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The Supreme Court of Canada and "the Bowater's law", 1950

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Many accounts have been written of the events leading to Newfoundland's union with Canada in 1949. None, however, details the diplomatic and legal controversy which developed in the months before union over the future status of Bowater's Newfoundland Pulp and Paper Mills Ltd. Settled by the Supreme Court of Canada in 1950, this tangled issue, arising from legislation dating back to 1915, produced important judicial insights into the constitutional position Newfoundland had assumed on becoming a Canadian province.

One of the mainstays of the present day provincial economy, Newfoundland's pulp and paper industry was launched in the opening decade of this century. The first mill to be built was located at Grand Falls and began production in 1909.¹ It was owned by the Anglo-Newfoundland Development Co., an enterprise founded by the famous Harmsworth brothers to service their expanding newspaper empire in the United Kingdom. Subsequent efforts by the colonial government to build on this initial success led eventually to the opening of a mill at Corner Brook in 1925 by the Newfoundland Power and Paper Co. Ltd., which combined British and Newfoundland interests.² Attracting capital on this scale to the forest resources of Newfoundland involved numerous concessions by the government in St. John's. The bargain made with the Anglo-Newfoundland Development Co. was spelled out in an Act passed by the colonial legislature in 1905.³ The origin of the concessions made to the developers of the Corner Brook operation

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1. For the history of this operation see James Hiller, "The Origins of the Pulp and Paper Industry in Newfoundland," *Acadiensis*, vol. 11, no. 2 (Spring, 1982), 42-68 and F.A. Price, "Fifty Years of Progress at Grand Falls: the impact of Anglo-Newfoundland Development Company Ltd., on the economy of Newfoundland," *Pulp and Paper Magazine of Canada*, vol. 60, no. 10 (October, 1959), 69-148.

2. For the industrial history of Corner Brook see W.J. Reader, *Bowater: a history* (Cambridge, 1981).

3. 5 Edward VII, cap. 10, *The Consolidated Statutes of Newfoundland* (St. John's 1916), vol. 4, 250-62.

(and therefore of the dispute to be considered in this paper) is to be found in legislation passed in 1915, 1917 and 1919 favouring Newfoundland Products Corp. Ltd., a creation of the Reid family, which had benefited greatly from the building of the Newfoundland railway.⁴

The chief purpose of this new enterprise was to develop “certain waters for the manufacture of fertilizers and such other articles and substances in connection with the Company’s business.”⁵ In the early 1920’s, however, the Company shifted its attention to the manufacture of pulp and paper.⁶ Accordingly, on November 27, 1922, it changed its name to Newfoundland Power and Paper Co. Ltd.,⁷ and in this guise made a deal with the powerful Armstrong Whitworth & Co. Ltd. of the United Kingdom. The new Company’s intention was to build a mill at Corner Brook and related hydroelectric works at Deer Lake. Its plans received public support in an Act passed in 1923 “to promote the speedy development of the water powers of the Humber Valley.”⁸ Under this legislation the Company could import its construction materials duty free, a like concession applying for fifty years to anything it needed to manufacture its product. Newfoundland now also agreed to back a £2,000,000 loan, a matching sum to be guaranteed by the British Treasury. For its part the Company agreed to pay a royalty out of profits of \$1 per ton of newsprint produced and twenty five cents *per annum* on each horsepower generated at its hydroelectric works. In return for these payments the Company would be exempt until 1973 “from all taxation (as for instance Municipal Taxes, Income Tax, Business Profits Tax) of every kind whatsoever other than duties (including Sales Tax) levied under the general laws of the colony on goods imported by the Company and not otherwise

4. The Acts were 6 Geo. V, cap. 4 (1915); 8 Geo. V, cap. 3 (1917); and 9-10 Geo. V, cap. 12 (1919). For these see, respectively, *The Consolidated Statutes of Newfoundland* (St. John’s, 1916), vol. 4, 508-20; *Acts of the General Assembly of Newfoundland* (St. John’s, 1917), 9; and *Acts of the General Assembly of Newfoundland* (St. John’s, 1919), 59.

5. *The Consolidated Statutes of Newfoundland* (St. John’s, 1916), vol. 4, 513.

6. See Reader, *Bowater*, *supra* note 2 at 33.

7. Supreme Court of Canada, file 7605, *Factum of Bowater’s Newfoundland Pulp and Paper Mills Limited*, 2. I am grateful to Mr. Bernard C. Hofley, Registrar, Supreme Court of Canada, for allowing me to read this file.

8. *Acts of the General Assembly of Newfoundland* (St. John’s, 1923), 6. The Act, 14 Geo. V, cap. 1, runs from pages 5 to 38.

exempt."⁹ In 1925 another statute gave the Company title to lands for a townsite at Corner Brook.¹⁰

In 1927 the Newfoundland Power and Paper Co. Ltd., was taken over by the International Paper Co. of New York and on July 29, 1927, became the International Paper Co. of Newfoundland Ltd., which, in turn, on November 9, 1927, became the International Power and Paper Co. of Newfoundland Ltd.¹¹ The latter change was preceded by fresh legislation assuring the new Company of "all the rights, powers, privileges, franchises and exemptions vested in, or owned or enjoyed by the Old Company."¹² New tax privileges were also included in this legislation. The Company's stock and shares, etc. were to be exempt from taxation for fifty years and the royalties required under the 1923 Act were abolished. In place of the latter the Company was required to pay an income tax of twenty per cent *per annum* to a maximum in the years 1928 to 1931 of \$75,000 and \$150,000 thereafter to 1973.

In 1934, forced to the point of bankruptcy by the Great Depression, Newfoundland gave up Responsible Government in favour of a system of "Commission of Government".¹³ Under this arrangement a British appointed governor was advised by six commissioners, also Whitehall appointees, three from Newfoundland and three from the United Kingdom. In itself, of course, this upheaval did not affect the status of the operator of the Corner Brook mill. Its arrangements with the Newfoundland government, like those of all other local companies, were carried intact across the constitutional divide of 1934 but important changes soon followed. Boxed in by social and economic problems, the new Commission of Government sought to quicken the pace of resource development. In the forest sector this led it into long and complex negotiations with the Bowater-Lloyd Group, another major British enterprise, for the development of timber stands in the Gander area. Tentative agreement was reached in 1938 for the building of a sulphite mill but Bowater quickly backed away from this deal when it was able to

9. Supreme Court of Canada, *Factum of Bowater's supra* note 7 at 5.

10. 15 Geo. V, cap. 27, *Acts of the General Assembly of Newfoundland* (St. John's, 1925), 146-52.

11. Supreme Court of Canada, *Factum of Bowater's supra* note 7 at 2; Reader, *Bowater, supra* note 2 at 139.

12. *Acts of the General Assembly of Newfoundland* (St. John's, 1927), 36. The Act, 18 Geo. V, cap. 4, runs from pages 31 to 63.

13. For the history of Newfoundland in this period see S.J.R. Noel, *Politics in Newfoundland* (Toronto, 1971).

take over the International Power and Paper Co. of Newfoundland Ltd., inheriting through the newly launched Bowater's Newfoundland Pulp and Paper Mills Ltd. all the former company's rights and privileges in Newfoundland.¹⁴ A deal, embodied in statute, between the new Company and the Newfoundland government followed whereby Bowater's agreed to enlarge the production of sulphite pulp at Corner Brook.¹⁵ The Company also undertook to cut for export 50,000 cords of unmanufactured timber *per annum* during the currency of its timber licences and to pay a royalty on this product. Preference was to be given by the Company in its operations to Newfoundland labour. On the other side of the coin, the Company obtained new land and water power rights, had its property in any towns or settlements it established exempted from municipal taxation and, indeed, was empowered to regulate many aspects of life in such places with the force of law. Two 1942 statutes altered the terms of the Company's loan arrangements and a 1943 Act removed a restriction on the payment of dividends on common share capital; all the provisions thus changed dating from the major 1927 legislation.¹⁶ Finally, in 1947 another Newfoundland Act confirmed, made binding, and gave the force of law, to a 1946 agreement whereby certain of the Company's licences had been extended from 50 to 99 years and 50,000 acres of its land conveyed back to the Crown.¹⁷

Altogether, then, the concessions Bowater's Newfoundland Pulp and Paper Mills Ltd. had acquired in Newfoundland were embodied in twelve pieces of legislation, the whole being referred to later by lawyers for the Company as "the Bowater's law".¹⁸ The advantages conferred by this body of law, especially the tax

14. See Reader, *Bowater*, *supra* note 2 at 129-55. The connection between Bowater and Newfoundland went back to the beginnings of the Corner Brook mill, when Bowater Paper Co. Inc. of New York had become the Newfoundland Power and Paper Co. Ltd.'s sole agent in the sale of its pulp and paper (Reader, *Bowater*, *supra* note 2 at 36).

15. 2 Geo. VI, no. 53, *Acts of the Honourable Commission of Government of Newfoundland* (St. John's, 1938), 515-51.

16. The 1942 and 1943 Acts were 6 Geo. VI, no. 35; 6 Geo. VI, no. 45; and 7 Geo. VI, no. 56. See, respectively, *Acts of the Honourable Commission of Government of Newfoundland 1942* (St. John's, 1942), 150-59, 244; and *Acts of the Honourable Commission of Government of Newfoundland 1943* (St. John's, 1943), 226.

17. 11 Geo. VI, no. 8, *Acts of the Honourable Commission of Government of Newfoundland 1947* (St. John's, 1947), 35-41.

18. Supreme Court of Canada, *Factum of Bowater's*, *supra* note 7 at 10.

exemptions, were substantial to say the least, and the Bowater-Lloyd Group had a great stake in the constitutional position of Newfoundland, especially in the continuity of the Dominion's laws. Hence the political events which began in 1945 with the announcement by the British government that a national convention would be elected in Newfoundland to advise it on choices which might be put before the people in a referendum on their constitutional future held great importance for the United Kingdom Company and its local subsidiary.¹⁹ Eventually Bowater moved to protect its privileged position in Newfoundland, in the process seeking the intervention of the British government on its behalf.

The moment of truth for the Corner Brook based enterprise came after the Newfoundland people voted on July 22, 1948, in favour of union with Canada. The negotiations which followed between a delegation appointed by the Commission of Government and representatives of the Government of Canada and which resulted in the signing of terms of union on December 11, 1948, were a great disappointment to Sir Eric Bowater, the London head of the conglomerate that bore his name. In November he had cabled both Sir Gordon Macdonald, the Governor of Newfoundland, and R.L.M. James, the Commissioner of Finance, who was also one of the Newfoundland directors of Bowater's Newfoundland Pulp and Paper Mills Ltd., promising "the strongest representations in London, Ottawa and St. John's" if his Company's position was not respected.²⁰ He had also sent Godfrey Morley, a close London associate, to St. John's to press his case, which had also been taken up by C.G. Heward, a Montreal lawyer and James' Commission of Government appointed colleague on the Bowater's Newfoundland board.²¹ Similar pressure was applied in London — at both the Treasury and the Commonwealth Relations Office.²²

Newfoundland's attitude at this juncture was explained by R.L.M. James in a letter to H.N. Tait at the Commonwealth Relations Office.²³ The government in St. John's was not attempting to control the delegation it had sent to Ottawa and would

19. The political and constitutional history of Newfoundland, 1945-49, is detailed in Noel, *Politics in Newfoundland*, *supra* note 13 at 244-61.

20. Public Record Office, DO 35/3470, James to Tait, Nov. 30, 1948. Transcripts of Crown-copyright records in the Public Record Office appear by permission of the Controller of Her Majesty's Stationery Office.

21. *Ibid.*

22. *Ibid.*, minute of Nov. 25, 1948.

23. *Ibid.*, James to Tait, Nov. 30, 1948.

not know of its discussions until it returned home and reported. In the circumstances, Bowater should itself contact Newfoundland's negotiators in the Canadian capital and obtain "the advice of a first-class lawyer, who . . . specialized in Dominion Provincial relations in the income tax field." When Godfrey Morley sought an assurance that the Commission of Government would "not endorse or recommend" terms negotiated in Ottawa inimical to the Bowater interest, he was told that the role the Commission would play on the delegation's return had yet to be determined. It was clear to all, however, that if the terms were generally satisfactory, "it would be most difficult to mobilize any effective opposition to them on the sole ground that they might have an adverse effect on the Bowater Company."

Bowater's worst fears were realized in the terms signed at Ottawa on December 11, 1948.²⁴ Despite having sent a powerful delegation to meet with the Canadian side, the Newfoundland Company received no guarantee of its special status. Indeed the intelligence received at Group headquarters in London was that the Canadian government might "not be prepared to recognise the existing agreements between the Newfoundland Government and Newfoundland Companies."²⁵ But all was not yet lost, since to come into effect on the scheduled date of March 31, 1949, the terms of union needed the approval both of the Parliament of Canada and of the Government of Newfoundland and a confirming act of the Parliament of the United Kingdom. Lobbying might yet prevail.

The opening shot in the next phase of the Bowater campaign was fired by Sir Eric Bowater himself on December 7, 1948, in a letter to Philip Noel-Baker, Secretary of State for Commonwealth Relations. His Company's arrangements with Newfoundland, he wrote, were "solemn agreements", which Bowater had always understood would, "as a matter of principle, law and equity, be honoured by Canada." That the Canadian representatives who had met with the Newfoundland delegation in Ottawa had indicated that these could "now be made null and void. . . as a result of a change in the constitutional status of the island" had come "as a great shock." Clearly, the British government had to intervene to set matters right. "I am confident," Sir Eric concluded, "that this apparent challenge to the probity of public and official relations will

24. For the terms of union see Noel, *Politics in Newfoundland*, *supra* note 13 at 296-313.

25. DO35/3470, memorandum enclosed in Bowater to Noel-Baker, Dec. 7, 1948.

not be condoned by your Department, and I therefore seek your confirmation that appropriate assurances will be obtained from H.M. Canadian Government that the Newfoundland Government's contractual obligations will be honoured by Canada prior to Parliament's ratification of the terms of Confederation.'

The response of the British Government to this initiative was shaped by several considerations. First and foremost was the desire to see Newfoundland safely made part of Canada. Encouraging Confederation was Great Britain's decided policy towards Newfoundland and there must be no last minute hitches, the more so since the decision to join Canada had carried by only 52.3% of the votes in the decisive July 22, 1948 referendum and there were still rumblings of protest from the Island. Great Britain was about to unload an imperial burden and no special pleading could stand in the way of that. On the other hand a national interest, albeit a lesser one, was clearly at stake in the Bowater claim. In November, after Godfrey Morley had visited St. John's, R.L.M. James had noted that if the Newfoundland Company's liability for income tax was increased, its dividends to its United Kingdom shareholders might be reduced or suspended and Great Britain's dollar position adversely affected.²⁶ Again, if dividends were to come under the terms of the double taxation agreement between Canada and the United Kingdom, shareholders in the latter country might gain at their Government's expense. For his part the Treasury's director on the Bowater's Newfoundland board pointed out that the "vast plant extensions" the Company had made assumed "that existing arrangements, especially [the] income tax agreement would be honoured."²⁷

The case for Whitehall's intervention was there (it would in any event have been difficult to deny Sir Eric Bowater outright) but so was Ottawa's conviction that Bowater's Newfoundland must operate in Canada on the same basis as all other paper companies. On December 14, R.A. MacKay, perhaps the most knowledgeable official at External Affairs on Newfoundland matters, told G.B. Shannon, of the British High Commission, that the Canadian Government wished "to keep their hands free" in relation to Bowater's, noting that whereas Newfoundland law limited the Company's taxation to \$150,000 its Canadian tax on its previous

26. *Ibid.*, James to Tait, Nov. 30, 1948.

27. *Ibid.*, Treasury to Tait, Nov. 24, 1948.

year's operations would have been \$1,000,000.²⁸ When the *Financial Post* reported on December 18 that the Government of Canada intended to cancel Bowater's tax concessions by special act of Parliament, Eric Bowater cabled Prime Minister Louis St. Laurent that the effect of such action "cannot be otherwise that to destroy all confidence in the moral sanctions binding upon Sovereign Government."²⁹ He received a courteous but unyielding reply: there was nothing to add to what Company officials had already been told, but Canada would welcome "additional information or further representations" to be taken into account when the matter was being considered.³⁰ Nor did the British Government get much further when it pressed the Company's claim through its High Commissioner in Ottawa, Sir P.A. Clutterbuck. "The Canadian Government," H.N. Tait of the Commonwealth Relations Office wrote to James in St. John's, "have been reluctant to commit themselves to any extent. But after Clutterbuck had brought the maximum pressure to bear on them they agreed on a formula which we could use here in the event of the question being referred to in Parliament."³¹ This formula accepted that Canada could not act definitively until the union with Newfoundland had been effected; only then would she be in a position "to go at all fully, in the light of local circumstances, into the implications of any differences which may exist in matters of taxation."³² There would, in other words, be no deal for Bowater's in advance of union. Canada agreed, however, to give the Newfoundland Company "full opportunity" to present its case and to take into account the "various factors involved" which the High Commission had brought to its attention. The balance of advantage in all this was clearly Canada's. British diplomacy had scored a point on procedure and the Commonwealth Relations Office had a plausible answer for Sir Eric Bowater but Canada had conceded nothing in principle and the matter would be settled as a matter of domestic rather than international concern. The high cards had been Canada's throughout the controversy and her diplomats had played them well. Though the idea of mobilizing further support for Bowater lingered

28. *Ibid.*, minute in Shannon to Tait, Dec. 16, 1948.

29. *Ibid.*, Bowater to St. Laurent, Dec. 22, 1948.

30. *Ibid.*, St. Laurent to Bowater, Dec. 23, 1948.

31. *Ibid.*, Tait to James, March 8, 1949.

32. *Ibid.*, Noel-Baker to Bowater, Feb. 14, 1949.

on in London,³³ the matter was to be brought to a swift conclusion by a determined St. Laurent government within the context of Canadian federalism.

The first step in this process came on April 8, 1949, when the Minister of Finance, Douglas Abbott, invited the Company to make representations on the following budget resolution: "That tax concessions under Statutes of Newfoundland shall not apply in respect of taxes imposed by any Act of the Parliament of Canada."³⁴ The negotiation that followed, and which also involved the new provincial government of Newfoundland, failed to satisfy the Company.³⁵ But the Federal Government pushed ahead anyway, its policy being embodied in section 49 of the amended income tax act assented to on December 10, 1949, as follows:

For greater certainty it is hereby declared and enacted that, notwithstanding any other law heretofore enacted by a legislative authority other than the Parliament of Canada (including a law of Newfoundland enacted prior to the first day of April nineteen hundred and forty-nine), no person is entitled to

33. See, for example, *ibid.*, minute of Sept. 26, 1949 as follows: "We surely have both the right and the duty of protecting (through our High Commissioner) the legitimate rights of a U.K. person or concern in another Commonwealth country whenever there is a threat of repudiation or other unjust treatment by the Government of that country. We certainly act upon that assumption in relation to India and Pakistan; and if it does not represent ordinary practice in relation to the older Commonwealth countries this is probably because such occasions do not commonly arise there. It is pretty certain that the Foreign Office would regard it as their business to make representations (and if necessary press them) if such a situation arose in a foreign country. As regards the substance of the matter, it seems to me that Bowaters have a very strong case in equity, and one that we ought to feel obliged to support. The principle that a successor Government must assume the liabilities of its predecessor (as it automatically takes over its assets, including the right to tax) is founded upon common sense and common good faith. The fact that the successor is a federalized complex does not affect the principle: it merely means that the assets and liabilities (like the other functions) of the former authority are divided between federal and provincial authorities. It would therefore be quite wrongful for the Canadian Government merely to repudiate their part in the liability undertaken towards Bowaters by the former Newfoundland Government. This, however, does not necessarily imply that they must maintain the same measure of tax relief even though they consider this would distort their fiscal system and give rise to complaints of discrimination. The natural and proper course in such a situation is that the successor Government should enter into negotiations with the other party to the contract concerned, with a view to arranging proper compensation for the cancellation of the contractual obligation."

34. *Ibid.*, Abbott to Heward, April 8, 1949.

35. *Ibid.*, Williams to Gandee, Oct. 24, 1949.

- (a) any deduction, exemption or immunity from, or any privilege in respect of,
 - (i) any duty or tax imposed by an Act of the Parliament of Canada, or
 - (ii) any obligation under an Act of the Parliament of Canada imposing any duty or tax, or
- (b) any exemption or immunity from any provision in an Act of the Parliament of Canada requiring a licence, permit or certificate for the export or import of goods,

unless provision for such deduction, exemption, immunity or privilege is expressly made by the Parliament of Canada.

Bowater's Newfoundland was, however, allowed its day in court. Thus, on December 29, 1949, by Order in Council P.C. 6510 the following questions were referred to the Supreme Court of Canada by the Governor General in Council under the terms of section 55 of the Supreme Court Act, chapter 35 of *The Revised Statutes of Canada, 1927*:

1. Is Bowater's Newfoundland Pulp & Paper Mills Limited entitled by reason of the Statutes of Newfoundland listed hereunder to any deduction, exemption or immunity from, or any privilege in respect of any duty or tax imposed by an Act of the Parliament of Canada?
2. Is Bowater's Newfoundland Pulp & Paper Mills Limited entitled by reason of the Statutes of Newfoundland listed hereunder to any deduction, exemption or immunity from, or any privilege in respect of any obligation under any Act of the Parliament of Canada imposing any duty or tax?
3. Is Bowater's Newfoundland Pulp & Paper Mills Limited entitled by reason of the Statutes of Newfoundland listed hereunder to any exemption or immunity from any provision in an Act of the Parliament of Canada requiring a license, permit or certificate for the export or import of goods?³⁶

The statutes listed were, of course, the twelve pieces of Newfoundland pre-Confederation legislation that made up "the Bowater's law".

The hearing on this reference began on February 27, 1950. Bowater's case was prepared by the Newfoundland Company's Montreal lawyers, Heward, Holden, Hutchinson, Cliff, Meredith & Ballantyne. It did not contend, as Sir Eric Bowater had, that the arrangements between the Company and Newfoundland could not be changed, but that they could be changed by the Parliament of Canada only with the consent of the Provincial Legislature of

36. There is a copy of the Order in Council in Supreme Court of Canada, file 7605.

Newfoundland. Accordingly, it argued for the following answers: question 1, "Yes; the deductions, exemptions, immunities and privileges provided for in the said Statutes of Newfoundland"; question 2, "No, except in respect of the obligations to pay duties or taxes otherwise than as provided by the said Statutes of Newfoundland"; question 3, "No, except in so far as the acquisition or possession of any such license, permit or certificate entails the payment of duties or tax otherwise than as provided by the said Statutes of Newfoundland."³⁷ The focus of the Company's argument was term 18 of the terms of union, which provides as follows:

- (1) Subject to these Terms, all laws in force in Newfoundland at or immediately prior to the date of Union shall continue therein as if the Union had not been made, subject nevertheless to be repealed, abolished, or altered by the Parliament of Canada or by the Legislature of the Province of Newfoundland according to the authority of the Parliament or of the Legislature under the British North America Acts, 1867 to 1946, and all orders, rules, and regulations made under any such laws shall likewise continue, subject to be revoked or amended by the body or person that made such orders, rules, or regulations or the body or person that has power to make such orders, rules, or regulations after the date of Union, according to their respective authority under the British North America Acts, 1867 to 1946.
- (2) Statutes of the Parliament of Canada in force at the date of Union, or any part thereof, shall come into force in the Province of Newfoundland on a day or days to be fixed by Act of the Parliament of Canada or by proclamation of the Governor General in Council issued from time to time, and any such proclamation may provide for the repeal of any of the laws of Newfoundland that
 - (a) are of general application;
 - (b) relate to the same subject matter as the statute or part thereof so proclaimed; and
 - (c) could be repealed by the Parliament of Canada under paragraph one of this Term.
- (3) Notwithstanding anything in these Terms, the Parliament of Canada may with the consent of the Legislature of the Province of Newfoundland repeal any law in force in Newfoundland at the date of Union.
- (4) Except as otherwise provided by these Terms, all courts of civil and criminal jurisdiction and all legal commissions, powers, authorities, and functions, and all officers and

37. Supreme Court of Canada, *Factum of Bowater's*, *supra* note 7 at 1-2.

functionaries, judicial, administrative, and ministerial, existing in Newfoundland at or immediately prior to the date of Union, shall continue in the Province of Newfoundland as if the Union had not been made, until altered, abolished, revoked, terminated, or dismissed by the appropriate authority under the British North America Acts, 1867 to 1946.

This section, it was contended, admitted Newfoundland on a basis different from any other province and comprised “a new constitutional code”.³⁸ Bowater’s law, being of “mixed” federal and provincial subject matter and therefore inseverable, fell under section 3 of this term.³⁹ It could be altered by the Parliament of Canada only with the assent of the Legislature of the Province. In defence of the indivisibility argument the Company’s lawyers principally cited two cases: *Dobie v. Temporalities Board* (1881) and *Attorney-General for Ontario v. Attorney-General for Canada (Distillers and Brewers Case)* (1896), both of which dealt with the status of pre-Confederation statutes of the Province of Canada. In a three page factum the Attorney-General of Newfoundland supported the Company’s main argument; Bowater’s and the Province were as one in the case.

In their factum F.P. Varcoe and D.W. Mundell, who acted for the Attorney-General of Canada, argued that the agreements between Newfoundland and the Company were not “legal contracts.”⁴⁰ “Neither the Crown”, they wrote, “nor any executive officer can enter into a valid and binding contract to change or not to change the law or to limit the laws that may be made by a sovereign legislature.” The existence of Bowater’s privileges depended on “statutory rules of law” and the statutes in question had “ceased to have legal operation at the time of the Union of Newfoundland and Canada.”⁴¹ The Newfoundland laws continued by term 18 were those that did not “depend for their operation upon the continued existence of the Government of Newfoundland as the government of a unitary state.”⁴² Even if the Bowater statutes had survived the union and applied “in respect of

38. *Ibid.*, 13.

39. *Ibid.*, 14.

40. Supreme Court of Canada, file 7605, *Factum of the Attorney-General of Canada* (Ottawa, 1950), 15.

41. *Ibid.*, 17.

42. *Ibid.*

Acts of the Parliament of Canada'',⁴³ they had been overridden by section 49 of the amended income tax act. This was because a Newfoundland law incorporating subject matter partly within Dominion and partly within provincial legislative jurisdiction might, *pro tanto*, be amended by the Parliament of Canada. The indivisibility argument did not apply because the subject matter of the statutes under review could all be assigned to either Dominion or provincial jurisdictions according to sections 91 and 92 of the British North America Act. These sections applied to Newfoundland except insofar as they were specifically overridden by the terms of union or the British North America Acts, neither of which offered any such provision in the case of Bowater's law. "Where a pre-Confederation statute", the government of Canada's solicitors argued, "is partly in relation to a subject matter within the authority of Parliament and partly in relation to a subject matter within the authority of the Legislatures the view that has repeatedly been taken is that Parliament may override it by legislation on the subject matter within its authority."⁴⁴

In its ruling, delivered on June 9, the Supreme Court answered all three questions negatively, as the factum of the Attorney General of Canada had recommended. Six justices (Chief Justice Rinfret and Justices Kerwin, Rand, Kellock, Estey and Locke) supported this decision and one, Justice Taschereau, dissented. In his written judgement, Chief Justice Rinfret placed great emphasis on term 3 of the terms of union which reads as follows:

The British North America Acts, 1867 to 1946, shall apply to the Province of Newfoundland in the same way and to the like extent as they apply to the provinces heretofore comprised in Canada, as if the Province of Newfoundland had been one of the provinces originally united, except insofar as varied by these Terms and except such provisions as are in terms made or by reasonable intendment may be held to be specially applicable to or only to affect one or more and not all of the provinces originally united.

This term and term 18 had to be understood together. Accordingly, the effect of subsection (1) of term 18 was to give "the Parliament of Canada . . . authority to repeal, abolish or alter any and all laws in force in Newfoundland at or immediately prior to the date of union, which deal with the subject matters in Section 91, and the Legislature of the Province . . . authority to repeal, abolish or alter

43. *Ibid.*, 19.

44. *Ibid.*, 21.

all laws in force in Newfoundland at or immediately prior to the date of union which deal with the subject matters in Section 92 of the Act.”⁴⁵ Subsection 3 of term 18, on which the Bowater’s lawyers had rested so much of their case, was limited to “repeal.”⁴⁶ “I would go as far as saying”, the Chief Justice wrote, “that that subsection may be used by the Parliament of Canada and the Legislature of the Province to authorize the repeal of a law in force in Newfoundland at the date of union even if it relates to a subject matter under section 92 of the British North America Act.”⁴⁷ Nor did “the argument of indivisibility or severability” apply.⁴⁸ Subsection 1 dealt specifically with that problem and a clear legislative boundary had been established between the Parliament of Canada and the Legislature of the Province. Thus the effect of section 49 of the amended income tax act was not to divest Bowater’s “of its immunities, exemptions or privileges in respect of taxes within the territory of Newfoundland” but to do so in relation to “federal taxes”.⁴⁹

Similar arguments are to be found in the decision of the other assenting judges. In a striking passage Justice Estey noted that “the acceptance of this submission on behalf of Bowaters would impose a limitation upon the Parliament of Canada to the extent that competently enacted legislation so far as it would be contrary to the pre-Confederation Bowater’s law could have no application to that company until such time as Newfoundland would give its consent to the repeal of Bowater’s law. In effect the exemptions from taxation and payment of certain customs duties provided for in Bowater’s law would remain until such time as Newfoundland permits the Parliament of Canada to legislate in regard thereto. No similar provision was embodied in the Terms of Union of any other province, and while that is not at all conclusive, it is significant in this sense, that a provision so important, far reaching and contrary to the general scheme of legislative jurisdiction under the B.N.A. Act would have been expressed in language clear and unambiguous. Sub-para 3 [of term 18] contains no such language. Indeed, its language as ordinarily construed does not suggest that the legislative

45. Richard, Adrien E. and Francois de Rivieres (eds.), *1950 Canada Law Reports: Supreme Court of Canada* (Ottawa, 1950), 620.

46. *Ibid.*, 623.

47. *Ibid.*

48. *Ibid.*, 624.

49. *Ibid.*, 625.

authority of either the Dominion or the province is interfered with."⁵⁰

Justice Taschereau's dissent rejected the claim of the lawyers representing the Attorney-General of Canada that the Newfoundland statutes relating to Bowater's had been made inoperable by the union of March 31, 1949. In his view these statutes not only remained in force but federal and provincial legislative matters were "so closely interwoven" in them that they formed "a complete unity" and were "inseverable."⁵¹ Like the Bowater's lawyers he found support for this view in *Dobie v. Temporalities Board* (1881) and *Attorney-General for Ontario v. Attorney-General for the Dominion (Distillers and Brewers case)* (1896). Equally, he accepted the view that subsection 3 of term 18 was intended to deal with "inseverable laws" such as those relating to Bowater's, a point which had been supported by the Attorney-General of Newfoundland at the hearing.⁵² Justice Taschereau, therefore, gave the answers advocated by the Company.

And so this major constitutional case relating to the new Province of Newfoundland ended. No appeal to the Privy Council was now possible since that recourse had been abolished by the Parliament of Canada the previous year. In June, 1950, an official of the High Commission reported to London that the decision, involving an additional tax burden on Bowater's Newfoundland of "an estimated one million dollars" would have come "as a severe shock to the company."⁵³ But times were good in Corner Brook and when the High Commissioner himself visited the town later in the year he found the Company accepting. There was "some lingering resentment" that the Supreme Court's decision could not be appealed to London but the Company "should have no real difficulty in shouldering the additional obligation now laid upon them."⁵⁴ Bowater's Newfoundland Pulp and Paper Mills Ltd. had become a Canadian paper company *comme les autres*. Whether Newfoundland would become a province *comme les autres* remained to be seen.

50. *Ibid.*, 653.

51. *Ibid.*, 635.

52. *Ibid.*, 636.

53. DO35/3470, Chadwick to Gandee, June 20, 1950.

54. *Ibid.*, Chadwick to Gandee, Oct. 12, 1950.