The Legal Career of John G. Diefenbaker

by Ken Whiteway

I. INTRODUCTION
John George Diefenbaker, the thirteenth person to become Prime Minister of Canada, was a practising lawyer for over thirty-seven years. He was called to the bar in June 1919 and retired when he became leader of the Progressive Conservative Party in December 1956. Most of the writing about him has understandably centred on his political career; however, Diefenbaker was not elected to public office until 1940 at the age of forty-four. Prior to that, he had earned his living exclusively as a barrister and solicitor in small-town Saskatchewan, and his experiences there shaped both his political outlook and his work methods. This paper gathers together information about Diefenbaker’s legal career which is scattered through primary and secondary sources. Perhaps the most noteworthy thing that results from this examination is that, his reputation to the contrary, only a small percentage of his cases dealt with criminal law.

Throughout Diefenbaker’s political life, his contemporaries repeatedly referred to the way in which his legal career had shaped his character. One of his colleagues noted that during Cabinet meetings:

...[if there wasn’t a consensus and he didn’t think the person holding out was a fool, to the exasperation of those of us who knew we were on the right course and wanted to get on with it, he’d roll it over, bring it up another time, try to bring him around, almost like a lawyer trying to bring a jury around so you’ve got all the twelve heads nodding.]

Another said:

One of the things that stands out in my mind about John Diefenbaker is that, while he had great concepts, he was not strong on an actual program by which they would be implemented. Perhaps this was the result of his training as a defence counsel. It was not his responsibility to build a positive case, it was his responsibility to destroy the Crown’s case. I think maybe that this training, this whole background and attitude, made it difficult for [him] to sit down and plan out step by step the positive program.

Even his political opponents made legal analogies:

Mr Diefenbaker is one of those people who is a merchant of words and when he says something he thinks he has done something. Now, I attribute this to his long period in opposition, to the fact that he was a courtroom lawyer where when you say something and it is effective you have done something. I also attribute it to another thing; that he was a loner. He never learned how to work cooperatively.

II. LEGAL EDUCATION
When Saskatchewan was established in 1905 no law school existed in the province. Students with Bachelor of Arts degrees articled in a solicitor’s office for three years; those who had graduated from high school articed for five years. While articling, students wrote three annual exams set by the Law Society and, if successful, were admitted to the bar. From 1907 in Regina and 1910 in Saskatoon, informal lectures were given by practitioners to help students prepare for the examinations.

The College of Law was established as the fourth college of the University of Saskatchewan in 1913. In the same year a second law school, Wetmore Hall (named in honour of the first Chief Justice of Saskatchewan,
Edward Ludlow Wetmore), began accepting students in Regina. It offered a three-year course but, unlike the University of Saskatchewan, it did not grant degrees in law. During its first decade, the College of Law conducted classes in downtown Saskatoon in the McKay Block, the Canada Building, the Masonic Temple, the Willoughby Sumner Building, and the National Trust Building.

Diefenbaker received his B.A. in May 1915 and his M.A. a year later. He took two law classes (jurisprudence and contracts) during his second undergraduate year, and studied constitutional law as part of his graduate work. In 1914, he was admitted to the law programme and took municipal, company, and sales law, and received credit for some of his political science classes. With World War I in progress, Diefenbaker was commissioned as a lieutenant in the Canadian army on 27 May 1916. He entered into articles with Russell Hartney of Saskatoon on 12 June 1916 at a salary of $15 a month but resigned on 22 August 1916, and was called up for active service within a few days.

Following active service and convalescence (25 August 1916 to 1 April 1918), he returned to work with Hartney, but his articles were assigned to Frederick Finlay MacDermid (of Ferguson & MacDermid) on 18 June 1918. Diefenbaker stayed with MacDermid for only about three months. As MacDermid later explained: “We didn’t get along too well. Any student I had, I wanted him in the office looking after business but he was always running around, into politics. So we soon parted ways.”

Diefenbaker re-enrolled in the College of Law in September 1918. The law classes he had taken during his undergraduate arts degree gave him credit for nearly one year of the three-year law course and the university credited him with an additional year for his time spent overseas (October 1916 to February 1917). Unfortunately, the flu epidemic of 1918 kept the university closed until late December. In the meantime, he continued his articles with Thomas Andrew Lynd (of Lynd & Yule) to whom they were assigned by MacDermid on 17 September 1918. Also at this firm was his former classmate Emmett Hall, and the paths of these two men would continue to cross throughout their careers.

Diefenbaker’s favourite teachers were Arthur Moxon, Donald Maclean, and Ira Allen MacKay, all of whom had come to the University of Saskatchewan from Nova Scotia. He said:

[Dean Arthur Moxon] could have touched the heights in law. He had a great heart, and his knowledge and appreciation of jurisprudence brought that subject to life for us. No student I know who was privileged to have had him as professor but would agree with me that no one was his equal as a teacher.

Of MacKay, Diefenbaker wrote:

No one had a greater influence on me in university than he... he had that quality essential to a great teacher, the power to inspire. He was a man of much wisdom and I remember many of his lessons. He judged that a people can never be made good by legislation, a point that many of us never learn.

In 1920 when a furore arose at the University of Saskatchewan over the firing of four professors by President Walter C. Murray who alleged they were trying to undermine his authority, Diefenbaker returned to help lead the unsuccessful attempt in Convocation to have the four professors, one of whom was Dr. MacKay, reinstated.

By May 1919, Diefenbaker had completed the nine classes required for the law degree. He also benefited from an agreement dated 20 March 1919 which provided that:

[The students of Wetmore Hall having passed their first and second intermediate exams (i.e., all but the final-year exam) would be exempted from the first two years of law studies and could receive an L.L.B. degree after one further year of university law studies. Correspondingly, university law students would be exempted from the first two professional exams, being required to successfully complete only the final Law Society exam at the end of their articles.]

Immediately after graduation he wrote his final bar exam and was relieved of the requirement to spend any more time under articles.

Even at a time when legal education was just becoming formalized, Diefenbaker seems to have received an unusually small amount of legal training. His studies comprised some legal courses taken as an undergraduate and graduate student, less than five months at law school, and about eleven months of sporadic articling. Nonetheless, he ranked seventh of the thirty-nine candidates who wrote the final exam.

Diefenbaker signed the roll of the Law Society in Regina on 30 June 1919 and later recalled:

As a young boy, I had set my mind on becoming a lawyer. My ambition was now realized. What my boyish determination had not included was an understanding that a call to the bar was a beginning, not an end, and that indeed there was no end to the law. Canadian law, like English law, is a living thing, subject to constant change. That combination of tradition, statute, and judicial decision constituting the law provides at any one time the most exact and
complete expression of what we are as a society... [A] call to the bar assures only that one has read and learned enough law to begin in earnest the process of learning the law.14

III. WAKAW

Diefenbaker must have been making plans prior to his admission to the bar because the following day, 1 July 1919, he opened his law office. He wanted to practise on his own and, after consultation with Saskatoon lawyer David Kyle, had decided on Wakaw (population 600) which was about equidistant from Prince Albert, Saskatoon, and Humboldt. Much later in life he was quoted as saying:

In determining where in Saskatchewan to set up practice, I took account of criminal and civil court cases in each area, and two places, above others, seemed to commend themselves: Theodore, a village near Yorkton, and Wakaw. I decided on the village of Wakaw. It was in that part of the province which I knew best and it was alleged that there were more murders in Wakaw than drunks in Saskatoon.15

Diefenbaker had many professional dealings with Wakaw Justice of the Peace, J. H. Lewis, and Prince Albert District Court Judge, Algernon Edwin Doak. His only legal competition in the town (until 1923) was Arthur E. Stewart. His first client was his brother Elmer who came up from Saskatoon for a vacation. Diefenbaker recalled:

He sought my advice on a particular matter and, expressing the belief that those who practise law should be paid in cash, he gave me one dollar, which in his words, was worth more than any advice I could give.16

His first court appearance began inauspiciously. During a chambers ex parte application before District Court Judge E. A. C. McLorg, Diefenbaker somehow managed to get his foot caught in a wire wastepaper basket.17 But, from the outset, he seemed able to appreciate the humorous aspects of legal life:

There are many amusing stories about the J.P. courts. One concerns a Justice of the Peace who had brought before him information that Mr. X had removed from a slough a small boat — a punt — that did not belong to him. The J.P. had his copy of the criminal code. He went through it and concluded that the offence committed by the alleged wrongdoer was not theft. Theft was defined among other things as taking from the possession of him who has. He decided that since the punt was on the slough it could not have been in possession of its owner. He finally came on to what he regarded as an appropriate charge: piracy on the high seas. It was only after Mr. X was convicted that the Justice of the Peace discovered that the penalty for piracy was death!18

Many of Diefenbaker’s reminiscences have a distinct after-dinner-speech tone:

Justices of the peace did their part. I think of one that I appeared before. He came from continental Europe. One of the first qualifications to be a J.P. was to be a Liberal. To disqualify oneself from such an appointment was to be other than a Liberal. The charge against my client... was that he did insult the complainant... I said, “What is this anyhow?” He said, “You know what hits is, that’s assault. You know what bad words is, that’s insult. This was both.”19

The first big case to come Diefenbaker’s way was R. v. Chernysh20 in which he defended a man charged with criminal negligence for shooting a neighbourhood boy at twilight in the mistaken belief that the child was an animal.21 The trial began at Humboldt on 23 October 1919 and was presided over by the Chief Justice of the Court of King’s Bench, James Thomas Brown. Emmett Hall was serving his articles in Humboldt at the time and, because of his knowledge of the local populace, helped Diefenbaker with jury selection.22 Hall, through conversations with the judge over dinner, also helped Diefenbaker to shape the presentation of his case, a practice which would not be viewed favourably in more recent times.23 Diefenbaker won an acquittal and pocketed a substantial fee of $600. To indicate just how large a sum this was in 1919, it could be noted that the entire cost of materials to build Diefenbaker’s law office in Wakaw was $480.08.24

The life of litigators in a small Saskatchewan town at this period has been carefully described elsewhere.25 Diefenbaker and Arthur E. Stewart, Wakaw’s two lawyers, spent most of their time in one of three courts: minor criminal matters were dealt with by the Police Court, appeals were heard by the District Court usually by way of a new trial, and serious criminal matters were heard by a King’s Bench judge and jury in Prince Albert. Most civil matters were handled by the District Court, which sat twice a year in the Wakaw town hall.

Initially Diefenbaker made quite a good living from his law practice. He had an annual net income of $3600 in 1920 and $2400 in 1921.26 However, the economic climate cooled in the early 1920s and he was often paid in wheat for his professional services. He supplemented his income by acting as a collection agent, arranging mortgage loans, and selling insurance.27 He hired his former classmate Michael Stechishin as an articling student. Stechishin’s fluency in Ukrainian was of great help in dealing with many of Diefenbaker’s clients who originally came from Ukraine. Stechishin moved to Yorkton in 1921 following his call to the bar.

In 1922, Diefenbaker was involved in one of the cases that laid the foundation for his reputation as a defender
of minority rights. It was also his first reported case. In *Boutin v. Mackie*, Diefenbaker handled the appeal from a summary conviction of two school trustees charged with knowingly permitting French to be used as the general language of instruction in their school. He won the appeal on a very narrow legal argument and in spite of the fact that the judge, A. E. Doak, very obviously wished to convict the appellants. The judgment, in effect, permitted the continued *de facto* use of French.

Diefenbaker was unwell during 1922 and 1923 and was admitted to hospital in November. The illness apparently affected his work to a certain extent. In one case he paid insufficient attention to a Montreal lawyer's instructions and months passed during which he repeatedly failed to supply requested documents. In July 1923, he hired Alexander A. Ehman to assist him.

In early 1924, Diefenbaker made his first appearance before the Saskatchewan Court of Appeal in Regina.

As a young boy, I had set my mind on becoming a lawyer. My ambition was now realized. What my boyish determination had not included was an understanding that a call to the bar was a beginning, not an end, and that indeed there was no end to the law.

The matter involved the digging of a well and the sum of $125. While this was not a particularly auspicious case with which to begin his appellate career, Diefenbaker was, at least, successful. A few months later, he also convinced the Court of Appeal to order a new trial owing to a judge's faulty charge to a jury.

**IV. PRINCE ALBERT**

Diefenbaker moved to Prince Albert in the summer of 1924 and set up his office in a bank building on Central Avenue. Frank Clifford Cousins joined Diefenbaker as a junior partner in early 1926. Alexander Ehman remained in Wakaw for only about six months after Diefenbaker's departure. He was replaced by Alexis Etienne Philion, then by Richmond B. Godfrey and the firm name became Diefenbaker, Cousins & Godfrey. Cousins died of a heart attack at the age of thirty-three on 9 June 1927. During this period Diefenbaker handled several cases which, although apparently rather trivial, found their way into the law reports. They concerned matters such
as child custody, agricultural fixtures, whether a new roof constituted an “addition” to a building, a controverted election, and the effect on a mechanic’s lien of a contract executed on a Sunday in contravention of the Lord’s Day Act. One of his 1929 cases, however, attracted a good deal of attention. The case was R. v. Olsen and it stands for the proposition that a judge may comment on the evidence during the course of a trial so long as the judge makes it manifestly clear to the jury members that they are the sole arbiters of the facts in the case, including the credibility of the witnesses.

He also defended John Pasowesty, a seventeen-year-old sentenced on 21 November 1929 at Wynyard for the murder of his father, Nick. Pasowesty’s defence was that his mother, Annie, had committed the crime and convinced her son to confess to it. The jury deliberated for seventeen hours before finding him guilty. Diefenbaker sent a long telegram to the Minister of Justice asking for a reprieve because Pasowesty, according to several experts, had the mental development of a twelve-year-old. The death sentence was later commuted to life imprisonment by the Cabinet.

By 1929, the Wakaw branch office was closed and Diefenbaker was again practising alone under the style of Diefenbaker & Co. He then formed the firm of Diefenbaker & Elder with William G. Elder, but the partnership dissolved in the summer of 1932.

The 1930s began with a string of minor cases involving custody, slander, and the Juvenile Delinquents Act. But in 1931 Diefenbaker became involved with a rather complicated civil action in which he represented a company that supplied railway ties to the Canadian National Railways. The issues in the litigation involved a resulting trust and the lack of consensus ad idem regarding the terms of an agreement between the company and one of its sub-contractors. Diefenbaker’s arguments were perfectly sound, but he lost the case. The next year, when the same parties returned to the Court of Appeal on a related matter, Diefenbaker had been replaced as the company’s counsel by A. E. Bence, K. C.

Unlike many people on the Prairies, Diefenbaker’s financial position during the Depression was remarkably good. By way of comparison, a prominent Saskatoon lawyer, J. M. Goldenberg, was netting about $2000 per year during the same period and Judge Walter H. Nelson knew of a lawyer working on a City of Saskatoon road crew for $3 a day in 1933. Henry C. Rees, Q.C. recalled receiving “an occasional pig in lieu of legal fees, and his friend and one-time associate Philip McMeans at Blaine Lake received a substantial portion of his fees in chickens, turkeys, dill pickles and borscht”. As the Depression wore on, Diefenbaker’s income dropped slightly but remained at about $3500 per year between 1936 and 1938.

Diefenbaker still seemed to have the occasional case to which he did not pay sufficient attention. One such case involved a claim to the Irish Grants Committee which was created to compensate people who had suffered injuries or lost property in the Irish Free State. He was retained by a client on 1 December 1926 who asked him to inquire about an application for a grant of reparation. Despite urging from the client, Diefenbaker kept delaying the matter until the Committee had been disbanded. He was still working on the file as late as 1932.

It was during this period that Diefenbaker undertook one of his most controversial defences. The case involved Alex Wysochan who was accused of the murder of his lover, Antena Kropa. Adrien Doiron of Vonda appeared for the accused at the preliminary hearing held on 3 and 4 January 1930 in Humboldt but Diefenbaker and Elder represented him at the trial.

The theory of the prosecution was that Wysochan, thwarted in his attempt to run off with Antena, had forced his way into the home of Antena and her husband, Stanley. Alex was drunk and brandishing a pistol. Stanley managed to escape through a window to summon aid and, when the police returned to the house, they found Antena mortally wounded and Alex suffering from a minor flesh wound. The theory of the defence was that Stanley had done the shooting, although this was not helped by the fact that, as she was carried from the house, Antena called for her husband and said: “Stanley, help me out because there is a
bullet in my body." The prosecution argued, quite reasonably, that Antena would hardly ask her husband for help, and tell him that she had been shot, if he were the person who had shot her. Another damning piece of evidence came from a witness named Ross Bell who testified that he had seen a revolver in Wysochan’s possession about a week before the murder. 

There was evidence from witnesses at the scene that the accused was intoxicated and, at the inquest into Antena Kropa’s death, Dr. H. R. Flemming testified that when Wysochan was taken into custody “he was either in a drunken stupor or semi-unconscious and he wouldn’t talk until the next day”. Diefenbaker marked this passage in the transcript and could have relied upon it to raise the partial defence of drunkenness which might well have resulted in a conviction for manslaughter only. Instead, he entered a plea of not guilty. Wysochan was convicted of murder and became, on 20 June 1930, the first prisoner to be hanged at the Prince Albert penitentiary. Diefenbaker maintained that his client had instructed him to plead not guilty, although one is left to wonder whether a recently arrived immigrant who spoke very little English, and who was unfamiliar with the Canadian legal system, could effectively instruct counsel on such a matter.

Diefenbaker further states in his memoirs that “[a] few months after the execution it was established that he was innocent”. Since it is unclear what this evidence was, and nothing about it appears in the file, he is probably simply trying to justify his strategy in the case. He seems, for example, to have expected that Antena’s plea to her husband for help would be excluded as hearsay. It was unlikely that Antena would ask Stanley for help if he had shot her, and equally unlikely that Wysochan would have escaped with only a minor wound if Stanley were the assailant. It was probable that Wysochan intended to kill Antena and her husband but, when Stanley fled, Wysochan shot Antena and then tried to commit suicide. It has been noted that Diefenbaker was recovering from a lengthy illness at the time of the trial; perhaps this affected his judgment. Given the circumstances, the credibility of his client, and the fact that a plea of not guilty required his client to take the stand and be subjected to cross-examination, a defence of drunkenness would have been more prudent. Even his partner, William Elder, appears to have had second thoughts about Wysochan. In a letter to Diefenbaker dated 17 June 1930, he stated: “...I have somewhat changed my mind in respect to the case. I don’t think that we should lose any sleep over the matter whatever.” Interestingly, in the next criminal case he handled in which drunkenness was a potential issue, R. v. Harms, Diefenbaker raised that issue immediately (see below).

John Marcel (Jack) Cuelenaere joined Diefenbaker as an articling student in the spring of 1933. The two were associated in the practice of law for twenty-three years which constituted Diefenbaker’s longest professional partnership. Cuelenaere was particularly adept at legal research and case preparation. (He was also at one time President of the Saskatchewan Young Liberals, a fact which Diefenbaker did not seem to hold against him.) It seems likely that Cuelenaere’s organizational ability and excellent research skills now allowed the firm to undertake more complex litigation. For example the Bondholders Securities Corp. v. Manville cases dragged on for over two years and involved issues such as conflict of laws, the capacity to contract, misrepresentation, and the endorsement of promissory notes. Although he was ultimately on the losing side, in Cassidy v. Blaine Lake Rural Telephone Co. he helped to determine the nature of the employment relationship and the elements necessary for such a relationship to be established for the purposes of (as it then was) The Workmen’s Compensation Act. Even the quality of Diefenbaker’s criminal work improved. His presentation in R. v. Bobur included astute arguments concerning the removal of evidence from a prisoner by the police and the admissibility of statements made by an accused.

In 1934, just prior to the fall of the J. T. M. Anderson government to the Liberals under James G. Gardiner, Diefenbaker acted briefly as the agent for the Attorney General in Prince Albert; however, his term of office was so short that he did not have the opportunity to prosecute a case. Ultimately this may have worked to his benefit since it would have been difficult for a former Crown attorney to gain a reputation as a defender of the underdog. While in office the Conservative government had taken the opportunity to reward party loyalists and Diefenbaker had been named a King’s Counsel in the provincial honours list of 1 January 1930.

Orest Bendas (later a judge) worked as a junior associate with Diefenbaker and Cuelenaere for a year in 1938-39. Russell L. Brownridge, who was appointed to the Saskatchewan Court of Queen’s Bench in 1959 and to the Court of Appeal in 1961, articulated with the firm beginning in September 1939. E. N. "Jiggs" Davis had begun his articles with the firm a year earlier but resigned without completing them and moved to Ontario to become a senior executive for industrialist E. P. Taylor.

The period 1934 to 1939 was a particularly busy one for Diefenbaker. During that time he handled over a dozen cases that were considered to be important enough to appear in the law reports. In Hazlett v. Ross, he successfully argued that when an accused
elects to be tried summarily on a charge, and the magistrate finds that the evidence does not establish the offence but does establish a greater offence, the accused must be informed specifically of the nature of the new charge and of his right to re-elect to be tried summarily, before the magistrate has jurisdiction on the new charge. *Camrud v. Hendry* was an affiliation proceeding in which it was held that the gift of a pair of shoes by a putative father to an illegitimate child did not constitute a payment of “money for the maintenance of the child” within the meaning of the limitation section of what was then *The Child Welfare Act*. He represented the accused in an early Native Law case, *R. v. Smith*, which held that the *ejusdem generis* rule should not apply to the phrase “or other purposes” following the words “settlement, mining, lumbering” in the treaty made between the Crown and certain Indians near Carlton on 23 August 1876, and that, therefore, game preserves were not unoccupied Crown lands to which Indians had a right of access within the meaning of paragraph 12 of the Natural Resources Transfer Agreement of 1930.

Some relatively minor cases from this period dealt with matters such as: successfully defending a client charged with the crime of seduction, the definition of the word “willfully”; an action for liquidated damages; proper procedure in sentencing; amending a notice of motion; the extension of the limitation period for an action brought under *The Vehicles Act, 1935*; obtaining money by false pretences; division of the proceeds of insurance contracts; the recovery of a prize awarded by mistake, employer’s negligence, interim alimony, and living on the avails of prostitution.

In many ways, *R. v. Harms* represents the pinnacle of Diefenbaker’s career as a criminal defence lawyer. At the trial of this murder case he raised, and ably argued, the issues of self-defence, provocation, and drunkenness. His work on the appeal was meticulous and he successfully challenged the trial judge’s charge to the jury on several points, using to support his arguments material such as recent House of Lords’ decisions and a current article from the *Canadian Bar Review*. In the end, Harms was found guilty of the reduced charge of manslaughter and was sentenced to fifteen years. It has been suggested that Cuelenaere did the research in this appeal. Whoever in the firm was responsible for the preparation of the case, it was a model of how a criminal defence should be conducted.
At more or less the same time, Diefenbaker was also involved with a particularly complex civil case. *Hackworth v. Baker* concerned a defendant purchasing and registering an interest in a piece of real estate with knowledge of the pre-existence of an unregistered interest. The issue was whether such an action would constitute fraud under *The Land Titles Act*. This litigation dragged on for several years and occupies five large files in the Diefenbaker archives. Diefenbaker’s client was the daughter of the original owner of the property, an 80-year-old illiterate blind woman. There was certainly not a lot of money to be made from this case, and Diefenbaker must have undertaken nearly all the work on a pro bono basis. Despite the fact that the statute seemed to state plainly that, barring actual deceit or misrepresentation, notice of an unregistered transfer would not affect a subsequent registered transfer, Diefenbaker lost by only a 3-2 split on the Court of Appeal. In fact, Mr. Justice Gordon later commented that, almost up to the time that the judgment was handed down, Mr. Justice Martin, agreed with the conclusions of Gordon and Chief Justice Haultain that the actions of the defendant constituted “passive fraud”. However, after reading Mr. Justice Turgeon’s decision, Martin changed his mind and re-wrote his judgment thereby creating a three-judge majority against Diefenbaker.

On 13 April 1938, the well-known writer and naturalist, Grey Owl (who was originally Archibald Stansfeld Belaney of Hastings, England) died. His will had been drafted by A. C. Marsh, K. C., of Prince Albert. By its terms, one-half of Grey Owl’s estate was left to his daughter, Shirley Dawn, who was the issue of his cohabitation with a woman named Anaahareo, and one-half to Yvonne Perrier with whom he had gone through a ceremony of marriage at Montreal on 5 December 1936. Marsh and the women in Grey Owl’s life were unaware that he had married Angle Aguenia Belaney in Northern Ontario on 23 August 1910. Grey Owl and Angle had three children, although Grey Owl had abandoned his first family in 1925. Upon hearing of his death, Angle applied under *The Widows’ Relief Act* for a share of the estate. In the action that followed, Diefenbaker ably represented the interests of Yvonne Perrier and Shirley Dawn and, in the end, the Court quite properly awarded Angle Belaney one-third of her husband’s estate.

In *R. v. Emele*, Diefenbaker won an acquittal for his client in February 1940 on a charge of murdering her husband. The Court of Appeal ordered a new trial and he again obtained an acquittal in October 1940. Following the second acquittal, he told an interviewer that Isobel Emele represented his seventeenth and eighteenth clients to be tried for murder. These figures more than doubled the actual total; but the numbers became fixed even in Diefenbaker’s mind and he added them as other cases came along. (The firm represented Mrs. Emele on one more occasion when John Cuelenaere established her right to a share of her husband’s estate because her acquittal on the murder charge was *prima facie* evidence that she had not feloniously caused his death.)

On 6 February 1940 he made his first appearance before the Supreme Court of Canada representing the respondent in an appeal from a judgment of the Saskatchewan Court of Appeal granting an application for a prerogative writ of mandamus to compel the Mining Recorder of Saskatchewan to enter the name of the respondent in the record of mineral claims. His arguments were unsuccessful and it was to be eleven years until his second appearance before the country’s highest court.

There is evidence that Diefenbaker prepared carefully for his court appearances. For example, he would study and mark relevant passages of testimony taken at preliminary hearings to be used during his cross-examinations at trial. He also made serious attempts to acquire the research materials necessary to keep abreast of the latest developments in the law. Between 1924 and 1939 he purchased, among other items, the *Canadian Encyclopedic Digest* (Ontario and Western editions), *Canadian Criminal Cases, Western Weekly Reports*, the statutes of Canada and Saskatchewan, *Halsbury’s Laws of England, Saskatchewan Law Reports*, *Supreme Court Reports, Dominion Law Reports*, and the *English and Empire Digest*. Between 1927 and 1931, he spent over $500 on law books from Butterworth & Co. alone. On 7 February 1930 he placed an order with Burroughs & Co. of Calgary for a King’s Counsel red stuff bag ($10.00) to hold his new silk robe and a copy of Wrinch’s *Cases Judicially Noted* ($17.50). He purchased *Odgers on Pleading and Practice* in 1934, and *Modern Criminal Investigation and Clevenger on Automobiles* in 1936; he began buying the *Canadian Abridgment* but seems to have discontinued the subscription, and he subscribed to the *Fortnightly Law Journal* (published in Toronto) for several years in the mid-1930s. At the time, all of this material would have constituted a first-rate legal research collection for any law firm in the country, let alone a one- or two-man operation in central Saskatchewan.

**V. OTTAWA**

Diefenbaker was elected to the House of Commons for the riding of Lake Centre on 26 March 1940. He won by 280 votes (of 16,000 cast) over Liberal John F. Johnston. (He had previously lost in the federal elections of 1925 and 1926, the provincial elections of 1929
and 1938, and in his attempt to become mayor of Prince Albert in 1935.) During the more than fifteen years that John Diefenbaker spent as a private member of Parliament he continued the practise of law as best he could. There are many letters in the files between him and his partners in Prince Albert concerning on-going cases, new clients, and office administration. Required to be in Ottawa from fall until early summer, Diefenbaker returned to Prince Albert as often as possible—usually for Christmas and Easter breaks—and carted files back and forth. Travel was by train, and Diefenbaker secured special boxes to accommodate both his legal and political material. To the staff in the law office who packed them, the boxes quickly became the “coffins.” Many files made the round-trip between Prince Albert and Ottawa several times, and some received no attention other than the packing. He continued to attend the annual meetings of the Canadian Bar Association and was elected to a three-year term as Vice-President in 1942.

He spent a great deal of time in the early 1940s with litigation involving the White Fox Alfalfa Seed Growers Co-operative. The main issue in this case involved the duty of disclosure by an agent, but a great deal of effort was devoted to various interlocutory motions such as the discovery of documents and the striking out of pleadings. In 1943, Diefenbaker returned to Saskatchewan to conduct two tax cases, an area of law into which he seldom ventured. Both dealt with whether a company is subject to assessment for municipal business tax with respect to a business conducted on Crown property. Two years later, he helped Cuelenaere defend a client charged with selling a car for a price higher than that set by the Wartime Prices and Trade Board. And, also in 1945, he successfully defended a client charged with failure to answer a “proper question” under the Excise Act.

Roy Hall was hired by the Prince Albert firm in 1946 shortly after Diefenbaker’s second election to Parliament and during Cuelenaere’s term as mayor. “[T]he popular quotation around town was that Diefenbaker ran the country, Cuelenaere ran the city and Roy Hall ran the business.”

In the autumn of 1948, Diefenbaker returned to Prince Albert to argue a nice point of law in R. v. Iror. In this case, the client had been convicted of assault. He spent one month in jail and was then released on bond pending an appeal. The appeal was dismissed and the accused was returned to jail, not on a new warrant of commitment, but on a certificate signed by the deputy clerk of the judicial district. Diefenbaker contended that his client was being illegally detained and applied for his release under a writ of habeas corpus. The Court agreed that the certificate was not a substitute for a fresh warrant of commitment and ordered the accused to be discharged from jail.

On 9 May 1951, at Prince George, B.C., Diefenbaker began what was probably his most well-known trial. In R. v. Atherton (Canoe River Case), twenty-two-year-old railroad telegrapher Alfred John Atherton was charged with manslaughter. Railway officials claimed Atherton was negligent in incorrectly relaying a message from the CNR dispatcher in Kamloops, which resulted in the wreck of a troop train and the deaths of twenty-one soldiers and train crew members. Atherton was raised in Saskatoon; his parents still lived there and had enlisted the support of Diefenbaker’s first wife, Edna. Roy Hall did the research and groundwork for the case. Diefenbaker was ultimately able to convince the jury that the incomplete message that caused the head-on collision may have resulted from a short-circuit in the telegraph lines between Kamloops and Red Pass and Atherton was acquitted. Edna Diefenbaker had died while this case was being prepared and Diefenbaker’s hard work on it may well have acted as an anodyne.

In 1951, he also made his second appearance before the Supreme Court of Canada. Lucey v. Catholic Orphanage of Prince Albert was a relatively simple case involving the question of whether a testatrix had left her estate to an orphanage or to the individual who ran the institution. The trial and first appeal had been handled by Cuelenaere, and it seems likely that Diefenbaker joined in on the final appeal simply because he happened to be in Ottawa at the time. In 1952 he represented a client who had lost the tip of her finger in an accident on a Prince Albert bus, and appeared in a case which reiterated the right of either side to demand a civil jury trial in certain specified situations in Saskatchewan. Two years later he appeared before the Supreme Court of Canada for the third time representing the interests of a group of children who, as gratuitous passengers, were seriously injured in a traffic accident through the gross negligence of their driver.

One of the last cases undertaken by Diefenbaker was M.N.R. v. Davidson Co-operative Association. This tax case (the third and last of his reported cases on this topic) began in 1953 and dragged on until the early part of 1956. He represented a small-town co-operative that challenged its tax assessment on the basis that it was only acting as an agent for its members, that its profits belonged to the members, and that, since it had no income, it was not liable to taxation. This argument was successful before the Tax Appeal Board, but the Exchequer Court took a different view. The Court held that the co-operative was a legal entity distinguishable
from its members and that the profits generated by its business were subject to income tax. The case helped to portray Diefenbaker as someone who would go to great lengths to defend the rights of prairie farmers against Ottawa bureaucrats.

As early as 1946-47, the House of Commons was keeping Diefenbaker too busy to deal with cases efficiently. In 1954 he considered joining the Vancouver firm of Jessley, Morrison, Eckardt & Goldie as counsel. He delayed giving them an answer for several months; apparently he was reluctant to join the firm because of his political commitments and because he was concerned that he would not be able to discharge his duties effectively. In a letter to the senior partner he stated that "...I have always endeavoured to follow the course of not undertaking anything unless convinced that I will be able to do it at least reasonably well." Members of his riding association in Prince Albert were divided on whether he should accept the position and negotiations seem to have petered out.

His final appearance before the Supreme Court of Canada came in the appeal of R. v. Cathro. He managed to obtain a new trial for his client, who had been convicted of murder, by successfully challenging the trial judge's rulings in the complicated area of constructive murder and accomplices. Cathro was re-tried in the British Columbia Supreme Court, this time defended by Diefenbaker, in January 1956. He was found guilty of murder and sentenced to death, but the sentence was later commuted. Mr. Justice J. V. Clyne who presided over the second Cathro murder trial said that Diefenbaker "was very eloquent before juries and could present a persuasive argument, but it my opinion he was not a very good lawyer." He did not elaborate on why he held this view or what else, exactly, could be expected of a litigator.

Diefenbaker argued one final case in late August 1956, just a few months before he retired from the bar. This, again, was a British Columbia trial that involved the publication of pleadings in a pending libel action and whether this constituted contempt of court.

J. H. Clyne Harradence articulated with the firm and became a partner in 1955. The firm was now known as Diefenbaker, Cuelenaere, Hall & Harradence. Throughout the early and mid-1950s, Diefenbaker was unwilling to stop taking on clients, but he referred virtually every case back to Cuelenaere, Hall or Harradence in Prince Albert. His partners did most of the work, although Diefenbaker believed that it was his name and reputation that attracted many of the clients to the firm. About this time the other partners probably ceased to believe this; each was becoming well known in his own right and having Diefenbaker as a long-distance partner undoubtedly generated more headaches than billings. By 1957, both Cuelenaere and Harradence had resigned from the firm in frustration.

Diefenbaker's last contemplated legal action occurred in 1965. He had always been sensitive about his German heritage and became very annoyed over a political cartoon in which he was depicted as a Prussian soldier. As he wrote to his brother Elmer: "If you look at the first February issue (15th) [actually 26 February 1965, p. 4] of Maclean's you will find a cartoon about which I am going to sue them for libel. I have been waiting for a really good case and I think I have got one now." The suit seems never to have been initiated.

VI. CONCLUSION

Diefenbaker's legal skills were apparently most evident when he was in front of a jury. This may account for the fact that, while criminal law constituted only a small segment of his practice, he tends to be remembered as a criminal lawyer. He has been described as:

[a] superbly effective defence counsel, [who] excelled in representing accused at a time when appeals to juries tended to be more hysterical than they are now. He had a keen sense of drama and timing, and a shrewd perception of the probable impact of testimony on a jury's deliberations.

Despite this assessment, however, even with juries he seemed to do well when the trial hinged on facts (as in the Canoe River case), but was sometimes less effective when questions of law were involved (R. v. Wysoczynski).

What some commentators view as his overall failure as a political leader may have been the result of the habits he acquired early in his career. As a lawyer, he worked alone or as senior partner and was used to making all the decisions. As a young politician, he planned his own campaigns, operated largely by political instinct, and had the single-minded objective of simply getting himself elected, which he finally accomplished after five unsuccessful attempts. Once in power he found himself in unfamiliar situations, particularly in the areas of public administration and foreign affairs. He had problems with delegating and in choosing between difficult options. He seemed "unable to come to a decision on his own as long as his counsellors gave him contradictory advice".

Diefenbaker practised law for over thirty-seven years, from July 1919 to December 1956. Most of his career involved civil law and much of the work was mundane (breach of contract, divorce, debt collection, and company law). Diefenbaker himself estimates that, by the time he moved to Prince Albert in 1924, ninety-five per-
cent of his practice involved civil law. While his most interesting cases, and the ones that tended to be reported by the press, were criminal, his reputation as one of the country's leading criminal lawyers seems to be largely mythical. There were several other lawyers of the time who had far more successful careers. By way of comparison, Robert A. Bonnar, K.C., a prairie criminal lawyer of the early part of the twentieth century, lost only one of the forty-six murder trials in which he acted for the defence.

Many other Canadian political leaders had begun their professional lives as lawyers, but Diefenbaker was perhaps the only one who continued to cultivate his courtroom image. Even after he had given up practice he was still seen in the role of lawyer. One writer noted: "The election of June 1957 was ideally suited for a person with Diefenbaker's forensic talents. As a superb craftsman in the art of cross-examination, he put the more vulnerable policies of the 22-year Liberal administration in the dock and tore them to shreds." One of his Ministers recalled that his invitation to join the Cabinet was preceded by a confirming phone call: "The prime minister doesn't ask anybody to do anything unless he knows what the answer's going to be to that request. It's good lawyer's training."

As late as 1976 he was entertaining an audience of four hundred people at the Dorchester Hotel in London with reminiscences of his days at the bar. He recalled for them the shortest judgment he had ever heard which was given in response to the plea: "As God is my judge, I am not guilty." The judge had supposedly replied: "He's not. I am. You are." To the end of his life, Diefenbaker attempted to ensure that he was always viewed as the Man from Prince Albert, the small-town lawyer who fought on the side of the underdog.

NOTES:

1 Diefenbaker's political career has been the subject of a number of books beginning with P.C. Newman, Renegade in Power: The Diefenbaker Years (Toronto: McClelland and Stewart, 1963) and, most recently, D. C. Story and R. B. Shepard, eds., Diefenbaker Legacy: Canadian Politics, Law and Society since 1957 (Regina: Canadian Plains Research Centre; Saskatoon: Diefenbaker Canada Centre, 1998.)


3 Davie Fulton, ibid. p.178.


5 W.H. McConnell, Prairie Justice (Calgary: Burroughs, 1980) pp.103-5. It was not until Wetmore Hall closed in 1922, that classes were moved to the Administration Building on the University of Saskatchewan campus.

6 Diefenbaker Canada Centre Archives, John G. Diefenbaker Fonds, Legal Papers (hereinafter LP), vol. 23, file 671 pp.21270-74.


8 LP, vol. 23, file 671 pp.21282-86.

9 J.G. Diefenbaker, One Canada: The Memoirs of the Right Honourable John G. Diefenbaker, vol. 1 (Toronto: Macmillan, 1975) p.79. Moxon was created a King's Counsel in 1927 and retired as Dean of Law to enter private practice in 1929 with the Saskatoon firm of Estey, Moxon, Schmitt & McDonald. He taught at the College on a part-time basis until 1938. Moxon "used to contend that to be appointed a judge one had to be elected three times or defeated twice": McConnell, supra note 5 p.88.

10 ibid. p.80.


12 Diefenbaker p.105.


14 Diefenbaker, supra note 9 pp.93, 95.


16 ibid. p.98.

17 Diefenbaker p.92.

18 ibid. p.94.

19 J.A. Munro, p.68.

20 The case is unreported. For fuller discussions see Diefenbaker, supra note 9 pp.98-100, Smith, supra note 7 pp.35-37, and Wilson & Wilson, supra note 12 pp.1-9.

21 Diefenbaker incorrectly states that the charge was attempted murder (Diefenbaker, supra note 9 p.98). See Smith, supra note 7 p.36.

22 As Prime Minister, Diefenbaker appointed Hall to succeed Brown as Chief Justice of Queen's Bench (1957), and later elevated him to Chief Justice of Saskatchewan (February 1961) and to the Supreme Court of Canada (November 1962).

23 Hall sent the following note to Diefenbaker written on a copy of the first page of the indictment in the case (LP, vol. 7, file 136 p.6750):

we were sitting & talking with the judge & he, in commenting on the case said that the only weakness displayed in your case so far was that you had laid to [sic] much stress upon the darkness, I would comment upon it, but dont [sic] paint it [sic] too black, he is somewhat suspicious of your evidence as to the darkness - He is very favorable - he doesn't [sic] believe that the injured man is telling the truth about his actions - follows Dave's [2] line of argument re his position on the ground.

He is very suspicious of the injured man on account of the discrepancies between his testimony here & at Walkerton - Referring to the darkness the Judge is quite impressed with this fact. The light was lit inside & when accused rushed out the darkness would appear greater.

24 Smith, supra note 7 p.35.

25 Wilson & Wilson, supra note 12 p.36.

26 ibid. p.37.

27 See LP, vols. 12-14 and vol. 1, file 3.


29 Letter to Makaroff & Bates, Barristers & Solicitors, Saskatoon (22 April 1922), LP; vol. 2, file 61 at 2040.

30 Letter from A. Ehman to Western Trust Co., Winnipeg (19 November 1923), LP; vol. 23, file 691 p.15412.

31 Brochu v. Rivard (1923), LP; vol. 1, file 20.

Mr. Diefenbaker is a great humanitarian and always very much touched by hardship. He was a great defence lawyer. He was always on the side of the underdog, and he was that way as prime minister, particularly with regard to the prairie people." Howard Green quoted in Stursberg, supra note 1 p. 217.

Wilson & Wilson, supra note 12 p.229, 233; McConnell, supra note 5 p.88.


Wilson & Wilson, supra note 12 pp.202-03.


LP, vol. 3, files 67.1 to 67.5.

McConnell, supra note 5 p.193.


Wilson & Wilson, supra note 12 p.259.


LP, vol. 17, files 597.1, 597.2, 598, 600.


LP, vol. 17, file 597.2 p.15704.

ibid. pp.15823, 15849, 15889; vol. 23, file 664.

Wilson & Wilson, supra note 12 pp.251-52.

ibid. p.262.

Co. (No. 3), [1943] 2 W.W.R. 556 (Sask. K.B.); White Fox Alfalfa Seed Growers Co-operative Marketing Association v. A.E. McKenzie (No. 4), [1944] 3 W.W.R. 173 (Sask. K.B.). There was at least one other action in this serial litigation which did not involve Diefenbaker.


107 The case is unreported. For fuller discussions see Diefenbaker, supra note 9 pp.111-16, Smith, supra note 7 pp.185-89, and Wilson & Wilson, supra note 12 pp.268-76.


113 See D.G. Bautenheimer, LP, vol. 15, file 419.


120 McConnell, supra note 5 p.42.

121 Although Diefenbaker is often viewed as a political failure, it should be remembered that he was responsible for: the Bill of Rights, the Gardiner Dam; simultaneous translation in the House of Commons; the initiation of wheat sales to China and the USSR; the Winter Works Programme; calling attention to the potential for the development of the North; appointing the first woman Cabinet minister (Ellen Fairclough); appointing the first Governor-General from Quebec (Georges Vanier); and his pegging of the dollar at 92.5 cents U.S. turned out to be of economic benefit by encouraging Canadian exports. T. C. Douglas even credited Diefenbaker with helping to bring about the national hospitalization plan: see Sturges, supra note 1 pp.225-27.

122 Smith, supra note 7 p.487.

123 Diefenbaker, supra note 9 p.110.

124 McConnell, supra note 5 p.160.

125 ibid. p.49.


127 Smith, supra note 7 p.569.

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Moosomin Gaol and Governor's House. Postcards at this time, c.1930, were often sold as a set of views of a town or area. The solid gaol pictured here and Diefenbaker's early legal practice suggest that prairie settlement was not as law abiding as myth suggests.