitutional provisions on the governments of Ontario[1] and Quebec,[2] the constitution of Nova Scotia continued as it existed prior to Confederation, except insofar as it was changed by the British North America Act itself: "The Constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act."[3] Moreover, unlike many of the colonies of the First British Empire, Nova Scotia was not granted a colonial charter establishing the terms of its government.[4] Instead, Nova Scotia's constitution was based largely on royal prerogative, as expressed in the Commissions and Instructions presented to the Province's pre-Confederation Governors.[5]

The British North America Act attempted to set into stone Nova Scotia's prerogative constitution, as it existed at the time of Confederation. But, what did that mean? A

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[1] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3 s 63, 69-70, 81-87, reprinted in RSC 1985, App II, No 5 [*Constitution Act, 1867*].

[2] *Constitution Act, 1867*, s 63, 71-87.

[3] *Constitution Act, 1867*, s 88.

[4] See Elizabeth Mancke, "Colonial and Imperial Contexts" in Philip Girard, Jim Phillips & Barry Cahill, eds, *The Supreme Court of Nova Scotia, 1754-2004: From Imperial Bastion to Provincial Oracle* (Toronto: Osgoode Society for Canadian Legal History, 2004) 30-50 at 33-36.

[5] *Ibid* at 33.

prerogative constitution implied one that could be changed by the Sovereign, yet the British North America Act suggested the constitution was locked in place. Did the British North America Act remove prerogative—that is, eliminate the Sovereign's ability to change the constitution of the Province at will—or did it merely state that the provincial constitution would continue to be built upon sand until affirmative action by the Nova Scotia Legislature?

For almost sixty years after Confederation, the predominant view in Nova Scotia was that the British North America Act had, indeed, locked the Province's constitution in place, so that it could no longer be changed by simple prerogative.[6] Instead, the royal prerogative to amend the constitution had been delegated to the Nova Scotia Legislature.[7] This view would only unravel slowly, as the Judicial Committee of the Privy Council recognized the continuing role of prerogative in the provincial constitutions.[8]

In order to understand these later debates, however, we must first examine the origins of Nova Scotia's prerogative constitution, particularly those provisions relating to the Legislative Council.

A. The Council of Twelve

Depending on how one views the issue, the Legislative Council dated back to 1719

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[6] See, e.g., JG Bourinot, "Some Contributions to Canadian Constitutional History: The Constitution of the Legislative Council of Nova Scotia" (1896) 2 Proceedings and Transactions of the Royal Society of Canada (Second Series) Section II 141.

[7] *Constitution Act, 1867*, s 92(1) ("In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say—1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.") (repealed); Bourinot, supra note 6. See also J Murray Beck, *The Government of Nova Scotia* (Toronto: University of Toronto Press, 1957) at 173 [Beck, *Government*] (quoting Sir John A Macdonald for argument that after the British North America Act, the provincial Lieutenant-Governors possessed "no right to deal with matters of prerogative as representatives of the sovereign."); Donald Creighton, *John A Macdonald: The Old Chieftain* (Toronto: Macmillan, 1955) at 261.

[8] See, e.g., *Bonanza Creek Gold Mining v R*, [1916] 1 AC 566, 26 DLR 273 (PC); *Maritime Bank of Canada (Liquidators of) v New Brunswick (Receiver-General)*, [1892] AC 437, 61 LJPC 75 (PC).

(the first Council, which combined executive, legislative and judicial functions), 1838 (the split of the earlier Council of Twelve into separate Legislative and Executive Councils), or 1861 (the reformation of the Legislative Council in Governor-in-Chief Monck's Commission of office).

The original Council (generally known as the Council of Twelve) dates to 1719, when it was created pursuant to the Commission and Instructions given to Richard Philipps, third Governor of the newly-acquired Province of Nova Scotia. Philipps' original Commission, dated July 1719, authorized him "to appoint such fitting and discreet persons as you shall either find there or carry along with you, not exceeding the number of twelve, to be our Council in the said province, till our further pleasure be known, any five whereof we do hereby appoint to be a quorum."[9] Upon arriving in Nova Scotia in April 1720, Philipps did just that, appointing a council "consisting of himself and eleven officers and townsmen."[10] This initial Council of Twelve consisted primarily of military officers, as there were as yet few British settlers and the Acadians were not seen as appropriate for appointment.[11] For similar reasons, Philipps did not call an Assembly, though he had been instructed to do so in his Commission, and legislation for the Province was impossible in its absence. In the meantime, Philipps' commission stated that he could refer to the Instructions to the governor of Virginia, which provided something of a framework for government in the absence of an Assembly or formal charter.[12]

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[9] See *Reference re Legislative Council of Nova Scotia* (1926), 59 NSR 1 at para 70, 1926 CarswellNS 44 (NS SC) (Chisholm, J) [*Supreme Court Reference*].

[10] J Murray Beck, *Politics of Nova Scotia* (Tantallon, NS: Four East Publications, 1985) vol 1 at 9 [Beck, *Politics*, vol 1].

[11] Bourinot, supra note 6 at 141-142.

[12] Beck, *Politics*, vol 1, supra note 10 at 9-10. The Board of Trade had purposely selected Virginia as the model as it had believed Massachusetts had deviated too far from the British ideal.

Philipps initial presence in Nova Scotia was short-lived; he returned to England in 1722, leaving the Province in the hands of Lieutenant-Governors John Doucett and Lawrence Armstrong (from May 1725).[13] After Armstrong provoked a crisis by demanding the local Acadian population swear an unqualified oath of allegiance (the Acadians sought to limit the oath so as not to require them taking up arms), however, the Board of Trade instructed Philipps in July 1729 to return to the Province.[14]

Where Philipps' initial instructions had been but a framework for the government of the Province, the Board of Trade's 1729 instructions filled in many of the earlier gaps, including the functioning of the Council of Twelve. After an introductory clause telling Philipps to return to Nova Scotia and to summon the Council,[15] the Commission set forth the constitution of the Council of Twelve. Apparently presuming that the first Council had dissolved, the Board of Trade instructed Philipps to appoint a Council and relay the "names and characters" of his appointees to His Majesty and to the Board of Trade.[16] Once this Council had been established, however, Philipps lost his power "to augment [or] diminish the number of said Council, nor suspend any of the members thereof, without good and sufficient cause".[17] Instead, he was to provide His Majesty and the Board of Trade with a list of twelve prospective councillors, from whom appointments could be made in the event of vacancies. As vacancies occurred, Philipps was to update this list, so that it always contained

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[13] *Ibid* at 9-10.

[14] See *Ibid* at 11.

[15] Instructions for Richard Phillips, Esq, Captain-General and Governor in Chief of Nova Scotia (1 July 1729) at para 2, in Parliament, *Sessional Papers*, No 70 (1883) at 25-30 [Instructions for Richard Phillips].

[16] *Ibid* at para 2-3.

[17] *Ibid* at para 4.

the names of twelve potential appointees.[18] But, should such vacancies result in a Council with fewer than seven members, Philipps was empowered to provisionally appoint up to a total of seven Councillors.[19] To facilitate the operation of the Council, however, members might be dismissed if they were absent from the Province for longer than one year without Philipps consent or two years without His Majesty's consent;[20] similarly, they could be dismissed for being willfully absent without just cause from Council meetings to which they had been duly summoned.[21] Finally, the Board of Trade ordered that Councillors be granted "freedom of debate and vote in all affairs of public concern that may be debated in Council."[22]

In practice, this early constitution of the Council of Twelve made operations difficult. Though it should have been easy to obtain a quorum of five in a body of twelve, the Governor's inability to dismiss Councillors made this increasingly difficult as time went on. Councillors might be away from the Province for less than twelve months, might be unable to attend due to age or infirmity, or might be absent for some other "just and lawful cause". This problem was exacerbated by the fact that tenure of office, while technically at pleasure, was treated as effectively one of life, so a once-productive Councillor might long-since have turned into dead weight, appearing only enough at meetings so as to avoid dismissal. In addition, the Board of Trade generally ignored the Governors' lists of proposed members, instead appointing other politically-connected individuals, meaning the Council

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[18] *Ibid* at para 7.

[19] *Ibid* at para 8.

[20] *Ibid* at para 5.

[21] *Ibid* at para 6.

[22] *Ibid* at para 3.

quickly became composed of individuals who might not jump at the Governor's call to meet.[23]

When the seat of government was moved from Annapolis Royal to Halifax under Governor Edward Cornwallis, the Council of Twelve was reconstituted with new membership and a slightly modified constitution.[24] Cornwallis and his successors could now appoint provisionally up to nine Councillors.[25] In 1764, the Commission appointing Governor Montagu Wilmot would also limit the time Councillors could be out of the Province without the consent of the Governor or Sovereign to six months and one year, respectively.[26] Neither reform, however, seems to have eliminated the problems with maintaining quorum.[27]

When the Council of Twelve did operate, it exercised executive, judicial, and (after 1758) legislative powers.[28] In addition to acting as Nova Scotia's cabinet (with members typically serving in such roles as Chief Justice, Provincial Secretary, Treasurer, Surveyor-General, or Attorney General),[29] the Council also acted as the Province's General Court, which had original jurisdiction in criminal cases and appellate jurisdiction in civil matters

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[23] See Beck, *Government*, supra note 7 at 19.

[24] See Beck, *Politics*, vol 1, supra note 10 at 19.

[25] See *Supreme Court Reference*, supra note 9 at para 72 (Chisholm, J). See also Instructions to Governor Wilmot (16 March 1764) at para 5, in Parliament, *Sessional Papers*, No 70 (1883) at 30-38 [Instructions to Governor Wilmot].

[26] Instructions to Governor Wilmot, supra note 25 at para 8.

[27] See Beck, *Government*, supra note 7 at 19.

[28] In the words of later Lieutenant-Governor Archibald, "The Council as it was then constituted under the Royal Instructions, was, while sitting in one capacity a constituent branch of the Legislature. While in another its members were the advisors of the Lieutenant-Governor." Address of Lieutenant-Governor Adams G. Archibald to the Legislative Council (11 April 1883), in *Journals and Proceedings of the Legislative Council of the Province of Nova Scotia*, 28th Parl, 1st Sess (1883) at 104-111 [Address of Lt-Gov Archibald].

[29] See Beck, *Government*, supra note 7 at 20-21.

concerning a dispute over £300.[30] This judicial function was reduced, but not wholly eliminated, upon the creation of the Supreme Court of Nova Scotia in 1754.[31] Finally, after the first Assembly was finally called in 1758, the Council acted as the Upper House of the Legislature, and would frequently amend or refuse its assent to legislation with which the Councillors did not agree, especially any and all attempts to increase the powers of the Assembly at the expense of the Council.[32]

B. The Council of Twelve is Split

By the mid-1830s, conflicts between the Assembly and Council of Twelve had come to a head. As has been told numerous times elsewhere, politicians in and out of the Assembly were calling increasingly for a government responsible to the majority in the Assembly. While Nova Scotia did not rise up in rebellion as did the Canadas in 1837, the Assembly, led by Joseph Howe, did that year submit to Crown a set of Twelve Resolutions calling for the reform of the Council. Howe proposed two alternatives: either the Council must be elective, or its executive and legislative functions must be split into two separate bodies.[33]

This call was answered by a Special Royal Commission to Lieutenant-Governor Falkland ordering the Council of Twelve split and two new Councils appointed, one Legislative and one Executive.[34] Many of the details would have to wait a few months, however, for John George Lambton, Earl of Durham, to be appointed governor of the Canadas and of Nova

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[30] Barry Cahill & Jim Phelps, "The Supreme Court of Nova Scotia: Origins to Confederation" in Philip Girard, Jim Phillips & Barry Cahill, eds, *The Supreme Court of Nova Scotia, 1754-2004: From Imperial Bastion to Provincial Oracle* (Toronto: Osgoode Society for Canadian Legal History, 2004) 53-139 at 54-57. See also Beck, *Politics*, vol 1, supra note 10 at 19.

[31] *Ibid* at 56-57.

[32] See Beck, *Government*, supra note 7 at 46; Beck, *Politics*, vol 1, supra note 10 at 23-24, 30, 35, 40-41,48-49, 51-52, 56-67, 71-72, 74, 76-77, 81-84, 89-91, 97-98, 103-107.

[33] Beck, *Politics*, vol 1, supra note 10 at 112-113; Bourinot, supra note 6 at 146-148.

[34] See Address of Lt-Gov Archibald, supra note 28 at 105.

Scotia. Though Lord Durham focused his energies on resolving the growing problems in the Canadas, the Colonial Office used his appointment (and its requisite Commission) as an opportunity to lay out the details of the constitution of the separated Executive and Legislative Councils.[35]

The new Legislative Council was to:

> consist of such and so many members as shall from time to time for that purpose be nominated and appointed by us, under Our Royal Sign Manual and Signet, or as shall be provisionally appointed by you . . . until Our pleasure therein shall be known. Provided always . . . that the total number of members of the said Legislative Council resident within Our said Province shall not at any time, by any such provisional appointment by you, be raised to a greater number in the whole than fifteen.[36]

Lord Durham was also given limited authority to suspend members of the Legislative Council. In addition to granting the ability to suspend chronically-absent Councillors (on substantially the same terms as in Governor Wilmot's Commission),[37] the Commission also provided a process whereby other Councillors might be suspended with "good and sufficient cause": Councillors were to be examined regarding the charge before their peers, after which they could be suspended by majority vote.[38] Once a Councillor had been suspended, Lord Durham was required to submit a report stating the allegations, along with the Councillor's response. However, if Lord Durham "ha[d] reasons for suspending any Legislative . . . Councillor not fit to be communicated to the [Council]," the member could be suspended by the governor alone, provided the report was immediately transmitted to

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[35] Instructions to the Right Honourable the Earl of Durham (6 February 1838) at para 2, in Parliament, *Sessional Papers*, No 70 (1883) at 39-45 [Instructions to Lord Durham].

[36] *Ibid* at para 2.

[37] See *Ibid* at para 6.

[38] See *Ibid* at para 5 ("You are not to suspend any of the members of either of Our said Councils, without good and sufficient cause, nor without the consent of the majority of the members of Our said respective Councils, signified in Council, after due examination of the charge against such Councillor, and his answer thereunto . . . .").

London.[39] As Councillors continued to be appointed at pleasure,[40] however, they could be dismissed by the Sovereign without reliance on this procedure.

These instructions dramatically altered the constitution of the Legislative Council. Where the former Council had been specifically limited to twelve, the Legislative Council consisted of "such and so many" individuals as were named by the Crown, though Lord Durham could provisionally appoint up to fifteen members (as opposed to up to nine provisional appointments for the Council of Twelve). Fifteen was not a ceiling, as seen a month later when Queen Victoria appointed nineteen men to the Legislative Council;[41] instead, it was a limit on what the governor could do without royal approval. This limit went hand-in-hand with the governor's increased power to appoint provisional councillors on his own; as the governor could simply appoint Councillors as vacancies opened, without first having to submit a list of prospective nominees to the Colonial Office, some numerical limit made sense.

But while the process of appointing Councillors was being modernized, Councillors continued to hold office only during pleasure. True, in practice "pleasure" effectively meant life tenure,[42] and a governor could generally only dismiss a Councillor with the consent of a majority of the Council,[43] but the Sovereign's power to dismiss was unlimited. In different

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[39] *Ibid* at para 5.

[40] See Additional Instructions to John George, Earl of Durham (9 March 1838), in Parliament, *Sessional Papers*, No 70 (1883) at 45-46 [Additional Instructions to Lord Durham].

[41] *Ibid*.

[42] See, e.g., Lord John Russell's Despatch on the Tenure of Office (16 October 1839), in Parliament, *Sessional Papers*, No 70 (1883) at 19-20 ("I find that the Governor himself, and every person serving under him, are appointed during the Royal pleasure, but with this important difference—the Governors commission is, in fact, revoked whenever the interests of the public service are supposed to require such a change in the administration of local affairs. But the commissions of all other Public Officers are very rarely indeed recalled, except for positive misconduct. . . .This [is] converting a tenure at pleasure into a tenure for life . . . .").

[43] See Address of Lt-Gov Archibald, supra note 28 at 110-111.

circumstances, tenure at pleasure might have severely limited the independence of the Legislative Council; because this power was unexercised, however, independence was not significantly affected. That is, the constitutional convention under which Councillors were permitted to retain their positions for life prevented the Council from being an entirely worthless body filled only with the governor's toadies.

C. The Push for a New Constitution

Although the 1837-38 reforms created a more modern Legislative Council, better positioned to act as an independent chamber of sober, second thought, it still proved difficult to recruit Councillors, especially from outside of Halifax. Members of the Council of Twelve had never been paid for their service *as Councillors* (though most held executive or judicial office that came with some manner of reimbursement); the tradition of an unpaid Council continued post-reform. As such, any potential members would have to be wealthy enough to afford to take off several weeks at a time for legislative sessions, and, if they lived outside of Halifax, pay for travel, room and board.[44] Prospective Councillors were also turned off by the lack of secure tenure and the ill-defined nature of the Legislative Council's constitution.[45]

In response to the perceived difficulty in recruiting and maintaining strong candidates, on March 18, 1845, the Council formed a committee of five members to consider the issue and report back with recommendations.[46] On April 7, the committee proposed an address to Queen Victoria, to be delivered via Lieutenant-Governor Falkland and the Colonial

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[44] See Beck, *Government*, supra note 7 at 102.

[45] Bourinot, supra note 6 at 148-149.

[46] *Journals and Proceedings of the Legislative Council of the Province of Nova Scotia*, 17th Parl, 3rd Sess (18 March 1845) at 38.

Office, laying out the difficulty and requesting either that Councillors be compensated for their work or that the Council be given a defined constitution:

> Seats in the Legislative Council are among the most honorable Colonial distinctions in the gift of Your Majesty, yet it is with difficulty that Gentlemen can be induced to accept them, or if they do, a speedy resignation or partial attendance exhibit the estimation in which the Body itself, and the Office of a Legislative Councillor are held.
>
> Whether these results may be ascribed to the want of a defined Constitution, or of a pecuniary provision for the expense of the attendance of the Country members at the Legislative Sessions, will be for Your Majesty's gracious consideration. . . .
>
> In regard to a matter in which your personal wishes and feelings may influence their judgment, they [the Councillors] do not presume to suggest what steps should be taken, but humbly and earnestly pray that Your Majesty would adopt such measures as seem proper for establishing this Branch of the Legislature upon such a basis as may be compatible with the right, efficient, and independent discharge of its high and important duties.[47]

Lieutenant-Governor Falkland duly passed the missive on to Lord Edward Stanley, Secretary of State for the Colonies (and later Prime Minister).[48] Although it has not survived, Lord Falkland seems to have appended a cover letter to the Council's address, in which he proposed changing the tenure of office of Councillors from pleasure to life.[49]

In a reply dated August 20, 1845, Lord Stanley recognized the seriousness of the issue, noting that he regarded "the general and settled reluctance of those gentlemen to assume such duties [in the Legislative Council] as one of the most serious evils with which society could be visited, in that part of Her Majesty's Dominions."[50] Lord Stanley, however,

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[47] *Journals and Proceedings of the Legislative Council of the Province of Nova Scotia*, 17th Parl, 3rd Sess (7 April 1845) at 60-61.

[48] See *Journals and Proceedings of the Legislative Council of the Province of Nova Scotia*, 17th Parl, 3rd Sess (9 April 1845) at 65; Address of Lt-Gov Archibald, supra note 28 at 105-106.

[49] Address of Lt-Gov Archibald, supra note 28 at 105-106.

[50] Letter from Lord Stanley to Viscount Falkland (20 August 1845), in *Journals and Proceedings of the Legislative Council of the Province of Nova Scotia*, 17th Parl, 4th Sess (1846) app 1 at 3-6 [Letter from Lord Stanley to Viscount Falkland].

dismissed out of hand the proposal that Councillors be remunerated, as the Councillors were

> the nominees of the Crown. Their high and delicate duty is to arbitrate between the opposite tendencies of the Monarchical and the Democratic Branches of the Constitution, and when necessary to control and to harmonize both. To become pensioners, either of the Crown or of the People, would be to detract materially from their qualifications for the uncompromising discharge of this important trust.[51]

Lord Stanley then turned to Lieutenant-Governor Falkland's proposal that the tenure of office be changed from pleasure to life. Though he rejected using the Province of Canada as a model (as life tenure was but one of numerous differences between the constitutions of the two provinces), Lord Stanley proposed instead looking to New Brunswick, as it and Nova Scotia were "far more nearly analogous to each other than case of either of them is to that of Canada."[52]

Lord Stanley then related recent changes to the constitution of New Brunswick that had increased that province's Legislative Council to twenty-one members, only seven of whom held office during the pleasure of the Crown.[53] The same amendment had also set quorum at eight and had established a mechanism for dismissing members in the event of bankruptcy, insolvency, conviction of an "infamous" crime, or extended absence without leave.[54] These changes had been made largely with the aim "to elevate the character, and to increase the legitimate authority and influence of the Legislative Council [of New Brunswick], and thus to give additional stability to the Provincial Constitution."[55] In Lord

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[51] *Ibid* at 3-4.

[52] *Ibid* at 4.

[53] *Ibid* at 4.

[54] *Ibid* at 4.

[55] *Ibid* at 5.

Stanley's view, the same principles held true for Nova Scotia, and "Her Majesty *would be prepared* to accede to the suggested change in that tenure."[56] He did not think it proper (or constitutional), however, for the change to be effected through an act of the imperial Parliament, as it was within Queen Victoria's power "to effect the change permanently, in the unaided exercise of Her Majesty's Royal Prerogative".[57] After discussing several additional minor matters, Lord Stanley concluded:

> Such being the conclusions to which Her Majesty's Government have been fed . . . I have humbly submitted them to Her Majesty, *who has been pleased to signify her sanction of them*, and to command me to write this Despatch to Your Lordship [Falkland], and to instruct you to communicate it to the Legislative Council, as comprising in substance the answer which Her Majesty is pleased to return to their loyal and dutiful Address.[58]

By the terms of this concluding paragraph, Lord Stanley's response seemed to announce a fait accompli—Queen Victoria had already "signif[ied] her sanction" of the proposals, apparently changing the tenure of office according to the terms of the New Brunswick constitution. Yet, earlier in his missive, Lord Stanley had stated that "Her Majesty would be prepared to accede to the suggested change", suggesting it had not yet been implemented. Decades later, this ambiguity would prove fatal for the Council.[59]

At the time, however, the ambiguity seems to have been lost on those involved. When the Legislative Council met again during the 1846 Session, it considered Lord Stanley's missive and unanimously adopted a resolution in response thanking the Queen "for the kind and gracious interest which Her Majesty has deigned to evince for the honor and usefulness of this Branch of the Provincial Legislature", noting that the amended constitution

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[56] *Ibid* at 5 (emphasis added).

[57] *Ibid* at 5.

[58] *Ibid* at 6 (emphasis added).

[59] See infra Chapter IV.

would increase the stability of the Legislative Council, and restating the terms of that new constitution:

> that it [the Legislative Council] shall consist ordinarily of twenty-one members—that of that number seven only shall be persons holding office at the pleasure of the Crown—that if any member shall fail to give his attendance in the said Legislative Council without Her Majesty's permission, or that of the Lieutenant Governor, for such number of Sessions as may be fixed by Her Majesty's Government, or shall become Bankrupt or Insolvent, . . . or shall have committed, or shall commit, and treason or felony, or other crime technically denominated infamous, the seat of such Legislative Councillor shall thereby become vacant.[60]

As before, this reply was transmitted via Lieutenant-Governor Falkland.[61]

By the time the resolution reached London, however, the Conservative Government of Sir Robert Peel had collapsed over the repeal of the Corn Laws and Lord Stanley had been replaced as Colonial Secretary by future Prime Minister William Gladstone.[62] In a reply dated May 4, 1846, Gladstone noted that the Legislative Council had already been increased from fifteen to twenty-one by the Commission of Earl Cathcart, issued after the Council's resolution, but presumably before its receipt in London.[63] Earl Cathcart's Commission, however, left open the questions of the maximum number of Councillors (as opposed to the maximum number of provisional appointments) and tenure of office. On these points, Gladstone stated:

> It has not been deemed necessary to insert in the Royal Instructions the Rule restricting the number of Councillors holding office. Your Lordship will therefore, in accordance with my Predecessor's intention, observe the

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[60] *Journals and Proceedings of the Legislative Council of the Province of Nova Scotia*, 17th Parl, 4th Sess (19 March 1846) at 81-82.

[61] *Ibid* at 82.

[62] See Bourinot, supra note 6 at 151-152.

[63] Extract of a Despatch from the Right Hon WE Gladstone to His Excellency Viscount Falkland (4 May 1846), in *Journals and Proceedings of the Legislative Council of the Province of Nova Scotia*, 17th Parl, 5th Sess (1846) app 4 at 15 [Despatch from Gladstone to Lt-Gov Falkland]; see also *Supreme Court Reference*, supra note 9 at para 75 (Chisholm, J).

> practice which subsists in the neighbouring Province of New-Brunswick, and frame your recommendations in conformity with the Queen's commands, that henceforth of the twenty-one Members of the Legislative Council, seven only shall be persons holding office at the pleasure of the Crown.[64]

Gladstone seemed to say that while the Province's constitution had been changed, no change would be made to Earl Cathcart's formal Commission or Instructions, Gladstone's letter being sufficient to effect the change. Thus while one element of the constitution had clearly been changed (the ability of the Lieutenant-Governor to appoint up to twenty-one members to the Council), other changes may or may not have been implemented.

As such, while it appeared to those involved that the Nova Scotia constitution had in fact been changed, this was highly debatable. The early consensus was that the tenure of office had been altered. Famed constitutional scholar John George Bourinot, for instance, argued that Queen Victoria had, through Lord Stanley, surrendered her prerogative power to amend unilaterally the Legislative Council's constitution (though Bourinot recognized this might not be enforceable in court).[65] Lieutenant-Governor Archibald largely agreed, though he did not expressly state that the Sovereign's prerogative power had been limited:

> Nothing can be clearer therefore than that by these proceedings, by the direct authority of the Sovereign, as communicated through two successive Secretaries of State, each of whom became at different times subsequently Prime Minister of the Empire, the Tenure of the Seat of a Legislative Councillor was enlarged from being one at pleasure, to being one for life, subject only to be defeated by the occurrence of one of the events specified in the Despatch and Resolutions. This matter was much in the nature of a compact between the Crown and the Council, and the faith of the Crown was formally pledged to the enlarged Tenure.[66]

Later, however, this view of events would be challenged by opponents of the Council. In the Supreme Court of Nova Scotia and Privy Council litigation, for instance, the Nova

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[64] *Ibid* at 15.

[65] Bourinot, supra note 6 at 167-169

[66] Address of Lt-Gov Archibald, supra note 28 at 108.

Scotia Government's counsel would emphasize Lord Stanley's statement that "Her Majesty *would be prepared* to accede to the suggested change", arguing this as evidence that the change had never actually occurred. Alternatively, they argued, any changes made in 1846 were undone by Lord Monck's Commission in 1861, which expressly stated tenure was at pleasure.[67] These arguments, however, would not become popular until Premier Edgar Nelson Rhodes declared war against the Legislative Council in 1926.[68] In the meantime, the matter would be complicated considerably by intervening events, especially the Commission granted to Lord Monck and Canadian Confederation.

D. Lord Monck's Commission

In November 1861, Charles Stanley, 4th Viscount Monck, was appointed Captain-General and Governor-in-Chief of Nova Scotia and the other British North American provinces. As Monck would remain in office until Confederation, after which he was appointed the first Governor-General of the new Dominion, Lord Monck's Commission was the final statement of Nova Scotia's pre-Confederation constitution. Later attempts to ascertain the contents of the constitution, which was for the most part continued post-Confederation, have thus generally started with Lord Monck's Commission.

Because of this strong emphasis on the language of Lord Monck's Commission, it is worth relaying here the provisions specifically relating to the Legislative Council:

> V. And we do by these presents grant, provide and declare, that there shall be within our said Province a Council to be called "The Legislative Council" of our said Province, and that all and ever the powers and authorities heretofore vested in or exercised by the Legislative Council of our said

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[67] See, e.g., *Supreme Court Reference*, supra note 9 (Oral argument, Plaintiff).

[68] But see Nova Scotia, *Debates and Proceedings of the House of Assembly*, 30th Parl, 4th Sess (26 January 1894) at 141-142 (Charles H Cahan) (arguing Lieutenant-Governor had ability to dismiss Councillors at pleasure). But, Cahan's was "a viewpoint shared by few others of that day." Beck, *Government*, supra note 7 at 247, n 77.

Province, shall continue to be exercised by our said Council hereby re-established.

VI. And we do hereby declare our pleasure to be that the said Legislative Council shall consist of such and so many members as have been or shall hereafter be from time to time for that purpose nominated and appointed by us under our Sign-Manuel [sic] and Signet, or as shall be provisionally appointed by you until our will therein shall be known, all which members shall hold their places in the said Council during our pleasure: Provided, nevertheless, and we do hereby declare our pleasure to be that the total number of the members of the said Legislative Council for the time being resident within our said Province shall not at any time by any such provisional appointments be raised to a greater number in the whole than twenty-one.

VII. And we do further direct and appoint that eight members of our said Legislative Council shall be a quorum for the dispatch of the business thereof, and that the senior member for the tim being of the said Council shall preside at all the deliberations thereof. . . .

IX. And we do hereby give and grant unto you, so far as we lawfully may, full power and authority, upon sufficient cause to you appearing, to remove from his office, or to suspend from the exercise of the same, any person exercising any office or place within our said Province or its Dependencies, under or by virtue of any commission or warrant granted, or which may be granted by us, or in our name, or under our authority.[69]

Lord Monck's Instructions, issued separately, also provided:

VI. And whereas we have, by our said Commission, declared our pleasure to be, that there should be within our said Province a Council, to be called the Legislative Council of our said Province, with certain powers and authorities therein mentioned, and have further declared our pleasure to be that the said Council shall consist of such and so many members as have been, or may thereafter for that purpose be, nominated and appointed by us under our royal sign manual and signet, or as should be provisionally appointed by you until our pleasure therein shall be known; Provided always that the total number of the members of said Legislative Council resident within our said Province, shall not, at any time, by any such provisional appointment, be raised to a greater number in the whole than twenty-one; Now know you that we, reposing especial trust and confidence in the wisdom, prudence, and ability of the persons who are now members of the said Legislative Council, do, by these our instructions, re-constitute and re-

[69] Commission appointing Viscount Monck (2 November 1861) at para V-VII, IX, in *Journals and Proceedings of the House of Assembly of the Province of Nova Scotia*, 22nd Parl, 4th Sess (1862) app 34 at 1-4 [Commission appointing Viscount Monck].

> appoint each and all of them to be Legislative Councillors for our said Province during our pleasure.
>
> VII. And we do especially require and enjoin that whenever you shall think fit in the exercise of the authority hereby vested in you, to appoint any person or persons provisionally as aforesaid to be a member or members of our said Legislative Council, you do in every such case forthwith transmit to us through one of our Principal Secretaries of State the names and the qualifications of the several members so provisionally appointed by you to be members of our said Council to the intent that the said appointments may be either confirmed or disallowed, as we shall see occasion.[70]

The instructions also provided for the dismissal of Councillors absent without leave under the same terms as before.[71]

For the most part, there were few changes from the prior gubernatorial Commissions and Instructions. But, the differences are more dramatic when compared against the 1845-46 correspondence with Lord Stanley and Gladstone. Lord Monck's Commission empowered him to provisionally appoint up to twenty-one Councillors, but no upper limit was placed on the Sovereign's power to appoint beyond that number. More importantly, Councillors were explicitly said to serve at pleasure, contrary to the earlier statements suggesting life tenure had been granted. As before, this might be explained by the Home Office's belief that life tenure need not expressly be referenced in the Commissions, but while that position might have made sense during the continuing term of office of Governor Cathcart, it became odd when his replacement was appointed.

Complicating the situation was the fact that the Legislative Council was technically dissolved and reconstituted at the time of Lord Monck's appointment. Though the Council's composition did not change at all ("each and all" existing members of the Council

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[70] Instructions to our Right Trusty and Well-Beloved Cousin Charles Stanley, Viscount Monck (2 November 1861) at para VI-VII, in *Journals and Proceedings of the House of Assembly of the Province of Nova Scotia*, 22nd Parl, 4th Sess (1862) app 34 at 4-7 [Instructions to Viscount Monck].

[71] *Ibid* at para IX.

having been reappointed),[72] there was a formal split between the two Councils. Thus, while Queen Victoria might have entered into a compact with the *old* Council, that compact might not have any binding effect on the *new* Council. In other words, while to the outside world it appeared as if the Legislative Council continued unchanged, the failure to expressly reaffirm the 1845-46 compact may have rendered its terms inoperative.

One further change of note was also introduced in Lord Monck's Commission: the governor was authorized to remove or suspend "any person exercising any office or place within our said Province or its Dependencies, under or by virtue of any commission or warrant granted, or which may be granted by us, or in our name, or under our authority."[73] Previously, the power of dismissal had been denied to the governors except under limited circumstances. Although it is possible that the power did not extend to Legislative Councillors, as they were not "officers" but "members," the broad language here (especially the phrase "office or place") seems to cover every appointment made in the Sovereign's name in the Province. Strangely, this provision was not later cited for the proposition that the Lieutenant-Governor could dismiss Councillors; instead, the much weaker argument that "the power to appoint implies the power to dismiss" was generally relied upon.

Of course, it should be noted that in the context of responsible government, which had been granted in 1848, these powers delegated to the governor were in practice exercised by the governor-in-council. Appointments to the Legislative Council were on the advice of the premier, and were never disallowed in London. Although the broader dismissal power was never exercised as to Legislative Councillors, it, too, would presumably only have been

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[72] *Ibid* at para VII. Compare the old tradition whereby Parliaments were automatically dismissed upon the death of the Sovereign.

[73] Commission appointing Viscount Monck, supra note 69 at para V-VII, IX.

exercised on the advice of the Executive Council. The power to increase the Legislative Council beyond 21, however, remained (if it continued to exist) firmly ensconced in the Queen, and could not be exercised within the Province (though, presumably, the Executive Council could relay a message to London requesting such an increase, which would likely have been granted).

E. The British North America Act, 1867

Dramatic change came with Canadian Confederation in 1867. The constitutional changes were dramatic: Nova Scotia was now now part of a federation, with many subject matters removed from its jurisdiction. In addition, many appointments previously handled at the provincial level, such as those of judges, were now made at the Dominion level. Critically, the Governor was also replaced by a Lieutenant-Governor, who served under and was appointed by the Governor-General-in-Council in Ottawa.

Despite these dramatic changes, however, the British North America Act, 1867, had practically nothing to say about Nova Scotia's constitution. Whereas the constitutions of Ontario and Quebec were set forth in some detail in the Act,[74] Nova Scotia's provincial constitution was left untouched. "The Constitution of the Legislature of each of the Provinces of Nova Scotia and New Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act."[75] That authority was granted exclusively to the provincial Legislature in Section 92(1):

> In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, —
>
> 1. The Amendment from Time to Time, notwithstanding anything in this Act,

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[74] *Constitution Act, 1867*, s 63, 69-70, 81-87 (Ontario); s 63, 71-87 (Quebec).

[75] *Constitution Act, 1867*, s 88.

> of the Constitution of the Province, except as regards the Office of Lieutenant Governor.[76]

In other words, except insofar as the constitution of Nova Scotia had been changed by the British North America Act, 1867, it continued in its prior form. But, as noted above, insofar as the province's constitution was based on royal prerogative (except where cast in place by affirmative statute), this created two potentialities. First, the British North America Act could have eliminated prerogative and effectively locked the constitution as it stood until amended by future statute. This was the view of most Nova Scotians, and, moreover, was consistent with the views of Sir John A. Macdonald, who argued that the provincial Lieutenant-Governors had "no right to deal with matters of prerogative as representatives of the sovereign."[77] While the Crown may previously have held prerogative powers to amend the provincial constitution, proponents of this view argued that power was removed by the British North America Act, which provided a sole means for future amendments.

Alternatively, the British North America Act could have left the prerogative constitution in place, but permitted the Nova Scotia Legislature to amend that constitution by statute (by, for instance, setting forth a specific governmental structure or limiting the prerogative powers of the Lieutenant-Governor). Under this view, the Crown's prerogative was an intrinsic part of the existing constitution, such that it could only be removed by affirmative statute. Although this view would have few adherents in the initial post-Confederation period, in part because it provided for a much stronger provincial government than Macdonald and others had intended, it would ultimately be adopted by the Rhodes

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[76] *Constitution Act, 1867*, s 92(1), repealed *Constitution Act, 1982*.

[77] Quoted in Beck, *Government*, supra note 7 at 173; see also Donald Creighton, *John A Macdonald: The Old Chieftain* (Toronto: Macmillan, 1955) at 261.

government,[78] by two of four justices on the Supreme Court of Nova Scotia,[79] and by the Judicial Committee of the Privy Council.[80]

The matter is complicated by another question: if the second viewpoint was correct, and the Province's constitution remained based upon prerogative, what were the limits of that prerogative as to pre-existing grants? Some limits on the royal prerogative had long been established. The Sovereign could not, for instance, withdraw the grant of an assembly.[81] If Queen Victoria had in fact granted life tenure to the Councillors, might not this have been equally irrevocable, especially considering Lord Stanley's statement that she had the power "to effect the change *permanently*, in the unaided exercise of Her Majesty's Royal Prerogative"?[82] Like the grant of an assembly, this may have been an area where the Sovereign, once having acted, ceded her ability to act unilaterally again in the future. As such, there was a third possibility—that some aspects of the Nova Scotia constitution remained based in prerogative, but that prerogative had been ceded as to other aspects, where any future amendments would have to be implemented through positive statute (whether of the Nova Scotia Legislature or of the imperial Parliament).

From a theoretical perspective, this third way offers significant benefits over the "unlimited prerogative" argument. Notably, it significantly limits the Lieutenant-Governor's ability to change important aspects of the provincial constitution solely through the prerogative power. He could probably not, for instance, simply abolish the Council

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[78] See, e.g., *Supreme Court Reference*, supra note 9 (Oral argument, Plaintiff).

[79] *Ibid* (Harris, CJ, and Chisholm, J).

[80] *Reference re Legislative Council of Nova Scotia*, [1927] 4 DLR 849 (PC) [*Privy Council Appeal*].

[81] See *Campbell v Hall*, [1774] 1 Cowper 204, 98 ER 1045 (KB).

[82] Letter from Lord Stanley to Viscount Falkland, supra note 50 at 5 (emphasis added).

outright, even though it had been created by royal prerogative and was supported only by peripheral statutory references.[83] Likewise, other governmental bodies created by royal prerogative, such as the Executive Council or the Supreme Court of Nova Scotia, could not be abolished by use of the same.[84] On the other hand, it permitted relatively minor changes to be made without legislation—the size of the Executive Council, for instance, could be increased (or decreased) as necessary, or the office of premier could be slowly established through a succession of minor decisions.

This view would also have sidestepped the problems raised by the incompatibilities between the 1845-46 correspondence and Lord Monck's Commission. If some uses of prerogative were "permanent" (at least insofar as they could not be undone by the Sovereign acting unilaterally), then it would not matter what the language of later Commissions said—the Legislative Council would already have been granted life tenure through an irrevocable compact with the Sovereign. The later references to serving at pleasure would either be unbinding or would merely reference the Sovereign's ability to dismiss up to seven Councillors at pleasure (indeed, the "at pleasure" language may have been retained so as to permit the dismissal of any seven; otherwise, it may have been necessary to treat some Councillors as having life tenure and others as having tenure at pleasure).[85]

Regardless of the theoretical benefits of this third way, however, it was never seriously

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[83] See, e.g., RSNS 1923, c 1, para 2 (form of enacting statutes reads "Be it enacted by the Governor, Council, and Assembly . . ."); c 2, para 2 (appointment of Councillors vested in Governor-in-Council), para 3 (Councillors absent for two consecutive sessions without leave of Governor-in-Council vacate seats); para 11 (members of the Canadian House of Commons or Senate cannot serve as Councillors or members of the Assembly); paras 18-28 (powers and privileges of both Council and Assembly)..

[84] Though, admittedly, the power to abolish the Supreme Court had been transferred to the Dominion government following Confederation.

[85] See *Supreme Court Reference*, supra note 9 at para 115 (Mellish, J).

considered by anyone involved in the Legislative Council abolition debates. Instead, it was generally assumed in the years immediately following Confederation that Confederation had locked the provincial constitution in place, so that it could only be amended by provincial statute or by an imperial amendment to the British North America Act itself. As such, prior to Rhodes there were no proposals to abolish the Legislative Council by appointing members in excess of twenty-one, and only a single call for dismissing Councillors under the theory that they were appointed at pleasure.[86] It was only with the rise of Rhodes' Conservatives that these old assumptions about the provincial constitution would be questioned.

F. Reform of the Appointment Process

Post-Confederation, there was only two significant amendments to the constitution of the Legislative Council. First, in 1872, the power to appoint Councillors was vested wholly in the Lieutenant-Governor in the name of the Crown.[87] No longer would it be necessary to make "provisional appointments," which would later be approved or denied by the Queen. In addition to greatly streamlining the appointment process and removing a step seen as wholly unnecessary in the new political context, the reform also removed any constitutional concerns about the Sovereign's ability to act at all on a matter of provincial or Dominion concern post-Confederation.[88] Although the constitutional concerns were likely overblown—the Sovereign could always claim that she was acting on the advice of the provincial government—they did have implications beyond the appointment process. If

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[86] See Nova Scotia, *Debates and Proceedings of the House of Assembly*, 30th Parl, 4th Sess (26 January 1894) at 141-142 (Charles H Cahan).

[87] SNS 1872, c 13.

[88] See, e.g., *Supreme Court Reference*, supra note 9 at para 110.

overseeing appointments potentially violated the precepts of the British North America Act, then direct exercises of prerogative were highly problematic. It is thus unsurprising that the Judicial Committee of the Privy Council later held that the Act transferring the appointment power to the Lieutenant-Governor also transmitted other prerogative powers related to appointments,[89] as a ruling that prerogative powers over such matters as changing the number of Councillors resided with the Sovereign would have raised significant constitutional problems and could have called the nature of imperial relations into question—something especially undesirable in the immediate aftermath of the 1926 Imperial Conference and the issuance of the Balfour Declaration.

G. The 1925 Reform of the Legislative Council

The second major amendment to the Legislative Council's constitution came in 1925, at the tail end of forty-three years of Liberal rule and four years of discussions between the Assembly and Council. After repeated efforts to abolish the Council had failed, Premier Armstrong and the Liberals instead proposed reforming it, and, surprisingly, the Council agreed.

On April 6, 1925, Armstrong introduced his reform bill, which echoed the reforms of the *Parliament Act, 1911*, while also limiting the tenure of office of newly-appointed Councillors to ten years and establishing an upper age limit for members (75 for existing members and 70 for new members); until reaching the maximum age, however, Councillors could be reappointed when their terms expired.[90]

Armstrong's proposal was generally well-received by the Liberal party establishment.

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[89] *Privy Council Appeal*, supra note 80.

[90] "Important Changes in Constitution of the Legislative Council", *The [Halifax] Morning Chronicle* (7 April 1925) 1; "Reform of Council is Proposed: Premier Introduces Bill Affecting Nova Scotia Upper House", *The Halifax Herald* (7 April 1925) 1.

The *Morning Chronicle* largely praised the bill, though it did suggest removing the provision allowing for reappointment.[91] In particular, the *Chronicle* lauded the reasonableness and non-radical nature of the reform, which changed the Council insofar as it was necessary.

Figure 2

Donald McRitchie, "Will He Get a Bob?", Cartoon, *The Halifax Herald* (17 April 1925) 3.

> It does not propose to impair extensively or undesirably, much less to override, the essential present powers of the Council. It does not propose to alter, except by amendments, its membership. It is merely intended to provided that the fixed and determined will of the elected representatives of the people shall ultimately prevail over persistent opposition of the non-elective House, after due delay for reflection and re-consideration. The power of the Upper House to check and correct hasty legislation and enforce due discussion is to be left practically unimpaired, while a means to overcome factious or unwarranted opposition from the Council is to be provided.[92]

If anything, the *Chronicle* suggested the reform might be too radical, as the emasculated state of the House of Lords had been criticized in Britain.[93]

Other parties were less supportive of the reform proposals. The Farmer-Labor coalition, which had swept into the role of Opposition after the 1920 election,[94] opposed reform on principle. D.G. McKenzie, Leader of the Opposition, for instance, condemned

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[91] "Legislative Council Reform", Editorial, *The [Halifax] Morning Chronicle* (9 April 1925) 6.

[92] *Ibid.*

[93] *Ibid.*

[94] See Anthony MacKenzie, *The Rise and Fall of the Farmer-Labor Party in Nova Scotia* (MA Thesis, Dalhousie University Department of History, 1969) [unpublished].

Armstrong's bill, saying that the province needed "a responsible government" and that it would be better to abolish the Council or make it an elective body than to fill it with defeated Liberal candidates.[95] The three Conservatives in the Assembly also opposed the bill despite party leader William Lorimer Hall (who did not hold a seat in the Assembly) having introduced a very similar bill in 1916.[96]

Armstrong did not help his case any when he publicly stated his reasons for supporting reform. While the Opposition might possibly have been convinced by an argument that amounted simply to "this is the best the Council will ever agree to," Armstrong instead offered a full-throated defence of a counter-majoritarian Council. According to Armstrong,

> If there was ever a time when retention of the Council was advisable, he said, it was now when some sections of people who aimed to take the seats of the law makers of the country, were advocating such legislation as the nationalization of coal mines and the repudiation of legislative contracts. The people must be safeguarded and could only be protected by having such an independent body as the Legislative Council to pass upon all such measures. There was no time, he declared, when there was greater need of an Upper House clothed with the power to revise legislation sent up from the Assembly.[97]

Armstrong was in essence arguing that the Legislative Council was a necessary bulwark against radicalism, especially socialism. This, unsurprisingly, enraged the Farmer-Labor Opposition.

In the end, however, as the Liberals held a majority in the Assembly, Armstrong's bill easily passed, albeit with an amendment deleting the ability of Councillors to be

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[95] "Legislative Council Bill Meets Strong Opposition", *The Halifax Herald* (16 April 1925) 3.

[96] See *Journals and Proceedings of the House of Assembly of the Province of Nova Scotia*, 35th Parl, 5th Sess (27 April, 10 May 1916) at 217; "Opposition 'Suspicions' Completely Dissipated by Premier Murray", *The [Halifax] Morning Chronicle* (3 May 1916) 2.

[97] "Legislative Council Bill Meets Strong Opposition", *The Halifax Herald* (16 April 1925) 3.

reappointed.[98]

Surprisingly, the Council, which had threatened a constitutional crisis over more moderate changes in 1917,[99] proposed only limited amendments. First, the Council deleted the mandatory retirement clause as to current members; second, it changed the mandatory retirement age for new Councillors from 70 to 75; third, it added a clause stating that the Council override provision (taken from the *Parliament Act,* 1911*)* could not be used to amend the constitution of the Houses (in effect, this prevented the Assembly from achieving abolition through reliance on the reform act).[100] While the Assembly initially refused to consent to the Council's amendments,[101] it ultimately agreed to them following a conference on May 4.[102] Finally, after more than half a century of efforts, the Council question appeared to be resolved.

And, indeed, the issue may have ended there, at least for years or decades, except for the curiously bad timing of the bill. Passed in May 1925, it came less than two months before the historic defeat of Nova Scotia's Liberals to Edgar Nelson Rhodes' Conservatives. What had been the result of four years of discussions between the Government and the Council thus appeared instead to be a last-minute political act designed to sustain Liberal control of the Province beyond the grave (a perception aided by Armstrong's anti-majoritarian defence of the Council). The reform was thus fatally hampered by its poor

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[98] "Legislative Council Bill Passed Second Reading on Division", *The [Halifax] Morning Chronicle* (16 April 1925) 2.

[99] See Beck, *Politics*, vol 2, supra note 10 at 65.

[100] "Legislative Council Reform Bill Back with Amendments", *The Halifax Herald* (28 April 1925) 1.

[101] "House Refuses to Concur in Amendments to Reform Bill", *The Halifax Herald* (1 May 1925) 1.

[102] Bill 80 in Legislative Council, "Bills 1925", Halifax, Nova Scotia Archives & Records Management (NSARM) (RG4 Series R vol 15).

timing. A reform implemented in 1916 or even 1922 might have had time to legitimize the Council in the eyes of the electorate; instead, Armstrong's reform had barely taken effect when a new Government came into power, making all of the same old familiar calls for abolition.

H. Conclusion

While the 1925 reform seemed to dramatically amend the Legislative Council's constitution, it actually left open numerous issues. Notably, it made no attempt to codify the existing constitution of the Council, which remained based in scattered Commissions, Instructions, letters, and the occasional statute. Thus, while the Revised Statutes of Nova Scotia laid out the constitution of the Assembly in great detail, including the number of members, the districts from which they were elected, the term of office, etc., nothing similar existed for the Council. The assumed maximum of twenty-one did not appear in provincial statute, only in pre-Confederation Commissions; likewise for the tenure of Councillors appointed pre-Reform.[103] A full understanding of the provincial constitution could only be obtained by looking to decades-old documents, many of which were not easily available, and several of which contradicted each other.

What, then, was the constitution of the Legislative Council? The body was assumed to consist of twenty-one members, but perhaps it actually consisted of "such and so many" as the Sovereign (or perhaps the Lieutenant-Governor) might appoint. Councillors seemed to

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[103] Intriguingly, the first draft of Armstrong's reform bill did provide that "Members of the Legislative Council, as that body is presently constituted, sit for life", but the provision was deleted from the bill sent to the Council. See "Important Changes in Constitution of the Legislative Council", *The [Halifax] Morning Chronicle* (7 April 1925) 1; "Reform of Council is Proposed: Premier Introduces Bill Affecting Nova Scotia Upper House", *The Halifax Herald* (7 April 1925) 1. This language was likely deleted because the statement itself was prone for misinterpretation (as it spoke of the Legislative Council as it then existed, rather than existing members), was unnecessary (as it seemed to simply restate an existing state of affairs), or both. Had this clause been left in the final bill as passed, it would have had a significant impact on the Supreme Court of Nova Scotia and Privy Council opinions, as well as on the final days of the Legislative Council, though it could not on its own have prevented abolition, which was alternatively available through packing the Council.

have life tenure (with some limited exceptions), but perhaps they actually served at pleasure, or, a strange compromise, seven served at pleasure and the rest for life; all the while, new members served for ten years. And, if members did serve at pleasure, whose pleasure? Did the Lieutenant-Governor exercise the royal prerogative to dismiss, or did that continue to reside in the Sovereign? After nearly ninety years of existence separate from the Executive Council, the rules establishing and governing the Legislative Council remained byzantine. Perhaps it had been easier to simply say that the constitution of the Legislative Council was set out not in the documents, but in convention, the actual practice of the Legislature and Government of Nova Scotia. Unfortunately, as the Council would come to discover, constitutional conventions could not be enforced in court.[104]

[104] See, e.g., Peter W Hogg, *Constitutional Law of Canada*, 2009 Student Edition (Toronto: Carswell, 2009) at s 1.10.

III. 1925-1926: The Final Battle for Abolition Begins

It appeared for a few months following the Conservative landslide in June 1925 as if Rhodes might accept the 1925 reform as having settled the question, at least so long as the Council did not cause any significant problems for the new government. Indeed, from July 1925 until February 1926, the Council had disappeared from the pages of the *Halifax Herald*.[1] Then, like a spectre returned from the dead to haunt the living, the question of abolition returned without fanfare, hidden away in the middle of Lieutenant-Governor James Cranswick Tory's 1926 Speech from the Throne. While filled with qualifiers—"measures will be considered," "with a view to the ultimate abolition"[2] —it was clear Rhodes would make at least a token attempt to abolish the Council, even if the language in the Throne Speech suggested that he believed the attempt would in the end prove futile.

Figure 3

McRitchie, Donald. "When a Feller Needs a Friend", Cartoon, *The Halifax Herald* (6 July 1925) 6.

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[1] The last significant mention of the Council was a Donald McRitchie cartoon entitled "When a Feller Needs a Friend," criticizing the last minute appointment of four Councillors. McRitchie, Donald. "When a Feller Needs a Friend", Cartoon, *The Halifax Herald* (6 July 1925) 6. McRitchie was particularly fond of this title and used it for at least two other unrelated cartoons in the 1925-1926 period.

[2] "The Speech from the Throne", *The Halifax Herald* (10 Feb 1926) 2.

Unfortunately, as with so many questions of political intents regarding the Legislative Council, it is impossible to know whether Rhodes viewed this as a serious attempt to abolish the Council or merely a public show. As noted above, few documents relating to abolition have survived, and key files such as the Attorney General's records relating to the Privy Council litigation have been lost.[3] As with earlier periods, trying to elucidate the intentions and beliefs of those involved is an exercise of reading between the lines of what little has survived.

Based on the manner in which Rhodes raised the issue of abolition, I suspect that he initially intended it as a way of garnering support from the Farmer-Labour voters who had swept him into office, while simultaneously firing a shot across the Legislative Council's bows. But, as it became clear that the Council would insist on playing an active role in the legislative process, especially after it refused its assent to the controversial Tenure of Office Bill, the symbolic morphed into the real; if the Council were to stand in the way of Rhodes' legislative agenda, he would not hesitate to destroy the Council once and for all. Of course, it is possible that Rhodes had intended to wage an all-out war against the Council from the beginning, but this fails to explain the highly qualified language in the Throne Speech, the fact that Rhodes initially introduced his abolition bill without speaking out in its favour, or even that the Conservative platform had inexplicably left out the de rigour reference to abolition.[4]

Regardless of Rhodes' initial intentions, however, by the end of the 1926 Session he would be out for the Council's blood and would not rest until he had managed to destroy

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[3] See supra Chapter I, Part B(3).

[4] See "Premier Rhodes Makes Remarkable Proposal to the Councillors", *The [Halifax] Morning Chronicle* (19 February 1926) 1.

it, no matter the cost. This chapter will demonstrate how the events of the 1926 Session changed Rhodes from a half-hearted abolitionist to a man on a crusade and set the stage for the Council's demise in 1928.

A. Prelude to Battle: Firing the Legislative Council's Chief Clerk.

Although Rhodes' landslide victory occurred in June 1925, in keeping with provincial practice the First Session of the 38th Assembly was not held until February of 1926. Before the 1926 Session even began, however, Rhodes fired a shot across the Council's bow. On February 6, 1926, just days before the opening of the Session, Rhodes delivered notice to J. Frank Outhit, KC, the long-serving Chief Clerk of the Legislative Council, that his services would no longer be needed.[5] Instead, Rhodes intended to hire Evan MacK. Forbes, partner of Minister of Public Works and Mines Gordon S. Harrington, and a loyal Conservative.[6] While public servants such as Outhit generally held their positions during good behaviour, and the tenure of office of the Chief Clerk of the House of Assembly was protected by specific statute,[7] Outhit had been hired on a year-to-year basis and had never been formally

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[5] "Chief Clerk of Legislative Council Fired", *The [Halifax] Morning Chronicle* (8 February 1926) 1. Strangely, Rhodes did not also take the opportunity to dismiss Peter McAuley, Assistant Clerk of the Legislative Council, perhaps because McAuley, while a Liberal, apparently also had significant connections with influential Conservatives. See Letter from WS Thompson to Edgar N Rhodes (28 January 1928), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 4, no 26222). Regardless, McAuley would himself be dismissed and replaced immediately prior to the 1928 Session. See, e.g., Letter from Edgar N Rhodes to WS Thompson (30 January 1928), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 4, no 26221).

[6] "Chief Clerk of Legislative Council Fired", *The [Halifax] Morning Chronicle* (8 February 1926) 1. At the time, most legislators and legislative personnel continued to hold outside employment on account of the limited legislative calendar. Indeed, the Nova Scotia statutes condoned this conduct, with only relatively minor restrictions on outside activity, such as a prohibition on members of the Council or Assembly, or any barristers or solicitors partnered with them, to accept compensation for lobbying before the Legislature. RSNS 1923, c 2, s 29. Furthermore, legislators were paid a sessional indemnity of $1,000, as well as reasonable traveling and living expenses, rather than a salary. RSNS 1923, c 2, s 30-32. Eleven years later, Forbes would unsuccessfully run as a Conservative in Cape Breton West, losing by a mere 91 votes. Elections Nova Scotia, Election Summary from 1867-2007, online: Elections Nova Scotia <http://electionsnovascotia.ns.ca/results/ele_summary.pdf>.

[7] RSNS 1923, c 2, s 42 ("Such Chief Clerk shall be paid a salary of twelve hundred dollars a year, and shall hold office during good behaviour.").

guaranteed tenure.[8] In all likelihood, this was a side effect of the generally poor state of legislation relating to the Council, which was limited prior to the 1925 reform to two short sections concerning means of appointment by the Governor-in-Council[9] and the removal from office of Councillors absent for two consecutive Sessions[10]—like so many other matters concerning the Council, tradition and practice had simply never been reduced to legislation. Alternatively, the Assembly might have preferred treating the Council's Chief Clerk as a year-to-year position in the event that either the Council or the position itself was abolished.[11] Regardless, it is likely that the earlier Liberal governments had assumed Outhit had moral, if not legal, tenure, and that they never considered he might be replaced without cause.

What the Liberal government and Outhit himself had not accounted for, however, was the intense pressure for political patronage placed on the first Conservative government in forty-three years, especially at a time when Mackenzie King's Liberals controlled the federal government. While all new governments are deluged with requests for patronage, Rhodes felt immense pressure to provide offices to his Conservative allies; in a 1928 letter, he referenced "the importunity of our friends who insist upon having at least one year in office out of the last forty-five."[12] Without a guaranteed tenure of office, Outhit's position was

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[8] "Chief Clerk of Legislative Council Fired", *The [Halifax] Morning Chronicle* (8 February 1926) 1.

[9] RSNS 1923, c 2, s 2.

[10] RSNS 1923, c 2, s 3.

[11] While the Assembly's Chief Clerk has specific duties established by legislation, e.g., the endorsement and promulgation of legislation, RSNS 1923, c 1, s 3, no such duties are provided for the Council's Chief Clerk. Thus, it might have been possible to abolish the position of Chief Clerk of the Legislative Council, with perhaps the Deputy Clerk of the Assembly taking on some of the administrative duties.

[12] Letter from Edgar N Rhodes to Neil R McArthur (18 January 1928), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 4, no 26245); see also Letter from Edgar N Rhodes to WS Thompson (30 January 1928), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 4, no 26221).

simply too tempting a target, especially since dismissing him could also send a message to the Council.

Outhit was not the only victim of the new Rhodes government, however. In the months since taking office, Rhodes had attempted to quietly dismiss as many Liberal appointees as possible, under the pretext that they were (or were likely to be) disloyal to the new regime. The purge was not strictly limited to political offices; according to the *Morning Chronicle*, "the first action of [Rhodes'] political executioners was against the young lady stenographers in the Government service".[13] The *Morning Chronicle* condemned the firings, particularly the Rhodes' government's "'women and children first' policy".[14] Unsurprisingly, the *Herald* wrote little of the firings, though did occasionally remark on the necessity of removing the prior government's cronies.[15]

In the end, however, these firings, including Outhit's dismissal, would serve merely as a prelude for what was to come. Within weeks, the Rhodes government would initiate all-out assaults against public service tenure and against the Legislative Council. Though not strictly connected, at least initially, Rhodes' drive to purge Liberal elements from the civil service would bring him into conflict with the Council, further strengthening his desire to be rid of the body once and for all.

B. The Speech from the Throne and the Tenure of Office and Abolition Bills in the Assembly

The first sign of these assaults appeared just days later, on February 9, when Lieutenant-Governor Tory delivered the Session's Speech from the Throne. The bulk of the throne

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[13] "The Hand of Tammany", Editorial, *The [Halifax] Morning Chronicle* (11 February 1926) 6.

[14] *Ibid.*

[15] See, e.g., "The Will of the People", Editorial, *The Halifax Herald* (8 March 1926) 6.

speech was dedicated to the essential elements of the Conservatives' legislative agenda: fighting the exodus of the Province's youth to the West and to the United States by improving the conditions of rural farmers; improving the Province's tourist industry; increasing expenditures on the roads; restructuring municipal finances; reform of the Workmen's Compensation Act; reorganizing public purchasing to increase efficiency; etc.[16] Yet two proposals, easily lost near the end of the throne speech's long agenda, would come to dominate the Session: 1) "Legislation will be introduced . . . to change the tenure of certain offices, now held for good behaviour"; and 2) "Conforming to the overwhelming pressure of public opinion measures will be considered respecting the Constitution of the Houses, with a view to the ultimate abolition of the Legislative Council."[17] While technically unrelated, the two bills demonstrated the newly-empowered Conservatives to control all organs of government in the Province, open up seats for patronage appointments, and eliminate anything that they could not control. Given the Conservatives' marginalization during the prior forty-three years of Liberal rule, these desires were understandable, if not commendable.

1. The Tenure of Office Bill in the Assembly

Though it was referenced only briefly near the end of the throne speech, Rhodes' Tenure of Office Bill was the first introduced in the 1926 Session. The bill provided:

> Every person appointed by the Lieutenant-Governor to any office, and every office appointed by the Lieutenant-Governor whether such person or officer was appointed before or shall be appointed after the enactment of this Act shall hold and remain in office during pleasure only, notwithstanding that any provision of any Act, enactment, law, order in council, appointment or commission in force or effect at the time of enactment of this Act is to

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[16] "The Speech from the Throne", *The Halifax Herald* (10 Feb 1926) 2.

[17] *Ibid.*

> the contrary or is inconsistent with the provisions of this Act.
>
> PROVIDED, however, that if any such first mentioned provision relates to the tenure of office of any member of the Legislative Council that provision shall not be affect by this Act.[18]

The Bill inspired a Liberal uproar. The *Morning Chronicle* called it "the hand of Tammany,"[19] referring to the still-powerful Tammany Hall political machine that dominated New York City politics from the 1850s through 1930s. The three Liberal MHAs in the Assembly were likewise incensed. During the debate on the Bill's third reading, William Chisholm, the Leader of the Opposition, declared it to be without precedent and contrary to British tradition.

> 'There is not another Bill of this kind to be found in any British Parliament of any British Country in the World,' declared Mr. Chisholm. There might be individual bills of such a nature dealing with individual cases, but a measure such as this, and of such sweeping character, he doubted very much if there was a duplicate or a precedent for it in the British Empire.[20]

Chisholm was particularly concerned about the effect of the Bill on judicial and quasi-judicial offices, such as members of the Board of Public Utilities and sheriffs. Just as the justices of the Supreme Court Bench should not be subjected to arbitrary firings and partisan manipulation, so should it be with others tasked with similar functions.

> We are dealing with a principle applicable to this bill, as well as that principle is applicable to the appointment of judges. It is desirable in the public interests that certain officials should in discharging their duties be permitted to do so fearlessly, free from influence of the Government or any other, or would you have a Damocles sword hanging over their necks to make them

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[18] "The Hand of Tammany", Editorial, *The [Halifax] Morning Chronicle* (11 February 1926) 6.

[19] *Ibid.* See also "To Exploit the 'Spoils'", Editorial, *The [Halifax] Morning Chronicle* (13 February 1926) 6 ("And now the Government, under the pretence of 'loyalty' and 'discipline,' is seeking legislative authority to make a clean sweep of the Government offices, if and when it pleases, and to open the door to a wholesale exploitation of the 'spoils.' Once the statutory enactments safeguarding the tenure of public officials are swept away partisan importunities will soon force the Government to action and its personnel is not lacking in ingenuity to discover 'cause' for dismissal 'at pleasure.'").

[20] "Attorney General's Letter Showed Hand of Tory Spoilsmen", *The [Halifax] Morning Chronicle* (24 February 1926) 1.

carry out the will of political masters?[21]

If judicial and quasi-judicial officers could be removed at will, then judicial independence simply did not exist, and officers would quickly conform their behaviour to the desires of the government to avoid dismissal.

Returning to his theme of British nationalism, Chisholm then argued that if Nova Scotia abandoned the principle of quasi-judicial independence to vague assertions of "democracy", it might as well surrender itself to the United States:

> If it was democracy, then why not have the judges and sheriffs and other important officials of the country elected as in the United States. Does any one think that we want that system in this country? Do they think the United States system is better? It is up to the Minister and the Government to say under which flag they will enroll themselves in this matter.[22]

In case his arguments and attacks on the Conservatives' patriotism were not sufficient, Chisholm also used the debates preceding the third reading of the Bill as an opportunity to embarrass the Government. When the Conservatives claimed that the Bill represented merely an attempt to increase the efficiency of the civil service, while simultaneously removing "the dead hand of the defeated and discredited Government" that continued to block progress, Chisholm laid before Assembly a letter he had received in August 1925 from provincial Attorney General John C. Douglas. The letter, apparently sent to Chisholm under the mistaken belief he was a Conservative MHA, asked for his advice in the replacement of the three Game License Agents for Antigonish County. In a particularly damning passage, the letter had stated, "I take it that yourself and colleague [John Laughlin McIsaac, also a Conservative MHA] would like to see these three officers changed and others appointed, and I would like you to let me know the names of the prospective

[21] *Ibid.*

[22] *Ibid.*

successors, as promptly as possible after the receipt of this letter."[23]

Overcome by embarrassment, the Conservative caucus lost their composure; "gales of laughter swept the House as the members realized the joke which the Attorney-General had unwittingly perpetrated upon himself and upon the 'No Party' Government."[24] Laughter continued when Chisholm read off his response to Douglas supporting the three men.[25]

His objections voiced, Chisholm then moved that the Bill be given the three months hoist, which would have effectively killed it until the 1927 Session. Unsurprisingly, this motion failed to carry as the Conservatives in the Assembly rallied behind the Bill.[26] Seeing that he could not so much as delay the Bill (let alone actually defeat it), he then proposed to send it back to the Committee of the Whole, where it might be amended to exclude quasi-judicial officers, including members of the Board of Public Utilities, the Board of Workmen's Compensation, sheriffs, and magistrates; this, too, failed.[27] Chisholm's efforts to delay or amend the Bill defeated, it ultimately passed the Assembly without division.[28] The Tenure of Office Bill would then pass to the Council for its consideration.

2. Abolition Debates in the Assembly and Council, February to early March

Meanwhile, Rhodes began taking steps toward abolishing the Legislative Council. First,

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[23] *Ibid*.

[24] *Ibid*.

[25] *Ibid*.

[26] *Ibid*; D Leo Dolan, "Tenure of Office Bill Is Passed", The Halifax Herald (24 February 1926) 1.

[27] "Attorney General's Letter Showed Hand of Tory Spoilsmen", *The [Halifax] Morning Chronicle* (24 February 1926) 1; D Leo Dolan, "Tenure of Office Bill Is Passed", The Halifax Herald (24 February 1926) 1.

[28] D Leo Dolan, "Tenure of Office Bill Is Passed", The Halifax Herald (24 February 1926) 1. While the three Liberals in the Assembly opposed the Bill, they presumably did not call for a division because its passage was a fait accompli.

Rhodes appointed Frederick P. Bligh to one of the vacancies on the Council, to serve as his eyes, ears, and mouthpiece on the Council. Second, he quietly offered pensions to the Councillors if they would agree to abolition. Third, he introduced an abolition bill into the Assembly.

Despite these steps, it is not clear how dedicated the Rhodes government was to abolition at the beginning of the 1926 Session. He certainly claimed publicly to want to abolish the Council, and even threatened a referendum if the Councillors rebuked his offer of a pension,[29] but it is hard to distinguish between Rhodes' statements and those of the earlier Liberal Government. It may simply have been the case that Rhodes was making a show of abolitionist rhetoric in order to both appease his political base and frighten the Council into submission. Unfortunately, because the bulk of Rhodes' correspondence and personal files from the 1925-27 period did not survive, it is impossible to evaluate Rhodes' sincerity at the time. Nonetheless, it appears that his dedication to abolition in early February 1926 was less than it would be just a month later, if only because the threat presented by the Council was as yet merely theoretical. Indeed, until early March, Rhodes' actions conform entirely with those of someone wanting to delegitimize the Council through threats of abolition. It was only after the Legislative Council had demonstrated it would not simply act as a rubber stamp (especially through its opposition to the Tenure of Office Act) that Rhodes took more dramatic action.

Rhodes' first act would occur on February 4, less than a week before the 1926 Session began, when he appointed Frederick P. Bligh to one of the vacancies on the Council; as one

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[29] "Premier Rhodes Makes Remarkable Proposal to the Councillors", *The [Halifax] Morning Chronicle* (19 February 1926) 1.

of only two Conservatives on the Council, Bligh was also named Government Leader.[30] While Rhodes did not fill the remaining Council vacancies (there were three others),[31] he needed someone to represent the Conservative Government in the Council; otherwise, it might prove impossible to even introduce legislation (whether because the lone Conservative on the Council, William H. Owen, happened to oppose the specific bill in question or could not obtain a second). More importantly, as Owen had long supported the continued existence of the Council (indeed, he was one of the only life members of the Council not pledged to support abolition), Bligh was needed to serve as Rhodes' mouthpiece on the subject of abolition.

Next, on February 18, approximately one week after the opening of the Session, Rhodes called a private meeting with the Councillors in the Executive Council chamber. There, Rhodes informed them that he intended to abolish the Legislative Council in order to live up to promises made during the election and to reduce the Province's expenses, but that he would offer pensions to the Councillors in recognition of the loss of their positions. Life members would be granted $1,000 per year for ten years (the same as their current sessional indemnity), while the "Ten Year Men" appointed following the 1925 reform were offered either $1,000 per year for five years or $500 per year for ten years. If, however, the Council rejected this offer, Rhodes stated he would hold a plebiscite on the question so

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[30] The other Conservative, William H Owen, had been appointed nearly forty-five years prior by the Holmes Government. Due to his advanced age, he was not a suitable candidate for Government Leader.

[31] See "End Nova Scotia Senate?", *The Toronto Daily Star* (24 February 1926) 26 online: Toronto Star: Pages of the Past <http://micromedia.pagesofthepast.ca>.

According to my calculations, the four open seats in January 1926 (one of which was filled by Bligh) were previously held by Robert Drummond (Pictou County), George A Cox (Shelburne County), Daniel Alexander Cameron (Cape Breton County), and William Whitman (Guysborough County). Due to repeated appointments of unelected cabinet ministers to the Council, no representatives from Annapolis, Guysborough, Pictou, Queens, or Shelburne counties sat on the Council in the 1926 Session.

that the people might be heard, or, if necessary, seek imperial legislation to abolish the Council. He further stated that the referendum procedure would be laid out in the Session's supply bill, thus removing it from the Council's hands.[32]

The Councillors did not take Rhodes' proposal well. At least some Councillors regarded it as an attempt to bribe them. According to an anonymous Councillor[33] who spoke with the *Morning Chronicle*,

> If the Legislative Council is of service to the Province, I have too high an opinion of the integrity of its members to think for a moment that they would be bribed into voting for their abolition by the promise of a retiring allowance, as suggested by Premier Rhodes. On the other hand, I would expect, if the members were convinced that its abolition were in the public interests, they would vote for it and spurn the retiring allowance offered by the Premier.[34]

To make matters worse for Rhodes, the Councillors also questioned his claim that he was merely living up to election promises. When pressed on this issue, Rhodes eventually conceded that abolition had not actually been an element in the Conservative platform or in his own manifesto, but he emphasized that other Conservative MHAs had promised to abolish the Council and that abolition had been Conservative policy for fifty years.[35] This did little to convince the Councillors, though strangely none seem to have raised the specific issue that the promises to abolish the Council were made prior to its substantial reform the year before, nor that failure to call for abolition post-reform denied the

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[32] "Premier Rhodes Makes Remarkable Proposal to the Councillors", *The [Halifax] Morning Chronicle* (19 February 1926) 1; "Legislative Council Costing Only Half what Premier Stated", *The [Halifax] Morning Chronicle* (3 March 1926) 1.

[33] Based on the later developments of this battle, I suspect the unnamed Councillor was Alexander Sterling MacMillan, future premier of Nova Scotia.

[34] "Premier Rhodes Makes Remarkable Proposal to the Councillors", *The [Halifax] Morning Chronicle* (19 February 1926) 1.

[35] *Ibid.*

Conservatives any sort of mandate on the question. The Councillors also contested Rhodes' argument that the Council was too expensive to maintain, saying that Rhodes' estimates were double the actual cost of maintaining the Council and that the generous pensions delayed any savings for years.[36]

There the matter sat for approximately a week until, on February 24, the Council formally discussed the Premier's proposal. By coincidence, as the Council began discussing the matter, the Assembly recessed for the day. Perhaps because the Council had been in the news of late or perhaps because the subject of their debate had been leaked, the crowd in the Assembly galleries "flocked" down the hall to the Red Chamber to hear what was going on there. "Not in many years has there been such a gathering of spectators in the Legislative Council as that which attended the sitting of the 'House of Lords' yesterday afternoon," said the *Herald*.[37] Likely out of embarrassment of suddenly being under the public eye, Richard G. Beazley, one of Halifax's four Councillors, moved for a recess so that the Council could discuss the matter privately in one of the committee rooms. The motion passed, the meeting was adjourned, and the Councillors disappeared until after six o'clock, when they returned and Neil Gillis, a Liberal Councillor from Glace Bay, Cape Breton, introduced a resolution intended as a formal response to Rhodes' offer:

> Resolved, that the Legislative Council has proved its usefulness in the past and gives promise of still greater usefulness in the future.
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> That no real saving would be effected by its abolition as the cost of its maintenance has been and will continue to be more than offset by its services in restraining, modifying, or preventing hasty, ill-advised or dangerous legislation.

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[36] See "Legislative Council Costing Only Half what Premier Stated", *The [Halifax] Morning Chronicle* (3 March 1926) 1.

[37] D Leo Dolan, "Upper Chamber Is Needed, Members Say in Resolution", *The Halifax Herald* (25 February 1926) 1.

> That no monetary consideration or offer of pensions, however generous, should be allowed to weigh against the necessity, more evident now than ever before, of maintaining the Council as a branch of the Provincial Legislature.[38]

Given the late hour,[39] the resolution was not formally debated at that time, though it had apparently been supported by all Councillors, save Bligh and Owen.[40] A copy of the resolution was promptly delivered to Rhodes, however, who then announced that he would introduce an abolition bill the next day, the Council having rejected his offer.[41]

Living up to his promise, Rhodes introduced his first abolition bill the next day, February 25. It provided for the abolition of the Council, effective May 1, 1926, with all powers of the Council devolved upon the Assembly and Lieutenant-Governor.[42] No debate was allowed after the bill was introduced.[43] However, the Conservative consensus seems to have been that the bill was doomed to failure; it served only as a token effort to seek the Council's assent before perhaps moving on to more aggressive measures. According to the *Herald*,

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[38] *Ibid*; "Legislative Council Turned Down Offer of Premier Rhodes", *The [Halifax] Morning Chronicle* (25 February 1926) 1. The "more necessary than ever before" language echoed Premier Armstrong's earlier statements in favour of the Council. See "Legislative Council Bill Meets Strong Opposition", *The Halifax Herald* (16 April 1925) 3.

[39] According to the *Herald*, this was "one of the longest [Council] sittings in years"; in addition to debating Rhodes' offer, the Council also gave the initial reading to thirteen Government bills, including the Tenure of Office Bill. D Leo Dolan, "Upper Chamber Is Needed, Members Say in Resolution", *The Halifax Herald* (25 February 1926) 1.

[40] "Legislative Council Turned Down Offer of Premier Rhodes", *The [Halifax] Morning Chronicle* (25 February 1926) 1.

[41] D Leo Dolan, "Upper Chamber Is Needed, Members Say in Resolution", *The Halifax Herald* (25 February 1926) 1.

[42] "Premier Introduced Bill to Abolish the Legislative Council", *The [Halifax] Morning Chronicle* (26 February 1926) 1; "Premier Launches Plan to Provide for One Chamber", *The Halifax Herald* (26 February 1926) 1. For the text of the bill, see "Bill to Abolish Council", *The Halifax Herald* (26 February 1926) 3; "Premier Introduced Bill to Abolish the Legislative Council", *The [Halifax] Morning Chronicle* (26 February 1926) 1.

[43] "Premier Introduced Bill to Abolish the Legislative Council", *The [Halifax] Morning Chronicle* (26 February 1926) 1

> there are few so sanguine as to believe that this bill will become law. It is taken as a 'first gun' fired by the new Government in its plan of campaign. If the bill is rejected in the Upper House—and there is no reason for believing that it will not be rejected there—it is taken that the Government will be prepared with an alternative plan to abolish the Council.[44]

The *Herald* then laid out a scenario for eliminating the Council should it not agree to abolish itself:

> That there is a popular misconception with regard to the tenure of office of the Nova Scotia legislative councillors, there can be no doubt. Outside the precincts of the Legislature it generally is supposed that the members of the Upper House hold their appointments 'for life.' Those familiar with the question know that this view is incorrect. It has been established clearly that the appointments of legislative councillors in this Province are 'at pleasure,' and that the holders of these seats can be dismissed by competent authority. Indeed, a definite legal opinion on this point is to be found in Journals of the House,[45] an opinion given by two of the ablest jurists in the history of the Nova Scotia Bar.[46]

Although the *Herald* stated that it did not not speak for the government, did not know what the Government's next step was and that "any opinion as to [the Government's] plan would be no better than conjecture",[47] these statements were likely disingenuous. Given the fact that the *Herald* set forth one of the legal arguments that would be raised by the Rhodes Government within a matter of weeks, it is highly likely that the *Herald*'s editors had conferred with someone from the Government benches. Indeed, it seems likely that

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[44] "Premier Launches Plan to Provide for One Chamber", *The Halifax Herald* (26 February 1926) 1.

[45] Here the Herald seems to have in mind the opinion delivered to Lieutenant-Governor Adams Archibald in 1883, which claimed that Councillors served at pleasure. Lieutenant-Governor Archibald disagreed, and delivered his own eight page opinion to the Council on why tenure was for life. See Address of Lieutenant-Governor Adams G. Archibald to the Legislative Council (11 April 1883), in *Journals and Proceedings of the Legislative Council of the Province of Nova Scotia*, 28th Parl, 1st Sess (1883) at 104-111 [Address of Lt-Gov Archibald]; *Reference re Legislative Council of Nova Scotia* (1926), 59 NSR 1, 1926 CarswellNS 44 at para 117 (Mellish, J).

Because the McGill Library copy of the Legislative Council *Journals* is missing the volume for 1883, I have been unable to scour the volume to determine if this earlier legal opinion was, in fact, published, or by whom it had been written. Readers interested in the question, however, are encouraged to consult the 1883 volume, cited supra.

[46] "Premier Launches Plan to Provide for One Chamber", *The Halifax Herald* (26 February 1926) 1.

[47] *Ibid.*

Rhodes was using the *Herald* to test the public reception of his fairly radical proposal; if it was received without disapproval, it might be worth pursuing; if the public reacted negatively, it could simply be dismissed as the *Herald*'s opinion.

At this point, Rhodes and his opponents launched rival public relations campaigns to try to win over public support before the abolition bill was voted on. For Rhodes, this was his chance to establish public support for abolition sufficient to force the Council to accept its fate; for the Liberals, it was their chance to demonstrate to the public that the Council served an important purpose.

As perhaps the most popular politician in the province, it is unsurprising that Rhodes spearheaded the Conservative campaign. At a February 24 speech before the Women's Conservative Club, Rhodes restated his intent to abolish the Council and called on the Club's members to "help mould opinion that will result in the abolition of the Legislative Council . . . should an appeal to the people for its abolition be necessary."[48] In order to win over their support, Rhodes emphasized the excessive cost of the Council ("at least $40,000 a year", a figure that was likely exaggerated), the delays caused by the Council, and the fact that other provinces (notably Ontario) did well enough without an Upper House. But, Rhodes also made clear that his opposition was strictly to the Legislative Council, not bicameralism in general, and he spoke in favour of the Canadian Senate, which, he said, "protected the interests of minorities and was of special worth to the Maritime Provinces which while having but one ninth of the population of the Dominion have one quarter of the total representation in the Senate."[49]

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[48] "The Government to Effect Economy by Abolishing Council", *The Halifax Herald* (26 February 1926) 10.

[49] *Ibid.*

Doing its part to delegitimize the Council, on March 1 the *Herald* published an editorial in which it noted that the Councillors were not technically eligible for the title of "honourable", though this style had in practice been used since Confederation.[50] Here, the *Herald* echoed a letter to the editor published in July 1925, which criticized the use of "honourable" not only for the members of the Legislative Council, but also for former members of the Executive Council,[51] though the *Herald* did not repeat the critique as to former cabinet ministers (it seems highly doubtful that the *Herald* independently stumbled upon this incorrect usage of the styling). While apparently focusing on trivialities—the way in which Councillors were referred to, rather than the merits of abolition—the *Herald* could be accused of missing the point. But, as much of the Council's defence of itself was on the basis of tradition, the *Herald*'s editorial exhibited a sort of brilliance; by changing the discourse surrounding the Councillors, the *Herald* would already have won half of its argument; the tradition was false (or, rather, had been transferred to Ottawa), and the Councillors wore no clothes.

The Councillors, meanwhile, recruited their old advocate, Benjamin Russell, co-author with later Prime Minister Sir Robert Borden of the 1894 opinion arguing against the constitutionality of pledges (Russell and Borden were then serving on the faculty of Dalhousie Law School).[52] Recently retired from his position as a puisne judge of the

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[50] "The Title Honorable", Editorial, *The Halifax Herald* (1 March 1926) 6. The term had been properly applied to the Councillors prior to Confederation, but at that time, the provincial legislative councils were, in effect, demoted, and the term was transferred (along with many members of the provincial councils) to the Canadian Senate. However, members of the legislative councils who had already been granted the title prior to Confederation were permitted to maintain it, though new members were not meant to receive the title. This seems to have led to general confusion, and all councillors were granted the title in practice, if not in fact.

[51] Observer, "The Little 'Honorable'", Letter to the Editor, *The Halifax Herald* (22 July 1925) 6.

[52] Benjamin Russell & Robert Laird Borden, Opinion in the Matter of Pledges by Legislative Councillors (1894), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG100, vol 174, no 40a).

Supreme Court of Nova Scotia,[53] Russell stepped back into the political fray for his former client by writing a substantial letter to the editor of the *Morning Chronicle*. His letter opened by relating (without names) the apocryphal story of George Washington and Thomas Jefferson discussing the role of the United States Senate.

> When a constitution for the United States was under consideration there was a question raised as to the necessity of a Senate, and I have the story at second hand of a discussion between two of the great statesmen of the Union, one of whom favored and the other of whom opposed the proposal that there should be a Senate. The believer in the policy of the Senate noticed his opponent pouring his tea into a saucer and asked why he did this. Oh said the other, that is to cool it. Well, replied the first, that is just what we need a Senate for. The legislation that will be sent up from a House of Representatives fresh from the people is always liable to be a little too hot for consumption. It will not hurt it to let it cool a while.[54]

In a strange turn, Russell then explained that the Council was necessary to prevent the democratic excesses of the United States.

> Let us imagine a wave of sectarian passion sweeping over the Province on a demand for some such legislation as is called for at this moment by some States of the American Union. We might find ourselves with a House of Assembly fresh form the people with a mandate for the passing of legislation such as no one in his moral condition of mind would ever dream of passing.[55]

While Russell believed this to be an unlikely occurrence in Nova Scotia, he thought it more

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[53] See Philip Girard, "The Supreme Court of Nova Scotia: Confederation to the Twenty-First Century" in Philip Girard, Jim Phillips & Barry Cahill, eds, *The Supreme Court of Nova Scotia, 1754-2004: From Imperial Bastion to Provincial Oracle* (Toronto: Osgoode Society for Canadian Legal History, 2004) 140-203 at 161, 165.

[54] Benjamin Russell, "A Word for the Legislative Council", Letter to the Editor, The [Halifax] Morning Chronicle (26 February 1926) 6. The original story has Thomas Jefferson, recently returned from Paris, asking George Washington why the new Constitution included a Senate, and Washington responding with the saucer anecdote. As the earliest known version of the story did not appear until 1871, see US, *Cong Rec*, vol 152, 45, at S3408 (24 April 2006) (Sen Byrd), it is most likely that the story was invented some time after the fact and attributed to the two most famous Founders.

In reality, the Senate was the result of the so-called Connecticut Compromise (or Great Compromise) that settled on a bicameral legislature with a lower house allocated according to population and an upper house allocated according to the principle of the equality of the states.

[55] Benjamin Russell, "A Word for the Legislative Council", Letter to the Editor, The [Halifax] Morning Chronicle (26 February 1926) 6.

likely that the Assembly might be overcome by pressure from special interests, such as the logging industry, which might threaten to support an Assemblyman's political opponents in the next election. An unelected upper house would serve as a buttress against the special interests, as its members "could afford to oppose such a special interest and legislate for the interest of the country as a whole."[56] Replying directly to the Rhodes government's economic arguments, Russell concluded by asking, "is it wise, for the sake of saving a few thousand dollars in legislative expenses, to destroy an institution which may come to be our only safeguard against [the special interests]?"[57]

Three days later, the *Morning Chronicle* followed up Russell's letter with its own editorial advocating on behalf of the Council. The *Chronicle* began by noting its long history of supporting the Council since at least 1900, including its critiques of the original 1925 reform bill, presumably in order to establish its credibility on the issue. The editorial then emphasized that the Conservatives had not raised the question of abolition in their party platform, denying them a mandate on the issue. In response to the economic arguments against the Council, the editorial delivered the *coup de grâce*—the province was fully reimbursed for the costs of the Council by the federal government: "[T]he Legislative Council is not costing the ratepayers of Nova Scotia a dollar. Provision is made in the British North America Act for an annual contribution from Federal funds for its maintenance and the costs of legislation. If it should be abolished that contribution might be correspondingly reduced."[58] Then, calling upon emerging Canadian nationalism evident

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[56] Benjamin Russell, "A Word for the Legislative Council", Letter to the Editor, The [Halifax] Morning Chronicle (26 February 1926) 6.

[57] *Ibid.*

[58] "Pause and Ponder", Editorial, *The [Hailfax] Morning Chronicle* (1 March 1926) 6.

since the end of the War (and soon exacerbated by the King-Byng affair), the *Chronicle* condemned Rhodes' statement that he would take the matter to the imperial government if necessary. "He is scarcely impressive when he makes threats of going to Westminster in quest of an 'Imperial decree' in accordance with his recently announced wishes. 'Imperial decrees' are rather out of date with reference to Canada or any of its Provinces."[59] Finally, the editorial noted that as no province had ever been granted an amendment to the British North America Act at its own request, the only means of abolishing the Council was by its own consent, something that was unlikely to be obtained. As such, the entire discussion was moot and, presumably, a waste of time.[60]

Rhodes spoke directly to this editorial when the Assembly took up the abolition bill for second reading. Rhodes claimed that he had never said that he would take the issue to Westminster, but, regardless, he was not afraid to do so. "I say this to the *Chronicle*, that we are sincere in our determination to abolish the Legislative Council . . . and I don't believe, I know, we will succeed. If it is necessary to go to Westminster or anywhere else to seek the remedy we desire, we will go there and seek it."[61] The remainder of Rhodes' speech, which went on for some time, reiterated arguments made time and time again against the

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[59] *Ibid.* Four decades later, similar concerns arose in Québec, where successive governments delayed petitioning Westminster to amend the British North America Act out of concern over how the petition would be viewed by the public. Ultimately, a petition was sent to the Queen, but the British North America Act was not amended as a result. See Sister Maura Ann Cahill, *The Legislative Council of Quebec: Attempts to Abolish or Reform, 1867-1965* (MA Thesis, McGill University Department of Economics and Political Science, 1966) [unpublished] at 82-115. Instead, the Québec Legislative Council was finally abolished after the Union Nationale agreed to pay the councillors a pension equal to their salaries. G William Kitchin, "The Abolition of Upper Chambers" in Donald Cameron Rowat, ed, *Provincial Government and Politics: Comparative Essays* (Ottawa: Carleton University, 1973) 61-82.

[60] "Pause and Ponder", Editorial, *The [Hailfax] Morning Chronicle* (1 March 1926) 6. The *Chronicle* ignored the alternative approach of petitioning the Dominion government to request an amendment to the British North America Act on behalf of Nova Scotia, a tactic that had in other cases been successful.

[61] D Leo Dolan, "Will Go to Westminster if Necessary, He Informs Members of Local House", *The Halifax Herald* (2 March 1926) 1.

Council: it had acted as a rubber stamp for the Liberal government, except for when the Liberals wanted political cover (as with prohibition); it cost the province thousands of dollars annually without any significant results to show for it; and had been opposed unanimously by all parties in Nova Scotia until the prior year.[62]

In reply to claims that the Council would protect the province from ill-drafted legislation, he cited an example from the 1922 Session[63] in which two inconsistent acts were passed in regards to the rules of the road, without anyone in the Council having noticed (though, admittedly, the error was made by the Assembly);[64] in order to rectify the error without calling a special session of the Legislature, the Liberal government petitioned Ottawa to disallow the statute.[65] According to Rhodes, if the Council could not catch such an obvious error in legislation—"any child could have discovered the inconsistency"—then contrary to the Liberals' claims, the Council did nothing to correct "hasty legislation."[66] Instead, having a second chamber encouraged the Assembly to be lazy in drafting legislation.[67]

After Chisholm compared the Council to the Canadian Senate, which the Fathers of Confederation had endorsed, Rhodes repeated his earlier defence of the Senate,

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[62] *Ibid*.

[63] Rhodes mistakenly claimed that the example came from the prior session. *Ibid*.

[64] One of the two statutes implementing the change from left-side driving to right-side driving failed to include a clause stating the date on which it went into effect. As such, right-side driving either went into effect immediately or after January 1, 1923. See SNS 1922, c 14 (including clause stating Act would come into force on January 1, 1923); SNS 1922, c 40 (not including clause stating when Act would come into force).

[65] See J Murray Beck, *Politics of Nova Scotia* (Tantallon, NS: Four East Publications, 1985) vol 2 at 96; Eugene A Forsey, "Disallowance of Provincial Acts, Reservation of Provincial Bills, and Refusal of Assent by Lieutenant-Governors since 1867" (1938) 4:1 Canadian Journal of Economics and Political Science / Revue canadienne d'Economique et de Science politique 47.

[66] D Leo Dolan, "Will Go to Westminster if Necessary, He Informs Members of Local House", The Halifax Herald (2 March 1926) 1.

[67] "The Legislative Council Must Go Declares Premier", *The [Halifax] Morning Chronicle* (2 March 1926) 1.

emphasizing Nova Scotia's disproportionate representation. But where the Senate dealt with important national issues, such as foreign relations and war, the Council faced no issues of such great importance. Indeed, most other provinces had found their upper houses unnecessary.[68] Rhodes then audaciously expanded his argument into a belittling of Nova Scotian government, stating, "With a population less than Toronto we have trimmed ourselves with all the legislative attributes of a nation. I venture to say that the people of this province would be well advised if this chamber were reduced to 30 members instead of 43 as at present. To my mind there is no reason why this should not be brought about."[69] In Rhodes' eye, the trappings of the Nova Scotia government, including the Legislative Council, were undeserved and unneeded.

For his part, Chisholm focused on more practical arguments: the Council was not nearly as costly as Rhodes claimed ($20,690 rather than $40,000 for the prior year); Rhodes had no mandate for abolition; public sentiment had shifted in favour of the Council; and abolition was impossible regardless. On the last point, Chisholm spoke at length about the 1894 appeal to the British government to abolish the Council, emphasizing that the British government had declined to get involved in a dispute that could be resolved within Nova Scotia. Finally, Chisholm considered the recent claims that Councillors served at the Lieutenant-Governor's pleasure. Strange, he said, "that during the sixty-five years in which it had been in force [service at pleasure], this had never been discovered by the various Governments which had wrestled with the problem" and that it should only be discovered

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[68] *Ibid.*

[69] D Leo Dolan, "Will Go to Westminster if Necessary, He Informs Members of Local House", The Halifax Herald (2 March 1926) 1.

when Rhodes came into power.[70] Addressing the point directly, however, he acknowledged that early documents relating to the Council did use the phrase "at pleasure," but, according to Chisholm, the phrase did not at the time mean "'capriciously,' 'arbitrarily' or 'at mere will'—'at pleasure' meant really 'removable for cause only.'"[71] It does not seem that Chisholm presented any evidence to substantiate this claim, however, so it is impossible to know whether he meant this argument genuinely or was merely grasping for straws in the heat of debate.

Chisholm did allow himself one sentimental moment, in which he referred to the Council as Nova Scotia's "birthright." In a short speech supporting abolition, John Flint Cahan, Conservative MHA representing Yarmouth County and the son of Charles Cahan, replied that Chisholm had it wrong: the Council "is more like a birthmark than a birthright."[72] Cahan's speech was otherwise largely repetitive.

Finally, after three hours of debate, Rhodes closed the floor and the bill was read for the second time.[73]

The next day (March 2), the Council finally took up the debate on Gillis' resolution regarding the utility of the Legislative Council. As Rhodes (like many of his predecessors) had framed his argument against the Council as an issue of economy—the Council was simply too expensive for a relatively poor province like Nova Scotia to maintain—much of the debate centred on the question of just how much the Council cost and how much

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[70] "The Legislative Council Must Go Declares Premier", *The [Halifax] Morning Chronicle* (2 March 1926) 1.

[71] *Ibid*.

[72] D Leo Dolan, "Will Go to Westminster if Necessary, He Informs Members of Local House", The Halifax Herald (2 March 1926) 1.

[73] *Ibid*; "The Legislative Council Must Go Declares Premier", *The [Halifax] Morning Chronicle* (2 March 1926) 1.

abolition could save the province. Gillis, for instance, contested Rhodes' claim that the Council cost $40,000 per year, noting that the public accounts had charged only $20,600 for Council-related expenses in 1925 and only $20,400 in 1924.[74] Moreover, Gillis said, the economy of maintaining the Council could not be judged solely by what the Council *cost*, but must also take into consideration what the Council *saved*. According to Gillis, Nova Scotia and Quebec, which had both maintained their Legislative Councils, had significantly lower per capita expenditures than Ontario or the western provinces, a state of affairs that Gillis attributed to the Councils' prevention of "hasty or ill-advised legislation".[75]

Alexander Sterling MacMillan, the de facto leader of the Opposition in the Legislative Council, echoed Gillis' argument, repeating the "hasty and ill-advised" language:

> The question is this, is this branch of the Legislature worth $20,000 to the people of the Province or is it not? That means a per capita cost of 3.4 cents per year, and I know if the people were acquainted with the facts of the case and were shown how the body has in the past and will no doubt again in the future refuse to sanction hasty and ill-advised legislation brought down from the Assembly not in the best interests of the Province as a whole, and has saved its cost many times over, they would not consider its cost a heavy one.[76]

MacMillan also accused Rhodes of bad faith in raising the economic argument, as Rhodes had otherwise generally increased the costs of provincial administration by increasing salaries or hiring additional personnel (presumably loyal Conservatives), and by subsidizing the unpopular Besco.[77]

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[74] "Legislative Council Costing Only Half what Premier Stated", *The [Halifax] Morning Chronicle* (3 March 1926) 1.

[75] *Ibid*. According to Gillis, the per capita expenditures of Nova Scotia amounted to only $10.46, compared to $15.96 for Ontario, $16.16 for Manitoba, $15.27 for Saskatchewan, $17.54 for Alberta, and a shocking $37.10 for British Columbia. Gillis did not provide figures for Quebec or the other Maritime provinces, nor did he cite the origin of his numbers.

[76] *Ibid*.

[77] "Legislative Council Costing Only Half what Premier Stated", *The [Halifax] Morning Chronicle* (3 March 1926) 1; D Leo Dolan, "Says Upper House Will Defeat Bill", *The Halifax Herald* (3 March 1926) 1.

MacMillan also made clear that the Council would vote down Rhodes' abolition bill as soon as it passed the Assembly. Rhodes' pension offer was little more than a bribe, MacMillan said, but the Councillors would refuse "to sell our birthright."[78] MacMillan then challenged any Councillors, save Frederick Bligh, who did not believe the Council served an important purpose to resign immediately; he exempted Bligh, Rhodes' lone appointee to the Council, because "he is here for a purpose, but I feel safe in saying that he will continue to draw his indemnity for many years to come."[79]

Despite MacMillan's bold statements against abolition, however, the Council once more ultimately deferred a vote on Gillis' resolution. Instead, the debate was adjourned, with the intent to resume once the Assembly had passed its abolition bill.

Unwilling to wait indefinitely, however, the Council resumed debate on Gillis' resolution on March 4.[80] Unlike earlier debates in the Council, which had largely been dominated by Councillors opposed to abolition, Bligh was at the centre of the March 4 debates, speaking for over an hour in favour of abolition. Unsurprisingly, Bligh's speech incited heated comments from the Liberal Councillors, leading to an almost total breakdown in parliamentary decorum. According to D. Leo Dolan, the *Herald*'s reporter covering the Council debates,

> During the last 14 years the writer has been privileged to report the proceedings of the Federal House at Ottawa and the Provincial assemblies in Saskatchewan, New Brunswick and Nova Scotia, but never in that period witnessed such an utter disregard of parliamentary decorum, or more discourteous treatment to a speaker, than that which featured yesterday

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[78] *Ibid*; D Leo Dolan, "Says Upper House Will Defeat Bill", *The Halifax Herald* (3 March 1926) 1.

[79] "Legislative Council Costing Only Half what Premier Stated", *The [Halifax] Morning Chronicle* (3 March 1926) 1.

[80] D Leo Dolan, "Lords Make Last Stand with Their Backs to the Wall", *The Halifax Herald* (5 March 1926) 1; "Bligh Turns Debate into a Burlesque", *The [Halifax] Morning Chronicle* (5 March 1926) 1.

> afternoon's sitting of the Upper Chamber. In fairness to a majority of the members of the Legislative Council, it should be said that they took no part in this ludicrous performance, which was confined to a few partisan members of the old machine. The spectacle of a presiding officer in any Canadian parliamentary institution interrupting a speaker, not for a breach of the rules on his part, but to submit some comment on the debate, also was most unusual, to say the least.[81]

The *Morning Chronicle*'s report of events was less critical of the Liberals, and instead represented the interruptions as generally being in good will.

> Mr. Bligh's apparent weakness in argument regarding the abolition of the Council was made up for by his wit, and at times he had the Council and the spectators in laughter, necessitating the President at one stage calling for order. At the close of his speech . . . Mr. Bligh was given a hearty handclap by his fellow members, who while not agreeing with his statements perhaps, at least least enjoyed the speech and the repartee.[82]

Bligh began by noting that Gillis had offered roughly ten arguments in favour of retaining the Council and MacMillan about another fifteen, but that he himself could name about thirty-nine of his own in favour of abolition.[83] Rather than list these thirty-nine reasons, however, Bligh focused on two related arguments: "that the people by defeating the the late Government had spoken in favor of the abolition of the Legislative Council and that the sovereign will of the people should be obeyed."[84] While he did not doubt Gillis' sincerity in defending the Council, Bligh said that he found "pathetic" the spectacle of Gillis defending a chamber that had fallen "out of touch with the spirit of the times."[85] According to Bligh, the Council had lost the people's confidence because it had acted as a rubber stamp for the

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[81] D Leo Dolan, "Lords Make Last Stand with Their Backs to the Wall", *The Halifax Herald* (5 March 1926) 1.

[82] "Bligh Turns Debate into a Burlesque", *The [Halifax] Morning Chronicle* (5 March 1926) 1.

[83] *Ibid.*

[84] *Ibid.*

[85] D Leo Dolan, "Lords Make Last Stand with Their Backs to the Wall", *The Halifax Herald* (5 March 1926) 1. Strangely, the *Morning Chronicle* did not report the "pathetic" statement, despite the fact that it made Bligh look bad.

former Liberal administrations. "Instead of checking hasty and ill-advised legislation in the past and showing independence, the council has been a servile follower of former governments. Had the members shown less slavish support to past administrations, the council might have secured a stronger following in the country."[86]

This comment inspired the first of many significant interruptions, as Christopher Chisholm[87] jumped to his feet and called Bligh to order. "The members of this body are the slaves of no man, and they have never been servile followers of any Government," said Christopher Chisholm.[88] Bligh immediately tried to backtrack, offering a half-hearted apology "if he had offended any member", but denied saying that the Councillors were slaves.[89] Christopher Chisholm again contested this latter statement, stating that Bligh had, in fact, said that very thing.[90] Trying to rephrase, Bligh then offered that the Council had, rather than slaves, been a rubber stamp for the Assembly; again, Christopher Chisholm objected. Finally, Bligh said that the Council was a clod on progress; not seeing any further objections, he proceeded with his speech.[91]

Bligh then claimed that in the prior forty years, the Council had never voted down a

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[86] *Ibid*.

[87] I have thus far been unable to determine the relationship, if any, between MLA William Chisholm, Legislative Councillor Christopher Chisholm, and Supreme Court of Nova Scotia Justice (and later Chief Justice) Joseph Chisholm. All three were originally from Antigonish County, and all three were born within a sixteen year period (Christopher in 1854, Joseph in 1863, and William in 1870). All were also trained as lawyers and called to the bar. I suspect the trio were cousins (of varying degree), but have no solid evidence.

In one particularly interesting turn, Christopher Chisholm represented Antigonish County in the Assembly from 1891 until he was appointed to the Legislative Council in 1916; during the 1916 election, William Chisholm ran and was elected to the same seat.

[88] D Leo Dolan, "Lords Make Last Stand with Their Backs to the Wall", *The Halifax Herald* (5 March 1926) 1; "Bligh Turns Debate into a Burlesque", *The [Halifax] Morning Chronicle* (5 March 1926) 1.

[89] D Leo Dolan, "Lords Make Last Stand with Their Backs to the Wall", *The Halifax Herald* (5 March 1926) 1.

[90] *Ibid*.

[91] "Bligh Turns Debate into a Burlesque", *The [Halifax] Morning Chronicle* (5 March 1926) 1.

single Government measure, yet now threatened to vote down several of Rhodes' bills.

> Was there ever a government measure that came to the House in the last 40 years that was defeated here? But today there are three government bills trembling in the balance and likely to be defeated because you are opposed to the government's program. Did you ever raise one word against government measures in the past? Were the past governments always right?[92]

At once, Liberal Councillors started shouting down Bligh for the perceived misrepresentation. Before all decorum was lost, however, Council President Jason Mack defused the situation by joking, "We were always firm in our opposition for abolition," to which Bligh replied, "Yes, you were always solid on that question. You stood up and fought that like men."[93]

Another Liberal Councillor then interjected that the Council had also blocked temperance bills. When Bligh said that this was only done at the Liberal government's bidding and that the Council had been used as a "buffer between the people and the government", Christopher Chisholm again objected, saying it was indecent to call any member of the Council a "buffer."[94]

Seemingly ignoring Chisholm's objection, Bligh continued, asking why the Council had done nothing to prevent various road spending scandals. MacMillan replied that one of the scandals (concerning the St. Margaret's Bay Road) had been thoroughly investigation by a royal commission, and the chairman of the highways board at the time of the scandal was now a member of the Conservative government, suggesting the Conservatives did not

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[92] D Leo Dolan, "Lords Make Last Stand with Their Backs to the Wall", *The Halifax Herald* (5 March 1926) 1.

[93] *Ibid*; "Bligh Turns Debate into a Burlesque", *The [Halifax] Morning Chronicle* (5 March 1926) 1.

[94] D Leo Dolan, "Lords Make Last Stand with Their Backs to the Wall", *The Halifax Herald* (5 March 1926) 1.

really take the matter seriously.[95]

"Well, it's pleasing to see you have at last awakened from your Rip Van Winkle sleep of 40 years," said Bligh in response. He then proceeded to criticize MacMillan's bombastic tone, comparing him to former Councillor Captain Thomas Fletcher Morrison, known colloquially as "roaring bellows," saying that it sounded as if MacMillan intended his speech to be heard in the *Morning Chronicle* offices across the street.[96]

After briefly touching on the question of pensions and of the constitutionality of pledges, Bligh finally turned to the language of Gillis' resolution. The resolution, which Bligh claimed was "skillfully drafted" by President Mack, was an insult to Premier Rhodes, as it had claimed that the Council was more necessary then "than ever before". "Can you conceive of a sentence more insulting or more of an affront to the Premier of this Province and his government? And this resolution was drafted before the Council knew anything of the government's program."[97]

When Bligh noted that similar arguments had been raised by William Chisholm in the Assembly, MacMillan once more objected, citing a rule that prohibited reference to a speech in the other House of the Legislature. President Mack suggested as a compromise that Bligh might refer to the speeches as happening in "another place"; MacMillan again objected, stating that this would merely run around the rule. Bligh then referenced Liberal claims that changed conditions in the province necessitated maintenance of the Council, as "the miners might start some movement and that revolutionary changes were probable

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[95] *Ibid.*

[96] *Ibid.*

[97] *Ibid.*

and that vested interests were in jeopardy".[98] Rufus Carter then asked who had made such claims, to which Bligh replied that he could not provide any names, but that he "heard it in another place."[99] When Carter once more objected, Bligh said that he did not in fact believe the Liberals were concerned about the miners, but instead put the "now more than ever before" language in the resolution solely because the Conservatives were in power.[100]

Bligh finally concluded by saying that it was only a matter of time before the Council was abolished. Bligh claimed that the Council "won't last five months after Premier Rhodes makes an application for abolition . . . to the Imperial Government."[101] According to Bligh, Rhodes could then appoint 25 additional Councillors, who would then outnumber the existing members and vote for abolition; Bligh believed the number of Councillors to have been set by order-in-council, allowing Lieutenant-Governor Tory to increase the chamber at Rhodes request. He had no doubts that Tory "would follow precedent and accept the advice of his advisors." But, according to Bligh, Rhodes did not want to have to resort to this approach, and it would be far preferable for the Council to accept its fate.[102]

Although packing the Council had been proposed in the past (indeed, it had been raised earlier that week by the *Herald*), this was the first public statement by an official representing the Rhodes government that it intended to do so if the Council did not pass the abolition bill. While the Councillors no doubt had read about or heard rumours of Rhodes' plans, they were now being confirmed by Rhodes' mouthpiece in their midst. They

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[98] *Ibid.*

[99] *Ibid.*

[100] *Ibid.*

[101] *Ibid.*

[102] *Ibid.*

thus found themselves facing a quandary: they could either accept abolition, along with the pensions Rhodes had promised, or they could hope that Lieutenant-Governor Tory, a loyal Liberal, would deny Rhodes' request as unconstitutional, while risking abolition without pensions. While some Councillors, notably MacMillan, could easily find other employment, others relied on their sessional indemnities and, due to advanced age, could not easily replace it with other employment. Faced with a direct threat of abolition-by-packing, many of the Councillors must have felt a strong temptation to give in to Rhodes' demands.

In what was likely a strategic response to this perceived threat, when debate resumed the next day, President Mack changed the subject from packing the Council to the prospect of a public referendum. While condemning Rhodes' threat to implement a referendum via a provision in the supply bill, Mack said that the Council would pass a separate referendum bill if presented.[103]

> I saw here, and I believe I am justified in saying it on behalf of every member of the Council, that there is not the slightest occasion for the Premier going to such lengths as to attach the machinery for holding a plebiscite regarding the abolition of the Legislative Council to the Supply Bill. If the Premier desires to appeal to the people on this question, if he thinks he can secure such an overwhelming vote as he says he can, then I give him the assurance, and I give him notice today, that he need take no such unprecedented course. But let him bring to this chamber a Bill providing for taking the view of the people with regard to abolition, and I feel personally that he can get this Bill through. It is well that we should have it before us because it is essential that the Bill when it finally passes should be in such shape as to secure a proper and impartial submission to the people on the real question at issue.[104]

Here, Mack framed a referendum as the sole legitimate means of abolition without the Council's consent. Rather than delaying the inevitable, a referendum would finally offer the

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[103] "Tenure of Office Bill Amended to Protect Officials", *The Halifax Herald* (6 March 1926) 1; "Would Get Rid of Watch Dogs of Council", *The [Halifax] Morning Chronicle* (6 March 1926) 1.

[104] "Would Get Rid of Watch Dogs of Council", *The [Halifax] Morning Chronicle* (6 March 1926) 1.

Council a chance to defend itself before the public. With the support of the Liberal machine, the Council might be able to win a referendum, depending on the framing and the course of events. Indeed, when the Australian state of Queensland held a referendum to abolish its Legislative Council in 1917, only 39% voted for abolition,[105] a fact well-known to the Councillors. Though victory was by no means assured, the Nova Scotia Legislative Council could at least have its future in its own hands, which was not true if Rhodes could simply pack the chamber.

Turning to the theme of the Council's usefulness, Mack related a parable to show how the Council had protected the province.

> In a certain primitive country, according to the fable, there were hungry wolves and many sheep. After many attempts on the sheep folds the wolves had failed because of the noise made by the dogs guarding the sheep. But after a time the wolves conceived the idea of approaching the shepherds with certain propaganda, arguing that the dogs cost too much and of how much could be saved if they were destroyed or sent away. And the shepherds, simple, primitive people, allowed themselves to be persuaded. They either killed or abolished them. (Laughter.) The result was that a night or two after that the wolves, having accomplished their purpose, came down in a raid upon the sheep folds and in a very short time there was no mutton to be found in that county. . . .
>
> The Premier is much too smooth and much too gentlemanly a person to personify the savage qualities of the wolf, . . . but the general impression is that there are interests behind him as voracious and ravenous as any pack that ever roamed the wild steppes of Russia or howled in the northern wilds of Canada. The object of the Premier is to get rid of the watch dogs of the Legislative Council. He has tried it. He means to try it again. He has declared a vendetta which will only be satisfied when the object of its hatred, the unfortunate Legislative Council, has ceased to exist.[106]

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[105] Australia, Parliament of Queensland, *The Abolition of the Legislative Council* at 6 online: Queensland Parliament <http://www.parliament.qld.gov.au/communityEngagement/view/exhibitions/documents/AbolitionLegCouncil.pdf>. Notwithstanding the overwhelming referendum loss, the Queensland Labor government went ahead with abolition anyway in 1921 once it had obtained a majority on the Legislative Council. *Ibid* at 7-10.

[106] "Would Get Rid of Watch Dogs of Council", *The [Halifax] Morning Chronicle* (6 March 1926) 1.

Mack then emphasized once more that he did not accuse Rhodes of anything improper, instead saying that he was being pushed by his caucus to abolish the Council when his personal views were perhaps more complex. According to Mack, many Conservative MHAs felt a greater loyalty to former leader William Lorimer Hall than to Rhodes, putting Rhodes in a position where he had to appease his caucus to prevent a leadership battle.[107]

Finally, turning to the language of Gillis' resolution that had been attacked the prior day by Bligh (the "now more than ever" clause), Mack stated that it was not a reference to the Rhodes government, but to the broader political situation in which the world had found itself. "There are certain radical ideas, certain revolutionary forces outside of Canada that are beginning to be exercised and to have their representatives within Canada," Mack said. Surprisingly, Mack did not have in mind Bolshevism, but instead the rise of powerful corporations:

> A number of influences are growing up in Nova Scotia more powerful politically and more powerful financially—and any Legislature of only one chamber is more amenable to lobby influences. Who can say that the most sacred interests of the people of Nova Scotia will not some day in the future be sacrificed at the insistence of these corporations? If some of these corporations have no conscience, as has been claimed by some of our Conservative friends, then it is the more necessary that this branch of the Legislature should be maintained.
>
> Nothing has ever been more hostile, more ruinous to the interests of the people than the lobby and the influence brought to bear by powerful interests upon the Legislatures of the country. With that in view, the people

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[107] *Ibid*. While some Conservatives no doubt felt loyalty to Hall, it is doubtful that Hall would have initiated a leadership battle with Rhodes. Hall had resigned the leadership under questionable terms after reportedly being carjacked on the St. Margaret's Bay Road in May 1925. According to Beck, rumors circulated that "the recent escapade on the St. Margaret's Bay Road was someting more than met the eye", though Beck does not speculate what those rumors might have been. J Murray Beck, *Politics of Nova Scotia* (Tantallon, NS: Four East Publications, 1985) vol 2 at 109. One possibility, given Hall's reputation for drinking, was that he had crashed his car while driving drunk, but reported his injuries and loss of car to assault and robbery. Regardless, the Conservative Party leadership were happy to replace Hall with Rhodes, who they saw as more electable, see *ibid* at 108-109, suggesting Mack either exaggerated the true state of affairs or inaccurately believed Hall to have more supporters than he in fact did. In the end, Hall would be named provincial Attorney General following the death of Attorney General Douglas.

> would never dream of being like the simple shepherds, and listen to the arguments of the wolves to do away with their watch dogs.[108]

With that, Mack concluded his comments and the debate on Gillis' resolution was once more deferred until March 9.

3. The Tenure of Office Bill Defeated in the Council

While debate on the Assembly abolition bill and Gillis' resolution raged, the Council had also taken up the Tenure of Office Bill, passed by the Assembly on February 23.[109] Initially, progress was rather slow, as the Bill was caught up in the Committee on Law Amendments while Chairman Christopher Chisholm was absent.[110] On Thursday March 4, however, the Committee, after much delay, referred the Bill back with a recommendation that it be given the three months hoist. Richard Beazley then proposed to send the Bill back to the Committee for further deliberation. Without debate or discussion, the Beazley's motion carried.[111] It seems that the Council recognized the political hand grenade that they were holding, especially in light of Jason Mack's statement the same day that the Rhodes government was willing to pack the Council with appointments in excess of twenty-one.

The next day, the Committee on Law Amendments considered the Bill anew, ultimately adopting two amendments designed to minimize the Bill's harm. First, the Bill was amended to be prospective only, so that it did not apply to any existing provincial officers; second, it was made inapplicable to individuals holding judicial or quasi-judicial office. The Committee

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[108] "Would Get Rid of Watch Dogs of Council", *The [Halifax] Morning Chronicle* (6 March 1926) 1.

[109] *Journals and Proceedings of the House of Assembly of the Province of Nova Scotia*, 38th Parl, 1st Sess (1926) at 51.

[110] See Dolan, D Leo. "Says Upper House Will Defeat Bill", *The Halifax Herald* (3 March 1926) 1.

[111] "Tenure of Office Bill Discussed", *The [Halifax] Morning Chronicle* (5 March 1926) 1; "Upper House Delays Tenure of Office Bill", *The Halifax Herald* (5 March 1926) 3.

then referred the Bill back to the Council as a whole.[112]

The Conservative backlash was immediate. In its initial report of the Council's amendments, the *Herald* said that the Council "had amended the bill in such a way as to directly oppose the very purpose of the government's proposal."[113] In the next issue,[114] the *Herald* ran not only an editorial condemning the Council,[115] but also a special piece entitled "The Legislative Council Must Go", which appeared in bold type on a page generally dedicated to news stories.[116] In the *Herald*'s eyes, amending the Bill was an affront to democracy and a violation of the principle of responsible government.

> The people voted for a change; and the expression of their will is in evidence in the changed complexion of the Lower House. The people could not vote to alter by a fraction the conditions as they exist in the Legislative Council, a non-elective body, responsible to no one but itself. Had the people been able to alter the complexion of the Upper Chamber, the majority of present incumbents of seats there would have gone out with their friends who sat in the Assembly. Therefore, since the will of the people as expressed at the polls must prevail, the will of the new Government and its supporters in the Lower House must prevail. That is axiomatic, the very essence of Responsible Government. . . .
>
> This is a free British Province in the year 1926. The days of autocracy and oligarchy have gone forever. And when the Sovereign People speak, the Sovereign People must be OBEYED.[117]

As the Council stood in the way of the will of the people, thereby interfering with the regular working of responsible government, the *Herald* concluded the Council had "sign[ed] its own death warrant" and must be abolished 'just as soon as abolition can be brought

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[112] "Tenure of Office Bill Amended to Protect Officials", *The Halifax Herald* (6 March 1926) 1.

[113] *Ibid.*

[114] The amendments were passed on March 5, a Friday, and were initially reported on March 6, a Saturday. As the *Herald* did not at the time publish on Sunday, the next issue appeared on March 8.

[115] "The Will of the People", Editorial, *The Halifax Herald* (8 March 1926) 6.

[116] "The Legislative Council Must Go", *The Halifax Herald* (8 March 1926) 3.

[117] "The Will of the People", Editorial, *The Halifax Herald* (8 March 1926) 6.

about''.[118]

The next day the *Morning Chronicle* issued a direct retort[119] to the *Herald*'s claims, criticizing the Tenure of Office Bill as contrary to British tradition, and applauding the Legislative Council's actions.

> The Bill is not in the public interest, it is vicious in principle, it is thoroughly unjust and un-British in its intent and application. It, in short, opens the door for the spoilsman in every office in the Provincial service and would place in the hands of the Government the power of dismissing officials by wholesale no matter how competent or faithful they are in the discharge of their duties. . . . It is so vicious in principle that the Legislative Council would be recreant in its duty and to the public service of the Province to allow a measure so thoroughly objectionable in character and so wholly subversive to good government to pass without amendment.[120]

The *Morning Chronicle*'s arguments were taken up later that day by Richard Beazley when debate on Gillis' resolution was resumed. Citing hostile news reports claiming that the rejection of the Tenure of Office Bill was enough by itself to justify abolition of the Council, Beazley claimed that, in fact, the opposite was the truth.

> I hold that this amendment alone would justify the retention of the Council, because this Bill as it comes form the House of Assembly seeks to make responsible officials creatures of partisan politics and subject to the whim of the Government. It would not be well for public business if this should be done, and such officials as sheriffs, registrars of deeds, school inspectors and other responsible and trusted officials turned out at the behest of some partisan and without just cause.[121]

Beazley then went on to specifically reference the *Morning Chronicle*'s editorial, which he encouraged any of his colleagues who did not fully understand the issue to read. Then, to

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[118] "The Legislative Council Must Go", *The Halifax Herald* (8 March 1926) 3.

[119] Where the *Herald* editorial had been named "The Will of the People," the *Morning Chronicle*'s response was "The Will of the Partisans." "The Will of the Partisans", Editorial, *The [Halifax] Morning Chronicle* (9 March 1926) 6.

[120] *Ibid*.

[121] "Hon. R.G. Beazley Hurls Challenge at Premier Rhodes", *The [Halifax] Morning Chronicle* (10 March 1926) 1.

prove that the Council's actions regarding the Tenure of Office Bill were not unprecedented, as claimed by the Conservatives, Beazley cited twelve government bills amended in 1923, fourteen amended and one deferred in 1924, and eleven amended and four deferred in 1925. Beazley then lamented that the public was largely unaware of the work the Council had done, accepting that at least some of the blame lay with the Council itself: "The work of this body is largely done in committee, and we have really been hiding our light under a bushel."[122]

In the end, the Council's morale seems to have been reinforced by the arguments raised by Beazley and the *Morning Chronicle*; when the Tenure of Office Bill came up for a vote on March 11, it passed with the proposed amendments.[123] The Bill was then returned to the Assembly, which rejected the amendments on March 16, sending the Bill back to the Council for reconsideration.[124] Two days later, the Council informed the Assembly that it adhered to its earlier amendments.[125] With the Assembly still unwilling to agree to the Council's amendments, the Tenure of Office Bill was effectively dead for the 1926 Session.

Though the Conservative moves to abolish the Council were already well under way by the time that the Council refused to pass the unamended Tenure of Office Bill, that refusal seems to have solidified Conservative resolve to destroy the Council. Prior to this point, the Rhodes government's critiques of the Council had been fairly oblique, focusing primarily on economic arguments or vague references to public sentiment. After this, however, the

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[122] *Ibid.*

[123] See *Journals and Proceedings of the House of Assembly of the Province of Nova Scotia*, 38th Parl, 1st Sess (1926) at 119.

[124] *Journals and Proceedings of the House of Assembly of the Province of Nova Scotia*, 38th Parl, 1st Sess (1926) at 119, 158.

[125] *Journals and Proceedings of the House of Assembly of the Province of Nova Scotia*, 38th Parl, 1st Sess (1926) at 184.

Council's critics claimed that the Council was contrary to the nature of responsible government and must be done away with lest the people be subjected to the whim of an unelected minority. In all likelihood similar opinions had been held by opponents of the Council since at least the 1870s, but they had not typically been voiced in recent decades due to the fear of instigating the sort of constitutional crisis narrowly avoided in 1917. The failure of the Tenure of Office Bill instigated a change in the rhetoric of abolition and seems to have helped inspire Rhodes to do everything necessary in order to achieve it.

4. Rhodes Attempts to Pack the Council

While debates on the Tenure of Office Bill and Gillis' resolution raged on, Rhodes' abolition bill sat ignored in the Assembly. Though it had been given a second reading on March 1,[126] and had been returned unamended by the Assembly Committee on Law Amendments on March 2,[127] no further debates were scheduled. Initially the Council had anticipated receiving an abolition bill from the Assembly by the end of that week; when no bill was received, the Council simply debated Gillis' resolution. Meanwhile, the Assembly did not discuss abolition until March 9, when William Chisholm finally asked Rhodes why the bill had not been brought up for third reading; Rhodes refused to give a definitive answer, saying only that "We have certain reasons for not stating at present what we propose to do to abolish the Council", but that "the Government was determined to abolish the Legislative Council".[128]

Rhodes' "certain reasons" suddenly became clear later that same day. After debates had

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[126] *Journals and Proceedings of the House of Assembly of the Province of Nova Scotia*, 38th Parl, 1st Sess (1926) at 68.

[127] *Journals and Proceedings of the House of Assembly of the Province of Nova Scotia*, 38th Parl, 1st Sess (1926) at 69-70.

[128] "Abolition of Council Bill Is Held Up", *The [Halifax] Morning Chronicle* (10 March 1926) 1.

concluded, provincial Liberals learned that Rhodes had secretly asked Lieutenant-Governor Tory to appoint twenty-two Conservatives to the Legislative Council.[129] Uncertain of the legality of such appointments, Tory then referred the matter to Ottawa,[130] at which point it was leaked to Nova Scotia Liberals by unknown federal or provincial officials.

The chain of events began sometime in late February or early March—most likely around March 1, the date of the second reading of the Assembly abolition bill—when Rhodes met with Deputy Attorney General Fred Mathers about the legality of appointing in excess of twenty-one and of dismissing existing Councillors.[131] At that meeting, Mathers told Rhodes that, with the possible exception of the "Ten Year Men" appointed since the Council's reform, Councillors were appointed during pleasure, but "it is a debatable question whether it is during the pleasure of the Lieutenant-Governor or of some other authority".[132] It seems, however, that Mathers was not prepared at the meeting to answer whether the Council was limited to twenty-one members, and told Rhodes that he would provide him with a formal opinion on that question. That opinion, dated March 3, 1926, concluded that while earlier Lieutenant-Governors had been instructed not to appoint more than twenty-one provisional Councillors needing final authorization of the Sovereign, nothing had limited the Sovereign's ability to appoint in excess of twenty-one. (By contrast, the Executive Council was strictly limited to no more than nine members). As appointment of new Councillors had been fully vested in the Lieutenant-Governor by legislation in 1872

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[129] "Rhodes Attempting to Overwhelm Council with Tory Block", *The [Halifax] Morning Chronicle* (10 March 1926) 1.

[130] *Ibid.*

[131] Letter from Fred F Mathers to Edgar N Rhodes (3 March 1926) in "Ottawa Opposes Council Abolition Plan", *The Halifax Herald* (17 March 1926) 1 [Letter from Mathers to Rhodes]. The letter refers to "our recent interview," but does not state when that meeting took place.

[132] *Ibid.*

(obviating the need to have provisional appointments made permanent by the Sovereign), Mathers concluded the Lieutenant-Governor now exercised the authority previously held by the Sovereign, and he could appoint in excess of twenty-one Councillors.[133]

With Mathers' opinion confirming what the Conservatives had already believed about the provincial constitution, on March 5, the same day the Council's Committee on Law Amendments proposed its changes to the Tenure of Office Bill, Rhodes informed Lieutenant-Governor Tory that he intended to submit draft orders-in-council to appoint twenty additional members to the Legislative Council, taking that body to a total of thirty-eight members.[134]

Despite personally agreeing with Mathers' assessment, Tory seems to have been quite uncomfortable with the prospect of appointing Councillors in excess of the accepted maximum. On March 6, Tory sent a detailed telegram to Under Secretary of State Thomas Mulvey explaining the situation and stating that he intended "to approve these appointments on the 15th of March unless as provided in the Commission and Instructions issued to me His Excellency the Governor General instructs me to the contrary."[135] Tory had, in essence, dumped responsibility onto Mulvey, outgoing Governor-General Byng, and the federal Law Officers.

On March 8, Mulvey replied to Tory by telegram, stating that "very grave constitutional questions are raised by the order-in-council in question" and begging that Tory consider delaying his March 15 deadline, as "due consideration . . . can scarcely be adequately given in

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[133] *Ibid.*

[134] Letter from Edgar N Rhodes to James Cranswick Tory (5 March 1926) in "Ottawa Opposes Council Abolition Plan", *The Halifax Herald* (17 March 1926) 1.

[135] Telegram from James Cranswick Tory to Thomas Mulvey (6 March 1926) in "Ottawa Opposes Council Abolition Plan", *The Halifax Herald* (17 March 1926) 1.

the course of a week."[136] Despite Mulvey's pleas, however, neither Tory nor Rhodes offered to delay the appointments, and the Governor-General's response was ultimately relayed to Rhodes on March 15.[137]

In the meantime, news of Rhodes' plan and the secret communications with Ottawa were leaked to provincial Liberals on the evening of March 9. Upon learning of the proposed appointments, William Chisholm sent a telegram to Prime Minister Mackenzie King asking if the rumors were in fact true: "Rumored here Lieutenant-Governor requested by his Government appoint additional Legislative Councillors exceeding twenty-one and that he has asked for directions from Ottawa. Have you any information regarding matter?"[138] The next day, Mackenzie King replied, "Rumor referred to in your wire, March 9th, quite correct Law officers of Crown at Ottawa have been asked carefully to consider and furnish Government with expression of their opinion and Lieut.-Governor has been so advised."[139]

Even before William Chisholm had received this confirmation from Mackenzie King, however, the *Morning Chronicle* broadcast news of the proposed appointments. But, as no details were known, the article focused primarily on arguments for why the appointments were unconstitutional, rather than the specifics of Rhodes' plan: the Commission issued to Lord Monck in 1861 called for a Legislative Council composed of 21 members, to serve at pleasure, which Lieutenant-Governor Adams Archibald confirmed in 1883, had come to

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[136] Telegram from Thomas Mulvey to James Cranswick Tory (8 March 1926) in "Ottawa Opposes Council Abolition Plan", *The Halifax Herald* (17 March 1926) 1.

[137] See *Ibid*.

[138] Telegram from William Chisholm to WL Mackenzie King (9 March 1926) in "Public Astounded by Exposure of Rhodes 'Coup' Against Council", *The [Halifax] Morning Chronicle* (11 March 1926) 1.

[139] Telegram from WL Mackenzie King to William Chisholm (10 March 1926) in "Public Astounded by Exposure of Rhodes 'Coup' Against Council", *The [Halifax] Morning Chronicle* (11 March 1926) 1.

mean during good behaviour. The *Morning Chronicle* then noted that no prior attempts to abolish the Council had included efforts to appoint more than 21 members, and the issue had not been considered at all in the Russell-Borden opinion from 1894.[140] Finally, while not directly stating that it was improper for Ottawa to interpret the Nova Scotian constitution, the *Morning Chronicle* suggested that if Rhodes held a different opinion than that of his predecessors, he should seek an opinion from the Supreme Court of Nova Scotia: "It is a Nova Scotia right to have a Nova Scotia matter determined as provided for by a Nova Scotia statute in a Nova Scotia court."[141] Of course, seeking an advisory opinion from the Supreme Court of Nova Scotia would have required Rhodes to state publicly his intent to pack the Council and could potentially take months.

When William Chisholm raised the planned appointments in the Assembly on the afternoon of March 10, Rhodes initially stated that he had no information to give the Assembly; he did not inform them of Mathers' opinion, of Tory's correspondence with Mulvey, or of the pending decision from the Law Officers. Chisholm then read aloud his telegram correspondence with Mackenzie King, which greatly "peeved" Rhodes, who continued his refusals to discuss the matter, citing the confidentiality concerns violated by the Prime Minister.[142]

> I have nothing to add. My answer has been given as far as I can give it, having regard to proper constitutional practice. If the Prime MInister of Canada is so lacking in appreciation of constitutional procedure as to disclose confidential communications passing between His Honor the

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[140] "Rhodes Attempting to Overwhelm Council with Tory Block", *The [Halifax] Morning Chronicle* (10 March 1926) 1. For the Russell-Borden opinion, see Russell & Borden, supra note 52.

[141] "Rhodes Attempting to Overwhelm Council with Tory Block", *The [Halifax] Morning Chronicle* (10 March 1926) 1.

[142] "Public Astounded by Exposure of Rhodes 'Coup' Against Council", *The [Halifax] Morning Chronicle* (11 March 1926) 1.

> Lieutenant-Governor and the Chief Law Officers of the Crown at Ottawa, that does not afford any reason for my departing from the correct practice, and he must take the responsibility. It would not be proper for me to divulge the nature of a matter of this character at this stage, without having first conferred with His Honor.[143]

In an editorial concerning the incident, the *Morning Chronicle* condemned Rhodes' attitude, saying that Mackenzie King had done nothing wrong in answering a question that had been directly posed to him. Rather, it was Rhodes who had done wrong in seeking to hide his actions.

> When [the Premier] initiates a movement to disrupt the Constitution of the Legislature the public is entitled to know all about it. . . . Instead of scheming in secret to destroy the Legislative Council, by means of what may not inappropriately be described as a guerilla movement, his duty as the Premier of the Province, in consonance with the dignity of the position and the rights of the Legislature, demanded that he should have stated publicly and formally to the House of Assembly that he proposed to submit a matter of such grave constitutional concern and questionable legal competency to the Supreme Court for decision as the statues of Nova Scotia provide. That was the proper procedure for Premier Rhodes to have followed. It would be fair to the public, it would be fair to the House of Assembly, and, especially, it would not only be fair but courteous of the Legislative Council, who hold their seats by constitutional right, and who may be said to have a contract with the Province for the breach of which there is no color of right by any penal mandate or otherwise.[144]

Nova Scotia did not need, the *Morning Chronicle* declared, "a modernised Caesar, much less . . . the dictatorial airs of a Mussolini."[145]

By contrast, the *Halifax Herald*, in its first reference to the affair, condemned Mackenzie King for violating Lieutenant-Governor Tory's expectation of confidentiality.

> [W]hen he proceeds through the proper channels to communicate with the Secretary of State at Ottawa, he has a right to expect that his communications will receive that dignified attention and that immunity from

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[143] *Ibid.*

[144] "No Caesarism", Editorial, *The [Halifax] Morning Chronicle* (12 March 1926) 6.

[145] *Ibid.*

> indiscriminate publicity to which, by their very nature, they are entitled. If the highly confidential communications of a Governor are to be made the football of politicians, then, the last bulwark of the system of Constitutional Government in this country is gone.
>
> The people of this Province, we know, will be shocked—and profoundly shocked—by the conduct of the Prime Minister of Canada ....[146]

Amazingly, while condemning the Prime Minister for the breach of confidentiality, the *Herald* did not report anything regarding the nature of the breach or the controversy that had arisen because of it. Indeed, the *Herald* would not mention Rhodes' efforts to pack the Council until March 17, *after* Ottawa's response was received.[147]

Meanwhile, in the Council, Bligh denied official knowledge of the plan and said he was "surprised when he read the programme as mapped out in the *Morning Chronicle*", but strangely accepted credit for the plan. According to Bligh, "he had told the Tory Party five years ago that he saw no constitutional reason why the Council could not have a membership of fifty or even a hundred."[148] The Council then debated whether the new appointments might include women, as had been rumoured in the afternoon press, "but as [Bligh] could not supply the desired information, the matter was dropped."[149]

Inflamed by Rhodes' scheme, the next day (March 11), the Council finally brought Gillis' resolution to a vote. The final debate began with Rufus Carter relating the history of the Council since responsible government. Carter noted that until recently, the Executive Council had always contained at least one Councillor, which Carter believed had improved

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[146] "Is Nothing Inviolate?", Editorial, *The Halifax Herald* (12 March 1926) 6.

[147] See "Ottawa Opposes Council Abolition Plan", *The Halifax Herald* (17 March 1926) 1. By comparison, the *Toronto Daily Star* reported the news a day earlier, on March 16. "Rhodes Would Fatten 'Senate' for Killing but Ottawa Says Nay", *The Toronto Daily Star* (16 March 1926) 1 online: Toronto Star: Pages of the Past <http://micromedia.pagesofthepast.ca>.

[148] "Public Astounded by Exposure of Rhodes 'Coup' Against Council", *The [Halifax] Morning Chronicle* (11 March 1926) 1.

[149] *Ibid.* For a discussion about the potential appointment of female Councillors, see infra Chapter V.

relations between the Assembly and Legislative Council.[150] Carter then argued that the lack of an upper house had facilitated political scandals in other provinces, citing several from New Brunswick that might have been avoided had that province maintained its Legislative Council. According to Carter, "there is not a rational business man in New Brunswick today who would say that the doing away with the second chamber in that Province helped to better the Government."[151] Yet, elsewhere in his speech, Carter also argued that the Legislative Council protected the province from demands for special legislation by business interests. Bligh found this latter argument laughable: "The second chamber in every country was regarded as the bulwark of the vested interests," Bligh interrupted, further noting that the miners and other labourers of the province were uniformly in favour of abolition.[152]

Following Carter's speech, J. Willie Comeau and Gillis rose in turn to contest Bligh's earlier argument that they were showing inconsistency in having previously supported abolition while in the Assembly. Comeau, a minister without portfolio during the 1916-17 and 1922-25 Assembly debates, said he had always supported the retention of the Council, and that as neither the Murray nor Armstrong governments themselves introduced abolition bills, he had never found himself in a position where he was duty-bound to resign to assuage his conscience. Gillis, a member of the Assembly from 1900-11 and a Councillor since 1916, confirmed that no government bill supporting abolition had been brought in all that time. When Bligh contested that the Armstrong Government had considered an

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[150] "Legislative Council Is Necessary", *The [Halifax] Morning Chronicle* (12 March 1926) 1; "Confidence Resolution Is Passed", *The Halifax Herald* (12 March 1926) 1.

[151] "Legislative Council Is Necessary", *The [Halifax] Morning Chronicle* (12 March 1926) 1.

[152] "Confidence Resolution Is Passed", *The Halifax Herald* (12 March 1926) 1.

abolition bill, Gillis said that the bill in question had been introduced by a member of the opposition (H.W. Corning).[153]

Bligh then motioned to amend Gillis' resolution to remove the "now more than ever" clause; he was seconded by William Owen, who agreed the language was "objectionable and unnecessary."[154] Gillis replied that he was happy to support the amendment—so long as Bligh would vote for the resolution. As Bligh could not support a resolution declaring the Council's usefulness, the amendment did not pass. When a final vote was taken on the resolution, Bligh was the sole dissenter, with even Owen—who had worried about the resolution's combative tone, as well as the timing of the resolution before the Assembly had passed an abolition bill—voting in favour.[155]

On the morning of March 15, the *Chronicle* reported (correctly) that a reply from Ottawa was expected that day, and that it was rumoured that the Department of Justice had concluded Rhodes' appointments would be unconstitutional.[156] At four o'clock that afternoon, William Chisholm rose in the Assembly and asked Rhodes if the Government had received a response from the State Department. Rhodes replied "almost laconically" that he had not.[157] But despite the Premier's denials, it was generally believed (and the *Morning Chronicle* reported) that the Government had in fact received Ottawa's response, that the answer had been a resounding "no", and that Rhodes had delayed submitting it to

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[153] "Legislative Council Is Necessary", *The [Halifax] Morning Chronicle* (12 March 1926) 1.

[154] "Confidence Resolution Is Passed", *The Halifax Herald* (12 March 1926) 1. Owen also argued that the vote on Gillis' resolution should be delayed until the Assembly had passed its abolition bill. "Legislative Council Is Necessary", *The [Halifax] Morning Chronicle* (12 March 1926) 1.

[155] "Legislative Council Is Necessary", *The [Halifax] Morning Chronicle* (12 March 1926) 1.

[156] "No Power to Increase Council's Membership", *The [Halifax] Morning Chronicle* (15 March 1926) 1.

[157] "Rhodes Silent on Report on the Council", *The [Halifax] Morning Chronicle* (16 March 1926) 1.

the Assembly so that he could announce his planned next step at the same time.[158]

The next day, Rhodes tabled Ottawa's response, along with its related correspondence, without explaining to the Assembly the contents.[159] He then moved for a third reading of the Council abolition bill, which passed without debate.[160] Only after the fact did it become clear what Rhodes had tabled or their contents.

As predicted by the *Morning Chronicle*, the Crown Law Officers had concluded that the Legislative Council was fixed at twenty-one and no appointments in excess could be made. In their view, the British North America Act had locked the Nova Scotia constitution in place, such that amendments which could previously be made by the Sovereign (including changing the size of the Council) could now only be made by the process established in the Act.[161] However, as this opinion differed from that of Rhodes and Nova Scotia Deputy Attorney General Fred Mathers, the Law Officers did not advise Governor-General Byng to prohibit the appointments altogether; instead, they recommended that "action be deferred until the questions involved have been judicially determined", as "disastrous consequences . . . might follow the enactment of legislation by a Legislature shorn of its upper chamber by an act which might be declared to be illegal"[162] By an order-in-council, Lord Byng concurred in the Law Officers' opinion, and instructed Tory that "an increase in

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[158] *Ibid.*

[159] "Lieut. Governor Has No Power to Make Any Appointments", *The [Halifax] Morning Chronicle* (17 March 1926) 1.

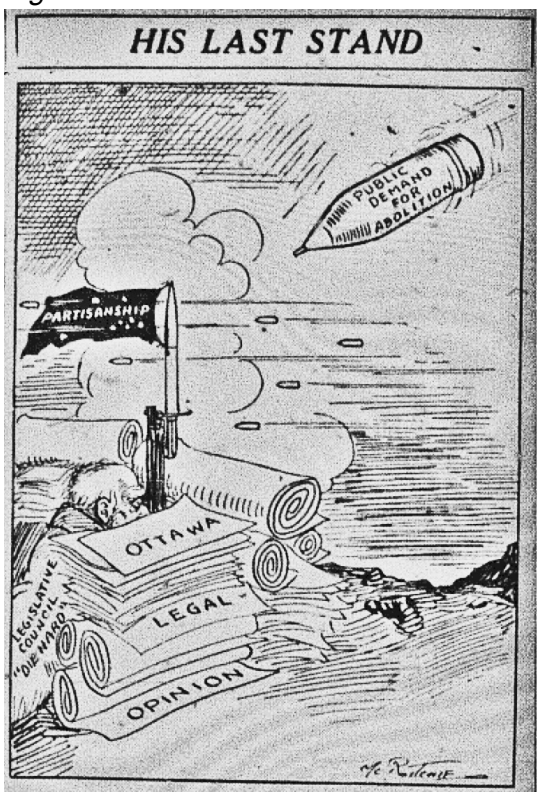
[160] "Ottawa Opposes Council Abolition Plan", *The Halifax Herald* (17 March 1926) 1.

[161] Telegram from Thomas Mulvey to Edgar N Rhodes (15 March 1926) in "Ottawa Opposes Council Abolition Plan", *The Halifax Herald* (17 March 1926) 1 [Telegram from Mulvey to Rhodes]. The opinion as relayed by Mulvey does not address the ability of the imperial Parliament to amend the Nova Scotia constitution via an amendment to the British North America Act, though presumably the Law Officers recognized this as another possibility.

[162] *Ibid.*

the number of members of the Legislative Council be not *now* approved."[163]

Figure 4



Donald McRitchie, "His Last Stand", Cartoon, *The Halifax Herald* (23 March 1926) 4.

With the Governor-General's instructions in hand, Rhodes' plan to abolish the Legislative Council by the close of the 1926 Session had failed. Without the ability to appoint additional or dismiss existing Councillors, he could not get his abolition bill through the Council, especially as the Council had passed a resolution on March 11 affirming its important constitutional role. Recognizing defeat for the time being, Rhodes informed the Council on March 18 that prorogation would occur the next day. As the Council had only received the abolition bill from the Assembly the day before, it would have less than two full days to consider it. As such, the Committee on Privileges, to which the bill was referred, recommended that it be given the three months hoist. On March 18, this motion passed by a vote of 11-1 (with Owens voting for the hoist and Bligh against), and the bill was effectively killed until the 1927 Session.[164]

The abolition bill dead, the next step was to pursue an advisory opinion in the Supreme Court of Nova Scotia.[165]

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[163] *Ibid* (emphasis added).

[164] "Premier Rhodes' Bill for Abolition of Council Killed", The [Halifax] Morning Chronicle (19 March 1926) 1.

[165] See, e.g., "The Next Step", Editorial, *The Halifax Herald* (18 March 1926) 6; "The Law and the Constitution", Editorial, *The [Halifax] Morning Chronicle* (17 March 1926) 6.

IV. The Supreme Court of Nova Scotia and the Judicial Committee of the Privy Council

With the Legislative Council once more refusing to vote for its own abolition and Ottawa blocking his attempts to pack the chamber with new members, Rhodes pursued the next logical step: seeking an advisory opinion from the Supreme Court of Nova Scotia.

A. The Reference Questions

Under the terms of Chapter 226 of the Revised Statutes of Nova Scotia, 1923, the Lieutenant-Governor-in-Council was permitted to refer to the Supreme Court "any matter which he thinks fit to refer, and the court shall thereupon hear and consider the same."[1] Where the reference concerned the constitutionality of an act passed or to be considered by the Legislature, the statute required notice to the Attorney General of Canada so that he might intervene.[2] Likewise, notice was also required for other interested parties, who could have counsel appointed for them at public expense if they could not obtain counsel themselves.[3] Although the resulting opinion was merely advisory, right of appeal nonetheless existed to either the Supreme Court of Canada or the Judicial Committee of the Privy Council.[4]

While seeking an advisory opinion pursuant to Chapter 226 was certainly the logical next step, it came with significant risks. Most importantly, Rhodes would be providing his opponents with a neutral forum before which they could defend the Legislative Council.

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[1] RSNS 1926, c 226 s 1. Although the chapter was entitled "Of the decision of constitutional and other provincial questions", nothing in the statute restricted the procedure to constitutional issues.

[2] RSNS 1926, c 226 s 3.

[3] RSNS 1926, c 226 s 4-5.

[4] RSNS 1926, c 226 s 6.

While Rhodes' case was strong, a loss in the Supreme Court could be devastating to any attempts to abolish the Council and could significantly decrease his ability to negotiate abolition with the Council. Indeed, the *Morning Chronicle* had argued since first rumour of Rhodes' plan that the question should be decided by Nova Scotian judges rather than federal attorneys, presumably because they believed the Supreme Court a friendly venue.

These risks were exacerbated by the difficulty in framing the right questions to present to the Supreme Court. A poorly worded question might invite a decision favourable to the Council. If, for instance, the Court were presented with a question asking simply, "What is the maximum number of members of the Legislative Council?", the Court could easily rule that the maximum was 21, without considering whether that maximum could be increased by the Lieutenant-Governor. The questions presented to the Supreme Court would have to be carefully framed to avoid any such difficulties. Thus while the Rhodes Government had effectively decided to refer the issue to the Supreme Court of Nova Scotia by mid-March, the referral was not in fact made for another two months, presumably because the Government was carefully considering what issues to present to the Court and how to frame them.

Finally, on May 12, 1926, Attorney General John Carey Douglas submitted to the Lieutenant-Governor-in-Council a list of four questions to refer to the Supreme Court:

> 1. Has the Lieutenant-Governor of Nova Scotia, acting by and with the advice of the Executive Council of Nova Scotia, power or authority to appoint in the name of the Crown by instrument under the Great Seal of the Province so many Members of the Legislative Council of Nova Scotia that the total number of the Members of such Council holding their offices or places as such Members would
>
> (a) exceed twenty-one, or
>
> (b) exceed the total number of the Members of said Council who held their

offices or places as such Members at the Union mentioned in Section 88 of The British North America Act, 1867?

2. Is the membership of the Legislative Council of Nova Scotia limited in number?

3. Is the tenure of office of Members of the said Council appointed thereto prior to May 7, A.D. 1925, during pleasure or during good behaviour or for life?

4. If such tenure is during pleasure, is it during the pleasure of His Majesty the King, or during the pleasure of His Majesty represented in that behalf by the Lieutenant-Governor of Nova Scotia acting by and with the advice of the Executive Council of Nova Scotia?[5]

Upon the advice of the Executive Council, Lieutenant-Governor Tory approved the questions, and by order-in-council, referred them to the Supreme Court of Nova Scotia on May 14.[6]

On May 20, Deputy Attorney General Mathers appeared before the Supreme Court and requested that a date be set for oral arguments.[7] The Court obliged, naming July 12, and directed that notice be provided to each member of the Legislative Council before June 2.[8] Oddly, the order did not provide for notice to the Attorney General of Canada, as required in constitutional matters.

B. Oral Arguments before the Supreme Court of Nova Scotia

When the the Court convened on July 12, the Province was represented by T. R. Robertson, KC, and C. B. Smith, KC, while the Legislative Council was represented by Stuart

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[5] *Order in Council referring matters in question to the Supreme Court,* in *Journals and Proceedings of the House of Assembly of the Province of Nova Scotia,* 38th Parl, 3rd Sess, App 31 (14 May 1928) at 1-2.

[6] *Ibid* at 1-2.

[7] "Court Sets July 12 as Day to Discuss Rhodes' Next Move", *The [Halifax] Morning Chronicle* (21 May 1926) 5.

[8] *Reference re Legislative Council of Nova Scotia* (1926), 59 NSR 1, 1926 CarswellNS 44 (NS SC) (Order setting matters down for hearing) [*Supreme Court Reference*].

Jenks, KC.[9] For the Province, Robertson focused on the first two questions, dealing with the membership of the Council, while Smith focused on the latter two, dealing with tenure of office.[10]

Robertson opened the arguments with a detailed history of the Legislative Council, beginning with the 1838 splitting of the old Council of Twelve. Robertson emphasized that Lord Durham's Commission had not stated a maximum size for the Council, but instead had imposed a limit of fifteen on provisional appointments made by the Governor.[11] He then noted that on March 9, 1838, before Durham had even left the United Kingdom, Queen Victoria appointed nineteen men to the Legislative Council, "shewing that the power of the Crown to make additional appointments was not limited and that the number mentioned in the previous instructions had reference only to provisional appointments."[12] The same held true when the Council was expanded to twenty-one under the Commissions of Sir Edmund Walker Head and Lord Monck.[13]

Robertson then argued that the British North America Act, 1867, continued the constitution of the Legislative Council as it was, so that the Crown could appoint an unlimited number of Councillors, while the Governor-in-Council maintained the "limited power . . . to make provisional appointments not exceeding twenty-one."[14] This, however,

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[9] "Stated Case on Council before the Court Today", *The [Halifax] Morning Chronicle* (12 July 1926) 1; "Status of Upper House Is Reviewed", *The Halifax Herald* (13 July 1926) 1.

[10] "Legislative Council's Case Before Court", *The [Halifax] Morning Chronicle* (13 July 1926) 1.

[11] *Supreme Court Reference*, supra note 8 (Oral argument, Plaintiff). See also Instructions to the Right Honourable the Earl of Durham (6 February 1838) at para 2, in Parliament, *Sessional Papers,* No 70 (1883) at 39-45.

[12] *Supreme Court Reference*, supra note 8 (Oral argument, Plaintiff). See also Additional Instructions to John George, Earl of Durham (9 March 1838), in Parliament, *Sessional Papers,* No 70 (1883) at 45-46.

[13] *Supreme Court Reference*, supra note 8 (Oral argument, Plaintiff).

[14] *Ibid.*

Robertson said, was changed by the adoption of the 1872 Act, which vested the power of appointment in the Lieutenant-Governor (later, the Lieutenant-Governor-in-Council); in doing so, the Act transferred the royal prerogative to appoint an indefinite number of Councillors from the Crown to the Lieutenant-Governor.[15]

Robertson was then followed by C. B. Smith, who focused on the questions dealing with the tenure of office of Councillors. Smith began by arguing that the constitution of Nova Scotia set in stone by the British North America Act, 1867, consisted entirely of the Commission and Instructions to Lord Monck and any statutes in force at the time. According to Smith, "Nothing therefore, in any Commission, Instructions or despatches prior to the issue of Lord Monck's Commission can in any way affect the constitution of the Legislature as it existed at the time of Union."[16] This was because the Legislative Council was not a continuing body, but had instead been re-established by the Crown in Lord Monck's Commission.[17] Here Smith seemingly had in mind undercutting the discussions between the Council and the Colonial Office in the 1840s, which had arguably resulted in the de facto recognition of life tenure. That is, because the Council was re-established with a statement that appointments were at pleasure, any prior correspondence designed to create a life tenure was irrelevant. Smith then went on to argue that the lack of a statement of tenure of office in the Councillors' own commissions was of no weight. According to Smith, tenure of office could only be changed by statute, so even a

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[15] *Ibid.*

[16] *Ibid.*

[17] *Ibid* ("The Legislative Council under Lord Monck was not a continuing one; it had to be re-established and was re-established. The power of the Crown to appoint could only be limited by grant or Statute.").

commission stating a Councillor held office for life would have had no legal effect.[18]

Smith then turned to the question of who had the power to dismiss Councillors if they served at pleasure. Smith raised three arguments for why the dismissal power should vest in the Crown: First, at common law, the power to appoint impliedly carried with it the power to dismiss.[19] Second, Smith argued that Legislative Councillors were "officers or functionaries" who could be dismissed by the Lieutenant-Governor pursuant to the *Interpretation Act*.[20] Finally, he argued that the Lieutenant-Governor had the power to dismiss Councillors as part of the royal prerogative acquired at the time of Confederation.

> By virture of the B.N.A. Act the prerogative of the Crown so far as it relates to provincial matters passed to the Lieutenant-Governor of the Province and within the territorial limits of the Province, and the limit of subjects made the object of provincial legislation the local Legislature including the Governor-in-Council is supreme and has such powers as the Imperial Parliament possessed in the plenitude of its own freedom before it handed them over to the Dominion and the Provinces in accordance with the scheme of distribution which it enacted in 1867.[21]

Smith then concluded, and Stuart Jenks rose to argue for the Council. He began by stating that any powers held by the Lieutenant-Governor "must derive from the B.N.A. Act, or from a statute passed pursuant to that Act."[22] According to Jenks, this included prerogative powers.[23] Jenks then argued that the Legislative Council had been set at twenty-one members by royal prerogative prior to Confederation, and that now the only

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[18] *Ibid.* Presumably Smith was here thinking of the Sovereign's ability in the absence of positive statute to amend the prerogative constitution to change tenure back from life to pleasure.

[19] *Ibid* (citing *Re James J Currie* (1924), 57 NSR 210, 2 DLR 823.)

[20] *Ibid* (citing 1923 RSNS c 1, s 23(37)).

[21] *Ibid.*

[22] *Supreme Court Reference*, supra note 8 (Oral argument, Defendant) (citing *Bonanza Creek Gold Mining v R*, [1916] 1 AC 566, 26 DLR 273).

[23] *Ibid.*

way to change it was through the amendment process set forth in section 91 of the British North America Act.[24] In his view, "All the Constitutions [of the provinces that formed to create Canada] were . . . put in a melting pot and new constitutions were granted to each Province. The king gave up his prerogative rights as regards Canada in 1867."[25] That is, even if the form of the Nova Scotia constitution appeared to be the same pre- and post-Confederation, the role of the Sovereign and the limits of prerogative power had changed dramatically.

Jenks then turned to the question of tenure of office, saying that although the royal Commissions had stated tenure was at pleasure, "usage and tradition" had changed this to life.[26] "The old form was followed, but the despatches and usage shew the intention."[27] Even if tenure was not for life, however, Jenks argued that Councillors served at the pleasure of the Crown, not the pleasure of the Lieutenant-Governor or Lieutenant-Governor-in-Council, and this had not been changed by the 1872 Act.[28]

When Jenks had concluded, Robertson and Smith rose once more to make a few points in rebuttal, most significantly that nothing formal had come of the 1845-46 discussions regarding the Council's constitution.[29] The Court then requested that it be

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[24] *Ibid*.

[25] "Argument Concluded in the Legislative Council Case", *The [Halifax] Morning Chronicle* (14 July 1926) 1.

[26] *Supreme Court Reference*, supra note 8 (Oral argument, Defendant).

[27] *Ibid*. While Jenks apparently did not raise the argument, Justice Mellish would later argue that the "at pleasure" language was retained because the revised constitution of the Legislative Council permitted the Crown to dismiss up to seven Councillors at pleasure, all others retaining their positions for life; by stating that all Councillors served "at pleasure", no distinction was made between which could be dismissed, though the limit of seven would nonetheless be enforced. *Supreme Court Reference*, supra note 8 at para 115 (Mellish, J).

[28] *Supreme Court Reference*, supra note 8 (Oral argument, Defendant).

[29] *Ibid*; "Argument Concluded in the Legislative Council Case", *The [Halifax] Morning Chronicle* (14 July 1926) 1.

provided with a copy of the standard commission issued to Councillors at appointment, which Deputy Attorney General Mathers agreed to provide.[30] Oral arguments concluded, the court then adjourned.[31]

C. The Supreme Court of Nova Scotia's "Decision"

Three months later, on October 23, 1926, the Court delivered its decision, such as it was. For all practical purposes, the Court was evenly divided, with Chief Justice Harris and Justice Chisholm holding that the Lieutenant-Governor could appoint in excess of twenty-one members to the Council, and that members held their positions during the pleasure of the Lieutenant-Governor. By contrast, Justices Carroll and Mellish held that the Council was capped at twenty-one, absent a formal amendment to the provincial constitution, and that tenure, if at pleasure, was at the pleasure of the Crown acting by and with the advice of the imperial cabinet (Carroll and Mellish disagreed on whether tenure was at pleasure (Carroll) or for life (Mellish)).[32] Thus with only two exceptions, there could not be said to be a "decision" of the Court, as it was on most issues evenly divided.

On two issues, however, a majority of the Court was in agreement. First, the justices unanimously held that at the present time, twenty-one members constituted a "full" Legislative Council; they disagreed, however, on the implications of this. Second, three justices (all but Mellish) held that the Councillors served at pleasure, though Carroll believed it to be the pleasure of the Sovereign, rather than of the Lieutenant-Governor.[33] But because the justices diverged on the ability to increase the total size of the Council and

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[30] "Argument Concluded in the Legislative Council Case", *The [Halifax] Morning Chronicle* (14 July 1926) 1.

[31] *Ibid.*

[32] *Supreme Court Reference*, supra note 8.

[33] *Ibid.*

on who had the power to dismiss Councillors, these holdings were of very limited effect.

1. Opinion of Chief Justice Harris

As Chief Justice, Harris's opinion has naturally been focused on to the largest extent. Harris began with a brief history of the Legislative Council, going through the Governors' Commissions by which it was established and modified. Like Robertson, Harris put particular emphasis on the fact that Queen Victoria had appointed nineteen members to the Council almost immediately after establishing in Lord Durham's Commission that he could tentatively appoint only fifteen members.[34] He also focused on the language of the various Commissions stating that appointments were at pleasure.[35]

Diverging from Robertson, however, Harris held that the Council had been set at twenty-one members at the time of Confederation.

> [I]t is, I think, obvious that the Imperial Government and the various Provincial Governments and the members of the Legislative Council regarded [Lord Elgin's Commission setting the maximum number of provisional appointments at twenty-one] as settling the total number of members composing the Council for the time being and they acted accordingly.
>
> It is, I think, therefore, correct to say that when the British North America Act was passed the number of members which constituted a full Legislative Council was 21 and that had been the number for more than twenty years immediately preceding that event.[36]

But, Harris did not believe this settled the question, as "the same power which appointed them could at any moment have indefinitely increased the number of members," as had been done in the past when the Council was increased from fifteen to twenty-one.[37] That

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[34] *Supreme Court Reference*, supra note 8 at para 7 (Harris, CJ).

[35] *Ibid* at para 15-16.

[36] *Ibid* at para 17-18.

[37] *Ibid* at para 20.

is, a Council of twenty-one might be "full," but the size of a "full" Council could always be changed by use of the royal prerogative.

Harris then turned to what effect, if any, the British North America Act had upon the Nova Scotia constitution. Harris saw two possibilities arising out of Section 88's provision that the constitution of the Legislature of Nova Scotia would continue as it existed at union: either the Legislative Council consisted of "such and so many members as have been or shall hereafter be from time to time for that purpose nominated and appointed", or it consisted of "the actual number which at the date of the union constituted a full house" (that is to say, twenty-one).[38]

Harris noted that he was initially drawn to the latter argument, but had reconsidered the issue and was now convinced that it was too narrow an interpretation.

> It cannot, I think, be denied that the words of section 88 are capable of either interpretation. If read without reference to the previous constitution as contained in the various Commissions it is true in a sense to say that the Legislative Council was constituted of 21 members at the date of the union. But we must I think read it in view of the Commissions to the various Governors of the Province, and so read we find that the Legislative Council was to consist not of any definite or fixed number, but of an indefinite number depending upon the will and discretion of the appointing power. That was I think the real constitution of the Legislative Council at the date of the union which was continued by section 88.
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> It is, I think, impossible to read the word "constitution" in section 88 as meaning simply the composition or make-up of the Legislature, i.e., the King or Lieutenant-Governor, the Legislative Council and the House of Assembly, or as meaning only the actual number of members of each House at the time. It obviously includes the tenure of office of members of both Houses and other things incidental to the office, and if so, I do not see how we can stop short of saying that it includes the power to increase the number of the members of the Legislative Council which is vested in the appointing power.[39]

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[38] *Ibid* at para 30-32. None of the justices took seriously the claim that the Legislative Council was limited to the number actually sitting—nineteen—at the time of Confederation.

[39] *Ibid* at para 33-34.

As the appointment power was vested in the Lieutenant-Governor-in-Council upon the passage of the 1872 Act, the Lieutenant-Governor-in-Council had the power to increase the size of the Legislative Council, despite the fact that no government had ever in fact done so.[40] Because the Legislature had done nothing to alter the constitutional provisions relating to the number of Councillors, the old ability of the King to "increase[] the number at any time" was maintained, albeit transferred to the Lieutenant-Governor-in-Council.[41] On the first question referred to the Court, Chief Justice Harris thus answered that Lieutenant-Governor-in-Council could appoint in excess of twenty-one Councillors; on the second question, he answered that a "full House" was presently twenty-one members, but that the number could be increased at any time by the Lieutenant-Governor-in-Council.[42]

Harris then turned to the questions regarding tenure of office. The first of these, whether Councillors served at pleasure or for life, he found easy to answer. He began by reiterating the language of the Commissions stating that Councillors held their places "during our pleasure and not otherwise."[43] Though the correspondence between the Council and the Colonial Office had suggested life tenure might be established, this was never formally done, and was, regardless, superseded by the Commissions of later governors. According to Harris, "I cannot find that these were anything more than tentative proposals which never resulted in any definite action affecting the matter. The subsequent Commissions are inconsistent with these proposals and show that they were not regarded

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[40] *Ibid* at para 35-36.

[41] *Ibid* at para 36.

[42] *Ibid* at para 37-39.

[43] *Ibid* at para 42.

as binding on any one."[44]

As for the question of at whose pleasure the Councillors served, Harris relied as much upon the theory of responsible government as the particulars of Nova Scotian law. In Harris' view, the 1872 Act had transferred the power of removal along with the power of appointment, as retaining removal in the King (upon advice of the Imperial Council) would defeat the intentions underlying the British North America Act.

> In the first place, the power of the King on the advice of his Imperial Council to dismiss a member of the Legislative Council had, of course, been confined to Legislative Councillors who had been appointed by his Majesty on the advice of his Imperial Council. A new condition arose when the appointing power was vested in the Governor-in-Council of the Province. To suppose that such an anomaly exists as is contended for is, I think, to ignore the whole trend of events leading up to responsible government, which long prior to Confederation firmly and permanently established executive responsibility in all the Provinces which later formed the Dominion of Canada, so far as the same was consistent with the conditions then existing. It is quite true that down to the time of Confederation the power to appoint and to dismiss members of the Legislative Council of Nova Scotia remained in the Sovereign and was exercised on the advice of His Imperial Council, but the whole question of self government of the colonies was a matter of growth and it took years of agitation to reach an understanding; to convince imperial as well as local opinion and to develop plans suitable for working out the new ideas; but for many years before Confederation it had been recognized by the statesmen of the old world that complete self-government for the various Provinces of Canada was the only solution of the difficulties then existing, and when the British North America Act was passed it was one of the objects in view.
>
> The preamble of the British North America Act shows that the intention was to create a federal union "with a constitution similar in principle to that of the United Kingdom," and as explained by the Privy Council in the *Reference case*, to give to the Federal Parliament and the local Legislatures

[44] *Ibid* at para 43.

complete self-government within their respective legislative spheres.[45]

Harris then quoted Lord Loreburn's opinion in the *Reference Appeal*: "It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self government was withheld from Canada. . . . [W]hatever belongs to self-government in Canada belongs either to the Dominion or to the Provinces, within the limits of the British North America Act."[46]

Harris then cited a number of cases and treatises to establish that the Lieutenant-Governor served as representative of the Sovereign for provincial matters, with the same prerogative powers as the Governor-General (albeit limited to provincial affairs).[47] While some uses of prerogative power (such as appointment of knights and peers) might remain in the Sovereign, that was because they were of imperial, not Canadian, concern.[48] This was not true for Legislative Councillors. As such, Harris concluded that the prerogative right to dismiss Councillors had been transferred to the Lieutenant-Governor-in-Council.[49] To hold otherwise, Harris argued, would put the King and the imperial cabinet in the awkward

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[45] *Ibid* at para 47-48 (internal citation omitted). But compare George Brown's statements on the limited ability of the Crown to make appointments to the Canadian Senate: "But it is said that if the members [of the Senate] are to be appointed for life, the number should be unlimited—that in the event of a deadlock arising between that chamber and this, there should be power to overcome the difficulty by the appointment of more members. Well, under the British system, in the case of a legislative union, that might be a legitimate provision. But honourable gentlemen must see that the limitation of the numbers in the upper house lies at the base of the whole compact on which this scheme lies. (Hear, hear.) It is perfectly clear, as was contended by those who represented Lower Canada in the [Québec] conference, that if the number of the legislative councillors was made capable of increase, you would thereby sweep the whole protection they had from the upper chamber." Reprinted in Janet Ajzenstat et al, *Canada's Founding Debates* (Toronto: University of Toronto Press, 2003) at 86-87 (8 February 1865).

[46] *Supreme Court Reference*, supra note 8 at para 49-50 (Harris, CJ), citing *Attorney-General of Ontario v. Attorney-General of Canada (Reference Appeal)* [1912] AC 571.

[47] *Supreme Court Reference*, supra note 8 at para 51-58 (Harris, CJ).

[48] *Ibid* at para 59.

[49] *Ibid* at para 60.

position of making decisions regarding matters of which they knew nothing.[50]

2. *Opinion of Justice Chisholm*

Justice Chisholm largely agreed with Chief Justice Harris on these questions, though a few specific arguments are worth examining. Regarding the impact of Section 88 of the British North America Act, Chisholm argued that the "Legislature" of the province included not only the House of Assembly and the Legislative Council, but also the Lieutenant-Governor. As the British North America Act prohibited amending the provincial constitution as to the office of Lieutenant-Governor, he must of necessity maintain the powers previously held, including the power to increase the size of the Legislative Council.[51]

Chisholm then discussed the background to the 1872 Act in greater detail, noting that it had been enacted to resolve a question as to who held the appointment power post-Confederation and to "relieve the home authority from the necessity of intervening in a matter of purely domestic concern".[52] By vesting such power in the Lieutenant-Governor, the Legislature avoided the very problems outlined in Chief Justice Harris' opinion.

On the question of tenure of office, Chisholm agreed that the 1845-46 changes had never been implemented.[53] Chisholm also argued that the dismissal power was vested in the Lieutenant-Governor, as it would

> be unreasonable to expect His Majesty to intervene to adjust any problems which might arise in relation to a domestic matter of this kind. It would be inconsistent also with the policy which has been developed respecting such concerns and to which terse and lucid expression was recently given in the House of Commons on July 22, 1926, by His Majesty's Secretary of State for the Dominions and Colonies [Leo Amery]:

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[50] *Ibid* at para 61.

[51] *Supreme Court Reference*, supra note 8 at para 88 (Chisholm, J).

[52] *Ibid* at para 89.

[53] *Ibid* at para 93-97.

> "The intervention of His Majesty's Government in the Domestic affairs of a Dominion is precluded by recognized constitutional principles."[54]

Here, Chisholm anticipated the constitutional principle set forth less than a month later in the Balfour Declaration: "[The Dominions] are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."[55] Retaining the dismissal power in the Sovereign on the advice of the Imperial Council would violate the principles underlying the developing Commonwealth. As such, they must be vested in the Lieutenant-Governor, Chisholm concluded.

3. Opinions of Justices Mellish and Carroll

On the other hand, Justices Mellish and Carroll disagreed with Harris and Chisholm on most accounts. In the views of both justices, the upper limit of twenty-one Councillors had become set by the British North America Act and could now be amended only by an act of the provincial Legislature.[56] To support this claim, Mellish cited August 1867 correspondence between Lord Monck and the Duke of Buckingham and Chandos, in which the latter opposed decreasing the number of Councillors by use of the Queen's prerogative power. Not only was this within the ability of the provincial Legislature to do itself, but it raised significant constitutional issues: "[I]t does not appear to me proper, on *constitutional* grounds, for Her Majesty to modify the existing council".[57] Intriguingly, this statement could

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[54] *Ibid* at para 101.

[55] Report, Proceedings and Memoranda, Inter-Imperial Relations Committee, Imperial Conference 1926 at 2.

[56] *Supreme Court Reference*, supra note 8 at para 109 (Mellish, J), 129-131 (Carroll, J).

[57] *Supreme Court Reference*, supra note 8 at para 110 (Mellish, J).

just as easily have confirmed the ability of the Lieutenant-Governor to do so himself, except for the strong emphasis placed by the Chief Justice and Justice Chisholm on the 1873 Act. Taking a similar perspective, Carroll agreed that the British North America Act had established the Council at twenty-one members. But, Carroll also recognized an alternative: the Queen may initially have retained the prerogative power to increase the size of the Council, but that power was removed by the 1872 Act.[58] Because the Legislature did not grant the Lieutenant-Governor the power to appoint "such and so many", he remained bound by the established limit of twenty-one.[59]

The one matter on which Mellish and Carroll significantly disagreed was that of tenure of office. In Mellish's view, the 1845-46 reforms *had* gone into effect, and the Councillors *had* gained life tenure. As such, the Councillors held their positions during life, though any seven could be dismissed at the Lieutenant-Governor-in-Council's pleasure.[60] Mellish emphasized that this view was shared by "[w]riters on the Nova Scotian constitution", including former Governor-General Adams Archibald, "himself an eminent lawyer".[61] Mellish did admit that this view may reflect usage more than law, but in his view this made no significant difference.[62]

Carroll, on the other hand, dismissed out of hand the suggestion that Councillors served for life. In his eyes, this was merely convention, rather than law.

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[58] *Supreme Court Reference*, supra note 8 at para 129 (Carroll, J).

[59] *Supreme Court Reference*, supra note 8 at para 131 (Carroll, J).

[60] *Supreme Court Reference*, supra note 8 at para 115 (Mellish, J). Mellish argued that the "at pleasure" language was retained after the 1845-46 change because *any seven* of the Councillors could be dismissed; by stating all served at pleasure, there was no restriction on which Councillors could be dismissed at any given time.

[61] *Ibid* at para 117-118.

[62] *Ibid* at para 117.

> It might be said, and I think was suggested, that a constitutional custom or usage has developed, has ripened into and become part of our constitution, from the fact that Legislative Councillors have from 1867 always held their places during their lives, but in the face of the plain reading of Lord Monck's Commission this contention cannot, I think, prevail.[63]

Thus, while dismissing Councillors might violate the established constitutional conventions, it did not violate the constitution itself, and thus must be permitted.

Mellish and Carroll were in agreement, however, that if the Councillors served at pleasure, it was the pleasure of the reigning sovereign. As it had been the Queen who had the power to dismiss Councillors at the time of the British North America Act and no specific statute had been passed altering that power, it must of necessity have remained with her; the 1872 Act by its terms did nothing to change that state of affairs.[64] Indeed, Carroll argued, the Sovereign's prerogative could not be reduced by implication, but only by express statute.[65] Moreover, according to Mellish, placing the power to remove Councillors in the Lieutenant-Governor-in-Council would "tend to subvert the usefulness and independence of the Council as a legislative body and should not be lightly inferred."[66] That is, the Legislative Council could hardly be expected to be independent of the Assembly if the Premier could instruct the Lieutenant-Governor to dismiss Councillors at will.

Finally, in response to the Chief Justice and Justice Chisholm's arguments on the nature of responsible government, Carroll noted that in fact no power had been denied the Province; it could amend its constitution at any time by positive act of the Legislature. The Legislature might, for instance, transfer prerogative from the Sovereign to the Lieutenant-

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[63] *Supreme Court Reference*, supra note 8 at para 136 (Carroll, J).

[64] *Supreme Court Reference*, supra note 8 at para 119 (Mellish, J), 140 (Carroll, J).

[65] *Supreme Court Reference*, supra note 8 at para 140 (Carroll, J).

[66] *Supreme Court Reference*, supra note 8 at para 119 (Mellish, J).

Governor (as it had done with the appointment power in 1872), or it could abolish the Council itself. But, without a positive act by the provincial Legislature, it was inappropriate to deem the royal prerogative transferred to the Lieutenant-Governor.[67]

D. The Next Step?

Almost immediately after the decision was rendered, Premier Rhodes stated that he intended to appeal to the Judicial Committee of the Privy Council.[68] In response, the Councillors, initially through the *Morning Chronicle* and later through legal counsel, argued that appeal was inappropriate, as the Supreme Court had not actually reached a decision. If there was no decision, asked the *Morning Chronicle*, how could there be an appeal to a higher court?[69] While the *Chronicle* recognized there might be some technical way out, it argued that the better approach was to reargue the case in the Supreme Court of Nova Scotia before a panel of five or seven judges, in order to ensure a majority decision.[70]

Recognizing the difficulty, the Government, through Robertson, Smith, and Mathers, asked the Supreme Court on November 7 to enter a pro-forma judgment and grant leave for appeal to the Privy Council.[71] Unsurprisingly, Jenks, continuing to represent the Legislative Councillors, argued this was inappropriate, and further claimed that the statute allowing for advisory opinions did not provide a means by which they might be appealed, meaning that special leave would have to be obtained from the Privy Council in order to

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[67] *Supreme Court Reference*, supra note 8 at para 143 (Carroll, J).

[68] "Government Determined to Abolish Upper Chamber, Premier Rhodes Declares", *The Halifax Herald* (26 October 1926) 1.

[69] "No Decision, No Appeal", Editorial, *The [Halifax] Morning Chronicle* (26 October 1926) 6.

[70] *Ibid.*

[71] "Government Seeks Leave to Appeal to Privy Council", *The Halifax Herald* (8 November 1926) 2.

bring the case before it.[72] "If there is no judgment there can be no appeal to the Privy Council and that would be so even if your Lordships [the judges] had been unanimous in your opinion".[73] Though special leave had been granted in the past, Jenks thought there to be serious questions as to whether it would be in this case. Instead, he argued it best to rehear the case before an odd number of judges, echoing the *Morning Chronicle*.[74]

On November 16, the Supreme Court granted leave to appeal to the Privy Council, with Justice Mellish dissenting,[75] inspiring a Donald McRitchie cartoon the next day in which the Supreme Court was shown to row the Legislative Council and the Provincial Government across the Atlantic to the Privy Council, with the note, "They'll settle it in the old country."[76] The Supreme Court had now successfully divested itself of the matter, and the Province would have to wait another year before a final decision came from London.

Figure 5

Donald McRitchie, "Snappy Shots [To the British Privy Council]", Cartoon, *The Halifax Herald* (18 November 1926) 6.

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[72] *Ibid.*

[73] *Ibid.*

[74] *Ibid.*

[75] "Legislative Council Appeal Will Be Sent to the Privy Council", *The Halifax Herald* (17 November 1926) 2.

[76] McRitchie, Donald. "Snappy Shots [To the British Privy Council]", Cartoon, The Halifax Herald (18 November 1926) 6.

E. Privy Council Oral Arguments

While Rhodes had delegated arguments before the Supreme Court of Nova Scotia to outside counsel (under the watchful eyes of Deputy Attorney General Mather), the Privy Council appeal was handled directly by Attorney General Hall. In May 1927, Hall travelled to London to make undisclosed preparations for oral arguments, including presumably meeting with local counsel about Privy Council procedure.[77] Hall returned to London in July for oral arguments.[78]

The Province's appeal was heard by a panel of five judges: Lord High Chancellor Viscount Cave, Lord Haldane, Lord Warrington, Lord Wrenbury, and Puisne Justice (and later Chief Justice) Lyman P. Duff of the Supreme Court of Canada, sitting to provide a Canadian perspective on the case.[79] While Canadian judges had sat on Privy Council appeals since 1895,[80] it is not clear that the practice actually protected Canadian interests, given the extreme formalism of Canadian judges during the period.[81] Indeed, Justice Duff seems to have taken a back seat during oral argument.[82] Regardless of Justice Duff's influence on the proceedings, the *Herald* welcomed his presence, noting "The idea of having a Canadian representative sitting on the Privy Council Bench when Canadian appeals are

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[77] See "The Popular Will", Editorial, *The Halifax Herald* (30 May 1927) 6.

[78] "Abolition of the N.S. Council: Appeal Is Now Being Heard by Judicial Committee of Privy Council", *The Halifax Chronicle* (19 July 1927) 1.

[79] *Ibid.*

[80] Kenneth Keith, "The Interplay with the Judicial Committee of the Privy Council" in Louis Blom-Cooper, Brice Dickson & Gavin Drewry, eds, *The Judicial House of Lords 1876-2009* (Oxford: Oxford University Press, 2009) 315-338 at 319.

[81] See Robert J Sharpe, "The Old Commonwealth: Canada" in Louis Blom-Cooper, Brice Dickson & Gavin Drewry, eds, The Judicial House of Lords 1876-2009 (Oxford: Oxford University Press, 2009) 351-359 at 351-352.

[82] "Abolition of the N.S. Council: Appeal Is Now Being Heard by Judicial Committee of Privy Council", *The Halifax Chronicle* (19 July 1927) 1.

heard is a wholesome one. It means that at least one member of the final court of appeal has a knowledge of Canadian conditions from actual experience."[83]

Unfortunately, as the Privy Council arguments were covered by the Canadian Press rather than the local Halifax press (the same reports appearing in the *Herald* and *Chronicle*, as well as out-of-province papers such as the *Toronto Daily Star*), the news reports were extremely brief and lacking in specific detail. Furthermore, the Privy Council reports do not recite arguments made by Council before the panel. While copies of counsels' arguments may have been preserved in the Privy Council materials held by the British Library or the National Archives of the United Kingdom, I have been unable thus far to consult these materials. Regardless, from the information available, it seems that oral arguments largely followed those made in the Supreme Court below.

Arguments began on July 18, when Attorney General Hall provided the panel with a history of Nova Scotia's constitution. He then argued that, based on this constitution, the Lieutenant-Governor had power to appoint in excess of twenty-one members to the Legislative Council and to dismiss Councillors at pleasure. While discussing the latter point, Lord Haldane noted that this may have resulted from the significant political troubles experienced in the Province of Canada, though he acknowledged they had not also occurred in Nova Scotia. At this point, Lord Haldane forgot the name of "a statesman who had been prominent in the early days of Canada"; Justice Duff, making his sole recorded contribution to the hearings, suggested he was thinking of Robert Baldwin.[84]

The next day, Stuart Jenks presented the Council's case. Jenks argued that the 1845-46

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[83] "A Wholesome Idea", Editorial, *The Halifax Herald* (20 July 1927) 6.

[84] "Abolition of the N.S. Council: Appeal Is Now Being Heard by Judicial Committee of Privy Council", *The Halifax Chronicle* (19 July 1927) 1.

correspondence had resulted in an amendment to the Council's constitution, establishing a maximum of twenty-one Councillors and permitting only seven to be dismissed at pleasure. Jenks further argued that Councillors were not "officers" or "functionaries" within the meaning of the Interpretation Act, and so could not be dismissed on the basis of that statute.[85]

With oral arguments concluded, the panel reserved judgment;[86] the Province would have to wait three more months for a final decision.

F. Privy Council Decision

On October 18, 1927, the waiting finally came to an end, as the Judicial Committee of the Privy Council released its judgment. In a brief fifteen paragraphs, the Privy Council found for the Province on all four questions, finally opening the door for Rhodes to abolish the Legislative Council at the next session of the Legislature.

The Privy Council's decision, written by Viscount Cave, largely followed the arguments laid out in Chief Justice Harris' opinion below, albeit in far less depth. Viscount Cave, for instance, dealt with the pre-Confederation and post-Confederation history of the Council in a single paragraph each.[87] From this brief history, Viscount Cave concluded that the limit of twenty-one provisional appointments had never been intended to limit the power of the Sovereign herself; like Harris and Chisholm, Viscount Cave pointed to Queen Victoria's appointment of nineteen Councillors in 1838 despite the fact that Lord Durham had been granted a Commission limiting appointments to fifteen.[88] Viscount Cave also rejected the

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[85] "Judgment Has Been Reserved", *The Halifax Chronicle* (20 July 1927) 1.

[86] *Ibid.*

[87] *Reference re Legislative Council of Nova Scotia,* [1927] JCJ No 2, [1928] AC 107, [1927] 4 DLR 849 (PC) at para 4-5 [*Privy Council Appeal*].

[88] *Ibid* at para 8.

argument that the 1845-46 correspondence had imposed a strict limit of twenty-one, as Lord Cathcart's Commission, issued very shortly thereafter, limited only provisional appointments to twenty-one.[89]

On the question of what effect the British North America Act had on the constitution of the Council, Viscount Cave agreed with Harris and Chisholm that it was

> the constitution of the Legislature, and not the number of persons actually or usually holding office under that constitution, which was to continue until altered under the authority of the Act; and the constitution then existing provided for the appointment of a Legislative Council not limited except by the decisions from time to time taken by the Sovereign under the advice of her Ministers.[90]

In contrast to Harris and Chisholm, however, the Privy Council decision framed the issue in a slightly different light. Where Harris and Chisholm had seen the limit of twenty-one as real, albeit transitory and subject to change at any time, Viscount Cave did not treat the traditional limit as anything other than custom. That is to say, the two Supreme Court justices viewed the existing Council as "full" at twenty-one, but held that the Lieutenant-Governor-in-Council had the power to increase the size of a "full" Council; Viscount Cave, on the other hand, did not recognize the concept of a "full" Council at all, and instead held that the present Council was unlimited in size. While this distinction had little impact on the decision at hand, it had potentially serious consequences for future cases. In the Supreme Court opinions, the Council was increased in size by exercise of the Sovereign's prerogative power, while no such act was required under the Privy Council decision. As such, the Privy Council did not have to face (even impliedly) the question of altering the constitution via use of the prerogative power, and its decision could not be used as a

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[89] *Ibid* at para 9.

[90] *Ibid* at para 10.

precedent for any such attempts in the future.

Having established that the Sovereign could appoint an unlimited number of Councillors at any time without altering the provincial constitution, the Privy Council then held that this power had since been vested in the Lieutenant-Governor, though it did not decide whether this had been done by the British North America Act itself or by the 1873 Act.[91] In Viscount Cave's mind, the 1873 Act on its own was sufficient to have transferred the full power of appointment so as to make it unnecessary to rule on whether this had previously been done by the British North America Act.[92] After 1873, the Lieutenant-Governor's power to appoint in excess of twenty-one Councillors was unrestrained except by "considerations of policy".[93]

Viscount Cave then turned to the questions regarding tenure of office, which he dealt with quickly. In his view, the Commissions had established tenure at pleasure, and this was unchanged by the 1845-46 correspondence.[94] Following arguments previously laid out by Harris and Chisholm, he then held that the power to dismiss had been vested in the Lieutenant-Governor-in-Council. Here, Viscount Cave made his sole reference to responsible government theory, otherwise absent from the opinion. "It would be strange," he argued, "if the effect of the legislation of 1872 and 1923 were to enable the Lieutenant-Governor to make appointments which might be revoked by the Sovereign acting under the advice of His Ministers in this country; and in their Lordships' opinion this was not the

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[91] *Ibid* at para 11.

[92] *Ibid*.

[93] *Ibid*.

[94] *Ibid* at para 13.

intention or effect of the statutes in question."[95] That is, since the dismissal power could be used at any time ("at pleasure"), if vested in the Sovereign it could be used *contrary to* the advice of the provincial government and Lieutenant-Governor, defeating the entire purpose of vesting full appointment power in the Lieutenant-Governor.

While Viscount Cave's argument here is compelling insofar as the situation described would be strange, it does not address the actual intentions of those behind the British North America Act or the 1873 Act. It would be strange indeed for the Nova Scotian Fathers of Confederation to have intended to create a toothless Legislative Council that could be abolished or whose members could be dismissed at any time; if that had been the intent, why not simply abolish the Council as part of the British North America Act? Moreover, both the plan of Confederation and the 1873 Act were approved by the Legislative Council, which presumably would have rejected either if it believed it meant signing its own death warrant. The semi-anonymous author ("J.E.R.") of a *Canadian Bar Journal* "Case and Comment" on the Privy Council decision agreed:

> The theory [that all prerogative powers had been transferred to the Lieutenant-Governor] is in itself not free from difficulty. Its acceptance gives to the B.N.A. Act an effect that certainly would have shocked the 'Fathers of Confederation.' A persual of the various drafts of sections dealing with the constitutions of the legislatures of Nova Scotia and New Brunswick discloses a clear intention that the N. S. Legislature should retain its constitution with restricted legislative powers. If there had been any suggestion, that the result would have been a second chamber, completely dependant upon the House of Assembly, whose members would always be subject to the threat of dismissal if they dared to disagree with the views of the lower house, it is unlikely that the concurrence of the Nova Scotia Legislature would have been obtained. Their Lordships refer to the anomaly of appointments made in Halifax being revoked in London but there is no doubt that the so-called anomaly was the result actually contemplated.[96]

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[95] *Ibid* at para 14.

[96] JE R, "Case and Comment" (1928) 6:1 Can Bar J 60 at 64.

Even more amazing, Viscount Cave also referenced the Interpretation Act's provisions stating that the power to appoint included the power to remove and that appointments made by the Lieutenant-Governor were at pleasure unless otherwise stated.[97] In this respect, Viscount Cave placed greater emphasis on the Interpretation Act than had Chief Justice Harris, who noted that the Act supported his interpretations, but was not necessary to his holding;[98] Justice Chisholm did not address the Interpretation Act, apparently believing it irrelevant or otherwise unnecessary. Here, the *Canadian Bar Journal*'s JER suggested that the Privy Council in effect held "that the enactment in 1900 of section 23(37) of the Interpretation Act . . . should be so extended in its application that its effect was completely to subvert the existing constitution of the Legislature."[99] Again, even a peripheral consideration of legislative intent would have shown that the Legislative Council could not have intended the Act to apply to itself.

As the custom of the Privy Council at the time was to issue a single opinion without dissents, it is unknown whether any on the panel dissented from Viscount Cave's decision. As such, Viscount Cave's short opinion stands as the single, definitive statement of the Privy Council regarding the Legislative Council of Nova Scotia.

After receiving the Privy Council's decision, Rhodes found himself in an extremely strong position. He had a definitive, unappealable, statement of the constitution of Nova Scotia that would permit him (via Lieutenant-Governor Tory) to appoint or dismiss so many Councillors as he desired. And where the split nature of the Supreme Court "decision" had reinforced the controversial nature of Rhodes' plan, the lack of any dissents at the Privy

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[97] *Privy Council Appeal*, supra note 87 at para 14.

[98] *Supreme Court Reference*, supra note 8 at para 64,

[99] JE R, supra note 96 at 64.

Council created a veneer of legitimacy. With a less wide-reaching decision or a decision with a vigorous dissent, Rhodes might have found himself limited not by the law but by political considerations; instead, he had been delivered a carte blanche, which he could use as soon as he desired.

Though the Legislative Council would survive for approximately another six months, Viscount Cave's decision at the Privy Council was truly its death knell. Everything that came after was merely formality.

V. 1927-1928: Abolition and Aftermath

While the Judicial Committee of the Privy Council's decision would ultimately serve as the Legislative Council's death warrant, it would be nearly a year between the "decision" of the Supreme Court of Nova Scotia and that of the Privy Council. In the meantime, life in the Province went on as before, with the Legislative Council continuing to exercise an effective veto (albeit a suspensory one that would begin to expire during the 1928 Session) on the Rhodes Government's legislative initiatives. Wanting to see the Council gone once and for all, and perhaps fearful of the outcome of the Privy Council appeal, Rhodes took advantage of the year to try once again to negotiate abolition with the Councillors. That his efforts ultimately failed is unsurprising—caught in a game of winner-take-all, the Councillors believed it better to take their chances with the Privy Council.

Once the Privy Council issued its decision, however, the situation changed dramatically. Though the decision did not formally abolish the Legislative Council—instead it only provided the mechanism whereby abolition could be achieved—the half century battle was now effectively ended; abolition was a certainty. The only questions that remained were over how precisely it would be done and who would have a hand in it.

A. Waiting for the Privy Council Decision

Although the Rhodes Government filed its appeal with the Privy Council in November 1926, the case was not heard by the Judicial Committee of the Privy Council until July 1927, and the decision not delivered until October of that year. In the meantime, Rhodes adopted a two prong approach, whereby he simultaneously sought to negotiate favourable terms of abolition with the Council and to instil fear in the Councillors that their situation

could only become worse when the Privy Council ruled. For the most part the Legislative Councillors stayed true to their earlier positions, though a few were swayed by Rhodes' arguments, no doubt as they were becoming increasingly fearful of a hostile opinion from London.

1. Rhodes Demands President Mack's Resignation

Rhodes' first warning shot came on January 4, 1927, when he wrote a letter to Council President Jason Mack asking him to resign the presidency so that Rhodes could appoint Frederick Bligh in his place. Should Mack not resign, Rhodes would ask Lieutenant-Governor Tory to dismiss him. After consulting with legal counsel (presumably Jenks), Mack responded on January 7, stating that he did neither believed it proper to resign, nor that Rhodes had the authority to dismiss him. "I may state that I am advised that there is considerable doubt as to the legal power of your Government to dismiss from office the President of the Legislative Council and in the circumstances I do not think it in the public interest to adopt your suggestion that I resign my office." [1]

In refusing to resign, Mack set the stage for a second, equally brutal contest between the Council and the Government. But fate would intervene before the matter was even presented to Lieutenant-Governor Tory: on January 18, Jason Mack died suddenly of a heart attack at his home in Liverpool, Nova Scotia, at the age of eighty-three.[2] The *Morning Chronicle* reported his passing with sadness, and noted the timing of his death in the midst of his conflict with Rhodes: "Coming so closely upon the publication of the correspondence relating to his proposed removal from his high office, there is added an element of

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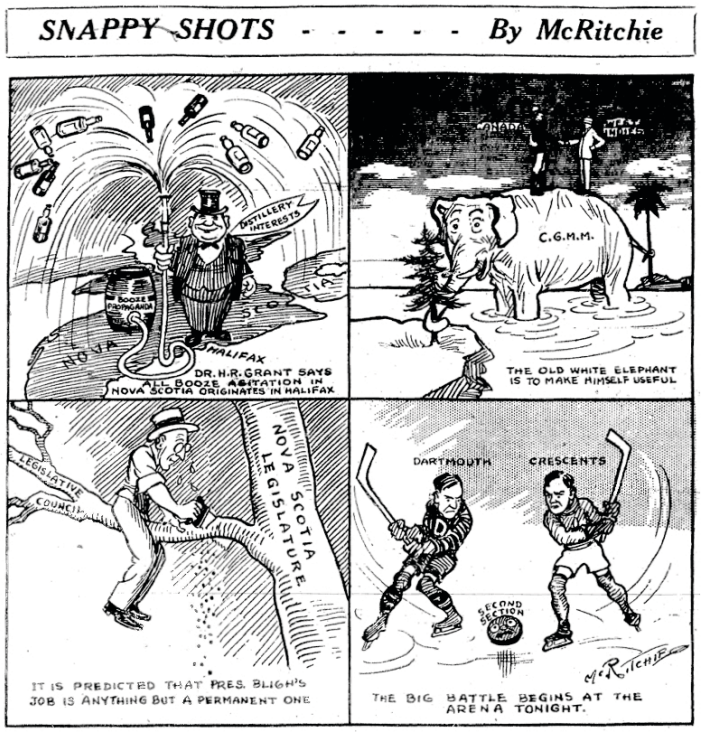
[1] "Hon. Jason M. Mack Will Not Resign Office", *The [Halifax] Morning Chronicle* (13 January 1927) 1.

[2] "Hon. Jason M. Mack Died Early Yesterday", *The [Halifax] Morning Chronicle* (19 January 1927) 1; "A Long, Useful Career", Editorial, *The Halifax Herald* (19 January 1927) 6.

poignancy to his sudden demise."[3]

With Mack gone, Rhodes appointed Bligh in his place and also appointed Robert Hamilton Butts to the Council to serve as Government Leader (the position previously held by Bligh).[4] Though the *Herald* predicted additional appointments would be made to help move legislation through the upper house,[5] none were forthcoming. When the Legislature reconvened on February 3, Butts offered something of a eulogy for Mack and for Daniel McLean, who had also died since the closure of the 1926 Session.[6]

Figure 6



Donald McRitchie, "Snappy Shots [Anything but Permanent]", Cartoon, *The Halifax Herald* (4 February 1927) 6.

2. *Rhodes Reintroduces Abolition Bill*

On February 8, Rhodes reintroduced the abolition bill that had been rejected the prior Session.[7] In so doing, Rhodes and the Conservatives were under no illusions that the bill was somehow more likely to pass;[8] instead, it appears to

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[3] "A Grand Old Liberal", Editorial, *The [Halifax] Morning Chronicle* (19 January 1927) 6.

[4] "The Provincial Legislature", Editorial, *The Halifax Chronicle* (3 February 1927) 6.

[5] "To Re-Introduce Bill to Abolish Upper Chamber", *The Halifax Herald* (24 January 1927) 5.

[6] "Committees in Upper Chamber Are Selected", *The Halifax Herald* (4 February 1927) 2.

[7] "Another Attempt to Abolish the Legislative Council", *The Halifax Chronicle* (9 February 1927) 1.

[8] "Why It Must Go", Editorial, *The Halifax Herald* (10 February 1927) 6.

have been introduced in case a deal could be worked out with the Legislative Council before the Privy Council could hear the case. During the bill's second reading on February 10, Rhodes seemed to accept that it was unlikely to pass, noting instead that he believed his Government would be victorious before the Privy Council.

> I have every hope and expectation that we will succeed in our case before the Privy Council, but if we do not we will then take the next step of having a referendum and taking the direct voice of the people of this province. We will exhaust every effort and take every step to abolish the Legislative Council, and if needs be will bring in the same measure next year, and if necessary the year after. But my own impression is that with the possible exception of another formal session this is the last session we will have to discuss a bill of this character.[9]

In response, Opposition Leader William Chisholm argued that Rhodes lacked a mandate to abolish the Council, that the questions of legitimacy had been resolved in the 1925 reform, and that further reform would be preferable to abolition. According to Chisholm, it was now "the recognised policy of all shades of political opinion in the House and in the country that the proper course was to bring the Council more up to date, harmonising it with ideas of democracy and making it more in accordance with the spirit that the will of the people shall prevail."[10] Chisholm also cited the predominance of upper houses in Westminster-style legislatures, noting that "every part of the Empire to which Great Britain has given constitutional responsible government of recent years had a Second Chamber in its Legislature", that every of the United States had a bicameral legislature, and that Ontario had regretted its decision not to adopt an upper house.[11] Finally, Chisholm

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[9] JG Cooper, "'House of Lords' Must Go, Premier Declares", *The Halifax Herald* (11 February 1927) 1. Here, Rhodes suggested holding a special session for the sole purpose of passing abolition legislation.

[10] *Ibid.*

[11] Horatio C Crowell, "Rhodes Determined to Abolish the Council", *The Halifax Chronicle* (11 February 1927) 1.

accused Rhodes of inconsistency in that he advocated the retention of the federal Senate while working to abolish the provincial Council[12]

After the verbal back-and-forth between Chisholm and Rhodes ended, the bill was read for the second time and was referred to the Assembly Committee on Law Amendments.[13] After being returned to the Assembly without amendment,[14] the it was read for the third time on February 15, despite Chisholm's vigorous opposition.[15]

3. Rumors of Another Settlement Offer

Meanwhile, Rhodes had also reintroduced his Tenure of Office Bill, which was duly given first and second readings in the Assembly. After that, however, the bill disappeared from the legislative agenda and was not debated while other bills introduced at the same time (including the Council abolition bill) were passed and sent to the Council.[16] Why, Horatio Crowell of the *Chronicle* asked, was the Tenure of Office Bill not also passed? While he offered no definitive answer, Crowell relayed rumors that the delay was "somehow or other related to the abolition of the Legislative Council."[17] First, it was believed Rhodes might have offered a quid-pro-quo to certain Councillors, promising them appointments in the civil service (no doubt positions that would become open only after the current occupants were dismissed under the terms of the Tenure of Office Bill) if they agreed to

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[12] *Ibid.* Indeed, Rhodes would spend his final years in the Canadian Senate.

[13] *Journals and Proceedings of the House of Assembly of the Province of Nova Scotia*, 38th Parl, 2nd Sess (10 February 1927) at 22-23.

[14] *Journals and Proceedings of the House of Assembly of the Province of Nova Scotia*, 38th Parl, 2nd Sess (11 February 1927) at 27.

[15] *Journals and Proceedings of the House of Assembly of the Province of Nova Scotia*, 38th Parl, 2nd Sess (15 February 1927) at 33.

[16] Horatio C Crowell, "Will the Legislative Council Surrender?", *The Halifax Chronicle* (17 February 1927) 1.

[17] *Ibid.*

vote in favour of abolition. Alternatively, Rhodes may have believed he would be able to achieve abolition before the end of the Session, but did not want the Tenure of Office Bill to be rejected before that point, as it would delay its implementation by another year. Though Crowell reported that neither President Bligh nor opposition leader Alexander Sterling Macmillan knew of any discussions between Councillors and the Rhodes Government, he said that he believed negotiations were either occurring or that several Councillors were open to negotiations.[18]

In the Assembly that afternoon, Chisholm rose and asked Rhodes if any such negotiations were ongoing and if the delay in passing the Tenure of Office Bill was due to a desire to do so only after the Council had been abolished.[19] Rhodes denied any discussions with the Council, but stated that he would welcome proposals for abolition. He would not, however, make any specific offers to the Councillors.[20]

While Crowell's report did not inspire Rhodes to make any proposals to the Council, it does seem to stir him to act on other matters: on February 17, the same day Crowell's report appeared, Rhodes brought the Tenure of Office Bill up for third reading. After a debate that went unreported in the press, which instead focused on the Council issue, it passed and was delivered to the Council.[21] Whatever the reason for Rhodes' initial delay in passing the Tenure of Office Bill, he appears to have been shamed by Crowell and Chisholm

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[18] *Ibid.*

[19] Horatio C Crowell, "Would Welcome Abolition Proposals from Council", *The Halifax Chronicle* (18 February 1927) 1.

[20] JG Cooper, "No Negotiations on Abolition of Council Premier Informs House", The Halifax Herald (18 February 1927) 1; Horatio C Crowell, "Would Welcome Abolition Proposals from Council", *The Halifax Chronicle* (18 February 1927) 1.

[21] *Journals and Proceedings of the House of Assembly of the Province of Nova Scotia*, 38th Parl, 2nd Sess (17 February 1927) at 41.

into acting immediately as a sign that he was not acting surreptitiously.

At about this time, Rhodes became concerned about his prospects before the Privy Council. The preliminary word, delivered to the Attorney General by the province's legal agents in London, was that the Privy Council was unlikely to accept appeal because no real decision had been entered by the Supreme Court of Nova Scotia. With the outlooks of appeal beginning to look dim, Rhodes was under increasing pressure to resolve the conflict with the Council politically. Though he was wary to extend a specific offer to the Councillors (having the year before been accused of trying to bribe them when he did so), his statement that he was willing to accept offers from individual Councillors was taken by the *Chronicle* as evidence that he would negotiate.[22]

Regardless of Rhodes' intentions, however, on the morning of February 28 he met with a group of Councillors in his office, including Neil Gillis, Fulton Logan, W. Davison Hill, Charles Campbell, and Burchill Fulmore. The meeting began with a discussion of Rhodes' offer from the prior Session (a ten year annuity of $1,000 for the life members and a five year annuity of the same amount for the "Ten Year Men"), but the Councillors quickly expressed their apprehension about an annuity that might be cancelled by a future government. Instead, a lump sum would be preferable, so as to avoid becoming the victim of politics in future years. But, as the Councillors had apparently scheduled the meeting to feel out what Rhodes might be willing to do, rather than to negotiate final terms, nothing definitive came of it; in fact, two of those present (Davison Hill and Campbell) were reported to be entirely undecided and had attended only to "get the atmosphere of the

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[22] Horatio C Crowell, "Another Move for Abolition of the Council", *The Halifax Chronicle* (28 February 1927) 1.

situation".[23]

Inevitably, word of the meeting quickly spread through Province House. That afternoon in the Assembly, Chisholm asked if Rhodes had indeed received a delegation from the Council and what had been discussed. Ever evasive, Rhodes denied meeting with representatives from the Council, instead claiming he had met with individuals in their private capacity. "I have not been in communication with the Legislative Council, or anyone representing the Legislative Council. It is not for me to disclose what business was conducted with private and individual [sic] who come to see me," Rhodes said.[24] This was not enough for Chisholm, who continued to press for information. If there had been discussions of monetary terms, Chisholm said, it was incumbent on the Premier to inform the Assembly, lest it take on the appearance of bartering the terms of a bribe.[25] Again Rhodes evaded the question.

Chisholm then asked what preparations were being made for the appeal to the Privy Council, in particular whether the Government intended to furnish attorneys for the Legislative Council. Rhodes stated that the case was being prepared for a hearing in June, but that no provisions were being made for representation for the Council; such could be provided for by the Privy Council if it thought it necessary.[26]

After this stormy back-and-forth in the Assembly, however, the question of terms of abolition disappeared for several days. When the *Herald* noted on March 7 that the legislative session was likely to end within the week, it said that a compromise with the

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[23] Horatio C Crowell, "'Lump Sum' Is Proposed for Council Abolition", *The Halifax Chronicle* (1 March 1927) 1.

[24] *Ibid.*

[25] *Ibid.*

[26] *Ibid.*

Council was still possible and that "in some quarters there is an idea that developments are likely", but it offered no concrete news.[27] Two days later, the *Chronicle* reported that while the Conservative caucus in the Assembly had granted the Rhodes Government authority to "at all costs get rid of the Council" (despite concerns about what those costs might be), the Councillors themselves were "stiffening their resistance to abolition, and resumed their former high idealism that they were of essential service to the country and should not be abolished."[28]

Figure 7

Donald McRitchie, "Snappy Shots [Still Going Strong]", Cartoon, *The Halifax Herald* (8 March 1927) 6.

In the end, when the abolition bill came before the Council, it unanimously voted to give the bill the three months hoist.[29] While no public statement was made as to why talks between the Government and Council had collapsed, the increasing uneasiness of Conservative backbenchers about provincial finances may have been a key component. On the final day of the Session, a rebellion by ten Conservative backbenchers developed over increased salaries for major government officers, notably the Deputy Provincial

[27] "House Session Is Likely to End this Week", *The Halifax Herald* (7 March 1927) 2.

[28] "Get Rid of the Council at All Costs", *The Halifax Chronicle* (9 March 1927) 1.

[29] "Council Abolition Bill Got Three Months Hoist", *The Halifax Chronicle* (12 March 1927) 1.

Secretary.[30] If Conservative backbenchers were opposed to paying an additional $1,000 to a long-serving governmental official critical to the provincial-Dominion negotiations regarding Maritime Rights and the Duncan Report,[31] a full-blown revolt may have occurred had Rhodes attempted to push through lump sum payments to the Councillors totalling $150,000. Alternatively, the delay in negotiations may simply have given the Councillors opposed to abolition the time to win over their wavering peers. Regardless, when the 1927 Session came to a close, the Council remained in place. All eyes thus turned to the Privy Council.

B. Sic Transit Gloria Mundi: The Council Is Abolished

On October 19, 1927, Halifax awoke to learn that the Privy Council had ruled definitively in Rhodes' favour. With Rhodes determined to see the Council abolished, it was now only a matter of time. Abolition, however, could only come after several key questions had been resolved: Would abolition occur at a special session or could it wait until the regular session in four months? What implication would abolition have on other provincial legislation? Would existing Councillors be permitted to remain for abolition? Who would fill their seats if they were dismissed? But first, Rhodes and his Conservative allies would celebrate.

1. Victory

Almost immediately after receiving the Privy Council's decision, Rhodes was deluged with congratulations from his supporters and submission from the defeated Councillors. While the compliments were generally unconditional, some came with advice for further

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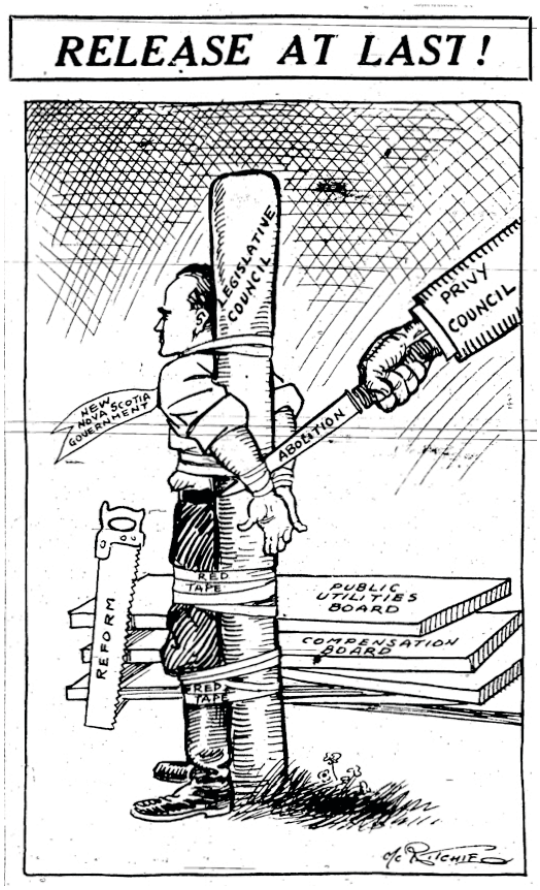
[30] See Horatio C Crowell, "Insurgency Broke Loose Within the Government Ranks", *The Halifax Chronicle* (12 March 1927) 1.

[31] See *Ibid.*

reform or with requests for appointments. Meanwhile, the Councillors began to reach out for a rapprochement with Rhodes, hoping to avoid premature dismissal.

Figure 8



Donald McRitchie, "Release at Last!", Cartoon, *The Halifax Herald* (19 October 1927) 9.

The Conservative response to the victory may best be epitomized in a *Herald* editorial published the next day, "The Brake Released". After offering a brief congratulation to the Premier and Attorney General, the editorial explained that the victory would remove a roadblock to popular government in the province.

> When they went to the polls in 1925, the Nova Scotia people voted overwhelmingly for a complete change. This they have not enjoyed. Important legislation submitted by the new Government has been deliberately nullified or killed by the Upper House. And when the Legislative Council did this, it signed its death warrant.
>
> The Victory won by the Rhodes Government for the people, through the decision of the Judicial Committee of the Privy Council, is one of the longest steps forward thus far taken. *It spells Progress*. It means that immediately the Council is abolished, the will of the people will prevail. It will enable a Government and a popular Chamber, backed by a sweeping mandate, to give effect to public desires. No longer will the elective branch of the Legislature be subservient to the non-elective branch—because, once the Upper House is abolished, only the direct representatives of the people will remain.[32]

A Donald McRitchie cartoon that same day portrayed the Rhodes Government as a

[32] "The Brake Released", Editorial, *The Halifax Herald* (19 October 1927) 6.

man tied to a post labelled "Legislative Council," finally being cut free by the Privy Council wielding a blade labelled "Abolition".[33] A cartoon the next day entitled "Washing Away Old Landmarks" would show the Legislative Council as a crumbling old lighthouse being brought down by the storm clouds of "Progress", "New Ideas", and "Changing Conditions".[34]

Figure 9

Donald McRitchie, "Washing Away Old Landmarks," Cartoon, *The Halifax Herald* (20 October 1927) 6.

Rhodes was also deluged with congratulatory letters and telegrams noting his victory. In one telegram, W. D. Dimock, editor of the Truro Daily News, congratulated Rhodes, noting "what the Grits pretended to do after 40 years struggle you and your clever Attorney General have done in two years."[35]

Other correspondence used the opportunity to propose additional reforms or ask for individual favours. H. Percy Blanchard, a perpetual correspondent, wrote an extended letter

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[33] Donald McRitchie, "Release at Last!", Cartoon, *The Halifax Herald* (19 October 1927) 9.

[34] Donald McRitchie, "Washing Away Old Landmarks," Cartoon, *The Halifax Herald* (20 October 1927) 6.

[35] Telegram from WD Dimock to Edgar N Rhodes (18 October 1927), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 3).

congratulating Rhodes, recommending a special Session to abolish the Council, and recommended that the Assembly now be elected on the basis of proportional representation (a favourite topic of Blanchard's).[36] Alexander McGregor of New Glasgow, on the other hand, noted at the end of his letter to Rhodes that he "would be pleased to participate in the funeral obsequies", impliedly asking Rhodes for an appointment to the Council.[37] A few months later, McGregor would have his request granted.[38]

Rhodes also received a brief letter from Councillor Arthur W. Redden, which read, "As a member of the Legislative Council I am at your service to implement the decision of the Privy Council, re. the abolition of the Legislative Council."[39] Though other Councillors (led by Alexander Stirling MacMillan) would also later express their willingness to participate in abolition, Redden's letter was noteworthy in its timing and complete surrender. In return, Rhodes would permit Redden to remain in the Council until its final days.[40]

2. *A Special Session?*

One of the first questions Rhodes faced was when abolition would occur. Initially, he was inclined to call a special session of the Legislature for the sole purpose of abolishing the Council, as this would avoid the problems raised by abolishing the Council mid-session.[41] Four things seem to have prevented Rhodes from calling a special session, however. First,

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[36] Letter from H Percy Blanchard to Edgar N Rhodes (19 October 1927), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 3, No 26002).

[37] Letter from Alexander McGregor to Edgar N Rhodes (19 October 1927), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 3, no 26008).

[38] "Twelve New Legislative Councillors", *The Halifax Chronicle* (13 February 1928) 1.

[39] Letter from Arther W Redden to Edgar N Rhodes (19 October 1927), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 4, no 26267).

[40] See below.

[41] See "Must Pass an Act of Abolition", *The Halifax Herald* (19 October 1927) 9.

the logistics of a special session would likely have been difficult, as legislators typically held other occupations during the months in which the Legislature did not meet; many prominent Assemblymen and Councillors would likely have been absent from a special session. Second, as legislators were paid sessional indemnities rather than salaries, a special session would have come at considerable cost to the province—$43,000 for the Assembly and approximately $21,000 for the Council. Given the fact that Rhodes had argued the Council was too costly to maintain, $64,000 was too much to pay to abolish it just a few months early. Third, any special session would have to be scheduled around the 1927 Dominion-Provincial Conference in Ottawa, scheduled for November 3-10.[42] Fourth, Rhodes fell ill while at the Dominion-Provincial Conference,[43] and spent the next two months in hospital in New York City, where he received an undisclosed operation.[44] As Rhodes did not return to Halifax until early January 1928, it was for all intents and purposes impossible to schedule a special session before the regularly-scheduled session to begin in February. As such, the Council saw its life extended several additional months.

3. "Life" Members Dismissed

With a special session out of the question, Rhodes next had to decide whether to exercise his new-found power to dismiss the "life" members of the Council. Although the Councillors signified that they would accede to Rhodes' plan, it appears that Rhodes never seriously considered permitting the majority of "life" members to remain. Instead, he saw their dismissal as his chance to replace him with loyal Conservatives who could receive the

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[42] See Dominion-Provincial Conference, Precis of Discussions, SP 69 (Ottawa: 3-10 November 1927).

[43] *Ibid* at 18 ("The conference expressed sorrow at the illness of Mr. Rhodes who had been compelled to go to Montreal to meet his physician from Halifax, and whose return before the end of the conference is regarded as doubtful.").

[44] "Premier Will Be at Office", *The Halifax Herald* (9 January 1928) 14; "Welcome Home", Editorial, *The Halifax Herald* (10 January 1928) 6.

substantial sessional indemnity for at least one year. In a letter to Neil McArthur, who had written to Rhodes to plead for mercy on Councillor Neil Gillis, Rhodes noted that he was under extreme pressure to provide positions to "our friends who insist upon having at least one year in office out of the last forty-five."[45] As appointing additional Councillors would simply increase the costs of the Council (as each Councillor would be due a sessional indemnity), the practical way to provide seats for his allies was to dismiss the existing "life" members.

Plans for dismissal began while Rhodes was still recovering in New York. An undated and unsigned draft letter (presumably from Attorney General Hall) to Rhodes laid out a four prong plan: first, ask existing "life" members (except for Owen and Redden) to resign; second, to dismiss any "life" members who did not resign within a week; third, ask the "Ten Year Men" (except for Blight and Butts) to resign; and fourth, pass a special act at the opening of the legislative session to change the tenure of "Ten Year Men" to pleasure, after which all remaining Liberal appointees would be dismissed. The letter then asked for Rhodes' views and stated that if he so desired, letters could be sent out in his name before his return to the province.[46] While Rhodes' response has not survived, he apparently instructed that the matter could wait for his return.

On January 11, 1928, two days after returning to his office, Rhodes sent letters to all of the "life" members save Owen and Redden. The letters read:

> Dear Sir:
>
> As you are aware, it has been for many years the policy of all political

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[45] Letter from Edgar N Rhodes to Neil R McArthur (18 January 1928), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 4, no 26245).

[46] Draft Letter to Edgar N Rhodes (1927), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 3, no 26021).

> parties in Nova Scotia to abolish the Legislative Council and in furtherance of this policy the Liberal Party, of which you are a supporter, for upwards of thirty years prior to 1925, required all its appointees to sign a pledge to vote in favour of abolition. Notwithstanding this policy and the pledges above referred to, during the last two Sessions of the Legislature you saw fit to vote against a Bill in favour of abolition which had passed the Legislative Assembly.
>
> In pursuance of this policy, fortified as it is by the recent decision of the Judicial Committee of the Privy Council, with which you are familiar, it is the intention of the Government that the Legislative Council shall be abolished at the forthcoming Session. Obviously to accomplish this purpose it is essential that the Council should be composed of those in sympathy with the policy of abolition.
>
> In these circumstances I feel it is my duty to ask you to submit your resignation and as the matter is to be dealt with in the near future would request a reply within the next ten days. If I do not hear from you I will assume that you would prefer that your office should be vacated by Order in Council.
>
> Faithfully yours,
>
> PREMIER[47]

Two days later, the *Herald* published a copy of the letter, presumably with Rhodes' permission (the *Herald* noted that the Councillors should by then each have received their copies). Letters were not sent to the "Ten Year Men,"[48] Rhodes having apparently decided it not worth going through the trouble of enacting special legislation just to dismiss four Liberals.

While the decision to permit Owen to remain was expected (he was, after all, a loyal Conservative in all issues save abolition), Redden's retention was more surprising. While Redden had long been a Liberal and had opposed abolition, he seems to have also had

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[47] See, e.g., Letter from Edgar N Rhodes to Burchill B Fulmore (11 January 1928), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 3, no 25994); Letter from Edgar N Rhodes to Alexander Sterling MacMillan (11 January 1928), in Alexander Sterling MacMillan, The Legislative Council & Story of Abolition 1924-1927 (undated), Halifax, Nova Scotia Archives & Records Management (NSARM) (microfilm reel 10,893, document 11).

[48] "Resignations of Members of Upper House Asked For", *The Halifax Herald* (13 January 1928) 1.

strong ties with the Conservative Party and with Rhodes himself. As noted above, Redden himself had sent a letter to Rhodes on October 19, the day after the Privy Council's decision, noting his willingness to work with Rhodes to abolish the Council.[49] On December 13, prominent local attorney John J. Power, KC, wrote a letter to Rhodes pleaded for Redden. "I have a warm personal interest in his retention," Power wrote, "and never asked you or your government for a favor or consideration by this time I am going to ask you for a consideration of his case." Were Power's plea insufficient, he emphasized Redden's sympathy with the Conservatives: "Certainly in 1925 his sympathies at least were in favour of a change of government and at that time I seconded them by open effort as well as I could."[50] In response, Rhodes noted that his "personal views are in cordial concurrence with your own", emphasizing that "Mr. Redden was always an old personal friend of my father and has always been a very good friend of my own."[51] In a January 12 letter to Redden himself, Rhodes emphasized the family connection: "As an old friend of my father as well as for any friendly acts you have shown toward me personally, I would wish to see you remain in the Council until its abolition at the next Session of the Legislature."[52]

For whatever reason, Rhodes was not as warm to other pleas for clemency. Rhodes received several letters suggesting he retain Neil Gillis, who was seen by the Conservatives

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[49] Letter from Arther W Redden to Edgar N Rhodes (19 October 1927), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 4, no 26267).

[50] Letter from John J Power to Edgar N Rhodes (13 December 1927), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 4, no 26265).

[51] Letter from Edgar N Rhodes to John J Power (12 January 1928), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 4, no 26263).

[52] Letter from Edgar N Rhodes to Arther W Redden (12 January 1928), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 4, no 26266).

from Cape Breton as "a pretty decent opponent".[53] According to Neil McArthur, Gillis was destitute, and allowing him to remain in the Council (and draw his sessional indemnity) would be viewed by all sides with pleasure. "I may say that I have canvassed the situation rather carefully here, and feel that there is no political demand for Gillis' head, the prevailing opinion appears to be about this: 'if the Government can work out the abolition of the Council, and at the same time give Gillis this term, by all means do it.'"[54] In a separate letter, D.H. MacLean of Sydney concurred with this sentiment and asked Rhodes to permit Neil Gillis to remain in the Council, if only to avoid having to pick a successor.[55] When Rhodes replied to McArthur on January 18, he rebuffed the suggestion of leniency. "I am personally in sympathy with the views you express. Mr. Gillis has been very fair and has evidenced every intent to deal with measures in a broad spirit and personally for him I have a very high opinion indeed. Unfortunately, however, as the situation has developed we have not the opportunity of showing that personal consideration which I would like."[56] Rhodes then blamed the dismissals on the Councillors, saying that had they accepted his offers in the prior Sessions this would not be necessary. In the end, however, Rhodes may simply have been providing a post hoc justification, for Gillis had already tendered his resignation by the time Rhodes considered the matter.[57]

Aside from these pleas on behalf of Redden and Gillis, Rhodes also received several

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[53] See Letter from Neil R McArthur to Edgar N Rhodes (16 January 1928), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 4, no 26246).

[54] *Ibid*.

[55] Letter from DH MacLean to Edgar N Rhodes (16 January 1928), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 4, no 26244).

[56] Letter from Edgar N Rhodes to Neil R McArthur (18 January 1928), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 4, no 26245).

[57] *Ibid*.

letters from the Councillors themselves asking that they be permitted to participate in the Council's final session. Richard G. Beazley, for instance, suggested,

> in lieu of the course suggested by your letter it is only fitting that all the members of the Council be convened in the usual manner and that those to whom your communication was addressed be given an opportunity to vote for abolition instead of tendering their resignation, on in default going out of existence by an order in Council.
>
> I want to say in conclusion that this course appeals to me not through any desire to obtain the usual sessional indemnity—I am willing to forego that. What I am submitting seems to be a more dignified step to take than that afforded to us by either of the methods suggested by you.[58]

Should this proposal be rejected, Beazley asked that his letter be treated as one of resignation,[59] which Rhodes did.[60]

Similarly, on January 18, Rufus Seaman Carter wrote to Rhodes, noting that his opposition to abolition had been based on his belief that it was improper for a Councillor to vote to abolish the Council without a mandate from the people, but that his mind had been changed by the Privy Council decision, which "makes it clear than an elective body with the consent of the Lieut. Governor, can destroy or dismiss the selective body, hence [its] usefulness is over."[61] Nonetheless, Carter asked to remain for the Council's final session: "If I am permitted, would be pleased to co-operate with the Government at the next regular session of the Legislature, in passing the necessary legislation to bring about abolition of the Council."[62] Rhodes did not receive Carter's letter until after his ten day

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[58] Letter from Richard G Beazley to Edgar N Rhodes (16 January 1928), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 3, No 25988).

[59] *Ibid.*

[60] Letter from Edgar N Rhodes to Burchill B Fulmore (11 January 1928), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 3, no 25987).

[61] Letter from Rufus Seaman Carter to Edgar N Rhodes (18 January 1928), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 4, No 26233).

[62] *Ibid.*

deadline had passed, however, and so Carter was dismissed without opportunity to discuss the matter personally with Rhodes as requested. Rhodes did, however, write that "it would have been a great pleasure to me if you had been able to continue until the end" and that he knew "that the action which the Government will be forced to take will have no effect upon our own cordial personal relations".[63]

Future premier Alexander Sterling MacMillan took a more aggressive approach. In a four page letter dated January 16, MacMillan castigated Rhodes for having never obtained a mandate on the question of abolition.[64] After laying out his argument that public sentiment had changed after the passage of the 1925 amendments to the Council and that the Conservatives had failed to include abolition in their 1925 platform, MacMillan stated he had no desire to remain in a position wholly dependent on Rhodes.

> In view of the recent decision of the Judicial Committee of the Privy Council, I have no desire to remain longer a member of the Council, and I am satisfied that no self-respecting member, appointed previous to the Act amending the constitution, has any desire to remain, as, under the constitution, they would be nothing more than puppets in the hands of the present Government.[65]

MacMillan then went further, stating he was glad he had refused to accept Rhodes' offer of an annuity, as he "would be recreant in my duties, and deserving to be branded as a betrayer of the trust reposed in me if I, even for one moment, considered any such negotiations."[66]

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[63] Letter from Edgar N Rhodes to Rufus Seaman Carter (23 January 1928), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 4, no 26232).

[64] Letter from Alexander Sterling MacMillan to Edgar N Rhodes (16 January 1928), in Alexander Sterling MacMillan, The Legislative Council & Story of Abolition 1924-1927 (undated), Halifax, Nova Scotia Archives & Records Management (NSARM) (microfilm reel 10,893, document 11).

[65] *Ibid.*

[66] *Ibid.*

Strangely, MacMillan then sent a second reply, published simultaneously in the *Daily Star*, on January 20. This letter took a much less confrontational tone, glossing quickly over his objections to abolition. Instead, MacMillan requested that Rhodes permit the existing Councillors to retain their seats and take part in the abolition vote.

> I assume from this that the process of despatching [sic] the historic Upper House of the Legislature, which has existed since Nova Scotia has had a Constitution and a Parliament, shall be conducted in an orderly manner in consonance with the traditions and dignity of the Council. I therefore deem it my duty to say, in reply to your communication, on my own behalf and on behalf of a number of my colleagues to whom you have addressed a similar communication, that in view of the decision of the Privy Council we are willing to attend at the next Session of the Legislative Council, waiving all claims to sessional indemnity, directly or indirectly, and hereby jointly and severally, do undertake to vote for the Bill to abolish the Legislative Council as announced in your letter to me of January 11th instant.
>
> In giving this formal assurance, on behalf of the said members of the Council whose appointments ante-date the Reforming Act of 1925, I desire to say further that we are constrained primarily by a sense of public duty to save the Province an unnecessary expense and by the desire to relieve you of the embarrassment of resorting to the expedient of creating a number of temporary members for the sole purpose of putting the Council out of existence—an unseemly procedure which would be an affront to the dignity of an ancient branch of the Legislature and, we believe, repugnant to your own sense of respect for orderly parliamentary usage and conventions.[67]

According to MacMillan, the Councillors were now willing to vote in favour of abolition because their independence had been fatally compromised by the Privy Council decision.

> [T]he effect of the decision of the Privy Council, which is to place the tenure of the majority of the members of the Legislative Council at the will and mercy of the Governor-in-Council, is subversive of its purpose and functions as understood from time immemorial, and gravely imperils, if it does not entirely destroy, its independence as a check to hasty and ill-designed legislation and a protection to the rights and interests of minorities. That involves a subserviency which no self-respecting member of a Legislative [sic] could tolerate.[68]

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[67] Letter from Alexander Sterling MacMillan to Edgar N Rhodes (20 January 1928), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 3, no 25986).

[68] *Ibid.*

The inconsistency between the two letters is probably explained by the first being a private letter sent solely to Rhodes, while the second was an open letter sent by MacMillan on behalf of himself and other Councillors. In the latter case, he seems to have been acting in his stead as Leader of the Opposition in the Legislative Council, rather than as a private Councillor. As such, he had to take a much more diplomatic tone and had to represent the interests of other Councillors, who did not want to see their beloved Legislative Council abolished without them having some sort of role.

Rhodes seems not to have appreciated the differing intents of MacMillan's two letters. In a single response to both letters, Rhodes rejected the Councillors' proposal. Rhodes' reply first castigated MacMillan for his claim that he would not argue the wisdom of abolition, before spending four pages doing just that. Next, Rhodes said that he could not accept the Councillors' offer to serve without indemnity, as he could not trust them to actually vote for abolition.

> I have only to point out that if solemn promises have been disregarded for a period of years, it would not be the part of wisdom for the Government to rely upon further pledges of a like character at this time. The Government therefore feels impelled to take the only safe course and rely upon the support of those who are in sympathy with its policy.[69]

Then, noting that he had not received resignations during the requested time period, action would be taken by the Lieutenant-Governor-in-Council as soon as possible. Finally, Rhodes unsubtly criticized MacMillan for having his letter published before Rhodes had received it.[70]

In the end, Rhodes received resignations from three Councillors—Beazley, Gillis, and

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[69] Letter from Edgar N Rhodes to Alexander Sterling MacMillan (21 January 1928), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 3, no 25983).

[70] *Ibid.*

Fulton J. Logan.[71] On January 26, Lieutenant-Governor Tory signed an Order-in-Council dismissing MacMillan, Chisholm, Carter, Fulmore, Hill, and LeBlanc.[72] Only eight Councillors would remain for the 1928 Session: Owen, Redden, and the six "Ten Year Men" (Bligh, Butts, Campbell, Comeau, McDonald, and Monbourquette).[73] The question now became who would join these eight.

Figure 10

Donald McRitchie, "The Old Rusty Key Ain't What She Used to Be", Cartoon, *The Halifax Herald* (24 January 1928) 6.

4. Appointing their Replacements

Given the manner in which Rhodes had dismissed the Liberal Councillors, there was little doubt that their replacements would be loyal Conservatives. Indeed, in response to a plea to have mercy on Gillis, Rhodes had noted that he was under intense pressure to to provide positions to "our friends who insist upon having at least one year in office out of the last forty-five."[74]

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[71] See Letter from Edgar N Rhodes to E Forbes (25 January 1928), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 4, no 26226) [Letter from Rhodes to Forbes].

[72] See Diary of James Cranswick Tory (25 January 1928), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 709, no 2); Letter from Rhodes to Forbes, supra note 71.

[73] Letter from Rhodes to Forbes, supra note 71.

[74] Letter from Edgar N Rhodes to Neil R McArthur (18 January 1928), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 4, no 26245).

Initially, it appeared as if Rhodes would have no problem finding suitable candidates for the Council. Immediately after the announcement of the Privy Council's decision, Rhodes began to receive requests for appointments.[75] Even D. H. MacLean, who had written to Rhodes to argue for Gillis' retention, joined in on the act, noting that he was "[a]mong many who feel they are the right man if any successor [to Gillis] is to be appointed."[76] With so many suitable candidates (and likely many more who had submitted their names for consideration in person or to another member of the Government), it seemed the difficulty would be in choosing between the candidates.

Instead, when word leaked that the Rhodes government was considering replacing the $1,000 sessional indemnity with a $15 per diem, interest in serving on the Council dried up.[77] Coupled with the Council's lack of prestige, there was now little incentive to serve in the Council, save being part of a historical moment. According to an anonymous Conservative with ties to the Government,

> [T]here is not much of substantial value to such an appointment, and so far as I know there is very little interest in the matter in the ranks of the Conservative Party. In fact I think that Mr. Rhodes is having considerable difficulty in obtaining sufficient men or women who are willing to accept the appointment, which has neither honors nor pecuniary value.[78]

This difficulty was exacerbated by Rhodes' desire to follow the tradition of appointing at least one Councillor for each county.[79] As such, filling the Council with loyal Halifax

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[75] See, e.g., Letter from Alexander McGregor to Edgar N Rhodes (19 October 1927), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 3, no 26008).

[76] Letter from DH MacLean to Edgar N Rhodes (16 January 1928), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 4, no 26244).

[77] "Rhodes Turns Down Offer of Liberals", *The Halifax Chronicle* (23 January 1928) 1.

[78] *Ibid.*

[79] See Letter from Edgar N Rhodes to H Percy Blanchard (24 January 1927), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 614, folder 160, no 23923)); J Murray Beck, *The Government of Nova Scotia* (Toronto: University of Toronto Press, 1957) at 251 [Beck, *Government*].

Conservatives, who would not incur substantial costs for travel, room, and board, was not an option. In the end, the Rhodes Government simply decided to maintain the existing sessional indemnity.

In making his appointments, Rhodes sought to create a Council that represented the Province. He wanted, for instance, to have at least one Councillor for each county, so that all of Nova Scotia could be represented in this momentous event.[80] He also seriously considered appointing at least one woman to the Council. When the 1926 packing scheme was made public, five women were among the list of potential Councillors published by the *Morning Chronicle* (albeit not under their own names—Mrs. Charles Archibald (Halifax), Mrs. Geoffrey Morrow (Halifax), Mrs. Matthew Scanlan (Halifax), Mrs. Newcombe (Canning), Mrs. Jean U. Fielding (Windsor).[81] In 1928, the *Chronicle* once more mentioned Mrs. Scanlan, and added the name of Mrs. William Dennis (Halifax).[82] While there is no evidence whether these specific women were indeed candidates, there is no doubt that Rhodes took the appointment of women seriously. Sometime in early January 1928, Rhodes asked Attorney General Hall for a formal opinion on the legality of such appointments; Hall delegated the task to the long-serving Deputy Attorney General Fred Mathers. In a three page opinion (with which Hall "entirely concur[red]"),[83] Mathers stated that he was "strongly of the opinion that [women] are ineligible" as "at common law women are not deemed capable of exercising public functions except in certain

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[80] Beck, *Government*, supra note 79 at 251.

[81] "Ladies Included in List of Faithful for the House of Lords", *The [Halifax] Morning Chronicle* (11 March 1926) 2.

[82] "Rhodes Turns Down Offer of Liberals", *The Halifax Chronicle* (23 January 1928) 1.

[83] Letter from WL Hall to Edgar N Rhodes (12 January 1928), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 3, no 25992) [Letter from Hall to Rhodes].

exceptional cases where a well recognized custom of the country has been established".[84] In his opinion, Mathers relied upon the Law Lords' decisions in *Beresford-Hope v Lady Sandhurst*[85] and *Viscountess Rhonnda's Claim,*[86] two cases later relied upon in the Supreme Court of Canada's decision in the *Persons Case*.[87] Based on Mathers' opinion, Hall said that it would be impossible to appoint women to the Council without first passing specific legislation to that effect, an endeavour which he thought futile due to the Council's pending abolition;[88] no such legislation was pursued and no women were appointed to the Council.[89]

Despite making efforts to ensure that Nova Scotia's counties, women, and the Acadian population[90] were represented in the Council, two notable groups were missing from Rhodes' outreach: African Nova Scotians and Mi'kmaqs.[91] There is no record of Rhodes considering a member of either group for appointment to the Council or of prominent members of the African or Mi'kmaq communities being named in the press as potential

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[84] Letter from Fred F Mathers to WL Hall (12 January 1928), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 623, folder 3, no 25993).

[85] (1889) 23 QBD 79 HL (Eng) at 95.

[86] [1922] 2 AC 339 HL (Eng).

[87] Edwards v. Canada (Attorney General), [1928] SCR 276, rev'd [1930] AC 124 PC.

[88] Letter from Hall to Rhodes, supra note 83.

[89] Regardless of his personal beliefs on the Nova Scotia constitution or the legality of appointing women, Rhodes no doubt wanted to make absolutely certain that such appointments were legal before going through with them, as he needed to be sure the abolition bill could not be challenged as constitutionally defective. The question of legality was likely raised in his mind in the first place because the prominent *Persons Case* was pending before the Supreme Court of Canada at the same time.

[90] While less of a concern due to the continued presence of Liberal Councillor Joseph Monbourquette, Rhodes would also appoint one man with Acadian roots, John P. Bourque of Richmond County, to the Council. Due to the lack of biographical information available, however, I have not been able to determine to what extent Bourque's family had assimilated, though it is likely given that he had the first name of "John".

[91] Also absent were more recent immigrants from continental Europe, though this may have been justified by the relative lack of roots in the province, something not true for the African and Mi'kmaq populations.

appointees. The "representative" Council Rhodes sought to create thus represented only white Nova Scotians.[92]

In the end, Rhodes appointed a total of fourteen new Councillors, bringing the total to a symbolic twenty-two.[93] The first twelve—Seth M. Bartling (Queens), John Bell (Pictou), John P. Bourque (Richmond), Edgar N. Clements (Yarmouth), Wendell H. Currie (Shelburne), Avard L. Davidson (Annapolis), J. Avard Fulton (Guysboro), Charles W. Lunn (Colchester), Alexander McGregor (Pictou), Daniel McLennan (Inverness), John C. O'Mullin (Halifax), and Percy L. Spicer (Cumberland)—were appointed on February 12,[94] with John F. MacLellan (Antigonish) following the next day.[95] The fourteenth appointee, William H. Roach (Hants), was a special case. Roach had been all but promised a position on the Council by Speaker Albert Parsons, but was not among the initial list of appointees. This perplexed the *Chronicle*, as it could not fathom why Hants County should be unrepresented in the Council.[96] Finally, on Saturday February 18, Roach received his appointment, but the Rhodes Government continued to deny that it had been made until the middle of the following week.[97] Most likely, Rhodes had intended to keep Roach's appointment a secret, so that he could make a show of introducing the symbolic twenty-second Councillor, but this was mooted once word of the appointment had leaked and Roach confirmed his

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[92] Considering the time period, this is not wholly surprising. See, e.g., McKay, Ian & Robin Bates, *In the Province of History: The Making of the Public Past in Twentieth-Century Nova Scotia* (Montreal: McGill-Queen's University Press, 2010) at 11 (describing 1936 tourist brochure that equated the "Native Types" of Nova Scotia with the province's "white races" and excluded the African Nova Scotian and Mi'kmaq populations).

[93] Beck, *Government*, supra note 79 at 251.

[94] "Twelve New Legislative Councillors", *The Halifax Chronicle* (13 February 1928) 1.

[95] "Will See Passing of Upper Chamber; New Member Named", *The Halifax Herald* (14 February 1928) 1.

[96] "Twelve New Legislative Councillors", *The Halifax Chronicle* (13 February 1928) 1; "Largess by Wholesale", Editorial, *The Halifax Chronicle* (14 February 1928) 6.

[97] "Another Appointment to Legislative Council", *The Halifax Chronicle* (21 February 1928) 1.

appointment to the press. Alternatively, Roach may have initially declined appointment (the *Chronicle* reported that Roach had not wanted the position), and only accepted after the lack of a Council seat for Hants turned into a minor scandal or Rhodes made clear he could not find another suitable candidate.[98]

While it is difficult to assess the quality of Rhodes' appointments in toto due to the dearth of readily available biographical information, what information is available suggests that they were no less qualified than their predecessors at the time of appointment. Alexander McGregor, for instance, had served in the Canadian House of Commons as a Unionist from 1917 to 1921.[99] Avard Davidson served in the Commons from 1911 to 1921.[100] John Bell had twice run for the Nova Scotia Assembly as a Conservative.[101] Wendell Currie was editor of the *Shelburne Gazette.*[102] Other members were prominent lawyers, businessmen, or journalists.[103] The only unknown was John Bourque, whose name was unfamiliar to the *Chronicle* and the anonymous Conservatives with which it spoke.[104]

Though the group may not have been the most qualified in Nova Scotia, and it certainly included the standard allotment of failed candidates and the politically well-connected, they were not wholly unqualified, as was later suggested by Alexander Sterling MacMillan in his account of the Council's abolition. According to MacMillan, Rhodes' "appointees, in my

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[98] See "Another Appointment to Legislative Council", *The Halifax Chronicle* (21 February 1928) 1.

[99] "Legislative Councillors to Be Named", *The Halifax Chronicle* (11 February 1928) 1.

[100] "Twelve New Legislative Councillors", *The Halifax Chronicle* (13 February 1928) 1.

[101] "Legislative Councillors to Be Named", *The Halifax Chronicle* (11 February 1928) 1.

[102] "Twelve New Legislative Councillors", *The Halifax Chronicle* (13 February 1928) 1.

[103] *Ibid.*

[104] *Ibid.*

judgment, were not the type of men who could have been elected to any elective body."[105] This was an unduly harsh critique of the final fourteen men appointed to the Council, though it is understandable that MacMillan viewed his replacements as unworthy of their positions. MacMillan's views may also have been influenced by the fact that none of the fourteen ran in the 1928 Assembly election, though this is likely because practically all seats in the Assembly were held by incumbent Conservatives, who with few exceptions ran for re-election (Council President Bligh and Government Leader Butts would run for the Assembly in 1928, however).

Regardless of the quality of the new Councillors, with their appointments secured, all pieces had come into place for the Legislative Council's abolition.

5. The Abolition Vote

When the 1928 Session opened on February 14, huge crowds packed Province House, hoping to witness the final days of the Legislative Council. While the public might not have loved the Council, there was still a sense that something momentous was happening, and people wanted to be a part of it. "[T]here was that feeling abroad yesterday that something was to pass away, and that again the opening of the House would not be quite the same."[106]

On February 15, the first regular day of the Session, Rhodes re-introduced his bill to abolish the Council, the first bill introduced in the Session.[107] (Indeed, save for the Speech from the Throne and the tabling of several routine reports, it was the first business

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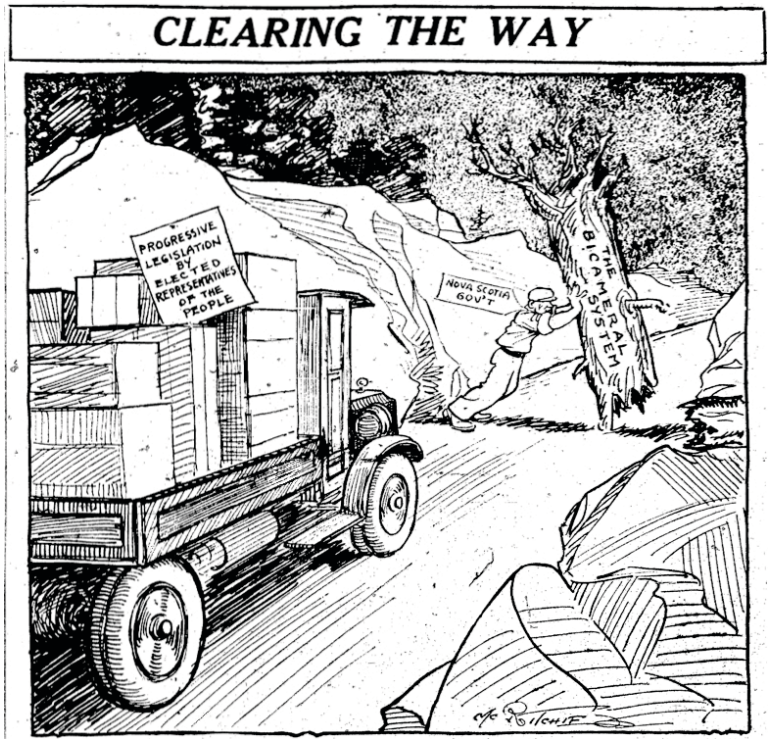
[105] Alexander Sterling MacMillan, The Legislative Council & Story of Abolition 1924-1927 (undated), Halifax, Nova Scotia Archives & Records Management (NSARM) (microfilm reel 10,893, document 11).

[106] Horatio C Crowell, "Crowded Galleries Witnessed Opening of Legislature", *The Halifax Chronicle* (15 February 1928) 1.

[107] *Journals and Proceedings of the House of Assembly of the Province of Nova Scotia*, 38th Parl, 3rd Sess (15 February 1928) at 9.

Figure 11



Donald McRitchie, "Clearing the Way", Cartoon, *The Halifax Herald* (15 February 1928) 6.

considered by the Assembly at all). The bill was then given its second reading two days later, when Rhodes motioned to dispense with submitting the bill to committee.[108] It was then read for the third time and delivered to the Council on February 21 (the Assembly not having met from February 18 to 20).[109]

At the third reading, Chisholm unsuccessfully attempted to amend the bill to abolish the Council at the end of February, rather than the end of May;[110] presumably, with the writing on the wall, he wanted to dispense with the Council as soon as possible. Rhodes replied, however, that the Council could not be abolished before the end of the Session, as otherwise any legislation enacted without its assent could be called into doubt. Chisholm also used this debate as a final chance to defend the Council and to question why Rhodes

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[108] *Journals and Proceedings of the House of Assembly of the Province of Nova Scotia*, 38th Parl, 3rd Sess (17 February 1928) at 20.

[109] *Journals and Proceedings of the House of Assembly of the Province of Nova Scotia*, 38th Parl, 3rd Sess (21 February 1928) at 21.

[110] *Journals and Proceedings of the House of Assembly of the Province of Nova Scotia*, 38th Parl, 3rd Sess (21 February 1928) at 21-22.

had appointed fourteen new Councillors, at a cost of $14,000, when no more than three would have been sufficient to push the abolition bill through. Rhodes replied that he had wanted to provide representation for every county and had also seen the number twenty-two as symbolic of the Lieutenant-Governor-in-Council's power. The bill then went to a vote; when it was passed, the Liberal caucus rose up in cheers.[111]

The abolition bill moved very quickly through the Legislative Council. It was given its first and second readings on February 22, the day after it was received from the Assembly.[112] After being submitted to the Committee of the Whole House on February 23, it was given its third reading and returned to the Assembly on February 24.[113]

Unsurprisingly, the Red Chamber was packed for the Council's third reading of the bill.

> Probably not since the days of the Council of Twelve has the Second Chamber of the Nova Scotia's Legislature [sic] attracted so much attention as it has in its more or less dramatic passing out. Many people came down to the Province House to listen to its last hours, and the members of the House of Assembly crowded the Council Chamber to witness the obedience to their will and the victorious end of the Assembly's long fight for complete supremacy. As Macaulay would have said: 'they listened with little emotion but with much civility.'[114]

The performance began with Government Leader Robert Butts rising to motion for the third reading of the abolition bill.[115] He then delivered a brief speech in favour. Horatio Crowell of the *Chronicle* applauded Butt's "powerful, yet modulated, and resonant voice"

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[111] Crowell, Horatio C. "Council Abolition Bill Passed House", *The Halifax Chronicle*, (22 February 1928) 1.

[112] Nova Scotia, *Legislative Council Bills 1928*, Halifax, Nova Scotia Archives & Records Management (NSARM) (RG 4 Series R, vol 16).

[113] Nova Scotia, *Legislative Council Bills 1928*, Halifax, Nova Scotia Archives & Records Management (NSARM) (RG 4 Series R, vol 16).

[114] Horatio C Crowell, "Historic Upper House Passes: Council Voted Sixteen to Two for Abolition", *The Halifax Chronicle* (25 February 1928) 1.

[115] Frank W Doyle, "Upper House Abolished by its Own Vote", *The Halifax Herald* (25 February 1928) 1.

with "a charming touch of humor in many of his well turned phrases", as well as his "concise clarity of diction."[116] Butts began by congratulating Rhodes for finally settling "a question that has engaged the attention of the public for nearly half a century."[117] Butts promised to be brief, however, as there was little new to be said concerning abolition "because it has been debated in all its moods and tenses both in this chamber and the Legislative Assembly since the early [18]70's."[118] Butts did take a few moments to outline the case against the Council. First, the Council had frequently served as "a pliant tool in the hands of the late government", such as when it rejected amendments to the Temperance Act in 1917 on the instructions of Premier Murray. Furthermore, the Council had failed to act to prevent legislative misadventures, such as the creation of BESCO in 1921.[119]

Butts was then followed by recent appointee Wendell Currie (Shelburne), who stated that the new Councillors, in serving as the Council's pall bearers, were rendering a greater service to the Province than had ever been done by the Council itself.[120] Crowell cited Currie's "well phrased presentation of argument" and noted that "he also possessed the lost art of being brief."[121]

President Bligh then rose to offer a bitter-sweet benediction for the Council. He began by noting that bicameralism was a valid form of government, "providing the upper chamber was properly constituted", though he believed the Legislative Council to be a "useless

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[116] Horatio C Crowell, "Historic Upper House Passes: Council Voted Sixteen to Two for Abolition", *The Halifax Chronicle* (25 February 1928) 1.

[117] Frank W Doyle, "Upper House Abolished by its Own Vote", *The Halifax Herald* (25 February 1928) 1.

[118] *Ibid.*

[119] *Ibid.*

[120] *Ibid.*

[121] Horatio C Crowell, "Historic Upper House Passes: Council Voted Sixteen to Two for Abolition", *The Halifax Chronicle* (25 February 1928) 1.

burden" on the Province. He did not want, however, to be entirely critical of the Council on the occasion, specifically noting that he did not want to see "this body go out unwept, unhonored and unsung". Though the Council had not always acted in the Province's best interests, it had been filled with "many able and brilliant men" "whose eloquent wit and wisdom have sparkled through this historic chamber." "We must not let these obsequies pass without paying them tribute."[122] Bligh then concluded with the Latin phrase, "Sic transit gloria mundi", "so passeth the glory of the world."[123] According to Crowell, Bligh was "at all times interesting, for he possesses a whimsical originality, a delightful sense of humour, which at times has caused him to be characterized as something of a wag, and the striking ability of being on both sides at the same time." Crowell also emphasized Bligh's expert performance in "making a strong constitutional plea for the second chamber in the government of the province, and at the same time contending for abolition, and voting for it. As an example of straddling a public question, it was a master performance."[124]

Although Bligh was meant to give the final speech before a vote was taken, he was unexpectedly followed by new Councillor Charles Lunn (Colchester). According to Crowell, Lunn was "somewhat overzealous " in arguing for abolition, giving his speech the feeling of an anti-climax, coming as it did after President Bligh's benediction. Lunn also created a moment of discomfort when he called on his fellow Councillors to return their sessional indemnities to the provincial treasury, though he dropped his offer when none immediately took him up on it.[125]

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[122] Frank W Doyle, "Upper House Abolished by its Own Vote", *The Halifax Herald* (25 February 1928) 1.

[123] Horatio C Crowell, "Historic Upper House Passes: Council Voted Sixteen to Two for Abolition", *The Halifax Chronicle* (25 February 1928) 1.

[124] *Ibid.*

[125] *Ibid.*

Just as notable, however, were the voices that were absent during this final "debate": none of the four Liberal "Ten Year Men," nor the long-serving William Owen or Arthur Redden spoke during the debate, leaving a significant gap in the proceedings. Crowell noted that Liberal opposition to abolition would have added "considerable spice to the discussion, a sort of nervous spasm to the dying body".[126] Most likely, the Liberals saw any effort as moot, and simply decided to remain silent and let the matter be finished as soon as possible. But while continuing to argue the virtues of abolition would have been a waste of time, the proceedings did suffer from the lack of a single unambiguous statement on behalf of the Council. It is a particular loss that Owen, who had served on the Council for nearly forty-seven years, decided not to take the opportunity to speak of some of the good it had done in that time.

The debates concluded, a vote was finally taken on the bill. In the end, sixteen voted for abolition, with two dissenting. John A. McDonald and J. Willie Comeau, both Liberal "Ten Year Men," voted against abolition, while Redden and Owen voted in favour. The vote completed, President Bligh reminded the Councillors that they remained in office until May 31 and asked that they continue to attend meetings until then.[127] Presumably, he feared some of the new appointees would view their work as done and stop attending the less glamourous days of rubber-stamping Assembly bills that would follow.

Within the week, Lieutenant-Governor Tory granted his assent to the abolition bill.[128]

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[126] *Ibid.*

[127] *Ibid.*

[128] See Diary of James Cranswick Tory (2 March 1928), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 709, no 2) ("In the afternoon, at four o'clock, went to the House of Assembly and assented to 39 Bills, including the Bill for the abolition of the Legislative Council."); "Governor Assents to Abolition of Council Bill", *The Halifax Chronicle* (3 March 1928) 1.

After a half century of efforts, the Legislative Council of Nova Scotia had finally been abolished.

6. Aftermath I: The Final Days of the Legislative Council

While abolition had been achieved, the Council continued to live a spectral existence for the remainder of the 1928 Session. The old majesty, however, disappeared almost immediately.

On February 25, the day after the abolition vote, William Owen suddenly took ill. He returned to his home in Bridgewater, where he was bedridden until March 4, when he died.[129] While the timing was likely coincidental (and, indeed, Owen's oncoming illness may have explained his odd silence during the prior day's debates), it seemed as if the Council's abolition had drained Owen of the will to live. Owen, the oldest member of the Council and the sole remaining connection to the last period of Conservative rule in Nova Scotia, had given up the ghost along with the Council.

With Redden serving as the only connection to the pre-reform Council and the Liberal "Ten Year Men" likely feeling deflated, the new Councillors quickly took over. But, with little work to do (and that little having effectively turned into merely rubber-stamping without consideration bills already passed by the Assembly), the Councillors effectively ceased holding regular meetings and instead turned the Red Chamber into a social club, complete with bar and one of the Councillors acting as bar tender.[130] In a speech the next winter, Alexander Sterling MacMillan described the drunken revelry, noting that "the feast of Belchazzar [sic] was a Sunday School picnic in comparison to the closing day of the

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[129] "Hon. W. H. Owen Passes Away at Bridgewater", *The Halifax Chronicle* (5 March 1928) 1.

[130] MacMillan, supra note 105.

Legislative Council."[131] Though MacMillan may lack credibility, as he was not present for the Council's final days and his account, presumably written late in life, is full of incorrect information, it was not seriously challenged at the time. In the opening days of the 1929 legislative Session, Rhodes apparently threatened to reprimand MacMillan before the Assembly, but no action was taken after MacMillan challenged the Conservatives to conduct a full investigation. According to MacMillan, "That closed the incident as, naturally, the matter had had enough publicity and they did not care to incur more advertising by holding an investigation."[132]

Finally, on March 30, the Council met for the last time in the ceremonial close of the 1928 Session. Though the details of the ceremony differed little from prior years, the *Chronicle* described a change in tone, comparing the Councillors to gladiators entering the Coliseum.[133] Indeed, the *Chronicle* noted that the Councillors may as well have greeted the Lieutenant-Governor with the cry, "Morituri te Salutamus," "We who are about to die salute you."[134] After the Session closed with a collective singing of "God Save the King," the Councillors tarried as the Lieutenant-Governor, Assemblymen, and spectators drifted out. It was as if, the *Chronicle* claimed, they were drawn back by a "homing instinct, toward the memory-enshrined chamber," where they might "smile wanly and sigh faintly, and live again those happy days of the winter of 1928."[135]

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[131] *Ibid.* The Feast of Belshazzar, detailed in chapter five of the *Book of Daniel*, was an infamous drunken feast on the eve of war in which the Babylonian king and his retinue drank from the holy cups taken from the Temple of Solomon. After this, a disembodied hand appeared and wrote a mysterious phrase on the wall, which Daniel later interpreted to signify that God had weighed Belshazzar and found him wanting and that his kingdom would soon be divided between the Medes and Persians.

[132] MacMillan, supra note 105.

[133] "'Lords' Pass on as House Prorogues", *The Halifax Chronicle* (31 March 1928) 1.

[134] *Ibid.*

[135] *Ibid.*

7. Aftermath II: The 1928 Election and After

Just six months after the Legislative Council disappeared forever, Nova Scotians returned to the polls. Though Rhodes had not thought it necessary to consult the electorate on changing the provincial constitution by abolishing the Council, he argued in September 1928 that the members of the Assembly should face the voters before making use of their substantial new powers.[136] That is, changing the constitution did not require an election, but using the powers resulting from that changed constitution did. The Liberals, meanwhile, argued that Rhodes was calling a snap election before Conservative support declined further.[137] (Rhodes would later admit as much in his private letters to other Conservatives, stating that the party would have done worse if the election were held a year later.)[138] Though the 1928 election might have been an opportunity to hold an ex-post-facto referendum on abolition, it was barely raised by the Liberals, who rightly recognized it to be a dead issue.[139] Instead, the election was fought on other matters such as old age pensions and the tuberculin testing of cattle.[140]

Unsurprisingly, a number of former Councillors stood for election in 1928. From the Liberals, Alexander Sterling MacMillan and J. Willie Comeau ran as a ticket in Digby County; from the Conservatives, Council President Frederick Bligh and Government Leader Robert Butts ran in Halifax and Cape Breton East, respectively.[141] A further twenty-six former

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[136] J Murray Beck, *Politics of Nova Scotia* (Tantallon, NS: Four East Publications, 1985) vol 2 at 127 [Beck, *Politics*].

[137] See *ibid.*

[138] *Ibid* at 130.

[139] *Ibid.*

[140] *Ibid* at 128-129.

[141] Elections Nova Scotia, Election Summary from 1867-2007, online: Elections Nova Scotia <http://electionsnovascotia.ns.ca/results/ele_summary.pdf>.

Councillors did not run in the 1928 elections, though this can likely be explained by a combination of disinterest, old age (especially among the Liberal members), and the prospect of running against incumbents from their own party (especially among the Conservative members). Conservative Councillor Seth M. Bartling would be elected for Queens County in the 1933 election, however.[142] In the end, the Conservatives were reelected with a slim majority of three seats. Of the former Councillors, all but Bligh were elected.[143]

Though the Conservative government would survive another five years, Rhodes resigned in August 1930 to become federal Minister of Fisheries and later Minister of Finance under Bennett.[144] In July 1935, three months before the Conservatives' defeat to Mackenzie King's Liberals, Prime Minister Bennett appointed Rhodes to the Canadian Senate.[145] Rhodes, who had spent three years fighting to abolish Nova Scotia's unelected upper house, would spend the last seven years of his life sitting in Canada's unreformed upper house. He did not, by all evidence, appreciate the irony of the situation.

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[142] *Ibid.*

[143] *Ibid*; Beck, *Politics*, supra note 136 at 129.

[144] Beck, *Politics*, supra note 136 at 138.

[145] "Rhodes, The Hon. Edgar Nelson, P.C.", *Parliament of Canada PARLINFO* (2011), online: <http://www.parl.gc.ca/parlinfo>.

VI. Conclusion: Into the History Books

After a half century of failed efforts, the Legislative Council of Nova Scotia had finally been abolished. A body seen to be holding back the Province was no more, and it seemed that Nova Scotia would no longer be bound to old ways of doing things. Except things did not play out as expected. Within only a few years, Nova Scotia would seize onto tradition as a way of selling itself in the burgeoning tourist industry.[1] Where Donald McRitchie represented the past as a crumbling lighthouse washed away by the crashing tides of progress, the Province would soon advertise lighthouses as symbols of its rich maritime history. Had but the Legislative Council survived a few more years, it perhaps might have been seen as the same sort of throwback to the past, a living artifact that tourists had to see when visiting Halifax.

Figure 12

Donald McRitchie, "The Passing of the Old Order", Cartoon, *The Halifax Herald* (2 March 1928) 6.

But while one might quibble with the decision to abolish the Legislative Council of Nova Scotia, it has been little mourned by those in the Province. There has never been a

[1] See McKay, Ian & Robin Bates, *In the Province of History: The Making of the Public Past in Twentieth-Century Nova Scotia* (Montreal: McGill-Queen's University Press, 2010).

movement to restore it or to create something else in its place. Instead, the Province has been content to continue with a unicameral Legislature consisting of the House of Assembly and the Lieutenant-Governor. In this regard, Nova Scotia is joined by every other Canadian province, and may at some point in the future be joined by the Canadian federal Parliament.

Even at the time of its abolition the Legislative Council appeared as a historical artifact. From 1850, only two provinces were created with upper houses: Québec, whose upper house was in effect a continuation of the old Legislative Council of the Province of Canada, and Manitoba, whose upper house was made up largely of old Hudson's Bay Company officials serving in an advisory capacity to the new government. When the Colony of Vancouver Island merged with mainland British Columbia in 1866, it left its upper house behind. When Alberta and Saskatchewan were created in 1905, they were formed, ab initio, without legislative councils. Even Nova Scotia's Maritime neighbours, which also had legislative councils from the beginning, abolished them in the late Nineteenth-Century. The era of the provincial upper house was coming to a close, and had the Council not already existed, no one would have argued for its creation.

But, of course, the removal of something in existence is far different from the creation of something anew. The Council's presence shifted the nature of provincial debate, a real life example of the status quo bias. The Council was an integral part of Nova Scotia's constitution, arguably older than the Assembly itself; abolishing it meant significantly changing a constitution that had served the Province well in the past. Moreover, abolition required changing the provincial constitution, which after Confederation meant an act of the Legislature—a Legislature that included the Council.

This constitutional conundrum—the Legislative Council's consent was required to abolish the Legislative Council—appeared for decades to be unresolvable. Successive governments sought to achieve abolition through some alternative means, whether it be an amendment to the British North America Act, requiring appointees to pledge themselves in favour of abolition, or offering substantial pensions, but none were successful. Eventually, the governing Liberals effectively gave up, embraced the Council, and sought reform instead of abolition. But decades of criticism left a Council bereft of popular support.

When Edgar Nelson Rhodes took office, he recognized the Council as a vestige of the old regime, an independent source of authority that could block his legislative agenda (even if that authority was mostly unexercised). Rhodes thus launched a renewed battle against the Council, dedicated this time to destroy it once and for all. In doing so, Rhodes questioned decades-old assumptions about the nature of the provincial constitution and the role of the Council. When Lieutenant-Governor Tory and the Dominion Law Officers were unwilling to go through with his plans to pack the Council with Conservative appointees, he took the matter to court. Fortunately for Rhodes, the Judicial Committee of the Privy Council was unwilling to recognize the settled conventions on which so much of Nova Scotian practice was based. According to the Privy Council, the Legislative Council was built on a foundation of sand.

But why was Rhodes successful where his predecessors had failed? Two factors provide something of an answer. First, where Premiers Murray and Armstrong had assumed that abolition or reform could only be achieved with the Legislative Council's consent (achievable, perhaps, through the practice of asking appointees to pledge themselves in

favour of abolition),[2] Rhodes believed abolition must be achieved notwithstanding the Council's opposition and instead looked to external means to abolish the Council or to put sufficient pressure on the Councillors to accept their fate. Thus, Rhodes considered holding a referendum, petitioning Westminster to amend the British North America Act, or bribing the Councillors with generous pensions.

Second, neither Rhodes nor Lieutenant-Governor Tory restrained themselves by unwritten constitutional convention. Where Lieutenant-Governor Archibald had decades before stated that he believed there to be a compact between the Council and the Crown[3] and subsequent premiers and governors acted as if life tenure and the maximum of twenty-one members were hard written into the provincial constitution, Rhodes and Tory acted differently. Buttressed by the Judicial Committee of the Privy Council's decision, they felt free to ignore the prior convention, as it was not, legally speaking, a binding part of the constitution. Indeed, in his extended argument for why Councillors held their positions for life, John George Bourinot acknowledged that that tenure might not be enforceable in court.[4] Yet this did not minimize that acting contrary to convention was, in a different sense, acting unconstitutionally.[5] Ignoring convention was a radical, unconstitutional means

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[2] See "Limiting the Veto of the Legislative Council" *The [Halifax] Morning Chronicle* (18 April 1917) 3 (quoting Murray for the proposition that pledges "would have an effect more or less some day or other in bringing about of constitutional change").

[3] Address of Lieutenant-Governor Adams G. Archibald to the Legislative Council (11 April 1883), in *Journals and Proceedings of the Legislative Council of the Province of Nova Scotia*, 28th Parl, 1st Sess (1883) at 104-111 at 108.

[4] JG Bourinot, "Some Contributions to Canadian Constitutional History: The Constitution of the Legislative Council of Nova Scotia" (1896) 2 Proceedings and Transactions of the Royal Society of Canada (Second Series) Section II 141 at 170.

[5] See Peter W Hogg, *Constitutional Law of Canada*, 2009 Student Edition (Toronto: Carswell, 2009) at s 1.10. See also *Reference re Resolution to Amend the Constitution*, [1981] 1 SCR 753 (holding that there was no legal requirement to obtain provincial consent to request amendment to the British North America Act, but that there was a non-binding convention to obtain a "substantial degree" of provincial consent to amendments).

of obtaining abolition. But because conventions are unenforceable in court, it was a "legal" unconstitutional radicalism.

Rhodes' success lies in the fact that he did not worry about convention. True, the Opposition Liberals could have claimed his actions were unconstitutional (though none seem to have done so after the Privy Council decision), but Rhodes seemed to recognize that the public, when faced with the paradox of a legal, but unconstitutional, act, would put more weight on a judicial decision rendered by the highest court in the British Empire than on unwritten conventions.

Of course, this does little to explain why Lieutenant-Governor Tory went along with Rhodes plan without ever consulting the electorate. While the Privy Council's decision verified that Lieutenant-Governor Tory had the ability to act, it in no way mandated his actions. Indeed, use of the prerogative powers of the Sovereign to dismiss Councillors or to appoint in excess of twenty-one members violated constitutional convention in place since at least 1846.[6] True, these conventions did not have the binding force of law,[7] but this did not make them any less a part of the constitutional structure of the Province.

At the same time, however, the constitutional conventions establishing responsible government demanded that Tory act according to the advice of his Executive Council, which had advised him to dismiss and replace the Liberal Councillors so that the Legislative Council might be abolished. Rejecting this advice could have set off a constitutional crisis, with Rhodes and the Conservatives likely claiming that responsible government had been overturned and calling on Ottawa to dismiss Tory as quickly as possible. Indeed, Tory's papers in the Nova Scotia Archives suggest that he viewed his role largely as executing the

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[6] See Bourinot, supra note 5 at 170.

[7] *Ibid.*

policies of the government, with only limited role for more overt action in exceptional circumstances.[8] While these were arguably exceptional circumstances, Tory's deep deference to the elected government is understandable.

And yet, Tory might still have been able to insist on a clear statement from the electorate without seeming to violate constitutional convention if he had relied specifically upon the earlier precedent of Kings Edward VII and George V in the passage of the *Parliament Act, 1911*. There, Prime Minister Asquith had advised nominating a sufficient number of Liberal peers to outnumber the recalcitrant Tory majority. Kings Edward VII and George V, however, refused to make the appointments until after Asquith had taken the question to the public, as the intent of the appointments was to dramatically change the country's constitutional structure. After receiving an assurance from George V that the appointments would be made if necessary following the Liberals' reelection, Asquith faced the electorate for the second time in less than a year and emerged victoriously (albeit with a reduced minority supported by Irish nationalists and the rising Labour Party).[9] In the end, packing the Lords with Liberals proved unnecessary, as the Tory peers ultimately accepted the *Parliament Act*'s two year suspensory veto so as to avoid the immediate passage of the hated Irish Home Rule bill.[10]

Although denying a premier's advice is a dramatic action that Tory was highly reticent to take, he could properly have cited this precedent in either 1926 or 1928 when asked to appoint additional or dismiss existing Councillors. Yet, the specific chain of events made it difficult for the issue to be raised in a timely manner. In 1926, Tory was more concerned

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[8] See James Cranswick Tory, Notebook and Clippings regarding Role of Lieutenant-Governor (various dates), Halifax, Nova Scotia Archives & Records Management (NSARM) (MG2 vol 713).

[9] Roy Jenkins, *Mr Balfour's Poodle: Peers v. People* (New York: Chilmark Press, 1954) at 173-192.

[10] *Ibid* at 243-268.

with whether the actions would be legal at all; in 1928, with legality established, it seemed a fait accompli and it would have seemed strange for Tory to mention for the first time that he would not act until following an election. The proper course would have been for Tory to state in March 1926 that he could not act until legality was fully established *and* the electorate had been consulted, but it is easy to understand why this did not occur to him at the time, even without considering Tory's minimalist views on the role of the Lieutenant-Governor.

More surprising is that the British precedent was not raised by the provincial Liberals or the Councillors themselves. Perhaps it was because the office of Lieutenant-Governor did not have the traditional legitimacy of that of Sovereign—while the King's actions were severely limited by convention, there was still a deep reverence for his position, a reverence that did not extend to his provincial representative. Instead, the Lieutenant-Governor was expected to do as instructed, regardless of the theoretical powers that he possessed. Thus, while it would have been entirely appropriate for the opposition Liberals to suggest Tory follow the British precedent, it may simply never have occurred to anyone that the Lieutenant-Governor could (or should) actually say no to Rhodes' request. In other words, Tory's minimalist view of the Lieutenant-Governor's role seems to have been shared by the rest of the Nova Scotia political class.

With no one standing up to suggest the Lieutenant-Governor should not act, however, the Privy Council's decision effectively settled the dispute. Abolition became merely a question of when and how; with the wide-scale dismissal of Liberal Councillors and their replacement with Conservatives, it became a fait accompli. Thus, on February 24, 1928, the packed Council voted for its own abolition, and shortly thereafter disappeared from the

world. In the words of Council President Frederick Bligh, "Sic transit gloria mundi"—" so passeth the glory of the world." And so, the Legislative Council walked out of the everyday life of the Province and into the history books.

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