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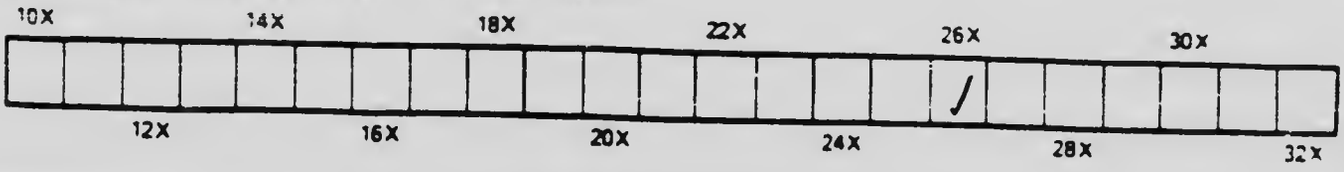

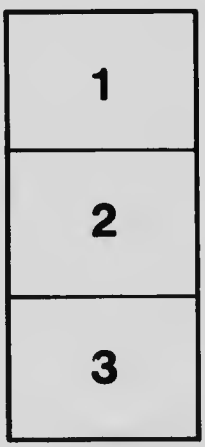

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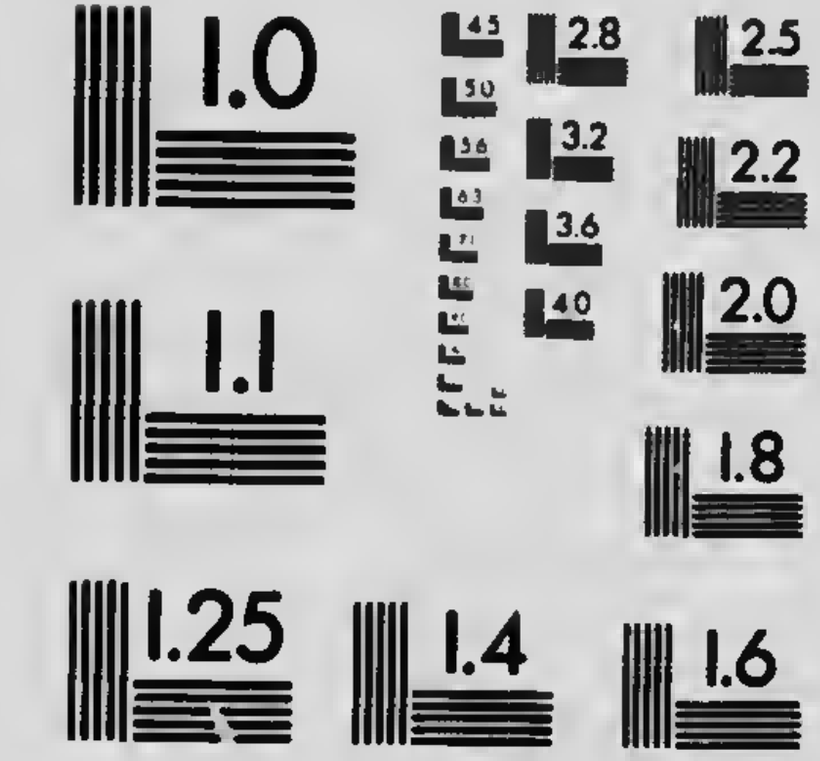

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Memorandum

Concerning Recent Provincial Legislation and Executive Action in Canada with Special Reference to the Niagara Question in the Ontario Legislature

This Memorandum is included in the Brief of the Petitioners on the Argument of the Case of the Electrical Development Company vs. The Attorney-General of Ontario before the Judicial Committee of the Privy Council.

June, 1917.

McCARTHY & McCARTHY,
Solicitors for the Petitioners.

9/12

Memorandum Concerning Recent Provincial Legislation and Executive Action in Canada with Special Reference to the Niagara Question in the Ontario Legislature:

The British North America Act (sec. 92, sub-sec. 13) confers upon a Provincial legislature power to make any law in relation to "property and civil rights in the Province." There does not appear on the face of the clause any specific limitation of the powers of Provincial legislatures in respect to encroachment upon civil rights, and, were this clause taken by itself, it would appear to be within the competence of a Provincial legislature to make laws which involved palpable injustice. The Constitution of the United States (Act 1, sec. 10) limits the powers of State legislatures in several directions and particularly as follows:—"No State shall . . . pass any . . . *ex post facto* Law or Law impairing the obligation of contracts." When the strength of the influence of the individual States during the formative period of the Union and the tenacity with which they clung to "State rights," as against the authority of the Federal legislature, are considered, this provision is very remarkable.

There is no similarly specific provision in the British North America Act, but the absence of such a provision cannot legitimately be regarded as affording legal sanction to the commission by Provincial legislatures or executive Governments of Acts which are palpably unjust.

> "It is a sound and well-recognized maxim of construction that in the interpretation of statutes we are to assume nothing calculated to impair private rights of ownership unless compelled to do so by express words or necessary implication . . . We are not to assume without express words or unavoidable implication, that it was the intention of the Imperial legislature to confer upon Parliament the power to encroach upon private and local rights of property."
>
> Strong, J., judgment in Queen v. Robertson, 6 S.C.R., p. 134; 2 Cart., p. 107 (1882); Lefroy "Leg. Pow. in Canada," Toronto, 1917-18, p. 24.

In placing "property and civil rights" within the jurisdiction of the Provincial legislatures, the British North America Act evidently did so to the end that these might be protected. It cannot seriously be maintained that the Provincial legislatures were expressly endowed with power to plunder the citizens of the Province within their jurisdiction, to repudiate contracts entered into by their predecessors or by themselves, to confiscate property belonging to British investors, and to close the Courts against the aggrieved parties. Thus, although no explicit pro-

vision for safeguarding the interests of those with whom the Provincial legislatures and Governments enter into contractual relations may be found in the British North America Act, machinery is, nevertheless, provided by means of which the limits of legislative and executive authority may be determined, and, in case of these limits being exceeded, remedy afforded. This machinery exists, in the first instance, in the Law Courts, before which complaints of undue exercise of power may be brought; in the second instance, in the power of Disallowance, with which the Dominion Parliament is endowed; and, in the third instance, in the power of Imperial Parliament to amend or repeal the British North America Act or, alternatively, to pass any law relating to the Dominion or the Provinces.

There can be no doubt about the general intention of the framers of the British North America Act, because these intentions were in strict accordance with the general attitude of Imperial Parliament and of Imperial Administration. Under these intentions and in consequence of the attitude of which they were the outcome, the Dominion and the Provinces were endowed with very large powers on the presumption that these powers would not be abused. The authorities created by the British North America Act were, however, not endowed and could not be endowed with "absolute power." Large as the powers of Imperial Parliament are, they are not "absolute." Parliament cannot delegate an unlimited authority, because, although its own powers are indefinite, they are, nevertheless, subject to constitutional limitations. This matter is left in no doubt, because under section 18 of the British North America Act the "privileges, immunities and powers to be held by the Senate and House of Commons" (of Canada) " . . . shall never exceed those at the passing of this Act held . . . by the Commons House of Parliament of the United Kingdom."

All expressions, therefore, such as "sovereign powers," "almost absolute powers," etc., which have, in the course of recent discussions, been loosely applied to the powers of the Provincial legislatures are wholly inapplicable to them, as indeed they are inapplicable to the British House of Commons. They are much less applicable in the cases in question, because, since these legislatures owe their existence to an Act of Imperial Parliament, and since their existence may be determined by it, they are, therefore, subordinate to Imperial Parliament. Apart from that circumstance, however, their proceedings are bound by certain rules and their Acts are subject to revision—Dominion Acts to the revision of Imperial Government, and the Provincial Acts to revision by the Dominion Parliament.

While the Provincial legislation is directly subject to revision by the Dominion authorities, the machinery of the British North America Act does not explicitly provide for revision or disallowance of Provincial legislation by Imperial authorities. That the effective right to revise or disallow the legislation of a Province inheres in Imperial Parliament, there can, however, be no manner of doubt, since Imperial Parliament might, if it so decided, pass an Act which would render null and void any Provincial Act. Thus the Secretary of State for the Colonies objected

(in 1909) to a clause in an Ontario Act restricting the right of appeal to the Privy Council. (Report of Committee of Privy Council, April 27th, 1909; see also Lefroy, A.H.L., "Canada's Federal System," Toronto, 1913, p. 33.) The Colonial Secretary also intervened in a case in 1911, whereupon the Minister of Justice recommended Disallowance, and the Act in question was disallowed. (Lefroy, *ibid.*)

Under the system which prevails in the British Empire from the centre to the Dominions, the exercise of power by the Executive Government is subject to defence in the Courts of Law. If any one is aggrieved at the exercise of that power, he may appeal to the Law Courts, and the Government can there defend its action. It is not necessary to submit proof of this from legal history. The proof is to be found in all authorities upon the law and practice of the Constitution.

A further principle has been well established, viz., that while within certain limits an executive Government may delegate its authority by Commission or otherwise, it cannot transfer to a person or body an immunity from prosecution which is not explicitly possessed by itself.

While the King cannot be personally sued in his own Courts, there does not seem to be any legal justification for the idea that any one who represents the King can be endowed with similar immunity. Indeed, it is clear that if this principle were admitted, there could be no such thing as *responsible government*. The meaning of *responsible government* in the sense in which these words apply to the British system, is that the Minister is responsible to the people, although his master the King is not.

"Some person is legally responsible for every act done by the Crown." This responsibility seems inevitably to be not merely to a legislative Chamber to which the Minister might (or might not) belong, but primarily to the people through the Courts of Law, for by a Court alone could it be determined what the act was and by whom it was done.

Argument is scarcely necessary to shew that the endowment of a Minister or other executive officer with immunity from appearance in a Court of Law in respect of any matter pertaining to his office is in entire discord with English law and with Constitutional practice throughout the British Empire.

It is obvious that this system has resulted from the development of British institutions. These institutions have acquired their present character through the interaction of constitutional checks by means of which the liberties of the people have been secured against the arbitrary exercise of governmental authority. If any governmental organ, whether superior or subordinate, exercises authority, it is under the principle and practice of the Constitution bound to shew that the authority is exercised by rule of law.

There thus underlies all discussions upon the powers of legislatures and upon the conflict of laws the assumption that the Courts of Law are open and that it is the duty of the Courts to determine such questions.

The history of the relations between the Dominion and the Provinces in this regard need not be detailed here further than to draw attention to the following points:

In all the published correspondence and discussions upon the question of Provincial legislation from the time of Confederation onwards it is either explicitly stated or it is implicitly assumed that the Courts of Law are open to those who feel themselves aggrieved by such legislation. For example, when Sir John Young, Governor-General of Canada, suggested in a despatch dated 11th March, 1869 (Hodgins, W. E., "Correspondence . . . upon . . . Dominion and Provincial Legislation," Ottawa, 1896, p. 63), that a special tribunal should be instituted in Canada with jurisdiction over the subject of Provincial legislation, Lord Granville, then Colonial Secretary, replying to this suggestion, wrote:—

> "I see no reason for the establishment of such a tribunal. Any question of this kind could be entertained and decided by the local Courts, subject to any appeal to the Judicial Committee of the Privy Council."

So also Sir Charles Fitzpatrick, while refusing to recommend the disallowance of An Act to Amend the Ontario Insurance Act (1 Edw. VII., ch. 21) reported:—

> "The undersigned considers that it is competent to a legislature to declare what the effect shall be of statutory proceedings authorized by the legislature. These sections (those objected to) appear to do no more. They cannot certainly affect any proceedings or appeal competently authorized by Parliament, and if the Supreme Court gives an appeal from the decisions in question, that right of appeal is not taken away by these provisions." (Hodgins, W. E., *opicit*, p. 4.)

The Judicial Committee of the Privy Council puts the case more strongly in the following judgment:—

> "It is the duty of the Courts, however difficult it may be, to ascertain in what degree and to what extent authority to deal with matters falling within these classes of subjects exists in each legislature, and to define in the particular case before them the limits of their respective powers. It could not have been the intention that a conflict should exist, and in order to prevent such a result the two sections (B.N.A. Acts 91 and 92) must be read together, and the language of one interpreted and where necessary modified by that of the other."
> (Judgment of Privy Council in Citizens Insurance Co. v. Parsons, 7 App. Cases, p. 108.)

Even in the arguments against disallowance of Provincial Acts advanced on behalf of the Provinces, the same assumption is manifest.

For example, in 1905, when the disallowance of a British Columbia Act was urged, the Attorney-General of British Columbia argued that "the effect of disallowance is to make the Minister of Justice the highest judicial dignitary in the land for the determination of constitutional questions, and in reality above the Supreme Court of Canada. The decisions of the Supreme Court of Canada are open to question in the Judicial Committee of the Privy Council. From the

decisions of the Minister of Justice there is no appeal. He stands alone." (Lefroy, "Canada's Federal System," p. 41.)

Up till the year 1896 the principle that a Provincial Act which involved injustice might be disallowed on the ground that the perpetration of injustice is contrary to public policy was generally accepted.

(*Cf.* Sir Allan Aylesworth, quoted by Lefroy, "Canada's Federal System," p. 35.)

Since that date there is manifest a change of view on the part of various Ministers of Justice.

For example, in a case cited above, Sir Charles Fitzpatrick reported:—

> "The undersigned conceives that your Excellency's Government is not concerned with the policy of this measure. It is, no doubt, *intra vires* of the legislature, and, if it be unfair or unjust or contrary to the principles which ought to govern in dealing with private rights, the constitutional recourse is to the legislature, and the acts of the legislature may ultimately be judged by the people."
>
> Hodgins, W.E., "Correspondence, etc.," 1905, p. 4.

This view was also held by the late Mr. David Mills (Minister of Justice, 1897-1902), and was further developed by Sir Charles Fitzpatrick in 1902, to the effect that "each Provincial legislature within the sphere of its authority and jurisdiction should be supreme and amenable only to its constitutional judges, the electors of its own Province." (Lefroy, "Canada's Federal System," p. 35.)

The view was endorsed in 1909 by Sir Allan Aylesworth when Minister of Justice.

With respect, this view must be regarded as failing to touch the marrow of the question, even if it were indisputable on constitutional grounds. To throw the responsibility for legislation by a legislature and for administrative acts by an executive Government back upon the people is to evade responsibility altogether, and to contribute to the destruction of Parliamentary government. The remedy for injustice in an organized society is not an appeal to the people, but an appeal to a Court of Law.

It is only necessary to look at the question in a practical way to realize the absurdity of the suggestion that there is no legal remedy, but only a political remedy, for administrative error or injustice. If, for example, an individual creditor of the Province, who is either resident or non-resident, finds himself aggrieved by a legislative Act, must he engage in political propaganda and endeavour to unseat the Government or submit tamely to what he conceives to be unjust treatment? An opinion of that kind is an encitement to all persons who come into relations in any way with the Government to engage in political action, with the result, if it were applied, that the political field, instead of being reserved for questions of public moment, would be degraded into an arena for the settlement of private quarrels between the Government and the persons whose contracts the Government had violated.

At the present moment, when so large a proportion of the mature manhood of the country is fighting its battles, it is impossible for any effective appeal to the electorate to be made.

Moreover, if the electorate is to be looked upon as the final tribunal for the trial of causes against the executive Government, it would be necessary to provide machinery for appeal to that tribunal by aggrieved parties. But there exists no such machinery, and the provision of it might be consistently and continuously refused by the legislature.

It is submitted that under the doctrine so developed, the Provincial legislatures might close all the Law Courts, deprive every citizen of his civil rights, confiscate all personal and real property, send all critics to jail or banish them from the Province, or perform any other tyrannical act, without hindrance so long as the legislatures were returned by the constituencies. They might repeal all the statutes against bribery at elections, and, by "stuffing" ballot boxes and other means, not unknown in the political history of Ontario, continue in power indefinitely, exercising "almost sovereign powers."

Even if the Provincial legislatures were to be regarded as supreme within their own sphere, it would still be necessary to determine the limits of that sphere. Have the electors of the Province been endowed with the power of determining the limits of their own powers, irrespective of the corresponding powers of the people of other Provinces of the Dominion, not to speak of the powers of other peoples within the Empire? It is clear that they have not, otherwise there could b no national or Imperial cohesion.

The doctrine that Provincial legislatures have the power to pass legislation, even if it is of a demonstrably unjust and confiscatory character, seems to have been re-enforced by a misinterpretation of a judgment of the Judicial Committee of the Privy Council in the case of the Attorney-General of Canada v. the Attorney-General of Ontario, Quebec and Nova Scotia, 1898. (Appeal Cases 713.) The passage in the judgment upon which the doctrine in question is based is as follows:—

> "The suggestion that the power" (of legislation) "might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is in an appeal to those by whom the legislature is elected."

Before this pronouncement was made, there were (between 1867 and 1898), according to Mr. Lafleur, five cases in which Acts were disallowed on the ground of injustice (*cf.* Lefroy, A. H. F., "Canada's Federal System," Toronto, 1913, p. 46), while in some other cases the recommendations made by Ministers of Justice led to a change in the law, either by appeal or amendment, and, consequently, the necessity for disallowance was obviated." There was also one case

subsequent to this pronouncement in which disallowance was recommended on the ground of injustice. (Yukon Ordinance (1898). (*Ibid.*)

Mr. Lafleur pointed out (*ibid*) in the case upon which the above pronouncement of the Judicial Committee of the Privy Council was made, the Provincial statutes in question had not only been passed by the Provincial legislature, but, through the lapse of the period during which disallowance might be effected, had become binding laws. That is to say, that the pronouncement of the Privy Council applied to the whole process of legislation, viz., the passing of the Acts in question by the Provincial legislature, the examination of the Acts by the Minister of Justice of the Dominion, and the consequent endorsation of the Acts by the Dominion Executive, the latter part of the process being devised for the express purpose of preventing the abuse of legislative authority by a subordinate legislative body.

It is, therefore, submitted that even if the doctrine were accepted that Dominion legislative authority is supreme, there is no justification for regarding Provincial legislation which is subject to revision by Dominion authority as binding until it is so revised.

In this connection the statement of Mr. Newcombe, Deputy Minister of Justice, sitting with the Privy Council of Canada (in the Alberta Case, 1910), may be quoted: "The interpretation of the Judicial Committee of the Imperial Privy Council that we have a carefully balanced constitution, under which no one of the Provinces can pass laws for itself, except under the control of the whole exercised by the Governor-General, means that His Excellency is advised here locally under our system by the representatives of all the Provinces, and, therefore, there is reason for interfering locally which could not be urged in the case of Colonial legislation dealt with at the Court in London." (*Cf.* Lefroy, "Canada's Federal System," p. 48.)

It is to be observed also that in the case of the Acts of the Ontario legislature to which exception is taken—one of the constitutional checks, viz.—appeal to the Courts of Law is removed, and, therefore, the legislation in question does not come within the category of valid legislation indicated in the judgment of the Privy Council quoted above.

The judgment of the Privy Council assumes that power will not be abused; but it is precisely the abuse of power about which complaint is made—abuse of power great enough to involve the removal of one of those constitutional checks, the assumption of which underlies the judgment.

It would not be in accordance either with the spirit or the letter of the law of England to submit to an electorate the interpretation of an Act of Parliament, nor the terms of a contract between the Executive Government and a private person. Clearly, therefore, the remedy proposed is wholly inapplicable in such cases. If it is the only remedy, it can be so only in the sense that all the checks

upon illegal or unjust action which have been provided for by the constitution have been proved to be ineffective. In that case the only remedy is to promote legislation by means of which other and more effective checks may be provided. No other meaning can be attached to the judgment of the Privy Council. It cannot be seriously suggested that every aggrieved person should demand a general election in order to bring to account a Government which he regarded as having wronged him. Since he could have no power to force such an election, the remedy for him would be non-existent.

If a subordinate legislature attempts to remove a constitutional check in order the more easily and effectively to perpetrate injustice, it is surely the constitutional duty of the superior authority to prevent the removal of such a check, and to declare as unconstitutional any legislation having that end in view.

There seems to be a general agreement among the authorities that, since about 1896, there has been a manifest reluctance to disallow Provincial legislation. The reason for that is not far to seek. The most important conflicts of jurisdiction had already taken place between the Province of Ontario and the Dominion. Owing to the fact that for many years the legislation of Ontario and the attitude of the Provincial Government towards questions of Provincial authority were determined by one of the most acute constitutional lawyers of his day, Sir Oliver Mowat, the cases brought by him in the interests of the Province of Ontario were invariably decided in favour of the Province, and this was the natural consequence of the fact that on all controverted questions of Provincial authority he took the utmost care to make exhaustive investigation before action was taken.

It seemed unlikely that any abuse of Provincial authority would occur nor would such abuse have occurred had the legal guidance of the Province remained in so competent hands as those of Sir Oliver Mowat.

Sir Oliver Mowat became Minister of Justice in 1896, and, although he retained office for only one year, his attitude towards the question of Provincial autonomy not only determined his view of the question during his period of office, but remained as a tradition of the Department of Justice. This attitude was founded upon what was assumed to be the characteristic of the conduct of Provincial Executive Governments, viz., serious consideration by competent experts of the legislation which was introduced and strict avoidance of the abuse of power. So long as these conditions existed, no harm could result from admission of the "right" of a Provincial legislature to legislate as it pleased; but when these conditions ceased to exist, as they did, in nearly every Province of Canada, the time had already arrived when the Dominion GOVERNMENT should exercise its authority in order to secure the public interest of the Dominion against Provincial encroachment or misgovernment.

The effect of the unfortunate relaxation of control over Provincial legislation which appears to have crept in about 1896 is apparent in the scandalous episodes which have disgraced the Provincial executives of Manitoba, Saskatchewan,

Alberta and British Columbia. Irrespective of party, the executive Governments of all of these Provinces have shewn how seriously they may abuse the power with which they have been entrusted by the people and endowed by statute.

The time seems to have arrived when the question of the abuse of powers by the Provincial executives and Provincial legislatures ought seriously to be considered.

The claim to absolute power on the part of a Provincial legislature has been put with greater vigour than soundness by the late Mr. J. J. Foy, Attorney-General of Ontario in 1909:—

> "For upwards of 200 years the Lords and Commons of Great Britain have legislated without fear of the Royal veto, although its existence has been undoubted; and, therefore, in full accord with the spirit and genius of British institutions, the people of the Province, being entitled to all the rights of British subjects elsewhere, and as free . . . to legislate within their jurisdiction as the Lords and Commons of Great Britain are free to legislate, cannot submit to any check upon the right of the legislature to legislate with respect to subjects within its well-defined jurisdiction, although a technical right to disallow may exist."
>
> (Lefroy, "Canada's Federal System," p. 39.)

This view of the "rights of a Provincial legislature" cannot be accepted. Even the Dominion Parliament possesses under Sec. 18 of the British North America Act no powers in excess of those of the House of Commons of the United Kingdom in 1867; and that House did not possess at that time, and the Parliament Act notwithstanding does not possess now, unchecked powers of legislation. A subordinate legislature, especially one being but a single Chamber, could by no means be permitted to dispense with any constitutional check. The liberty of the people of the Province would otherwise not be worth an hour's purchase.

In several of the cases in which disallowance of Provincial legislation was asked for and refused, various Ministers of Justice reported adversely upon the justice of the legislation, although they entertained the view that unjust legislation should not be disallowed unless the injustice of it affected the interests of the Dominion as a whole. This view was put forcibly by Mr. Doherty in his report upon the Alberta Act of 1910 relating to the funds derived from the sale of bonds of the Alberta and Great Waterways Railway Company. He says:—

> "There was considerable discussion at the hearing as to the practice and precedents in respect of disallowance of legislation by reason of unjust provisions, or because of its interference with vested rights or the obligation of contract, and a recent report of the predecessor in office of the undersigned was quoted as shewing that the Governor-General should in no case be advised to disallow for such reasons. It is true, as has been frequently pointed out, that it is very difficult for the Government of the Dominion, acting through the Governor-General, to review local legislation or consider its qualities upon questions of hardship or injustice to the rights affected, and this is manifested not only by expressions in reports of Ministers, but also by the fact that but a single instance is cited in which the Governor-General has exercised the

power upon these grounds alone. The undersigned entertains no doubt, however, that the power is constitutionally capable of exercise and may on occasion be properly invoked for the purpose of preventing, not inconsistently with the public interest, irreparable injustice or undue interference with private rights or property through the operations of local statutes *intra vires* of the legislatures. Doubtless, however, the burden of establishing a case for the execution of the power lies upon those who allege it."

On this point it may be remarked that serious injury might have been inflicted upon the credit of the Dominion by an unjust Act of a Provincial legislature and yet positive evidence of such injury might be quite impossible to procure. Injury of this character is invariably negative. Some people refuse to invest in the bonds of a Province whose legislature passes unjust laws or whose Executive Government commits unjust acts, and under certain circumstances the refusal of these people to invest might involve the closing of some money markets against the Province and even against the Dominion, but the difficulty of eliminating all the elements in the determination of the rate of interest other than the abstention of the investors in question would be almost insuperable in practice. Hence definite proof is probably wholly impossible to obtain in any case. Nevertheless the equilibrium of credit may have been seriously disturbed and on account of the abstention in question the rate of interest for public and private borrowers alike might have been increased. An example may be given from the financial history of the United States. In or about the year 1885 a small municipality in the State of New Jersey defaulted in the payment of interest upon its bonds. This circumstance drew the attention of trustees and other holders of municipal bonds to the risk incurred in such investment. The consequence was the sale of large amounts of municipal bonds, not only in the State of New Jersey, but elsewhere in the United States, and the investment of the funds in European securities. These operations were effected quietly and many of them were conducted imitatively, the persons who conducted them being in frequent cases unaware of the reasons for the failure of confidence in municipal securities. Thus, although there seemed to be no doubt whatever of the fact, it might have been difficult to find more than one or two persons who actually acted directly upon the fact that the municipality in question had defaulted. In such a case legal proof might be very difficult to establish. So also in the case of the numerous prior liens created by various Acts of the legislature of Saskatchewan. Certain loan companies promptly advanced the rate of interest upon loans effected in that Province, while others refused to lend there on any terms. Even in such a case it would have been difficult to establish proof that injury had been committed upon the Province and upon the Dominion by the legislation in question. Other causes for the increase in the rate of interest might easily be alleged. Moreover, the credit of the Dominion stands high and the effect of an individual legislative Act of one Province upon that credit might be regarded in general as negligible.

It is necessary in the first instance to approach the problem in a more abstract manner. The principle that legislation or action of any kind which throws

obstacles in the way of recovery of a debt contracted for goods supplied on credit involves an increase of the price of such goods, other things being equal, is well established. So also legislation which renders it more expensive to secure payment of interest upon a loan, must, other things being equal, increase the gross rate of interest or the rate of pure interest plus the premium of insurance against difficulty in procuring payment and against risk of loss of the principal. It may be regarded as susceptible of proof therefore in an abstract sense, that such legislation as that of the Province of Saskatchewan must be injurious not only to the Province but to the Dominion, because it conduces to the advance in the rate of gross interest, other things being equal. It is not necessary to prove that A. B. increased the rate demanded for a particular loan on the exclusive ground of the legislation.

So also in the Alberta case, according to the Minister of Justice, proof of injury to the credit of the Dominion was wanting, yet it might be submitted that the proof lay on the face of the Act. If the injustice of the Act is admitted, the injury to the Dominion, however proportionately infinitesimal it might be, is apparent.

Thus while it is true that it may not be possible incontrovertibly to demonstrate that a single Act of a legislature which perpetrates an injustice to an individual inflicts an injury upon the credit of the Dominion, it nevertheless does so, *because* it is an unjust Act, however inappreciably the credit of the Dominion has suffered, and however difficult it may be to prove any specific damage.

It is clear that if a succession of unjust measures is passed by the Provincial legislatures or unjust Acts are perpetrated by the Provincial executives, the effect of these Acts is cumulative and that the total effect *must be* serious injury to the credit of the Dominion. The time for the Dominion authorities to impose a check is when these acts begin to be committed, not when the accumulation of grievances resulting from these acts renders drastic measures absolutely necessary, or when the damage is irreparable by any measures that can be taken.

The plea which underlies the decisions of various Ministers of Justice that the Dominion GOVERNMENT is not concerned with political ethics and that the Provincial legislatures may pass any measure, no matter how unjust, so long as it does not infringe upon a privilege of the Dominion, seems to the writer, for the reason stated above, quite inadmissible.

A sounder view is that unjust Acts injure not merely the individuals who are prejudiced by them, but through the introduction of injustice into legislation, unjust Acts diminish the authority of all legislation and an accumulation of them brings legislation and legislatures alike into contempt. Not only, therefore, do unjust Acts perpetrated by a Province bring the legislation of that Province into contempt, but they bring the legislation of the Dominion into contempt also. Moreover, not only do unjust Acts reflect unfavourably upon the Executive Government by which they are introduced, but as well upon the superior executive which fails to exercise the disciplinary power with which it has been endowed by the Constitution.

Still more important, in these critical moments democracy is on trial. If every Province in our democratic Empire develops "particularist" views, such as have been expressed in some of the quotations given above, the Empire must fall to pieces; and if every democratic nation insists upon the "right to misgovern itself" democracy must fall to pieces.

The particular instance of the abuse of Provincial authority which has occasioned this Memorandum is legislation concerning the exploitation of water power in Ontario and principally at Niagara Falls.

This legislation has, during the past few years, created an administrative body known as the Hydro-Electric Commission, and has endowed this Commission with powers which it has not scrupled to exercise in an arbitrary manner, while the legislation has also prevented an appeal to the Courts of Law in respect of the acts of the Commission. The legislation has, moreover, explicitly abrogated contracts entered into by the Government of Ontario with private parties. Even if the acts and the projects of the Commission were on a small scale, the injury to the public interest and the injustice to private persons would be objectionable; but both are on a scale of such magnitude that they seem to be hastening towards financial disaster for the Province and financial embarrassment for the Dominion.

There can be no doubt that ere long the Dominion Parliament will be invited to make large contributions either by way of loan or by guarantee in order that the Province of Ontario may be relieved from the intolerable burden which must be imposed upon it if the fantastic schemes of the Hydro-Electric Commission are carried out.

Already these schemes involve an expenditure of not less than $200,000,000. It is true that the expenditure of this large sum cannot take effect immediately, but in this session of the local legislature, appropriations of upwards of $7,000,000 have been made on account of the Hydro-Electric Commission. Those who are most active in the propaganda for the Commission have evidently no thought of or interest in the prosecution of the war, excepting in so far as the preoccupation of the minds of the people enables the Commission to engage in undertakings at which in any other circumstances the people would look more critically.

In the closing hours of the session of 1916 and again even in the last minutes of the last hour of the session of 1917, Hydro-Electric legislation was introduced and passed in the Ontario legislature without discussion.

This expedition could only be justified on the ground that the measures in question were measures of emergency. There can be no excuse of this kind. It is obvious that each year the Hydro-Electric legislation is kept back so that discussion is impossible. The consequence of this absence of discussion is a continuous series year after year of amending Acts. The legislation is evidently of deliberate intention drafted in haste so that the purport of it may not become known; but this haste prevents adequate consideration of the measures even by the promoters of them. Amending measures upon amending measures are therefore

necessary until the numerous Acts form a mass of ill-digested and incoherent legislation.

It must be realized that the Acts in question added greatly to the powers of the Government over the property of private persons and that the intention of the Government, as has been made abundantly clear, is that this legislation is final, no legal appeal of any kind being tolerated, either to the Courts of Law or to the Dominion authorities—while an appeal to the people is effectually prevented by the suppression of criticism in every way open to the Government.

The process of legislating in this manner could not continue year after year without collusion between the Government and the Opposition, or alternatively without the control of both by the Hydro-Electric Commission. The latter is clearly the case. It has become widely understood that no candidate for a seat on either side of the House has any chance whatever of being elected until he arrives at an agreement with the Chairman of the Hydro-Electric Commission. The control of the Chairman of the Hydro-Electric Commission has apparently also been great enough to secure the suppression of a report upon the finances of the Commission prepared at the instance of the Government by Messrs. Clarkson & Cross, Chartered Accountants.

Individual instances of the exercise of arbitrary power may appear to be condoned by the public during a transitory phase of public feeling; but the habit of exercising power in an arbitrary manner is easily formed and difficult to break. It may readily outlast a public movement, and may be counted upon, sooner or later, to bring the Government which acquires the habit into conflict with the people. Meanwhile, however, the country suffers alike in its internal and external relations. It is a very usual dialectical trick of the politician who sets all law at defiance to denounce his critics as enemies of the public welfare, and, since his strident voice reaches many people, criticism is discouraged and sometimes even suppressed.

While the Ontario legislation is objectionable on legal, constitutional and ethical grounds, it is also objectionable on economic grounds. None of the experiments in public ownership by the Province can be regarded as successful in an economic sense. All of these experiments have involved the Province in heavy obligations, and none of them has produced an adequate return. There is, no doubt, much popular enthusiasm for what is called public ownership; but such enthusiasm is with difficulty sustained by means of rhetorical speeches and extravagant promises in face of balance-sheets which show constantly recurring deficits. It is true that the people, who have encouraged these enterprises by voting for the politicians who have promoted them, have themselves to blame if they find the failures reflected in their tax bills; but the people do not usually blame themselves, in general, they look for some political scapegoat and execute vengeance upon him. In Manitoba, for example, disaffection on account of the Government management of the telephones is said by the politicians of the Province to have

had much to do with the defeat there of the Conservative Government, and yet the Government had assumed that the people approved of their telephone policy.

The history of "Public Ownership" in Great Britain is highly instructive, because, on a scale of great magnitude and under conditions highly favourable in respect to efficiency and integrity of officials, the policy has, on the whole, not been successful in an economical sense. The Government telegraphs have exhibited from the beginning enormous deficits, because of the fixation of a telegraph rate on political grounds at a point not at, but below, cost, even when the Government system was inaugurated. The deficiency has grown with the increase of cost. The Government telephone service was instituted, not because the service rendered by the former company was unsatisfactory, but because the telephone service was interfering with the Government telegraph monopoly. Thus, in order to endeavour to prevent the further development of the telegraph deficit, it was necessary for the Government to acquire the telephone. The monopoly of telegraph and telephone notwithstanding, the Government has not been able to provide a satisfactory service or to give a low rate, while the losses in these branches of the Post Office service continue to absorb an increasing proportion of the Post Office revenue.

The control of the railways during war time is an emergency measure. While strong pressure may come from the shareholders of the railways to retain the Government guarantee of their dividends, even at the sacrifice of some independence, there is no reason to believe that any British Government would seek to add to the total mass of the British debt by the amount which would be necessary to nationalize the railways.

As regards municipal industrial undertakings in Great Britain, the period of furore for these has long passed. The great increase of municipal indebtedness and the difficulty of procuring from British investors the necessary funds for extensions led, in or about 1906, to a practical cessation of development. The municipal enterprises which up till that time had been established have had varying fortunes; many of them have encountered financial and political difficulties. After initial losses, some of them may be said to have passed into a stable condition, but even in such cases the actual pecuniary result has been in general disappointing to the enthusiastic advocates of the schemes when they were initiated. The lesson which the experiments on public ownership in Great Britain undoubtedly convey is that great caution should be exercised in regard to such projects and every encouragement given to private enterprise under public control, rather than to public monopoly. Any service is more likely to be efficiently and cheaply rendered under the first system than under the second.

Some public speakers and writers have of late been expressing the opinions that "public ownership is inevitable," "that it is an incident of progress," and that, after the war, the policy will be very generally adopted. In the opinion of the writer, there is no justification for any of these views. To regard "public

ownership" as inevitable is mere fatalism. This view arises from inadequate knowledge of the history of the subject. The same remark applies to the view that it is an incident of progress. It is rather an incident of reaction. The history of the subject shows that democracy and "public ownership" are incompatible. The policy has sometimes thriven in autocratic countries, but never in countries where individual liberty is valued. The reason is that "public ownership" involves and requires the use of autocratic methods. A ready illustration is to be found in the arbitrary and autocratic conduct of the Hydro-Electric Commission of Ontario. The third view, that the conditions after the conclusion of peace will make for "public ownership," seems to the writer to be wholly fallacious. The mass of public burdens upon all the belligerent countries and upon some neutrals after the war will be so great that there must be extreme reluctance to increase them. After the war, there is more likely to occur, as after all wars in modern history, a considerable migration of peoples. These peoples will naturally migrate to that country which, in their opinion, offers the highest wages and the most unrestricted opportunity for the employment of their labour and capital. Apart from the movements of population, the movements of capital must be similarly determined. The administration of industry by a political organ must necessarily restrict such opportunities and must, therefore, repel immigration. It is clear that these countries will recover most quickly from the war in which production is most active; and production must be most active where the rewards of it, in the wages of labour and the profits of capital, are highest and most certain. The competition of different countries, after the war, will be undoubtedly keener than before, and those countries which permit themselves to be guided by visionaries into discouraging private enterprise must find themselves heavily handicapped in the industrial struggle. In such countries the farmer may be prosperous in so far as he restricts himself to the consumption of his own produce, but industry must decline and population must be stagnant.

The general conclusions which may fairly be drawn from a survey of this complicated subject may be put in the following terms:—

(*a*) While the control and inspection of industrial undertakings may properly be entrusted to a public authority responsible to the people, such functions cannot with safety to the public interest be entrusted to irresponsible commissions.

(*b*) It is still more disadvantageous to the public interest to endow irresponsible commissions with powers to expropriate private property and to conduct industrial enterprises.

(*c*) Under the name of "public ownership," small groups of persons have been endowed by Provincial legislatures and in particular by the legislature of Ontario with powers of an exclusive and monopolistic character, without adequate constitutional checks upon their proceedings.

(*d*) Such commissions have been rendered exempt from control by the legislature and at the same time have been rendered immune from proceedings in the Law Courts.

(*e*) Experience has shown that such commissions habitually use their powers to the fullest extent and have on frequent occasions acted in a manner defiant of the laws respecting civil rights.

(*f*) The Ontario Acts have placed many municipalities of Ontario wholly at the mercy of the Commission in question, and have by so doing seriously infringed upon municipal autonomy.

(*g*) These Acts have also removed, in the interests of the commissions, the financial safeguards which had been devised for the purpose of preventing public bodies from assuming responsibilities which they might have difficulty in sustaining.

(*h*) Experience has shown that, deprived as the Governments and legislatures are of effective checks upon the commissions, these bodies have involved the Provinces in financial obligations for which there was no Parliamentary warrant.

(*i*) The schemes in which the Hydro-Electric Commission of Ontario has embarked have not in any case received the approval of competent technical persons. No adequate estimates have been formulated and extensive engineering works have been embarked upon directly by the Commission without contract. These proceedings have involved the Province in a series of hazardous enterprises which seem certain at no distant date to involve the Provincial treasury and the municipal bodies alike in serious financial embarrassment.

(*j*) By means of fantastic promises as to rates for electrical power, the Hydro-Electric Commission has stimulated demand for electrical power to an extent which has overwhelmed it. This demand depends upon a price which is unremunerative and is not susceptible of being sustained. If the Hydro-Electric Commission attempts to redeem its promises, it must continuously increase its expenditure upon capital account, at the same time charging that account with its accumulating deficits, with the result that, when the inevitable crash comes, the consequences to the credit of the country may be very serious. Prudence would suggest preventive measures.

(*k*) The embarkation of the Province of Ontario in extensive engineering schemes, even if these were properly estimated and adequately investigated, is clearly inexpedient at the present critical time, when the resources of the Province are already heavily engaged, and may ere long be still more heavily engaged in providing the means necessary for the conduct of the war and afterwards for the liquidation of its cost.

(*l*) The schemes of the Ontario Hydro-Electric Commission cannot possibly be carried out without revision of the Treaty between Great Britain and the United States respecting the International Waterways.

(*m*) The projects of the Hydro-Electric Commission, according to the public statements of the Chairman (Sir Adam Beck), include the electrification of *all* of the railways in Ontario. Since the railway system of Ontario is not independent but is necessarily connected with the general system of the country, the interests of the Dominion may or may not be served by the electrification of the lines of a single Province.

(*n*) The projects of the Hydro-Electric Commission include also the erection of pulp mills and other industrial undertakings of a more or less speculative character.

The following practical suggestions may be added:—

1. That the Attorney-General of Ontario should be strongly urged on grounds of public policy to grant a fiat or fiats in order that the legal questions connected with the development of power at Niagara may be thoroughly settled in the Courts.

2. That the Prime Minister of Ontario be strongly urged, on grounds of public policy, to disclose without delay the terms of the report upon the Hydro-Electric affairs by Mr. Clarkson, C.A.

3. That at the present time no unnecessary public works should be undertaken.

4. That at the present crisis in international affairs, no steps be taken which might involve Great Britain and the United States in renewed controversies over boundary waters.

5. That the legislation respecting the Hydro-Electric Commission in the years 1916 and 1917 be disallowed as contrary to public policy.

While the earlier legislation cannot now be impugned, the series of Acts passed last year (1916) and the similar series passed this year (1917) fall within the limit of time provided by statute, and, therefore, they may be dealt with. The history of the Hydro-Electric Commission has shown that the presumption that the extensive powers with which the Government and the Legislature have been endowed would not be abused is unfounded, and the presumption now is that they will continue to be abused until a check is imposed.

NOTE.

The clauses in the Ontario legislation relating to Niagara Power which seem to be specially objectionable are contained in the following statement:—

1. 6 Edw. VII, Chap. 15, Sec. 21. "No action shall be brought against the Commission or against any member thereof for anything done or omitted in the exercise of his office without the consent of the Attorney-General for Ontario."
2. 7 Edw. VII, Chap. 19, Sec. 23. "Without the consent of the Attorney-General, no action shall be brought against the Commission or against any member thereof for anything done or omitted in the exercise of his office. 6 Edw. VII, c. 15, s. 21."

3. Acts validating contracts between the Hydro-Electric Commission and a large number of municipalities were passed, although information and estimates required by Statute to be given were not submitted, and other statutory provisions had not been complied with, *ex post facto* legislation was passed in order to validate these illegal acts.

8 Edw. VII, Chap. 22, Sec. 1. "And the said by-laws of certain municipalities are hereby confirmed and declared to be sufficient, legal, valid and binding for the purposes thereof."

4. Information not having been given, estimates not having been submitted, and other statutory requirements not having been complied with, litigation was threatened, in order to prevent which the following Acts were enacted:—

9 Edw. VII, Chap. 19, Sec. 3. "Notwithstanding any provision of any by-law of the council of any of the corporations hereinafter in this section mentioned to the contrary, the said contract as so varied shall be and the same is hereby declared to be valid and binding according to the terms thereof upon the Corporation of the City of Toronto, the Corporation of the City of London, the Corporation of the City of Guelph, the Corporation of the City of Stratford, the Corporation of the City of St. Thomas, the Corporation of the City of Woodstock, the Corporation of the Town of Berlin, the Corporation of the Town of Galt, the Corporation of the Village of Hespeler, the Corporation of the Town of St. Mary's, the Corporation of the Town of Preston, the Corporation of the Town of Waterloo, the Corporation of the Village of New Hamburg, and the Corporation of the Town of Ingersoll."

9 Edw. VII, Chap. 19, Sec. 4. "It is hereby further declared and enacted that the validity of the said contract as so varied as aforesaid shall not be open to question and shall not be called in question on any ground whatever in any Court, but shall be held and adjudged to be valid and binding on all the corporations mentioned in section 3, and each and every of them according to the terms thereof as so varied as aforesaid and shall be given effect to accordingly."

5. The Mayor of the Town of Galt having declined to execute a contract, between the Town and the Hydro-Electric Commission, the following Act was passed:—

9 Edw. VII, Chap. 19, Sec. 5. "The said contract as so varied as aforesaid shall be treated and conclusively deemed to have been executed by the said Corporation of the Town of Galt."

6. Actions having been brought, and in one case a judgment given adverse to the Hydro-Electric Commission, the following was enacted:—

9 Edw. VII, Chap. 19, Sec. 8. "Every action which has been heretofore brought and is now pending wherein the validity of the said contract or any by-law passed or purporting to have been passed authorizing the execution thereof by any of the Corporations hereinbefore mentioned is attacked or called in question, or calling in question the jurisdiction, power of authority of the Commission or of any Municipal Corporation or of the Councils

thereof or of any or either of them to exercise any power or to do any of the acts which the said recited Acts authorize to be exercised or done by the Commission or by a Municipal Corporation or by the Council thereof, by whomsoever such action is brought shall be and the same is hereby forever stayed."

7. The agreement made between the Electrical Development Company and the Government of the Province of Ontario contains the following clause:—

"16. The Commissioners will not themselves engage in making use of the water to generate electric, pneumatic, or other power except for the purposes of the Park, provided that in case the said Commissioners shall have granted or at any time may have granted to any other person or corporation license to use the waters of the said Niagara or Welland Rivers, and by reason of failure of such person or corporation to carry on the works so licensed the said Commissioners find it necessary to forfeit said license and take over said works, this clause shall not prohibit said Commissioners from operating such works for the generation and transmission, sale or lease of electricity or power."

8. But being desirous of constructing works on the Chippewa River and of taking water therefrom for the development of electrical power, the following legislation was enacted:—

6 Geo. V, Chap. 20, Sec. 3. "The Government may authorize the Commission to:—

"(*a*) Enter upon, survey and lay out, all such lands, water, water privileges and water powers as may be required for the construction of the works hereinafter mentioned;

"(*b*) Acquire options upon and enter into preliminary contracts for the purchase of land for sites, right-of-way, the location of buildings, plant, works, machinery and appliances required for the works hereinafter mentioned;

"(*c*) Construct, erect, maintain and operate works for the purpose of diverting the waters of the Niagara River, Welland River, and tributary waters, or any of them, and conveying the same by aqueduct, conduit or canal, or in any other manner, from any point on the Welland River, or on the Niagara River, above the Cataract, and discharging such waters into the Niagara River;

"(*d*) Construct, erect, maintain and operate at or in the vicinity of such place of discharge, works, plant, machinery and appliances, for the use of the waters so taken and diverted in the development of a water power for the production of electrical or pneumatic power or energy;

"(*e*) For such purposes, exercise all powers and enforce all rights which may be exercised and enforced by the Commission when taking land or other property in the exercise of powers conferred by or under The Power Commission Act."

Full powers are conferred upon the Commission to "construct, erect, maintain and operate works for the purpose of developing the waters of the Niagara River, Welland River

(Chippewa River) and tributary waters or any of them," and to use the waters to develop electrical power in competition with the Electrical Development Company.

9. In order to prevent legal action on the part of the Company to restrain the proposed breach of the contract, the following legislation was enacted:—

6 Geo. V, Chap. 20, Sec. 7. "The exercise of the powers which may be conferred by or under the authority of this Act or of any of them, shall not be deemed to be a making use of the waters of the Niagara River to generate electric or pneumatic power within the meaning of any stipulation or condition contained in any agreement entered into by the Commissioners for the Queen Victoria Niagara Falls Park."

10. Although actually engaged in business in competition with the existing Power Companies, legislation has been enacted authorizing the Lieutenant-Governor-in-Council to appoint Inspectors, who may enter upon the works of the companies and take measurements and tests to ascertain the quantity of water used, the electrical and hydraulic efficiency of the machinery, the number of cubic feet per second necessary to produce a specific quantity of horse-power, to regulate the operation of the works, and to compel alterations therein, and to shut off the power and close the works as may be necessary. See 6 Geo. V, Chap. 21.

11. To aid the municipalities and assist them in borrowing the necessary monies for the construction of Transformer Houses and Distribution Stations, the following Act was enacted:—

6 Geo. V, Chap. 10, Sec. 9. "Section 18 of the Power Commission Act is amended by adding thereto the following subsection:—

"(8) Where a corporation has entered into a contract with the Commission for the supply of electrical power or energy, the debentures issued for any works for the distribution and supply of such electrical power or energy by the corporation shall not be included in ascertaining the limit of the borrowing powers of the corporations as prescribed by the Municipal Act."

12. The Hydro-Electric Commission, having created a false demand for power at an arbitrarily low price, has exhausted its supply and is now without power for further requirements; it cannot proceed with the Chippewa Power Project without the consent of the International Waterways Commission and without variation of the terms of the Treaty between Great Britain and the United States.

There is a question in doubt which ought to go to the Courts to decide as to how much water the Electrical Development Company is entitled to take in order to develop under its franchise 125,000 horse-power for commercial use; without going to the Courts, because the procedure is too slow, as Sir Adam Beck explained, he has from his seat in Parliament accused the Electrical Development Company of stealing water beyond its franchise rights, and has brought down a Bill and rushed it through in the last fifteen minutes of the Session:—

This legislation denies to the company access to the Courts for the proper determination of its legal position; it will be observed that the three Judges do not sit as a Court, but as a Commission; they are appointed by the Government and there is no right of appeal.

The Act is entitled, "The Water Powers Regulation Act, 1917;" it provides as follows:—

"2. The Water Powers Regulation Act, 1916, is amended by adding thereto the following section:—

"13.—(1) Where the Inspector reports that the owner of a water power,

"(*a*) is diverting or using more water than such owner is entitled to divert or use; or

"(*b*) is developing or generating a greater amount of power in horsepower, than such owner is entitled to develop or generate; or

"(*c*) has installed works and equipment capable of developing or generating a greater amount of power in horsepower than such owner is entitled to develop or generate,

"The Lieutenant-Governor in Council may appoint three commissioners, who shall be Judges of the Supreme Court of Ontario, to hold an enquiry under The Public Enquiries Act, and report to the Lieutenant-Governor in Council as to,

"(*a*) The quantity of water in cubic feet per second which such owner is entitled to divert or use.

"(*b*) the amount of power in horsepower which such owner is entitled to develop or generate;

"(*c*) the extent, if any, by which the capacity of the works installed or equipped by the owner, exceeds the amount of power in horsepower which the owner is entitled to develop or generate; and

"(*d*) as to the price and terms and conditions upon which, having regard to all the circumstances and to the rights of the owner as ascertained by the commissioners, the power to the extent of such excess should be delivered to the Hydro-Electric Power Commission of Ontario as hereinafter provided, and

"(*e*) as to such other matters connected with or arising out of the subject matter of this reference as they may deem expedient.

"(2) If the Commissioners find that the owner is diverting or using more water than he is entitled to divert or use, or is developing or generating a greater amount of power in horsepower than he is entitled to develop or generate, or that he has installed and equipped works exceeding in capacity the amount of power which he is entitled to develop or generate, the Lieutenant-Governor in Council may order the owner to deliver to the Hydro-Electric Power Commission of Ontario, upon the date named in the order, such amount of electrical power or energy as shall equal such excess as found by the report of the commissioners, or to operate the works of the owner to their full capacity and to deliver such excess power to the Hydro-Electric Power Commission of Ontario.

"(3) If the owner refuses or neglects to deliver such power after notice in writing so to do, he shall incur a penalty of $1,000 per diem for every day during which such neglect or default continues to be recoverable by action in the Supreme Court at the suit of the Attorney-General of Ontario.

"(4) Nothing in this section contained shall affect or diminish any duty or obligation as to payment of any penalty or rental to which the owner might otherwise be liable for exceeding the amount of power which he is entitled to develop or generate, and all such penalties may be collected and all such rentals shall be due and payable and the like proceedings may be taken by the Crown or by any commission or other public body from which the rights or franchises of the owner are derived, as if this Act had not been passed."

13. "The Ontario Niagara Development Act, 1917," amending "The Ontario Niagara Development Act, 1916" (6 Geo. V, Chap. 20) extends the powers of the Hydro-Electric Commission by giving powers to that Commission which by the former Act were vested in the Lieutenant-Governor in Council, thus depriving the competing Power Companies and others competing with the Commission of their Parliamentary rights.