

# PAWNS OF THE POWERFUL

## *The Politics of Litigation in the Union Colliery Case*

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LAW SCHOOL CASE-BOOKS tell us the formal reasons why a case came before the courts, its outcome, the judges' reasons for their decision, and the way in which formal judicial logic links one case to other cases. The commentaries, however, rarely say anything about the social-political context out of which a case developed or the extra-legal values which affected the judges' decision.<sup>1</sup> For a historian or a political scientist, what is left is a burlesque interpretation, one that titillates rather than satisfies.

This paper utilizes three disciplines to analyse the constitutional case of *Union Colliery v. Bryden*.<sup>2</sup> It uses jurisprudence to identify the significance of the case, it relies on historical research to explain the social-political background, and it calls on political science to provide the underlying conceptual framework. From this multidisciplinary perspective the judicial decision is seen as part of the political process,<sup>3</sup> and the route by which it came before the courts is as important as the decision of the court itself.<sup>4</sup> Independently, these three approaches blur reality; combined, they give new insights.<sup>5</sup>

<sup>1</sup> Recent legal scholarship acknowledges these deficiencies. See, for example, John Hagan, "The New Legal Scholarship: Problems and Prospects," *Canadian Journal of Law and Society* 1 (1986): 35. See also M. H. Ogilvie, "Canadian Law: Legal History," *Ottawa Law Review* 19 (1987): 222.

<sup>2</sup> *Union Colliery Co. v. Bryden* [1899] A.C. 580 (P.C.).

<sup>3</sup> For an analysis of the study of the judiciary in Canadian political science, see Peter H. Russell, "Overcoming Legal Formalism: The treatment of the Constitution, the Courts and Judicial Behaviour in Canadian Political Science," *Canadian Journal of Law and Society*, 1 (1968): 5.

<sup>4</sup> "One of the political scientist's interests in the study of the judicial process is to identify the interests or groups that have easier access to, or a greater propensity to use, litigation and the judicial process as a means of defending their rights and advancing their interests." Peter Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987), 26.

<sup>5</sup> There have been few Canadian case studies. See Carl Baar, "Using Process Theory to Explain Judicial Decision Making," *Canadian Journal of Law and Society* 1 (1986): 65. Baar also

The legal facts and outcome of *Union Colliery* appear in most case-books and texts on Canadian constitutional law.<sup>6</sup> It involved section 4 of the *Coal Mines Regulation Act of British Columbia*,<sup>7</sup> which in 1890 was amended to forbid the employment of Chinese underground. John Bryden, a Union Colliery shareholder, asked the court for a declaration and an injunction to force the company to stop engaging in this illegal practice. The Supreme Court of British Columbia found that section 4 of the Act was *intra vires* provincial jurisdiction and the Full Court upheld the decision on appeal. On further appeal, the Judicial Committee of the Privy Council (JCPC) overturned the provincial legislation, on the grounds that it encroached on the federal power to legislate over aliens and naturalized citizens.<sup>8</sup>

Legal scholars have traditionally viewed *Union Colliery* as important for three reasons. First, it is one of the leading cases on subsection 25 of section 91 of the *British North America Act*,<sup>9</sup> which gives Ottawa jurisdiction over "Naturalization and Aliens." Second, it contributed to the development of the principles by which the courts determine whether a piece of legislation falls under federal or provincial jurisdiction.<sup>10</sup> Third, it has often been referred to as a human rights case.

What did *Union Colliery* have to do with human rights? Walter Tarnopolsky stated that in this decision "the human rights of Chinamen [*sic*] were protected by the Supreme Court [*sic*] through the use of the power allocation device." Although he conceded that "the decision was not rendered in recognition of the human rights issues involved," Tarnopolsky implied that this is a "good" case because it protected the interests of the Chinese in B.C. in contrast to a later "bad" case, *Tommy Homma*,<sup>11</sup> where the JCPC distinguished the *Union Colliery* precedent

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discusses the need for more case studies, and offers three short examples. Two Canadian case studies are Douglas Sanders, "The Nishga Case," *BC Studies* 19 (1973): 3, and Peter H. Russell, "The Anti-Inflation Case: The Anatomy of a Constitutional Decision," *Canadian Public Administration* 20 (1977): 632.

<sup>6</sup> See, for example, Neil Finkelstein, ed., *Laskin's Canadian Constitutional Law*, 5th ed. (Toronto: Carswell, 1986): 969; John D. Whyte and William R. Lederman, eds., *Canadian Constitutional Law: Cases, Notes and Materials on the Distribution and Limitation of Legislative Powers Under the Constitution of Canada*, 2nd ed. (Toronto: Butterworths, 1977), 4-48. See also the brief discussion in Peter Hogg, *Constitutional Law of Canada*, 3rd ed. (Scarborough: Carswell, 1992), 52.1.

<sup>7</sup> *An Act to amend the "Coal Mines Regulation Act"* S.B.C. 1890, c. 33.

<sup>8</sup> *Ibid.*

<sup>9</sup> *British North America Act, 1867*, 30 & 31 Victoria, c.3. The BNA Act was, of course, given a new name in 1982: *The Constitution Act, 1867*. For convenience, this paper refers to it by its original title.

<sup>10</sup> For a discussion of this, see Peter Hogg, *Constitutional Law of Canada*, 3rd ed. (Scarborough: Carswell, 1992), 79-80. See also G. P. Browne, *The Judicial Committee and the British North America Act*, (Toronto: University of Toronto Press, 1967), 138.

<sup>11</sup> *Cunningham v. Tommy Homma* [1903] A.C. (P.C.).

and severely limited the human rights of Asians in the province. Peter Hogg is even more explicit about *Union Colliery* being a “good” human rights case. He argues that this is one of several cases in which the ambiguities of the *BNA Act* permitted the courts “to introduce egalitarian values into decisions reviewing the validity of statutes.”<sup>12</sup>

These interpretations of the *Union Colliery* decision are misleading; the case was less a dispute over ethnic minority rights than a fight between organized labour and capitalists over the right to freedom of contract. Moreover, these analyses do not point out that this ostensibly private dispute was in fact the continuation of political warfare by other means. By contrast, in focusing on first the legislative process, and then the legal battle, this paper sheds new light on the political conflict of late nineteenth-century British Columbia.<sup>13</sup>

The history of anti-Chinese agitation in nineteenth-century British Columbia has been recounted in detail elsewhere.<sup>14</sup> The first Chinese in any numbers arrived in 1858; by the 1880s they constituted a significant portion of the province’s inhabitants. By 1881 there were 4,350 Chinese in the province, and in 1891 there were 8,910, constituting almost a tenth of the total population.<sup>15</sup> This influx of “unassimilable” Asians engendered considerable apprehension and racist hostility, resulting in a series of waves of anti-Chinese public agitation which began in the early 1860s. Soon, a number of laws were passed which discriminated against them.<sup>16</sup>

<sup>12</sup> Hogg, *Constitutional Law of Canada*, 52.1. The case is placed in the section called “Equality,” in White and Lederman *Canadian Constitutional Law*, and it is found under the heading “Mobility and the Right to Pursue a Livelihood” in Finkelstein, *Laskin’s Canadian Constitutional Law*.

<sup>13</sup> Until recently, Canadian historians tended to ignore the political role of the law and the courts. See David H. Flaherty, “Writing Canadian Legal History: An Introduction,” in David H. Flaherty, ed., *Essays in the History of Canadian Law*, volume I (Toronto: University of Toronto, 1988), 10. See also Barry Wright, “An Introduction to Canadian Law in History,” in W. Wesley Pue and Barry Wright, eds., *Canadian Perspectives on Law and Society: Issues in Legal History* (Ottawa: Carleton University Press, 1988), 10.

<sup>14</sup> There are two major works on this subject. See Patricia E. Roy, *A White Man’s Province: British Columbia Politicians and Chinese and Japanese Immigrants, 1858-1914* (Vancouver: University of British Columbia Press, 1989). See also Peter Ward, *White Canada Forever: Popular Attitudes and Public Policy Toward Orientals in British Columbia*, 2nd ed. (Montreal and Kingston: McGill-Queen’s University Press, 1990). For a discussion of attempts by anti-Asian British Columbians to evade the impact of the *Union Colliery* decision, see Ross Lambertson, “After *Union Colliery*: Law, Race, and Class in the Coal-Mines of British Columbia,” Hamar Foster and John McLaren, eds., *Essays in the History of Canadian Law: British Columbia and the Yukon* (Toronto: University of Toronto Press, forthcoming 1995).

<sup>15</sup> Roy, *A White Man’s Province*, “Appendix,” 269.

<sup>16</sup> The early attempts to discriminate usually failed. For example, legislative motions to impose a head tax on Chinese failed in 1865, 1871, and 1872. In 1872, John Robson unsuccessfully attempted to have Chinese excluded from work on public works. By 1873, however, public

Nowhere was such agitation stronger than in the coalmining communities of Vancouver Island. The use of Chinese labour in the coalfields was an issue as early as 1867, when the Vancouver Coal Mining and Land Company (vcMLC) hired a small group of Chinese to work at Nanaimo. A Victoria newspaper signalled the new policy with block letter headlines,<sup>17</sup> and soon began railing against the employment of Chinese, going so far as to suggest that white miners might take violent action if they had to compete with Chinese labourers.<sup>18</sup>

Robert Dunsmuir, owner-manager of Dunsmuir-Diggie Company (DDC), soon realized that the employment of Chinese was an excellent way to reduce labour costs in a labour-intensive industry. By the early 1870s both he and the vcMLC were hiring Chinese as coalmine workers who were paid about half the wages of white labourers.<sup>19</sup> To avoid criticism from the white miners and the general public,<sup>20</sup> however, they often would pay a white miner a combined rate for miner and assistant and then allow the white miner to contract the services of a Chinese worker, thereby making him a partner in exploitation.<sup>21</sup> By 1877 the Vancouver Island coalmines were major employers of Chinese — Dunsmuir's Wellington Collieries employed 80 Chinese and 162 whites, while the Nanaimo Collieries of the vcMLC employed 87 Chinese and 301 whites.<sup>22</sup>

The white miners became increasingly unhappy with the use of Chinese labour and began to claim that they were a safety hazard. As early as 1876, they lobbied for legislation to regulate the Chinese within the coalmining industry. One of their demands was for a stipulation "that no Chinese shall be employed in any position where

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pressure was mounting and an anti-Chinese society was formed. Soon after, the Chinese were disenfranchised at the provincial electoral level in 1872, and at the municipal level in 1876. See Roy, *A White Man's Province*, x, 10; Peter Ward, *White Canada Forever*, 30-3; *An Act to amend "The Qualifications and Registration of Voters Act, 1871" S.B.C. 1872, no. 37, s. 13; An Act to amend "The Municipality Act, 1872" and amendments thereto S.B.C. 1876, no. 1, s. 9.*

<sup>17</sup> *The Colonist*, 27 April 1867.

<sup>18</sup> *Ibid.*, 8 May 1867.

<sup>19</sup> For example, in 1875 Dunsmuir's white workers at the Wellington Colliery received \$2.00 to \$3.00 a day, while Chinese workers received only \$1.25 a day. Ministry of Mines, "Report: 1875," *Sessional Papers of British Columbia*, 1876.

<sup>20</sup> For a discussion of public opposition to the use of Chinese as coalminers, see Daniel Thomas Gallacher, "Men, Money, Machines: Studies Comparing Colliery Operations and Factors of Production in British Columbia's Coal Industry to 1891" (Ph.D. diss., University of British Columbia, 1979), note 31 at 211-212.

<sup>21</sup> See John Douglas Belshaw, "The Standard of Living of British Miners on Vancouver Island, 1848-1900," *BC Studies* 84 (Winter 1898-90) 37; Gallacher, "Men, Money, Machines," 210-215. The sub-contracting system remained in effect for some time. See *Cumberland News*, 26 July 1898; *Nanaimo Free Press* 22 November 1899.

<sup>22</sup> Ministry of Mines, "Report: 1877," in *Sessional Papers of British Columbia*, 1878.

his neglect or carelessness might endanger the limbs or lives of any man working in the mines."<sup>23</sup>

Meanwhile, public pressure had mounted for a solution to the province-wide "Chinese question." In the context of other complaints about the Chinese,<sup>24</sup> and a growing pattern of discriminatory legislation, it was relatively easy for the miners to press their exclusionary claims.<sup>25</sup> At first, however, the mining companies worked together in opposing any interference with their right to contract with Chinese labour. For example, in 1876 John Bryden (who later became the *Union Colliery* plaintiff) attempted to moderate the position of the extreme anti-Chinese politicians in the legislature.<sup>26</sup> He acted as legislative representative (MPP) for Nanaimo, but as manager of the VCMLC and son-in-law to Robert Dunsmuir he was clearly a spokesperson for the Island's mining interests.<sup>27</sup> He failed to stem the anti-Chinese tide, however, and the House adopted a report by a special legislative committee that the government should "prevent this Province from being overrun with a Chinese population, to the injury of the settled population of the country."<sup>28</sup>

The miners were not appeased. Continued agitation over the employment of Chinese, combined with dissatisfaction over working conditions and wages, led white miners at the Wellington Collieries to strike in early February 1877. In March the government of Premier Andrew Charles Elliott responded by introducing a bill to create the *Coal Mines Regulation Act, 1877*, (CMRA) which regulated safety and employment standards in the province's coalmines, with Rule 33 of section 46 excluding the Chinese from positions of trust in coal-

<sup>23</sup> Lynne Bowen, *Three Dollar Dreams* (Lantzville, British Columbia: Oolichan Books, 1987), 146.

<sup>24</sup> The Chinese were often portrayed as unassimilable, dirty, tax-evaders, and addicted to such vices as opium smoking, gambling, and prostitution. See *1885 Royal Commission on Chinese Immigration: Report and Evidence* (Ottawa: Queen's Printer, 1885; reprinted by Arno Press, New York, 1978).

<sup>25</sup> *Supra* note 16.

<sup>26</sup> Bryden attempted to amend a motion to create a committee which would examine the "ruinous" effect of the influx of the "mongolian population"; he wanted to have himself and two like-minded colleagues included on the committee. See *Journals of the Legislative Assembly*, 1 May 1876, 37-38.

<sup>27</sup> John Bryden married Elizabeth Dunsmuir, eldest daughter of his supervisor, Robert Dunsmuir, in 1866. After Robert Dunsmuir left his job as VCMLC mines superintendent in 1868, Bryden replaced him and served in that capacity until his resignation in 1880, whereupon he became an executive shareholder in the Dunsmuir empire. He was first elected to the House in 1875, but resigned in 1876 because of business concerns. Bryden returned to the House in 1894 as the representative for North Nanaimo, and was reelected in 1898. Ross Lambertson, "John Bryden," *Dictionary of Canadian Biography*, vol. XIV (forthcoming).

<sup>28</sup> *Journals of the Legislative Assembly*, 9 May 1876, 48. There was no recorded division.

mines.<sup>29</sup> There is no record of opposition to this statute in the legislative assembly. However, since the coalmining companies did not often employ Chinese in positions of trust, they probably considered the legislation to be a sop to the miners, a concession that was no great threat to the practice of hiring Chinese as assistants or unskilled labourers.<sup>30</sup>

Meanwhile, the strike dragged on for four acrimonious months, with Dunsmuir using Chinese as strike-breakers and evicting the strikers from company-owned houses. Finally, having exhausted all other means, he used his considerable political influence to bring in the militia.<sup>31</sup> The miners responded by forming a Mutual Protective Society (MPS), but were unable to achieve their goals.<sup>32</sup>

The Chinese had been caught between the two factions. Since the white miners viewed them from a racist perspective and did not allow them to join the MPS,<sup>33</sup> they faced the dilemma of being either employed scabs or unemployed outcasts. Given the alternatives, it is not surprising that the Chinese chose to work as strike-breakers.

The infant labour movement reacted vehemently to the actions of the Chinese during the strike of 1877 as well as to their perception that Asian labour was a threat to all workers in the province. In 1878, a general union, the short-lived Workingman's Protective Association (WPA), was formed in Victoria.<sup>34</sup> Its mandate was not primarily the achievement of collective bargaining, but rather "the mutual protection of the working class of B.C. against the great influx of Chinese"

<sup>29</sup> *Journals of the Legislative Assembly*, 1877, 23 March, 33, 59; *Statutes of British Columbia*, 1877, c. 122. Rule 33 stated: "No Chinaman or person unable to speak English shall be appointed to or occupy any position of trust or responsibility in or about a mine subject to this Act, whereby through his ignorance, carelessness, or negligence, he might endanger the life or limb of any person employed in or about a mine, viz.: A banksman, onsetter, signalman, brakesman, pointsman, furnaceman, engineer, or be employed at the windlass of a sinking pit."

<sup>30</sup> Robert Dunsmuir testified to the 1885 Royal Commission that he hired no Chinese in positions of trust. However, there is a letter from the Inspector of Mines to John Bryden, 22 February 1888, pointing out that he is employing "Chinamen" as banksmen and furnacemen in violation of the 1877 *CMRA* Rule 33, and threatening prosecution unless this ceases. *Royal Commission on Chinese Immigration*, 128; BC Inspector of Mines, "Correspondence, 1877-1890," GR 184, BCARS MSS.

<sup>31</sup> Eric Newsome, *The Coal Coast: The History of Coal Mining in B.C., 1835-1900* (Victoria: Orca Book Publishers, 1989), 80-101. Newsome points out that the commander of the militia was Lt. Col. C. F. Houghton, future husband of Robert Dunsmuir's daughter Marion.

<sup>32</sup> Paul A. Phillips, *No Power Greater: A Century of Labour in British Columbia* (Vancouver: B.C. Federation of Labour, 1967), 7.

<sup>33</sup> Gallacher, "Men, Money, Machines," 201-60. For an analysis of racism in organized labour, see Gillian Creese, "Exclusion or Solidarity? Vancouver Workers Confront the 'Oriental Problem,'" *BC Studies* 80 (Winter 1988-89): 33.

<sup>34</sup> The WPA was reborn in the fall of 1879 as the Anti-Chinese Union. For more information, see Roy, *White Man's Province*, 48-9.

and the use of "all legitimate means for the suppression of their immigration."<sup>35</sup>

The employment of Chinese in coalmines remained highly contentious. In 1883, white miners struck the Wellington operation over wages and Dunsmuir broke the strike by employing whites in skilled positions and Chinese as their helpers.<sup>36</sup> Frustrated by this tactic and worried about mine safety, the white miners demanded the complete removal of Chinese from all underground positions. When Dunsmuir refused, they shifted their attack to the political arena, where they lobbied unsuccessfully for a *CMRA* amendment which would have precluded the employment of Chinese in many mining positions by prohibiting them from handling gunpowder.<sup>37</sup>

In opposing the Chinese, labour portrayed them as competitors for scarce jobs, willing to work for less than half the wages of a white man, and also competing for jobs against white miners' sons.<sup>38</sup> In addition, organizations such as the Nanaimo local of the Knights of Labor claimed that the Chinese showed "docile servility;"<sup>39</sup> this complaint was untrue, but it had its roots in the Chinese propensity to act as strike-breakers.<sup>40</sup>

However, labour's most convincing argument against the employment of Chinese in coalmines was that the Chinese endangered safety largely because they were not fluent in English. This assertion had been made for many years, but came to a head in 1887-88, sparked by two major coalmine disasters on Vancouver Island. While there is little doubt that the majority of the miners, and many members of the middle classes, genuinely believed the validity of this argument,<sup>41</sup> it

<sup>35</sup> Phillips, *No Power Greater*, 9-10. It prevented Chinese from using powder in the mines, thereby excluding them from skilled underground employment.

<sup>36</sup> Roy, *White Man's Province*, 40.

<sup>37</sup> *Ibid.*, 53-4; *Journals of the Legislative Assembly*, 1883-84, 27, 71. The bill was introduced by opposition MPP William Raybould (Nanaimo).

<sup>38</sup> *Royal Commission On Chinese Immigration*, 158.

<sup>39</sup> *Ibid.*

<sup>40</sup> Chinese labour was not docile; indeed, the workers were quite willing to strike for better wages and working conditions. Roy, *White Man's Province*, 39-40. See also the diary and letterbook of John Bryden, which demonstrate that the Chinese were far more aggressive than labour claimed. Had the white workers been willing to extend the principle of labour solidarity to Asians, perhaps the latter might not have been so willing to work as strike-breakers. "John Bryden's Diary and Letterbook, 1878-1880," BCARS.

<sup>41</sup> *Sessional Papers of British Columbia*, 1888, 367-70. There were two petitions signed by hundreds of coalminers of the Nanaimo District (constituting a majority of the voters in the electoral district), which called for the exclusion of Chinese from coalmines on the grounds that they constituted a significant danger. Professor Roy says that "safety was only an excuse," but admits that many people, not just the miners, saw the safety argument as "persuasive." Roy, *White Man's Province*, 78, 80.

seems to have been more myth than fact. In the first place, there were many other miners, some illiterate and others not fluent in English, who were exempt from exclusionist demands. Due to Dunsmuir's hiring policies, the white miners employed at his operations were such a cosmopolitan group that interpreters were necessary for mass meetings, yet there were few complaints about European workers.<sup>42</sup> Second, a comparison of colliery accidents between 1879 and 1890 in both VCMLC and Dunsmuir's operations reveals that the Chinese safety record was superior to that of the total workforce.<sup>43</sup>

Commonly held arguments, even when clearly inaccurate, can have considerable effect. The white miners used the safety argument to pressure VCMLC and Robert Dunsmuir. In February 1888, shortly after the second Vancouver Island mine disaster, both companies agreed to exclude Chinese from employment below ground and to hire white labourers as replacements.<sup>44</sup>

About the same time, the coalminers petitioned the pro-business A. E. Davie administration to make exclusion a legal requirement, and the issue was referred to a select standing committee of the House.<sup>45</sup> However, Robert Dunsmuir (by then a prominent member of the government party), and two other government MPPs, his son-in-law, Henry Croft (Cowichan), and a business associate, Charles E. Pooley (Esquimalt), convinced the legislature to do nothing more than to improve the safety standards of the *CRMA*. Thus, while Chinese were still barred from positions of trust, they were not prohibited from working underground.<sup>46</sup>

The white coalminers were not satisfied with improved safety legislation and the mine-owners' promise to exclude Chinese from underground work. Their concerns were heightened in late 1888 by Robert Dunsmuir's decision to employ Chinese miners underground at his new operation, the Union Colliery in Cumberland.<sup>47</sup> He pub-

<sup>42</sup> Mouat, "The Politics of Coal," 8-9.

<sup>43</sup> Gallacher, "Men, Money, Machines," 217-9. There is, however, some evidence that at times Chinese workers could be forced to work under conditions deemed too dangerous by white workers. See the report in *Sessional Papers of British Columbia*, 1898, 775.

<sup>44</sup> Mouat, "The Politics of Coal," 10-11. See also Bowen, *Three Dollar Dreams*, 279.

<sup>45</sup> *Sessional Papers of British Columbia*, 1888, 367-70; *Journals of the Legislative Assembly*, 1888, lxxxv-lxxxix. The testimony was largely anti-Chinese, but not entirely, and the report of Archibald Dick, the Inspector of Mines, was neutral on the issue.

<sup>46</sup> *An Act to amend the "Coal Mines Regulation Act, 1877"* S.B.C. 1988, c. 21. This amendment made several changes involving the rules concerning ventilation, safety lamps, the use of gunpowder, and the inspection of mines. Charles E. Pooley was a close business associate of the Dunsmuirs. He was appointed Secretary of the Union Colliery Company at a founding meeting in Wellington, 11 Sept. 1888. "Alex Fraser Buckham Collection," ADD MSS 436, box 32, file 3, BCARS.

<sup>47</sup> Roy, *White Man's Province*, 79.

licly explained this policy by asserting that the February agreement only applied to the mines in the Nanaimo area, but seems to have been an excuse rather than a reason. The exclusion of Chinese had driven up the costs of mining labour substantially.<sup>48</sup> Moreover, Dunsmuir did not have a controlling interest in the mine; his American partners held 50 per cent of the shares in this new enterprise, and it is likely that they were unwilling to tolerate the lower profits which came from eschewing Chinese labour.<sup>49</sup>

In February 1890 white workers formed the Miners' and Mine Labourers' Protective Association (MMLPA). This organization's immediate goal was the legislated exclusion of Chinese from underground work in coalmines — a goal which put them directly at odds with the Dunsmuir empire since no other coalmining company in the province ever employed underground Asian labour after 1888.<sup>50</sup> On 19 March, Andrew Haslam, a sawmill owner who had taken Robert Dunsmuir's seat in a by-election following the coal baron's death, introduced a petition from the Island miners which called for the exclusion of Chinese from underground work in the coalmines.<sup>51</sup> The following day he introduced a bill to amend the *CMRA*. Short, and to the point, it inserted the words "and no Chinaman" into section 4, so that it now read:

No boy under the age of twelve years, and no woman or girl of any age, and no Chinaman, shall be employed in or allowed to be for the purpose of employment in any mine to which this Act applies below ground.<sup>52</sup>

<sup>48</sup> *Ibid.*, 78.

<sup>49</sup> When he incorporated the Union Colliery company in 1888, Robert (along with John Bryden and his sons Alexander and James) went into partnership with the capitalists of the Southern Pacific Railway. The company had a book capital of one million dollars, with Robert Dunsmuir holding 49¼ per cent, and his two sons and John Bryden holding ¼ per cent each. The remaining 50 per cent was split by the "Big Four" of the Southern Pacific Railway. When the *Union Colliery* case came to trial, one of these American partners, C.P. Huntington, was added to the list of defendants, along with James Dunsmuir and Alexander Dunsmuir. By then, of course, Robert Dunsmuir was dead and James Dunsmuir had inherited his mantle as head of the empire. "Alex Fraser Buckham Collection," ADD MSS 436, box 32, file 33, and box 146, file 10, BCARS. It is perhaps not insignificant that these American capitalists, when building the Central Pacific Railway Company in the 1860s, had pioneered the use of Chinese labour in the United States. See Shih-shan Henry Tsai, *The Chinese Experience in America* (Bloomington and Indianapolis: Indiana University Press, 1986), 15-6.

<sup>50</sup> *Nanaimo Free Press*, 4 February 1890, 1; Ministry of Mines Reports, *Sessional Papers of British Columbia*, 1888-1900.

<sup>51</sup> *British Columbia Legislative Journals*, 19 March 1890, 69.

<sup>52</sup> *Statutes of British Columbia 1890*, c. 33; *Revised Statutes of British Columbia, 1897*, c. 138.

The lobbying efforts of the MMLPA had succeeded, and the safety argument proved to be crucial. In introducing the bill, Haslam called it a safety measure, not legislation to increase the wages of white workers. He noted that "the miners had shown how sincere they were in this matter by voluntarily paying white helpers \$2.00 a day to do the work that Chinese had been hired to do for \$1.00," and he added that it was not an anti-Chinese bill, but "simply legislation to protect life."<sup>53</sup> No member of the House appears to have spoken against the legislation. One representative pointed out that the safety aspect of the bill made it different from prohibiting the use of Chinese in other businesses such as fish canneries; another member suggested that the absence of serious mining accidents in the two years of voluntary exclusion confirmed the reputation of the Chinese as unsafe workers. The legislation passed without division.<sup>54</sup>

To understand why this uncontested amendment to the *CMRA* later became the focus of so much controversy, culminating in the JCPC decision in *Union Colliery v. Bryden*, it is useful to go back to the evidence of an 1885 Royal Commission on Chinese Immigration for a look at the attitudes of both workers and the capitalist élite. Although British Columbians tended to divide along class lines on the issue of the Chinese, the division was not absolute; there were British Columbians other than members of the proletariat who were willing to eschew the Chinese as a pool of readily available cheap labour.<sup>55</sup>

Submissions made to the 1885 Royal Commission show that most of British Columbia's élite had little regard for the inherent dignity and worth of the Chinese, but were divided as to how they should be treated. For example, into the first group, which we can call the "exclusionists," fell Montague W. T. Drake (who later, as a judge of the Supreme Court of B.C., would rule on the constitutionality of the 1890 *CMRA*). When he appeared before the Commission as President of the Executive Council, he argued that because the Chinese were "of no benefit to the country as settlers," their immigration should be restricted.<sup>56</sup> Another exclusionist, Samuel Robins, Superintendent of the VCMLC, argued that "it is not necessary to retain Chinese in the province, but . . . their removal should not be sudden."

<sup>53</sup> *The Daily Colonist*, 27 March 1890.

<sup>54</sup> *Ibid.*

<sup>55</sup> This is not surprising, given that the ideas of white supremacy, especially British supremacy, were so powerful at this time. For a discussion of "Anglo-Saxonism," see Robert A. Huttenback, *Racism and Empire: White Settlers and Colored Immigrants in the British Self-Governing Colonies, 1830-1910* (Ithaca: Cornell University Press, 1976), especially 13.

<sup>56</sup> *Royal Commission on Chinese Immigration*, 153-4.

He suggested that a poll-tax of \$50.00 would effectively curtail further immigration.<sup>57</sup>

In the second camp, which we can call the “exploiters,” were other members of the élite, such as Mr. Justice Crease, a judge of the Supreme Court of British Columbia (soon to strike down a piece of anti-Chinese legislation on constitutional grounds);<sup>58</sup> he argued that exclusion would “create the worst of all monopolies, next to that of capital: the tyranny of labour.”<sup>59</sup> He was supported by many other British Columbians, especially those members of the capitalist class who could profit from cheap labour.<sup>60</sup> For example, Robert Dunsmuir, who spoke both as member of the legislative assembly and as the proprietor of the Wellington coalmines,<sup>61</sup> testified that the Chinese were “hardy and industrious” and that if it “were not for Chinese labor, the business I am engaged in specially, coalmining, would be seriously retarded and curtailed.” Moreover, he offered a radical solution — give the Chinese the franchise.<sup>62</sup>

John Bryden, by then general manager of Dunsmuir’s Wellington Collieries, agreed with his father-in-law. He stated that the Chinese were necessary for the economic growth of the province and did not interfere with the white population “in any other way than that offered by fair competition in the labour market.”<sup>63</sup> In this and in other documents Bryden always appeared to be clearly in the ranks of the exploiters.<sup>64</sup>

The testimony in the Royal Commission Report therefore sets out the division between exclusionists and exploiters in the province’s élite, and demonstrates that this cleavage embraced a division between the two major coalmining companies of Vancouver Island, the VCMC and the Dunsmuir holdings. This schism within the B.C. élite is one of the most interesting aspects of this case. Why did the capitalist coalminers of the province strongly disagree on such a contentious

<sup>57</sup> *Ibid.*, 118-20.

<sup>58</sup> *R. v. Wing Chong* (1885), 1 B.C.R., Pt. II (S.C.)

<sup>59</sup> *Royal Commission on Chinese Immigration*, 143.

<sup>60</sup> This group includes railway contractor, road builders, and fish cannery operators. See Roy, *White Man’s Province*, 41, 66, 99, 142.

There was also domestic exploitation. Those who could afford domestic servants were often predisposed against exclusionism, and considerations of a domestic labour shortage even had an effect upon some of the wealthier members of the pro-labour forces. See *Ibid.*, 180.

<sup>61</sup> *Colonist*, 14 September 1883. A report indicated that Robert Dunsmuir had purchased the outstanding shares of DDC and would now operate “under the name and style of R. Dunsmuir and Sons.”

<sup>62</sup> *Royal Commission on Chinese Immigration*, 127-31.

<sup>63</sup> 1885 *Royal Commission on Chinese Immigration*, 110.

<sup>64</sup> “John Bryden’s Diary and Letterbook, 1878-1880,” Bryden to Robins, 7 August 1879, BCARS.

issue? To some degree it appears to have been a division over profits rather than principle. The publicly incorporated VCMLC was administered by Robins, often portrayed as a socially enlightened employer with a genuine concern for the well-being and interests of his white employees.<sup>65</sup> The VCMLC had recruited most of its white miners from Great Britain, attempting to create a close-knit community and homogeneous workforce, and its British shareholders were willing to accept a low rate of dividends.<sup>66</sup> Robert Dunsmuir's company, on the other hand, was privately owned by "robber barons" who were willing to extract the last penny of profit whenever possible.<sup>67</sup> In addition, the white miners employed by Dunsmuir were a cosmopolitan group that had difficulty attaining labour solidarity,<sup>68</sup> so that he was better able than the VCMLC to act in defiance of what the white miners saw as their best interests.

To understand why Bryden was finally driven to the unusual ploy of suing his brother-in-law's mining company it is useful to see the *CMRA* in the context of similar earlier legislation; it was simply one of a series of anti-Chinese laws, some of which were subject to judicial review and the federal power of disallowance. For example, in 1878 the government of George Walkem passed the *Chinese Taxation Act*,<sup>69</sup> which made it mandatory for all Chinese persons over the age of twelve to purchase a \$10.00 licence each month. The Chinese business community of Victoria swiftly challenged the validity of this legislation, in *Tai Sing v. Maguire*.<sup>70</sup> In ruling that the legislation was *ultra vires*, Mr. Justice Gray of the B.C. Supreme Court explained it was "not intended to collect revenue, but to drive the Chinese from the country, thus interfering at once with the authority reserved to the Dominion Parliament as to the regulation of trade and commerce, the right of aliens, and the treaties of the empire."<sup>71</sup> When similar discriminatory laws were passed during the next few years, other judges such as Mr. Justice Crease and Chief Justice Begbie also used the

<sup>65</sup> Mouat, "The Politics of Coal," 6-7. See also Bowen, *Three Dollar Dreams*, 267, 287.

<sup>66</sup> See A. W. Currie, "The Vancouver Coal Mining Company: A Source for Galsworthy's *Strife*," *Queen's Quarterly* LXX, no. 1 (1963): 60-61.

<sup>67</sup> Gallacher, "Men, Money, Machines," 179.

<sup>68</sup> Mouat, "The Politics of Coal," 8-9.

<sup>69</sup> *Statutes of British Columbia*, 1878, c. 35; *An Act to Provide for the Better Collection of Provincial Taxes*.

<sup>70</sup> *Tai Sing v. Maguire* (1878), 1 B.C.R. Pt. II, 101 (S.C.).

<sup>71</sup> *Ibid.*, 112.

law to frustrate the exclusionary impulses of the British Columbia electorate.<sup>72</sup>

The Canadian constitution in the late nineteenth century, however, provided for the striking down of legislation through more than the exercise of judicial review. Ottawa had been given the powers of reservation and disallowance to control provincial legislation; the federally appointed Lieutenant Governor could temporarily refuse to give royal assent to a provincial bill ("reserving" the decision to the federal cabinet, acting through the Governor General), and Ottawa could also use the disallowance power to strike down any provincial statute within one year of its passage.<sup>73</sup> From 1881 to 1896 Ottawa frequently took action against the provinces, thereby playing a markedly centralist role.<sup>74</sup>

Yet the underlying "rules of the game" were never clear, and were subject to reinterpretation. In the 1870s disallowance was exercised primarily as a means of safeguarding the boundaries of federal-provincial jurisdiction, a sort of substitute for judicial review. In the 1880s, however, the federal government began to exercise this power as a means of promoting federal nation-building policies, and occasionally to safeguard British imperial policy. But, whenever this federal power was exercised to protect "the traditional rights and liberties of British subjects," it was the rights of the white subjects that were upheld; at no time in the years preceding the *CMRA* amendment was there any suggestion that this power should be used to protect the rights of Asians — even naturalized British subjects — in British Columbia. Any protection that the Chinese derived from Ottawa was purely incidental to its pursuit of some other goal.<sup>75</sup>

<sup>72</sup> These cases are: *R. v. Mee Wab* (1886), 3 B.C.R. 403 (Cty Ct.); *R. v. Gold Commissioner of Victoria District* (1886), 1 B.C.R. Pt. II 260 (S.C., Full Ct.); *R. v. Corporation of Victoria* (1888), 1 B.C.R. Pt. II 331 (Div. Ct.) They are discussed in John P.S. McLaren, "The Early British Columbia Supreme Court and the 'Chinese Question': Echoes of the Rule of Law," *Manitoba Law Journal / Revue de droit Manitobain* 20, (1991): 103.

<sup>73</sup> *British North America Act, 1867*, ss. 55, 56, 57, 90.

<sup>74</sup> G. V. La Forest, *Disallowance and Reservation of Provincial Legislation* (Ottawa: Queen's Printer, 1955), 53. Unfortunately, this work says very little about the disallowance of British Columbia legislation during this period. The most comprehensive examination of the relationship between British Columbia's anti-Asian legislation and the use of the reservation and disallowance powers are in two articles by Bruce Ryder, "Racism and the Constitution: The Constitutional Fate of British Columbia Anti-Asian Immigration Legislation, 1872-1923" (unpublished paper, 1990); "Racism and the Constitution: The Constitutional Fate of British Columbia Anti-Asian Immigration Legislation, 1884-1909" (1991) *Osgoode Hall Law Journal* 29 (1991): 619.

<sup>75</sup> Eugene Forsey, "Disallowance of Provincial Acts, Reservation of Provincial Bills, and Refusal of Assent by Lieutenant-Governors Since 1867," *The Canadian Journal of Economics and*

By 1890 the federal government had disallowed British Columbia legislation on twenty different occasions, but only three of these involved anti-Asian legislation (there were no anti-Asian laws reserved).<sup>76</sup> The *Chinese Taxation Act* was disallowed following a finding of *ultra vires* in *Tai Sing*<sup>77</sup>; the *Chinese Immigration Act, 1884*,<sup>78</sup> was disallowed on the grounds that it involved "Dominion and possibly Imperial interests"<sup>79</sup>; and Ottawa disallowed the 1885 revision of the *Chinese Immigration Act*<sup>80</sup> because it interfered with the federal powers of trade and commerce, and "ordinary tribunals [could] afford no adequate remedy or protection against injuries resulting from allowing [the] Act to go into operation."<sup>81</sup>

Other pieces of anti-Asian legislation fared better; in 1872 the Chinese were excluded from the provincial franchise, and in 1876 this was extended to municipal politics,<sup>82</sup> but neither of these laws was disallowed. Then, in the same year that the 1884 *Chinese Immigration Act* was disallowed, the federal Minister of Justice recommended against disallowance of both *An Act to prevent Chinese from acquiring Crown Lands* and the Chinese Regulation Act.<sup>83</sup> The latter was rendered *ultra vires* by the courts in the *Wing Chong* case,<sup>84</sup> but the former remained the law of British Columbia.

In short, by 1890 it had become clear that any future anti-Asian legislation might well be struck down by the federal guillotine of disallowance or by the exercise of judicial review, but it was also clear

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*Political Science* IV (February–November 1938): 47; Ryder, "Racism and the Constitution, 1872–1923," 18–19, 26, 36–37. In the late nineteenth century there was no such thing as Canadian citizenship. A resident of Canada was either an alien, a naturalized British subject, or a British subject through birth (either in Canada or in some other part of the British Empire). Federal law determined that an alien could fairly easily obtain naturalized status after three years' residence in Canada. *An Act respecting Aliens and Naturalization*, S.C. 1868, c. 66, s. 3.

<sup>76</sup> La Forest, *Disallowance and Reservation*, Appendix "A", 83–101.

<sup>77</sup> Department of Justice, "Memorandum on Dominion Power of Disallowance of Provincial Legislation," 1937, Appendix "C" 68.

<sup>78</sup> *Statutes of British Columbia 1884*, c. 3.

<sup>79</sup> Letter from A. Campbell, Minister of Justice, to the Governor General in Council, 7 May 1884, in W. E. Hodgins, ed., *Correspondence*, 1092. By May 1884 it had become apparent that Chinese immigration was not considered a matter involving "imperial interests," and therefore had to be dealt with as a purely federal-provincial matter. See letter from the Earl of Derby to the Governor General, 31 May 1884, 1093.

<sup>80</sup> *An Act to prevent the Immigration of Chinese* S.B.C. 1885, c. 13. This legislation attempted to make unlawful any further Chinese immigration to British Columbia.

<sup>81</sup> La Forest, *Disallowance and Reservation*, Appendix "A," 90.

<sup>82</sup> *Supra* note 16.

<sup>83</sup> *An Act to regulate the Chinese population of British Columbia*, S.B.C. 1884, c. 4. This legislation attempted to impose a yearly head tax on every Chinese resident in British Columbia over the age of fourteen.

<sup>84</sup> *Supra*, note 58.

that this was by no means a certainty. The Dunsmuirs were therefore in no position to assume that they could rely upon Ottawa and the courts to save them from the restrictive effects of any exclusionary legislation passed by the British Columbia legislature.

Curiously, this appears to be exactly what they did. As we have seen, in 1888 Robert Dunsmuir had been able to marshal sufficient support to defeat a bill that prohibited the employment of Chinese in coalmines, but in 1890 the *CMRA* was amended, without even a division. What had changed? For one thing, Robert Dunsmuir had died in 1889, and although his son James became the new head of the empire, he had not yet been elected to the British Columbia legislature.<sup>85</sup> In addition, although the government was still pro-business (with John Robson having replaced A. E. Davie as Premier), the political costs of opposing the demands for Chinese exclusion in the mines were at this time prohibitive; an election was imminent, anti-Asian sentiment was rising, and the safety argument was persuasive, even to those normally favouring the exploitation of the Chinese.<sup>86</sup>

If the shareholders of the Union Colliery had assumed that the *CMRA* amendment would be disallowed, they were disappointed; the legislation escaped the federal veto. However, the reason for this is not clear because the Ministry of Justice records dealing with federal and provincial legislation do not mention this particular matter.<sup>87</sup> The report of the Minister of Justice to the Governor-General-in-Council on 21 April 1891, dealing with legislation passed by the British Columbia legislature in 1890,<sup>88</sup> makes no mention of the *CMRA* amendment. The only reference to anti-Chinese legislation is *An Act to Incorporate the New Westminster Electric Light and Motor Power Company*, which

<sup>85</sup> John Bryden was also no longer a member of the provincial legislature. However, James Dunsmuir might have been able to count upon some support from his other brother-in-law, Henry Croft (Cowichan), as well as long-time Dunsmuir supporter Charles Edward Pooley (Esquimalt). *Electoral History of British Columbia 1871-1986*, Elections British Columbia (Victoria: Queen's Printer, 1988), 55-56. James Dunsmuir was educated at an early age by his father as a coalminer and oversman. He was later sent to a Virginia military academy to acquire skills in engineering, after which he rejoined the family company, becoming mine superintendent in 1876. By 1883 he had become a managing partner and assumed the presidency of R. Dunsmuir and Sons after Robert died in 1889. Like his father, Robert, James Dunsmuir was strongly opposed to organized labour, and refused to recognize unions. James was politically active and served the province as an MPP, cabinet minister, premier (1900-02), and Lieutenant Governor (1906-08). During all of this "service" he remained firmly in control of his family's vast business interests. See "James Dunsmuir," BCARS vertical files.

<sup>86</sup> Roy, *White Man's Province*, 79-80. James Dunsmuir may have also been aware that the legislation could not be enforced; see the discussion following.

<sup>87</sup> W. E. Hodgins, ed., *Correspondence*.

<sup>88</sup> *Ibid.*, 1120-21.

contained a section prohibiting the employment of Chinese. The memorandum said that this law might be invalid on the grounds that it was legislation respecting aliens, but it added that this issue of constitutionality should be left to the courts.<sup>89</sup>

The significance of this memorandum is not entirely clear. Is the omission of the *CMRA* simply an administrative oversight, or did the government of British Columbia succeed in keeping information about the legislation from the federal government? Does the Minister's analysis of the legislation to incorporate the private company indicate that the *CMRA* legislation would have been treated in the same way, or would it have been considered a more serious infringement of property rights, and consequently disallowed? The first question, in the absence of any documentation, remains unanswered. The answer to the latter question is that Ottawa was unlikely to disallow a bill that incorporated a company, since this would have imposed a serious burden on the investors,<sup>90</sup> but it is more likely that a bill such as the *CMRA* amendment would have been disallowed.

The real test for Ottawa was whether or not legislation was clearly *ultra vires*, or ran afoul of some policy goal. At this time the CPR had been completed, so Ottawa no longer had a powerful interest in safeguarding its corporate right to employ cheap Chinese labour. In addition, the legislation obviously did not run afoul of the British Imperial interest in maintaining good relations with Japan (an issue which did arise later in the decade). The only reason why Ottawa might at that time have disallowed the *CMRA* amendment was therefore on the grounds that it interfered with federal legislative jurisdiction, and it is entirely possible that the federal Minister was persuaded that the amendment was, as British Columbia legislators maintained, truly a matter of regulating safety in the coalmines, and therefore a matter falling within the constitutional jurisdiction of the province.<sup>91</sup>

Within a year the Dunsmuir group had reacted in several ways to the 1890 *CMRA* amendment: they attempted to repeal it (as well as working to prevent it being strengthened), they tried to replace Chinese workers with equally cheap Japanese labour, and they inhibited the effective enforcement of the legislation. At the same time,

<sup>89</sup> *Ibid.*, 1121.

<sup>90</sup> See letter from B.C. Lieutenant-Governor to the federal Secretary of State, 8 April 1886. W. E. Hodgins, ed., *Correspondence*, 1106.

<sup>91</sup> Ryder, "Racism and the Constitution, 1872-1923," 86-87. Ryder has found it "odd" that this amendment to the *CMRA* was not disallowed, and says that either it escaped the attention of the Federal Minister of Justice, or he accepted the argument that it was really safety legislation.

however, they were faced with strong opposition in the House; the June 1890 election which was won by Premier Robson also put into the House for the first time Nanaimo area Labour MPPs who were supported by the MMLPA and who favoured the exclusionist cause.<sup>92</sup>

The major barrier to enforcement of the 1890 *CMRA* amendment was the wording of the legislation. Shortly after it had been passed, the provincial inspector of mines attempted to enforce the law in June by charging Frank D. Little, manager of the Union Colliery; however, the charges were dismissed by the local magistrate on the grounds that the legislation did not provide any penalty for its breach.<sup>93</sup>

The exclusionists reacted by trying to amend the legislation. In March 1891, the Labour MPP for Nanaimo City, Thomas Keith, proposed an amendment to make the law effective, but after considerable debate it was narrowly defeated by the Dunsmuir forces. They responded in April with an attempt by James Dunsmuir's brother-in-law, Henry Croft (Cowichan) to repeal the 1890 *CMRA* amendment, but although the bill narrowly passed second reading it was killed in the Committee of the Whole. For the moment the contest was a draw.<sup>94</sup>

Although the legislature in this period has been described as "a political aquarium swimming with loose fish which dashed from one side of the House to the other,"<sup>95</sup> scrutiny of the legislative divisions in 1891 reveals a definite voting pattern — the long-standing cleavage between the "exploiters" and "exclusionists." For example, in the divisions over the *CMRA* as well as attempts to insert a "no Chinese" clause into bills incorporating private companies, staunch Dunsmuir loyalists such as Pooley and Croft, and almost all of Premier John Robson's supporters, formed a block of twelve which always voted in favour of corporate freedom to exploit the Chinese. They in turn were able to prevail because a group of eight legislators (for the most part identified as government supporters) usually voted against exclusion.<sup>96</sup>

<sup>92</sup> Thomas William Forster (Nanaimo) and Thomas Keith (Nanaimo City) were nominated by the MMLPA and campaigned on the "Workingmen's Platform." Colin Campbell McKenzie (Nanaimo) was a "farmers' candidate" but also was endorsed by the MMLPA and supported the "Workingmen's Platform." *Electoral History of British Columbia*, 55-56.

<sup>93</sup> *The Nanaimo Free Press*, 20 June 1890.

<sup>94</sup> *British Columbia Legislative Journals*, 1891, 9 March, 68; 14 April, 128; 17 April, 143. The recorded division of the former bill was 14 to 15; the latter was 15 to 13.

<sup>95</sup> F. W. Howay, *British Columbia: From the Earliest Times to the Present*, Vol. 2 (Vancouver: S. J. Clarke and Company, 1914), 401.

<sup>96</sup> *British Columbia Legislative Journals*, 1891. The analysis was prepared by looking at divisions on 5 February, 6 February, 4 March, 9 March (4 bills), 25 March (4 bills), 7 April, 14 April, 16 April, and 17 April. The consistent supporters of corporate freedom were: James Baker (East

They were confronted, however, by a core group of seven strong exclusionists, some of whom were labour representatives while others floated in the opposition waters. These, in turn, were usually supported by two somewhat less committed anti-Chinese legislators, one in the opposition ranks and one an independent.<sup>97</sup> Finally, both the exploiters and the exclusionists were at different times supported by members forming a third group of "loose fish" — one independent legislator, one member of the opposition, and one supporter of the government.<sup>98</sup>

The voting in the legislature reflected not just factional divisions, but also class conflict. The concessions won by organized labour had galvanized the elected élite into viewing the issue of Chinese employment as crucial to this struggle. In the legislature, Pooley claimed that Keith's exclusion proposal was an attempt to "get control of the coalmining industries in British Columbia so that [the union miners] may say who shall work and who shall not work and what wages they each shall receive."<sup>99</sup> Yet there was more here than class tensions. Charles Semlin, the opposition legislator representing Yale, was consistently exclusionist, but by no means anti-capitalist. Rather, he seems to have led an exclusionist group which was pro-business in general and committed in particular to the interests of the vcMLC, the "whites only" coalmining competition of the Dunsmuirs.<sup>100</sup>

For the next three years, however, Labour MPP Thomas Keith led the effort to make the *CMRA* enforceable, but the pro-business forces

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Kootenay), Henry Croft (Cowichan), Theodore Davie (Cowichan), David Eberts (Victoria), Robert Hall (Cassiar), Joseph Nason (Cariboo), C. E. Pooley (Esquimalt), John Robson (Westminster), S. A. Rogers, (Cariboo), Alfred Smith (Lillooet), John Turner (Victoria City) and Forbes Vernon (Yale). Strong but somewhat less consistent supporters were: G. W. Anderson (Victoria), J. P. Booth (The Islands), Thomas Fletcher (Alberni), J. W. Horne (Vancouver City), Joseph Hunter (Comox), James Kellie (West Kootenay), T. A. Kitchen (Westminster), and C. B. Sword (Westminster). All of these were government supporters, except Horne, Kellie, Sword (Independent) and Kitchen (Opposition).

<sup>97</sup> The Labour supporters, Thomas Forster (Nanaimo), Thomas Keith (Nanaimo City), and Colin Mackenzie (Nanaimo), voted overwhelmingly but (except for McKenzie) not entirely consistently against the Chinese and in favour of business' right of free employment. Consistently anti-Chinese votes were cast by opposition legislators Robert Beaven (Victoria City), Francis Carter-Cotton (Vancouver City), George Milne (Victoria City), and Charles Semlin (Yale). David Stoddart (Lillooet) was predominantly but not consistently in this camp, and J. Punch voted only once, for the exclusionists. Of all of these, only Punch had run as an Independent.

<sup>98</sup> The "loose fish" were J. C. Brown (New Westminster City), John Grant (Victoria City), and G. B. Martin (Yale), who split fairly evenly on the Chinese issue.

<sup>99</sup> Mouat, "The Politics of Coal," 25-26; *Nanaimo Free Press*, 3 March 1892.

<sup>100</sup> *Supra*, note 97, *infra* note 101. There are several suggestions in newspapers that Semlin at some point became a spokesperson for the vcMLC interests. See the *Colonist* 3, 4 February 1900; *Nanaimo Free Press*, 22 May 1900; *Province* 13 February 1902.

in the House prevailed against him and the other exclusionists until 1894.<sup>101</sup> In that year, with a depressed economy and an imminent election, two “no Chinese” clauses were inserted in private acts incorporating mining companies, and Keith was also able to obtain a *CMRA* amendment which dealt with the alleged danger of Chinese in the coalmines by mandating government inspection of “any person who, by reason of want of understanding or owing to mental or physical incapacity or incompetency for the performance of the particular task or duty upon which he is engaged, is a source of danger to his co-labourers.”<sup>102</sup>

This legislation aside, however, the *CMRA* remained, as far as the employment of Chinese miners was concerned, essentially a dead letter, especially because the government chose — no doubt because of pressure from Dunsmuir — not to appeal the Nanaimo magistrate’s June 1890 decision. Nevertheless, Dunsmuir had begun to hedge his bets, hiring about one hundred Japanese coalminers in late 1891 (although because of the harsh working conditions at the Union Colliery by 1893 there were only twelve still employed there).<sup>103</sup>

Although the July 1894 provincial election was won by the pro-business group led by Theodore Davie (who had succeeded to the premiership after Robson died in 1892), support in the legislature for anti-Chinese measures had increased. One of the first issues debated by the new legislature was a bill presented on 21 January 1895 by government MPP James McGregor (Nanaimo City).<sup>104</sup> This proposal was an attempt to strengthen the 1894 *CMRA* amendment. It permitted coalminers to request that the Inspector of Mines investigate any allegation that a man “by want of understanding, knowledge or skill” was exposing other miners to danger or (and this was crucial) was “unable to understand instructions conveyed to him.”<sup>105</sup> The intention of this bill was to exclude at least some Chinese from underground employment.

The Dunsmuir forces fought the bill. On 31 January newly elected government MPP John Bryden (North Nanaimo) presented a petition signed by 770 Wellington miners in opposition to it.<sup>106</sup> On the same

<sup>101</sup> *British Columbia Legislative Journals*, 1892-1894. Keith tried in 1892, 1893, and 1894, always supported by opposition legislators such as Beaven and Semlin. He also began to call for the exclusion of Japanese miners, because of the new hiring policies of the Union Colliery.

<sup>102</sup> Roy, *White Man’s Province*, 76; *British Columbia Legislative Journals*, 1894, 31, 73; *The Coal Mines Regulation Act Amendment Act*, S.B.C. 1894, c. 5, s. 2.

<sup>103</sup> Roy, *White Man’s Province*, 82-83.

<sup>104</sup> *British Columbia Legislative Journals*, 1895, 81.

<sup>105</sup> *Statutes of British Columbia 1895*, c. 38, s. 2.

<sup>106</sup> *British Columbia Legislative Journals*, 1895, 98. A copy of the petition is appended at cv.

day the bill came up for second reading, and the bill was ordered to be committed on the following day. The next day, however, the bill was not dealt with, although MPP Joseph Hunter (Comox) presented a similar petition signed by 240 Comox miners.<sup>107</sup> Although both petitions had been signed by over three-quarters of the white workers employed in these mines,<sup>108</sup> government supporter W. W. Walkem (South Nanaimo) suggested that they were the result of Dunsmuir intimidation and therefore not truly representative of public opinion.<sup>109</sup>

On 7 February the bill came before the House once again, but Joseph Hunter then proposed two amendments to ensure that no investigation could take place unless requested by the miners who worked in that particular mine. This was no doubt intended to weaken the legislation, since it might be possible for an employer to intimidate his workforce into not laying a complaint. The motion to amend carried on a division of 15 to 15, with the speaker casting the deciding ballot, and the amended bill was passed.<sup>110</sup>

The significance of this should not be underestimated. The Dunsmuir forces had been able to muster enough support to protect their business interests, even though the general populace supported exclusion and pressured their MPPs to support it. The chessmasters had once again controlled the board, and the legislation did not impede Dunsmuir's hiring policy. The 1894 Ministry of Mines report shows that 290 Chinese and 45 Japanese were employed in the Union Colliery<sup>111</sup>; the 1895 report indicates the same figure for Chinese employment and an increase of 50 Japanese workers<sup>112</sup>; the following year there were only 283 Chinese but 132 Japanese employees.<sup>113</sup> The effect of the safety requirement on the Asian workforce was inconsequential.

At the same time, however, anti-Asian sentiment was growing and it was becoming more difficult for the Dunsmuir group to dominate

<sup>107</sup> *Ibid.*, 99.

<sup>108</sup> Roy, *White Man's Province*, 81.

<sup>109</sup> *Colonist*, 1 February 1985. Given Dunsmuir's track record of employee manipulation and intimidation, this assertion merits strong consideration. For other allegations of intimidation, see "Report of the Royal Commission on Industrial Disputes in the Province of British Columbia," *Sessional Papers* (Ottawa), 1903, vol. XXVII, no. 13, paper no. 36a, 454, 460-461, 467, 495, 498, 501; letter from D. M. Rogers to the Attorney-General, 28 July 1903, GR 429, box 10, file 3, BCARS.

<sup>110</sup> *British Columbia Legislative Journals*, 1895, 120-121; *An Act to amend the "Coal Mines Regulation Act" and amending Acts* S.B.C. 1895, c. 38; Roy, *White Man's Province*, 80-81.

<sup>111</sup> Ministry of Mines, "Report: 1894," in *Sessional Papers of British Columbia*, 1895, 772.

<sup>112</sup> Ministry of Mines, "Report: 1895," in *Sessional Papers of British Columbia*, 1896, 727.

<sup>113</sup> Ministry of Mines, "Report: 1896" in *Sessional Papers of British Columbia*, 1897, 596.

the political arena. The federal head tax imposed in 1886 was no longer an effective deterrent to Chinese immigration, and in 1896 certain frustrated members of the white community formed the Anti-Mongolian society, an organization with close ties to the exclusionist politicians in the assembly.<sup>114</sup>

Asian coalminers were the major target of this hostility. On 12 February 1896, W. W. Walkem asked if the government would consider a constitutional court test of the *CMRA* provision regarding the employment of Chinese. Attorney-General David Eberts (South Victoria) replied in the affirmative.<sup>115</sup> The pro-business government (headed by Premier John Turner since he replaced Theodore Davie in March 1895) had finally succumbed to the pressure from the Island coalminers.

On 11 December 1896, the Supreme Court of British Columbia (SCBC) heard the reference case, *In Re The Coal Mines Regulation Amendment Act, 1890*,<sup>116</sup> and on 3 February 1897 the court found the act *intra vires*. The judges delivered two decisions, one prepared by Mr. Justice Walkem, the former exclusionist Premier (and brother of W. W. Walkem), and the other by the former exclusionist politician, Mr. Justice Drake.<sup>117</sup> Although the judges disagreed as to whether or not the legislation was primarily aimed at securing mine safety,<sup>118</sup> they both ruled, despite earlier precedents, that the legislation was constitutional since it fell into the category of "property and civil rights."<sup>119</sup> The exclusionist politicians had now become exclusionist judges.

The BCSC's decision in the *CMRA* reference case meant that the government no longer had any excuse to avoid prosecution. At the same time, support in the House for anti-Chinese measures was now extremely high.<sup>120</sup> The MMLPA had been lobbying the government to

<sup>114</sup> Roy, *White Man's Province*, 67, 91-94.

<sup>115</sup> *British Columbia Legislative Journals*, 1896, 37.

<sup>116</sup> *In Re The Coal Mines Regulation Amendment Act, 1890* (1897), 5 B.C.R. (S.C.).

<sup>117</sup> Mr. Justice McColl concurred with Mr. Justice Drake, whose exclusionist beliefs had been publicly stated, when, as President of the Executive Council, he testified before the 1885 Royal Commission on Chinese Immigration (see *supra*, at 9).

<sup>118</sup> Walkem held that the legislation was primarily a safety measure, while Drake denied this.

<sup>119</sup> *In Re The Coal Mines Regulation Amendment Act, 1890* (1897), 5 B.C.R. (S.C.).

<sup>120</sup> As noted, in 1891 the Dunsmuirs and others had been able to prevent the passage of anti-Chinese legislation (*supra*, note 96). Now, when it came to a vote on *An Act relating to the employment of Chinese on works carried on under franchise granted by Private Acts*, the Dunsmuir group was outvoted 21 to 8. *British Columbia Legislative Journals*, 1897, 18 March, 64. Another example of the exclusionists' strength in the legislature was the passage, in 1897, of *An Act for Securing the Safety and Good Health of Workers Engaged in or About the Metalliferous Mines in the Province of British Columbia by the Appointment of an Inspector of Metalliferous Mines*, *Statutes of British Columbia, 1897* c. 134. Among other things, this Act

enforce the *CMRA* and soon Frank D. Little, manager of the Union Colliery, had been charged with employing Chinese miners underground.<sup>121</sup> In *Regina v. Little* he was found guilty and fined \$100.00 plus \$3.50 in costs, with the alternative of one month in jail.<sup>122</sup> This proved to be only a temporary set-back for the Dunsmuir forces, however, for when Little applied for a writ of *certiorari* to quash the conviction, it was granted by Mr. Justice Drake on the grounds that no penalty had been provided in the legislation.<sup>123</sup> The 1890 *CMRA* amendment was a dead letter and the Dunsmuir forces had triumphed once again.

At this point British Columbia historians have ignored a key question — if the Act was inoperative, why did Dunsmuir later force the issue in the spring of 1898, rather than prevent a legislative amendment that would rectify the court decision of 1897 and put teeth into the prohibition?

The answer is that the amendment was inserted surreptitiously. Shortly before Drake handed down his decision, on 9 March 1895, a review commission consisting of Mr. Justice Drake and Premier Davie submitted a draft copy of British Columbia's revised statutes to Lieutenant Governor Edgar Dewdney. The word "Chinamen" did not appear in this draft, but the task of preparing a final revision was then handed to a new commission "authorized to examine the work of the previous Commission, to correct inaccuracies, and to insert emendations or additional Acts where desirable."<sup>124</sup> Somehow, in this revision the word "Chinamen" was inserted into the penalty clause of the *CMRA*.<sup>125</sup>

This second commission also included Davie (now Chief Justice of the province), and Mr. Justice Drake, but they were joined by Mr.

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prohibited, in s. 12, the employment of either Chinese or Japanese underground in metaliferous mines, and s. 14 prohibited any Chinese or Japanese person from being in charge of the machinery for raising or lowering men in a mine. Clearly, the legislature was not going to overlook any employer's employment of Asian miners.

<sup>121</sup> *Nanaimo Free Press*, 13 March 1897.

<sup>122</sup> Reported in the appeal: *Regina v. Little*, B.C.R. vol. VI, 78.

<sup>123</sup> *Regina v. Little*, B.C.R. vol. VI, 78. The grounds of Little's application for *certiorari* was that the employment of Chinese was not made an offense under the act, and that the prohibition was *ultra vires*. Justice Drake chose not to deal with the second claim, but noted that he would have been bound by the Full Court's recent decision.

<sup>124</sup> *Draft. Revised Statutes of British Columbia: Second Report, 1897*, 3-4. A copy of this draft is in the Diana M. Priestly Law Library, University of Victoria.

<sup>125</sup> *Revised Statutes of British Columbia, 1897*, c. 138. It is somewhat suspicious that although the term "Chinamen" was deliberately inserted, the draftsman erred in his citation; according to the statute, this section previously appeared in "C.A. 1883, c. 84, s. 12," but no such consolidation exists. The correct citation should be C.A. 1888, c. 84, s. 12.

Justice Walkem.<sup>126</sup> This strongly exclusionist body submitted the revised draft to the government and Attorney-General Eberts introduced it to the house.<sup>127</sup> On 8 May 1897 it received royal assent.<sup>128</sup>

There is no indication that the members of the assembly were aware that they were amending the penalty clause of the *CMRA* when they adopted the 1897 consolidation. Yet in the context of the times the addition of the word "Chinamen" was crucial, and it flew in the face of the commonly accepted rule that a consolidation of statutes should not include significant alterations.<sup>129</sup> The Dunsmuir empire had been seriously outmanoeuvred by its exclusionist opposition.

About this time, the Union Colliery company appealed the *BCSC's* *CMRA* reference decision. In *Union Colliery Company v. The A.G. of B.C.*,<sup>130</sup> the British Columbia Attorney-General, the *VCMLC*, and the *MMLPA* combined forces to deny the appeal — the Dunsmuir forces were faced by the provincial government, their major economic competitor, and the forces of organized labour. The result was a set-back for the Dunsmuirs, for the federal court refused to hear the appeal, on the grounds that it had no jurisdiction to consider a reference decision. The British Columbia court's decision on the constitutionality of the *CMRA* therefore remained in effect.<sup>131</sup>

On 28 January 1898, the *SCBC's* Full Court upheld the decision in *Regina v. Little* which had quashed the previous conviction of the Union Colliery manager.<sup>132</sup> The anti-Chinese section of the *CMRA* was now constitutional but inoperative — unless one was aware that it had just been amended, in which case it was now constitutional and newly fanged, ready for future prosecutions.

It did not take long for the authorities to act. On 28 April 1898 Little was again convicted for violating the 1890 amendment to the *CMRA*,<sup>133</sup> and on the following day the government also obtained a conviction for a breach of the *CMRA* in the Dunsmuir-owned Alex-

<sup>126</sup> Reports of Commissioners on Revised Statutes, in *Sessional Papers of British Columbia*, 1897, 641-43.

<sup>127</sup> *British Columbia Legislative Journals*, 120. Davie may have become an exclusionist after leaving active politics. However, even if he remained pro-business, he was still outvoted by the traditionally exclusionist other two members of the commission.

<sup>128</sup> *Ibid.*, 171.

<sup>129</sup> *Statutes of British Columbia*, 1897, c. 41. The enabling legislation contained a provision, section 3, that allowed the commissioners to make "such amendments or additions or changes as may be necessary or desirable for administering or carrying the law into effect." The authors of this paper do not believe this warranted the insertion of the term "Chinamen."

<sup>130</sup> *Union Colliery Company of British Columbia v. The Attorney General of British Columbia and Others Re Coal Mines Regulation Act, 1890*, S.C.R. vol. XXVII, 1897, 637.

<sup>131</sup> *Nanaimo Free Press*, 20 October 1897.

<sup>132</sup> *Regina v. Little*, B.C.R. vol. VI, 80.

<sup>133</sup> Cited in the appeal: *Regina v. Little*, B.C.R. vol. VI, 1898, 321.

andria mine.<sup>134</sup> Little appealed, claiming that the legislation was *ultra vires* as an interference with the federal power over aliens,<sup>135</sup> but these charges turned out to be only the first of a series of prosecutions. By 6 June of that year Mines Inspector Archibald Dick had launched at least eleven charges against the manager of the Union Colliery.<sup>136</sup>

Meanwhile, even before the appeal could come before the Full Court, the Dunsmuir empire chose to go on the offensive. The Dunsmuirs had not become the wealthiest family in British Columbia by waiting for someone else to make bold manoeuvres. The family adopted a legal strategy that would allow them to present the strongest case possible — they had Bryden launch a civil suit against the Union Colliery, ostensibly to force the company to comply with section 4 of the *CMRA*.

There were two distinct advantages to the Dunsmuir empire in launching this incestuous suit. First, they could orchestrate both the offence and defence of the legal battle. Second, it no doubt appeared obvious to the Dunsmuirs that there was a good chance of the exclusionist forces of Charles Semlin winning the next election.<sup>137</sup> There was, therefore, a distinct possibility that even more vigilant enforcement of the law lay in the future, so there was nothing to be gained by waiting. Moreover, by launching a court case the Dunsmuir forces could hope for a stay of prosecutions while the issue was *sub judice*.

There is, however, another point that should be made at this juncture, a point which highlights an absence rather than a presence. Did the Chinese ever consider challenging the legislation? Why was “their” case pre-empted by the Dunsmuir-Bryden forces? In other words, is this image of Chinese passivity an accurate reflection of historical reality, or is it the result of some other factor, such as an unconscious racist bias or an absence of historical material?

The Chinese were by no means always passive. Chinese labourers were not always submissive in their relations with employers, for although economic and labour exigencies often forced them to act as strike-breakers, they sometimes went on strike themselves.<sup>138</sup> Moreover, Chinese merchants engaged in political lobbying for the dis-

<sup>134</sup> Attorney-General Records, GR 429, box 4, file 2, BCARS.

<sup>135</sup> *Ibid.*

<sup>136</sup> Letter from Archibald Dick to Attorney-General Eberts, 6 June 1898, Attorney-General Records, GR 429, box 4, file 2, BCARS.

<sup>137</sup> Roy, *White Man's Province*, 137-38. For a discussion of Semlin's exclusionist policies after this election, see Lambertson, “After *Union Colliery*.”

<sup>138</sup> *Ibid.*, 39-40.

allowance of discriminatory legislation. For example, in 1878, Victoria's Chinese merchants sent a petition to the Governor-General, protesting against the *Chinese Taxation Act*, and the Chinese ambassador in Britain made representations on their behalf.<sup>139</sup> Also, in 1884, the Victoria Chinese established the Chinese Benevolent Association with the express purpose of "uniting the Chinese in British Columbia in their protest against the discriminatory laws of the province," and there are several references in the association's records detailing political activity against this discriminatory legislation.<sup>140</sup> Finally, there is also considerable evidence that the Chinese community was relatively litigious. Besides the five Chinese cases already mentioned in this paper, between 1 January 1885 and 1 January 1895 there were in British Columbia 99 lawsuits with Chinese plaintiffs and 118 with Chinese defendants.<sup>141</sup>

Nevertheless, there were strong class divisions within the Chinese community — it did not defend all of its members equally, for the Chinese Benevolent Association primarily represented the interests of Chinese merchants, not the interests of "ordinary" Chinese. This may be one reason why the Chinese assumed a passive role with regard to the *Union Colliery* case. While discrimination in the coalfields would have concerned the Association, since unemployed Chinese often migrated to Victoria seeking work or assistance, it did not threaten Chinese business interests as seriously as had the earlier *Chinese Taxation Act*. Consequently, the community leaders chose not to litigate the offending provisions of the *CMRA*, and adopted a low profile so as not to exacerbate the province's volatile political situation. In fact, during this period the Association cautioned Chinese not to emigrate to British Columbia, sending a notice to China which warned that economic conditions were onerous and that Chinese had been "prohibited from underground work in the Nanaimo coalmines."<sup>142</sup>

The new litigation came before Mr. Justice Drake in May 1898, and from the beginning people questioned the motives of John Bryden. A newspaper article noted that:

<sup>139</sup> "Petition of Chinese Merchants to His Excellency the Governor General," and letter from Sir M. E. Hicks-Beach to the Marquis of Lorne, in W. E. Hodgins, ed., *Correspondence*, 1061 and 1063-64.

<sup>140</sup> Chuen-Yan Lai, "The Chinese Consolidated Benevolent Association in Victoria: Its Origins and Functions," *BC Studies* 15 (1972): 54.

<sup>141</sup> *Supra*, note 72, at 132.

<sup>142</sup> Chuen-Yan Lai, "Chinese Attempts to Discourage Emigration to Canada: Some Findings from the Chinese Archives in Victoria," *BC Studies* 18 (1973): 35.

The publication in the *FREE PRESS* on Saturday evening of the fact that John Bryden, a shareholder of the Union Colliery company, had entered a suit in the Supreme Court to prevent the Company from employing Chinamen in the Union Colliery in contravention of the anti-Chinese clause of the Coal Mines Regulation Act, was received with astonishment by some, while others went so far as to say it was either a joke or a fake. The report was absolutely true, even if it does appear a strange procedure.<sup>143</sup>

The trial lawyer for the provincial government also suspected Bryden's motives and "entered an objection on the ground that the suit was instituted by an interested party, which indicated collusion."<sup>144</sup> Indeed, even the notes in Drake's bench-book indicate that he agreed with the government that it was "a collusive action" and they provide an example of jurisprudential Freudian slippage when he refers to the case as "*Dunsmuir v. Union Colliery*." However, he heard the case, maintaining that it was merely "a friendly action in order to raise the question for another tribunal."<sup>145</sup>

Two main issues were placed before the court: Bryden claimed that the Union Colliery Company was employing Chinese in positions of trust in violation of section 97, Rule 34 (previously Rule 33 of the 1877 *CMRA* legislation), and he further claimed that the company was employing them as labourers below ground, in violation of section 4 (the 1890 *CMRA* amendment).<sup>146</sup> At trial it became apparent that there was no evidence to support Bryden's first claim, and it was dropped; the case now hinged on the second claim of underground employment. However, the outcome of the trial was a foregone conclusion, since Drake was the presiding judge and he had supported the impugned section in the earlier reference case. As he wrote in his decision, although the evidence contradicted allegations that the Chinese were dangerous as coalminers, he would follow the Full Court reference decision for he saw "no reason for changing the opinions therein expressed."<sup>147</sup> The Union Colliery was legally obliged to cease employing Chinese underground.

James Dunsmuir and his co-litigants (including J. P. Huntington of

<sup>143</sup> *Nanaimo Free Press*, 9 May 1898.

<sup>144</sup> *Victoria Daily Times*, 10 May 1898.

<sup>145</sup> Montague W. T. Drake, "Case-book Notes," GR 1727, box 608, 133, 135, 138, BCARS. Drake corrected the title of the case by scratching out the name of Dunsmuir and substituting that of Bryden.

<sup>146</sup> H. Maurice Hills & Co., "John Bryden's Statement of Claim in the Supreme Court of British Columbia," 16 February 1898. GR 419, box 78, file 27, 1899, BCARS.

<sup>147</sup> *Bryden v. Union Colliery*, 14 May 1898. GR 1589, Reel B-6260, vol. 3, 362, BCARS.

California)<sup>148</sup> then appealed to the Full Court of the SCBC. Not unexpectedly, on 20 August 1898 the law was found to be *intra vires*, for the judgment of the court was delivered by the ubiquitous Mr. Justice Drake, who referred to the reference case when he said that “the opinion of the Full Court has already been expressed . . . and we concur in it.”<sup>149</sup> As a result, Dunsmuir chose to appeal to the JCPC.

Meanwhile, Frank Little’s appeal from his 28 April conviction reached the SCBC Full Court on 10 November 1898. In the second case of *Regina v. Little*<sup>150</sup> the judges dismissed the appeal with costs, after the lawyer for the Crown pointed out that the issue of constitutionality had previously been decided by *In re The Coal Mines Regulation Amendment Act, 1890*, and also followed in *Union Colliery v. Bryden*, which was being appealed to the JCPC.

The legislation clearly was having a serious impact upon the Dunsmuir operations. By the time Dunsmuir decided to appeal to the Privy Council the exclusionist Charles Semlin had become Premier (in August 1898), and the Union Colliery had been faced with so many successful prosecutions that Dunsmuir had asked the government to refrain from any further action until the JCPC decided the case.<sup>151</sup> This ploy does not seem to have been successful, for by the time that the case was about to be heard, the company had been obliged to fire all of its Chinese miners, was worried about the possibility of anti-Japanese legislation that would further limit its ability to hire cheap Asian labour, and was asking for a speedy resolution of the case, which was leading to “loss and great inconvenience.”<sup>152</sup>

<sup>148</sup> Supra note 49.

<sup>149</sup> *Bryden v. Union Colliery*, 20 August 1898. GR 1589, Reel B-626I, vol. 5, 366, BCARS. The judge added that “the manner of testing the validity of the section by the present proceedings seems most unusual. The plaintiffs, in effect, attack the conclusion come to by the Legislature that the employment of Chinese underground is undesirable. In short, the declaration of the Legislature to that effect is controverted, a proceeding hitherto probably unheard of in a Court of law, and it is needless to point out that as between the two divergent opinions, that of the Legislature must prevail.”

<sup>150</sup> *Regina v. Little*, B.C.R. vol. VI, 1898, 321.

<sup>151</sup> Letter from Robert Cassidy (Union Colliery counsel) to Attorney-General Eberts, Attorney-General Records, GR 429, box 4, file 2, BCARS. See also a series of receipts from F. D. Little “deposited under protest to stay distress pending proceedings by certiorari to quash conviction” dated 27 June, 9 May, and 8 October 1898. At a fine of \$25.00 per conviction, plus about \$7.00 costs per conviction, these receipts add up to almost \$1700.00, a considerable “tax” for employing Chinese miners. See Attorney-General Records, GR 429, box 5, file 2, BCARS.

<sup>152</sup> Letter from Longbourne, Stevens and Co. (for the appellant) to Gard, Hall, and Rook, contained in a letter from Gard, Hall, and Rook to the B.C. Attorney-General, 24 March 1899, Attorney-General Records, GR 420, box 4, file 4, BCARS. Having fired its Chinese employees, the Union Colliery first sought to replace them with Japanese workers. This ploy

The JCPC heard the case in July 1899, with the British Columbia government intervening in support of the legislation. Lord Watson wrote the decision, and although he is famous for decentralist decisions which favoured provincial legislation, in this case he declared the legislation *ultra vires*, ordering Bryden to pay the costs of the appeal as well as those of the lower courts. This decision was a triumph of formalism, based upon purely legal principles, and eschewing any reference to the “sociological” realities of the day. As he said, “it is the proper function of a court of law to determine what are the limits of the jurisdiction [of legislatures] committed to them; but when that point has been settled, courts of law have no right whatever to inquire whether their jurisdiction has been exercised wisely or not.”<sup>153</sup>

The decision rested upon two premises. Lord Watson maintained, first, that any law whose main focus was the rights of naturalized citizens and aliens fell within federal powers under subsection 25, section 91 of the *BNA Act*. He then argued that the “real” focus of the *CMRA* was certain naturalized citizens and aliens (i.e., Chinese miners). He claimed, as if it were a self-evident proposition, that “the whole pith and substance of the enactments of s. 4 of the Coal Mines Regulation Act . . . consists in establishing a statutory prohibition which affects aliens or naturalized subjects, and therefore trench upon the exclusive authority of the Parliament of Canada.”<sup>154</sup> In accordance with the accepted principles of statutory interpretation of the time, he did not consider any evidence which might suggest that the British Columbia legislature had truly intended, when passing the *CMRA* amendment, to enact legislation for safety reasons.<sup>155</sup>

The result of this decision, of course, was that the Dunsmuir empire was now able to hire Chinese; the division of powers set out in the constitution had protected, through the unstated extra-legal values of Lord Watson, the classical liberal principle of freedom of com-

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was checked by an amendment to the *CMRA* on 27 February 1899, which included Japanese as a prohibited source of labour in underground mining. Although this amendment was subsequently disallowed on 24 April 1900, it appears to have been a significant inconvenience for the Union Colliery at the time. *An Act to amend the “Coal Mines Regulation Act”* S.B.C. 1899, c. 46; Francis H. Gisborne and Arthur A. Fraser, *Correspondence, Reports of the Minister of Justice, and Orders in Council Upon the Subject of Provincial Legislation 1896-1920*, vol. II (Ottawa: King’s Printer, 1922), 585; Roy, *White Man’s Province*, 141.

<sup>153</sup> *Union Colliery Co. v. Bryden*, 585.

<sup>154</sup> *Ibid.*, 581.

<sup>155</sup> There was an attempt by the defenders of the *CMRA* to demonstrate that it had been passed as safety legislation, but Lord Watson dismissed this, saying “In considering the issue to which the case has thus been narrowed, the evidence led by the parties appears to their Lordships to be of no relevancy. It is chiefly directed to the character, whether reasonable or unreasonable, of the legislation which has been impugned by the appellant company.” *Ibid.*, 584.

merce.<sup>156</sup> The clear losers were the white miners of British Columbia whose political activity had finally been check-mated by the Dunsmuir.

The case should therefore be seen as a triumph for property rights, especially the property rights of the wealthy. Although the Dunsmuir group had lost its ability to dominate the British Columbia legislature, the shareholders of the Union Colliery had retained the right to exploit cheap Asian labour. For Bryden, of course, losing the case was hardly a disaster; all of the evidence suggests that he embarked on the litigation with the hope that he would lose. On the other hand, he was ordered to pay the court costs, and although he was not a poor man, this might have been a considerable financial burden. Since this was a collusive action, one might have expected that the Union Colliery company would have borne the actual costs, but master exploiter James Dunsmuir went one step further. On 19 September 1899, he ordered the manager of the mine to deduct "fifty cents per month of each Chinaman working around and in the mines, including those working for the miners until further advised. This is to cover part of the cost of carrying the Chinese case to the Privy Council."<sup>157</sup> Obviously John Bryden was not going to be left in the financial lurch by his brother-in-law.

For the Chinese workers, contrary to what one might believe on reading accounts in "traditional" legal literature, the decision was therefore only a qualified victory. They retained their right to work underground in the coalmines of Vancouver Island, but they were now earning even less than before the legal battle. *Union Colliery v. Bryden* is more of an example of how litigation can protect the economic rights of the wealthy than an example of how courts can protect the human rights of the weak. The Chinese, like the white miners who opposed them, still remained the pawns of the powerful.

<sup>156</sup> F. Murray Greenwood has examined the decisions of the Privy Council in order to determine the extra-legal influences which affected its decision-making. He concluded that the decentralist tendencies of Lord Watson were less a result of a concern for the principles of federalism than a desire to enhance the prestige and legitimacy of the JCPC. However, the *Union Colliery* decision was centralist in its impact, an exception to the general rule. Although Greenwood has concluded that "statistically speaking, no pro-business bias is evident before or during Lord Watson's period of activity on the Board," it is highly likely that in this case at least a freedom of commerce bias underpins the decision. F. Murray Greenwood, "Lord Watson, Institutional Self-Interest, and the Decentralization of Canadian Federalism in the 1890's," *University of British Columbia Law Review* 9 (1986): 244.

<sup>157</sup> "Alex Fraser Buckham Collection," ADD MSS 436, box 21, file 1, BCARS. Dunsmuir later used this ploy to finance the costs of arbitration (concerning the employment of Asians) under the *CMRA*. See *Ibid.*, letter to the Wellington Colliery, 12 January 1900; letter of 9 April 1900, to George W. Clinton, Union, B.C.; and letter to the Wellington Colliery, 27 April 1900.