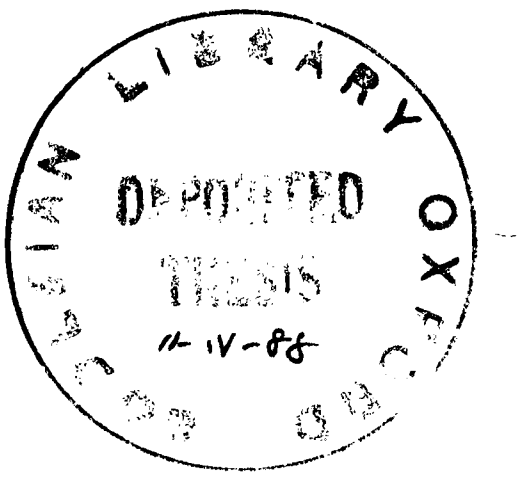
VOLUNTARISM AND COMPULSION: THE CANADIAN FEDERAL GOVERNMENT'S INTERVENTION IN COLLECTIVE BARGAINING FROM 1900 TO 1946

By Judy Fudge

University College, Oxford



A thesis submitted for the degree of
Doctor of Philosophy in the University of Oxford

Michaelmas term 1987

ABSTRACT

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In February 1944 the Canadian federal government introduced Order in Council PC 1003, a system of compulsory collective bargaining which has been conventionally characterized as the culmination of the gradual evolution in federal labour relations policy towards the greater recognition of trade unions and collective bargaining.

The issue addressed in this thesis is whether this characterization is accurate. As against the tendency to present federal intervention in collective bargaining as having developed towards some inevitable maturity, the account presented herein seeks to draw attention to the suppressed alternatives of history. Thus, the thesis begins with an examination of PC 1003'S historical antecedents dating back to 1900.

This is followed by an examination of the developments during the Second World War. Instead of concentrating upon federal collective bargaining policy as a means of responding to wartime pressures by establishing a mechanism for mediating and resolving disputes between labour and capital, the thesis emphasizes the extent to which the policy was part of the large post-war settlement. By ignoring this, the conventional account has failed to provide any guidance for understanding either the actual provisions wheich were introduced or the longevity of PC 1003 as the dominant institutional model for Canadian labour relations.

By contrast, if PC 1003 is understood as part of an attempt to forge a post-war settlement between labour and capital it is possible to identify the general thrust of the Order. Although it represented a fundamental shift in Canadian labour policy in that employers were compelled to recognize unions for the purpose of collective agreements, PC 1003 did not radically alter the balance of power to make it easier to organize or constrain managerial prerogatives. In fact, PC 1003 was consistent with the federal government's historical preoccupation with promoting responsible unions and attaining industrial peace and stability.

ACKNOWLEDGEMENTS

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LIST OF ABBREVIATIONS

ACCL	All Canadian Congress of Labour
AFL	American Federation of Labor
CBRE	Canadian Brotherhood of Railway Employees
CCCL	Canadian and Catholic Federation of Labour
CCC	Canadian Chamber of Commerce
CCL	Canadian Congress of Labour
CFL	Canadian Federation of Labour
CMA	Canadian Manufacturers' Association
CIO	Congress of Industrial Organizations
CCF	Cooperative Commonwealth Federation
EAC	Economic Advisory Committee
IC	Industrial Canada
IDI Act	Industrial Disputes Investigation Act
IDIC	Industrial Disputes Investigation Committee
LG	Labour Gazette
LPP	Labour Progressive Party
NDMB	National Defense Mediation Board
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board
NWLB	National War Labour Board
OBU	One Big Union
SWOC	Steel Workers Organizing Committee
TLC	Trades and Labour Congress
UAW	United Automobile Workers
UMW	United Mine Workers
USNWLB	United States National War Labor Board

WCRB	Wartime Labour Relations Board
WFM	Western Federation of Miners
WUL	Workers' Unity League

Introduction

Commenting upon the various accounts of the history of the New Deal, David Brody warned that the historian

> knows the end of the story and so is under a strong compulsion to see events as a steady and direct march to that end .... We have tended to write as if only one set of results were possible. And this, of course, has a deadly effect on the interpretive potential of the subject.[1]

When this tendency is added to the Whiggish proclivity to look back upon the history of an institution or an official policy and see it as the inevitable unfolding of a basic human good the deadly effect is compounded - for not only is the possibility of alternatives ignored, the existence of different evaluative standards is denied.

A Whiggish historical account has been offered of Canadian collective bargaining policy. According to conventional wisdom,[2] the federal government's intervention in collective bargaining is characterized by the gradual evolution towards greater recognition of trade unions and collective bargaining as the legitimate means of regulating the relations between capital and labour in an industrialized society. The culmination of the development of the federal government's labour relations policy of gradual recognition was the introduction of the Wartime Labour Relations Regulations, Order in Council PC 1003, in 1944. PC 1003 is seen as incorporating within the Canadian compulsory conciliation system the principles of compulsory collective bargaining basic to the American

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1 David Brody, Workers in Industrial America (Oxford: Oxford U.P., 1980) 136.

2 A.W.R. Carrothers et al., Collective Bargaining Law in Canada (2nd Ed.) (Toronto: Butterworths, 1986) 59; H.D. Woods, Labour Policy in Canada (2nd Ed.) (Toronto: MacMillan, 1973) 44-45, 338; Daniel Coates, "Organized Labour and Politics in Canada: The Development of a National Labour Code," Ph.D thesis, Cornell University, 1973,63; Laurel Sefton MacDowell, "The Formation of the Canadian Industrial Relations System during World War II," 3 Labour/ Le Travailleur 175-96 (1978); Desmond Morton and Terry Copp, Working People (Ottawa: Deneau, 1980) 184.

Wagner Act. Under its wartime authority the federal government in PC 1003 established a procedural mechanism, administered by a representative board, for the certification and recognition of trade unions having majority support of a designated group of employees. Employers were prohibited from interfering with the attempts of bona fide trade unions to organize employees and compelled to bargain exclusively with the certified bargaining representative. Thus, PC 1003 is regarded as having introduced a qualitatively different policy regarding labour relations whereby the Canadian state utilized its coercive power to promote union recognition and collective bargaining on behalf of workers.

Recently, however, this conventional wisdom has come under attack - both in terms of its description of the trajectory of federal labour relations policy and its characterization of PC 1003. The "myth of evolution" has been questioned by David Millar, who argues that federal labour relations policy during the Second World War is more accurately described as one in which the federal government exhausted all of the available alternatives until it was forced to concede what organized labour had already won by sheer economic strength.[3] Further, Peter Warrian argues that the primary goal of PC 1003 was to secure and maintain industrial peace rather than to redress the employer's overwhelming power in the workplace in favour of workers - as was done in the United States with the Wagner Act.[4] Warrian claims that PC 1003 merely introduced a mechanism which made the process of collective bargaining compulsory without granting any new substantive rights to labour nor guaranteeing substantive outcomes in the form of collective agreements.

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3 Frederick David Millar, "Shapes of Power: The Ontario Labour Relations Board, 1944 to 1950," Ph.D thesis, York University, 1980, 285.

4 Peter J.Warrian, "'Labour is not a Commodity': A Study of the Rights of Labour in the Canadian Postwar Economy 1944 - 48," Ph.D thesis, University of Waterloo, 1986,36.

As against the previous tendency to present federal labour relations policy as having "developed" towards some inevitable "maturity", the account of federal intervention in collective bargaining presented herein seeks to draw attention to the suppressed alternatives of history.[5] As such, it is part of the new "revisionist" history which both emphasizes the policies which were contemplated but not followed and attempts to locate the policy selected within a complex web of continuities, disjunctures and causation.

Traditionally, Canadian labour relations policy has been studied from the perspective of collective bargaining as a means of mediating and resolving conflict between labour and capital.[6] Consequently, the focus has been to describe and analyze collective bargaining as a process which produces rules for the workplace. The problem with this focus is that it treats the nature of the intervention by the Canadian state too narrowly, paying insufficient attention to the linkages between industrial relations policy and economic development.[7] Unless federal collective bargaining policy is placed within the larger context of economic policy it is impossible to account for either the timing or content of legislative intervention. While it is true that the federal government engaged in a form of brokerage politics, responding to the often conflicting demands of labour and capital in terms of the relative strength of the two "interest group" at a particular time,[8] the government's responses were mediated

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5 Alan Fox, History and Heritage, (London: George Allen and Unwin, 1985) 437.

6 See, for example, Carrothers, supra note 2; Woods, supra note 2; Paul Weiler, Reconcilable Differences (Toronto: Carswell, 1980)

7 H.J. Glasbeek, "Labour Relations Policy as a Mechanism of Adjustment," forthcoming, Osgoode Hall Law Journal, 1987. See also Richard Hyman, Industrial Relations: A Marxist Introduction (London: MacMillan, 1975), who characterizes industrial relations systems analysis, of which the traditional Canadian labour policy is an example, in this way.

8 Leo Panitch, "Corporatism in Canada," 1 Studies in Political Economy, 43-92 (1979) 59-60.

by its over-riding concern with creating and maintaining the conditions necessary for industrial and economic development which were ultimately to be determined by private investment. This gave capital a decided structural advantage, even in cases where it was necessary for the government to respond to labour's demands in order to maintain political support.

In the following chapters I situate the federal government's intervention in collective bargaining within the context of its overall economic policy, changes in the Canadian political economy and the legislative demands of the major institutional actors. I have focused on the major institutional actors, the central trade union congresses and the central organizations representing business, because my concern is with understanding and describing federal policy development, and the federal government typically sought the opinions of these central institutions rather than those of local organizations.

Since one of the primary goals of my thesis is to illustrate the short-comings of the conventional account of federal policy regarding collective bargaining, I have examined federal policy from the turn of the century until the years immediately following the Second World War. The starting point was selected because it marks the first positive legislative intervention by the federal government to regulate the relations between labour and capital, and 1946 was chosen as the end-point to allow for an evaluation of the administration of PC 1003. Absent from my study of federal collective bargaining policy is any discussion of the role of the common law in limiting the power of trade unions. Such a discussion, while essential for a complete evaluation of the respective power of labour and capital, is beyond the scope of my study.[9]

The thesis is divided into five chapters. In the first, I examine the federal government's policy of conciliation between 1900 and 1929, focusing on the divergence between the official policy as expressed in governmental

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9. See Carrothers, supra note 2, Chapter 2.

pronouncements and statutory language, and the administrative policies which emerged in response to changes in the economy and the trade union movement. In Chapter 2, which concentrates on the 1930s, the influence of the Wagner Act is evaluated. My aim there is to demonstrate that the American policy was fed through a distinctive Canadian political economy. In the first two chapters I have relied exclusively upon secondary sources (supplemented by recourse to contemporary government publications), since my object is to describe the context out of which the federal government's Second World War collective bargaining policy emerged in order to evaluate the conventional characterization of that policy. In the final three chapters, relying upon primary sources such as governmental correspondence, memoranda, reports, and trade union and business papers, I show how collective bargaining policy was subsumed under the federal government's wartime and postwar economic policy. Until 1943, when the federal government was confronted with a crisis of legitimacy regarding its collective bargaining policy, it was content to rely on policy precedents which emphasized voluntarism and evenhandedness in the treatment of conflicts between organized labour and capital. The federal government's preference for strategies which were outmoded in light of the changes in the political economy is presented in Chapter 3. Chapter 4 illustrates how the federal government, in seeking to construct compulsory collective bargaining legislation as part of its post war settlement, rejected alternative policies which would have strengthened organized labour in its dealings with capital. Chapter 5 is concerned to show how the public policy of recognizing trade unions and fostering industrial peace contained in PC 1003 and administered by the National War Labour Relations Board harnessed the unions to a system of priorities and restrictions which invariably designated industrial peace and productivity as the rock upon which their conditional legitimacy was founded.

Chapter 1 - The Triumph of Voluntarism: 1900 - 1929

During the first decade of the twentieth century the federal government enacted three statutes, the Conciliation Act, 1900, the Railway Labour Disputes Act, 1903 (RLD Act), and the Industrial Disputes Investigation Act, 1907 (IDI Act), which together constituted the major legislative expression of federal labour relations policy until compulsory collective bargaining was introduced in 1944. The first Act authorized voluntary third party conciliation of industrial disputes, the second authorized compulsory conciliation and investigation of disputes by ad hoc tripartite boards, and the third, borrowing the main features of its immediate predecessor, added a prohibition against industrial action by the disputants during the ad hoc board's investigation. These statutes, and the administrative practices developed thereunder, provide the policy context for evaluating the labour relations initiatives implemented during the Second World War. To determine whether the imposition of compulsory collective bargaining constitutes the marked departure in federal labour policy that is claimed of it[1], it is necessary to examine both the antecedent labour policy of the federal government and the policy options which were not followed. Thus, this chapter focuses on the impact of the federal government's labour policies from 1900 to 1929 on collective bargaining.

The vast majority of authors who discuss the historical development of federal labour relations policy have started from the premise that the compulsory collective bargaining system introduced in the United States by the Wagner Act in

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1 L.S. MacDowell, 'Remember Kirkland Lake', The Gold Miners' Strike of 1941-42 (Toronto: U. of T. Press, 1983), vii; J.C. Cameron and F.L.Y. Young, The Status of Trade Unions in Canada (Kingston, Ont.: Dept. of Ind. Rel., Queen's Univ., 1960) 29, especially footnote 25; A.W.R. Carrothers, Collective Bargaining Law in Canada (Toronto: Butterworths, 1965) 53; Bora Laskin, "Union Recognition and Collective Bargaining," 8 (1) Public Affairs 48 (1944) 49.

1935, and implemented almost a decade later in Canada by Order in Council PC 1003, is the standard against which the IDI Act should be judged.[2] What is striking is the extent to which their verdicts are incompatible. One group of commentators[3] argue that the three federal statutes implemented before 1910 and, in particular, the IDI Act, constitute a logical step in the evolution of labour policy towards compulsory collective bargaining. H.D. Woods, the major spokesman for the evolutionary perspective, regarded the IDI Act requirement for a vote by the employees to support the application for a board as tantamount to the administrative certification procedure whereby a bargaining representative for a group of employees is selected on a majority basis. In addition, he saw the ability of employees unilaterally to compel an employer to submit to conciliation by a board as resulting in de facto recognition.[4] Thus, he concluded that

> the primary purpose of this law was the establishment of a bargaining relationship, and not, as commonly supposed, the delaying of the strike or lockout. The significance of this observation is that the Wagner Act principles of compulsory recognition and collective bargaining were contained by implication in the Industrial Disputes Investigation Act of 1907. Since the element of recognition was so very important in the early

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2 Carrothers, supra note 1, 33-34; H.D. Woods and Sylvia Ostry, Labour Policy and Labour Economics in Canada (Toronto: Macmillan, 1962) 39-86; S.M. Jamieson, Times of Trouble: Labour Unrest and Industrial Conflict in Canada, 1960-66, Task Force on Labour Relations, Study No. 22 (Ottawa: Privy Council Office, 1968) 128-129; H.D. Woods, "Canadian Collective Bargaining and Dispute Settlement Policy: An Appraisal," XXI Cdn. J. of Econ. and Pol. Sc., 447 (1955); C.B. Williams, "Notes on the Evolution of Compulsory Conciliation in Canada," Relations Industrielles 305 (1964). However, for an evaluation of the IDI Act which does not accept compulsory collective bargaining as the standard against which the Act should be judged see Paul Craven, An Impartial Umpire: Industrial Relations and the Canadian State 1900 to 1911 (Toronto: University of Toronto Press, 1980) and H.C. Pentland, "The Canadian Industrial Relations System: Some Formative Factors," 4 Labour/Le Travailleur 21 (1979).

3 See Woods (1962), supra note 2, 53-54 and (1955) supra note 2, 461; F.R. Anton, The Role of the Government in the Settlement of Industrial Disputes in Canada (Don Mills, Ont.: CCH Can. Ltd., 1972) 72; J.C. Cameron and Young, supra note 1, 44; and see also King's claim that the IDI Act was tantamount to collective bargaining in Industry and Humanity (2nd Ed.) (Toronto: Macmillan, 1947) xxvi, footnote 1.

4 Woods (1955), supra note 2, 461.

period, it is not too unrealistic to suggest that the IDI Act preceded the Wagner Act both historically and logically.[5]

By contrast, Jamieson and Carrothers argue that the IDI Act delayed the evolution in Canada of a mature system of collective bargaining - for it failed both to protect unions from the actions of employers which were calculated to discourage employees from organizing and to impose an obligation on employers to bargain collectively with representatives chosen by their employees.[6] They conclude, therefore, that the implementation of compulsory collective bargaining during the Second World War constituted a radical departure from federal labour relations policy between 1900 and 1929.

The problem with the debate over whether federal labour relations policy during this period is more accurately characterized as a logical step in an evolutionary process or a defective policy arising out of an immature industrial relations system is that both sides view the period from 1900 to 1930 as embodying a consistent policy. The proponents of each side to the debate are content to rely on statutory provisions and parliamentary expressions as the sole determinants of labour relations policy. However, if attention is directed to the practices of both the Minister of Labour and the conciliation boards in administering the IDI Act, in addition to the legislative provisions, what emerges is that fact that labour relations policy during this period can be divided into three stages corresponding to the years 1900 to 1914, 1914 to 1920, and 1921 to 1930. Each of these stages is distinctive in terms of the administration of the IDI Act and the resulting effect upon disputes over union recognition. Thus, in order to determine what effect the IDI Act and its predecessor statutes had on subsequent Canadian labour policy it is necessary to examine each of the three stages and at each of the stages to emphasize the

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5 H.D. Woods, Labour Policy in Canada (2nd Ed.) (Toronto: Macmillan, 1973) 341

6 Carrothers, supra note 1, 38 and Jamieson, supra note 2, 128-29.

practices developed under the Act as much as the legislative provisions themselves.

In what follows I will attempt to demonstrate how changes in the economy and the demands and composition of both the labour movement and business influenced the development, implementation and administration of the federal government's labour relations legislation. In turn, I will show how changes in the administration of the IDI Act influenced the resolution of recognition disputes and, hence, collective bargaining. In conclusion, the main themes in the federal government's labour policy will be summarized and the continuities and divergences with subsequent policy will be indicated.

I The National Policy - 1900 to 1914

1. Background

From the turn of the century to the First World War the Canadian economy rapidly expanded. The wheat boom brought a flood of settlers into the west, resulting in the creation of two new provinces. In turn, this precipitated a new era of railway development and spurred the industrialization of central Canada.[7] Concomitant with the growth of the wheat staple was the emergence of new mineral and pulp staples in the west.[8]

Directing the economic expansion was the National Policy with its three closely related strands: Canadian operated transcontinental railways running exclusively within Canadian territory, western settlement and protective tariffs against American manufactured goods. The overall objective of the National Policy was to ensure the continued existence of Canada as an independent political entity by developing the manufacturing base of central Canada and opening up markets for manufactured goods in the west. The federal government

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7 Donald V. Smiley, The Rowell-Sirois Report, Book I (Toronto: Macmillan, 1978) 91.

8 Craven, supra note 2, 90.

feared that the competitive advantage of American manufactured goods, which resulted from the more advanced manufacturing industries and larger markets in the United States, would lead to the American absorption of the Canadian market. The solution was to impose high tariffs on American manufactured goods, thus creating a safe enclave behind the tariff wall where a Canadian manufacturing base could develop. The policy of promoting western settlement would create a market for central Canadian goods and the railways would both bring staples from the west to sell on international markets and transport the manufactured goods to the new western market.

Three important consequences followed from the National Policy. First, the commitment to an all-Canadian railway system involved the federal government in financing the expensive infrastructure as its costs were more than the limited Canadian capital markets could meet. After Confederation the federal government helped to finance the national railways by making investment more attractive to British portfolio investors by guaranteeing their loans and granting large tracts of land to the railway companies. The active role of the Canadian state in financing the infrastructure necessary for capitalist development led the state to intervene in industrial disputes which threatened that infrastructure.[9] Second, the tariff led to American penetration of the Canadian economy via the establishment of American subsidiaries in Canada. As American branch plants opened up in Canada, organizing Canadian workers was high on the list of the

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9 Id., 91.

American Federation of Labor's (AFL) priorities.[10] And third, specialized regional economies were encouraged by the National Policy. This, in turn, had a profound impact upon the development of wage differentials and patterns of employment. By the 1920s the regional wage differentials and occupational patterns which characterized the Canadian labour market today were firmly entrenched.[11]

Initially the Canadian trade union federation, the Trades and Labour Congress (TLC), whose membership included the international craft unions affiliated to the AFL, internationals in the running trades (such as the railway engineers, trainmen, firemen and conductors) outside the AFL, Canadian unions, and Knights of Labor Assemblies, was distinct both in composition and philosophy from the AFL. Unlike the AFL, which categorically rejected dual unionism (the practice of more than one union representing the same class of workers), from its founding convention in 1886 the TLC adopted a policy of unifying all the various locals in Canada for legislative purposes.[12] The reform goals and tendency to political action of the Knights of Labor influenced the policies of the Canadian

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10 Id., 115. Robert Babcock, Gompers in Canada: A Study of American Continentalism before the First World War (Toronto: University of Toronto Press, 1974) 12. In light of the recent shift in Canadian historiography from emphasizing nationalism to emphasizing class, Babcock admits that he might have over-emphasized the importance of American control. However, he continues to adhere to the position that American Labour continentalism had a profound impact upon the Canadian labour movement. See Robert Babcock "Gompers in Canada Revisited" in W.J.C. Cherwinsky & Greg Kealey (Eds.), Lectures in Canadian Labour and Working Class History (St. Johns: Com. on Cdn. Lab. History & New Hogtown Press, 1985).

11 J.H. Thompson and A. Seager, Canada 1922-1939 (Toronto: McClelland & Stewart, 1985) 12-13.

12 Babcock, supra note 10, 12.

Congress. The TLC endorsed independent labour politics.[13] In addition, it adopted several of the legislative proposals of the Knights. At its founding convention the TLC supported compulsory arbitration for settling disputes over terms of employment; a plank in the Knight's platform dating back to the 1880s.

By contrast, the AFL was far more homogeneous than the TLC - as it had been formed specifically to exclude the Knights of Labor. Under the presidency of Samuel Gompers, the AFL adopted the principles of craft unionism and exclusive jurisdiction and the philosophy of business unionism. Rather than organizing all of the employees within either a single industry or a specific geographical territory, the AFL advocated the organization of skilled workers along craft lines. The principle of exclusive jurisdiction provided that each international or national union affiliated to the AFL should have a clear and specific job territory and boundary defined in terms of work operation, craft, trade or occupation and that no two unions were to have authority over the same work operation. The AFL's philosophy of business unionism was based on the conviction that it was preferable to eschew long range reforms and concentrate on immediate economic and industrial gains. Thus, it accepted the wage system and sought only to improve the lot of its members.[14] In turn, the AFL's commitment to business unionism shaped its vision of the role of a union federation in the political process. Instead of supporting independent labour politics, it adopted a position of political neutrality best expressed by Gompers' maxim "reward your friends and punish your enemies."[15] Moreover, Gompers was adamantly opposed to

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13 Martin Robin, Radical Politics and Canadian Labour, 1880-1930 (Kingston, Ont.: Dept. of Industrial Relations, Queen's University, 1968) 75. Note, however, that in the Canadian context that independent politics did not necessarily entail socialism.

14 Neil W. Chamberlain, Labor (N.Y.: McGraw Hill, 1958) 41 and see also Robert F. Hoxie, Trade Unionism in the United States (N.Y.: Appleton-Century Crofts, 1921) 336.

15 Robin, supra note 13, 69.

socialism and tended to equate dual unionism with socialist infiltration. Collective bargaining was advocated as the best technique for securing improvements in workers' standards of living. Compulsory arbitration was rejected as involving an unacceptable degree of state intervention in the employment relationship. Basically, the AFL endorsed a policy of voluntarism: the state was urged to keep out of labour relations.[16]

The TLC's attempts to organize the workers in the new manufacturing concerns that sprang up around urban centres in central Canada and the extraction industries in the west were limited by its lack of funds. By comparison the AFL was affluent. In 1900 it began to compete with the TLC in issuing charters to Canadian labour councils and it appointed John Flett as its first general organizer for Canada. As the power of the international craft unions in the TLC grew, they applied pressure on the Canadian Congress to incorporate AFL

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16 "Voluntarism" is a term with a spectrum of meanings. In this chapter the meaning employed is that initially adopted by the American Federation of Labour (AFL), which basically consists of a policy of state abstention in labour relations. Gompers claimed that the state ought not to intervene in the relations between capital and labour because the parties are best able to regulate their relations according to their own self-interest. Accordingly, the only desirable legislation for workers was that which offered protection to their labour market by restricting of immigration, and that which restrained government agencies, such as the courts and police, from encroaching upon or hampering such union activities as strikes, picketing, and boycotts (see G.G. Higgins, Voluntarism in Organized Labor in the United States, 1930-1940 (Washington: Catholic Univ. of Am. Press, 1944) 3).

This definition of voluntarism is at one extreme of the spectrum - that of total state abstention. At the other end of the spectrum it is possible to describe as voluntaristic any legislation which allows the ultimate outcomes of a regulatory process to be determined be market forces. For examples of this use of the term in the contexts of occupational health and safety regulation and collective bargaining, emphasizing grievance arbitration, see, respectively, Eric Tucker, "The Persistence of Market Regulation of Occupational Health and Safety: The Stillbirth of Voluntarism" and H.J. Glasbeek, "Voluntarism, Liberalism and Grievance Arbitration: Holy Grail, Romance and Real Life", both in Geoff England (ed.), Conference on Government and Labour Relations: The Death of Voluntarism (Don Mills: CCH, 1986). By the end of the Second World War, the federal government's policy of voluntarism had shifted to this end of the spectrum. However, when contrasted with the AFL's initial abstentious definition, compulsory collective bargaining legislation signals the end of voluntarism as administratively regulated recognition procedures are substituted for recognition achieved by the threat or use of economic power.

philosophy. The showdown between the industrial and national unions and the international unions within the TLC came at the Congress' 1902 annual convention held in Berlin, Ontario. Commenting upon the role of Samuel Gompers at the Berlin Convention, Irving Abella stated that:

> [w]hat concerned Gompers was that some TLC leaders and unions seemed to be making approving sounds towards socialism, industrial unionism ... and compulsory arbitration, all three of which were anathema to the AFL president .... Thus to protect American labour from these insidious Canadian influences, Gompers ordered all international affiliates in Canada ... to vote to strip the Congress of all its national pretensions and to make it surbordinate in every way to the AFL.[17]

At Berlin the TLC Constitution was amended to embody the principle of exclusive jurisdiction. Consequently, approximately one-fifth of the TLC membership - primarily Knights of Labor Assemblies - were expelled from the TLC. This secured the dominance of the international craft unions, which were largely based in central Canada within the TLC. The culminating event of the 1902 convention was the election of John Flett, the AFL organizer, as president of the Congress. Not only was the composition of the TLC affected by the AFL victory, so too was its philosophy. By the end of the decade the central AFL policies of craft autonomy, exclusive jurisdiction, and opposition to any form of compulsory arbitration were adopted, if somewhat ambivalently, by the TLC.

AFL dominance over the TLC served to heighten tensions already existing in the Canadian labour movement. These tensions resulted from the vastly different economic contexts and labour markets of central and western Canada. In British Columbia the large scale capitalism of railway, mining and lumber companies predominated and was characterized by a highly concentrated, absentee ownership.[18] The high capital investment and structure of employment ensured the

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17 Irving Abella, "The Canadian Labour Movement, 1902 - 1960," Canadian Historical Association Booklet No. 28 (1974) 4.

18 Pentland, supra note 2, 17.

predominance of industrial unionism.[19] The proliferation of isolated company towns, arduous working conditions and a literate and ambitious workforce fostered the growth of socialist ideas.[20] The industrial socialist American Labour Union (ALU) and its affiliates, the Western Federation of Miners (WFM) and the United Brotherhood of Railway Employees (UBRE), found the British Columbia industrial relations climate conducive to their form of union organization. At the turn of the century the ALU and its affiliates, despite fierce employer opposition, particularly in the coal mines, posed a potent threat to the union philosophy espoused by the TLC and AFL. After a series of strikes in British Columbia between 1900 and 1903, which TLC affiliated unions helped to break, the ALU and its affiliates lost impetus and eventually collapsed. However, their industrial socialist philosophy cultivated the ground for future western movements to secede from the TLC and the subsequent growth of syndicalist unions in the west. Moreover, the series of strikes at the turn of the century organized by the ALU affiliates in British Columbia served to crystalize the federal government's policy towards trade unions.

Two strikes, occurring in 1903 and involving ALU affiliated unions, were the immediate trigger for the appointment by the federal government of a Royal Commission to investigate the causes of industrial disputes in British Columbia

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19 Robin, supra note 13, 44.

20 Pentland, supra note 2, 17.

which had been disrupting the provincial economy during recent years.[21] Mackenzie King, the Deputy Minister of Labour, was appointed the Secretary of the Commission and reputedly wrote the report.[22] The most significant feature of the report lay in the Commission's distinction between legitimate and illegitimate unions. Although this distinction was echoed, if somewhat imprecisely, by Canadian manufacturers and the Senate during the first decade of the century, it was not incorporated as a feature of federal labour relations policy until the end of the First World War.

Testimony at the Commission's public inquiry supported a finding that anti-union practices employed by the mine operators and the Canadian Pacific Railway exacerbated the already poor industrial relations between the employers and workers. However, the Commission identified the tactics of the unions, led by foreign agitators, as the main cause of industrial strife. The Commission distinguished between legitimate and illegitimate trade unions in the following terms:

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21 Miners employed by the Crow's Nest Pass Coal Company at three camps in British Columbia formed a Western Federation of Miners (WFM) district federation in the fall of 1902 and presented a wage demand to the company. The company refused to recognize the WFM for the purpose of wage negotiations. On February 10, 1903 the WFM called a strike, which resulted in coal shortages in the mining industry in the region. At the request of British Columbia Senator Templeman, King was sent to intervene in the dispute, although neither of the parties had requested intervention under the Conciliation Act. King withdrew after deciding that the issue of union recognition was not amenable to conciliation and arbitration. The strike was settled six weeks after it began when the company agreed to meet with employee committees from each of the camps.

During the miners' strike, clerks and baggagemen, who were members of the United Brotherhood of Railway Employees (UBRE) went on strike against the Canadian Pacific Railway (CPR) after the company dismissed several employees on account of their membership in the UBRE. Locals of the WFM struck in sympathy, stopping the supply of coal to the CPR. The strike was broken with the help of the railway brotherhoods affiliated to the TLC, who agreed to operate trains which carried strikebreakers. After receiving repeated requests, the federal government appointed a Royal Commisssion to investigate the causes of these disputes.

22 Craven, supra note 2, 247.

> And here, it may be remarked, lies the essential difference between the legitimate trade unionist and the revolutionary socialist: the former realizes that he has a common interest with the employer in the successful conduct of the business; the latter postulates an irreconcilable hostility and is ever compassing the embarrassment or ruin of the employer, all the while ignoring the fact that capital and labour are the two blades of the shears which, to work well, must be joined together by the bolt of mutual confidence, but if wrenched apart, are both helpless and useless.[23]

A union such as the WFM or the UBRE was illegitimate since it was "really not a trade union at all, but a secret political organization."[24] Consequently, the Commission recommended that the WFM and UBRE be declared illegal organizations. The Commission proposed to make it a criminal offence punishable by either fine or imprisonment for any person not a British subject and who had not been residing in Canada for at least one year to recommend, incite or call Canadian workers out on strike.[25] Although aimed at the officers of the ALU and its affiliates "who are not trade unionists, but socialistic agitators of the most bigoted and ignorant type",[26] the proposed criminal prohibition was sufficiently broad to sweep AFL union organizers, who under the Commission's own definition represented legitimate trade unions, within its net.

The Canadian Manufacturer's Association (CMA) shared the Royal Commission's belief that foreign agitators caused industrial disputes. Although it dates from 1887, the CMA did not achieve national status as an organization representing manufacturers until the beginning of the twentieth century. Its primary concern was the continuance and increase of the tariff, which it supported with "the argument that a prosperous manufacturing sector was in the greater national

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23 The Report of the Royal Commission on Industrial Disputes in the Province of British Columbia (Govt. Printing Bureau, 1903) 65-66.

24 Id., 67.

25 Id., 76.

26 Id., 75.

interest...."[27] This preoccupation with the tariff influenced the CMA's method of dealing with industrial relations problems. While employers in the western resource industries, particularly the coal operators, were very hostile to trade unions,[28] the CMA, which was primarily based in central Canada, adopted a more moderate approach. Concerned that active involvement in industrial disputes might prejudice its argument that developed manufacturing industries were in the national interest, the CMA left direct confrontations with trade unions to employer associations. Instead, it adopted the high road of lobbying the federal government for the labour policy it wanted.

Claiming to accept trade unionism in theory, at the 1901 convention the president of the CMA, P.W. Ellis, condemned two aspects of trade unionism as it was practiced in Canada: 1) the tendency of trade unions to challenge management prerogatives, and 2) international unionism, which the CMA saw as irresponsibly promoting industrial strife.[29]

The CMA's call to ban foreign organizers was taken up in the Senate the same year as the Royal Commission investigating the British Columbian disputes issued its report. The Senate passed a bill, introduced by James Lougheed, which was designed to outlaw "[t]he agitators who were coming into Canada to establish unions and foment strikes" by amending the Criminal Code.[30] However, the House

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27 Craven, supra note 2, 188.

28 Id., 123 and A.E. Grauer, Labour Legislation, A Study Prepared for the Royal Commission on Dominion-Provincial Relations (Rowell-Sirois Commission), (Ottawa, 1939) 88. Pentland indicates that the majority of Canadian employers were reluctant to recognise trade unions for a number of reasons. Pentland, supra note 2, 14-15. See also Michael Bliss, A Living Project (Toronto: McClelland and Stewart, 1974) Chapt. 4 for a discussion, very similar to Pentland's, of the reaction of Canadian business to trade unions between 1883 and 1911.

29 Industrial Canada, Nov., 1901. Herinafter cited as I.C. I.C. was the official monthly publication of the C.M.A.

30 Babcock, supra note 10, 3.

of Commons (whose members were elected by, among others, recently enfranchised workers) rejected the bill passed by the Senate, which in the early 1900s was mainly, if not exclusively, composed of government appointees selected from the ranks of business. This defeat did not deter the upper house. The Senate responded to the continued demands of the CMA with two further unsuccessful attempts to ban foreign agitators.[31] But by the end of the decade even the Senate had come to appreciate the distinction between legitimate and illegitimate unions, as its new-found endorsement of international unionism of the AFL variety indicated. In 1910 Senator Loughheed advised that businessmen "had more to gain by appealing to the responsible organizations of an international character than if the strike in question had been instituted simply by a local, limited and largely irresponsible organization."[32]

By the end of the first decade of the twentieth century permanent features of both Canadian industrial relations and federal labour policy were constructed. First, the AFL assertion of control over the TLC ensured that the TLC endorsed a policy of voluntarism regarding the relations between capital and labour. Although the Canadian Congress's acceptance of voluntarism was never as whole-hearted as that of its American counterpart, it did entail that collective bargaining permanently supplanted arbitration on its legislative agenda. Secondly, the American takeover led to a permanent split in the Canadian labour movement between the international and national factions. Thirdly, the early struggles between business unions and their syndicalist/socialist rivals gave rise to the government's distinction between legitimate and illegitimate trade unions. During each subsequent outbreak of labour militancy "illegitimate" trade

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31 In 1909 Senator James McMullen, who had unsuccessfully advocated a similar bill in 1907, introduced a bill to ban foreign organizers. This bill was rejected by the Senate. In 1910 a final attempt to ban international unions met with such overwhelming opposition in the Senate that Senator N.A. Belcourt agreed to withdraw it. See Babcock, supra note 10, 113.

32 Id.

unions, allegedly controlled by foreign agitators, were blamed as the cause of unrest. Fourthly, the identification of foreign agitators as the cause of unrest characterized Canadian labour policy throughout the Second World War; the only aspect of the designation which changed was the immigrant group identified as subversive. And finally, maintaining the regional wage differentials which were established during the early part of the 1900s was the cornerstone of federal wage control policy during World War Two.

2. Federal Labour Relations Policy

In 1900 the first federal legislation authorizing positive intervention in industrial disputes was enacted. The Conciliation Act, 1900,[33] was not a response to demands for intervention by the CMA or TLC, but rather a government initiative, triggered by the British Columbia coal mining disputes, designed to copy the success of the English Conciliation Act, 1896. Babcock attributes this positive excursion into industrial relations to the fact that the Liberal government faced an election and needed working class votes to retain power.[34] Prime Minister Laurier and Sir William Mulock, the Postmaster-General and the Minister having responsibility over labour matters, appeared at the 1900 TLC annual convention touting the government's labour policy in order to persuade TLC leaders that independent labour politics were unnecessary since the Liberals were sensitive to trade union needs. In response to the TLC's call for the imposition of compulsory arbitration, the government urged that such legislation was outside the authority of the federal Parliament as it impinged upon civil rights, an area within provincial legislative jurisdiction.[35] The federal Parliament, so the government claimed, had sufficient legislative authority only to enact

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33 Conciliation Act, 1900, 63-64 Vic., c. 24.

34 Babcock, supra note 10, 67.

35 Labour Gazette, Sept. 1900, 29. Hereinafter cited as L.G.

legislation authorizing state intervention in industrial disputes on a voluntary basis.

The Canadian Act virtually duplicated the provisions of the English Act concerning third party intervention in industrial disputes.[36] It provided that in the event of an existing or apprehended trade dispute the Minister assigned to

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36 As both Craven and Williams have noted, the terminology with respect to third party intervention was used somewhat indiscriminately. For example, sometimes "arbitration" denoted collective bargaining by nominated representatives of the parties; other times it meant third-party intervention to assist negotiations; and sometimes it referred to binding third party adjudication. Similarly, non-binding arbitration might refer to either conciliation or arbitration. However, Craven makes the point that for both the TLC and Gompers compulsory arbitration referred to binding third-party intervention imposed by statute and involving both a compulsory settlement and a strike ban. C.W. Williams, supra note 2, 300-1 and Craven, supra note 2, 149-50.

To avoid terminological confusion, I shall stipulate some definitions of third party intervention which are generally accepted in industrial relations literature. Four types of intervention, in ascending order of participation, can be identified: conciliation, mediation, investigation and arbitration. (See O. Kahn Freund, Selected Writings (London: Stevens & Sons, 1978) Chap. 2, 67.) Moreover, the third party can adopt an accommodative approach, that is, attempt to settle the dispute using the technique of compromise, or a normative approach, that is, adjudicate the issues in dispute and issue an award. (See H.D. Woods, Patterns of Industrial Dispute Settlement in Five Canadian Industries, Pt. I, Chap. 2.)

Conciliation involves third party assistance to the parties of an industrial dispute in order to promote good faith bargaining between them. The approach of the third party is accommodative, the result of conciliation is not binding and the intervention may be voluntary, unilateral or compulsory. Mediation refers to the form of intervention where the third party sets out to achieve an agreement between the two parties to a dispute. Craven expresses the distinction between conciliation and mediation in terms of the function of the third party: "The conciliator's role ... is to assist the two parties to engage in productive negotiation; the mediator's role is to attempt to bring them to a settlement." (Craven, supra note 2, 149-150). As with conciliation, the approach of the third party in mediation is accommodative; however, mediation contemplates a greater degree of participation by the third party than conciliation. In both other respects mediation is similar to conciliation. Investigation as a form of third party intervention contemplates a greater degree of participation by the third party than either conciliation or mediation. It involves the appointment of a fact-finding committee, usually vested with quasi-judicial powers, which adopts a normative approach, with a view to mobilizing public opinion to settle the dispute. The report of the investigator is usually voluntary and in the majority of cases it is published. Typically investigation is unilateral or compulsory. Arbitration, like investigation, involves a normative approach by the third party; however, it goes beyond investigation as the arbitrator issues a normative award. The arbitrator's award may be voluntary or compulsory. Arbitration may be invoked on a voluntary or compulsory, but rarely a unilateral, basis.

administer the Act (there being no fully separate Ministry of Labour until 1909) was empowered: 1) to investigate the dispute, 2) to arrange a conference under the auspices of a chairman selected by the Minister with a view to the amicable settlement of the dispute, 3) on the application of either party to a dispute, to appoint a conciliator or a board of conciliation, 4) on the application of both parties, to appoint an arbitrator and 5) at the request of one or more of the members of a conciliation board, to request the Governor in Council to appoint a commissioner of inquiry under the Inquiries Act. The Canadian Act departed from its English forbear in respect to the agency responsible for administering the Act. Under the English Act the Board of Trade was responsible for its administration. By contrast, the Conciliation Act, 1900 established the Department of Labour, which was to administer the Act as well as to gather information about "important industrial questions", the labour market, terms of employment and "kindred subjects," and publish such information in the monthly Labour Gazette.[37]

Unlike the situation in Britain where the practice of employers and employees of referring collective disputes to a conciliator predated the legislation, no similar practice had developed in Canada. The absence of a history of voluntary conciliation before the introduction of the Conciliation Act, 1900 helps to explain why its conciliation and arbitration provisions were never used.[38] However, the mediation services provided by the Department of

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37 Conciliation Act, 1900, supra note 33, s. 10.

38 F.A. Acland, "Canadian Labour Legislation Concerning Industrial Disputes," LXIX Annals of the American Academy of Political and Social Sciences (1919) 157, 159.

Labour under the Minister's general authority to investigate disputes were often invoked to aid in the resolution of industrial disputes.[39]

Craven claims that "from the outset ... King placed far more stress on the role of the third party than seems to have been intended by the legislators."[40] Rather than merely lending his good offices to bringing the parties to a dispute closer together for productive consultation, as the Act appeared to call for,[41] King played the role of active mediation.[42] Thus, although in theory the Conciliation Act was designed to promote voluntary conciliation, in practice it more closely resembled mediation by Department of Labour officials to end work stoppages. This practice continued to characterize the administration of the Act after King left the Department of Labour in 1911.[43]

The TLC responded favourably to the Conciliation Act, 1900, although it initially felt that the Act did not go far enough.[44] At the 1901 TLC annual

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39 Margaret MacIntosh, Government Intervention in Labour Disputes, No. 47, Bulletin of the Departments of History and Political Science in Queen's University (Kingston, February, 1924) 13-14.

40 Craven, supra note 2, 221. By contrast, Williams argues that both on its face and in legislative debates the Conciliation Act "involved the bringing together of the parties to discuss, argue, debate and hence to reach consent among themselves ... little emphasis, if any, is placed on the role of the third party as a participant in formulating the terms of the settlement ... The role of the third party was not so much to partake of discussions and suggest possible areas of settlement (to mediate) as it was to bring the parties together for purposes of collective bargaining (to conciliate)." See C.B. Williams, supra note 2, 305. However, in failing to take account of the administration of the Act, Williams ignores the extent to which mediation was employed in practice.

41 Conciliation Act 1900, supra note 33, s.4b.

42 Craven, supra note, 2, 221.

43 MacIntosh, supra note 39, 14.

44 Craven, supra note 2, 236.

convention Ralph Smith, the president of the Congress, called for compulsory arbitration. In 1902 the Winnipeg independent labour M.P. Arthur Puttie attempted to amend the Conciliation Act, 1900 to provide for binding arbitration at the request of one, rather than both, of the parties to a dispute. The CMA orchestrated a successful campaign against unilateral compulsory binding arbitration and the amendment was defeated.[45] The CMA was content with the Conciliation Act, 1900, as long as it remained a voluntary measure with mediation by officials of the Department of Labour as the extent of government intervention. With the AFL takeover of the TLC, compulsory arbitration was dropped from the TLC's list of demands.

Following a two and a half month strike in 1901 of 5,000 trackmen employed by the Canadian Pacific Railway (CPR), the Liberal government began to consider introducing legislation to maintain industrial peace on the national railways. The jurisdictional impediment, raised by the federal government in 1900 to justify its decision to introduce voluntary as opposed to compulsory conciliation and arbitration, did not apply to disputes on the national railways since under the British North America Act[46] the federal government had legislative jurisdiction over any matter involving interprovincial transportation.

In 1902 Mulock introduced a bill providing for compulsory arbitration of railway disputes.[47] However, Mulock's commitment to compulsory arbitration was weak. He stressed both in the House of Commons and in the Labour Gazette, that the bill was a tentative measure only and that suggestions for its improvement

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45 I.C., Sept. 1902, 90; I.C. June 1903, 480.

46 British North America Act, U.K. Statutes 1867, 30 Vic., c.3, s.92(10)(a) provides that the province was exclusive jurisdiction over works of undertakings except those extending beyond the limits of a province.

47 Craven, supra note 2, 274-75.

were welcome.[48] To this end the Department of Labour actively solicited responses to the Bill from trade unions, railway companies and other interested parties,[49] and kept a file of all of the newspaper reports of the Bill. This concern with the opinions of the parties to be regulated by the proposed legislation signals a shift in the formation of federal labour relations policy away from merely transplanting a scheme operating in a foreign jurisdiction (as was done with respect to the Conciliation Act), to a sensitivity to the Canadian economic context and the views of the major industrial relations participants.

King wrote that a survey of the newspaper clippings illustrated that

> [t]he opposition to compulsory arbitration as reflected through this medium was less general than the expression given by resolutions through labour organization. It indicated, however, a hesitancy in the public mind as to the advisability of the adoption in this country of this means of prevention of industrial disputes. The difficulties besetting the enforcement of awards, and the liability of error arising in the judicial determination of relations which, in the interests of the parties and the business community must ultimately be determined by economic forces, appeared to be the strongest arguments urged against the principle of the measure, while at the same time mention of them helped to suggest an alternative method better suited to the end in view. This method may be described as that of "compulsory investigation."[50] (emphasis added)

With the AFL takeover of the TLC, both the official voice of the Canadian labour movement and business opted for laissez-faire, as opposed to state intervention, as the mechanism for establishing wage rates and conditions of employment. Moreover, the government recognized that without the consent of the parties it sought to regulate, the enforcement of compulsory binding arbitration would be virtually impossible. But instead of allowing the parties to resolve their dispute without third-party supervision, the federal government adopted a policy of "regulated laissez-faire". The government instituted procedures both

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48 L.G., June 1902, 769.

49 Report of the Department of Labour for the Year ending June 30, 1903, 3-4 Ed. VII, Sess. Paper No. 36 (Ottawa, 1904) 58.

50 Id., 59.

to identify the causes of and to help to resolve the dispute. This policy of regulated laissez-faire was the solution to the problem of introducing order into industrial relations without pre-empting the primacy of economic forces in determinging substantive outcomes. Consequently, the Railway Labour Disputes Act, 1903 (RLD Act)[51] was introduced on March 17 and it received Royal Assent on July 10. King described the Act as

> carrying as far as was possible the principle of voluntary conciliation, but substituting for compulsory arbitration, with its coercive penalties, the principle of compulsory investigation, and its recognition of the influence of an informed public opinion upon matters of vital importance to the public interest.[52]

The RLD Act established a two stage form of intervention, modelled on the New South Wales Trade Disputes Conciliation and Arbitration Act, 1892,[53] to aid in the settlement of railway disputes. A dispute between a railway company and its employees was to be referred to an ad hoc tripartite conciliation committee upon the application of either of the parties to the dispute, the application of the corporation or any municipality directly affected by the dispute or at the instigation of the Minister. The provision for third party initiation of the conciliation proceedings represented the public interest in the continued operation of the railways. If a settlement was not achieved by the committee the Minister had the discretion to send the dispute to a Board of Arbitrators. With the consent of the parties the conciliation committee could act as an Arbitration Board; but failing this, the board was to be established on the same basis as the conciliation committee. The Arbitration Board was fortified with quasi-judicial powers of investigation and was required to issue a normative report. The

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51 Railway Labour Disputes Act, 1903, 3 Edward VII, c.55.

52 Report of the Department of Labour for the year ending June 30, 1903, supra note 49, 59.

53 S.N.S.W., 1891-82, 55 Vic., No. 29.

report, which was to present all of the facts and circumstances found to be relevant to the dispute and to contain the Board's recommendations for the settlement of the dispute, was to be published in the Labour Gazette. Instead of imposing the recommendations of the Arbitration Board on the disputing parties in order to effect a settlement, the government was content to rely on the influence of public opinion to promote a settlement. However, the Act contained no prohibition against industrial action while the conciliation and investigation processes were in progress.

The RLD Act was invoked on only three occasions during its 80 year history.[54] The fact that it was rarely used is partially attributable to the existence after 1907 of an alternative form of state intervention in railway disputes which was more attractive to railway employees.[55] Although the Act had little direct effect on railway disputes, it left a profound impact upon subsequent labour relations legislation. First, it introduced the first element of compulsion into the federal government's intervention into industrial disputes in the form of the power to compel testimony and order the production of documents. Second, the RLD Act established the federal precedent of directing legislation to disputes in specific industries, in particular, industries essential to the National Policy. Third, the use of ad hoc tripartite boards remained the government's preferred agency of intervention until well into the Second World War. And, most importantly, with the RLD Act the federal government rejected both voluntary conciliation and compulsory binding arbitration for

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54 The RLD Act was incorporated with the Conciliation Act 1900 into the Conciliation and Labour Act, R.S.C. 1906, c.96. Although this Act was not included in the Revised Statutes of 1970, it was not repealed until Dec. 1, 1983 by S.C. 1980-81-82-83, c.159, Sch. item 41.

55 Participants in railway disputes could elect whether to proceed by way of the RLD Act or the IDI Act. However, since under s.56 of the IDI Act the compulsory cooling off provision also applied to disputes under the RLD Act, the fact that the IDI Act also contained a provision protecting the status quo made it more attractive to railway employees than the 1903 Act.

compulsory conciliation and investigation backed by publicity as the form of intervention in industries which were important for the Canadian economy. In 1906 the Conciliation Act, 1900 and the RLD Act were consolidated as the Conciliation and Labour Act.[56]

A heated strike in Lethbridge was the immediate trigger for the next federal labour relations statute. In March 1906, the AFL and the TLC affiliate, the United Mine Workers (UMW), District 18,[57] went on strike demanding a wage increase, union recognition and a union shop from the major fuel supplier to rural Saskatchewan and Alberta.[58] Fearing a fuel shortage during the bitter winter months, the Premier of Saskatchewan asked King to intervene in the Lethbridge dispute - since neither of the parties had applied for conciliation under the Conciliation Act, 1900. King's mediation, which included a trip to the UMW headquarters in the U.S., proved successful and the strike ended.

The conclusions King drew from his involvement in the Lethbridge strike were expressed in his official report:

> When it is remembered that organized society alone makes possible the organization of mines to the mutual benefit of those engaged in the work of production, a recognition of the obligations due society by the parties is something which the State is justified in compelling if the parties are unwilling to concede it. In any civilized community private rights should cease when they become public wrongs. Clearly, there is nothing in the rights of the parties to a dispute to justify the inhabitants of a province being brought face to face with a fuel famine amid winter conditions, so long as there is coal on the ground, and men and capital at hand to mine it. Either the disputants must be prepared to leave the differences which they are unable to amicably settle to the arbitration of such authority that the

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56 Conciliation and Labour Act, R.S.C. 1906, c.96.

57 The UMWA, although an important affiliate of the AFL, was organized on an industry, rather than craft basis. The principle of union autonomy to which the AFL was committed meant that each of its affiliates was free to determine their own composition.

58 For a full description of the strike see W.M. Baker, "The Miners and the Mediator: The 1906 Lethbridge Strike and MacKenzie King", 11 Labour/Le Travailleur 89-117 (1983).

> State may determine most expedient, or make way for others who are prepared to do so.[59]

If a dispute threatened the public interest, King reasoned, then state intervention was justified. The particular form of intervention contemplated would go further than previous federal legislation and provide that

> all questions in dispute might be referred to a Board empowered to conduct an investigation under oath, with the additional feature, perhaps, that such reference should not be optional but obligatory, and pending the investigation and until the Board has issued its finding the parties be restrained, on pain of penalty from declaring a strike or lockout.[60]

King viewed compulsory investigation coupled with a delay in the resort to economic sanctions as a compromise between purely voluntary conciliation, which experience had shown did not work in Canada, and compulsory binding arbitration, which was unacceptable to both the CMA and TLC. The new legislation would go further than the compulsory investigation procedures embodied in the RLD Act by indirectly compelling the parties to submit their dispute to a board, which would publish a report of its findings and recommendations, and by prohibiting the parties' exercise of industrial strength until after the report was published. King believed that public opinion would exert sufficient pressure on the parties to compel them to adopt the board's recommendations without resort to economic sanctions.

Less than one month after his return from Lethbridge King completed the draft of a bill which was introduced by Lemieux, the Minister of Labour from 1906 to 1909, in the House of Commons on December 17, 1906. The bill, which was given Royal Assent on March 22, 1907 as the IDI Act,[61] embodied several of the features of the RLD Act; in particular, the use of ad hoc tripartite boards having legal powers to compel the submission of testimony and evidence, and reliance on the

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59 L.G., Dec. 1906, 647, 661 emphasis added.

60 Id.

61 6-7 Edward VII, c.20.

publication of the board's recommendations to bring public opinion to bear upon the parties to a dispute in order to provoke a settlement. Unlike the RLD Act, however, the bill established a one stage, rather than two stage form of intervention, broadened the scope of intervention to disputes in public utilities and prohibited strikes and lockouts pending the issuance by a board of its report.

The statute was to be administered by the Minister of Labour and the Deputy Minister - who was to serve as the registrar of conciliation boards under the Act. The Deputy Minister's duties were exclusively administrative. By contrast, the duties of the Minister were of a policy-making nature. Upon receiving an application for the appointment of a board, which was to be accompanied by what was in effect a declaration that a strike vote had been taken in cases where employees made the application,[62] the Minister had discretion as to whether or not to appoint a board.[63] The Minister could refuse to establish boards in those types of disputes which he or she felt were not amenable to settlement by compulsory investigation. If the application to appoint a board was refused, there was no provision in the Act which entitled the disputing parties to engage in lawful industrial action - the legality of industrial action depended solely upon a board issuing a report.

A board was to consist of one representative nominated by the employer, another by the employees and the third, the chairman, to be nominated on the agreement of the parties' representatives. If the parties refused to nominate representatives, the minister was authorized to appoint them.

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62 Clause 15(2)(b) required that a statutory declaration, setting forth that a strike or lockout will be declared and that the necessary authority to declare such lockout or strike has been obtained, accompany the application.

63 From the wording of the Act, in particular s.6, it would appear that the Minister had no discretion to refuse to appoint a board if all the relevant conditions have been met. However, there is no record of any legal action taken against the Minister for refusing to appoint a board in a recognition dispute.

Each conciliation board was vested with quasi-judicial powers of examination, entry and summons, and granted a great deal of discretion as to the manner of conducting its proceedings.[64] Once appointed, a board was first required to endeavour to bring about a settlement by conciliation. In the event that a settlement was not forthcoming, it was then required to investigate the dispute and issue a report to the Minister containing its "recommendation for the settlement of the dispute according to the merits and substantial justice of the case."[65] The report was not binding upon the parties; however, if they agreed to be bound by it, the recommendations concerning the settlement of the dispute could be made, upon the joint initiative of both parties, a binding order of the court enforceable on the application of either party. In essence, this provision amounted to voluntary binding arbitration.

The application of the IDI Act was compulsory with respect to disputes in public utilities - industries seen as essential in the fragile Canadian economy such as mines, agencies of transportation and communication, steam and electric railways, steamships, telegraph and telephone lines, gas, electric and power

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64 It would appear that the Act contemplated informal proceedings, since the appearance of legal counsel before a board depended both upon the consent of the parties and the agreement of the board.

65 IDI Act, supra note 61, s. 25.

works.[66] The federal government claimed that its jurisdiction over disputes in public utilities derived from its residual authority to legislate for the peace, order and good government of Canada.

The most distinctive aspect of a public utility, as defined by the federal government, was its potential impact upon the community or other industries in the event of a disruption of operations. Since the government identified the public interest with the continued operation of industries necessary for the National Policy, it reasoned that there should be legislation to promote industrial peace in those industries. Thus, the IDI Act was a species of emergency disputes or essential industries legislation.

The important new feature of federal labour relations policy introduced by the IDI Act was the prohibition against industrial action during the conciliation board's investigation. Persons engaging in industrial action prior to or during the reference of a dispute to a conciliation board would be prosecuted summarily under the Criminal Code. Fines of between $100 and $1,000 for each day that an employer declared or caused a lockout and between $50 and $100 for each day that an employee was on strike were provided. In addition, section 60 created an

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66 The application of the Act was compulsory in that the parties to a public utilities dispute could not resort to economic santions unless they had exhausted the conciliation and investigation procedures contained in the IDI Act. However, by virtue of s.63 the IDI Act could be invoked voluntarily upon the agreement of both parties to a dispute in any other industry. Between March 1907 and March 1924, 20 percent of the disputes referred to IDI Act boards were brought voluntarily under s.63. F.R.Scott, "Federal Jurisdiction and Labour Relations" 6 McGill L.J. 156(1960) 156.

Public utilities are not defined in the Act nor is the scope of the Act defined. Instead the industries to which the Act applies are enumerated in the definition of "employer," s. 2(c). Moreover, the definition of "employer" was further limited to exclude those employing less than ten employees. Although the Lethbridge strike provided the immediate catalyst for the new legislation, the fact that one-third of the emplyees engaged in strikes from 1900 to 1906 were employed in public utilities (railways, mining, transportation and communications) provided the larger context. William Martin, "A Study of Legislation designed to Foster Industrial Peace in the Common Law Jurisdictions of Canada," Ph.D. thesis, university of Toronto, 1954, 201.

offence for trade union officials to call their membership out on strike.[67] This reliance upon criminal sanctions, as opposed to civil remedies, highlighted the "public interest" nature of the Act.

The compulsory cooling off provision was coupled with a provision guaranteeing the status quo until after the board reported. The status quo provision required the disputing parties to give 30 days notice of any intention to change wages or hours of employment and the existing terms were to continue until the board issued its report. The purpose of the provision was to indirectly compell the party seeking changes in the terms and conditions of employment to apply for a board in order lawfully to resort to industrial action. But, unlike the prohibition against strikes and lockouts, there were no sanctions backing this provision. Hence, employers were de facto free unilaterally to change the employment contract - thus prompting employees either to apply for a board or take illegal industrial action in retaliation.

In Parliament Lemieux declared that the spirit of the law was that there were to be not strikes without investigation.[68] In McGuire[69] the Ontario Court of Appeal gave authoritative expression to the government's intention, holding that the compulsory cooling off period applied in those cases where no application for a board had been made.

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[67] Section 60 provides that:

> Any person who incites, encourages or aides in any manner any employer to declare or continue a lockout or any employee to go or continue on strike contrary to the provisions of this Act, shall be guilty of an offence and liable to a fine of not less than fifty dollars nor more than one thousand dollars.

Although the offence was directed to employees as well, it would appear that the main target was union officials not employed by the employer who was involved in the dispute.

[68] Can., H.C Deb., Feb. 19, 1906-7, 3323-2234.

[69] The King v. McGuire (1908), 13 C.C.C. 312 (H. C. Ont.)

But the administration of the Act belied its theory, for employees stopping work in violation of the IDI Act were rarely prosecuted.[70] Writing in 1919 Acland, the Deputy Minister of Labour from 1908 to 1923, acknowledged that "[i]t has not been the policy of the successive ministers under whose authority the statute has been administered to undertake the enforcement of these provisions. The parties concerned, or the local authorities, have laid information occasionally, and there have been in all eight or ten judicial decisions."[71]

Virtually from the outset, it was recognized that the prosecution of illegal strikers under the Act would exacerbate disputes, rather than promote their settlement.[72] For example, when questioned as to why coalminers, who had been responsible for repeated violations of the Act, were not prosecuted one Department of Labour official replied:

> In a case of this kind the act is powerless; what can you do? Here are about 6,000 men, most of them foreigners. They don't understand the act. They don't care for it. What are you going to do? Fine them? Well, they won't pay. Put them in jail - if you could? The coal won't be mined.[73]

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70 For contemporary comments on the Act see the following. In England the IDI Act was described in the Colonial Office Journal, see, "Lemieux Act, 1907," 3 Colonial Office Journal, 1909, and the Chief Industrial Commissioner, Sir George Askwith, was sent to Canada in 1912 to investigate the administration of the IDI Act and he reported in 1913; Sir George Askwith, Report to the Board of Trade on the Industrial Disputes Investigation Act of Canada, 1907, Cd.6603, HMSO 1913. In the United States several studies of the Act were commissioned by the U.S. Dept. of Labor: B.M. Squires, Operation of the Industrial Disputes Investigation Act of Canada, No. 233 Bulletin of the U.S. Bureau of Labor Statistics (Washington: Govt. Printing Office, 1918) and Victor S. Clark, "The Canadian Industrial Disputes Act," (Washington: Govt. Printing Office, 1908 and 1910). In B.M. Selkeman, Disputes and the Canadian Act (N.Y.: Russell Sage Foundation, 1917); Postponing Strikes (N.Y.: Russell Sage Foundation, 1927); and Law and Labour Relations, Business Research Studies No., 14, Harvard University Graduate School of Business Administration (Boston, March 1936).

71 Acland, supra note 38, 167.

72 H.S. Ferns and B. Ostry, The Age of Mackenzie King (London: William and Heinemann, 1955) 76.

73 B.M. Selekman, Postponing Strikes (N.Y.: Russell Sage Foundation, 1927) 120.

Since the primary purpose of the legislation was to promote compromise, criminal penalties were provided merely to create additional pressure upon the parties to participate in the conciliation process.[74]

Furthermore, King's testimony before the Walsh Commission on Industrial Relations (established in 1912 by the U.S. Congress) indicates that the government never intended to enforce the penal provisions contained in the Act. King testified that the penalty for violating the cooling off provision was introduced at the instance of the government with an eye to getting the legislation through Parliament.

> The question was this: We knew that as soon as the measure was brought down that at once the employers would say and the public would say "You are setting up a tribunal at the expense of the State, giving rights that have never been given to labor before, namely, the right to have their own member on a board, the right to choose a chairman, the right to call witnesses and to have those witnesses paid by the State, the right to appear by themselves, or by their own representatives. You do all this at the expense of the State. What is the State getting in return for it." The government of the day did not think the measure could be put through unless there was some answer to that question. The answer was this: "What you get in return is the continuous operation of the utility that is concerned," and the only way that could be put into words before the public was to impose a penalty which could be collectible in the event of a violation if that took place. That is the nature of the understanding, so to speak, between the State and one of the parties to an industrial dispute.[75]

Taking King's testimony at face value, the compulsory cooling off provision was introduced as a political compromise rather than as an essential feature of the legislation. When confronted with violations the government was content to rely on private parties to initiate prosecutions.

Defending the government's policy of non-enforcement King stated that:

> The government has never laid particular stress upon the penalty end of the IDI Act: the penalty part of it has always been treated much in the same light as a penalty for trespass. If the party affected wishes to enter an action to recover damages, they may do so, but the Government of its own

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74 Report of the Deputy Minister of Labour for the Fiscal Year ended March 31, 1908, 8-9 Ed. VII, 1909, Sess. Paper No. 36, 54-55.

75 Commission on Industrial Relations (Walsh Commission), Final Report and Testimony (Washington: Govt. Printing Office, 1916), vol. I, 716.

> initiative has never laid an information against any of the parties for violating the provisions of the act.[76]

The problem with this defense is that King's analogy between the penalty imposed for a violation of the cooling off period and an action in trespass undercuts the argument that state intervention in public utility disputes is justified because of their potential impact upon public welfare. If the rationale for state intervention in public utility disputes is consistently applied - that private rights should cease when they become public wrongs - prosecutions for the breach of provisions designed to protecting the public interest should not depend upon the initiative of a party to the dispute. It appears that in the administration of the IDI Act, theoretical consistency gave way to administrative expediency.

The theory behind both the IDI Act and the RLD Act was that the publication of the third party's report would place the issues in dispute before the general public and thus enlightened public opinion could be brought to bear upon the parties. This theory was never achieved in practice. Adam Shortt, who served as an influential conciliation board chairman during the initial stage of the Act's administration, developed the technique of conciliation by bargaining as a means of achieving compromises which would effect settlements as a substitute for compulsion.[77] Owing to his emphasis on conciliation, Shortt played down publicity and hence diminished the role of public opinion. Outlining his practice Shortt wrote:

> In the case of all the boards presided over by the writer, it was arranged that there should be no newspaper reports of the proceedings before the board. The objection to such reports has been that the very calling for a board implied that there was more or less radical differences of opinion and assertions of right, which the respective parties were about to lay down and defend, but which, in the course of the proceedings before the board, must

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76 Id., 715-16. The damages King referred to are damages in tort.

77 Adam Shortt, "The Canadian Industrial Disputes Act," X American Economic Publications, Third Series (April, 1909) 158 and Selekman, supra note 73, 106-109.

> be given up or at least greatly modified on one or both sides if a settlement will be reached.[78]

Publicity, Shortt argued, was suitable to arbitration but inimical "to the attitude and frame of mind which is essential to the settlement of difficult and often bitter disputes."[79]

The administration of the IDI Act stressed conciliation and mediation.[80] The threat of publicity was used to promote a willingness to compromise on both sides in order to make the conciliation procedure more effective.[81] The brand of conciliation employed by several influential chairman stressed active mediation on the part of the third party.[82] In this respect, intervention practised under the IDI Act resembled that practised under the Conciliation Act, 1900. What distinguished the process of third party intervention under the IDI Act from that under the 1900 Act is not the mode of intervention, but rather the agency of intervention: ad hoc representational boards were substituted for Department of Labour officials. Party representation and independence from the Department of

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78 Id., 158, 161-2, quoted by Selekman, supra note 73 at 124.

79 Id.

80 Squires, supra note 70, 139; Selekman, supra note 73, 15-16.

81 Report of the Deputy Minister of Labour for the Fiscal Year ended March 31, 1911, Sess. Paper No. 36a, 2 Geo. VI 1912, 13.

82 Shortt, supra note 77, 164-65 and Victor S. Clark, No. 76 Bulletin of the U.S. Bureau of Labor (1908) at 666. On the basis of interviews with several chairman of boards appointed under the IDI Act Clark concluded that "the most successful boards in conducting proceedings, have interpreted the act as a statute for conciliation by informal methods, looking toward a voluntary agreement by the parties as its object."

Labour characterised the IDI Act boards, lending an aura of legitimacy to the process of mediation which was not to be found in the Conciliation Act.[83]

The emphasis on conciliation in the administration of the Act had an impact on its effect on disputes concerning collective bargaining. A necessary preliminary to collective bargaining is union recognition - that is the willingness of the employer to bargain with a representative of its employees, rather than to insist on bargaining with each of the employees individually. In 1912 A.L. Acland, the Registrar of the Boards of Conciliation, commented that

> disputes arising directly out of union recognition were peculiarly difficult of adjustment and have proved hardly susceptible to ordinary methods of conciliation. Inquiry into such disputes shows that agreement can be reached only by the abandonment on one side or the other of the matter of contention, there being no ground for a common point of view.[84]

Successful conciliation by IDI Act boards depended for its success upon the willingness of the parties to compromise. However, as Acland's statement illustrates, the issue of union recognition was not susceptible to compromise.[85] In light of this discrepancy between the process of intervention and the issue in dispute, Ministers of Labour were unwilling to appoint conciliation boards when union recognition was the sole issue in dispute.[86] The refusal of the Minister to appoint a board in recognition disputes was based on a realization of the limited power of such boards:

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83 However, it was typical practice in attempting to resolve disputes for departmental officials first to attempt to mediate the dispute, and, failing this, for the parties to apply for an IDI Act board.

84 Fifth Report of the Registrar of Boards of Conciliation and Investigation for the fiscal year ending March 31, 1912 (Dept. of Labour, Ottawa) 8.

85 Woods discusses four different types of disputes, recognition, jurisdictional, rights and interest disputes, and criticizes the IDI Act because the distinctions between the various types of disputes "were not reflected in the settlement machinery." See H.D. Woods, "Canadian Collective Bargaining and Dispute Settlement Policy: An Appraisal," XXI Can. J. of Econ. and Pol. Sc. 447 (1955).

86 Selekman, supra note 73, 146.

> A board can do nothing to alter the character of the labour market at a particular time, nor the power of the parties in the market. The most that a conciliation board can do is estimate the balance of power in a situation, to translate this balance into a finding and to persuade the parties that, the facts being what they are, such is the settlement which each will have to accept, whether or not they strike or lock out their employees.[87]

The problem was that the boards saw no way to split the difference in what they perceived as a zero-sum game. Thus, a test of strength was seen as the only way to resolve a recognition dispute since the other option, forcing employers to recognize trade unions for the purpose of collective bargaining, was not on the government's policy agenda. Workers had the freedom, to be exercised through the legitimate use of economic force, which was patrolled by criminal and civil sanctions, to organize if they wished. The government would not force employers to bargain with a union since compulsory recognition was perceived as too great an intrusion into the private sphere of market forces.

What impact, then, did the IDI Act have upon collective bargaining? Since during the first stage of the Act's administration the government illustrated an unwillingness to appoint boards when the dispute revolved around union recognition it is difficult to see how Woods' claim,[88] that the IDI Act indirectly supported collective bargaining by providing de facto recognition - can be supported. His failure to examine the administration of the legislation suggests a deeper failure: a failure to recognize the indeterminacy of legal form. The social effects of adopting a particular piece of legislation are never predictable from the legislation itself, since the effects of the legislation are dependent upon interpretation, administration and the responses of the regulated parties. Thus, at best, the Act's effect on union recognition was neutral. At worst, the Act made the achievement of union recognition more difficult as the requirement for a strike vote and the prohibition against industrial action

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87 Ferns and Ostry, supra note 72, 75-76.

88 Woods, supra note 5, 461.

during the cooling off period, both informed the employer of the degree of union support in the workplace and provided the employer with an opportunity to take action against union supporters when the workers could not use their collective muscle to retaliate.[89] However, since most of the workers who struck in violation of the Act were rarely prosecuted, many groups of workers merely ignored the legislation.[90] Thus, it is likely that the IDI Act had a neutral, as opposed to negative, impact upon collective bargaining disputes.[91]

II A Period of Transition - 1914 to 1920

The wartime period can best be characterized as a transitional period during which the Canadian economy, the labour movement and federal labour relations policy underwent significant changes - many of which were to become lasting features of the 1920s. Committed to the National Policy in theory, the successful prosecution of the war occupied centre stage in the government's economic policy. Industrial mobilization gave impetus to trade union organization, which had lagged during the depression of 1913-14, and trade union

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89 Jamieson, supra note 2, 128-129.

90 Squires, supra note 70, 54-57. During the period from March 22, 1907 to December 31, 1916 Squires found that of the 395 disputes falling within the scope of the Act, just over half of them, 217, were referred under the Act. Of these 217 disputes, no stoppage occurred in 173 of them. In the 44 disputes referred under the Act in which a stoppage occurred, in 26 of them the stoppage occurred before the board issued its report. Thus, over half of the total number of disputes, 222 out of 395, resulted in stoppages and the vast majority of those stoppages, 204, were illegal.

91 From his examination of conciliation board intervention in disputes between 1907 and 1914, Russell concludes that "[c]ompulsory conciliation operated, albeit weakly, to moderate employer positions and, thereby, enhance the likelihood of compromise rather than defeat workers in conflict with capital." However, he does acknowledge that this type of "strategic compromise" depended upon the industrial seller and the union's willingness to strike. Bob Russell, "State constructed industrial relations and the social reproduction of production: the case of the Canadian IDIA," 24 Can. Rev. Soc. & Anth. 213-230 (1987) 227.

membership increased from 166,200 in 1914 to 373,800 in 1920.[92] Bolstered by their organizing success and spurred on by the price inflation that set in during the war, the western trade union movement embraced industrial militancy. This heightened the regional rifts within the TLC and led to the formation of rival federations after the war. In order to put an end to what it perceived to be industrial warfare the federal government implemented, with varying degrees of success, a number of mechanisms to resolve the wave of industrial disputes which gained momentum during the war. Permanent amendments were made to the IDI Act at the end of the war, which, although minor in terms of policy development, contributed to the creation of a favourable attitude on the part of the TLC to federal labour policy. However, more important, both for securing TLC support for and influencing subsequent developments in federal policy, were the temporary measures introduced to resolve wartime disputes.

Shortly after the outbreak of the First World War the War Measures Act, 5 Geo. V, c.2, was enacted. This Act authorized the federal cabinet to issue orders in council, thus by-passing Parliament, on any matter relating to the war, including matters normally within provincial legislative jurisdiction. These orders would have the force of law for the duration of the war. The government's wartime labour policy consisted of three general types of orders: modifications to the IDI Act and orders directed to labour relations generally; restrictions on civil liberties which were, in part, directed to controlling elements in the

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92 Robert Craig Brown and Ramsay Cook, Canada 1896 - 1921, A Nation Transformed (Toronto: McClelland and Stewart, 1976) 241, footnote 62.

trade union movement;[93] and the introduction of distinctive regulatory regimes to resolve industrial disputes occurring on the railways[94] and in the western coal mines. The restrictions on civil liberties and the apparently ad hoc amendments made to the IDI Act during the war provided a model for wartime labour policy which was invoked by the federal government during the first half of the Second World War. But, most important for its effect upon labour relations policy in

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93 The restrictions on the freedom of speech, publication and association which were directed to, among other things, controlling what the government considered to be illegitimate trade union acitivity. In February 1918 Senator Gideon Robertson, to be appointed Minister of Labour later that year, warned the government that the International Workers of the World, an industrial, socialist union based in Western Canada and the Western United States, was attempting "to spread sedition and foment industrial unrest in British Columbia." (Robin, supra note 13, 163-64.) Although a government appointed investigator failed to find any evidence for Robertson's allegation, the government was convinced that labour radicalism and militancy promoted by enemy aliens was behind the strike wave. In September 1918 the government issued PC 2831 banning the use of publications in fourteen languages. Three days later the government issues PC 2384, which banned fourteen specified associations, among them political parties associated with the Western labour movement, and prohibited the use of many foreign languages at public meetings. These prohibitions severely restricted the ability of workers, particularly western coal miners, to engage in ordinary trade union activities since many of them could not communicate except in their native languages, the majority of which had been banned from public use. See Robin, supra note 13, 163-67. See also Donald Avery, 'Dangerous Foreigners' European Immigrant Workers and Labour Radicalism in Canada, 1896-1932 (Toronto: McClelland and Stewart, 1979) 70-76.

94 Regularized relations for collective bargaining had been institutionalized between the railway brotherhoods, which represented the elite running trades, and the railway companies from the turn of the century. Just before the end of the war, the companies and the brotherhoods, with the encouragement of the federal government, established a system of dispute settlement under the Canadian Railway Board of Adjustment No. 1. This Board was composed of an equal number of representatives selected by the railway companies and brotherhoods. Disputes which were not settled on a local basis were submitted to the Board for binding arbitration. The purpose of the Board was to assist in resolving disputes not readily disposed of through the regular grievance machinery. After the war the parties agreed to have the Board continue. However, the jurisdiction of the Board was confined to cases involving the interpretation of wage schedules and collective agreements. Moreover, the parties agreed that the decisions of the Adjustment Board would be binding. Disputes arising out of the negotiation of new agreements were referred to conciliation boards appointed under the IDI Act. See H.A. Logan, Trade Unions in Canada (Toronto: MacMillan, 1948) 151.

the immediate postwar period, was the federal government's distinction between legitimate and illegitimate trade unions, which was implemented towards the end of the war under the temporary measure designed to resolve industrial disputes in the coal mines.

Before discussing the temporary wartime measures which influenced subsequent labour policy, it is worth noting two permanent sets of amendments to the IDI Act which were implemented in 1918 and 1920. At the behest of the TLC, three types of amendments were introduced in 1918:[95] the first guaranteed the employment relationship during a strike or lockout pending the application for the appointment of a conciliation board,[96] the second enabled an affected municipality or the Minister of Labour to initiate conciliation proceedings, and the third extended the power of the Minister over board proceedings. Two years later the Act was further amended.[97] Several of the amendments were a response to the fact that employers' associations and trade union federations had begun to play an important role in dispute settlement.[98] But the majority of the 1920 amendments extended the provisions introduced in 1918. The employment relationship was guaranteed until the Board reported and the power of the

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95 8-9 Geo. V, c.27 (1918).

96 In the House of Commons the Minister of Labour at the time, W.T. Crothers, indicated that "[i]n several cases it has been held by the Courts that as the Act provides for an investigation of disputes between employers and employees, immediately there is a strike that relationship no longer exists. If a number of men went on strike yesterday, for instance, and applied for a board to-day, under this decision of the courts they would not be entitled to a board because the relationship of master and servant had ceased." Can., H.C. Deb., April 17, 1918, 835.

97 10-11 Geo. V, c.29 (1920).

98 Hence the definition of "employee" was extended to include an employees' association and the definition of trade union was similarly extended to include a trade union federation and copies of applications for the appointment of boards were to be sent to the relevant employers' association and trade union federation.

Minister to compel investigation at his or her own initiative was extended to disputes where a stoppage appeared to be imminent.

The thrust of these two sets of amendments was twofold; first, to heighten the public interest aspect of the IDI Act by providing for third party initiation of conciliation, and second, to modify the legislation both to meet changes in the industrial relations situation and to resolve problems occasioned by judicial interpretation. Essentially, however, the policy underpinning the amendments was identical to the policy behind the Act at the time of its enactment. The main effect of the amendments, in conjunction with the practice of appointing Ministers of Labour recruited from the ranks of organized labour which began in 1918, was to help to convince the TLC that it had some influence over the Act. Thus, after an initial period of ambivalent support, followed by a period of outright rejection, by 1921 the TLC actively endorsed the IDI Act as its preferred mechanism for the resolution of industrial disputes.[99]

As its first wartime labour relations measure on March 23, 1916, the federal government issued PC 680 which extended the IDI Act to cover disputes in industries essential for the prosecution of the war. By 1917 military recruitment and the increased demand for skilled labour in the munitions and shipbuilding industries led to a labour shortage. This, in addition to inflationary pressures, contributed to a wave of strikes in munitions industries. The IDI Act proved inadequate to deal with the wartime labour disputes.

During the war, Gompers visited Canada, exhorting union members affiliated to the AFL to forego strikes during the national crisis. But instead of promoting industrial peace; Gompers' intervention proved to further alienate western and Quebec workers from the TLC. At the beginning of 1918

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99 The years between 1907 and 1916 marked a period of ambivalent support for the IDI Act by the TLC, punctuated by a decidedly negative turn in 1911, which is attributable to an unpopular court decision. In 1916 the TLC again called for the repeal of the Act, and this attitude continued throughout the war. From 1921 the TLC adopted a positive stance to the Act and called for amendments to prevent employers from unilaterally rolling back wages.

representatives from leading international unions met with Prime Minister Borden, the leader of the Conservative Party and head of the wartime coalition government, and his Cabinet ministers to discuss labour's role in the prosecution of the war. Conspicuously, no labour representatives from the west or maritimes were invited. Following a series of meetings, an agreement concerning the government's wartime labour relations policy was forged.[100] In exchange for representation on wartime advisory boards, government recognition and endorsement of trade unions, and the acceptance of labour's demand that wages keep pace with inflation, the labour representatives agreed both to a strike ban for the duration of the war and to co-operate in securing maximum production for war industries.

In July 1918 the cabinet issued PC 1743 which expressed the government's wartime labour relations policy. The principle of freedom of association for employees and the practice of collective bargaining were endorsed. The Order further urged the adoption of a strike and lockout ban and that conciliation boards established under the IDI Act be used to settle disputes in war industries. In addition, PC 1743 established a permanent tripartite board - called the Board of Appeal - which consisted of two representatives nominated by the TLC, two business representatives nominated by the CMA and a neutral chairman selected by agreement of the parties or, failing that, selected by the Minister of Labour. This Board would provide a final appeal from decisions of the ad hoc boards established under the IDI Act. However, the decisions of the Board were not binding upon the parties without their consent.

Order in Council PC 1743 did little to decrease the number of disputes in the war industries as its principles were exhortary rather than mandatory. To remedy this, on October 11, 1918, the cabinet issued PC 2525 which effectively

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100 After the initial meeting on January 16, 1918 talks were adjourned until the end of the month when a few representatives appeared from British Columbia and Alberta, Robin, supra note 13, 138.

imposed compulsory arbitration on disputes arising in war industries. Strikes and lockouts in industries falling within the extended scope of the IDI Act were expressly prohibited, and the decisions of the Board of Appeal were final and binding. Persons found guilty of inciting, ordering or participating in a strike or lockout or refusing or failing to obey a decision or order of the Board were liable, on summary conviction, to a fine of not greater than $1,000, imprisonment for a maximum of six months, or both. Moreover, Order PC 2525 implemented protections to ensure an employee's freedom to join or refuse to join a trade union; an employer who refused to employ or discharged a worker merely for participating in a trade union, or an employee who attempted to coerce or intimidate another employee to join a trade union was liable, on summary conviction, to the penalty outlined above.

Organized labour responded in protest to PC 2525. On October 22 the government issued a press release defending the unprecedented restriction on workers' freedom to strike. The government emphasised that "the Order-in-Council only carried into effect the war labour policy approved by representatives or organized labour and employers."[101] The government's claim was mendacious: since it was only as a result of organized labour's protest that the original wording of the July order expressing the government's labour policy was modified such that the clause declaring the strike ban was exhortary rather than mandatory. The executive committees of the Winnipeg and Edmonton central labour councils threatened a general strike if five Calgary freight handlers, who had been summoned to appear in the Police Court for violating the strike ban, were prosecuted.[102] The threat of a general strike was sufficient to persuade the federal government not to prosecute. But the full extent of organized labour's

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101 Robin, supra note 13, 167, footnote omitted.

102 Id., 167-168. See also D. J. Bercusson, Confrontation at Winnipeg (Montreal: McGill-Queen's U.P., 1974) 82-83.

opposition to the strike ban was never tested since the armistice was declared only a month after PC 2525 was issued. The ban on industrial action in war industries was revoked in November 1918, and on May 11, 1919, the Board of Appeal was abolished.

The federal government was not, however, content to rely on its general wartime labour relations initiatives to resolve the industrial unrest which was growing in the western coal fields. Owing to the need for a continuous supply of coal for the successful prosecution of the war, the federal government imposed a regime of compulsory, binding arbitration. Prior to the war the vast majority of strikes in the coal fields were attributable to union recognition disputes. However, as the war progressed wages fell further behind soaring prices. District 18 of the UMWA, which represented the majority of miners in the Crow's Nest Pass region of Alberta, began to press for wage bonuses to meet the rise in prices. Intermittent strikes which began in November 1916 became widespread among the 9,000 workers employed in that region and culminated in a prolonged strike beginning in April 1917. The IDI Act was completely ignored by both sides to the dispute and a fuel shortage resulted. The government saw little prospect of a working agreement being concluded between the coal operators and coal miners in the region and it appears that it never contemplated prosecuting the miners for violating the IDI Act's compulsory cooling off provision.[103] Recognizing the inadequacy of the IDI Act to resolve the strike the federal government imposed compulsory binding arbitration on disputes in the Crow's Nest Pass coal mines. On June 25, 1917 a Director of Coal Operations was appointed for the coal industry in that region. An order in council granted the Director extensive powers to control the industry - including the power to make all necessary investigations, to adjust grievances and to fix prices and wages. Failure to comply with the Director's orders could result in the imposition of criminal

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103 Report of the Department of Labour for the fiscal year ending March 31, 1918, 9 Geo. V, Sessional Paper No. 36 (Ottawa, 1919) 24.

sanctions. In effect, the Director was empowered to arbitrate disputes and impose binding awards.

The tensions between the central and western trade union movement which had long been fermenting erupted in an open split over federal wartime labour policy at the 1918 annual TLC convention held in Quebec City. A majority of the Committee on Officers' Reports, dominated by the international unions located in central Canada, supported the decision of the executive of the TLC to endorse the federal government's labour policy.[104] By contrast, a minority of the Committee, supported by western delegates, issued a report condemning the meetings held earlier that year between the cabinet and trade union leaders on the grounds that western representation was negligible and the international unions had dominated. The minority report argued that the wartime labour policy was inimical to the interests of the western trade unionists. After heated debate the minority report was rejected and the power of the central internationals was consolidated through the election of Tom Moore, a firm supporter of international craft unionism, as the president of the TLC. Dissatisfaction with the results of the convention fuelled successionist feelings in the Western labour movement. The western delegates held a Western Labour Conference in Calgary in March 1919, out of which the industrial syndicalist One Big Union (OBU) grew. The OBU, which had its roots in the Wobblies, advocated organization on an industrial/territorial basis and the use of the general strike to obtain a better deal for workers.

At the beginning of 1919 the OBU began to vie with District 18 of the UMW for the coalminers in the Crow's Nest Pass.[105] Owing to this challenge the UMW, which had been noted for its vehement opposition to compulsory arbitration, changed its policy and supported the Office of the Director of Coal Operations.

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104 Robin, supra note 13, 161.

105 David J. Bercusson, Fools and Wise Men: The Rise and Fall of the One Big Union (Toronto: McGraw-Hill Ryerson, 1978) 196-204 and Robin, supra note 13, 190-93.

Under the guiding hand of W.H. Armstrong, the Director of Coal Operations, an alliance of business, government and international unions was forged in order to combat the OBU.[106] In an unprecedented departure from previous policy, Robertson, the Minister of Labour, encouraged the establishment of closed shop agreements between the coal operators and the UMW in order to oust the OBU. Accordingly, the UMW and the Western Coal Operators' Association negotiated an agreement whereby each mine operator was required to collect UMW dues from each miner on the payroll and the 14 per cent pay rise which was agreed to was to be granted only to UMW members. To give the agreement legal effect, Armstrong issued Order 141 on December 19, 1919 which established the agreement as the official working code between the mine operators and coal miners in the Crow's Nest Pass. The OBU organized a strike against the checkoff provision. Rather than relying upon the government to initiate criminal proceedings against the illegal strikers, the coal operators applied for an injunction to end the OBU strike.[107] On October 10, 1920 "an injunction was issued against the OBU for failure to abide by the requirements of the IDI Act and attempting to break their contract with the operators."[108] To ensure that the authority of the Director did not lapse once the war ended (when the legal authority of the orders in council issued under the War Measures Act was exhausted), a special statute was

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106 Bercusson, supra note 105, 205.

107 Collective employee action was severely constrained by the operation of the common law economic torts and the criminal law of conspiracy. The Trade Unions Act, 35 Vict., c. 30 and Criminal Law Amendment Act, 35 Vict., c. 31 were enacted in 1872 allegedly to immunize trade unions from the operation of the common law; however these statutes proved to be ineffective. Moreover, where an employer could demonstrate that damage would result from picketing or a strike which offended the common law the courts could issue an injunction. Failure to abide by the injunction could attract contempt of court proceedings and, ultimately, penal sanctions. For a discussion of the restrictions imposed upon trade unions by the common law and the inadequate statutory responses see Carrothers, supra note 1, 11-31.

108 Bercusson, supra note 105, 213 and see also Robin, supra 13, 191.

passed by Parliament in December 1920 continuing the authority of the Director and all of his orders until June 1921.[109]

The office and powers of the Director of Coal Operations were used to give effect to the federal government's distinction between legitimate and illegitimate unions, which was drawn by MacKenzie King in the 1903 report of the Royal Commission appointed to investigate the industrial disputes occurring in British Columbia. As Minister of Labour, Robertson asserted that workers would enjoy union membership rights "only so long as the organization to which they belong is not one what has for its purpose the destruction of industry and of existing legitimate institutions."[110] The OBU, which organized workers on a territorial basis, was committed to the syndicalist agenda of using the general strike to bring about social as well as industrial change.[111] By comparison, the UMW, which before the war had been unacceptable to the Western Mine Operators, was a legitimate union. As Bercusson notes "[t]he coal operators, who had denounced the UMW as alien extremists in 1917, [by 1918] held the very same union in loving embrace."[112] When confronted with competing unions the federal government was able to apply its distinction and use its legislative authority to ensure the triumph of the legitimate union over the illegitimate one.

The formation of the OBU was just one manifestation of the extent of workers' dissatisfaction with both the traditional trade union movement and the federal government's labour policy at the end of the war. The most infamous

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109 Selekman, supra note 73, 297. See also the Report of the Deputy Minister of Labour, 12 Geo. V., Sessional Paper No. 37, (Ottawa, 1922), 51-55. A second agreement was negotiated between the Western Canada Coal Operators' Association and District 18 of the United Mine Workers, which once again contained a closed-shop and compulsory dues check-off.

110 Robin, supra note 13, 191.

111 Logan, supra note 94, 316.

112 Bercusson, supra note 105.

eruption of worker militancy, met by the full force of governmental repression, was the Winnipeg general strike - which occurred at the same time as the OBU and UMW vied for the coalminers in the Crow's Nest Pass. Although closely identified with the OBU, the strike was organized by the Winnipeg Metal Trades Council on May 15, 1919 to obtain collective bargaining in the city's railway repair shops. However, is spread throughout the working population of the city and grew into a general campaign to give union recognition and collective bargaining a status in law so that employees would no longer be dependent upon employer whim for decent wages and job security.[113]

The federal government prepared to defeat the strike. An amendment to the Immigration Act was passed in record time - 43 minutes from first reading to Royal Assent. This amendment, s.41, empowered the federal government to deport anyone who "by word or act" sought the violent overthrow of constituted authority in Canada. After receiving assurances that the amendment would not be used against the international unions, the TLC executive informed the labour minister that the measure was in the best interest of organized labour and the state.[114] Foreign agitators were henceforth identified as the eastern Europeans involved in the strike. Robertson ordered the arrest and deportation of several strikers on the ground that they were enemy aliens. In addition, the army and the RCMP were reinforced with additional men and secret shipments of machine guns. On Saturday, June 21 when demonstrators marched on the city centre to emphasize their demands, the Riot Act was read, and the marchers were ordered to disperse. When they failed to do so, an RCMP detachment opened fire on the crowd. By the end of Bloody Saturday two marchers were dead and the strike was in ruins.

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113 Bercusson, supra, note 102, 188.

114 A.B. Waywitka, "The Drumheller Strike of 1919," Alberta Historical Review, 1-7 (Winter 1973) 7, for a detailed discussion of the strike. For a thorough discussion of the events and considerations leading up to the amendment of the Immigration Act see Isaac Shin Imai, "Canadian Immigration Law and Policy: 1867-1935," LL.M. thesis, York University, 1983, 167-193.

Management prerogatives were protected, constituted authority reigned supreme and the combined efforts of the Minister of Labour and the TLC executive had successfully crushed the OBU and shored up international unionism.

How are we to evaluate labour relations policy during the wartime period? Although it is true that "[t]he First World War produced no lasting impact on labour relations legislation,"[115] the wartime initiatives influenced subsequent labour policy in several respects. First, federal labour policy during the First World War established a precedent that was invoked during the Second World War. The use of temporary orders instead of lasting legislation, the extension of the IDI Act to deal with disputes in war industries and the issuance of an order endorsing collective bargaining and union recognition rather than compelling employer recognition of representatives freely chosen by the employees, characterized federal policy during the greatest part of World War Two.[116] Second, the representation battle between the OBU and the UMW in the coal mines of the Crow's Nest Pass, which was resolved through the federal government's support of the recognition of the legitimate union at the expense of the illegitimate union, prefigured changes in the administration of the IDI Act. The federal government's willingness to use an industrial disputes resolution mechanism to implement its distinction between illegitimate and legitimate trade unions became a permanent feature of its labour relations policy during the 1920s. And thirdly, the federal government displayed its willingness to use repression when workers' dissatisfaction with their failure to achieve recognition and collective bargaining resulted in militancy.

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115 Woods (1955), supra note 2, 456, emphasis added.

116 In addition, the compulsory arbitration of grievances arising out of the interpretation and application of collective agreements on the railways (supra note 94) prefigured a major feature of the Wartime Industrial Relations Regulations, 1944.

III Retrenchment - 1921 to 1930

In 1921 the National Policy was finally discarded. The new frontier was no longer the west, but the central-north with its hydro-electric power, base metals and pulp and paper.[117] The large scale liquidation of British investment after the war and the continued expansion of American equity investment ended British economic supremacy. American capital and American industrial relations techniques were clearly predominant by 1920. The postwar period also marked the end of an era in Canadian federalism when the central government dominated. The provinces began to take control over natural resources and, assisted by the Privy Council, asserted their legislative authority over a wide range of fields, including labour relations. This led to what has been characterized as the balkanization of Canadian labour policy.[118] The Canadian labour movement was weakened by internal rifts and employer policies, and trade union membership actually declined from 313,000 in 1921 (or 16 per cent of the non-agricultural paid workforce) to 311,000 (or 15.3 per cent) in 1931.[119] Although no new labour relations legislation was implemented during the 1920s, the change in administrative policy under the IDI Act concerning union recognition, which was signalled at the end of the war, was generalized and became a lasting feature of federal labour policy.

From 1921 until the end of 1924 the Canadian economy experienced severe deflation and, accordingly, the majority of employers cut wages. The large, American owned firms which dominated the manufacturing sector instituted a

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117 Smiley, supra note 7, 138.

118 Carrothers, supra note 2, 40.

119 H.D. Woods et al., Canadian Industrial Relations. The Report of the Task Force on Labour Relations (Ottawa: Privy Council Office, 1968) 24.

programme of welfare capitalism borrowed from their American parents.[120] This programme included joint councils or shop committees, group insurance, bonus systems and profit sharing. At the same time these firms emulated their American counterparts by indulging in a vociferous "open shop" drive.[121]

The concerted action of the federal government, employers and the TLC served to quell the western labour revolt, which was expressed in the activities of the OBU. By 1923 the OBU was little more than a minor protest movement. The business depression of the early 1920s and the employers' open shop drive drained the TLC of any organizational impetus. Easterbrook and Aitkin commented that

> [t]hroughout this period the TLC made no move toward organizing workers on an industrial basis; rather the older organizational pattern of craft unionism seems to have become more rigid than formerly. The result was the that TLC came to be more and more an organization of old-line skilled trades, with the building trades, the printers, the garment workers, and certain classes of railway employees playing a dominant role.[122]

Shortly into the decade the TLC was confronted by a rival federation in Quebec. In 1921 the Catholic and Canadian Confederation of Labour (CCCL) was founded. It consisted of the majority of unions in Quebec and was defined by its "repudiation of the false principle of the conflict of classes, and the practice of justice and charity in dealing with employers, regulation of disputes by recourse to arbitration...."[123] That same year the Canadian Brotherhood of Railway Employees (CBRE) was driven out of the TLC on the grounds of dual

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120 Thompson and Seager, supra note 11, 140-41.

121 H.C. Pentland, "A Study of the Changing Social, Economic, and Political Background of the Canadian System of Industrial Relations," a draft study prepared for the Task Force on Industrial Relations (Privy Council, 1968) 98; Bryan Palmer, Working-Class Experience: The Rise and Reconstitution of Canadian Labour 1800-1980 (Toronto: Butterworths, 1983) 189-90.

122 W.T. Easterbrook and Hugh G.J. Aitkin, Canadian Economic History (Toronto: MacMillan, 1956) 566.

123 Leo Panitch, "Corporatism in Canada," 1 Studies in Political Economy 43 (1979) 52.

unionism. In 1927 the unions affiliated to the Canadian Federation of Labour (CFL), which comprised the national unions expelled from the TLC in the 1902 AFL takeover, joined with the CBRE to form the All-Canadian Congress of Labour (ACCL). The ACCL, which was effectively controlled by Aaron Mosher (who presided over the CBRE), mounted a campaign against international unionism. It was distinguished from the TLC both by its nationalism and its support for left-leaning politics.

Although the approximation to full employment from 1925 to 1929 ideally should have resulted in the growth of the labour movement, internecine rivalry precluded exploitation of the favourable economic conditions. The TLC, despite both its failure to take the initiative to organize the new mass production industries and the challenges to its claim to be the national voice of labour,[124] continued to be the major union influence on the federal government's labour policy during the 1920s.

From 1922 onwards the TLC demanded that the federal government strengthen the IDI Act to counteract the trend of wage reductions by employers. Specifically it requested that 1) a penalty be imposed upon an employer who implemented a change in wages before a board was established or reported, 2) the penalties for unlawful lockouts to be increased in proportion to the number of employees affected, 3) the responsibility for applying for a board be placed on the party seeking to disturb the status quo, and 4) the requirement for a strike vote to accompany an application for a board be abolished.[125] In 1923 and 1924 bills were passed in the House of Commons embodying the changes demanded by the

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124 Pentland, supra note 121, 139.

125 Selekman, supra note 73, 175.

TLC.[126] On both occasions the legislation was defeated by the Senate. In 1924 the Senate proposed a change to a government bill which would amend the IDI Act to meet the TLC's demands. The Senate amendment proposed to strip the Minister of Labour of his power to appoint chairmen and other members to boards where the parties failed to do so and to vest this power in the Chief Justice of the Supreme Court of Canada. This proposal reflected the employers' complaint that recent Ministers of Labour, who were recruited from the ranks of organized labour, were overly sympathetic to employees,[127] and that their sympathy was interfering with the selection of neutral chairmen. Predictably, the Senate's amendment was rejected by the Minister of Labour and consequently the entire government bill was defeated.

The final set of amendments to the IDI Act was not enacted until 1925, after the constitutionality of the Act was finally resolved. The question of the legislative authority of the federal government to enact the IDI Act had been raised as far back as 1907 during the debate over the introduction of the Act, and the question continued to surface over the years. In 1916, owing to a constitutional challenge, the federal government embarked on a policy of

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126 In 1923 Murdock, Minister of Labour since 1921, proposed a bill embodying the amendments requested by the TLC. The bill passed through the House of Commons only to be defeated in the Senate. L.G., July 1923, 744-50.

127 Selekman, supra note 73, 206.

appointing a board under the IDI Act in disputes involving municipalities only when the interested municipality agreed to refer the dispute to a board.[128]

In August 1923 the Toronto Electric Commissioners applied for an injunction to restrain the Minister of Labour from appointing a board under the IDI Act following the application of the street railway employees. The Commission based its application for injunction on two constitutional arguments: first, that the federal government lacked the authority to apply the Act to municipal employees, and second, that it lacked competence to legislate on matters involving property and civil rights, which were under provincial authority. An interim injunction was granted on the basis of the Commission's second argument.[129] On appeal the Supreme Court of Ontario, affirmed by the Ontario Court of Appeal, reversed the earlier decision and denied the injunction on the ground that the federal government was competent to enact the IDI Act.[130]

But the Privy Council had the last say in the matter. The Supreme Court of Canada was by-passed as a per saltum appeal was taken to the Privy Council. On January 20, 1925 Viscount Haldane declared that the IDI Act was outside the legislative competence of the federal Parliament as it was clearly concerned with the civil rights of employees and employers, a matter within the jurisdiction of

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128 In a constitutional challenge by the Montreal Street Railway Company the Superior Court of Quebec upheld, in 1913, the authority of the federal Parliament to enact the legislation on the ground that the subject matter had a general or national importance and was connected with the peace, order and good government of Canada. Upon review, the Superior Court dismissed the appeal on the constitutional issue but allowed a writ of prohibition on the ground that there was no dispute in existence (LG, Aug. 1913, 155). The federal government's conviction in its authority to enact the IDI Act was further undermined by a decision of the Nova Scotia Court of Appeal (District 26, UMWA v. Dominion coal Co. (1921), 55 N.S.R. 121, 132 per Ritchie E.J.). The Court indicated, albeit in obiter, that it had grave doubts concerning the competency of the federal government to pass the IDI Act.

129 (1923) 55 O.L.R. 454.

130 [1924] 1 D.L.R. 101 (Ont. S.C.) and [1924] 2 D.L.R. 761 (Ont. C.A.).

the provinces. The decision in Toronto Electric Commissioners v. Snider[131] established that the federal Parliament had authority to legislate with respect to industrial relations in only those industries within federal jurisdiction; viz., interprovincial transportation and communication undertakings, inland or maritime navigation and shipping, and businesses within one province declared by the federal government to be for the general advantage of Canada or two or more provinces. Since the vast majority of industries fell within provincial jurisdiction, labour relations became primarily a matter of provincial responsibility.

Snider did more than impose a decentralized conception of labour policy; it was part of a trend in Privy Council decisions which undermined the notion that any level of government had the right to intervene in the economy. Snider was not litigated by a province trying to preserve its jurisdiction, but rather by a corporation concerned with blocking any attempt by government to regulate economic life. Since the federal government was more willing to introduce regulatory legislation than the provinces, it was more often the target of litigation.[132]

Upon learning of the Snider decision, the TLC urged the federal government to amend the British North America Act so that the IDI Act, reenacted "with the amendments previously sought by labour", would be brought within the legislative competence of the federal parliament.[133] But instead of attempting the difficult route of constitutional amendment, King's government introduced a bill which both restricted the scope of the IDI Act to those industries within federal legislative authority and provided that the Act might apply to disputes in

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131 1925 A.C. 396.

132 Thompson and Seager, supra note 11, 132.

133 Selekman, supra note 73, 178.

industries under provincial jurisdiction so long as a province enacted legislation authorizing the application of the IDI Act to industries within its jurisdiction. By 1932 each of the provinces, with the exception of Prince Edward Island, had passed enabling legislation making the IDI Act applicable within their jurisdiction.[134] The provincial enabling statutes, with the exception of Alberta, were careful to limit the availability of compulsory conciliation to public utilities. Thus, the IDI Act remained as exceptional legislation justified by reference to the public interest in the continuous operation of public utilities until the outbreak of the Second World War.

The bill amending the IDI Act received Royal Assent on June 12, 1925.[135] In addition to the amendments regarding the scope of the Act, several of the changes requested by the TLC were implemented. The 1925 Act explicitly permitted the establishment of a board in cases where the employer refused to confer with a union representing its employees,[136] introduced a penalty backing the prohibition against changes in wage rates or hours of work before a board issued its report[137] and placed the responsibility for applying for a board upon the party proposing any changes in wages or hours of work. The TLC greeted these changes with approval; however, it was not satisfied with the amendments which were introduced to address the constitutional decision in Snider. In contrast,

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134 British Columbia, 1925, c.19; Alberta, 1926, c.53; Saskatchewan, 1925-27, c.58. New Brunswick, 1926, c.17; Manitoba, 1926, c.21; Ontario, 1932, c.20; Quebec, 1932, c.46; and Nova Scotia, 1926, c.5. Unlike the other provinces, Alberta introduced legislation which applied to all employers employing 10 employees or more.

135 15-16 George V. c.14.

136 Prior to this amendment, the Minister was able under the Act to appoint boards where the issue in dispute was recognition. However, the Minister refused to exercise his authority in such cases.

137 The amendment imposed a fine of between $100 and $1,000 for each day that a change in wages or hours was in effect before a conciliation board appointed under the Act issued an award.

Canadian employers criticized the amendment which prohibited, on pain of penalty, the employer from changing wage rates until a board had reported, claiming that it put an unfair burden upon manufacturers who faced the necessity of an immediate reduction in wages.[138]

After the First World War TLC affiliated unions were more willing to invoke the IDI Act to resolve industrial disputes than they were previously. Several factors contributed to this change in attitude. First, the rapprochement between the federal government and the TLC which occurred during the war convinced the Congress that it had something to gain from using the Act. Second, the Act was invoked as a defensive strategy on the part of unions to combat wage reductions.[139] By applying for boards unions were able to present their case against such reductions and avoid calling a strike. This tactic served to delay wage rollbacks, since the 1925 amendment prohibited employers, on pain of penalty from unilaterally reducing wages before a board reported. Third, the internal divisions within the trade union movement affected the ability of unions to present a unified front to employers. Much of the strength needed for strike action was dissipated on inter-union rivalry. Moreover, international union officials were anxious that the strike weapon, if used, could be exploited by more radical members of the rank and file to the advantage of the new syndicalist unions. Thus, they preferred to use the machinery of the IDI Act to settle disputes with employers rather than to chance a strike.

During the 1920s the administration of the IDI Act regarding recognition disputes changed, and this change in administrative policy was reflected in the 1925 amendment to the IDI Act which explicitly permitted the establishment of a board in disputes where the employer refused to confer with the union representing its employees. In his 1936 study of the IDI Act, Selekman

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138 Selekman, supra note 73, 214.

139 Id., 253.

discovered that boards were being appointed in disputes involving the issue of recognition. He attributed this change in policy to the "tendency of the administrators to formalize advancing industrial custom through the flexible machinery of the Act."[140] At a time when collective bargaining "was being gradually put into more general practice" the IDI Act tended to support collective bargaining.[141]

What accounts for this change in policy regarding the appointment of conciliation boards in disputes where the sole issue was one of recognition?[142] The distinction between different types of recognition issues is important for answering this question. One type of recognition dispute involves recognition per se, that is, the willingness of the employer to bargain with a representative of its employees. In light of their weakened condition after World War One, unions were more willing to apply for boards to resolve recognition disputes. Generally, IDI Act boards were unwilling to take the parties to a dispute beyond the point where a realistic appraisal of their relative strength and of their day-to-day relationships showed that they could be made to go.[143] In cases where the employer adamantly refused to recognize a union selected by its employees, the boards often sought to promote the compromise solution that the employer

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140 B.M. Selekman, Law and Labour Relations, Business Research Studies No. 14, Harvard University Graduate School of Business Administration (Boston, March 1936) 23.

141 Id.

142. Although there is a dearth of secondary material concerning the effect of the IDI Act on disputes centering soley upon the issue of union recognition, what exists is consonant with the following observations and conclusions. However, a detailed examination of the conciliation board reports during that period (which is beyond the scope of my thesis) might lead to different conclusions.

143 Selekman, supra note 140, 25.

negotiate with a committee of employees "free from outside interference."[144] In other words, if the employer was unwilling to negotiate with a union, the board sought to reach a compromise by substituting an employees' committee that was not affiliated to a trade union. However, this compromise was only successful in a limited number of cases where the employer was opposed to trade unions and not to negotiation with its employees on a collective basis, and where the employees were satisfied with employee committees free of outside affiliation.

By contrast, where the recognition dispute was one of representation, that is, which one of two unions should represent a particular group of employees, the boards were able to play an active role in establishing a settlement. It was with respect to the issue of representation that the federal government's distinction between illegitimate and legitimate trade unions took on significance for the administration of the IDI Act.

The IDI Act was administered in such a way as to favour the recognition of "legitimate" unions or unions affiliated to the TLC. In situations where an international craft union was faced with a challenge by a syndicalist union for its membership, the international union would apply for a board to resolve the issue of recognition with the employer. The board would try to effect a settlement between the international union and the employer, usually to the detriment of the rival union. As the battle between the OBU and the UMW for the coal miners on the Crow's Nest Pass illustrates, the employer might be willing to compromise on the issue of recognition qua representation if it was faced with the possibility that a "radical" union might gain a foothold on the workforce. In cases where a union, typically a syndicalist union, applied for a board where there already was an agreement between an international union and the employer the Minister adopted a policy of refusing to establish a board.[145] For example,

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144 Id. See also L.G., Aug. 1928, 827-32; L.G., Sept. 1928, 954-55.

145 Selekman, supra note 73, 263-64 and supra note 140, 29.

in 1926 the OBU applied for a board to consider a seniority dispute in the Fort Rouge Rail Plant at Winnipeg. However, since the employees concerned were already covered by an agreement between the Railway Association of Canada, representing the employer, and the United Brotherhood of Maintenance-of-Way Employees and Railway Shop Labourers, a legitimate trade union under the government's definition, the Minister decided that there was no ground for constituting a board.[146] In effect, the Minister adopted a policy of exclusive representation by one union of a particular group of employees where an illegitimate union was seeking to reorganize the workforce.

In cases where there was no collective agreement in effect and two unions each applied for a board with respect to the same group of employees, the Minister adopted a policy of establishing the board on the application of the union representing the majority of the employees.[147] This policy of majority representation tended to support the unions affiliated to the TLC, since they had a longer history of organizing particular groups of workers and greater financial resources than the newer unions and thus were usually able to win a majority of the employees in membership campaigns.

The administration of the IDI Act in the 1920s did not promote collective bargaining per se, rather it influenced the type of collective bargaining relationship established where employers were willing to deal with employees on a collective, as opposed to an individual, basis. Where employers were opposed to bargaining with unions, the compromise of employee or shop committees devised by conciliation boards enabled employees to enjoy collective representation, albeit

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146 Report of the Department of Labour for the fiscal year ending March 21, 1926 (Ottawa, 1926), 15 and also see Selekman, supra note 140, 29.

147 Selekman, supra note 140, 30. Conciliation Boards would recommend the appointment of a joint committee representing two unions where both of the unions were legitimate. See, for example, L.G., June 1920, 523-31, where the conciliation board recommended that a joint committee representing the Canadian Brotherhood of Railway Workers and the United Railway Express Workers be established.

in a limited form. In cases where an employer was confronted with a illegitimate union attempting to organize the workforce, conciliation boards developed two related principles, exclusive and majority representation, to promote collective bargaining with legitimate unions. Ultimately, however, collective bargaining during this period depended upon the employer's willingness to negotiate with a trade union, and this willingness on the part of the employer depended both upon the trade union's strength and the employer's perception of the available options.

The absence of substantial legislative innovation during the 1920s, and the federal government's preference for modifications in the administration of the IDI Act to meet changes in the industrial relations situation, is partially attributable to Mackenzie King's commitment to voluntarism, as opposed to legislative compulsion, for the resolution of industrial disputes. King's commitment to voluntarism, in addition to the explicit positions of the TLC and the CMA and the internal rifts in the Canadian labour movement, created an insurmountable barrier against the development and implementation of new legislative policy options.

The year before his rise to the leadership of the Liberal Party in 1919, King published Industry and Humanity[148] as his contribution to the postwar reconstruction debate. This treatise contained King's prescriptions for amicable relations between capital and labour which developed out of his involvement in industrial relations as Deputy Minister and then Minister of Labour from 1900 to 1911, and as an industrial relations consultant to the Rockefellers during the war. Significantly, his analysis of the cause of industrial conflict, and his resulting recommendations influenced federal labour policy until well into the Second World War.

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148 William Lyon Mackenzie King, Industry and Humanity (Toronto: Thomas Allen, 1918).

King has been characterized as espousing a quasi-corporatist ideology whereby the four parties to industry (Labour, Capital, Management and the Community), equally represented on industrial directorates, work in partnership to achieve their common interests.[149] Equal representation did not, however, entail a similarity in the functions of the four parties or an equality in rewards, but rather equal rights to be represented in decisions which affected their common interests.[150] Conflict in industry, which resulted from the breakdown of status relations and their replacement by contract relations in the capitalist mode of production, could be resolved only if all of the parties recognized their common interest in increased production which would lead to a greater share in social entitlement for each party.[151] Rather than regarding conflict as endemic to the capitalist form, King saw conflict as resulting from abuses in the form of industrial organization:[152] abuses which he attributed to the personalities of business and trade union leaders.[153] To further the spirit of cooperation on the industrial front, King advocated joint councils on the Whitely model and profit sharing; while on the social front he urged the adoption of both national health and unemployment insurance schemes.

King's emphasis on consensus, as opposed to conflict, as the principle underlying labour relations led to his distinction between legitimate and

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149 R. Whitaker, "The Liberal Corporatist Ideas of Mackenzie King," 2 Labour/Le Travailleur 169 (1977) for a full discussion of King's corporatist ideology; see also Paul Craven, "King and Context: A Reply to Whitaker," 4 Labour/ Le Travailleur 165 (1979), which subscribes to Whitaker's corporatist analysis, although disagreeing with Whitaker's analysis of King's intellectual development and Panitch, supra note 2, 54-59.

150 Panitch, supra note 123, 55.

151 Id., 139.

152 Id., 102.

153 Id., 14.

illegitimate unions. As Secretary to the 1903 Royal Commission investigating industrial disputes in British Columbia, he identified legitimate unions as those unions accepting a basic community of interest with employers. Illegitimate trade unions, by contrast, were motivated by political concerns and sought to use of illegitimate means such as secondary and general strikes to overthrow the economic and political structure. King never abandoned his distinction between legitimate and illegitimate unions and this distinction, in turn, influenced his conception of the justification for and the role of collective bargaining.

Although not specifically recommending collective bargaining between trade unions and employers, King endorsed collective agreements as "essential to mutual faith and a complete understanding between the parties to Industry."[154] This written agreement outlining the rights and duties flowing from the employment relationship would, in King's eyes, be the first step towards industrial justice. The role of the state in resolving industrial conflict was analogized to that of "an impartially selected umpire or referee to whom, in cases of dispute, appeal can be made, and whose decision is accepted as final."[155] King preferred voluntary as opposed to compulsory, state intervention to promote collective agreements and to resolve industrial disputes, for "[t]o apply Force in seeking to prevent and settle industrial differences ... is to destroy the very spirit it is desired to create and maintain, namely, confidence and goodwill."[156]

Fortunately for King there was a power superior to Force in resolving disputes, which he identified in Reason. Furthermore he distinguished between "Force applied as a weapon for aggression, and Force duly restricted and applied

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154 King, supra note 148, 193.

155 Id., 206.

156 Id., 214.

as a restraining influence to serve social ends."[157] This distinction between the right use and the aggressive of Force and the identification of Reason with informed public opinion constituted King's justification of compulsory investigation as the most suitable method for resolving industrial disputes.

> As a means of effecting the application of Reason to industrial disputes, Publicity has merits quite the equal of penalties imposed by process of Law. Reason can be exercised properly only in the light of knowledge. Through the knowledge of facts it discloses, Compulsory Investigation coupled with Publicity gives Reason its chance. Exercised prior to the severance of industrial relations, Compulsory Investigation tends wholly toward the exercise of Reason.[158]

However, King acknowledged that the state may have to resort to the aggressive use of force if labour failed to embrace the opportunity provided by public investigation.[159] This, in turn, provided King with a justification for the use of compulsion to stamp out illegitimate unions which did not contradict his basic premise that voluntary mechanisms should be used to resolve industrial disputes. Illegitimate trade unions were beyond the pale of voluntarism, since they sought to achieve political objectives, rather than economic ones.

King's specific labour relations proposals, with the exception of his continued endorsement of the IDI Act, never really amounted to much, even after his election as Prime Minister in 1921. Although large American-owned manufacturing firms, particularly those with a professional management, established joint councils, this mechanism for resolving industrial disputes was never generalized beyond a minority of employers.[160] In fact, in 1921 the Canadian Association of Builders recommended the discontinuance of joint councils because its members were unable to agree with unions as to the basic principles

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157 Id.

158 Id., 220.

159 Craven, supra note 2, 86.

160 Pentland, supra note 121, 99-100.

to be established in dealing with industrial questions.[161] Furthermore, King's recommendation for the implementation of a national unemployment insurance scheme was not acted upon until 1940. A Dominion-Provincial Conference in 1922 decided that unemployment was the responsibility of industry, that is, employers, and not the state.[162] In the face of opposition from both employers and the provinces, King was content to let his labour relations recommendations die. However, he remained committed to the principle of voluntarism, as articulated in Industry and Humanity. Third party conciliation and investigation, as authorized under the IDI Act, remained his preferred method for resolving industrial disputes, until forced to change his view during the Second World War.

Conclusion

During the first decade of the twentieth century industrial disputes in the western provinces triggered the enactment of each of the federal government's labour relations statutes. The fact that a particular dispute triggered each of the three Acts influenced the type of legislation that was introduced. Carrothers described the form of state intervention adopted by the Canadian government as a "firefighting" policy of "insinuating the intervention of the state at the point of actual or apprehended conflict."[163] In other words, the federal government chose to limit its intervention to cases where the bargaining relationship had broken down and a stoppage was imminent. The timing of the intervention, in turn, influenced the focus of the intervention. Rather than attempting to promote a continuing relationship between the parties, the purpose of the intervention was to settle the particular dispute. Once the process of

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161 L.G., Feb. 1922, 191.

162 L.G., Sept. 1922, 977-980.

163 Carrothers, supra note 2, 32.

intervention was completed, the parties were free both to return to the status quo which obtained prior to the third party intervention and to resort to industrial action. Moreover, the federal government justified its enactment of legislation authorizing third party intervention in industrial disputes in terms of protecting the public interest. And the public interest was identified with the continued operation of industries essential to the National Policy, specifically, railways, mines and public utilities. Thus, the federal government's legislative policy was designed to promote industrial peace in essential industries rather than to promote union recognition and collective bargaining generally.

A remarkable feature of the federal government's labour relations policy from 1900 to 1929 was the extent to which the administration of the legislation diverged both from the language of the legislation and the underlying policy as expressed in legislative debates. In theory the continuities manifested in federal labour relations policy during this period were an incremental approach to greater intrusion in industrial disputes and a gradual move from voluntarism to compulsion. However, the administration of the legislation belies its theory: throughout this period federal labour relations policy concentrated upon active third party mediation in order to settle industrial disputes resulting in strikes. In particular, the policy of mediation employed under the IDI Act is attributable to the fact that the majority of employers falling within the scope of the Act refused to recognize trade unions for the purpose of collective bargaining - the main issue in disputes prior to the First World War. Thus, from 1907 to 1920 Ministers of Labour refused to appoint conciliation boards when the dispute was solely over union recognition. Moreover, it would appear that publicity, contrary to King's expectations, played but a nominal role in the administration of the IDI Act. Rather, the public interest was embodied in the process of mediation employed by the quasi-official boards.

During World War One the federal government sought to resolve the growing industrial relations crisis by publicly expressing it commitment to collective bargaining in the form of an order in council. However, this policy of exhortation, as opposed to compulsion, failed to placate organized labour. Just before the end of the war the federal government responded to organized labour's demands by issuing an order compelling union recognition and collective bargaining; however, this order went against organized labour's wishes by imposing an absolute strike ban. This coupling of compulsory recognition and bargaining to an absolute prohibition against strikes became a theme of federal labour policy throughout the Second World War - a theme which served to alienate organized labour to an even greater extent in the second war than in the first.

Moreover, wartime labour relations policy had a lasting, if indirect effect, on the use of conciliation legislation to resolve a particular type of recognition dispute. The Director of Coal Operations used his extensive powers to ensure the exclusive recognition of the UMWA as the sole legitimate bargaining representative of the coalminers in the Crow's Nest Pass region. After the war, when the militant western labour movement split from the TLC, the federal government and the ad hoc conciliation boards modified their administration of the Act, to achieve much the same result as the Director of Coal Operations was able to do directly. Ministers of Labour began to appoint conciliation boards when the sole issue in dispute was that of union recognition. The boards adopted policies favouring the recognition of international unions in cases where the issue was which of two unions, one legitimate and the other illegitimate in terms of the federal government's distinctions, was to represent a group of employees. Employers, who previously opposed collective bargaining with international trade unions, were willing to recognize such trade unions when faced with the possibility that syndicalist unions might organize their employees.

On the one hand, the federal government adopted a policy of neutrality to collective bargaining per se and the relative balance of power between employees

and employers, while on the other, it intervened in industrial disputes to promote legitimate unions at the expense of those it considered to be illegitimate. From the end of World War One it adopted a policy of administering the IDI Act to impede the progress of what it perceived as illegitimate trade unions. In addition, the federal government was prepared to use force to crush what it perceived as industrial strife caused by illegitimate trade unions. Thus, the rhetoric of public interest and neutrality served to obscure the political decisions upon which the federal government's labour relations policy rested.

Instead of developing an explicit collective bargaining policy, the federal government preferred to use the IDI Act policy of compulsory conciliation in conjunction with its distinction between legitimate and illegitimate trade unions to promote collective bargaining in particular cases. Throughout the greatest part of the 1930s it continued to adhere to a policy of voluntarism regarding union recognition and collective bargaining. However, during the decade of the depression the trade union movement began to look increasingly to the United States for legislative models. Eventually the federal government was forced to introduce legislation to protect trade union members from employer opposition. However, the legislation that was eventually introduced did not constitute a radical departure from the policy of the 1920s. When examined in light of its historical tragectory the development of Canadian labour policy took place "by means of changes within continuities, not by means of clean breaks but by transformations of inherited realities."[164] In the following chapter the trajectory of this policy during the 1930s will be charted.

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164 E. Meiksins Wood, The Retreat from Class (London: Verso, 1986) 112.

Chapter 2: Conciliation and Representation: Federal Labour Relations Policy during the 1930s

The unparalleled economic depression of the 1930s proved to be a period of consolidation and further retrenchment for the federal government's labour relations policy as it emerged from the 1920s. During the worst part of the depression (1929 to 1934) the federal government met the labour unrest, which was caused by economically dispossessed workers, by supplementing its policy of compulsory conciliation under the Industrial Disputes Investigation Act with the policy of repression it had developed to deal with the disruptions immediately following the end of the First World War. The established trade union movement, which was severely weakened by the unfavourable economic conditions, remained committed to voluntarism regarding the structure and process of collective bargaining. Thus, the federal government was under no external pressure to re-evaluate its legislative policy, and its commitment to voluntarism remained unchallenged.

In the United States an important conjunction of events occurring in 1935 created conditions which were propitious for a radical change in American labour policy. In an attempt both to achieve a long-lasting economic recovery and to solidify its ties with the labour movement, the Roosevelt administration enacted compulsory collective bargaining legislation. The American government rejected voluntarism for a policy of compelling employers to bargain with the administratively designated representatives of administratively defined groups of employees.

The policy developments in the United States influenced the legislative demands of the Trades and Labour Congress during the second half of the decade. The Canadian Congress was no longer content with the status quo - which while removing legal disabilities from workers' freedom of association simultaneously

allowed employers to use their employment power against workers who exercised that freedom. Hence, the TLC demanded legislative protection for the right to organize. But the AFL's growing antipathy to the Wagner Act influenced the shape of the TLC's demands; the Canadian Congress sought to obtain legislative protection for the freedom to organize within an overall policy of voluntarism. By the end of the decade the majority of the provincial governments and the federal government had enacted legislation which responded - in varying degrees - to the TLC's demand.

The main question to be addressed in this chapter is the extent to and ways in which the implementation of the Wagner policy of compulsory collective bargaining influenced federal labour relations policy in Canada. While the developments in American policy had some effect on Canadian industrial relations, the question to be examined is whether the statutes protecting workers' freedom of association constituted the radical departure in Canadian labour relations policy claimed by many Canadian commentators. Although Woods, for example, admitted that these statutes were much less remarkable in practice than they were in principle, he also claimed that taken together they symbolized the end of government neutrality to be replaced by a policy favouring trade union organization and collective bargaining.[1] On this account, by the end of the 1930s both levels of government are seen as embracing, albeit hesitantly, the American model and taking the first step along the inevitable path leading to the rejection of voluntarism for a full-fledged regime of compulsory collective bargaining.

In contrast to this line of analysis I shall attempt to demonstrate that although the influence of the Wagner policy both on trade union and government legislative policy can be discerned, these influences were fed through a

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1 H.D. Woods, Labour Policy in Canada (2nd Ed.) (Toronto: Macmillan, 1973) 42 and A.W.R. Carrothers Collective Bargaining Law in Canada (Toronto: Butterworths, 1965) 10, 50.

distinctive Canadian political economy with its own institutions, preoccupations and practices. The federal government's economic conservatism, over-riding concern with evenhandedness in the treatment of employees and employers and its reliance on criminal sanctions to implement labour policy - in addition to the TLC's responsiveness to the AFL's growing dissatisfaction with the Wagner Act - modified the impact of the American policy. By the end of the decade a synthesis of the indigenous Canadian pattern with features of the American policy had been constructed; however, the elements of continuity in federal labour policy substantially outweighed the innovative features. Federal labour policy during the 1930s was characterized by its continued commitment to the goal of industrial peace and the principles of voluntarism and evenhandedness, reinforced by compulsory conciliation and the ultimate resort to criminal sanctions to deal with unrest.

Yet, if continuity was the stronger theme in federal labour policy during the 1930s, innovation characterized both the industrial relations and political fronts. In this chapter, I shall also indicate how industrial relations and political developments which emerged during the 1930s began to create tensions for the general commitment to voluntarism of both the established trade union movement and the federal government.

Mirroring the split in the American labour movement, the rupture between craft and industrial unions was established in Canada by the end of the 1930s. This further fragmented the already deeply divided Canadian labour movement, with the central trade union organizations adopted different positions regarding the desirability of compulsory collective bargaining.

The second innovation, which occurred in the early 1930s, was, by contrast, peculiarly Canadian: the rise of a social democratic party to challenge the traditional two party system. This party, which was formed by groups dissatisfied with the policies of the established parties, sought to establish close ties with the industrial union movement by advocating compulsory collective

bargaining legislation. By the end of the decade its political influence was just beginning to be felt by the Liberal party. However, it was not until the economy was radically transformed by the industrial mobilization during the Second World War that the industrial union movement and the social democratic party were able to exploit the changed social and industrial conditions to exert a significant influence on federal labour policy.

I. Iron Heel Tactics - 1930 to 1934

At the worst point of the depression in 1933, 817,000 Canadians (19.3 per cent) of a workforce of just over 4 million workers, were listed as officially unemployed.[2] Employers responded to the economic downturn by imposing a series of ruthless wage cuts. Consequently between 1930 and 1934 wages and salaries in primary industry declined to approximately half of their 1929 level.[3] During this period the TLC had "developed into a conservative, respectable organization, contented with its insignificant but solidly established status in Canadian society. The inclination of its leaders was to preserve the hard won status of their unions, not to take aggressive or unorthodox actions which might disturb their established relationships with Liberal and Conservative politicians."[4] The TLC's defensive strategy ignored the unemployed and unskilled workers who bore the brunt of the depression. Thus, although the percentage of non-agricultural paid workers in the workforce increased slightly between 1930 and 1934 (from 13.1

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2 W.C. McConnell, "Some Comparisons of the Roosevelt and Bennett 'New Deals'," 9 O.H.L.J. 221 (1971) 224. Safarian estimates that when those who had given up seeking employment are included, one-half of the Canadian labour force was without jobs in 1933. A.E. Safarian, The Canadian Economy in the Great Depression (Toronto: U. of Toronto Press, 1959) 45.

3 Id.

4 Gad Horowitz, Canadian Labour in Politics (Toronto: U. of T. Press, 1968) 63.

per cent to 14.6 per cent), the number of workers in unions affiliated to the TLC dropped during that same period from 231,000 to 161,000.[5]

Stepping in to fill the organizing gap was the Workers' Unity League (WUL) - the most radical and aggressive of the TLC's rivals. Formed in 1930, the WUL began to organize the unskilled and the unemployed; and, unlike its more traditional counterparts, it was willing to use the strike as a weapon against both employers and the government.[6] The WUL consisted of national unions organized on an industrial basis in the mining, clothing, lumber and textile industries. Affiliated to the Red International of Labour Unions, the majority of the WUL's leadership were members of the Communist Party - although most of its membership were not. By 1932 the WUL's membership had reached 40,000.[7] The extent of the concomitant decline of the TLC was evidenced by the fact that in 1935 the combined membership of the three national Congresses - the All-Canadian Congress of Labour (ACCL), the Canadian and Catholic Congress of Labour (CCCL) and the WUL - equalled the membership of the international union congress.[8]

Industrial relations during the early 1930s were marred by "desperation" strikes to resist the wage cuts and other losses imposed by employers.[9] The most important of these strikes occurred in the west and were organized by WUL-affiliated unions. These desperation strikes left little in terms of

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5 M.C. Urquhart (Ed.), Historical Statistics of Canada (2nd Ed.) (Ottawa: Statistics Canada, 1983) Series E 178-189.

6 I. M. Abella, Nationalism, Communism and Canadian Labour (Toronto: U. of T. Press, 1973) 3.

7 Charles Lipton, The Trade Union Movement of Canada, 1827 - 1959 (Montreal: Canadian Social Pub., 1966) 255.

8 Abella, supra note 6, 3.

9 Stewart Jamieson, Times of Trouble, Labour Unrest and Industrial Relations in Canada, 1900-66. Task Force on Labour Relations, Study No. 22 (Ottawa: Privy Council Office, 1968) 214-15.

institutional legacy - for instead of diffusing the pent-up dissatisfaction by directly addressing the underlying causes, the federal government revived precedents introduced at the end of the First World War to crush the unrest.

Not content to rely solely on the employer's superior economic position - which was bolstered by the massive labour surplus - the federal government adopted a policy which Prime Minister Bennett referred to in an oft-quoted speech as the "iron heel of repression."[10] The central feature of Bennett's iron heel policy was s.98 of the Criminal Code, which had been enacted late in the First World War to deal with "seditious," "subversive" and "Communistic" influences and activities.[11] Section 98 outlawed "unlawful associations" which it defined as any association which sought or threatened to "bring about any governmental, industrial or economic change within Canada by use of force, violence, terrorism, or physical injury ... in order to accomplish such change."[12] The penalties reinforcing s.98 were extremely harsh: membership in, or contribution of dues to, an unlawful association were crimes punishable by up to twenty years imprisonment.[13] Moreover, the RCMP could seize, without warrant, all property belonging to, or suspected of belonging to, an unlawful association. Although s.98 was primarily employed against suspected Communist party members, it was often used to harass WUL organizers and members - as the language of the section

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10 H. Blair Neatby, The Politics of Chaos: Canada in the Thirties (Toronto: Macmillan 1972) 63, Thompson and Seager, supra note 3, 226.

11 Jamieson, supra note 9, 217.

12 An Act to Amend the Criminal Code, 9-10 George V, 1919, c. 46.

13 The section also provided that anyone who attended a meeting of an unlawful association, or spoke publicly on its behalf, or distributed literature about it, should be presumed to be a member in the absence of proof to the contrary. See Thomas Berger, Fragile Freedoms (Toronto: Clarke Irwin, 1981) 133.

was sufficiently broad to encompass extravagant rhetoric at a trade union meeting, for example.

In addition to s.98 there was s.41 of the Immigration Act, which Parliament also enacted to deal with the unrest occuring at the end of the First World War. The Communist Party had its base in the immigrant communities of western Canada, and it was at this base that s.41 was directed.[14] This provision empowered the federal government to deport any alien or Canadian citizen born outside Canada who advocated "overthrow by force ... of constituted law and authority."[15] Members of western trade unions affiliated to the WUL were particularly vulnerable to this, as many of them were landed-immigrants from Russia, the Ukraine and Finland. In 1932, 7,000 "suspected Communists" and hundreds of foreign-born trade unionists were deported under this provision.[16]

Bennett's iron heel policy was used to police the distinction between legitimate and illegitimate trade unions. A glaring example of the application of this policy (reminiscent of the government's handling of the Winnipeg General Strike of 1919) was the government's intervention in the Estevan strike. In the fall of 1931 the Mine Workers' Union (MWU) - a WUL affiliate - called a strike in the coal mines surrounding Estevan, Saskatchewan.[17] After an attempt by the

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14 Donald Avery, Dangerous Foreigners (Toronto: McClelland and Stewart, 1979) 140

15 Berger, supra note 13, 135. For a detailed discussion of the federal government's use of the Immigration Act to deport alleged communists and labour activists see Issac Shin Imai, "Canadian Immigration Law and Policy: 1867-1935," LL.M. thesis, York University, 1983, 244-274.

16 Id., 136. This estimate is on the low side; it has been estimated that 10,000 immigrants were deported under this provision. See J.H. Thompson and Allen Seager, Canada 1922-1939, Decades of Discord (Toronto: McClelland and Stewart, 1985) 348.

17 L.G., March 1932, 263. For a brief but informative account of the strike see Stan Hanson, "Black Powder: The History" in Rex Reverell and Geoffrey Ursell, Black Powder, Estevan 1931 (Moose Jaw, Sask.: Coteau books, 1982) 67-71.

chief conciliation officer of the federal Department of Labour failed to resolve the dispute - the main issue in contention being the recognition of the MWU - the strikers organized a demonstration through the streets of Estevan. The federal government authorized a detachment of the RCMP to help the municipal authorities. The police, with the RCMP reinforcement, met the strikers at the outskirts of the town. While dispersing the demonstrators the RCMP opened fire, killing three strikers and wounding several others.

The government appointed a Royal Commission to investigate the causes of the dispute,[18] while at the same time prosecuting the strike leaders under s.98 of the Criminal Code.[19] The Commissioner, Judge Wylie of the Estevan District, refused to examine the alleged violations of s.98 since the matter was sub judice. However, in his report issued the following spring, he found that the MWU, on account of its affiliation with the WUL, had

> ceased to become a labour union in the ordinary sense, but has been converted into a revolutionary industrial union, pledged to a program and policy of revolutionary struggle for the complete overthrow of capitalism and for the establishment of a revolutionary workers' government.[20]

Since the MWU was an illegitimate trade union, Wylie decided that the mine operators were justified in their refusal to recognize it. He recommended, among other things, that the operators negotiate with a committee of miners from each

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18 The Mayor of Estevan applied to the federal Minister of Labour for a Board of Conciliation and Investigation under s.65 of the IDI Act - neither of the parties to the dispute having made an application (L.G., Oct. 1931, 1066). The Local president of the union had been informed that in striking before a board had been established the workers would be acting illegally in contravention of s.57 of the IDI Act. It was clear, however, that the miners preferred a Royal Commission to a conciliation board, and hence, the former was appointed. See the Summary of the Royal Commission Report, L.G., Mar. 1932, 264.

19 For a brief discussion of the charges against the miners see Stan Hanson, supra note 17, 70.

20 Id., 264.

mine - a technique which found general application under the IDI Act in the 1920s.[21]

During the first half of the decade, federal labour relations policy manifested a remarkable continuity with the policy of the 1920s. Relying upon conciliation and mediation mechanisms provided under the Conciliation and Labour Act, 1906 and the IDI Act, the federal government promoted a policy of compromise whereby disputing parties were able to agree voluntarily to resume production. As in the 1920s, employee representation plans continued to be the employer's preferred alternative to union recognition in cases where it refused to negotiate with anyone who was not within its employ.[22] Supplementing this policy of voluntarism reinforced by compulsory conciliation was the government's willingness to invoke force to repress "illegitimate" trade unions. Bennett's iron heel policy revived the provisions introduced at the end of the First World War to crush labour unrest. Underlying these policies was the continued belief that foreign agitators were the cause of labour unrest.

A number of factors contributed to the federal government's failure to depart from established patterns to deal with the labour unrest of the 1930s. The Conservative government's commitment to the idea of a self-regulating economy and antipathy to aggressive trade unionism created an inhibition against the development and implementation of new economic or labour relations policies.[23]

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21 Id., 268.

22 See Chapter 1 text at notes 141-143 and L.G. Oct. 1930, 1127 for an example of the employer opting for employee committees.

23 David A. Wolfe, "The Rise and Demise of the Keynesian Era in Canada: Economic Policy, 1930 - 82," in Michael S. Cross and Gregory S. Kealey (Eds.), Modern Canada, 1930-1980's (Toronto: McClelland and Stewart, 1984) 49-52 and Safarin, supra note 2, 65.

In the face of redrawn lines of conflict,[24] Bennett's government sought to maintain its traditional power base in the financial and manufacturing sectors.[25] Hence, it lacked the political will to disrupt, however slightly, the status quo.

In the absence of a political will for innovative policies, institutional constraints within the Department of Labour created a further barrier against changes in the established labour relations policy. Unlike the ministers responsible for representing portfolios involving specific interests, such as agriculture or trade and industry, the Minister of Labour was responsible for representing the interests of both sides to the employment relationship in Cabinet.[26] In effect, the labour minister was required to mediate the conflicting interests of capital and labour and represent the public interest in stable industrial relations. The mediating role of the Minister was reflected in the major policy and administrative functions of the Department of Labour, viz., the provision of conciliation and mediation services to resolve industrial disputes. Thus, the sole pressure for initiatives in labour relations policy rested with the major organized interests - the TLC and CMA.

The TLC's defensive strategy of maintaining the living standards of its membership was reinforced by the unfavourable economic conditions. Thus, it did not exert any concerted pressure on the federal government to reform its labour

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24 The Rowell-Sirois Commission reported that the depression resulted in redrawn lines of conflict which "were not clearly drawn on either a regional or an industrial basis; it was rather a struggle between owners on the one hand - owners of farm, mine, and forest resources, and of equities in industry, who depended on entrepreneurial net income - and recipients of relatively fixed incomes on the other hand - bond and mortgage holders and wage-earners." Donald V. Smiley (Ed.), The Rowell/Sirois Report, Book I (Toronto: Macmillan, 1978) 168.

25 Alvin Finkel, "Origins of the Welfare State in Canada," in Leo Panitch (Ed.), The Canadian State (Toronto: U. of T. Press, 1977) 344-70 at 352.

26 Rianne Mahon, "Canadian public policy: the unequal structure of representation," in Panitch, supra note 25, 165-98 at 182-86.

relations policy.[27] With the exception of a belated demand for legislation to protect workers' freedom to join trade unions without the threat of employer retaliation,[28] the TLC was satisfied with the basic features of the government's collective bargaining policy. It was content to rely on the conciliation mechanisms provided under the IDI Act to challenge and thereby delay wage cuts.[29] Moreover, the Congress did not seriously object to the use of the iron heel policy to crush the WUL.

Nor did the CMA exert any pressure on the federal government to depart from its policy of voluntarism respecting the structure and process of collective bargaining. Quite the opposite - the manufacturers' association warned the Canadian government that "it would not be wise for this country to follow the example set in the United States under the NIRA, one of the principle features of

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27 By contrast, early as 1930 the ACCL consistently advocated legislation protecting workers' rights to form organizations of their own choice for collective bargaining purposes (L.G., Dec. 1930, 1411). However, the ACCL had put a marginal impact in the lobbying process when compared with the influence of the TLC.

28 This demand was prompted by an unprecedented number of complaints that workers were being discriminated against on account of trade union membership. See L.G., Oct. 1934, 927. However, Logan notes that in 1920 the TLC demanded the right to organize and at the 1922 convention the Executive was instructed to press the federal government to enact legislation providing to all workers the right to organize, in addition to ensuring that no worker would be penalized or discharged by an employer simply for joining a bona fide trade union, see H.A. Logan, Trade Unions in Canada (Toronto: Macmillan, 1948) 414. It should be noted, however, that these demands merely reflected what the federal government had already provided in its Wartime Orders in Council, PC 1743 and PC 2525. Moreover, Lipton notes that at the 1930 annual convention president Moore opposed legislation guaranteeing the right to organize on the ground that the enactment of such legislation might jeopardize existing organizations, see Lipton, supra note 7, 255.

29 Regarding collective bargaining, the TLC was content with voluntarism - although some of its leaders favoured legislation which enforced the extension of terms and conditions established by collective bargaining (L.G., Oct. 1934, 927), such as the Collective Labour Agreements Extension Act, introduced in Quebec in 1934 (Stat. Que., 24 Geo V., C.56).

which is, of course, the principle of collective bargaining."[30] Since maintaining business confidence was high on the government's agenda, it ignored the TLC's tentative conversion to state protection for workers' freedom to organize. An administrative mechanism for imposing collective bargaining on intransigent employers, which was being mooted in the United States, thus was on neither the federal government's nor the TLC's legislative agenda.

In contrast to the continuities with established patterns in industrial relations, the early 1930s saw the emergence of a new political party - which by the end of the decade would begin to pose a serious challenge to political traditions in Canada. The length and severity of the depression fuelled the arguments of those who criticized Bennett's blend of laissez-faire economics and protectionism as unsuited to the problems faced by Canadian agriculture, industry and exports.[31] The economic downturn set in motion a number of diverse groups whose paths ultimately converged in Calgary in 1932. The first of these groups consisted of a number of class conscious prairie farmers who had formed the United Farmers' Association (UFA) in 1926. By 1930 the UFA was calling for public ownership of natural resources and the nationalization of the credit system. The second group consisted of the League for Social Reconstruction (LSR), which was established in 1931 by a group of British-educated university professors influenced by Britain's Fabian Society.[32] Sharing the UFA's commitment to public ownership of resources and the nationalisation of the credit system, the LSR called for democratic socialism. The Socialist Party of Canada, which drew its membership from British Columbia, constituted the third group.

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30 L.G., June 1934, 535.

31 Ivan Avakumovic, Socialism in Canada (Toronto: McClelland and Stewart, 1978) 49.

32 Id., 50 and see also Walter D. Young, The National CCF, 1932-61 (Toronto: U. of T. Press, 1969) 69-70.

Meeting in Calgary in 1932 these groups agreed that a new political party representing the farmer, labour and the socialist was needed. The Cooperative Commonwealth Federation (CCF) emerged from this meeting and a convention was set for July 1933 in Regina, at which time the party's constitution and programme were adopted.

The CCF's Regina Manifesto strongly condemned capitalism and advocated in its stead a programme of planning and the socialization of a wide range of resources.[33] Although the CCF's constitution made no provision for the affiliation of trade unions at the national level, there was a provision for provincial affiliation. Some trade unionists were actively involved in the formation of the CCF - most particularly Aaron Mosher of the ACCL. But, in general, the trade union movement adopted a hands off approach to the new party. Initially the CCF made little effort to persuade the union movement that it could best represent organized labour's interests in the political arena. However, the Regina Manifesto contained a number of items designed to attract organized labour - including legislative protection of freedom of association and collective bargaining, government regulation of wages and the proposal to amend the BNA Act so as to enable the enactment of a uniform labour code.[34] During the second half of the decade the CCF embarked upon a campaign to persuade the trade unions that it could best represent their legislative demands. And by the end of the decade it exerted sufficient pressure on the federal government to persuade it to depart

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33 Avamukovic, supra note 31, 59.

34 Id., 58. Note, it is not exactly clear what the CCF's commitment to collective bargaining entailed. The Regina Manifesto endorsed a "system of industrial democracy" guaranteed by a national labour code to assist the formation of trade unions which would not simply bargain with management but "would share in the control of industry and profession." Since the Manifesto also advocated social ownership of production, it would appear that the CCF was advocating much stronger measures than either mere exhortation or compulsory collective bargaining along the lines of the Wagner Act. Thompson and Allen Seager, supra note 16, 231-32.

from its policy of whole-hearted voluntarism to implement some minimal protections for workers' freedom of association.

II. American Precedents

1. The Wagner Act and the AFL/CIO Split.

In the United States, unlike in Canada, an important new direction in labour relations policy began to emerge in the early 1930s, culminating in the enactment of the National Labor Relations Act (NLRA) in 1935.[35] This innovative policy was part of the Roosevelt administration's overarching economic programme, which identified the revival of purchasing power and consumer demand as necessary for the recovery of production and the reduction of unemployment. Significantly, the American government saw the economic depression as a consequence of the fluctuation in the portion of national income paid out as returns to labour and capital. Thus, the crucial task for government was to improve its capacity to stabilize the distribution of national income. Hence, labour relations moved to the centre stage of economic policy, since one way of stabilizing the return to labour was to encourage collective bargaining between employers and independent unions.[36]

Roosevelt selected Senator Wagner to oversee the development of an administration recovery bill and appointed him the first chairman of the national board established to administer the labour relations aspects of the legislation. Initially, Wagner concentrated on conciliation and mediation mechanisms to

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35 49 U.S. Stat. 449 (1935).

36 Christopher L. Tomlins, The State and the Unions: Labour Relations, Law, and the Organized Labor Movement in America, 1880 - 1960 (Cambridge: Cambridge U.P. 1985) 99-100 and Leon H. Keyserling, "The Wagner Act: Its Origins and Current Significance," 29 Wash. L. R. 199-233 (1960), 213-218. Keyserling was Wagner's legislative counsel until 1937 and he had a major role in drafting the National Labor Relations Act.

facilitate the voluntary generalization of collective bargaining.[37] This emphasis was consistent with the AFL's policy of voluntarism. The Federation regarded collective bargaining as essentially a private activity in which the state's role should be confined to eliminating company unionism and protecting the rights of independent unions.[38] The administration's initial labour legislation lacked an independent enforcement mechanism and thus was unable to prevent the spread of company unionism. Consequently, both Wagner and the AFL called for the establishment of an agency with sufficient authority to compel employers to bargain with independent unions. More importantly, it prompted a radical change in Wagner's policy regarding collective bargaining; instead of endorsing the AFL's policy of voluntarism, Wagner believed that collective bargaining should be brought fully within the regulatory ambit of the state.[39]

In March 1934 Wagner proposed the first draft of a bill which was eventually to become the NLRA or Wagner Act. Christopher Tomlins, in his recent study of industrial relations and labour law in the U.S. between 1880 and 1960, claims that the supporters of Wagner's bill

> were proposing a course qualitatively different from that suggested by previous advocacy of collective bargaining. Their intention was to give unambiguous public support to independent unionism as a means to promote collective bargaining, not in the interest of stabilizing relations between existing organized parties - the rationale of previous legislation - but in vindication of the tangible public interest in the stabilization of wages, hours and conditions of the labour force at large. From this flowed the two most important features of the bill; first, its critique of company unionism; and second, its proposal to place authority to determine the appropriate dimensions of collective bargaining relationships in the hands of the Board.[40]

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37 Id., 109 and Peter Irons, The New Deal Lawyers (Princeton: Princeton U.P., 1982) 206.

38 Tomlins, supra note 36, 101.

39 Id.

40 Id., 122.

Two arguments - the first based on the notion of industrial democracy and the second economic - were used by the bill's supporters to justify the prohibitions against company unions.[41] The industrial democracy argument rested on the premise that company unions amounted to an intolerable interference with employees' civil rights to organize in associations of their own choosing.[42] According to Tomlins, however, primary stress was laid on the economic argument. For Wagner and his supporters economic stabilization depended upon wages and other working conditions being dealt with on an industry or nation-wide basis. Thus, organizations, such as company unions, which were limited to one plant or employer were ineffective in promoting economic stability. But simply prohibiting company unions would not achieve the desired end, since employees would still be free to choose the size of unit they wanted. Thus, in order to achieve the goal of economic recovery, it was necessary for there to be "administrative designation of the dimension of the group from which representatives would be selected by majority vote to bargain on the group's behalf."[43] The significance of this provision did not escape some of the witnesses appearing before the Senate Committee on Education and Labor (entrusted with reviewing the bill), who recognized that the bill would place the important question of bargaining structure in the hands of an agency of the state, rather than with the bargaining parties.[44]

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41 Id., 122-23.

42 Id., 122.

43 Id., 123.

44 Id., 123-24. Daniel Tobin, the President of the Teamsters Union, feared that Wagner's bill would enable a government labour board to promote industrial at the expense of craft organization. Wagner's response was that it was better to place the power to define the unit in the hands of an administrative board than the hands of employers or employees: Philip Taft, The AF of L from the Death of Gompers to the Merger (N.Y.: Harper Bros., 1959) 127.

In addition to administrative determination of the appropriate bargaining unit, the bill defined and outlawed a number of unfair labour practices committed by employers - including interference with independent unions, discrimination against employees on account of trade union membership, and the refusal to bargain with a duly certified bargaining agent. The board was authorized to exercise remedial, as well as punitive, powers. It could order reinstatement or damages in order to compensate an employee injured by an unfair labour practice. Moreover, the Board could ensure the enforcement of its orders by petitioning the appropriate appellate court.

The obligation imposed upon the employer to bargain with the trade union representing the majority of its employees, together with the requirement of administrative determination of the appropriate bargaining unit, constituted a major departure from previous American labour policy. No longer would an employer be entitled to fend off collective bargaining simply by refusing to bargain with a union. The decision to bargain was no longer voluntary, but compulsory; however, the outcomes of the bargaining process remained in the realm of private economic forces. The only fetter on the free competition of labour and capital in determining the outcomes of collective bargaining was an indirect one - the administrative determination of the bargaining unit, which (as we shall see) implicitly determined the economic strength of organized labour. Thus, arguably, the legislation was still consistent with voluntarism because it did

not authorize the state to intervene to scrutinize outcomes.[45] However, voluntarism in this sense was a far cry from the AFL's initial policy of state abstention in labour relations.

Despite a setback, Wagner introduced a slightly modified version of his bill in 1934.[46] The AFL and Wagner's coterie of backers constituted virtually the only support for the bill. The National Recovery Administration and the Department of Labor preferred a decentralized, mediatory approach to industrial relations, while the National Association of Manufacturers and other employers'

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45 G.G. Higgins argues that the NLRA was consistent with the AFL's commitment to voluntarism because the Act did not intervene with the outcomes of bargaining, see Voluntarism in Organized Labor in the United States, 1930-1940 (Wash.: Catholic U. of Am. Press, 1944) 90. Recently there has been a debate in American legal periodicals as to whether the Wagner Act authorized state intervention regarding the substantive outcomes of the bargaining process. Karl Klare argued that such intervention was entirely consistent with the Wagner Act; "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941," 62 Minn. L. Rev. 265 (1978). However, for the opposite, and more persuasive point of view, see Comment, "The Radical Potential of the Wagner Act: The Duty to Bargain in Good Faith," 129 U. of Pa. L. R. 1329-1476 (1981) 1412-1415 and David H. Rabban, "Radical Assumptions about American Labor Law," 84 Col. L. Rev. 1118 (1984) 1120.

46 As a compromise, Roosevelt issued Public Resolution No. 44 on June 13, 1934 which entitled him to establish a labour board for one year. On June 29, 1934 he issued Executive Order 6763 establishing a quasi-judicial expert tribunal, called the National Labor Relations Board, for the partisan and mediatory National Labor Board chaired by Wagner. However, like its predecessor, the first NLRB was doomed to failure since it did not provide an effective enforcement mechanism nor did it clarify what collective bargaining entailed. See Thomlins, supra note 36, 127-29 and Irving Bernstein, The New Deal Collective Bargaining Policy (Berkeley: U. of Calif. Press, 1950) 78-85.

Under Wagner's auspices members of both his and the first NLRB staff began to revise the 1934 bill with an eye both to incorporating the experience gained under the NLRB and surmounting the constitutional hurdle. The drafters, all of whom were lawyers, sought to recast the 1934 bill in a simple conceptual pattern. First, they sought to establish the new NLRB as a quasi-judicial agency emphasizing the enforcement of rights rather than the adjustment of disputes. To this end they devised a tripartite board consisting of expert members, like the first NLRB, which would be totally independent from the Department of Labor with its emphasis on mediation. Second, they sought to broaden the administrative discretion of the expert board to develop labour policy in tune with changes in the industrial relations climate by employing broad enabling language. See Irons, supra note 37, 226-27.

organizations condemned the bill outright.[47] The bill's opponents accused it of treating employers and employees unequally, and attempted to amend the bill to impose "correlative responsibilities" on both labour and employers.[48] Employers' organizations and the Department of Labor wanted the definition of unfair labour practices broadened to include oppressive employee and trade union behaviour, in addition to that of employers. Wagner rejected these amendments on the ground that any attempt to impose unfair labour practices on employees would present intransigent employers with an opportunity to prevent organizing and collective bargaining.[49] By contrast, the AFL lent its enthusiastic support to the bill in general, although it expressed reservation over the provision which entitled the board to determine the appropriate bargaining unit.[50] While accepting the principles of exclusive representation and majority rule, the AFL wanted to confine the board's intervention to effectively guaranteeing the rights to organize and bargain collectively, leaving the substance of both processes to the parties themselves.[51]

In the face of the combined opposition of employer groups and elements within the administration, it took two important events to create the conditions necessary for the enactment of Wagner's bill.[52] The Democratic sweep of both Houses in 1934 ensured that the bill was presented to a Congress which was favourably disposed to organized labour. Moreover, Senators who believed that

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47 Bernstein, supra note 46, 68-72 and Tomlins, supra note 36, 125-127.

48 Irons, supra note 37, 230.

49 Id.

50 Bernstein, supra note 46, 89; Tomlins, supra note 36, 138-40.

51 Id.

52 Bernstein, supra note 46, 116-19; Irons, supra note 37, 231.

the bill went too far in tilting the balance of power in favour of unions chose not to vote against the bill and risk organized labour's anger. They were convinced that employers could successfully evade the bill until it was declared unconstitutional - an eventuality which they mistakenly took for granted. Furthermore, when the Supreme Court handed down the Schechter decision on May 27, 1935 declaring that the recovery legislation was unconstitutional,[53] Roosevelt was left without a labour policy - just as another wave of industrial unrest was mounting. Consequently, he threw his support behind the bill. On July 5, 1935 the Wagner Act became law, although it was not effective for another month and a half at which time the members of the National Labor Relations Board (NLRB) were appointed.

The enactment of the Wagner Act marked what was at the time an unrecognized but profound shift in American labour policy. It signalled a lasting change in the roles of the three participants in labour relations. With the Wagner Act the unions won legal constraints on employers' ability to interfere with worker associations and collective bargaining in exchange for board determination of the appropriate bargaining unit, which, in effect, amounted to administrative control over the structure of the labour movement. Most dramatic was the shift in the role of the state brought about by the Wagner Act. No longer did the state merely ensure that the rules devised by the parties did not unduly disrupt the economy, it became responsible for establishing the rules of industrial relations. In the short run, the Wagner Act strengthened labour in its dealings

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53 A.L.A. Schechter Poultry Corp. v. United States (1935), 295 U.S. 495.

with recalcitrant employers, but in the long term it established the structure of the relations between unions and employers.[54]

The state's role in setting, and not merely enforcing, the rules regulating the process of collective bargaining through its determination of the appropriate bargaining unit signalled the end of voluntarism in the AFL sense in American labour relations policy. Employers' organizations remained opposed to the NLRA, channelling their opposition in the form of an attack on the Act's constitutionality. By contrast, the AFL's initial attitude to the Act underwent a radical revision. Although from the outset the AFL was critical of the provision in the Act authorizing the NLRB to determine the appropriate bargaining unit, at the time of enactment the AFL did not foresee the ensuing rift in the labour movement which would give the Board the central role in determining the structure of collective bargaining in the United States. With the split in the labour movement over competing organizational principles, the Board's authority to determine the appropriate bargaining unit was a crucial factor in determining the structure of the American labour movement. Since the statutory criteria for determining the appropriate bargaining unit were open-textured in order to give the Board maximum discretion, the administrative practices of the Board became the site of conflict between the craft and industrial union movements.

The principle of organizing on an industrial, as opposed to a craft, basis was endorsed by a number of unions as the only means of organizing workers in the mass production (for example, steel, rubber, auto and textile) industries. Early in 1935 these unions mounted an aggressive organizing campaign which included the use of the sit-down strike. At the October 1935 AFL convention an acrimonious

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54 Milton Derber, "The New Deal and Labor" in Milton Derber and Edwin Young (Eds.). Labor and the New Deal (Madison: U. of Wisc. Press, 1957) 110, 112. Gross claims this shift in policy was manifested in the shift in the modus operandi of the first NLRB to the second NLRB from mediation to adjudication. James Gross, The Making of the National Labor Relations Board (Albany, N.Y.: SUNY Press, 1974) 2-3.

debate between the craft and industrial unions erupted.[55] The industrial union forces were defeated in their bid to change the course of the AFL and, instead, they formed the Committee for Industrial Organization (CIO). John Lewis, the charismatic president of the CIO, resigned from his position as vice-president of the AFL - both forcing the pace of industrial unionism and emphasizing the split in the labour movement.[56] In August of the next year the AFL executive council began hearings which culminated in a resolution finding the affiliates of the CIO guilty of dual unionism, and giving them a month to withdraw from the CIO or be suspended from the AFL. The CIO affiliates ignored the AFL's ultimatum and at the November AFL convention the expulsion order was ratified.

As both the CIO and AFL went into their conventions in the fall of 1937 the pressure for some sort of rapprochement was mounting. An informal agreement unifying the two organizations was reached, but in 1938 Murray and Lewis of the CIO rejected it.[57] In that year the split between the craft and industrial union movements was cemented as the CIO established itself as a permanent organization and changed its name from Committee to the Congress of Industrial Organizations.

The formation of the CIO and its ultimate establishment as a permanent rival congress had a profound impact on the AFL's attitude to the Wagner Act. With the rise of the CIO, the AFL complained that the NLRB failed to protect the "vested rights" of old unions against their new rivals. Commenting on the administration of the Act between its enactment and 1939, Harry Millis (the chairman of the NLRB from 1940 to 1945) noted that "[e]specially important were the issues as to craft units, as to the setting aside of contracts made by minority unions or with

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55 Edwin Young, "The Split in the Labor Movement," in Milton Derber and Edwin Young (Eds.), Labor and the New Deal (Madison: U. of Wisc. Press, 1957) 47, 52.

56 Walter Galenson, The CIO Challenge to the AFL (Cambridge, Mass.: Harvard U. Press, 1960) 6.

57 Young, supra note 55, 60-70.

illegal assistance by employers, the holding of elections in spite of contracts claimed to be a bar to the petition, and protection of individuals for advocating a shift to the CIO .... [O]n each of these issues it was most often older unions that were hurt, and newer groups who were aided, by these policies."[58]

Beginning in 1937, the AFL sought to secure an amendment to the Wagner Act which would have limited the board's power to determine the appropriate bargaining unit by making it mandatory for the board to separate craft units out of larger industrial units. The next year, after the establishment of the CIO as a permanent congress and the decision in Jones and Laughlin[59] upholding the constitutionality of the Wagner Act, the AFL mounted a bitter campaign against the Act. It charged both that board members were biased in favour of CIO unions and that the Act authorized too much interference with traditional organizational structures. Although it emphasized that certain members of the Board and their administrative policies regarding unit determination were the chief cause of its complaints, the AFL also demanded the following amendments in exchange for its support: 1) that the craft rule be made mandatory on the board, 2) that the board be prohibited from invalidating collective agreements with AFL unions notwithstanding a finding that the agreements were collusive, and 3) that the existing board be replaced with a new five member board mandated to overhaul the staff.[60]

In April 1939 Roosevelt appointed William Leiserson - a well-known industrial relations expert - to fill the recent vacancy on the NLRB in order "to weaken the demands for amendments to the Wagner Act and to reduce the adverse

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58 H. Millis and E.C. Brown, From the Wagner Act to Taft Hartley (Chicago: U. of Chic. Press, 1950) 69.

59 N.L.R.B. v. Jones and Laughlin Steel Corp. (1937), 301 U.S. 1.

60 Galenson, supra, note 56, 613; Thomlins, supra note 36, 160-62, 184-85.

political pressure on himself and his administration."[61] Leiserson's appointment signalled the beginning of a profound change in the NLRB's labour policy.[62] Prior to Leiserson's appointment, the Board had adopted a legalistic approach emphasizing the rights of workers to self determination in certification elections and public ordering in unit determinations. The stability of the existing institutional arrangement was compromised in the interest of adjusting the bargaining structure to achieve an "ideal structure" of industrial relations.[63] By contrast, Leiserson adopted what Tomlins calls an "industrial pluralist" approach, emphasizing established custom and practice and institutional stability in determining bargaining structure.[64]

The conflict inherent in these two approaches was expressed in the most controversial aspect of the NLRB's responsibilities - the determination of the appropriate unit. Before Leiserson's appointment the Board manifested a preference for units amenable to industrial union representation.[65] Leiserson's emphasis upon custom and practice (where it had been established) for determining

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61 James Gross, The Reshaping of the National Labor Relations Board (Albany: SUNY, 1981) 89.

62 Millis and Brown, supra note 58, 148.

63 Tomlins, supra note 36, 218. However, although Madden, the chairman, and Smith both saw the NLRB as responsible for determining an ideal bargaining structure, they differed as to their conception of what constituted the ideal. Tomlins claims that "[f]or Smith the answer lay in industrial unionism" whereas for "Madden it lay in ... conditional free choice" ... but "[b]oth, however, emphasized the power of the Board to continue adjusting the bargaining structure until the best possible system of labor relations emerged." Id.

64 Id., 213-17. For Tomlins' detailed discussion of industrial pluralism see 79-82. See also J.M. Eisner, William Morris Leiserson (Madison, Wisc.: Univ. of Wisc. Press, 1967) 68-90.

65 Gross, supra note 61, 43. By the end of the 1937 CIO unions had won 3 out of every 4 elections where the CIO and AFL opposed each other and compiled average majorities of 83 per cent in winning the 208 elections.

the appropriate bargaining unit, tended to favour craft over industrial unions as the appropriate institutions or bargaining structure for all units. Although this approach did not completely satisfy the AFL executive, which demanded adherence to the principle of craft severance no matter what the circumstances, it was considered by the Federation to be a great improvement over the previous approach.[66]

In November 1940 Roosevelt ensured that Leiserson's approach would continue to dominate NLRB policy by appointing Harry Millis, who shared Leiserson's industrial pluralist approach to collective bargaining, as the new chairman of the Board.[67] In part, Millis' appointment resulted from Roosevelt's need to establish a non-controversial bi-partisan conduct of the Board during the war.[68] The Millis Board embraced a dynamic theory of custom and practice which effectively institutionalized bargaining structures wherever they were established and functioning.[69] This policy offered affiliates of both federations relief from the insecurities which resulted from the earlier conflict over units.

While the AFL continued to advocate amendments to the NLRA, its objectives were largely satisfied by the changes to the Board's membership in 1940. Under Leiserson and Millis, craft groups were given greater opportunity to establish separate bargaining rights and AFL contracts were accorded a greater measure of protection against CIO charges of collusion with employers. Galenson, in his study of the split between the AFL and CIO, suggests that the extent of the Board's policy shift was indicated by the AFL characterization of the

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66 Tomlins, supra note 36, 223.

67 Gross, supra note 61, 227-38 and Tomlins, supra note 36, 224-30.

68 Gross, supra note 61, 227.

69 Tomlins, supra note 36, 229.

administration of the NLRA in 1941 as "fair and impartial" and a "vast improvement over the previous administration," as well as by the CIO condemnation of the Millis-Leiserson majority.[70] The rapprochement between the AFL and NLRB was firmly entrenched during the United States' involvement in the Second World War.

2. American influence on Canadian policy and industrial relations.

The major shift in American labour policy was not duplicated in Canada during the 1930s. This is not surprising, since the enactment of the NLRA was the result of a concatenation of three events: the Democratic sweep of both Houses, a wave of industrial unrest and a Supreme Court decision which left Roosevelt without a labour policy. Thus, the Wagner Act may be more accurately characterized as the result of a conjunction of exceptional circumstances, rather than an inevitable development in American labour policy.

Moreover, several elements in the Canadian political economy during the 1930s hindered the adoption of a Wagner-style regime of compulsory collective bargaining. First, unlike the United States, in Canada traditional economic ideas remained virtually unchallenged with the result that the depression was seen as merely a particularly severe downturn in a cyclical economy. Second, the elements within the American polity which were dissatisfied with traditional economic policies - farmers and labour - developed a form of coalition politics which exercised unprecedented (and since unparalleled) control over the Democratic party. By contrast, similar Canadian groups, who failed to influence the established parties, formed a social democratic third party. Thus, their resources were primarily directed to building this party, rather than influencing the policies of the Liberals or Conservatives. Third, manufacturing was much less developed in Canada than in the United States. During the 1930s Canada was

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70 Galenson, supra note 56, 614.

still predominantly an agricultural country.[71] Consequently, labour was much less powerful than it was in America and the stabilization of industrial wages was not high on the list of the Canadian government's priorities.

Although the Wagner Act did not exert dramatic direct effect on the federal government's legislative policy during the 1930s, it had an indirect influence via its impact on the legislative demands of the Canadian labour movement. But the most important American influence on Canadian industrial relations during the decade was the craft/industrial union split. Once the AFL expelled the industrial unions, it no longer exercised direct control over the resolution of jurisdictional disputes in the U.S. Instead, the authority for determining whether a craft or industrial union should represent a particular group of employees fell upon the NLRB, since it had the responsibility for determining the appropriate bargaining unit. Consequently, the AFL's opinion of the NLRA varied in relation to the Board's bargaining unit policy. Taking its lead from its American counterpart, the TLC eschewed Wagner-style collective bargaining legislation for legislative protection of the freedom of association. The TLC did not modify its policy until the rapprochement between the AFL and NLRB was completed in the 1940s. This, in turn, influenced federal labour policy - since there was no pressure from the TLC to deviate from the status quo.

The industrial unions which were beginning to organize in Canada were favourably disposed to collective bargaining legislation of the Wagner variety. While the power of craft unions resided in their control of the supply of skilled tradesmen, industrial union power derived from the control of numbers.[72]

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71 In 1931 33.9 per cent of the male labour force was employed in agricultural work, and by 1941 that figure had only dropped to 31.7 per cent. By comparison, the second largest employing sector was manufacturing, which comprised 12.1 and 16.7 per cent of the male labour force in 1931 and 1941 respectively. Thompson and Seager, supra note 16, 348.

72 Laurel Sefton MacDowell, 'Remember Kirkland Lake' The Gold Miners' Strike of 1941-42 (Toronto: U. of T. Press, 1983) 7.

Industrial unions, which organized semi-skilled and unskilled workers in the mass production industries, needed compulsory collective bargaining legislation as a guarantee that during periods of economic downturn employers would not simply get rid of their entire workforce. Thus, industrial unions within Canada exerted pressure on the TLC to adopt a legislative programme which included compulsory collective bargaining legislation. Eventually, however, the TLC was forced by the AFL to expel the industrial unions. As a result, the already divided Canadian labour movement was further weakened. And significantly, during the first part of the Second World War the rival factions continued to adopt different legislative positions regarding collective bargaining.

III. The Canadian Compromise - 1935-1939

On the eve of the general election in 1935 Prime Minister Bennett recognized the need to modify his iron heel policy - especially after the highly visible debacle involving the relief camp marchers and the RCMP in Regina earlier in the year.[73] He responded to the growing pressure for reform by introducing a legislative package generally referred to as "Bennett's New Deal." Among the numerous reform proposals, a national unemployment insurance scheme and minimum wage and maximum hour laws were introduced to ameliorate the conditions of Canadian workers.[74] However, the TLC continued to lobby for legislative protection for workers' freedom of association. On this issue the government

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73 The WUL organized the single unemployed men who entered relief camps rather than face starvation. The relief camps were a system of work camps run by the Ministry of National Defence. To publicize their demands for better wages and workers' control of the camps, 1,500 relief camp workers began the "On to Ottawa Trek", which was halted by the RCMP in Regina. See Thompson and Seager, supra note 16, 267-72.

74 Employment and Social Insurance Act, S.C. 1935, 25-26 Geo. V, c. 38 and for a discussion of the Act see McConnell, supra note 5, 245-46. The Minimum Wages Act, S.C. 1935, 25-26 Geo. V, c. 44; Limitation of Hours of Work Act, S.C. 1935, 25-26 Geo. V, c. 63; Weekly Rest in Industrial Undertakings Act, S.C. 1935, 25-26 Geo. v, c. 14 and for a discussion of these statutes also see McConnell, supra note 4, 242-43. See Finkel, supra note 25, at 351 for a discussion of the other aspects of Bennett's "New Deal" programme.

drew its legislative inspiration from the recommendations of the Royal Commission on Price Spreads, appointed in 1934 to investigate the causes of the gap between prices received by producers and prices paid by consumers.[75] The Commission identified the organization of workers into strong trade unions for the purpose of collective bargaining as one method of preventing employers from imposing ruthless wage cuts. Furthermore, it diagnosed employer discrimination against trade union members as the major barrier to collective bargaining. But instead of recommending the adoption of the American model, the Commission advocated amending the IDI Act such that conciliation boards could be appointed to investigate complaints concerning improper intimidation or discriminatory action by employers or workers.[76] The Commission's solution to the problem of discrimination against trade union members emphasized conciliation and evenhandedness in the treatment of workers and employees.

The Commission's recommendations for dealing with complaints of discrimination on the basis of trade union membership were favourably received by Bennett's government. On May 23, 1935, an amendment to the IDI Act was introduced in the Commons.[77] The bill passed through the Commons only to be defeated in the Senate. Two technical objections to the bill were raised.[78]

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75 The Royal Commission on Price Spreads, Report (Ottawa: King's Printer, 1935). Finkel notes that earlier in the year Bennett had angrily rejected a CCF suggestion that the black-listing of trade unionists by employers be made illegal. Finkel, supra note 25, 359.

76 Id., 136-37.

77 Industrial Disputes Investigation Act Amendment Bill, No. 71, Can. H.C. Deb., 1935, 1st reading, 2995; 2nd reading and committee, 3151, and 3rd reading, 3163.

78 They were first, that the adjudicatory stance necessary for resolving complaints of discrimination was not consonant with the conciliatory thrust of the IDI Act, and second, that the power to investigate complaints of discrimination fell within provincial jurisdiction. Senate Deb., June 11, 1935, 363 per Meighen.

However, it was the lack of support from organized labour that clinched the bill's defeat. Tom Moore, President of the TLC, was reported as having "stated definitely that there was nothing in the bill worth saving."[79] The Congress rejected the Conservative government's attempt to provide legislative protection of workers' freedom of association within a legislative framework which emphasized conciliation and evenhandedness.

Bennett's last ditch attempt to stave off electoral defeat was a case of too little, too late. The Liberals, led by MacKenzie King, swept to victory in October 1935. As promised in his election campaign, King dismantled Bennett's iron heel policy by repealing both s. 98 of the Criminal Code and s. 41 of the Immigration Act. This constituted the sole departure from Bennett's policy. The Liberals returned to fiscal orthodoxy and regressive tax increases - Bennett's short spurt of public spending being a mere aberration.[80] Moreover, King was not prepared to implement any new legislation to secure organized labour's support. King handled the TLC's demand that the federal government enact legislation protecting workers' freedom of association and right to bargain collectively through organizations of their own choice by deflecting the pressure onto the provinces. He used his personal and political friendship with the leaders of the TLC, Tom Moore and Paddy Draper, to convince them that the Congress should press the provincial governments to enact such legislation, since the federal government did not have jurisdiction under the BNA Act.[81] The Privy Council's decisions in 1937 declaring Bennett's national unemployment insurance scheme and

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79 Id., 634.

80 See the 1938 statement of Charles Dunning, King's finance minister, on the necessity of maintaining business confidence, quoted in Finkel, supra note 25, 364. See also J.H. Thompson and Allen Seager, supra note 3, 273 and at 331 describing Bennett's atavistic attempts at recovery and King's acceptance of the status quo.

81 Daniel Coates, "Organized Labor and Politics in Canada: The Development of a National Labor Code," Ph.D. thesis, Cornell University, 1973, 34.

the minimum wage and maximum hour laws to be beyond the legislative powers of the federal government,[82] confirmed the federal government's position that it lacked the authority to enact uniform legislation to protect workers' rights to organize and bargain collectively.

Norman Rogers (the federal Minister of Labour) responded to organized labour's complaint that certain employers had discharged workers for organizing trade unions, by emphatically declaring in the Commons that

> the right of association is a civil right, long established by law and usage. It was affirmed with special reference to Canada by an Order-in-Council of July 11, 1918 (PC 1748).... To deny the right of workmen to combine in any lawful organization they desire for the promotion of their welfare is an open invitation to extremists to preach the futility of collective bargaining as an alternative to direct action. The right of association for legitimate purposes should be respected in the national interest and labour should not be denied the means of organizing for collective bargaining.[83]

Throughout 1937 and 1938 the government continued to assert that recognition of the right of workers to combine in lawful organizations and bargain collectively was the path most likely to lead to industrial peace, while simultaneously refusing to commit itself to legislation guaranteeing such rights.[84]

Conciliation boards appointed under the IDI Act began increasingly to recommend that employers recognize their employees' right to be represented by trade unions of their own choice,[85] and affirmed the right of employees to select union officials who were not employees of the employer in the dispute as their

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82 A.G. Can. v. A.G. Ont., [1937] A.C. 326 and A.G. Can. v. A.G. Ont. (Re Social Insurance Act Reference), [1937] A.C. 355. See again McConnell, supra note 4, 254-255 for a discussion of the two cases.

83 L.G., Jan. 1937, 24 quoting a statement made by Rogers on December 30, 1936.

84 See the following issues of the Labour Gazette for reports of Rogers' speeches: L.G., July 1937, 595; L.G., Oct. 1937, 1080 and L.G., Jan. 1938, 24.

85 See B.M. Selekman, Law and Labor Relations, 14 Business Research Studies (Grad. School of Business Admin. Harvard: March, 1936), 24; L.G., July 1938, 725; L.G., May 1935, 397; L.G., Oct. 1930, 1127.

representatives for the purposes of conciliation under the Act.[86] However, the boards were quick to acknowledge that they had no authority to compel an employer to recognize a union,[87] and the recognition of employee committees was the extent of employers' concession to freedom of association in many instances.[88] Ignoring the fact that employers could simply reject conciliation board recommendations, the federal government refused to depart from its policy of voluntarism.

The government's continued commitment to voluntarism regarding collective bargaining was not only a matter of constitutional principle and labour policy, but also a function of political expediency. King's politics of compromise were not conducive to the enactment of legislation that would support workers' rights in the face of concerted opposition.[89] Elements in the Senate, organized business interests and the politically sensitive Liberal government in Ontario were adamantly opposed to legislation which aided trade unions (particularly those of the CIO variety) in their attempts to organize workers. Moreover, the trade union movement, which had yet to recover the membership it lost during the depression, was wracked by internal schisms. In 1935 a new national umbrella organization of trade unions, calling itself the Canadian Federation of Labour (CFL), was formed in opposition to the ACCL, on account of the latter's increasing orientation to the CCF.[90] Battle lines were drawn on national, linguistic, religious and political grounds within the trade union movement,

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86 L.G., Dec. 1936, 1106.

87 L.G., July 1938, 725.

88 L.G., Oct. 1930, 1127.

89 Neatby, supra note 10, 74-75.

90 Thompson and Seager, supra note 16, 286.

fragmenting any power it could muster.[91] Thus, in the face of the competing demands of the coalition of business and conservative political interests and organized labour the Liberal government, in effect, continued to adhere to the status quo.

At the 1936 annual TLC convention the industrial unions affiliated to the Congress banded together to propose a resolution that employers' use of discriminatory tactics against employees on account of trade union membership should be made illegal, and that the federal government should be pressed to enact legislation to this end.[92] At the time, Canadian legislative reforms went only so far as to free unions from the disabilities which were imposed against organization in the 19th century.[93] They failed, however, to protect the act of organization from an employer's competing freedom to exercise its employment power to prevent unionization. Thus, the industrial unions within the TLC were calling for legislative protections enabling workers to exercise their freedom of association. Following King's advice, Paddy Draper, president of the TLC,

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91 Divisions of ethnicity and gender were of considerable importance, and sectional and regional barriers also fractured the trade union movement. Brian Palmer, Working Class Experience: The Rise and Reconstitution of Canadian Labour (Toronto: Butterworth, 1983) 227.

92 Coates, supra note 81, 35 and H.A. Logan, Trade Unions in Canada (Toronto: MacMillan, 1948) 415.

93 A.W.R. Carrothers, Collective Bargaining Law in Canada (Toronto: Butterworths, 1965) 32. Carrothers tends to overstate his case, although he does acknowledge the limitations of the Trade Unions Act, 1872 35 Vict. c. 30 and, the Criminal Law Amendment Act, 1872, 35 Vict. c.35 (at pp. 16-25). Although the purported purpose of both of these statutes was to free trade unions from civil and criminal disabilities, their restrictive wording and inherent limitations meant that they "were no more than hollow, rhetorical responses to the need to modernize the law in relation to trade unions." See Marc Chartrand, "The First Canadian Trade Union Legislation: An Historical Perspective," 16 Ottawa L. Rev. 267, 288 (1984). In addition to the use of the common law economic torts to restrain trade union behaviour, the criminal law of conspiracy continued to operate until 1892 with the enactment of the Criminal Code, 55 & 56 Vict. c.29. However, the Criminal Code failed to immunize peaceful picketing from criminal sanction; consequently a great deal of trade union behaviour was subject to repression.

informed the convention that the federal government lacked the requisite authority to enact such legislation. Consequently, the convention instructed the Executive Council to draft a model bill guaranteeing workers' rights to bargain collectively through organizations of their own choice and to lobby each of the provincial legislatures to enact a similar bill.[94]

Adhering to its instructions, the TLC executive prepared a draft bill entitled "Freedom of Trade Union Association Act"; and a copy of it, with a memorandum concerning legislative jurisdiction over labour relations, was sent to each of the provinces.[95] This draft bill was essentially a compromise between two competing considerations. On the one hand, the executive wanted to avoid legislation modelled on the Wagner Act since the AFL was opposed to those features of the American Act which gave the NLRB authority to determine the appropriate bargaining unit and representative. On the other hand, the executive wanted to accede to the industrial unions' demand for legislation protecting workers' freedom of association for collective bargaining purposes.

Accordingly, the Executive invoked the precedent of the First World War order (PC 2525) which prohibited discrimination on the basis of trade union membership as the basic outline of its bill. PC 2525 provided criminal sanctions to be imposed against any person who coerced, intimidated or discriminated against any employee for reason of membership or participation in the legitimate activities of a trade union outside working hours. The TLC draft bill followed PC 2525 by providing criminal sanctions to ensure workers' freedom of association and by omitting any reference to a procedure for determining the appropriate bargaining unit or representative. However, it departed from PC 2525 by

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94 Coates, supra note 81, 35 and Logan, supra note 29, 415-16.

95 Archives of Ontario, RG 3, Hepburn Papers, General, Private, 1936, Box 257, file Labour Department, Dec. 30, 1936, David Croll, Minister of Labour to Hepburn re Draper's draft bill and 26(2) Canadian Congress Journal Feb. 1937 10.

deviating from the principle of evenhandedness in the treatment of employers and employees: the Congress omitted the wartime order's prohibition against employees who attempted to intimidate or coerce fellow employees into joining a trade union.

Specifically, the TLC draft bill 1) acknowledged the right of employees to form themselves in trade unions; 2) defined "trade union" so as to exclude any organization which was unduly influenced, dominated, restrained or interfered with by employers or employers' associations; 3) declared that employees had the right to bargain collectively with employers through the officers of trade unions; 4) outlawed "yellow dog contracts", viz., contracts of employment which contained conditions restraining employee rights under the proposed bill; and 5) provided that any employer who by intimidation, threats of loss of position or employment, interfered with employee membership in a trade union was liable, via criminal prosecution, to a fine not exceeding $100 ($1000 for a corporation) or, if in default, to a maximum jail term of 30 days.[96] The Draft bill departed from PC 2525 in that it did not protect employees who participated in legitimate trade union activities outside working hours and by providing lower penalties in the event of a violation. The bill was consistent with the TLC's continued adherence to voluntarism, since it did not contain any provisions which authorized the state to interfere with the structure and process of collective bargaining, nor did it compel an employer to bargain with a trade union. Moreover, the use of criminal sanctions to underwrite labour policy was consistent with the federal government's previous legislative practice - as evidenced by PC 2525 and the IDI Act.

The TLC supported its demand for the enactment of the draft bill by claiming that it merely provided positive protection for what had already been recognized in a negative way; viz., it was no longer illegal for employees to combine in

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96 Id. Note it would appear that, as a result of inadvertence, the TLC draft bill failed to protect participation in the activities of a trade union.

trade unions.[97] Moreover, the Congress claimed that such legislation would remove from the realm of industrial disputes those involving the workers' right to organize.[98] Hence, the Congress employed justifications which were consistent with the federal government's policy of voluntarism and goal of industrial peace.

1. The Provinces' Response

Seven out of the nine provinces responded to the TLC's lobbying campaign by enacting legislation to protect workers' freedom of association.[99] What was particularly conspicuous about the provincial statutes was the extent both to which they differed among themselves and departed from the TLC draft bill. The interplay of three factors accounted for this double divergence. First, the party composition of the legislature differed from province to province - and certain provincial legislatures (British Columbia, for example) were much more favourably inclined to organized labour than others. Second, the Canadian labour movement was highly regionally diversified both in strength and composition. The presence and influence of the TLC differed amongst the provinces such that it had a greater input into labour policy in some provinces than others. And third, since the provincial TLC executives, rather than the national executive, were

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97 As was mentioned at supra note 93, it was possible to invoke a wide range of sanctions against trade unions. However, both employers and the federal government generally were content to limit use of civil and criminal sanctions to illegitimate trade unions.

98 26(2) Canadian Congress Journal, Feb. 1937, 10.

99 - British Columbia Industrial Conciliation and Arbitration Act, S.B.C. 1937, c. 31, amended by S.B.C. 1938, c. 23.
- Alberta Freedom of Association Act, S.A. 1937, 1 Geo. VI, c. 75, replaced by the Industrial Conciliation and Arbitration Act, S.A. 1938, c. 57.
- Saskatchewan, Freedom of Trade Union Association Act, 1938 S.S. 1938, c. 87.
- Manitoba, Strikes and Lockouts Prevention Act, S.M. 1937, c. 40.
- Quebec Fair Wages Act, S.Q. 1937, c. 40, amended by S.Q. 1938, c. 53.
- New Brunswick Labour and Industrial Relations Act, S.N.B. 1938, 2 Geo. VI, c. 68.
- Nova Scotia Trade Union Act, S.N.S. 1937, 1 Geo. VI, c. 6.

responsible for lobbying their respective legislatures they could press for the inclusion of provisions which were not contained within the TLC bill - as the compulsory dues check-off provision in the Nova Scotia statute suggests.[100]

A conglomeration of different influences - including the TLC draft bill, the Wagner Act, existing Canadian labour policy and the IDI Act - are revealed in the provincial statutes. The majority of the statutes dealt with the three main features of the TLC bill: the declaration of the right to bargain collectively, the prohibition of "yellow dog" contracts and the prohibition of employer discriminatory practices intended to prevent employees from exercising their freedom of association. However, with the exception of a general uniformity in the prohibition of "yellow dog" contracts,[101] the divergences of the statutes from the TLC bill were as predominant as the points of adherence to the Congress's model.

The majority of the provincial statutes illustrated the development of a new policy which blended the legislative protection of the freedom of association with the older Canadian policy of compulsory dispute settlement.[102] In British Columbia, Alberta, Manitoba and New Brunswick the new legislative protections were grafted on to the provincial compulsory conciliation statutes, which were modelled on the IDI Act.[103]

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100 S.N.S., I Geo. VI, c.6, s.12.

101 S.B.C. 1937, c.31, s.6; S.A. 1938, c.57, s.6; S.S. 1938, c.87, s.5, S.N.B. 1938, c.68, s.7 and S.N.S. 1937, c.6, s.6.

102 Quebec labour relations legislation was unique amongst the Canadian jurisdictions, for the Collective Labour Agreements Extension Act implemented a policy of legally extending privately negotiated agreements. See H.D. Woods, Labour Policy in Canada, 2nd Ed. (Toronto: Macmillan, 1973) 67, and Carrothers, supra note 97, 43. In 1937 the province introduced an amendment to the Act declaring it illegal for an employee from becoming a member of an association or to dismiss an employee for exercising rights under the Act (Fair Wages Act, S.Q. 1937, c.50, s.23).

103 S.B.C. 1937, c.31; S.A. 1938, c.57; S.M. 1937, c.40 and S.N.B. 1938, c.68.

Amongst the statutory treatments of the right of employees to engage in collective bargaining through trade unions, two major strains - the first permissive and the second compulsory - can be identified. Saskatchewan, Manitoba and New Brunswick followed the TLC draft bill and adopted a declaratory or permissive approach - viz., the lawfulness of collective bargaining between trade unions and employers was expressly stated.[104] However, the Saskatchewan provision was the only one which was consistent in all respects with the TLC bill. The New Brunswick Act diverged in its reference to the principle of majority rule in selecting the bargaining representative, while the Manitoba statute departed from the TLC model in its adherence to the principle of evenhandedness. The Manitoba provision declared that both "employers and employees shall have the right to bargain with one another individually or collectively through their organizations or representatives."[105] In effect, this commitment to evenhandedness enabled an employee to bargain with an employer on an individual basis, even in cases where a collective agreement governed the rest of the employees. As such, the Manitoba Act was an example of window-dressing, rather than illustrative of a genuine commitment to promoting collective bargaining.

In contrast to the provinces which merely declared that collective bargaining was lawful, British Columbia, Alberta and Nova Scotia went further than the TLC bill by providing for compulsory collective bargaining once certain conditions were met.[106] In British Columbia and Alberta an employer which failed to or refused to bargain with the representatives of its employees was subject,

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104 S.S. 1938, c.87; S.M. 1937, c.40 and S.N.B. 1938, c.68.

105 S.M. 1937, c.40, s.45.

106 S.B.C. 1937, c.31; S.A. 1938, c.57 and S.N.S. 1937, c.6.

via criminal prosecution, to a fine not exceeding $500;[107] while in Nova Scotia the fine for the same offence was not to exceed $100.[108]

Alberta and British Columbia provided for the selection of the bargaining representative on the basis of a majority vote by the employees. The principle of majority rule to determine representation can be traced to the recommendations of the IDI Act boards in the previous decade,[109] and, thus, is as much an indigenous feature of Canadian labour policy as an influence of the Wagner Act.

The Nova Scotia statute compelled the employer to recognize and bargain collectively "with the members of a trade union representing the majority choice of the employees eligible for membership in said trade union."[110] Although committed to the principle of majority rule on the basis of trade union membership, it failed to provide any criteria for selecting a bargaining representative in cases in which a trade union was not involved. Moreover, it also failed to compel the employer to bargain with the representative of the employees in such a situation.

The British Columbia Act was amended in 1938 to provide legislative protection for incumbent unions in the collective bargaining process.[111] Employers were compelled to recognize, without a vote, a trade union as the bargaining representative if over 50 per cent of the employees were members of a union which had registered with the government before December 7, 1938. It was the CCF's view that the amendment was implemented to placate AFL unions, who were

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107 S.B.C. 1937, c.31, s.5 and S.A. 1938, c.57, s.5.

108 S.N.S. 1937, c.6, s.5.

109 See Chapter 1, discussion.

110 S.N.S. 1937, c.6, s.5.

111 S.B.C. 1938, c.23.

worried that the 1937 provisions alone would have benefitted CIO unions.[112] Since the CIO unions did not start to move into British Columbia until 1938, the requirement that a union be registered before December 7th of that year in order to avoid a representation election favoured the longer-established craft unions.

Despite the differences in the methods for determining the bargaining representative in the three provinces, the three compulsory statutes were similar in that they each stopped short of the Wagner Act - none of them provided for administrative determination of the appropriate bargaining unit. Reliance upon criminal penalties to ensure that an employer bargain with the trade union representing the majority of its employees, rather than the Wagner method of vesting remedial powers within an administrative board, was consistent with the TLC's favoured technique of guaranteeing employees' rights through criminal sanctions. Although the three provincial statutes compelled employers to bargain collectively with the union representing a majority of the relevant employees, none of the statutes interfered with the structure of collective bargaining by establishing a board to determine the composition of the bargaining unit. Unit determination remained in the hands of the unions.

All of the provincial freedom of association statutes followed the TLC bill by providing for fines, ranging between $10 and $1,000 for each offence, to be enforced by criminal prosecution, against any employer found guilty of using its employment power to prevent an employee from joining a trade union.[113] However, the majority of the statutes diverged from the TLC bill by providing that the management prerogative to dismiss, lay-off or transfer an employee for just and sufficient cause was not diminished by the prohibition against discrimination on

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112 Harold E. Winch, "The British Columbia Labor Act," 18 The Canadian Forum, 330-31 (Feb. 1939).

113 S.B.C. 1937, c.31, s.7(1); S.A. 1938, c.57, s.7(1); S.S. 1938 c.87, s.6(1); S.M. 1937, c.40, s.46; S.Q. 1937, c.50, s.23; S.N.B. c.68, s.9 and S.N.S. 1937, c.6, s.7.

the basis of trade union membership.[114] Moreover, with the exception of Nova Scotia, the provinces further departed from the TLC bill by opting for the pattern, established at the end of the First World War by PC 2525, of evenhandedness in the treatment of employees and employers.[115] Thus, the statutes provided that any employee found guilty of attempting to intimidate or threaten (or succeed in doing either) a fellow employee into joining a trade union was subject to criminal prosecution and a fine of between $10 and $1,000.

The theme of evenhandedness, which was contrary to the thrust of both the TLC bill and the Wagner Act, ran throughout the provincial statutes. Five of the seven provincial statutes required every trade union in the province to file a copy of its constitution, rules, by-laws and annual financial return with the appropriate government official as the quid pro quo for the implicit or explicit (as the case may be) recognition of a trade union as bargaining agent.[116] This requirement undermined the TLC's attempt to keep the internal affairs of trade unions outside the ambit of state regulation. But while providing a mechanism to ensure that trade unions did not violate their own rules, only Saskatchewan followed the TLC recommendation that the statutory protections for employees' freedom to organize and bargain collectively be denied to any organization that was unduly influenced, dominated by or interfered with by an employer.[117] Thus, the majority of the provincial enactments failed to distinguish company unions from independent unions for the purpose of legislative protection.

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114 S.B.C. 1937, c.31, s.8; S.A. 1938, c.57, s.8; S.S. 1938, c.87, s.7; S.N.B. 1938, c.68, s.8 and S.N.S. 1937, c.6, s.8.

115 S.B.C. 1937, c.31, s.7(1); S.A. 1938, c.57, s.7(1); S.S. 1938, c.87, s.6(1); S.M. 1937, c.40,s.46 and S.N.B. 1938, c.68, s.7.

116 S.B.C. 1937, c.31, s.9; S.A. 1938, c.57, s.9; S.S. 1938, c.87, s.8, S.N.B. 1938, c.68, ss.10-12 and S.N.S. 1937, c.6, s.9.

117 S.S. 1938, c.87, s.2(2).

How are we to evaluate the provincial legislation? Woods, for example, characterized the provincial statutes as Wagner-type laws which imported the principles upon which the American policy was built into Canadian law.[118] But, while it is true that the provincial laws confirmed the legality of collective bargaining and the right to associate in trade unions and provided sanctions to be invoked against employers who interfered with these rights, Woods' characterization rests on an exaggeration of the similarities between the Canadian laws and the American Act. The TLC bill, although prompted by the demands of industrial unions which wanted Wagner-style legislation, was carefully drafted to avoid the most distinctive and innovative features of the Wagner Act - the establishment of an administrative board with the power to issue cease and desist orders and determine the appropriate bargaining unit and representative. And, most importantly, all of the provincial statutes closely followed the TLC draft bill in this respect. In fact, the only feature of the provincial enactments that owed its existence solely to the Wagner Act was the provision in the Alberta, British Columbia and Manitoba statutes excluding agricultural and domestic employees from the scope of the protective legislation.[119] Indeed, the vast majority of the provisions of the provincial statutes can be traced back to Canadian sources: PC 2525, the IDI Act and the IDI Act boards' recommendations.

However, the acknowledgement that many of the principles contained within the provincial statutes have found earlier expression in Canadian labour policy does not deny the fact that the enactment of the provincial statutes constituted an important juncture in Canadian labour policy. They expressed the growing recognition by organized labour and the state that it is not sufficient to merely liberate the freedom to associate and to bargain collectively from legal

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118 Woods, supra note 102, 66-67.

119 S.B.C. 1937, c.31, s.2(1); S.A. 1938, c.57, s.2(1)(f) and S.M. 1937, c.48, s.2

disability; rather, these freedoms must be granted legislative protection from competing employer freedoms if they are to be enjoyed by employees.

Although in principle a positive step for trade unions, in practice the statutes proved ineffective in promoting collective bargaining or protecting workers' freedom of association. Paradoxically, the provincial governments' respect for the TLC's commitment to voluntarism, in part, undermined the effect of the legislation. The provincial statutes, unlike the Wagner Act, did not provide an effective administration empowered to act affirmatively in enforcing the employer's duty to bargain collectively or preventing the employer from discriminating against trade union members.[120] Instead, Canadian employees were forced to rely upon the traditional strike weapon or the ill-suited procedures of the criminal courts, to guarantee their rights. The problems associated with using criminal sanctions to implement labour policy were evident with respect to the compulsory cooling off provision of the IDI Act, and similar problems arose regarding the compulsory provisions of the provincial statutes. Government officials were unwilling to prosecute employers for alleged violations, and the high standards required by criminal procedures made proving a violation very difficult.

Yet, the ineffectiveness of the provincial statutes did not vitiate their influence on the subsequent development of federal labour policy. The provincial enactments both brought together a number of themes existing in Canadian labour policy and introduced some unprecedented elements which can be found in the federal collective bargaining legislation introduced towards the end of the Second World War. The technique of using criminal sanctions to reinforce labour policy, the coupling of protections for the freedom to associate and the right to bargain collectively to the existing framework of compulsory conciliation legislation, the principle of majority rule in determining bargaining

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120 Bora Laskin, "Union Recognition and Collective Bargaining," 8(1) Public Affairs (1944) 48 and Woods, supra note 102, 67.

representatives, and a commitment to evenhandedness were emphasized in the provincial legislation and left a strong mark on subsequent policy. The innovative elements identifiable in the provincial legislation - the bias in favour of selecting incumbent unions as bargaining representatives, the commitment to preserving management prerogatives from incidental encroachment and the tendency to demand union registration as the quid pro quo for recognition - also marked the federal legislation when it was introduced half a decade later. In fact, the major difference between the provincial legislation and the ultimate form of Canadian collective bargaining legislation, was the latter's gradual repudiation of the principle of voluntarism regarding the structure of collective bargaining.

By the end of 1938 all of the provinces, with the exception of Prince Edward Island and Ontario, had enacted legislation to protect workers' freedom of association for collective bargaining purposes.[121] Since Prince Edward Island was a small, agricultural and conservative province with a numerically insignificant workforce, the absence of such legislative action is not remarkable. By contrast, Ontario contained the largest number of industrial workers of all of the provinces. Its failure to respond to the lobbying demands of the TLC is mainly attributable to Premier Mitchell Hepburn's antipathy to CIO unions, which he saw infiltrating Ontario's mass production industries.

2. The CIO Organizing Drive

The Comintern's 1935 order to the WUL to disband and integrate with the established trade union movement had a profound impact on labour relations in

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121 In 1938 David Croll, Minister of Labour in Hepburn's cabinet introduced a bill modelled on the TLC draft. During the discussion in Committee, however, Hepburn proposed amendments to the bill, which would have had the effect of stripping the penalty clause from the bill and adding protection for company unions. Faced with Hepburn's amendments organized labour informed the Ontario government "that no bill at all was infinitely preferable" and the bill was withdrawn. See Duff Munro, "Labour Legislation 1939" 19 The Canadian Forum 74-75 (June 1939).

Canada, for it led to the organization of CIO unions in Canada and established a firm core of communists within those unions. Scores of ex-WUL organizers responded to the Canadian mass production workers' demands for organization by forming CIO unions.[122] Initially this was done without the knowledge of the CIO hierarchy in the United States. However, in 1936 the CIO headquarters authorized the organizing campaign, although it failed to provide much needed funds.[123] The CIO's organizing campaign marked a change in the pattern of industrial conflict in Canada, from resource industries based in the West to the mass production industries in central Canada.[124] Premier Hepburn met the organizing campaign and resulting industrial unrest by declaring war upon the CIO.[125] Once again "foreign agitators" (this time Americans) were identified as the cause of the unrest.

The General Motors plant in Oshawa, Ontario was the site of the major battle between Hepburn and the CIO.[126] On April 8, 1937 the workers walked out demanding, among other things, their right to be represented by officials of the United Automobile workers (UAW), which was affiliated to the CIO. Hepburn backed the management's categorical refusal to negotiate with any one other than their own employees. Adopting tough tactics, he ordered the recruitment of special police officers, known as Hepburn's Hussars, allegedly to keep the peace in Oshawa. Moreover, Hepburn extracted written statements from Charles Millard, the

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122 Abella, supra note 6, 25.

123 Id.

124 Jamieson, supra note 9, 248-49.

125 According to Desmond Morton, Mosher's ACCL joined with Hepburn in denouncing the CIO and the TLC kept quiet about some of the most blatant anti-union politicking in modern Canadian history. Desmond Morton and Terry Copp, Working People (Ottawa: Deneau, 1984) 159.

126 Abella, supra note 6, 8-23.

president of the UAW local in Oshawa, and J.L. Cohen, the local's lawyer, that neither of them were in any way associated with the CIO. Confronted with both the employer's and provincial government's intransigence the strikers returned to work with none of their demands met. However, instead of crushing the CIO as he planned, Hepburn's Oshawa tactics turned the rather limited CIO organizing campaign into a violent crusade.[127]

The CIO's organizing campaign in Canada was disrupted by the economic downturn which occurred in the later half of 1937. As a result, between 1937 and 1938, membership in CIO unions declined drastically.[128] In response to the unfavourable economic conditions, the CIO unions began to call for legislation along the lines of the Wagner Act to aid their organizing campaigns. Thus, the aggressiveness of the CIO unions in the industrial arena in 1937 was replaced by their assertiveness at the TLC's 1938 annual convention. At the preceding convention, a block of industrial unions had proposed a resolution indicating the shortcomings of the executive's draft bill and calling upon the executive to revise the draft in light of their criticisms.[129] But the resolution was never voted on by the Convention since Draper, the TLC president, successfully orchestrated its premature burial.

This delay in dealing with the objections to the draft legislation fuelled the dissatisfaction of the industrial unions, which erupted at the 1938 convention. A strongly worded resolution criticizing the executive's draft bill was proposed. It specifically requested that the draft bill be amended to provide for "an independent government tribunal to ascertain by a majority vote as determined by secret ballot or otherwise ... which labour union would have the

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127 Id., 24.

128 Id.

129 Logan, supra note 94, 420.

exclusive bargaining rights" where there were two or more unions.[130] In effect, the resolution called for the revision of the draft bill in conformity with the Wagner Act, which it extolled as the "Magna Carta of American Labour."[131] Responding to the resolution, Draper revealed that the reason for the Executive's opposition to Wagner-style legislation was the AFL's belief that the American Act had favoured CIO unions.[132] In the end, however, the industrial unions in the Congress, which were aligned with the CIO, prevailed over the Executive's objections and the resolution was carried.

Ultimately, the resolution was to no avail since the Executive failed to act upon it. The problem of avoiding the example of its American counterpart in expelling the CIO was uppermost in the minds of the executive members. The TLC, which had never been as committed to the principle of exclusive jurisdiction as the American Federation, attempted to steer a course whereby CIO unions could remain affiliated to the craft-dominated Congress.[133] However, the AFL, following the 1902 precedent, exerted its authority to circumscribe the autonomy of its Canadian affiliate. At a meeting with members of the AFL executive in Washington in November 1938, the TLC was presented with the ultimatum of either expelling the CIO affiliates or being expelled from AFL. Bowing to the pressure of the powerful American Federation, in January 1939 the TLC issued an order

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130 Id., 421.

131 Id. 420.

132 Id.

133 L.G., Oct. 1936, 891, 895. At the 1936 annual convention Draper claimed that the TLC's constitution allowed for both AFL affiliates and any trade union which 2/3 of the convention had voted in favour of affiliating.

expelling the unions affiliated to the CIO.[134] After a long and acrimonious debate at the 1939 TLC convention in September, from which the CIO unions were barred, the expulsion order was confirmed.

The confirmation of the expulsion order served to galvanize the CIO forces in Canada, which had been beset by internal squabbling between the communist, ex-WUL organizers, who were chiefly responsible for organizing many of the CIO unions, and the CCF and anti-communist forces which sought greater influence over the CIO.[135] In October 1939 the CIO representatives in Canada formally established the Canadian Committee for Industrial Organization to "co-ordinate the work of the CIO unions in Canada in order to initiate and direct a powerful organizational drive."[136] A committee, rather than a full-fledged congress, was established so as to avoid deepening the rifts in the already divided labour movement. Significantly, the Canadian organization received full autonomy over Canadian CIO affairs from the American organization.

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134 Abella, supra note 6, 35. The following unions were expelled from the TLC because they were affiliated with the CIO:

	No. of Locals	Membership
United Mine Workers	72	15,000
Amalgamated Clothing Workers	20	4,000
International Fur Workers	11	750
Int'l Union of Quarry Workers	1	54
United Automobile Workers	1	200
Steel Workers Organizing Cmtee	8	1,120
Mine, Mill and Smelter Workers	3	1,110

Figures from the L.G., Oct. 1939, 1007. These unions led the demand for compulsory collective bargaining legislation during the Second World War.

135 I.M. Abella, "The CIO, the Communist Party and the Formation of the Canadian Congress of Labour, 1936-1941" Canadian Historical Association, Booklet No. 28 Historical (1978) 18-19.

136 Abella, supra note 6, 41.

3. The Federal Government Reacts

At the same time as the CIO unions had begun to organize in Canada, the CCF was placing increasing emphasis on associating with organized labour. In 1939 the national office published a pamphlet entitled "Strengthen the Trade Union," in which the party aligned itself squarely with organized labour.[137] Moreover, as evidence of its support for trade union goals the CCF could cite the repeated attempts of its leader, J.S. Woodsworth, to obtain an amendment to the Criminal Code which would protect workers from employers who sought by overt acts of intimidation, threats or conspiracy to prevent employees from belonging to trade unions.[138] Essentially, Woodsworth proposed to duplicate within federal legislation the provisions of the provincial statutes guaranteeing employees' freedom of association.

During the discussion of his 1938 bill in the House of Commons, Woodsworth sought to defuse possible objections to his proposed amendment to the Criminal Code.[139] First, he addressed a possible constitutional objection, arguing that the criminal law (which was under federal legislative authority) was an appropriate mechanism for prohibiting employers from interfering with the legitimate rights of workers. In support of his constitutional argument he noted that the Criminal Code already contained a number of analogous prohibitions dealing with restraint of trade and breach of contract.[140] Second, he sought to undermine the argument that as there was no law preventing a worker from refusing

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137 Young, supra note 35, 80.

138 Bill 62, 1936; Bill 4, 1938 and Bill 5, 1939.

139 Bill No. 4, Report of the Debate relating to an amendment to the Criminal Code to prevent discrimination against members of Trade Unions, 3(1) Workers' Education Association (April 1938) 10, 12-14.

140 Id., 10 and see also Can., H.C. Deb., Feb. 17, 1937, 1077 for a similar argument with respect to the 1939 bill.

to work for a particular employer, employers should not be prevented from refusing to employ a particular worker. Woodsworth met this demand for evenhandedness in the treatment of employees and employers by turning it on its head. He argued that as the law protected the employer's right to organize via incorporation, the employee's right to organize should be given equal protection - even if it necessitated a different type of law.

The government launched a concerted attack on Woodsworth's bill on two fronts. On the first, Ernest Lapoint (the Minister of Justice) took direct issue with Woodsworth's two arguments in support of the amendment; while, on the second, Norman Rogers (the Minister of Labour) argued that the federal government's labour relations policy adequately dealt with the problem that Woodsworth sought to resolve through the Criminal Code.

Ignoring Woodsworth's claim that the Criminal Code contained offences analogous to that which he was proposing, Lapointe declared that the use of federal criminal law powers to protect workers' right to associate was a colourable device intended to obscure the fact that the subject matter of the amendment encroached on property and civil rights.[141] Addressing Woodsworth's second argument, Lapointe relied on the formal legal equivalence between the employer and employee to undercut the claim that protective legislation for workers was necessary to achieve evenhandedness of treatment.[142]

Placing the proposed criminal amendment in the larger context of federal labour relations policy, Rogers claimed that conciliatory intervention under the IDI Act had proved a suitable method for resolving complaints that employers were discriminating against persons on account of their trade union membership.[143]

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141 Report of the Debate relating to Bill No. 4, supra note 148, 12-14.

142 Id., 20.

143 Can., H.C. Deb., May 17, 1938, 2974.

Moreover, he declared that it was federal labour relations policy to promote workers' freedom of association and collective bargaining on a voluntary basis, as was done in Great Britain.[144] Since the government commanded a majority in the House of Commons, the bill was dropped.

Woodsworth re-introduced the bill into the Commons the following year. This time it commanded general support - including the CCF, organized labour, the leader of the opposition and members of the Liberal caucus. Faced with an election the following year, King could not risk his government being perceived as unwilling to legislate in order to protect organized labour; he feared that the Liberals might loose organized labour's electoral support to the CCF. On the other hand, he could forestall strong employer opposition to the provision by amending Woodsworth's bill, under the guise of ensuring its constitutionality, so as to create serious impediments to successful prosecutions. As a consequence of this calculation of political expediency, on April 11, 1939 Lapointe introduced an amendment to the Criminal Code making it an offence, punishable either on indictment or by summary conviction, for an employer 1) to refuse to employ or dismiss any person for the sole reason that such person was a member of a trade union, or 2) to intimidate or threaten an employee in order to compel him or her to refrain from belonging to a trade union.[145]

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144 Id.

145 The section was enacted as follows:

> "502A. Any employer or his agent, whether a person, company or corporation, who wrongfully and without lawful authority
> (a) refuses to employ or dismisses from his employment any person for the sole reason that such person is a member of a lawful trade union or of a lawful association or combination of workmen or employees formed for the purpose of advancing in a lawful manner their interests and organized for their protection in the regulation of wages and conditions of work;
> (b) seeks by intimidation, threat of loss of position or employment, or by causing actual loss of position or employment, or by threatening or imposing any pecuniary penalty, to compel workmen or employees to abstain from belonging to such a trade union or to such an association or combination to which they have lawful right to belong; or

During the Common's Committee discussion of the amendment several speakers remarked that Woodsworth's bill had been altered in several significant respects through the addition of qualifying language.[146] Lapointe claimed that there were two reasons for this: first, to ensure that the provision was upheld by the courts, and second, to provide that it did not result in any injustice or unfairness to anyone.[147] Although several CCF participants in the discussion were aware that the prohibition lacked teeth,[148] they supported it in the belief that its moral effect was considerable and that it would lead the way to the development of better labour legislation.[149] Accordingly, the bill passed through the Commons and was sent to the Senate. In the Senate Meighen (the former Conservative Prime Minister) led the opposition to the provision. He argued, echoing the demands of the CMA,[150] that a matching prohibition against employees who sought to intimidate a fellow employee into joining a trade union

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> (c)conspires, combines, agrees or arranges with any other employer or his agent to do any of the things mentioned in the preceding paragraphs;
> is guilty of an offence punishable on indictment or on summary conviction before two justices, and liable on conviction, if an individual, to a fine not exceeding one hundred dollars or to three months' imprisonment, with or without hard labour, and, if a company or corporation, to a fine not exceeding one thousand dollars."
>
> The qualifying language added and the modifications to Woodsworth's bill are underlined.

146 Bill No. 90, 1939, An Act to Amend the Criminal Code; Report of the Debate in the House of Commons and the Senate re an amendment to the Criminal Code to prevent discrimination against members of trade unions (The Lapointe Bill), 4(4) Workers' Educational Association (June 1939) 86.

147 Id., 103, 110, 115.

148 Id., 118.

149 Id.

150 L.G., July 1939 679.

should be introduced.[151] However, Meighen's objections failed to persuade a majority of the Senators; and on August 1, 1939 the amendment took effect as s.502A of the Criminal Code - just five weeks before the outbreak of the Second World War.

Within the mainstream of Canadian labour law commentary, s.502A of the Criminal Code is generally seen as representing a major departure from a legislative approach which merely freed employee collective action from legal disabilities, to one which actively guaranteed employees' freedom to associate.[152] In fact, Woods went so far as to characterize the amendment as a breakthrough in principle, whereby Parliament very cautiously abandoned neutrality.[153] Although the ineffectiveness of the provision has generally been acknowledged, typically this failing is attributed to the restrictive statutory language necessitated by constitutional constraints or the principles of the criminal law.[154] The fact that the legislation failed to protect workers' freedom of association has not been taken by most commentators as denigrating from the positive thrust of its enactment.

By contrast, I want to propose a quite different line of analysis; viz., both the extent to which the changes to the language of Woodsworth's initial bill weakened the protection offered by the provision, and the actual experience of workers who initiated prosecutions under the section, indicates that the amendment was intended by the government merely to convince trade unions that

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151 Bill No. 90, 1939, supra note 146, 121-22.

152 Woods, supra note 102, 42 and J.C. Cameron and F.J.L. Young, The Status of Trade Unions in Canada (Kingston: Queen's Univ., Dept. of Industrial Relations, 1960) 29.

153 Woods, supra, note 102, 45.

154 H.A. Logan, State Intervention and Assistance in Collective Bargaining (Toronto: U. of T. Press, 1956).

their request had been answered, without upsetting the balance of power between employers and employees. In other words, the intended ineffectiveness of the amendment belies any proclaimed change in policy on the part of the federal government.

An analysis of the statutory language of s.502A demonstrates that the protection afforded by it was illusory. For example, only a person who was a member of a "lawful" trade union could enjoy the protection accorded under the provision. The use of the modifier "lawful" imported all of the disabilities which the common law doctrines of conspiracy and restraint of trade imposed upon trade unions into the section. In Ontario, one of the two provinces which did not enact legislation to immunize trade unions from the operation of the common law and the province with the greatest number of industrial workers, the common law continued to operate to render trade union action unlawful.[155] Moreover, only an employer who refused to employ a person for the "sole reason" that such person was a member of a lawful trade union was guilty of an offence. The term "sole reason" rendered conviction virtually impossible, since it required that the prosecution affirmatively establish that the employer had no reason other than trade union membership for dismissing the employee. Furthermore, the provision required that the employer exercise his employment power "to compel" an employee "to abstain from belonging to" a trade union. Two problems arose from this phraseology. First, the word "compel" placed the onus on the prosecution to establish that the employer issued a threat excessive enough to compel the employee to abstain from belonging to a trade union. Any degree of dissuasion milder than compulsion would not constitute an offence. Second, the offence was only committed if the employer's intention was that of compelling the worker to abstain from "belonging" to a lawful trade union. As such, it failed to protect an employee who participated in trade union activities - from organizing to

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155 J.L. Cohen, Collective Bargaining in Canada (Toronto: Steel Workers Organizing Committee, 1941) 17.

acting as an official. Thus, the language and construction of the section virtually precluded the possibility of conviction.[156]

The Woodsworth bill itself contained a fundamental flaw which was embodied in the government's version. It failed to protect employees who participated in trade union activities, limiting the scope of protection exclusively to membership in a trade union. Consequently, trade unionists who attempted to engage in collective bargaining would not be shielded from employer retaliation by the Criminal Code amendment. However, neither Woodsworth nor the government were totally responsible for this omission, since the TLC draft bill contained the same limited scope of protection.[157] What began as an oversight of the labour movement became, potentially at least, a major loophole in the legislative protection of workers' freedom to organize.

In addition to the statutory language, the rules of criminal evidence and procedure made conviction under the section extremely difficult. The machinery of the Criminal Code and the forum of the police court were ill-suited to foster trade union association. But, even more important for creating a barrier to successful prosecution was the practice of the prosecutorial officials. Martin, in his discussion of federal labour policy, remarked that

> [i]n attempting to gain protection under this section of the Code, trade unionists found that if the Crown attorney was out of sympathy with the allegation of the complainant, the expense of private prosecution must be born by the trade union or employee concerned. Even if the employer was convicted under the section, no restitution was made for the costs involved in the prosecution, nor was the employer forced to reinstate the discharged employees. Such victories were indeed very hollow.[158]

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156 Id. and Duff Munro, "Labor Legislation 1939," 19 Cdn. Forum 74-75 (1939).

157 See supra note 96.

158 W.A. Martin, "A Study of Legislation Designed to Foster Industrial Peace in the Common Law Jurisdictions of Canada," Ph.D. Thesis, University of Toronto, 1954, 306-7.

Ultimately, the federal Criminal Code amendment was much less important in a positive sense than the provincial freedom of association statutes. Although both were ineffective, at least the provincial statutes brought together a number of themes in Canadian labour policy and prefigured later developments in federal collective bargaining legislation. By contrast, the Criminal Code amendment, which shortly after its enactment became the focus of the union's denunciation of the government's labour policy, illustrated an opportunistic strain in the development of the Liberal government's labour legislation. Under the pressure of political and union demands the government enacted a provision allegedly to protect the freedoms necessary for collective bargaining, while simultaneously ensuring - both in language and practice - that it did not disturb the one-sided balance of power which prevailed in the employment relationship.

Conclusion

By the end of the decade, neither the federal government's nor the TLC's commitment to voluntarism regarding the structure and process of collective bargaining had been seriously disrupted. This essential continuity in union and federal labour policy contrasts sharply with developments in the United States, where a policy of compulsory collective bargaining had been implemented as part of an overarching economic programme. The generalization of collective bargaining on a national level was perceived by Roosevelt's administration to be a viable solution to the depression which it saw as resulting from the fluctuations in the distribution of national income to labour and capital. Consequently, a bipartite policy of 1) preventing barriers to free collective bargaining, which included both employer discrimination against employees for trade union membership or activity and interference with independent unions, and 2) rationalizing the bargaining structure through the administrative determination of bargaining units, was implemented. Although the administrative determination of bargaining units was not initially designed to resolve

jurisdictional disputes between rival unions, after the AFL/CIO rift this became one of the NLRB's major, and most controversial, responsibilities. Moreover, as the NLRB's policy regarding appropriate bargaining units changed, so too did the AFL's attitude to the Wagner Act.

Meanwhile, in Canada the major complaint of organized labour was that employers' discrimination against employees on account of trade union membership or activity was seriously impeding unionization and collective bargaining. But, as was the case in 1902, the AFL's reassertion of control over the TLC in the late 1930's had a profound influence over the Canadian Congress's legislative policy and, hence, an indirect impact on federal labour policy. In light of the AFL's dissatisfaction with the NLRB's bargaining unit policy between 1935 and 1940, the TLC rejected the idea of an administrative board authorized both to certify bargaining agents for appropriate bargaining units and to prevent unfair labour practices as suitable for the Canadian industrial environment. Furthermore, in the absence of concerted pressure from the most important labour federation, the federal government did not make any independent movement towards a policy of compulsory collective bargaining modelled on the Wagner Act. Unlike the case in the United States, where business opposition was overcome by the government's commitment to an economic programme of which compulsory collective bargaining was an integral part, the federal government's economic policy consisted of maintaining business confidence and the tariffs; Keynesian fiscal policy was never considered.[159] Labour policy was not seen as an essential element of economic policy in Canada (probably because Canada was still predominantly an agricultural country), but rather as a means of ensuring industrial peace, and thus only indirectly important for the economy. Consequently, the most distinctive feature of the Wagner Act - compulsory

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159 Thompson and Seager, supra note 16, 279.

collective bargaining with trade unions representing administratively defined units - was not on the Canadian legislative agenda.

Instead of the American model, the Canadian Congress opted for the First World War technique of reinforcing a declaration of the right of workers to associate by criminal sanctions. The use of criminal sanctions against an employer who interfered with an employee's freedom of association would both protect the right to organize, while at the same time allowing the parties to determine the structure and process of collective bargaining. Owing to the constitutional division of powers cemented by the Snider decision, the TLC lobbied the provincial government's for legislation along the lines of its model bill. The majority of the provinces responded by enacting legislation; however, the form and content of the various statutes was mediated by existing features of Canadian labour policy - in particular, the commitment to evenhandedness and compulsory conciliation. These statutes were important both for bringing together various elements in Canadian labour policy and for foreshadowing future developments. By contrast, the federal amendment to the Criminal Code, which was introduced as a result of CCF pressure, was not nearly as far reaching as the provincial statutes. However, the legislation in both the provincial and federal jurisdictions were similar to the extent that they were ineffective in guaranteeing employees' freedom to associate. The commitment of the TLC and the two levels of government to criminal sanctions to protect the freedom of association undermined the efficacy of the legislation, since criminal procedures proved to be an ineffective means of implementing labour policies.

Throughout the 1930s the TLC, the federal government and the majority of the provinces remained committed to voluntarism. However, this commitment to voluntarism was tempered by a gradual shift in the public/private distinction from its position at the beginning of the decade. The notion of what constituted an area of public concern had broadened to include the defence of workers' civil right to associate. Prior to the federal amendment of the Criminal Code and the

provincial right to organize statutes, freedom of association was a private matter. Although employees were under no legal disability preventing them from organizing trade unions[160], employers were entitled to exercise their economic power to prevent them from doing so. By 1939 freedom of association was part of public policy, as the state was authorized to use its coercive power to prevent employers from exercising their private employment power to deny an employee's civil right to associate. But an examination of the language of and practice under the federal provision suggests that this change in public policy was more apparent than real.

With the exception of this slight modification, the public/private distinction remained the same at the end of the 1930s as it did at the beginning of the 1920s - the structure, processes and results of collective bargaining continued to be perceived as private matters unsuitable for compulsory state intervention. The goal of industrial peace, the principle of evenhandedness in the legal treatment of employers and employees (without regard to their respective economic positions) and the mechanisms of compulsory conciliation and criminal sanctions to distinguish between legitimate and illegitimate trade unions, continued to dominate federal labour policy. Thus, employees were free, subject to the employer's exercise of private economic power and the state's exercise of political power to prevent subversion, to organize into trade unions if they could.

It was not until the Second World War that strains within the federal government's policy - in particular, its distinction between public and private - became apparent such that it was subject to major revision. The increase in strength of the industrial unions as a result of wartime production, the AFL' rapprochement with the NLRB and its subsequent impact upon the legislative

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160 Both the criminal and civil law did, however, impose constraints upon how trade union's could exercise their collective power. See supra note 93 for a brief discussion of the legal constraints.

demands of the TLC, the growing electoral attractiveness of the CCF and the imposition of wage controls converged during the war to shift the prevailing conception of the distinction between public and private and, consequently, the areas which were deemed suitable for compulsory state intervention.

Chapter 3: The Exhaustion of Voluntarism - Fall 1939 to January 1943

When war was declared in the autumn of 1939 the Canadian economy had not fully emerged from the decade-long depression. Nearly 900,000 workers out of a workforce of approximately 3.8 million were unemployed,[1] with under-employment affecting a further large percentage of the working population.[2] The economy was still predominantly agricultural and industrial productivity was generally low.[3] These factors tended to limit the extent of unionization of the Canadian working population. Thus, although the percentage of non-agricultural paid workers in unions had increased since the worst part of the depression, union density remained low at 17.3 per cent.[4]

From the outbreak of the war the federal government devoted the greatest part of its attention to gearing up the still lagging economy for war production. In a marked departure from its previous role - which was limited to indirect intervention in the economy through the provision of subsidies and grants - the federal government directly intervened both to allocate resources for war production and to control inflation.

By contrast, labour relations was a low priority and King's government maintained its overall commitment to voluntarism regarding collective bargaining.

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1 Laurel Sefton MacDowell, 'Remember Kirkland Lake' The Goldminers' Strike of 1941-42 (Toronto: University of Toronto Press, 1983) 17.

2 K.W. Taylor, "Canadian War-time Price Controls, 1941-46," 13 Cdn. J. of Econ. and Pol. Sc., 81-98 (1947) at 81.

3 For example, it was estimated that the iron and steel industries operated at 20 per cent of their 1928-29 pre-depression capacity and probably not in excess of 50 per cent of their current capacity.

4 M.C. Urquhart (Ed.), Historical Statistics of Canada (2d. ed.) (Ottawa: Statistics Canada, 1983) Series E 175-177.

During the first phase of its wartime labour policy, from the fall of 1939 to the spring of 1941, the federal government was content to repeat established precedents to deal with any murmur of unrest. The IDI Act policy of compulsory conciliation coupled with a cooling off period was extended to all industries essential for the prosecution of the war. Bennett's "iron heel of repression" was invoked (this time in the form of the Defence of Canada Regulations) to restrain "communist agitators," who were blamed for any industrial unrest which occurred. In order to induce organized labour to accept a voluntary strike ban, the government followed the First World War example of issuing a statement of the principles which should govern industrial relations.

However, at the same time that federal labour policy was marked by continuities, tendencies which emerged at the end of the 1930s were developing. The industrial union movement, seeking to consolidate its position within Canadian industrial relations, merged with the flagging nationalist union movement. This new labour organization proved to be much better suited to the industrial transformation brought about by the war, and thus it posed a serious challenge to the TLC. To maintain its membership and stature, the TLC was gradually forced to adopt many of legislative demands of its rival. Moreover, the new trade union congress was closely aligned to the CCF. Consequently, the CCF began to turn its attention to the industrial workers in Ontario.

With the rapid growth of the manufacturing sector these new tendencies began to overshadow the established continuities. In the spring of 1941 the zone of full employment was approached, and the government's major domestic preoccupation became controlling inflation. In an effort to avoid the savage inflation which characterized the aftermath of the First World War, the government introduced its first tentative measure to control wages. The thrust of the government's wage control policy was to maintain the pre-war wage structure, with its emphasis on both skill and regional differentials. However, full employment led not only to the threat of inflation, but also to a stronger labour movement. Organized

labour's dissatisfaction with the government's policy of voluntarism supplemented by compulsory conciliation and repression on the one hand, and the movement towards compulsory wage controls on the other, erupted in a series of strikes. This prompted the government to rely increasingly on coercive measures to resolve labour problems. Thus, during the second phase in the government's labour policy, from the spring of 1941 to the end of 1942, the government imposed additional layers of conciliation as a precondition for legal strikes, compulsory wage controls and coercive allocation measures, while at the same time holding to a policy of voluntarism in collective bargaining. Organized labour refused to accept the government's argument that while coercion was necessary to prevent wage inflation, it was not justified to compel employers to bargain with trade unions who represented the majority of their employees. Moreover, the government's failure to provide labour a place on important policy-making boards strengthened organized labour's demand for compulsory collective bargaining legislation - for collective bargaining was seen as the only method of attaining a voice in the running of war industries. Simultaneously, events in the political realm created increasing pressure for the government to change its labour policy.

Consequently, union recognition and collective bargaining, which were hitherto perceived as private matters to be resolved by the parties, were transformed into questions of politics and public policy. Although the union movement (backed by the CCF) endorsed compulsory collective bargaining, the federal government was fearful of alienating business interests. Eventually, however, it was forced to concede organized labour's demands. But contrary to

accepted wisdom,[5] there was nothing inevitable about the timing or content of the government's change of policy. A range of alternative policies and strategies, several of which it considered, were available. Despite this, the federal government clung tenaciously to the principle of equal treatment by the state of labour and management, refusing to encroach upon the private responsibilities of the parties.[6] Although the policy of voluntarism was exhausted by the end of 1942, it took a concatenation of personalities, events, strategies and opportunities which converged in 1943 to impel the government to introduce compulsory collective bargaining legislation.

I. Institutional and Political Context

Faced with the war emergency, the federal government followed the precedent established in the previous war and invoked the War Measures Act,[7] and thereby vested an extraordinary range of powers within the executive. In addition to sweeping away the constitutional barrier to federal regulation of the entire field of labour relations, the Act enabled the government to avoid having to go before Parliament in order to implement its policies - authorizing it instead to issue orders in council which had the force of law for the duration of the war. Typically the Cabinet delegated to subordinate agencies the powers conferred to

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5 Coates saw the government's labour policy between 1939 and 1943 as a cautious, consensus-building approach leading to compulsory collective bargaining (Daniel Coates, "Organized Labor and Politics in Canada: The Development of a National Labor Code," Ph.D. thesis, Cornell University, 1973, at 63). In a similar vein, Woods characterized Canadian labour policy during this period as the gradual evolution towards a policy of compulsory bargaining (H.D. Woods, Labour Policy in Canada (2nd. Ed.) (Toronto: Macmillan, 1973) 44-45, 338. By contrast, Millar characterized the labour policy during this period as a process of exhaustion rather than evolution (Frederick David Millar, "Shapes of Power: The Ontario Labour Relations Board, 1944-50," Ph.D. thesis, York University, 1980, 416).

6 H.A. Logan, State Intervention and Assistance in Collective Bargaining (Toronto: University of Toronto Press, 1956) vi.

7 War Measures Act, 1914, 5 Geo. V (2nd. Sess.), c.2.

it under the Act.[8] The reliance upon the War Measures Act tended to consolidate power in the executive and to promote secrecy in the development of labour policy since there was no requirement for parliamentary scrutiny of the orders nor parliamentary accountability for the administrative agencies.

From the outset of the war the federal government recognized that as production increased and idle productive capacity was utilized, intervention both to ensure the speedy reallocation of resources for wartime demands and to control inflation would be required. It immediately drew up an anti-inflation programme to be administered by the Wartime Prices and Trade Board (WPTB). The Board's mandate was to "provide safeguards under war conditions against undue enhancement of prices of food, fuel and other necessaries of life, and to ensure an adequate supply and equitable distribution of such commodities."[9] This Board, which consisted of civil servants selected primarily from the Finance Department, reported to the Minister of Labour - as its initial policy centred on the protection of workers against undue increases in the cost of living. But as the threat of inflation grew, the responsibility for the WPTB was transferred to the Minister of Finance.

Initially scant attention was paid by the government to labour relations. The government considered labour policy only to the extent that it was subsumed under general economic policy. At this time labour policy was relegated to fostering industrial peace. The low priority assigned to labour relations was

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8 In Reference as to the Validity of the Regulations in relation to Chemicals enacted by Order in Council and an Order of the Chemical Controller made pursuant thereto [1943] S.C.R. 1 (Duff, C.J.) the Supreme Court of Canada unanimously held that the Governor General in Council had the power under s.3 of the War Measures Act to delegate his powers, whether legislative or administrative to subordinate agencies (in this case the Controller of Chemicals) to make orders, rules and by-laws generally of the nature that the Controller of Chemicals was empowered to make. Furthermore, the Court held that under the War Measures Act the final responsibility for acts of the Executive Government rested with Parliament.

9 P.C. 2576 issued on September 19, 1939.

evidenced by the absence or nominal presence of Department of Labour representation on the most important wartime decision and policy-making bodies. A War Committee of the Cabinet was constituted and it became the primary decision-making apparatus of the government throughout the hostilities. This Committee was dominated by the finance minister and, later, by the Minister of Munitions and Supply. Significantly, the Minister of Labour was not a member of the Committee - merely appearing before it when labour relations were discussed. Thus, the concerns of organized labour were not deemed important enough to be given departmental representation in the development of the overall wartime economic policies.

In addition, the labour department had a marginal role in the Economic Advisory Committee (EAC), which was the most influential of the War Committee's advisory bodies.[10] The EAC was established in September 1939 to advise on all aspects of economic policy, including labour policy. Reporting directly to the Prime Minister, the committee was primarily concerned with controlling inflation - which was identified as the major cause of unrest after the First World War.[11] From the very beginning of the war, the EAC saw wage policy as an integral part of the anti-inflation policy.

The dominance of the finance-related departments which were preoccupied with economic policy is but one reason for the low priority assigned to industrial

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10 Public Archives of Canada (hereafter PAC), Records of the Department of Labour, RG 27, vol. 893, file 8-3-51, pt.1, Norman A. McLarty to W.L.M. King, Feb. 6, 1940 noting the fact that the Department of Labour had no representation on the EAC. Consequently, the membership of the EAC was enlarged by PC 767, February 23, 1940, to include the Deputy Minister of Labour. See also PAC, Dept. of Finance Records RG, 19, 4660, 187-EAC-3, The Advisory Committee on Economic Policy. This document sets out the role and membership of the Committee throughout the war.

11 Clifford Clark, Deputy Minister of Finance and Chairman of the EAC, and W.A. Mackintosh, vice-chairman of the EAC were King's principal economic advisors during World War Two and they were both authorities on the price policy during the preceding war. Peter Warrian, "'Labour is Not a Commodity:' A Study of the Rights of Labour in the Canadian Post War Economy 1944-48," Ph.D. thesis, University of Waterloo, 1987, 11.

relations. Another, more important reason for the government's failure to recognize the importance of labour relations during the early part of the war was that by emphasizing production it tended to identify with the interests of manufacturers, transportation companies and natural resource extractors.[12]

A full-scale reorganization of the economy was undertaken in order to boost the production of war materials. Harold Crabtree, the president of the CMA, urged King to appoint "an outstanding industrialist of proven executive and administrative ability to co-ordinate, develop and direct the production of Industries engaged in the manufacture of munitions and war supplies."[13] In April 1940 the Department of Munitions and Supply was established and C.D. Howe, formerly Minister of Transport, was appointed the new Minister. Howe, who was closely aligned with industry, was in charge of all of the government's production and procurement programmes - and thus he became the most influential member of King's cabinet. He appointed business executives, who were on leave from private industry, to the multitude of administrative agencies under his authority. These administrators were known as the "dollar-a-year" men, since they continued to be paid by their former employers on a voluntary basis after being seconded by the federal government for a sum of $1.00 per annum. These

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12 Jeremy Webber, "The Malaise of Compulsory Conciliation: Strike Prevention in Canada during World War II," 15 Labour/Le Travail 57-88 (1985) at 62.

13 PAC, W.L.M. King, Memoranda and Notes, MG 24, J4, vol. 241, file 2425, Harold Crabtree, President of the CMA to W.L.M. King, January 5, 1940.

dollar-a-year men were notoriously anti-labour;[14] and their antipathy to trade unions reflected the attitudes of the majority of employers in Canada.[15]

The labour relations policies and practices of the Department of Munitions and Supply were extremely important for the government's overall labour policy. The Department's status as the major purchaser during the war and its direct control of a number of war-related industries through the medium of crown corporations greatly influenced industrial practices generally. As the war progressed, organized labour identified Howe and his administrators as the progenitors of the federal government's ambivalence to trade unions. This ambivalence can be seen in the government's declared commitment to the equal representation of labour on policy bodies, freedom of association and collective bargaining, while at the same time implementing policies and indulging in practices which marginalized labour's input in policy formation and created barriers to effective trade union representation. Since the government was primarily concerned with increasing war-related production, the "specialized" concerns of organized labour were ignored, and it concentrated on production policies in the "national" interest.

Shortly after war was declared the structure of the Canadian trade union movement radically altered - with far-reaching consequences for wartime labour relations. On September 9, 1940 the ACCL and the Canadian Committee for Industrial Organization merged to form the Canadian Congress of Labour (CCL). During the previous year Charles Millard, the head of the Canadian CIO and president of the powerful Steel Workers Organizing Committee (SWOC), approached

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14 Robert Bothwell and William Kilbourn, C.D. Howe, (Toronto: McClelland and Stewart, 1979) 162.

15 H.C. Pentland, "A Study of the Changing Social, Economic, and Political System of Industrial Relations," A Draft Study prepared for the Task Force on Labour Relations (Privy Council, 1968), 27, 199 and A.E. Grauer, Labour Legislation (Ottawa: Royal Commission on Dominion-Provincial Relations, 1939) 88.

the nationalist ACCL to discuss a possible merger. Millard sought the merger to end the communist domination of the CIO, which had existed for the past three years.[16] Combination with the ACCL, which was fervently anti-communist, would dilute the communist influence within the industrial union movement. Although rampantly opposed to the CIO and international unions in general, Aaron Mosher (the influential president of the ACCL) was willing to contemplate Millard's proposal - since the CIO posed a threat to the financially poor and organizationally bankrupt national congress.[17]

Mosher and Millard, both active supporters of the CCF, defeated the communist opposition to the merger. The formation of the CCL cemented the close ties that were building between the industrial union movement and the CCF, and signalled the beginning of the end of strong communist influence within the Canadian labour movement. This lent the CIO-affiliated unions an aura of responsibility and triggered an aggressive organizing campaign. By 1942 the membership of unions affiliated with the CCL had swelled to 200,089, closely rivalling that of the TLC, which was 230,290.[18] The CCL's challenge to the TLC's supremacy eventually prompted the more conservative congress to change its traditional policy of voluntarism regarding collective bargaining and to embark on an organizing campaign of its own. Furthermore, the merger assured a more responsible attitude on the part of the industrial unions, since the CCL was dominated by the more conservative unions and Mosher, as president and official spokesman, exerted a moderating influence. Ironically, neither the majority of government officials involved in labour relations nor employers recognized the

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16 Irving Abella, "The Canadian Labour Movement, 1902-1960," Canadian Historical Association Booklet, No. 28 (1975) 24-26.

17 Irving Abella, Nationalism, Communism and Canadian Labour (Toronto: University of Toronto Press, 1973) 44.

18 Urquhart, supra note 4, Series E 178-189.

moderating influence of the merger, and they continued to believe that the CIO unions were communist-dominated. This unfounded belief was to exert a profound influence over the government's policy concerning collective bargaining.

II. Relying on Precedents - Fall 1939 to Spring 1941

Three strands constituted the first phase of the government's labour policy during the war - the invocation of the First World War precedents to promote peaceful industrial relations, the use of repression to neutralize the causes of industrial unrest and the imposition of wage controls to constrain inflationary wage demands.

From the outset of the war the federal government looked back to the previous war for policies to supplement voluntarism. An important counterpoint to the federal government's avowed commitment to voluntarism was its willingness to resort to repression to crush labour unrest. This time the policy of repression took the form of the Defence of Canada Regulations, which were issued in November 1939.[19] Not only did these Regulations threaten basic civil liberties, they were used to harass the trade union movement.[20] Regulation 16 outlawed trespassing and loitering around war industries, and it was broadly read to prevent picketing of any description around such industries. Owing to organized labour's outcry, it was subsequently amended so as to exclude peaceful picketing.[21] Regulation 21 enabled the Minister of Justice to intern without trial any person who, in his or her opinion, was likely to "act in a manner prejudicial to the public safety or the safety of the state". By January 1941,

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19 For a thorough discussion of how the Defence of Canada Regulations were used both against the Communist Party and organized labour. See, Reg Whitacker, "Official Repression of Communism During World War II," 17 Labour/Le Travail 135-66 (1986).

20 G.M. Grube, "Those Defence Regulations," 20 Cdn. Forum 304-306 (1941) 304.

21 Whitacker, supra note 19, 153, footnote 44.

1500 people were so detained.[22] Members of the Communist party, including prominent trade unionists such as Pat Sullivan (the president of the Canadian Seamen's Union), were interned under this provision - even though the federal government had informed trade union officials that the Regulations were intended only to prevent sabotage. Similarly, Regulation 29 was used to arrest any person who unlawfully interfered with war services. Furthermore, illegal organizations were banned under Regulation 39. The method of enforcing these provisions was contained in Regulation 51, the Aid to Civil Power, which authorized troops for strike and riot duties at the initiative of the provincial Attorney-Generals. By mid-1940 this authority had been delegated to prosecuting attorneys or magistrates.[23]

Although the Defence of Canada Regulations were reputedly designed to prevent sabotage in essential war industries, they were primarily directed against members of the Communist party. With the signing of the Stalin-Hitler pact the Communist Party refused to make any concessions on the labour front with regards to war production. The belief that communist agitation was the cause of industrial unrest had a long history in Canadian labour policy, dating back to the First World War, when sympathizers and members of the Communist party were interned. This fear of communist subversives resurged in the early 1930s as Bennett's iron heel of repression. In June 1940 the Communist party was declared an illegal organization, and many of its members were interned - although the Canadian leader, Tim Buck, managed to escape to the United States. Later, with the German invasion of the Soviet Union in the spring of 1941, the Communist party changed its industrial relations policy, calling for a strike ban and uninterrupted production for the duration of the war. After a delay, interned members of the Communist party were released in October 1942, on condition that

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22 Grube, supra note 20, 305.

23 Millar, supra, note 5, 16.

they signed a declaration that they would not engage in political activity. For the duration of the war, the Communist Party engaged in political activity under the guise of the Labour Progressive Party.

In applying the Defence of Canada Regulations, the various levels of government were not able to distinguish between sabotage (which was uncritically equated with communist agitation) and the activities of the industrial union movement. At the outset of the war, Millard, the leading spokesperson for industrial unionism in Canada, was arrested under Regulation 29 by order of Conant, the Attorney-General of Ontario.[24] However, he was released shortly thereafter as the federal government recognized (unlike the rampantly anti-CIO Ontario government) that a policy of undifferentiated repression would exacerbate rather than ameliorate, industrial unrest. The application of the Defence of Canada Regulations proved to be a major source of the trade union movement's dissatisfaction with the federal government throughout the war.

Simultaneously with its policy of repression, the federal government supplemented its policy of voluntarism in labour relations with tested methods. On November 9, 1939 the Cabinet issued PC 3495 extending the IDI Act to industries engaged in war work and empowering the Minister of Labour to designate industries as war industries.[25] This step, first taken during World War One, was advocated by the TLC[26] and supported by the CMA[27] - the only opposition coming

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24 PAC, J.L. Cohen Papers, MG 30, A 94, vol.14, file 277, R. v. Charles Millard, Proceedings re Charge of Contravention of Defence of Canada Regulations, Timmins, Ont., 1939-40.

25 On March 10, 1941 the Cabinet issued PC 1708 which further clarified the definition of "war industries" falling within the scope of the IDI Act.

26 PAC, RG 27, vol. 254, file 721.02:1, Memorandum submitted to W.L.M. King by the TLC, Oct. 5, 1939.

27 PAC, CMA Papers, MG 28, I 230, accession no. 83/38, Minute of the Industrial Relations Committee, Nov. 9, 1939.

from the Ontario government on the ground that the extension of compulsory conciliation would facilitate CIO organizing drives.[28] The federal government dismissed this objection, and by 1941, 85 per cent of all industry fell within the scope of the IDI Act.[29]

In order to maintain its commitment to the policy of voluntarism and evenhandedness, the federal government contemplated following the First World War precedent of issuing a declaration of admonitory principles which should govern industrial relations. The First World War precedent, PC 1743 issued July 11, 1918, called for (among other things) a voluntary ban on industrial action for the duration of the war, asserted the right of employees to form and join trade unions for the purpose of collective bargaining, and emphasized the corresponding duty of employers to recognize trade unions for collective bargaining purposes.[30]

This step, however, was much more controversial than extending the IDI Act. Within the first month of war, the TLC offered its co-operation for the government's war effort, which included a voluntary strike ban, in exchange for an order similar to PC 1743.[31] By contrast, the CMA argued that such a statement of the government's labour policy was no longer necessary in light of the changes which had occurred in labour relations since the previous war.[32] The CMA, stressing the lack of any appreciable labour unrest, the provincial and federal

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28 PAC, RG 27, vol. 28, file 33, Memorandum of the meeting between Hepel and McLarty, Jan. 24, 1940.

29 MacDowell, supra note 1, 22.

30 See Chapter 1, text accompanying notes 100-102. PC 1743 also provided for a tripartite Board of Appeal for reviewing the recommendations of conciliation boards.

31 PAC, RG 27, vol. 254, file 721.02:1, Memorandum submitted to W.L.M. King by the TLC, Oct. 5, 1939.

32 PAC, MG 28, I 230, accession no. 83/38, Minutes of the Industrial Relations Committee, Nov. 9, 1939.

legislation protecting the employees' freedom to form and join trade unions and the existence of voluntary conciliation machinery in many plants, concluded that the proposed order might prompt union organizing campaigns, thus jeopardizing the good will that had built up between employers and employees. This good will was one-sided - as the success of union organizing campaigns indicates.

The CMA's opposition to the proposed order served to delay its implementation, even in the face of support from the Department of Labour. This support was somewhat surprising, since during the previous war PC 1743 did not reduce the number of strikes in war industries. In fact, a mere three months after the Order was issued the government deemed it necessary to impose a compulsory strike ban.[33] However, labour department officials attributed the failure of PC 1743 to promote industrial peace to the timing of the Order rather than to the policy contained in it - the Order was issued only after industrial unrest was widespread. Thus, the Assistant Deputy Minister of Labour reasoned that if the government issued a similar order before the outbreak of industrial unrest, the unhappy experience of the previous war would be avoided.[34] Consequently, labour department officials drew up a draft order, modelled on PC 1743, which contained the principles and methods the government endorsed as the best means of avoiding industrial unrest for the duration of the war. This draft, which was the basis for PC 2685, departed from the 1918 Order in several respects. Most significantly, as the Department of Labour was later to acknowledge, the First World War order was "much more forthright in its

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33 See Chapter 1 text accompanying notes 101-102. PC 2525, issued October 11, 1918, prohibited strikes and lockouts and ensured that the awards and orders of conciliation boards and the Board of Appeal would be binding.

34 PAC, RG 27, vol. 254, file 721.02:1, Memorandum submitted by the Assistant Deputy Minister of Labour, March 5, 1940.

expression regarding the rights of organized labour" than the order issued during the Second World War.[35]

The mere fact of the Department of Labour's support was insufficient to overcome the Cabinet's apparent lack of enthusiasm for declaring the principles which should govern labour relations. It took the concerted demand of the diverse elements of the Canadian labour movement to prompt the government into issuing its declaration of labour relations principles. Concerned that it was in for a long battle on the labour front,[36] the government convened a conference between organized labour and members of the cabinet on June 13, 1940. Discussion at the conference centred on organized labour's quid pro quo for cooperating with the government's campaign to speed up war production.[37] The labour leaders criticized; (1) the failure of employers to cooperate with organized labour, (2) the government's delay in issuing a declaration of labour principles similar to that issued during the First World War, (3) the lack of labour representation on policy making boards, (4) the failure of the Department of Munitions and Supply to take into account the concerns of organized labour in its dealings with industry, and (5) the provision of the IDI Act requiring that a strike vote be taken before the establishment of a conciliation board.

Both King and Howe responded to labour's criticisms of the government's labour relations policy. King dismissed the objection to the strike vote requirement contained in the IDI Act and he avoided any promise of greater labour representation on policy-making boards. Defending the behaviour of his

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35 PAC, Public Records Committee, RG 35, Series 7, vol. 21, file 18, Historical Account of the legislation administered by the Industrial Relations Branch, prepared under the direction of M.M. Maclean, March 1946, 3.

36 PAC, MG 26, J4, vol. 299, file 3079, Memorandum submitted by W.J. Turnbull, Principal Secretary to the Prime Minister, to W.L.M. King, June 1, 1940.

37 RG 27, vol. 80, file 401:55, vol. 1, Memorandum with respect to a meeting held on June 13, 1940, at 11 a.m., between the members of the federal government and leaders off organized labour.

officials. Howe argued that unique problems were associated with war production. However, as a compromise he agreed to appoint an official from his Department to consult with the Department of Labour concerning labour relations. The Prime Minister firmly expressed his government's preference for voluntary mechanisms to ensure peaceful labour relations and its commitment to the incremental implementation of coercive techniques only as voluntary methods were exhausted - although he did voice a concern that employers were refusing voluntarily to bargain with unions. King concluded by making two concessions to organized labour: he promised that the cabinet would immediately issue an order based on the First World War declaration of labour principles, and he pledged that a board representing both organized labour and industry would be established to advise the government on labour matters. In fulfillment of these commitments, on June 19, 1940 the cabinet issued two orders in council: PC 2685, containing a statement of the government's labour relations policy, and PC 2686, establishing the National Labour Supply Council.

Sounding the government's recurring theme that "[t]he best interests of industry and labour are inseparable and since organized society alone makes possible industrial production to the mutual benefit of those engaged therein, the needs of the community at large, especially under war conditions, must be regarded as paramount," PC 2685 went on to enumerate ten principles "for the avoidance of labour unrest during the war."[38] Several of the principles contained in the Order dealt with wages and conditions of employment,[39] but the heart of the Order (principles 5 to 9) concerned collective relations between

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38 Preamble to PC 2685. Note the similarity of the language with that used by King in his official report of the Lethbridge strike, L.G., Dec. 1906, 647. See Chapter 1, text accompanying note 59.

39 Principles 1 through 4 dealt with the speed up in war production, wages, hours of work, and health and safety, while principle 10 provided that the suspension of any established standard on account of war production should be regarded as operating only during the war emergency.

employers and employees. The first of these two principles emphasized the use of pre-war mechanisms to promote industrial peace and to protect workers' freedom of association. Principle 5 stated that "there should be no interruption in productive or distributive operations on account of strikes or lockouts" and endorsed the extended IDI Act as the mechanism for resolving labour disputes. The right of employees to organize in trade unions free of control or interference by employers, as guaranteed by section 502A of the Criminal Code, was affirmed by principle 6.

The next two principles dealt with the process of collective bargaining. In line with several provincial collective bargaining statutes, principle 7 declared the right of employees to bargain with employers through trade unions or other representatives of their choice for the purpose of concluding a collective agreement. However, in an unprecedented move, principle 8 declared that collective agreement should be scrupulously observed and that each agreement should provide machinery for the settlement of disputes arising out of the application or interpretation of collective agreements. This principle constituted the federal government's first declaration of a policy favouring the arbitration of rights disputes,[40] a feature which was later incorporated into its compulsory collective bargaining policy. Again, following the example of several of the provinces (and sounding the theme of evenhandedness) principle 9 stated that neither coercion nor intimidation should be used by workers organizing trade unions to influence another worker to join a trade union. Significantly, and

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40 Rights disputes are distinguished from interest disputes in conventional Canadian labour jurisprudence. The former comprises disputes over the application, administration or interpretation of a collective agreement, whereas interest disputes comprise those involved in the negotiation of a collective agreement. In Canadian collective bargaining legislation after 1944 interest disputes were subject to compulsory conciliation, whereas rights disputes were dealt with by binding, compulsory arbitration. Rights disputes are also known as grievances. See A.W.R. Carrothers, Labour Arbitration in Canada (Toronto: Butterworths, 1961) 12 and H.D. Woods, "Canadian Collective Bargaining and Dispute Settlement Policy: An Appraisal," 21 Cdn. J. of Econ. and Pol. Sc., 447-65 (1955) 448.

later the focus of much criticism by organized labour, throughout the Order the government employed permissive language in order to dispell any doubt that the principles were voluntarily and not mandatory.[41]

As a second concession to organized labour, PC 2686 established the tripartite National Labour Supply Council (NLSC) to advise the Minister of Labour about problems concernedlabour supply and labour relations generally. The Council consisted of ten partisan members (with a corresponding number of alternates), an equal number to be selected by organized labour and industry, and a neutral chairperson selected by the Minister of Labour. The divisions within the Canadian trade union movement and the fact that the TLC's support for the Council was conditioned upon its obtaining the power to select the majority of labour representatives accounted for the large membership of the Council.[42] The TLC's dominance was justified on the ground that the TLC membership was larger than the combined membership of the ACCL and Catholic union federation. But with the formation of the CCL - less than three months after the Council was appointed - the number of representatives selected by the TLC was disproportionate considering the large membership of the new Congress. The government's failure to right the imbalance, contributed to the CCL's belief that the TLC received undue recognition.

Within a few months of the implementation of the concessions to organized labour the federal government began to undermine them. In the fall of 1940 the Interdepartmental Committee on Labour Coordination, consisting of senior civil servants, was established to coordinate the requirements and interests of various governmental departments in order to ensure an adequate labour supply and smooth

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41 PAC, RG 27, vol. 254, file 721.02:1, Memorandum submitted by the Assistant Deputy Minister of Labour, March 5, 1940, 1.

42 PAC, RG 27, vol. 147, file 611.1.11, vol. 1, Memorandum from the Assistant Deputy Minister of Labour to the Minister of Labour, June 26, 1940. The TLC and railway brotherhoods and the power to select three members between them, whereas the ACCL and Catholic unions had one representative each.

industrial relations.[43] This Committee, which reported to the Cabinet Committee on Labour Supply, was required to refer questions to and consult with the NLSC so as to secure the Council's considered judgement as to the measures and practices which would best obtain the consent of employers, workers and trade unions. However, it both ignored the Council's recommendations,[44] and failed to submit relevant proposals to the Council,[45] thus nullifying organized labour's input into policy development. Consequently, organized labour gradually withdrew its support for the NLSC.

Concurrently, intimations that organized labour's faith in PC 2685 was eroding began to appear. During discussions of the Order, the NLSC voiced the recurring criticism that the actions of Department of Munitions and Supply officials were frustrating the efforts of conciliation boards established under the IDI Act to peacefully resolve disputes.[46] Moreover, the NLSC found that owing to difficulties in applying s.502A of the Criminal Code, employers were able to dismiss employees on account of trade union activity with impunity, and that PC 2685 did nothing to prevent this practice. Perhaps most damagingly, the

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43 Order in Council PC 5922, October 25, 1940. See Bryce M. Stewart, "War-time Labour Problems and Policies in Canada," 7 Can. J. of Econ. and Pol. Sc., 426-446 (1941) at 428.

44 PAC, RG 27, vol. 147, file 611.1:11, vol. 2, Minutes of the NLSC meeting, Dec. 9, 1940, recommending that PC 3495 extending the IDI Act be amended to abolish the strike vote requirement and Id., Jan. 27, 1941, recommending that interpretative guidelines with respect to PC 7440 not be issued. Neither of these recommendations were followed.

45 PAC, MG 28, I 103, vol. 192, file 192-5, A.R. Mosher to Norman McLarty, Sept. 23, 1940 condemning P.C. 3749 (which empowered Howe to call in the troops to settle strikes in war industries) on the ground that the Order was not submitted to the NLSC. Similarly, PAC, RG 27, vol. 273 file NLSC Minutes of Meetings, Oct. 3, 1941, 2, indicating that the Council felt it should have been consulted regarding the desirability of implementing PC 7307.

46 PAC, RG 27, vol. 147, file 611.1; 11, vol. 2, Minutes of the meeting of the NLSC held on Nov. 29, 1940, 2.

Council noted the allegation that many of the firms under war contracts with the government refused to deal with trade unions. These murmurs of discontent did not reach full pitch until the government introduced its wage control policy at the end of the year.

Heartened both by the favourable economic conditions and the declaration of labour relations principles, trade unions embarked on an organizing campaign - directing their attack to firms holding war contracts. The newly organized trade unions applied to the Minister of Labour for the appointment of conciliation boards in order to obtain wage increases to make up for the decade of depressed wages. In a memorandum to the Labour Coordination Committee, Howard Chase, the Director of Labour Relations for the Department of Munitions and Supply, complained that the recommendations of the conciliation boards varied widely, such that wage rates were getting out of line in plants within the same industry.[47] Furthermore, he pointed out that the tendency of the boards to grant wage increases placed a strain on federal war coffers, since, as the major wartime purchaser, the government was, in effect, subsidizing industry's increased labour costs. Thus, he recommended invoking the First World War precedent of coupling a strike ban with compulsory bind wage arbitration by a National Labour Review Board.

Chase's proposal, which had the support of the Labour Coordination Committee, was presented to the NLSC at the end of November 1940.[48] The labour representatives on the Council were adamantly opposed to the compulsory features

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47 PAC, RG 27, vol. 897, file 8-9-74, pt.1, Memorandum for discussion by the Committee on Labour Coordination at the meeting of Oct. 30, 1940, by H.B. Chase.

48 PAC, RG, vol. 147, file 611.1:11, vol. 2, Minutes of the meeting of the NLSC held on Nov. 29, 1940.

of the proposal.[49] Possibly in light of the fact that organized labour's rejection of the similar First World War order resulted in an industrial relations crisis, the proposal was withdrawn and a compromise was struck.[50] Voluntary wage guidelines were substituted for compulsory binding arbitration and workers retained the freedom to strike after a conciliation board reported. The NLSC endorsed this compromise proposal, and it took effect as PC 7440 on December 20, 1940.[51]

Order in Council PC 7440 constituted the first stage in the government's wage control policy. It took the form of an instruction to IDI Act boards as to what was to be considered a fair and reasonable wage rate in the determination of an application for a wage increase. PC 7440 only applied to industries within the scope of the extended IDI Act, thus non-essential industries within provincial jurisdiction were not covered. The thrust of the Order was the maintenance of the pre-war wage structure. The formula for the authorized wage increase was based on that contained in the compulsory arbitration proposal and consisted of a defined "reasonable and fair" wage rate at which wages would be maintained. Following Chase's proposal the Order provided a cost of living bonus which was triggered once a threshold increase in the cost of living was reached.[52] Specifically, PC 7440 stated that wage rates ought not to be increased during the war beyond those prevailing between 1926 and 1929 (the last

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49 PAC, RG 27, vol. 142, file 611.1:11, vol. 2, Minutes of the meeting of the NLSC, Dec. 9, 1940, 4.

50 PAC, MG 28, I 103, accession no. 80/289, CCL-B.C. General Correspondence 1940, Norman S. Dowd, Secretary Treasurer of the CCL, to George Burt, Director, Region 7, UAW, Feb. 10, 1941.

51 PAC, RG 27, vol. 142, file 611.1:11, vol. 2, Minutes of the meeting of the NLSC, Dec. 9, 1940, 1-3.

52 PAC, RG 27, vol. 897, file 8-9-74, pt.1, Memorandum for Discussion by the Committee on Labour Coordination, Oct. 26, 1940.

pre-depression period), or any higher level established thereafter up to the date of the issuance of the Order. To ensure that workers did not suffer undue hardship resulting from increases in the cost of necessaries, a flat rate bonus - equivalent to 25 cents for each point increase in the cost of living index and triggered by a five point increase in that index - was to be paid to workers each week.[53] A flat rate bonus was selected in order to extend a greater measure of protection to the low, as opposed to the well-paid, worker. The actual figure chosen reflected the government's concern to fully compensate a worker at the official subsistence level of $25 per week for the cost of necessaries.

Exceptions to the wage standard were permitted only if it could be shown that when the 1926-29 level was established, wages were depressed and subnormal or unduly enhanced. Since the Order took the form of a guideline to conciliation boards established under the IDI Act, it contained no penalty for breach by the parties of the wage standard. However, the Order did provide that each conciliation board should ensure that all agreements arrived at as a result of its deliberations should be filed with the Department of Labour. Further, it required the Minister to review the findings of each board. If, in the Minister's opinion, a board's report deviated from the wage guidelines, he was required to direct the board to reconvene to reconsider its report. The Minister delegated his authority to review of the boards to Justice C.P. McTague, whom he appointed as his official conciliation advisor.[54]

Either no serious effort was made to apply the policy contained in PC 7440,

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53 Chase's formula for calculating the bonus differed from that provided by PC 7440, since his was calculated on an hourly basis.

54 McTague was the conciliation board chairman in a number of important wartime disputes, notably the Kirkland Lake Strike, and the first chairman of the National War Labour Board. Subsequent to the loosening of the wage freeze in 1944, McTague resigned from the NWLB to become National Chairman of the Progressive Conservative Party.

or a very muddled administration of the Order resulted from any such efforts.[55] Advice of departmental conciliation officers was frequently disregarded by the boards. Only 7 of the 48 boards reports received by the Department of Labour during the life of PC 7440 were submitted to the Conciliation Advisor. Thus, although the Order required it, there was no consistent procedure for reviewing the board's wage decisions. Furthermore, PC 7440 stipulated that the reports of conciliation boards should be scrutinized in an effort to bring their recommendations in line with PC 2685. However, no attempt was made to review the recommendations of the conciliation board with respect to principles enunciated in PC 2685. Whatever review took place concentrated on wage control.

A fundamental conflict over the interpretation and application of the exception to the wage standard began to emerge shortly after the implementation of PC 7440.[56] At issue was the question of the retention of regional wage differentials, viz, whether the exception should be liberally construed so as to raise substandard wages to a national level or narrowly confined to a local comparison, thus maintaining regional differentials. The trade unions condemned the narrow construction as freezing substandard wage rates, whereas the government argued that the local comparability standard ought to be adopted as establishing national wage rate would fuel inflation. The sharply divergent recommendations contained in the minority and majority reports in the Peck Rolling Mill strike crystallized the competing interpretations of the Order and proved a rallying point for organized labour's criticisms of the government's wage control policy.

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55 PAC, RG 35, 7, vol. 21, file 18, Historical account of the legislation administered by the Industrial Relations Branch, prepared under the direction of M.M. Maclean, 17-21.

56 Clause 3 of PC 7440, which provided the exception to the general wage ceiling, was ambiguously worded, since it contained the phrase "nationally or locally" when referring to the industry or trade in which the standard wage rate was to be established.

The Steel Workers' organizing Committee (SWOC), led by Millard and affiliated to the CCL, spearheaded the attack against the government's policy of maintaining regional wage differentials. Before the war there was virtually no industry wide bargaining - any bargaining that occurred was conducted on a plant-by-plant basis.[57] SWOC sought to capitalize on the economic climate created by the war to establish industry-wide wage rates in the primary steel industry. The first stage of its attack was directed at the Peck Rolling Mill in Montreal. SWOC represented 93 per cent of the employees at the Peck Mill, which was a wholly-owned subsidiary of the nation-wide Dominion Steel and Coal Corporation. On the application of SWOC, a conciliation board consisting of Justice Cannon of the Superior Court of Quebec as chairman, L.A. Forsythe as the employer's nominee, and J.L. Cohen (an influential representative of organized labour and legal counsel for SWOC) as the employees' nominee, was appointed in April 1941. Agreeing on the issues of union recognition and hours of work, the conciliation board failed to achieve consensus over the interpretation of PC 7440 and issued two reports. The crux of the disagreement concerned the interpretation of the exception to the wage standard.

Endorsing the employer's interpretation, Cannon and Forsythe adopted a local comparability standard for determining the scope of the exception.[58] Although they believed that the prevailing rate was inadequate, they found that the rate was comparable to wage rates for similar work in similar establishments in the district and that it was higher than that prevailing between 1926 and 1929. Thus, the wage increase was denied. Moreover, they refused to order a cost of living bonus on the grounds that the company lacked the capacity to pay it.[59]

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57 H.N. Drennon, "The Industrial Relations Policy of the Canadian Dominion Government," Ph.D. thesis, Duke University, 1951, 19.

58 L.G., April 1941, 372, 375-76.

59 Id., 376.

By contrast, Cohen adopted a permissive approach to the interpretation of PC 7440 in the minority report. Finding that the Peck mill was an integral part of the steel operations of the huge Dominion Steel and Coal Corporation, Cohen stated that a conciliation board was entitled to consider the general industry rate in determining whether a particular rate fell within the exception.[60] On Cohen's approach, the basic wage rate as defined in the Order was to be taken only as a general guide, thus, it did not interfere with a board's authority to determine a reasonable and fair rate in the circumstances. Furthermore, Cohen placed PC 7440 in the context of other legislation relating to labour relations. He argued that substandard wages were not to be maintained merely because the wages in the area were low - for, if it did, that would violate principles of social justice necessary for positive industrial relations. Advocating that a fall rate was equivalent to the rate required to provide an adequate standard of living, Cohen recommended that the Peck wage rate be increased from 30.7 cents an hour to 40 cents per hour along with the substitution of a bonus based upon the formula contained in PC 7440 for that paid by the employer.

On April 29, 1949 324 workers at the Peck mill went on strike demanding the wage increase recommended in the minority report. Both the CCL and the CCF supported the strike and called for a wage increase to raise the Montreal steel workers wage rates to the national level. Fearing that the strike would reverberate throughout the steel industry, the government entertained a series of negotiations in order to resolve the dispute without further eroding the credibility of its wage control policy. In a confidential memorandum to the Prime Minister, McLarty canvassed the options available to the government for

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60 L.G., April, 1941, 377 at 382-85.

settling the dispute.[61] He recommended increasing the minimum wage clause of the Fair Wages and Hours of Labour Act, 1935 from 30 to 35 cents an hour for men and 20 to 25 cents an hour for women. The cabinet accepted McLarty's recommendation, and on May 30, 1941 issued PC 3884 increasing the minimum wage rate. Satisfied with obtaining some concession from the government, the strikers returned to work. However, the Peck dispute became a symbol of organized labour's increasing disillusionment with the government's wage control policy, and the issues of substandard wage rates and national standards continued to haunt the wage control policy throughout the war. Moreover, the government's response to the Peck dispute initiated the pattern of ad hoc compromise to resolve disputes.

To prevent further controversy resulting from inconsistent interpretations of PC 7440, the Interdepartmental Committee on Labour Coordination proposed that interpretive guidelines for PC 7440 be issued to conciliation boards. In January 1941 the Minister of Labour asked the National Labour Supply Council to comment on the Committee's recommendations. The Council rejected the proposal for interpretive guidelines, and instead advised the Minister that conciliation boards should interpret PC 7440 "on broad lines of justice ... having in mind the particular conditions applicable in each case."[62] Ignoring the Council's advice, the Department of Labour implemented the Interdepartmental Committee's recommendation by issuing "Suggestions for the Application of Order in Council PC

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61 PAC, W.L.M. King, Primary Series Correspondence, MG 26, J 1, vol. 310, McLarty to King, May 21, 1941. The three remaining options considered by the Minister included (1) doing nothing and letting the strike run its course, (2) amending the Order so as to empower a conciliation board to rectify a wage scale which it found to be "clearly unfair", and (3) to ask the Board to reconvene to reconsider its report.

62 PAC, RG 27, vol. 273, file Minutes of the meeting of the NLSC, Jan. 27, 1941, 3, referring to the request of the Minister of Labour, contained in his letter of Jan. 23, to consider the interpretation placed on PC 7440 by the Labour Coordination Committee.

7440 by Boards of Conciliation and Investigation" on March 31, 1941.[63] These "suggestions" approved the interpretation offered in the majority report of the Peck conciliation board. On June 27, 1941, PC 4643 was issued to revise and clarify the formula for determining wage rates. In essence, the narrow interpretation offered by the board in the Peck dispute was made mandatory for all conciliation boards.

Organized labour was angry with the government's interpretation of the wage policy. The TLC was incensed with what it saw both as interference by the Minister of Labour and his officials with the free operation of the boards of conciliation and with an interpretation of the Order at odds with that presented to the NLSC. At the 1941 annual convention, the Congress passed a resolution condemning the interference of the Minister with the operation of conciliation boards and urged an interpretation of the Order consistent with its original intention.[64] In protest against the restrictive interpretation of the wage control order implemented by the amendment after the Peck Rolling Mills dispute, Mosher[65] (a NLSC member) and Millard[66] (an alternate on the NLSC) submitted their resignations from the Council to the Minister of Labour. Millard was replaced; Mosher, however, decided to retain his position on the Council. Reacting to what it saw as a betrayal of the government's declared labour relations policy, the CCL, at its annual convention of the same year, went further than the TLC and advocated a rejection of the wage control policy, endorsing a return to free

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63 PAC, J.L. Cohen Papers, MG 30, A 94, vol. 24, file 2848, "Suggestions for the Application of Order in Council P.C. 7440 by Boards of Conciliation and Investigation."

64 L.G., Oct. 1941, 1243.

65 PAC, RG 27, vol. 631, file 60, A.R. Mosher to McLarty, April 21, 1941.

66 PAC, RG 27, vol. 273, N.L.S.C., C.H. Millard to A.J. Hills, April 25, 1941.

collective bargaining to determine wage rates.[67] The CCL also demanded that a higher minimum wage be implemented in order to deal with the problem of excessively low wages.

The wage control policy contained in PC 7440 was fraught with difficulties in its very conception - let alone its administration. The compromise of using conciliation boards under the IDI Act, which had merely recommendatory powers, to impose wage constraints compromised the boards' authority. The authority of the conciliation boards derived from their autonomy; the partisan representatives and neutral chairperson were free to work out an acceptable compromise, or, failing that, arbitrate the dispute according to the justice and merits of the case. Once the government imposed constraints on the boards' autonomy to determine reasonable wage rates, their authority was undermined. What was initially designed as an independent third party became incorporated into the government's administrative machinery. In addition, the mandatory interpretation of the wage ceiling stood in sharp contrast to the permissive interpretation given to the cost of living bonuses by conciliation boards.[68] Furthermore, the discrepancy between the recommendations of the representative NLSC and the governmental Interdepartmental Committee on Labour Coordination concerning governmental wage control policy, and the subsequent implementation of the latter's recommendations, fuelled organized labour's suspicion that it really had no influence over government labour policy. Consequently, both the wage control policy and the National Labour Supply Council lost legitimacy in the eyes of the labour movement.

But most significant for discrediting the government's labour relations policy to organized labour was the fact that the mandatory interpretation given

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67 L.G., Oct. 1941, 1247.

68 J.L. Granatstein, Canada's War: The Politics of Mackenzie King's Government, 1939-45 (Toronto: Oxford U.P., 1975) 176.

to wage control policy contained in PC 7440 was seen as conflicting with the government's declared labour relations policy as expressed in PC 2685. This perception was expressed by J.L. Cohen, the author of the minority report in the Peck dispute, in an influential booklet on collective bargaining law and government policy in Canada, commissioned by the Steel Workers Organizing Committee for Canada.[69] Cohen argued that "in so far as PC 7440 fixed the wages for workers and indirectly their hours of labour or similar associated questions, it usurped the field of collective bargaining which it was the declared policy of 2685 to protect and encourage."[70] Particularly vexing to Cohen was the fact that the government took great pains to ensure that its commitment to collective bargaining as expressed in PC 2685 was declaratory, only while at the same time taking measures to ensure that the wage control policy contained in PC 7440 was mandatory.[71] Cohen exclaimed that "[w]hatever may be said of PC 7440 as an economic measure, its enactment and its term constitute a negation of the principle of collective bargaining."[72] This claim was forcefully taken up by organized labour and proved to be the crux of its dissatisfaction with the government's policy concerning collective bargaining.

III. The Introduction of Compulsion - Spring 1941 to January 1943

1. Labour participation in Policy-Making

By the spring of 1941 the labour surplus was absorbed and labour relations

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69 J.L. Cohen, Collective Bargaining in Canada (Toronto: Steelworkers' Organizing Committee, 1941).

70 Id., 37.

71 Id.

72 Id.

became highly volatile.[73] Labour unrest was on the increase, and the number of working days lost on account of strikes had almost doubled since 1939 from 224,588 to 433,914 in 1941.[74] Organized labour's dissatisfaction with the government's labour relations policy was aggravated by the government's failure to integrate the unions into the government-business complex that was running the wartime economy. During the winter of 1940-41 organized labour had become increasingly critical of the Liberal government. Although its deepening dislike was immediately attributable to the government's wage control policy, the general tendency was a reaction to the government's continuing failure to give organized labour a vital place in national planning.[75] The British example - where trade unions achieved parity with employers on important policy-making bodies[76] - was taken as a beacon for Canadian labour leaders.[77] While the government declared that labour was an equal partner in war production, organized labour complained that it was being treated more like a commodity. Millard charged that the government's claim that it was attempting to duplicate "Bevan's methods" was rhetoric rather than reality.[78] The Department of Munitions and Supply was the

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73 Taylor, supra note 2, 83.

74 Urquhart, supra note 4, Series E 190-197.

75 H.A. Logan, Trade Unions in Canada (Toronto: Macmillan, 1948), 523.

76 Keith Middlemas, Politics in Industrial Society (London: Andre Deutsch, 1979), 275-300.

77 Leo Panitch, "Corporatism in Canada," 1 Studies in Political Economy, 43-92 (1979), 63.

78 PAC, MG 28, I 103, vol. 191, pt. 2, 1941-42, C.H. Millard to A.J. Hills, March 17, 1941.

focus of organized labour's displeasure, and union leaders alleged that the Department was ignoring the government's labour relations policies.[79]

The attitudes of Canadian manufacturers were, at least, partially responsible for the government's failure to bring labour representatives into policy-making boards.[80] In a brief submitted to a closed meeting of the War Cabinet Committee, the CMA propounded its recurring foreign agitator theory of labour unrest.[81] The CMA identified the CIO unions as the chief cause of what it characterized as the dangerous labour situation. Furthermore, it equated CIO organization with communist subversion and charged that 90 per cent of the labour unrest was imported from the United States.

Turning to an evaluation of the government's wartime labour relations policy, the CMA stressed that the wage control guidelines contained in PC 7440 ought to be rigorously enforced, that the charges of wrongful dismissal appearing in the reports of conciliation boards were without substance and that the overwhelming majority of industrial workers did not desire unionization. Admitting that it did not have reliable statistics to back up the latter claim, the CMA argued that if industrial workers were desirous of unionization employer opposition could not have prevented them from organizing. Moreover, the CMA claimed that CIO unions were using the IDI Act to facilitate union recognition by pushing for government sponsored representation votes. In conclusion, the CMA

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79 PAC, RG 27, vol. 147, file 611.1:11, vol. 1, A.J. Hills to McLarty, Aug. 2, 1940. Hills was speaking on behalf of the NLSC.

80 Granatstein, supra note 68, 82. On January 27, 1940 King told his ministers that labour had to be represented on the War Supply Board, the government's major purchasing agent until the Department of Munitions and Supply began to function in the Spring of 1940. However, Howe, the Minister responsible for the Board, pointed out that the Chairman of the Board, Wallace Campbell (the President of Ford, Canada) would resign if labour was given representation.

81 PAC, Privy Council Office, Cabinet War Committee, RG 2, 7c, microfilm, reel c-4653A, Minutes of the Cabinet War Committee, May 5, 1941 and PAC, RG 27, vol. 121, file 602, Brief submitted to W.L.M. King by Harold Crabtree, President of the CMA, May 5, 1941.

recommended that the IDI Act be amended so as to limit the appointment of conciliation boards to cases involving bona fide grievances and that a ban on industrial action be imposed.

The CMA's allegations were dismissed as hyperbole by the War Cabinet Committee.[82] Howe charged the manufacturers with "flagrant disregard for labour laws", and McLarty claimed that most of the difficulties confronting his department arose from allegations of employer discrimination against employees for trade union activity. The Prime Minister declared that although his government held no brief for the CIO he would not take any action which would "fuel the flames" of labour unrest. King endorsed publicity via conciliation boards as the most appropriate method for getting at the facts and refused to change the direction of the government's labour relations policy. The government's rejection of the CMA's agitator theory of labour unrest did not, however, dissuade the Association, which continued to urge the government to introduce stringent measures against labour agitators.[83]

The Minister of Munitions of Supply proved susceptible to the CMA's further representations, and he adopted the Association's analysis of the cause of labour unrest. During a War Cabinet Committee discussion of labour policy, Howe expressed concern at the extent of the CIO's penetration into Canadian industries and identified the labour situation which resulted from the CIO activities as the most pressing war problem.[84] Echoing the CMA's complaint, he claimed that the IDI Act was capable of abuse by unscrupulous representatives of organized labour

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82 PAC, RG 2, 7C, c-4653A, Minutes of the Cabinet War Committee, May 5, 1941.

83 PAC, RG 27, vol. 121, file 602, telegram from Harold Crabtree to Mclarty, June 11, 1941.

84 PAC, RG 2, 7c, Microfilm reel c-4653A, Minutes of the Cabinet War Committee, May 30, 1941. During the same meeting McLarty stated that this department had no evidence of any large numbers of agitators coming from the United States.

and should be amended. In response, the Minister of Justice observed, with King's support, that neither the exclusion of subversive elements within the trade union movement nor amendments to the IDI Act could be undertaken without the support of the substantial and moderate elements within organized labour.[85]

The government's induction of anti-union businessmen into wartime administrative apparatus, Howe's subscription to an agitator theory of labour unrest and the initial weakness and internal divisions in the trade union reinforced King's policy of evasion and delay regarding organized labour's demand for compulsory collective bargaining.[86] Moreover, these factors also created a formidable barrier to the implementation of corporatist forms for running the war economy. Generally, the intervention of the state into the economy, the tight labour market, the need to obtain organized labour's consent to some form of wage restraint, and the strong notion of national interest which converge during a war emergency tend to create pressures for the introduction of corporatist forms.[87] In Canada, by contrast, organized business's antipathy to trade unions and the lack of a central trade union congress with strong disciplinary power over its member unions served to cancel out any general tendency towards corporatism. Increasing war production and controlling inflation were the government's primary domestic goals.[88] Accordingly, industrial productivity and wage restraint were identified with the public interest and any union threats to either of these were

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85 Id.

86 Horowitz claims King rationalized his tactics of evasion and delay into a conception of conciliatory political leadership, Gad Horowitz, Canadian Labour in Politics (Toronto: Univ. of Toronto Press, 1968) 37-8.

87 Colin Crouch, "The State, Capital and Liberal Democracy" in (Ed.) State and Economy in Contemporary Capitalism (London: Croom Helm, 1978) 13-54 at 17-18.

88 Douglas Hart, "State Economic Management in Wartime: A Study of the 'Regimentation' of Industry in the Canadian Industrial Mobilization," Ph.D. thesis, York University, 1981, 31-32.

considered by the government to be sectional opportunism at best, or the work of subversives at worst. Organized labour's requests for adequate wage rates and collective bargaining were never regarded as overarching moral claims, but rather the demands of sectional interests. The Liberal party's tradition of brokerage politics, militated against giving organized labour much say in policy development.[89] Not only were the interests of manufacturers identified with the national interest, organized employer interests were much more powerful than trade unions at the outset of the war, and thus they had a greater influence on the government's labour relations policy. Thus, King's corporatist ideological strains, which found fullest expression in Industry and Humanity,[90] did not give rise to corporatist forms during the war.

2. Avoiding compulsion - Imposing additional layers of conciliation

Independent verification of the CMA's allegation that the IDI Act was being used by labour organizations to promote trade union recognition was voiced by Justice McTague, the Minister of Labour's conciliation advisor. McTague described the new "technique in labour conciliation machinery" in the following terms:

> A certain union applies to the Minister of Labour for a board of conciliation. It represents that it is the accredited bargaining agency for the employees in a certain plant. The fact may be that it does not represent the majority at all. The next step is that the parties appear before the conciliation board, and then the question arises as to whether the union represents the men or not. The union executive then suggests that a vote be taken. The conciliator appointed by the union mildly and subtly suggests that the only fair way to ascertain the disputed fact is for the conciliation board to order a vote. The chairman and the other conciliator, who usually have not the necessary experience to recognize the technique,

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89 Panitch, supra note 77, 59-60.

90 Reginald Whitacker, "The Ideas of Mackenzie King," 2 Labour/Le Travailleur 137-69 (1977) 169.

> agree and a vote is authorized and held at the expense of the Department of Labour. (emphasis added)[91]

Responding to the demands that measures be taken to prevent the IDI Act from being used to facilitate union recognition, the government introduced two modifications to the conciliation process: the Act was amended to ensure the selection of board members who were not directly interested in the dispute under consideration, and an order in council introducing a mechanism for screening applications for the appointment of conciliation boards was issued. In theory, both of these techniques were supposed to ensure the adoption by conciliation boards of a judicial approach to the resolution of industrial disputes. But the practical effect of the modifications undermined any theoretical justifications.

On June 6, 1941 the proposed amendment to the IDI Act received second reading[92] and PC 4020, which established a body to screen applications for the appointment of conciliation boards, was issued. The first measure (Bill 96) proposed to amend the IDI Act to prevent any person from serving on a conciliation board if that person, either at the time of or six months preceding an application for a board, was or had been a solicitor, legal advisor, counsel or paid agent of either of the parties to a dispute. This amendment was described by McLarty as designed to ensure a greater measure of impartiality in order "to secure so far as possible more unanimous reports from a board."[93] However, CCF members of Parliament lobbied the government to withdraw the bill as it operated unfairly against organized labour. They argued that as industry had so many more representatives to call upon than organized labour, the amendment would not impede industry's selection of a representative, whereas labour's

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91 PAC, RG 27, vol. 638, file 201, Photocopy of The Labour Review, June 1941 and also A.H. Hollingworth, "The War-time Labour Policy of the Dominion Government," B. Com. thesis, Queen's University, 1942, 9.

92 Can., H.C. Deb., June 6, 1941, 3603.

93 Id., 3607.

selection would be severely limited.[94] Moreover, the CCF members alleged - voicing the suspicions of organized labour[95] - that a covert purpose of the amendment was to exclude specific persons, such as J.L. Cohen, from conciliation boards. Although denying that specific persons were targeted, McLarty admitted that the amendment had a wide scope and that, for example, a solicitor acting for a national union would be ineligible to sit on a board considering a dispute involving an affiliated local.[96] Thus, Cohen as solicitor for SWOC, would be disqualified from sitting on any future boards considering disputes in the steel industry. In defending the amendment the Minister of Labour cited the NLSC's support.[97] However, he failed to mention that labour representatives on the Council had strongly opposed it.[98] Despite the CCF's criticisms and organized labour's misgivings, the bill received Royal Assent on June 14, 1941.[99]

Experience under the amended IDI Act demonstrated that the government's policy backfired.[100] The Department of Labour later acknowledged that its belief that the exclusion of directly interested parties from conciliation boards would lead to the consideration of disputes on their merits alone was ill-founded.

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94 Id.

95 PAC, MG 28, I 103, vol. 4, Federal Government Correspondence, 1939-41, Norman S. Dowd, Secretary Treasurer of the CCL, to Pat Conroy, Vice-President of the CCL, June 11, 1941.

96 Can., H.C. Deb., supra note 94.

97 Id., 3618.

98 PAC, MG 28, I 103, vol. 4, Fed. Govt. Corresp. 1939-41, Dowd to Conroy, June 11, 1941.

99 4-5 Geo. VI, c.20.

100 PAC, RG 35, 7, vol. 21, file 18, Historical Account of the Legislation Administered by the Industrial Relations Branch, 24.

More importantly, it was to discover that the amendment tended to undermine the conciliation process itself. By endeavouring to prevent the repeated nomination of legal representatives (who, by acting on several boards at the same time, delayed the operation of the conciliation process), the amendment also had the effect of keeping persons who were skilled conciliators under the IDI Act from achieving some degree of uniformity in the interpretation of regulations such as PC 7440.

The second measure, PC 4020, established a permanent tripartite commission (called the Industrial Disputes Inquiry Commission (IDIC)) which was required to conduct preliminary investigations into disputes falling within the scope of the IDI Act at the Minister of Labour's discretion and without the consent of either of the parties. The IDIC was established to provide machinery for the prompt investigation and conciliation of existing or impending disputes and to advise the Minister whether the circumstances warranted the appointment of an IDI Act. The Minister was authorized to appoint all of the members of the IDIC without the input of the parties.[101] Members were given the powers of commissioners under the Inquiries Act, including the power of summoning and enforcing the attendance of witnesses, compelling evidence on oath or the production of documents. On the advice of the NLSC, the Commission was explicitly prohibited from offering an opinion as to the merits or substantial justice of a dispute, since that might prejudice the report of the conciliation board.[102] The Commission had the power to recommend the establishment of a conciliation board without the necessity of a strike vote having been taken. The IDIC felt that this was essential in view of the disturbing effect of the publicity given to strike votes, which usually indicated mere compliance with the law, rather than the inevitability of a

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101 L.G., Oct. 1941, 1211.

102 PAC, RG 27, vol. 273, Minutes of the National Labour Supply Council, June 2, 1941, 3.

strike.[103] Although the IDIC had no power to defer a strike it could, by prolonging its investigation, postpone the time when it would be lawful for employees to strike - since strikes remained unlawful until after an IDI Act board reported.[104] Whether the freedom to strike could be delayed indefinitely if the Commission recommended that no board be appointed remained an open question. However, the Order did provide that the IDI Act strike ban remained in force until after the Commission completed its work, even if the IDIC was appointed after a conciliation board had reported.

The Order was later amended to allow the Minister of Labour to appoint, on an ad hoc basis, a single commissioner to investigate a dispute.[105] A policy developed of appointing senior industrial relations officers from both federal and provincial departments of labour as commissioners to investigate applications for conciliation boards.[106] This supplemented the practice of appointing a conciliator under the Conciliation and Labour Act before appointing a conciliation board.[107] If a single Commissioner failed to arrange a settlement, the dispute was usually referred to a three member Commission, which, if necessary, recommended conciliation under the IDI Act.[108] Commissioners under PC

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103 PAC, RG 27, vol. 638, file 201, Memorandum of a meeting by the IDIC, July 3, 1941.

104 PAC, RG 27, vol. 638, file 201, A.J. Hills, Chairman of the NLSC, to Oliver B. North, Assistant Commercial Attache, American Legation, July 19, 1941.

105 PC 4844, issued July 2, 1941, amending PC 4020.

106 PAC, RG 35, 7, vol. 21, file 18, Historical Account of the Legislation Administered by Industrial Relations Branch, 59.

107 Webber, supra note 12, 64.

108 William Steward Martin, "A Study of Legislation Designed to Foster Industrial Peace in the Common Law Jurisdiction of Canada," Ph.D. thesis, University of Toronto, 1954, 336.

4020 were frequently used,[109] providing a third layer of conciliation. The IDIC supplanted the IDI Act boards as the primary agency of conciliation, and one commentator speculated that this was because there was no requirement on the Commission to give reasons for its actions or for the Minister to publish the Commission's recommendations.[110]

But, instead of promoting the speedy resolution of disputes, the IDIC aggravated the deteriorating industrial relations climate by undermining organized labour's confidence in the government's labour relations policy in two ways. First, the imposition of another layer of conciliation before workers were free to resort to industrial action served merely to try workers' already diminishing patience. Second, and more damagingly, under the chairmanship of Humphrey Mitchell the IDIC made recommendations for the settlement of disputes which were totally unacceptable to organized labour. As we shall see, Mitchell's intervention in the Kirkland Lake dispute completely undermined the government's labour relations policy and served to focus organized labour's discontent. Thus, at best, the IDIC was merely a palliative measure that did not go to what organized labour perceived as the heart of the industrial relations problem - employers' failure to recognize and bargain collectively with trade unions - and, at worst, the IDIC imposed further delays on unions' freedom of action without giving protection from employer opposition.

The federal government's general policy of imposing additional layers of conciliation and its practice of sending in successive conciliators undermined the conciliation process. Instead of facilitating amicable relations between trade unions and employers, the IDIC both delayed resort to industrial action and prevented the IDI Act from being used to further union recognition via the mechanism of representation votes by screening applications for conciliation

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109 Id.

110 Id., 352-54.

boards. Conciliation continued to be an ineffective method of achieving industrial peace where the trade unions and employers refused to compromise over the issue of union recognition, and many strikes were held in contravention of the IDI Act cooling off period. Moreover, the fact that tripartite conciliation boards differed in their recommendations from government-appointed IDICs also undermined the policy of compulsory conciliation. Organized labour believed that the hidden function of conciliation was to exhaust the militancy of workers and the resources of unions.[111]

3. Labour dissatisfaction

Contemporaneous with his introduction of the modifications to the conciliation process, McLarty took the opportunity to address the CCF's repeated demands for clarification of the government's stance to the principles contained in PC 2685 which endorsed collective bargaining. Responding to the suggestion that the government should make the provisions of PC 2685 coercive and compel employers to bargain collectively with trade unions, McLarty emphasized that the provisions of the Order

> are not mandatory; they are simply a recognition that in the opinion of the government this would be the very best way to produce satisfactory labour relations in wartime.[112]

In support of the government's policy towards collective bargaining McLarty offered the following rationale:

> If you enter into the field of compulsion on the one side, you have to enter it on the other, and then you stir up inevitable difficulty. One trouble leads to another. If you have compulsory recognition, then you must have compulsory arbitration, and I believe that labour organizations of this country are not in favour of that.[113]

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111 Millar, supra note 5, 339.

112 Can., H.C. Deb., June 6, 1941, 3628.

113 Id.

Thus, the government's commitment to evenhandedness consisted of the "equal handed" application of coercion in labour relations, regardless of the underlying economic realities. Moreover, the government failed to recognize that with the introduction of compulsory wage arbitration, at the end of the year, this rationale strengthened the labour movement's argument for compulsory collective bargaining legislation. Reversing the equation, trade unions would argue that compulsory arbitration in the form of wage controls should be matched by compulsory trade union recognition and collective bargaining.

Even prior to the introduction of compulsory wage controls, organized labour's dissatisfaction with the government's labour relations policy was increasing. The government's policy regarding collective bargaining within its own plants, its failure to provide effective protection for workers' freedom to organize and its adherence to the agitator theory of labour unrest, resulted in numerous grievances on the part of organized labour which finally erupted over the Kirkland Lake strike and the imposition of wage controls.

i) Collective bargaining in government-controlled undertakings

The issue of trade union recognition and collective bargaining within government controlled enterprises was of the utmost importance not only because the government controlled a great many industries which were involved in war production,[114] but also because the application by the government of such a policy to its own undertakings would have a significant demonstration effect on private industry. The National Steel Car dispute indicated that the government was not prepared to implement the principles contained in PC 2865 in its own undertakings.

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114 The Minister of Munitions and Supply had full discretionary power over the 28 wholly-owned government corporations established during the war. See Paul Phillips and Stephen Watson, "From Mobilization to Continentalism: The Canadian Economy in the Post-Depression Period," in Michael S. Cross and Gregory S. Kealey (Eds.), Modern Canada: 1930-1980s (Toronto: McClelland and Stewart, 1984) 20-45 at 25.

On February 3, 1941 members of SWOC employed by the National Steel Car plant in Hamilton, Ontario applied for a conciliation board to investigate a dispute involving the company's failure to recognize SWOC as the bargaining representatives of its employees and alleged discrimination against union members. After officials of the Department of Labour tried unsuccessfully to resolve the dispute, a conciliation board was appointed. On April 10 the conciliation board issued an interim report, ordering that a plant-wide government-supervised vote be conducted.[115] The report further recommended that the company reinstate the dismissed workers and, if the union won the vote, that the company - in accordance with PC 2685 - recognize and bargain with the union. The company refused to reinstate the workers and a strike ensued. Almost immediately the government appointed E.J. Brunning controller of the plant to ensure that production was not disrupted. The employees returned to work as the controller promptly reinstated the dismissed employees. The Department of Labour conducted a representation vote. Although the employees indicated their desire to be represented by SWOC by a three to one majority, the controller refused to recognize the union. Instead he agreed only to meet with an employees' committee to consider the outstanding issues in dispute. In a letter to the Minister of Labour, Cohen (the employees' representative on the conciliation board) charged that in refusing to recognize the union the controller was acting on the instruction of the government. If the government failed to reverse its policy, he warned that it would "create a difficult situation more aggravated even than the previous condition since a dispute on such an issue would appear to be one, not between the union and the company management itself, but between the union

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115 L.G., May 1941, 527-30 for a copy of the interim report. Notably, this technique was what the amendment to the IDI Act and the IDIC (which were implemented after the National Steel Car dispute) were supposed to prevent. Cohen, the employee's nominee, recommended the vote. The CMA was opposed to the representation vote, PAC, MG 28, I 230, accession no. 83/138, Minutes of the Industrial Relations Committee of the CMA, April 17, 1941.

and active government policy in respect to union recognition and collective bargaining."[116]

Cohen's suspicion was correct; the Controller's refusal to recognize the union and his insistence upon an employee committee was based on instructions originating in the Cabinet War Committee.[117] Although the Prime Minister expressed sympathy for organized labour's view that PC 2685 entailed that government-controlled companies enter into collective bargaining arrangements with trade unions, he was met by the combined opposition of three of his most powerful ministers. Providing a legal ground for the controller's refusal to recognize a trade union, the Minister of Justice, Ernest Lapoint, opined that all emanations of the Crown, which included undertakings under the charge of a government appointed controller and Crown corporations, were legally incapable of entering into collective agreements with trade unions.[118] Howe was bitterly opposed to the adoption of any policy which would surrender industrial plants to agitators who interfered with war production, which included - in his eyes - the local union organizers at the Hamilton plant. Both Ministers feared that if the union was to obtain a collective agreement in the National Steel Car plant it would trigger a campaign to organize the workers in all of the government-controlled enterprises. It was left to J.L. Isley (the Minister of Finance) to fashion a compromise, which could be justified within the terms of PC 2685, between the employees' right to representation and the objection that the recognition of independent unions in government-controlled undertakings could lead to their control by foreign agitators. Accordingly, he recommended that

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116 PAC, MG 30, A 94, vol. 24, file 2848, J.L. Cohen to McLarty, May 18, 1941, 9.

117 PAC, RG 2, 7c, vol. 6, Microfilm reel c-4654, Cabinet War Committee Minutes, July 31, 1941.

118 Id., July 29, 1941.

recognition in government enterprises be limited to employee committees that were freely chosen by the affected workers.[119]

In the final report, both the chairman and employer's representative on the conciliation board accepted the Controller's position that as a government appointee he had no authority to recognize and bargain with a trade union. In fact, the majority concluded that conciliation boards had no authority with respect to recognition disputes in government-controlled undertakings.[120] By contrast, Cohen argued that as a majority of the employees had indicated their support for the trade union the Controller should bargain with it. Moreover, he alleged that the majority had abdicated its responsibility to promote the principles contained in PC 2685 in favour of government opinion.[121] The union called a second strike, this time directed at the government's labour relations policy. Thus, Cohen's prediction proved correct: the appointment of the controller and his refusal to recognize the union, instead of defusing the dispute, shifted the focus of organized labour's displeasure from the particular employer to the government's labour policy in general. The National Steel Car dispute provided the occasion for the triumph of the finance and munition and supply-dominated cabinet's concern with uninterrupted production at the expense of King's scruples regarding the integrity of the government's commitment to PC 2685. In addition, the attempted resolution of the dispute initiated the government's policy of encouraging employee committees as a substitute for the

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119 Id., July 31, 1941.

120 L.G., Aug. 1941, 878.

121 Id., 880.

recognition of trade unions[122] - a policy which resulted in a nation-wide controversy during the Kirkland Lake strike.

ii) Freedom to organize - a tentative measure.

The demand for effective protection of the freedom to organize moved to the centre of organized labour's legislative proposals, for many employers were continuing to refuse to recognize trade unions, blacklist trade union leaders and dismiss union organizers, despite PC 2685. Eventually, organized labour pressured the government into making its first, albeit minor, concession away from the policy of voluntarism. However, in making its concession the government was careful to avoid introducing any measure which gave the appearance of leading to full-scale compulsory collective bargaining.

In March 1941 Norman McLarty, the Minister of Labour, responded to organized labour's criticisms by requesting that the NLSC devise a proposal to deal with complaints of discriminatory employer practices, as neither the IDI Act nor s.502A of the Criminal Code proved expeditious or effective in resolving the problem.[123] In an attempt to set the terms of the discussion within the Council, the CCL commissioned Cohen to draft a measure prohibiting employer discriminatory practices, which was subsequently submitted to the NLSC for consideration.[124]

Cohen's measure, which was endorsed by the committee of the NLSC formed to consider proposals to deal with discrimination, was modelled on the Wagner Act in

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122 PAC, MG 28, I 230, accession no. 83/138, Minutes of the Industrial Relations Committee, September 10, 1941. The Chairman of the Committee, Coulter, reported a conversation with Dr. Bryce Stewart, the Deputy Minister of Labour, in which Dr. Stewart expressed the opinion that employers would be well-advised, if they had not already done so, to organize shop committees or works councils representing their employees, and enter into collective agreements with them.

123 PAC, MG 30, A 94, vol. 24, file 2856, Report of the Committee on Measures for Dealing with Alleged Discrimination for Union Activity.

124 PAC, MG 28, I 103, vol. 4, Federal Government Correspondence, 1939-41, Pat Conroy to A.R. Mosher, April 19, 1941.

four significant respects.[125] It provided for (1) a permanent agency to administer the proposed order, (2) unfair labour practices consisting of an employer's interference with the right of employees to bargain through a trade union or representative of their choice and employer discrimination against employees for trade union activity, (3) remedial, in addition to penal, powers enabling the board to compensate employees, and (4) an enforcement mechanism which avoided the procedures of the ordinary courts.[126] The proposal departed from the Wagner Act in that it did not provide for a mechanism to determine either the bargaining representative or appropriate bargaining unit, or compel collective bargaining once a bargaining representative had been duly selected. The CCL endorsed Cohen's measure as a step in the Wagner direction, for it would establish permanent machinery which could be expanded to include other features necessary for compulsory collective bargaining.[127] The NLSC Committee drew up a draft order based on Cohen's proposal and submitted it to the full Council.

The CMA was opposed to the draft order.[128] It stated that the proposal violated the principle of evenhandedness. The Association argued that the prohibition against employer discrimination for trade union activity should be

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125 PAC, MG 30, A 94, vol. 24, file 2856, Report of the Committee on Measures for Dealing with Alleged Discrimination for Union Activity.

126 The proposed Order in Council would establish a tripartite Labour Policy Enforcement Board authorized, either upon its own initiation or upon complaint or representation, to enquire into and investigate any alleged violation of PC 2685 or any allegation of discrimination for trade union membership or activity. Any person found guilty of violating the proposed order would have been subject to a fine of between $100 and $1,000. Moreover, the Board would have been empowered to order reinstatement or compensation for any employee injured by a violation. The Board's orders and awards were to be enforced as an order of the Court and registered with a District or County Court.

127 PAC, MG 28, I 103, vol. 4, Fed. Govt. Corresp., 1939-41, Pat Conroy to A.R. Mosher, April 19, 1941.

128 PAC, RG 27, vol. 3199, file 165, J.P. Stirrett, General Manager of the CMA, to the Chairman and Members of the NLSC, April 19, 1941.

matched by a prohibition against the use of coercion or intimidation to influence a person to join a trade union, similar to that contained in principle 9 of PC 2685. The CMA also complained that the proposed order went further than PC 2685 in that instead of merely safeguarding the freedom of employees to choose representatives such as trade unions to bargain on their behalf, it prevented the employer from doing anything to persuade his employees to choose one method of representation over another. Moreover, the CMA criticized the institution which the Order proposed to administer the provisions; it argued that the use of an administrative agency in these circumstances would conflate the roles of prosecutor and judge and leave the mechanism susceptible to political influence. It suggested that the traditional courts were the appropriate forum to deal with cases of alleged discrimination. Finally, the Association declared that such a marked departure in Canadian labour relations policy - viz., the establishment of a tribunal to investigate and prosecute cases of discrimination and dismissal - should not take the form of an order-in-council, but, rather, should be subjected to full parliamentary scrutiny.

Bowing to the CMA's criticisms, the NLSC eventually endorsed a compromise proposal, which reaffirmed the government's policy of evenhandedness and voluntarism and merely tinkered with existing mechanisms. On July 2, 1941 the cabinet issued PC 4844 which amended the powers of the IDIC. At the direction of the Minister of Labour the Commission was authorized to:

> examine into any allegation that any person has been discharged or discriminated against for the reason that he is a member of or is working on behalf of a trade union or that any person has been improperly coerced or has been intimidated to induce him to join a trade union and failing settlement of the matter at issue, to forthwith report its findings and recommendations to the Minister of Labour.[129]

The requirement for the existence or imminent apprehension of an industrial dispute and the strike vote were dispensed with as conditions necessary for the IDIC to investigate an allegation of discrimination. However, such an

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129 PC 4844 amending section 5 of PC 4020.

investigation could only be triggered by the Minister of Labour, and not at the initiative of an aggrieved party. The Commission was given no authority to enforce its recommendations, although the compulsory cooling off provision contained in the IDI Act was imposed pending the conclusion of the Commission's investigation. Only after the sustained lobbying of organized labour was the Minister empowered to issue binding orders implementing IDIC recommendations.[130] This amendment constituted the government's first, albeit minor, departure from voluntarism in its wartime labour policy.

The IDIC was frequently used to investigate cases of discrimination, although, notably, a Commission was never appointed to investigate a complaint of intimidation to induce a person to join a trade union.[131] The labour department gradually developed a practice of initiating a preliminary inquiry by an industrial relations officer upon the receipt of a complaint to ascertain whether the facts of the case justified formal investigation by the IDIC. In a large number of cases the officer was able to effect a voluntary settlement rendering the appointment of an IDIC unnecessary.[132] In cases where a dispute was referred to a Commission, it attempted to conciliate the dispute and settlement was often achieved on the basis of voluntary reinstatement. When this failed, the Commission did not hesitate to recommend reinstatement, which was then ordered by the Minister.[133] A practice of appointing lawyers and judges to Commission's

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130 PC 7068, issued September 10, 1941, empowered the Minister of Labour to issue final and binding orders where he deemed it necessary to give effect to the IDIC recommendations.

131 Logan, supra note 6, 12.

132 L.G., Feb. 1944, 188.

133 PAC, RG 27, vol. 618, file 2, Statistical table of the results of investigations by the IDIC into allegations of dismissal for union membership or activity, by M.M. Maclean, Director of Industrial Relations. In the 64 investigations conducted by the IDIC pursuant to s.5 of PC 4020 between July 2, 1941 to Jan. 1, 1944 the Minister ordered 29 reinstatements.

investigating complaints of discrimination developed in order to give the Commission the appearance of impartiality.[134] But the provisions for ministerial appointment and initiation tended to undermine the autonomy and legitimacy of the Commission and it was perceived as susceptible to political manipulation. Moreover, organized labour was unhappy with the compromise.[135] The CCL saw the technique of appointing occasional Commissioners as a poor substitute for the establishment of a permanent board.[136]

iii) The agitator theory of labour unrest.

On July 24, 1941, 400 potmen staged a sitdown strike in the Aluminum Company Plant in Arvida, Quebec. The strike filtered throughout the workforce, and the aluminum within the pots froze, halting production at the most important aluminum plant for the allied war effort.The government's reaction to the strike illustrated both the extent to which Howe had succumbed to a foreign agitator theory of labour unrest and the extent of his influence with the government - even over matters concerning which the Prime Minister held a constrasting position.[137]

Frustrated both by the fact that provincial approval was required for federal government to send in troops to end the strike and by the refusal of his cabinet colleagues to accept his view that enemy aliens were behind the strike,

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134 PAC, RG 25, 7, vol. 21, file 18, Historical Account of the Legislation Administered by the Industrial Relations Branch, 59.

135 PAC, MG 28, I 103, vol. 4, file Fed. Govt. Corresp. 1939-41, Conroy to Mosher, April 19, 1941.

136 Id.

137 J.W. Pickersgill, The Mackenzie King Record, Vol. I (Toronto: University of Toronto Press, 1960) 228 and Bothwell and Kilbourn, supra note 14, 162-64.

Howe submitted his resignation to King.[138] At a meeting of the cabinet Howe agreed to retain his post only on the condition that he be granted the powers to deal with such emergency situations, including the authority to deal with strikes.[139] Although King was of the view that sabotage was not involved, he conceded to Howe's demands on account of his belief that the Minister was essential for the organization of war production. Thus, on July 29 the cabinet issued PC 5830 which authorized the Minister of National Defense, on Howe's request, to call out the troops to deal with labour disputes without reference to municipal or provincial authorities.

The CCL denounced the order not only on the ground that the NLSC had not been consulted, but also because it gave unrestricted power to a single minister to use force without first employing the established conciliation machinery.[140] Moreover, the Royal Commission which was appointed to investigate the Arvida dispute, concluded that although the strike was illegal (the employees had failed to apply for an IDI Act board), it had not been caused by subversives, but rather by a gradual deterioration in labour management relations.[141] Significantly, even though Howe's agitator theory had been discredited, he retained the power to unilaterally invoke force to ensure production.

While it was true that the CIO and CCL affiliated unions were responsible for a much greater proportion of strikes during the early part of the war than their AFL-TLC counterparts, it was not true that the reason for this was a profound difference in political philosophy or loyalty to the war efforts.

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138 PAC, MG 26, J 1, vol. 306, H.D. Howe to W.L.M. King, July 26, 1941.

139 Bothwell and Kilbourn, supra note 14, 164.

140 PAC, MG 28, I 103, vol. 4, Fed. Govt. Corresp., 1939-41, Norman S. Dowd to King, Aug. 14, 1941.

141 Royal Commission to Inquire into the Events which occurred at Arvida, Quebec, Report (Ottawa: King's Printer, Oct. 1941), 9.

Rather the discrepancy in the strike-proneness of the industrial and craft unions was attributable to the differences in their organizational history and constituencies. At least some officials in the Department of Labour acknowledged that the CIO-CCL unions were attempting to organize, unlike the AFL-TLC affiliates, the mass production industries in which employer resistence to collective bargaining was the best organized and least compromising. Moreover, the mass production industries happened to be essential war industries. A memorandum circulated within the Department of Labour implored the government to recognize that war industries were vulnerable to industrial disruption "because of their past or present obsolete, anti-union, industrial relations policies, and that not all attacks on a war industry's labour policy are ipso facto subversive in origin, intent or purpose."[142] Unfortunately, however, this clear-headed analysis of the cause of wartime industrial unrest was ignored, and the more provocative agitator theory of unrest was adhered to.

Howe's dogma that agitators, particularly those of the CIO variety, were the cause of labour unrest tended to infect other areas of the government's labour policy. Prompted by the legal strike at McKinnon Industries, which was engaged in war work, the government, on the advice of the Interdepartmental Committee on Labour Coordination, imposed the additional requirement of a strike vote before employers were entitled to strike.[143] This action was taken without consulting the NLSC, although the Ministers of Labour convened an informal meeting with Tom Moore -where he secured the TLC's leader's commitment to do what he could to obtain Congress support for the measure.[144] Echoing the Department of Munitions

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142 PAC, RG 27, vol. 636, file 157, Memorandum re Wartime Wages Policy from W.J. Couper to the Deputy Minister of Labour, June 16, 1941, 6.

143 PAC, RG 27, vol. 254, file 721.02:1, Memorandum for McLarty, November 12, 1941.

144 Coates, supra note 5, 86.

and Supply's view that strikes were the work of agitators, rather than the outcome of general and legitimate employee dissatisfaction, McLarty stated that the compulsory strike vote was necessary "to prevent the calling of strikes by snap decisions of minority groups."[145] Paradoxically, the Deputy Minister of Labour had earlier identified the constant interference of officials with the Department of Munitions and Supply officials, which was directed at breaking the power of the CIO, as the cause of the unrest at McKinnon Industries.[146]

Order in Council PC 7307, which was issued on September 17, 1941, made it illegal to strike until the following conditions were fulfilled: (1) a conciliation board had investigated the dispute and its findings had been delivered to both parties; (2) the employees had notified the Minister of Labour that they were contemplating a strike; (3) a vote had been taken under the supervision of the Department of Labour, subject to such provisions and restrictions as the Minister imposed; and (4) a majority of the employees affected had voted in favour of a strike. In addition, the order provided that any employee who went on strike in contravention of the regulations or any person who incited, encouraged or aided an employee to strike or continue to strike would be liable on summary conviction to a fine not exceeding $500, imprisonment not exceeding twelve months, or both.

Two features of the Order raised the ire of organized labour. First, the Minister had the sole authority to decide who was entitled to vote. Paragraph 3 provided that the Minister could enfranchise "all employees who in his opinion are affected by the dispute or whose employment might be affected by the proposed

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145 L.G., Oct. 1941, 1209.

146 PAC, MG 26, J 4, vol. 361, file 3854, Memorandum from W.J. Turnbull, Principal Secretary, to King, Sept. 27, 1941.

strike."[147] This meant that the Minister could enfranchise employees who the union had made no attempt to organize. It also gave the Minister the de facto power to determine the appropriate bargaining unit. Second, paragraph 4 provided that "unless a majority of the ballots of those entitled to vote are cast in favour of a strike, it shall be unlawful for any employee to go on strike." (emphasis added). Trade unions objected to this feature of the order as imposing unduly harsh requirements upon them. In Parliament, M.J. Coldwell (the leader of the CCF) applied a similar test to the Liberal government:

> In the last election, 60% of those entitled to vote, voted. The Liberal government received 54% of the votes cast. That is to say, they received 34% of the votes of those entitled to vote. Therefore, under their own order in council, if they applied it to themselves, they could not govern this country.[148]

As a method of ensuring majority support for strikes PC 7307 was particularly onerous for trade unions, and the history of its operation suggests that such harsh measures were not called for - since the vast majority of votes taken under the Order favoured strike action.[149] Moreover, the provision was redundant with the requirement that a strike vote be conducted before an IDI Act Board was established. By insisting on a strike vote the government tended both to induce a strike-minded attitude and to sanctify strike action once the vote

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147 PC 8821, issued on November 13, 1941, deleted the latter class of indirectly affected employees.

148 MacDowell, supra note 1, 112 (footnote omitted).

149 During the two and a half years that the Order was in effect, twenty votes were held by the Department of Labour in response to 36 applications. In 15 cases the majority of employees voted to strike. In the 5 cases where a majority of the votes cast were against striking only a relatively small number of employees were involved. On the basis of data furnished by the Department of Labour, Anton found that these 5 cases affected some 429 employees, whereas 12,835 workers were involved in the 15 cases where the majority of workers voted for a strike. Of the total number of employees participating in the 20 supervised strike elections, 10,148 or 77 per cent voted in favour of strike action. Twelve strikes occurred in the 20 cases where a strike vote was authorized. Frank Robert Anton, The Role of Government in the Settlement of Industrial Disputes in Canada (Don Mills, Ont.: CCH Can. Ltd., 1962) 179.

was taken. But even though PC 7307 was based on a faulty premise and dubious psychology, it provided the Department of Labour with one last attempt to settle the dispute.[150] Thus, in practice PC 7307 delayed industrial action in order to provide yet another level of conciliation. The first application of PC 7307, in the Kirkland Lake dispute, illustrated the extent to which it could be manipulated to the detriment of the union. Moreover, from the perspective of the government's overall labour relations policy PC 7307 was significant in two respects. First, by directing sanctions only to employees, it derogated from the government's policy of evenhandedness in the application of compulsion. Organized labour could invoke it as a precedent to support its call for sanctions to be unilaterally imposed against employers who failed to recognize trade unions. Second, PC 7307 stood as just another example "of the piece-meal treatment accorded labour by the government."[151]

The continued acceptance of the agitator theory of labour unrest, despite evidence to the contrary, created an atmosphere highly unfavourable to organized labour at a time when it was necessary for the government to obtain organized labour's support for its labour relations policy. King's capitulation to Howe and the introduction of an additional strike vote requirement served to unite the various labour factions in their opposition to the Liberal government. The unwillingness of the government to embrace organized labour as a partner in wartime production created the climate for the crisis in labour policy which erupted the following year.

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150 PAC, RG 35, 7, vol 21, file 18, Historical Account, 31. Either after, but usually before, each vote was taken, one last effort was made to effect a settlement by the arrangement of a conference in Ottawa.

151 PAC, MG 28, I 103, vol. 4, Fed. Govt. Corresp., 1939-41, Pat Conroy to A.R. Mosher, Sept. 19, 1941, 3.

IV. The Crisis for Voluntarism - the Kirkland Lake Strike and Compulsory Wage Controls

The operation of the various orders and legislative provisions which constituted the federal government's wartime labour policy were subjected to public scrutiny in the Kirkland Lake dispute, which began in the late spring of 1941 and continued well into 1942. The numerous agencies which intervened to conciliate the dispute issued contradictory recommendations, and the repeated attempts at conciliation merely postponed the inevitable strike - enervating the trade union rather than laying the ground for a settlement. Moreover, as was the case in the National Steel Car dispute, the government opted for employee committees - rather than compelling collective bargaining with trade unions - as the compromise for dealing with recalcitrant employers. As Laurel MacDowell aptly put it in her commendable study of the strike, the bitter defeat of the miners demonstrated that labour relations "problems could not be solved by the traditional methods of consultation, conciliation and procrastination."[152] The strike, although lost because of the failure of the federal government to intervene, served to unify the Canadian labour movement and crystallized organized labour's discontent with the existing legislative framework for industrial relations.[153] It initiated the series of events which culminated in the government's rejection of voluntarism for compulsion in collective bargaining.

After an unsuccessful attempt to organize the gold mines in Northern Ontario on an individual basis, Local 240 of the International Union of Mine, Mill and Smelter workers (which was affiliated to the CIO and CCL) concentrated on organizing all of the goldminers in the Kirkland Lake district in order to achieve a district-wide collective agreement. The tactic of district-wide

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152 MacDowell, supra note 1, 229.

153 Id.

bargaining was adopted by the union in order to present a unified front to the mine operators so as to prevent them from playing the workers of one mine off the workers at another and from meeting their production commitments by relying on mines which continued to operate. Furthermore, the union believed that if gold production - which at the time was the government's primary method of financing war supplies - was brought to a halt, then the government would be forced to intervene in a manner favourable to the union.

Heeding the rumours of the possibility of a district-wide strike in the gold mines of Kirkland Lake, the government dispatched one of its senior conciliation officers to attempt to settle the dispute. The mine operators refused to negotiate with the union because of the union's CIO affiliation. The conciliation officer recommended that an IDI Act board be established, and the employees subsequently applied for the appointment of a board. But instead of appointing a conciliation board, the Minister of Labour referred the dispute to the three member IDIC, which was chaired by Humphrey Mitchell. The union protested the government's action arguing that an investigation had already been conducted by the conciliation officer, who had recommended the establishment of a conciliation board, and therefore further investigation was unnecessary to determine if a board was warranted. The union complained that an IDIC investigation would serve merely to delay, rather than to resolve, the dispute. Mosher, on the other hand, wanted the union to exhaust every possibility of conciliation and arbitration before resorting to a strike.

Since the mine operators continued to refuse to meet with union representatives the IDIC met with each party separately. As a compromise between the operators' refusal to recognize the union, and the union's demand for district-wide recognition, the IDIC proposed that one year agreements be negotiated between each mining company and a committee of the employees of each mine, to be elected by secret ballot. This recommendation, which went beyond the

particular dispute, proved to be the crux of the union's dissatisfaction with the government's labour relations policy.[154]

The employees flatly rejected the IDIC's proposal on the ground that it called for what was (to their minds) company unionism. J.L. Cohen condemned the one-plant committee plan proposed by the IDIC in the following terms:

> It is a mechanism which is designed to deprive workers of the aid or support of outside representation; it interns workers in their own industrial plants - cut off from association with, or support of, their fellow workers in the industry; it deprives them of any knowledge of what goes on in other sections of the industry in which they are working; it prevents the combined influence of all workers within a given industry; it exposes the workers within a plant to the doubly destroying influence either of favouritism for the well-behaved employee, or subtle, if not outright, discrimination against the more aggressive employee.[155]

Moreover, the employee committee plan was perceived by organized labour as completely at odds with the principle of free collective bargaining with representatives of the employees' choice, as embodied in PC 2685.

Six weeks after the employees' application, a conciliation board - consisting of Justice McTague as chairman, J.L. Cohen as employees' nominee and F.H. Wilkinson as the employers' nominee - was established. Significantly, McTague and Cohen were later appointed to the War Labour Board which conducted an in-depth inquiry into labour relations during the war. The conciliation board's

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154 Employee Committees had been suggested by the IDIC in numerous cases involving union recognition. See, for example, PAC, RG 27, vol. 144, file 611.04:21, Industrial Disputes Commission Reports. Examples of cases where Mitchell recommended employee committees: Case No. 1 - Canadian Westinghouse Co. and Local 504, United Electrical Radio and Machine Workers of America, Hamilton, Ont., June 23, 1941; Case No. 2 - Canadian General Electric Co. and Local 307, U.E.R.M. of America, June 24, 1941; Case No. 25 - Dominion Bedding, Montreal and employees represented by International Upholsterers Union, August 20, 1941; and Case No. 31 - Canada Packers Ltd., Toronto and Local 114 of Packinghouse Workers Organizing Committee, August 28, 1941.

Moreover, its origins dated back to King's efforts at conciliation at the turn of the century and to compromises worked out by conciliation boards in the 1920s. See Chapter 1 at notes 141 to 146.

155 J.L. Cohen, supra note 69, 59-60.

report prefigured many of the findings and recommendations contained in the War Labour Board's report.

In contrast to the recommendations of the IDIC, on October 15, 1941 the conciliation board unanimously recommended the recognition of Local 240 as the employees' bargaining representative. The employers' action in ordering their lawyer to withdraw from the conciliation hearings demonstrated to the conciliation board that the process contemplated by the IDI Act was inadequate for resolving disputes concerning union recognition and collective bargaining.[156] Moreover, the employer's declared apprehension that the union was controlled by a radical American organization, namely the CIO, was dismissed by the board as "erroneous and illogical."[157] The employees accepted the conciliation board's report, whereas the mine operators rejected the board's recommendations - preferring instead the IDIC proposal.

But before the gold miners could legally resort to strike action, a further requirement in the government's war-time labour policy needed to be satisfied. As was required by PC 7307, on November 3 the union requested a government supervised strike vote. Controversy surrounded both the determination of the voting constituency and the interpretation of the result.

Organized labour criticized the operation of PC 7307 on three grounds: (1) the lack of any accepted criteria for determining the vote constituency: (2) the manipulation of the question on the ballot to favour the employer by providing the option of employee committees; and (3) the tacit assumption that each mine should be treated as the appropriate unit rather than the district as a whole. Despite these problems, the majority of eligible participants voted in favour of

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156 MacDowell, supra note 1, 110.

157 Id., 110.

the recommendations contained in the conciliation board report.[158] However, because the vote was tallied on a mine by mine basis, employees at the four mines where the strike action was not carried by a majority of eligible voters were precluded from strike action.

The Minister of Labour made one last attempt to conciliate the dispute before the strike began. He convened a meeting of the parties in Ottawa. However, since neither the operators nor the union were willing to compromise, the conference served merely to further delay the strike. On November 18, 1941, nearly four months after the government sent in the first of the series of conciliators, the strike began and the parties were no closer to agreement than they were at the outset.

The local, with the active support of its international parent, the CCL and several unions which were affiliated to the TLC, dug in for a long strike. Kirkland Lake strike support committees sprang up in various communities across the country. The CCF argued the union's case in the House of Commons and offered active and consistent political support for the strike.[159] The mine operators, on the other hand, were determined to break the strike and strikebreakers were recruited for this purpose. Hepburn, the Premier of Ontario, dispatched a large contingent of provincial police to bolster the municipal police force at Kirkland Lake with the stated purpose of helping to keep the peace. Throughout the strike the union local made repeated pleas to the government to intervene to settle the dispute by enacting legislation to impose compulsory collective bargaining.

In December 1941 two important events occurred which significantly influenced the outcome of the strike: the entry of the United States into the

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158 Of the 4,333 employees eligible to vote, 4,057 voted and of these 2,725 voted to strike in support of the recommendations contained in the conciliation report and 1,254 voted against strike action. (L.G., Dec. 1941, 1942).

159 MacDowell, supra note 1, 181.

war and King's appointment of Humphrey Mitchell as Minister of Labour in McLarty's place. Once the United States entered the war it was evident to the union that it would lose the strike. Changes in American financial policy, in particular the substitution of Lend-Lease for gold transfers to finance war supplies, meant that gold production would cease to be a priority.[160] Gold mining was declassified as an essential industry and the government focussed its attention in steel production. Thus, the union lost any hope that an interruption in gold production would force the government to compel the mine operators to recognize the union. Moreover, once war was declared the American labour movement adopted a voluntary strike ban, which meant that little financial or moral support could be expected from the American parent in aid of the Kirkland Lake strike. Thus, the local union's ability to weather a long strike was severely weakened.

King's December 16 announcement of the appointment of Mitchell as the new Minister of Labour served to confirm the union's fear that the government would let the strike run its course without intervening to impose collective bargaining. King had long been searching for a replacement for McLarty and earlier he promised organized labour that the next labour minister would be a trade unionist. On several occasions he approached Tom Moore, the leader of the TLC who had close ties with King and the Liberal Party, to take the labour portfolio. However, Moore refused and suggested Mitchell instead.[161] Although Mitchell's appointment was acceptable to both Howe and the TLC, the CCL was ambivalent.[162] In particular, the union involved in the Kirkland Lake strike believed that Mitchell would not impose compulsory recognition on the mine

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160 Id., 206.

161 Pickersgill, supra note 137, 91-92, 94, 96, 309-10.

162 MacDowell, supra note 1, 196-97.

operators, as that would contradict his earlier position as chairman of the IDIC that one plant employee committees were suitable. The union's suspicions turned out to be correct;[163] and on February 12 the gold miners returned to work after striking for three months with the recognition issue still unresolved. As production resumed at the mines during the next fortnight, the overall workforce was reduced by 25 per cent. The Kirkland Lake strike occurred at an important juncture in the government's overall labour policy; for just as the prolonged strike got underway, the government introduced the second stage in its wage control policy. The introduction of compulsory wage controls provided a stark contrast with the government's refusal to compel recognition of the union in order to end the Kirkland Lake dispute.

The pros and cons of implementing compulsory wage controls had been canvassed by the Department of Labour as far back as June, when the labour surplus was absorbed.[164] However, the policy took several months to implement as a compromise acceptable to the competing interests was difficult to fashion. The cabinet was divided over imposing a measure as drastic as a wage and price ceiling: King preferred an incremental approach, whilst Isley wanted the immediate imposition of stringent controls.[165] As a preliminary step, the cabinet agreed that the responsibility for the Wartime Prices and Trade Board should be transferred from the Minister of Labour to the Minister of Finance.

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163 Id., 197-202.

164 PAC, RG 27, vol. 636, file 157, Memorandum re the Wartime Wages Policy by W.J. Couper, June 16, 1941.

165 Pickersgill, supra note 137, 268-69; Granatstein, supra note 68, 177-78.

The CMA supported overall wage and price controls,[166] while organized labour was concerned that a wage ceiling would freeze substandard wage rates and intra-occupational differentials. The labour representatives on the NLSC argued that the wage ceiling should not apply to wage rates of less than 50¢ per hour and that inequalities in rates should be adjusted by collective bargaining.[167] But these recommendations were rejected out of hand as potentially inflationary. However, both the Interdepartmental Committee on Labour Coordination and, B.M. Stewart, the Deputy Minister of Labour warned that organized labour would reject the wage freeze unless they were given concessions.[168] These concessions included an extended and mandatory cost of living bonus and greater labour input into the policy-making process. Although Isley believed that the first concession was inflationary, both King and McLarty argued that it was part of the necessary quid pro quo required to obtain organized labour's somewhat begrudging support for the compulsory wage freeze.[169]

On October 18, 1941 King announced that an overall price ceiling was to come into effect on December 1. Orders in Council PC 8257 and 8258 gave the Wartime Prices and Trade Board authority to peg prices, rents, and charges over a wide range of goods and services at the maximum levels reached in the four week period from September 15 to October 11, 1941. Mirroring the policy of a general price

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166 In the President's annual review at the June 1941 Annual Convention of the CMA, Harold Crabtree - accepting the government's account of inflation - stated that although flexible controls were preferable to rigid ones, the CMA endorsed the government's wage and price freeze: Industrial Canada (hereafter IC), July 1942, 92. IC was the official monthly publication of the CMA.

167 PAC, RG 27, vol. 253, file 719:7-4, vol. 1, Recommendations of the National Labour Supply Council in Connection with the Proposals for a National War Labour Board and the Amendment of PC 7440.

168 Coates, supra note 5, 96.

169 Pickersgill, supra note 137, 270.

ceiling a general wage freeze, contained in PC 8253, came into effect on the same day.

Although the wage control policy contained in the PC 8253 maintained the government's commitment not to interfere with established differentials and to account for increases in the cost of living through a bonus system, it differed from the policy expressed in PC 7440 in a number of conspicuous respects. First, PC 8253 marked the transition from an exhortatory to compulsory wage control policy. In the event that an employer failed to obtain the written permission of the board administering the wage policy before increasing wage rates it was liable, in summary conviction, to fine of between $100 and $5,000.[170] PC 8253 committed the government to a policy of coercive intervention in what was previously the territory of individual and collective bargaining. The fact that the government had so far failed to impose compulsory collective bargaining on employers unwilling to recognize trade unions stood in sharp contrast to its decision to impose a compulsory wage freeze. It appeared to organized labour that the government did not eschew intervention in labour relations <u>per se</u>, but that certain kinds of intervention were to be avoided. Second, the scope of the compulsory wage control order extended much beyond that contained in PC 7440 and covered virtually all, and not just war industries.[171] Third, the cost of living bonus was extended and made mandatory. Fourth, the exception to the general wage freeze was unambiguously framed in terms of a local comparability standard and

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170 Order in Council PC 5963, issued July 10, 1942, made it an offense for any person to do anything calculated or intended to interfere with the continuation of operations or production or for any person to do any act in contradiction of the wage control order. The offense was to be prosecuted on summary conviction, and was subject to a fine of between $50 and $1,000. This amendment was directed against trade unions officials urging strikes or other work action to obtain wage increases in violation of the Order.

171 PC 9154, issued on December 5, 1941 - after a conference between the provincial ministers of labour, departmental officials and the Executive Committee of the National War Labour Board - abolished the exception for employers who employed fewer than 50 employees.

reference to the rates prevailing between 1926 and 1929 was abolished. Finally, a new administrative machinery was established to implement the wage control policy, instead of relying on the ad hoc conciliation boards as was previously the case under PC 7440. The last change avoided the confusion of administrative and conciliatory functions that had resulted when boards of conciliation were entrusted with administering the governments first attempt at a wage control policy.

The Order established a two-tier system of national and regional boards to administer the wage control policy. The National War Labour Board (NWLB) consisted of the federal Minister of Labour and four or more representatives each of employees and employers. In recognition of the regional diversity of the country, five regional boards - each consisting of a provincial minister of labour to be selected either by the provincial government of a province constituting an entire region or the labour ministers of the provinces comprising a single region - were also established.[172] The Boards were to establish by-laws implementing the agreed upon division of powers. In general, the National Board was responsible for developing broad policy and the Regional boards were to supervise, inspect, enforce and administer that policy. PC 8253 also empowered the National Board to assist in the development of new wage and labour policies and to make recommendations and give advice to the Minister of Labour.

The cummulative effect of the Kirkland Lake strike and the introduction of the compulsory wage ceiling served both to heighten what organized labour saw as a contradiction in the government's policy concerning the use of compulsion in labour relations and to unite organized labour in its demand for a system of compulsory collective bargaining along the lines of the Wagner Act. Although traditionally a staunch supporter of the Liberal government's labour policy, the TLC called for substantial revisions to the compulsory wage control order and the

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172 Due to provincial representations, PC 9154 substituted 9 provincial boards for the 5 regional boards.

introduction of legislation imposing union recognition on recalcitrant employers, so as to avoid a repetition of the Kirkland Lake scenario.[173] As usual, the CCL was less restrained in its criticisms of the government's labour relations policy. It called for compulsory collective bargaining legislation - labelling the current policy as retrograde and ineffective - and demanded the outright repeal of PC 2685.[174] Moreover, prompted by Millard's press release condemning labour Minister Mitchell for completely disregarding the letter and spirit of PC 2685 and attempting to "introduce the notorious Mackenzie King 'company union' formula,"[175] several resolutions of a similar vein were introduced at the CCL's annual convention in 1942.[176] However, Mosher exercised a moderating force, and the resolutions were defeated. In his address to the convention, Mitchell defended the outcome of the Kirkland Lake strike on the ground that single-plant employee committees had been established. Notably, he refused to commit the federal government to a policy of compulsory collective bargaining. In sharp contrast, the Ontario labour minister, Peter Heenan, surprised the delegates by promising that his government would present a bill during the next session, to be drafted with the input of organized labour, which would implement compulsory collective bargaining in Ontario. This drastic turnaround in the Hepburn government's labour policy - from a position tantamount to open warfare against many of the unions affiliated to the CCL to a policy actively endorsed by the same unions - was prompted by the provincial government's need to consolidate its

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173 L.G., Feb. 1942, 178-79.

174 Logan, supra note 75, 546-47; L.G., March 1942, 291-93 and 1942 Proceedings of the 3rd Annual Convention of the CCL, 119.

175 PAC, MG 28, I 103, vol. 4, Fed. Govt. Corresp. 1939-41, C.H. Millard to all SWOC Local Unions in Canada, Dec. 17, 1941, containing the text of a press release condemning Mitchell.

176 MacDowell, supra note 1, 224-25.

support amongst working people to stave off the CCF threat in the upcoming election and to reduce the level of industrial unrest.[177]

The defeat of the miners in the Kirkland Lake strike and the introduction of compulsory wage controls in the winter of 1941-42 triggered a realignment of both the trade union movement and political forces which were to have far-reaching consequences for the federal government's labour relations policy. The introduction of what was essentially compulsory binding wage arbitration transformed what was previously a private matter determined by the free play of economic forces into a matter of public policy. As Millar recently put it:

> The essential contradiction of Ottawa's wartime controls was that they attempted to maintain the prewar status quo (including all its inequalities) at the same time that governmental decrees made it obvious that economic injustice was no longer the product of impersonal market forces.[178]

This factor, in conjunction with the additional contradiction between the use of coercion in its wage policy and the government's adherence to voluntarism in collective bargaining, served to bring about a reapprochement between the craft and industrial trade union congresses. In December 1941 Tom Moore wrote to Aaron Mosher declaring that "there can be no possibility of the Trades and Labour congress acting jointly with your Canadian Congress of Labour";[179] however, before a year had passed both Congresses actively endorsed compulsory collective bargaining legislation and jointly condemned both the Minister of Labour and the government's labour policies. The government's failure to impose compulsory collective bargaining and its preference for employee committees in the Kirkland Lake strike provide a turning point in the relationship between and the demands of the craft and industrial trade union movements. Moreover, the government's

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177 Martin, supra note 1, 348 and MacDowell, supra note 1, 228.

178 Millar, supra note 5, 32.

179 PAC, MG 28, I 103, vol. 9, file TLC 1941-48, Tom Moore to A.R. Mosher, Dec. 19, 1941.

hostility to trade union demands pushed the trade union movement, in particular the CCL, closer to the CCF. The growing popularity of the CCF at the expense of the Liberal Party,[180] led not only to the about-face in the Ontario government's labour policy, but also to a significant shift in the national Conservative party's labour policy.

V. The Government's Response - The Continued Commitment to Voluntarism

The question which arises at this juncture is why the federal government continued to refuse to introduce compulsory collective bargaining - in light of both organized labour's concerted demands and the recommendation of an internal labour policy committee.[181] Essentially, the answer is that the government perceived it to be impracticable to require all employers to bargain collectively and conclude formal written agreements with trade unions in the circumstances which existed at the beginning of 1942.[182] Many employers were fundamentally opposed to collective bargaining, and those that were not required as a

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180 PAC, MG 26, J 4, vol. 240, file 2480, Memorandum for the Prime Minister, Dec. 28, 1942.
Canadian Institute of Public Opinion
Public Opinion News Service Release, December 19, 1942

	(electoral results) 1940	Jan. 1942	Sept. 1942	Dec. 1942
Liberal	55	55	39	36
Conservative	31	30	23	24
CCF	8	10	21	23
New Democracy	3		6	10
Other	3	5	11	17

not polled separately, results being included with 5% others.

181 PAC, RG 27, vol. 897, 8-9-74, pt. 3, Report of the Labour Supply Investigation Committee to the Labour Coordination Committee, October 1941.

182 PAC, RG 27, vol. 253, file 719:7-4, vol. 1, A Plan for the Co-operation of the Dominion and Provincial Governments in the Development and Administration of War Labour Policy, 7-8.

preliminary condition to collective bargaining that the union ensure that its members faithfully observe the terms of the agreement. The government believed that this precondition was unlikely to be fulfilled in light of the inexperience of most industrial union leaders. Regional and other differentials further complicated the situation, since the tendency of a union once recognized was to bargain for national standards - a process the government found difficult to reconcile with its wage rates stabilization policy. Although unwilling to impose collective bargaining on the lines of the Wagner Act, the government contemplated establishing a jointly representative board under which employers might be required to extend recognition to trade unions in proportion to the extent to which each union demonstrated that it was not only prepared to assure observance of agreements, but also to contribute effectively to the joint solution of industrial problems and the furtherance of war production. Put simply, contract observance and a ban on industrial action constituted the quid pro quo for trade union recognition - two conditions that the government believed organized labour in general (and the CIO unions in particular) incapable of meeting.

In a more public vein, McLarty justified the government's intervention in the Kirkland Lake strike in terms of its policy of evenhandedness and voluntarism. In a letter to the leader of the CCF party, echoing his earlier parliamentary statement of the government's policy concerning collective bargaining, McLarty declared that:

> The Government had pursued this policy of non-compulsion during the war period and has tried to deal out even justice to both parties. It is felt that should employers be compelled to recognize and deal with trade unions that the question immediately arises as to whether the employees should be forbidden to go on strike. If compulsion is adopted it must be applied to both parties and when rights are given responsibilities should definitely exist.[183] (emphasis added)

Although the government ignored organized labour's demands for compulsory collective bargaining and a major revision of the compulsory wage control policy,

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183 PAC, MG 26, J 1, vol. 310, McLarty to M.J. Coldwell, M.P., Dec. 4, 1941.

it responded almost immediately to the TLC's request that the NLSC be abolished.[184] The TLC advocated this arguing that the Council had been rendered redundant by the advisory function of the NWLB. The TLC further requested that in the Council's place a small consultative committee of labour representatives, and a similar committee of employee representatives, be established to advise the Minister of Labour. Accordingly, on February 24, 1942 the NLSC was abolished and a Consultative Committee on Labour Policy - consisting of two panels, one representing organized labour and the other employers - was established.[185] Furthermore, the executive committee of the NWLB, which consisted of representatives of organized labour and employers, was appointed to the Interdepartmental Committee on Labour Coordination.

Paradoxically, although these changes were introduced in answer to the TLC's request for greater labour input into the policy-making process, they had the opposite effect. The Consultative Committee had little influence and the appointment of the Minister of Labour as chairman of the NWLB tended to undermine the Board's authority in the eyes of organized labour. In addition, these modifications also influenced the government's internal policy-making bodies. With the addition of labour and industry representatives to the Interdepartmental Committee, it lost its status as the cabinet's principal labour policy mechanism.[186] Instead, this function was gradually taken over by the Economic Advisory Committee. Thus, the dominance of an intra-governmental body - which was without direct input from organized labour, and biased in favour of controlling inflation and production interests - was established in the development of labour relations policy.

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184 L.G., Feb. 1942, 178.

185 See L.G., May 1942, 506 for the composition of the Consultative Committee.

186 Coates, supra note 5, 106-107.

The defeat of the Kirkland Lake miners and the operation of compulsory wage controls inaugurated a year in which the government's policy of voluntarism collective bargaining was to withstand increasing pressure both on the labour relations and political fronts. After the Kirkland Lake strike the CCL was convinced that King himself was anti-labour.[187] By the end of 1942 the government was embroiled in a major showdown with the steelworkers' union over its wage control policy. Led by Millard, SWOC extended its campaign, inaugurated in the Peck dispute, to achieve national wage rates in the basic steel industry - a move which the government believed threatened the integrity of its wage policy. Various techniques were employed to resolve the dispute, including the appointment of a conciliation board and Royal Commission. The use of these tactics successfully deferred the strike until 1943. As will be described in the next chapter, a compromise was fashioned and the government commissioned the reconstituted NWLB to carry out a full-scale inquiry into labour relations. In the end, the Board recommended that the government introduce compulsory collective bargaining as the quid pro quo for organized labour's acceptance of a stringent wage control policy.

King's appointment of Mitchell as Minister of Labour served to strengthen the reapprochement between the CCL and TLC which began with their joint condemnation of the government's response to the Kirkland Lake strike. In a letter to King, Bengough, the acting president of the TLC, and Mosher complained that while both "Congresses have urged the adoption of an adequate Labour policy, with protection for the right to organize and bargain collectively" in the meantime "company unions, with the tacit approval of the Minister and certainly without any word of condemnation by him, are being formed by corporations all

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187 MG 28, I 103, 84/381, CCL minutes, Feb. 28, 1942. Conroy reported that at his meeting with the Prime Minister King was definitely hostile to the CCL and the Congress's position regarding the Kirkland Lake strike.

over Canada" as the government delayed.[188] Somewhat ironically, although one of the reasons for the government's refusal to impose collective bargaining was the split within the trade union movement, its continual refusal brought the rival factions within the trade union movement closer together - thus making it harder for the government to maintain its voluntarist policy.

In addition to the pressures in the labour relations front in 1942, political trends were shaping up which would significantly influence the federal government's policy towards collective bargaining. On February 13, just one day after the defeat of the Kirkland Lake strike, an important federal by-election was held with the result that the CCF candidate defeated the Conservative party leader, Arthur Meighen, in the York South riding.[189] Two important consequences flowed from the by-election. First, the CCF victory was the signal for a veritable eruption in public support for the social democratic party.[190] Disillusioned with the labour policies of both of the traditional parties, urban workers began to rally around the CCF - a trend which reached its zenith, with important consequences for the government's labour policy, in 1943. Second, the defeat of its leader, primarily on the ground of his anti-labour stance, led the Conservative party to re-evaluate its policy towards collective bargaining. A National Conservative Conference was convened in Port Hope in September in order to take stock of the parties diminishing electoral appeal and develop a more acceptable programme. The Port Hope programme marked a significant change in labour policy: collective bargaining was accepted in principle, the formation of a national labour relations board on the American model was suggested and

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188 PAC, CLC Papers, MG 28, I 103, vol. 7, file W.L.M. King, 1942-44, Percy R. Bengough and A.R. Mosher to King, Nov. 24, 1942, 2.

189 On the same day Mitchell, the Minister of Labour, won the by-election in Welland.

190 Gad Horowitz, Canadian Labour in Politics (Toronto: University of Toronto Press, 1968) 70.

labour's full freedom of association, self-organization and designation of representatives of their own choosing was recognized.[191] The main features of this programme were adopted at the Winnipeg Convention in December with the avowed purpose of maintaining free enterprise. Official Conservative party labour policy included the transfer of jurisdiction over labour relations generally from the provinces to the federal government, the establishment of machinery for the election and certification of the agency which is entitled to represent employees in collective bargaining negotiations, the requirement that employers bargain with representatives duly elected by their employees or prospective employees on account of trade union activities.[192] To further its chances for winning support of urban workers the party changed its name to the Progressive Conservatives and elected John Bracken, the long-term Liberal-Progressive premier of Manitoba, as its new leader. Thus, by the end of 1942 the federal Liberal party was isolated in its refusal to endorse compulsory collective bargaining. Moreover, the strong showing of the CCF and the leftward shift of the newly rechristened Progressive Conservative Party served to squeeze the Liberal outside of their traditional centre role. As the war continued this political realignment would have grave consequences for the government's labour relations policy.

The immediate consequence of organized labour's concerted denunciation of the government's labour policies and the left-ward shift of the Conservative party, was a change in the federal government's policy regarding collective bargaining in government controlled undertakings. During the previous year the Department of Justice ruled that the Minister of Labour had no jurisdiction to appoint an IDIC with respect to a dispute in a government owned and operated

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191 J.L. Granatstein, The Politics of Survival, The Conservative Party of Canada, 1939-45 (Toronto: University of Toronto Press, 1967) 133.

192 Id., 212.

undertaking.[193] Thus, the government's compulsory conciliation mechanisms were not available in disputes involving Crown corporations. In addition, the government's policy of preferring employee committees to trade unions as bargaining representatives in Crown corporations and undertakings directed by government appointed controllers, further undermined its commitment to the principles embodied in PC 2685. As an indication of its good faith, the TLC requested that the government ensure the observance of PC 2685 in its own undertakings.[194] Although the cabinet indicated its acquiesence on the TLC's demand and promised immediate action, such action was delayed for several months. On Mitchell's instigation the National War Labour Board commissioned J. Henry Richardson to conduct an investigation into, and make recommendations concerning, collective bargaining in government enterprises.[195] Professor Richardson recommended that employees in government enterprises be granted the right to elect representatives of their own choosing, including trade unions, and that an impartial tribunal be appointed by the Department of Labour to determine whether the employee organizations were sufficiently representative and responsible.[196]

Both the long delay in implementing the promised policy and the actual policy that was implemented served to further anger the trade union movement. Instead of imposing compulsory collective bargaining in government controlled

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193 In 1941 SWOC applied for a conciliation board under the IDI Act on behalf of the employees of Research Enterprises, a Crown Corporation, in order to investigate an allegation of discrimination against an employee for trade union membership. The Department of Justice ruled that the Minister of Labour did not have authority to appoint a conciliation board with respect to a dispute in a wholly-owned and operated government undertaking.

194 L.G., Feb. 1942, 178.

195 PAC, National War Labour Board Records, RG 36, Series 4, vol. 25, Humphrey Mitchell to the Secretary of the NWLB, Jan. 12, 1942.

196 Id., Collective Bargaining in Government controlled Undertakings, by Prof. J. Henry Richardson, March 1942.

undertakings, all the government did was affirm that the principles contained in PC 2685 applied in its enterprises. On December 1 the government issued PC 10802 which provided that the principles enumerated in PC 2685 should apply to employees in Crown corporations and extended the provisions of the IDI Act to them.[197] The freedom of employees of crown corporations to join or continue their membership in trade unions and to participate in the activities or administration of a union was guaranteed. Agents or officers of Crown corporations were authorized to negotiate with trade unions representing a majority of the employees for the purpose of concluding a collective agreement covering the terms and conditions of employment. Disputes between Crown corporations and employers, other than those involving the appropriate bargaining representatives or unit, were to be referred to conciliation boards under the IDI Act. However, representation and jurisdiction disputes were to be determined by the Minister of Labour, who might refer them to an IDIC. In short, although PC 10802 "removed any legal doubts respecting the rights of employees of crown corporations to organize and bargain collectively" it fell short of what organized labour wanted, because "while it authorized crown companies to enter into collective agreements there was no compulsion upon them to bargain collectively if they choose to ignore representative unions."[198] Once again, the government failed to respond, except through inaction, to organized labour's

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197 Crown corporations were defined as any corporation engaged in war production have a share capital the majority of which was held on behalf of the Crown or a war industry controlled by a government appointed controller. However, the Canadian Broadcasting Corporation and the National Harbours Board were not brought within the provisions of PC 10802 (L.G., March 1943, 376, 380). For the rationale behind this see PAC, W.L.M. King, Memoranda and Notes, MG 26, J 4, vol. 361, file 3854, Memorandum to Dr. Stewart, re the Application of Industrial Disputes Investigation Act to Canadian Broadcasting Corporation, National Harbours Boards, and Allied War Supplies Board, July 29, 1941.

198 Bora Laskin, "Recent Labour Legislation in Canada," XXII Canadian Bar Review, 776-92 (1944) 782.

demand that employers be compelled to bargain with the union representing the majority of their employees.

Conclusion

The first phase of the federal government's labour relations policy, which consisted of invoking the First World War precedents of extending compulsory conciliation, issuing an exhortary declaration of labour principles and applying coercion against labour agitators, proved to be outmoded in light of the changes both in the economy and the structure and policies of the trade union movement which occurred once war was declared. The government's commitment to neutrality and industrial peace, the anti-union sentiments of employers engaged in war production, the dominance of the economic planners and Department of Munition and Supply officials in policy formation all served to inhibit any changes in labour policy. However, with the imposition of the first tentative measure of wage control, the government was forced gradually to retreat from its commitment to voluntarism in order to quell the increasing industrial unrest.

This retreat did not lead to the introduction of compulsory collective bargaining. Instead, the government added additional layers of compulsory conciliation, imposed a further compulsory strike vote requirement and introduced an ineffective means of dealing with complaints of employer discrimination for trade union activity. The IDIC was rejected by organized labour virtually from its establishment on account of its partiality for employee committees as a compromise for union recognition and the frequent divergence between its recommendations and those of the representational IDI Act boards. The government's policy regarding collective bargaining in Crown Corporations, its failure to intervene to compel union recognition in the Kirkland Lake dispute, official acceptance of the agitator theory of labour unrest and the controversy surrounding Mitchell's appointment as Minister of Labour culminated in a crisis of confidence for organized labour regarding the government's labour policy.

Moreover, the government's avowed commitment to equality of sacrifice in the effort to control inflation was undermined by the difference in treatment of employees and employers. While workers were subject to compulsory wage controls, the government reneged on its proposal to impose a five per cent limit on the profits from war contracts in light of the war contractors threat to halt production.[199] This double standard in the treatment of employees and employers discredited the government's commitment to evenhandedness in allocating the burden of war sacrifices.[200] Most importantly, the government's resort to compulsion to enforce wage controls, while at the same time clinging to voluntarism regarding collective bargaining brought its overall labour policy into dispute.

By the end of 1942 it was obvious to the opposition parties and organized labour that the policy of voluntarism regarding collective bargaining was exhausted. However, it took another year before the Liberal government introduced compulsory measures. Publicly it explained its refusal to implement such legislation in terms of its commitment to the principles of neutrality, evenhandedness and voluntarism.[201] The government's labour policy was not neutral, however, because while the right to strike was severely constrained by the compulsory conciliation and strike vote legislation, workers' rights to organize and bargain collectively were not effectively protected - thus tipping the balance of power further in favour of the employer.[202]

Intra-governmental memoranda revealed other reasons for the government's refusal to implement compulsory collective bargaining. Contract observance, the

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199 Millar, supra note 5, 19.

200 Hart, supra note 88, 16-17, 31-32.

201 See text infra at notes 112 and 113.

202 MacDowell, supra note 1, 23 and Cohen, supra note 68, 34.

central element in the concept of union responsibility, was regarded by the government as a necessary condition for compulsory collective bargaining - a condition that it believed the "immature" industrial unions unable to fulfill. Furthermore, a ban on industrial action was stressed as the quid pro quo for compulsory union recognition and bargaining.[203] Both of these conditions derived from King's continuing preoccupation with industrial peace as the goal of labour relations policy. Historically, the federal government refused to intervene in labour relations unless it could impose a constraint on the resort to economic sanctions - for example, compulsory conciliation in exchange for the cooling off provision. Until the labour movement agreed to a strike ban and was able to guarantee contract adherence, compulsory collective bargaining was not on the government's agenda. Thus, the government only contemplated compulsory collective bargain when unions were deprived of their sole bargaining power - the freedom to strike. This coupling of compulsory bargaining with a total strike ban was constantly invoked by the government to obtain concessions from organized labour.

Contrary to MacDowell's allegation,[204] the federal government did not seek to promote industrial peace at the expense of collective bargaining. Although King was primarily committed to maintaining industrial peace, he recognized that voluntary collective bargaining could aid in achieving that goal. As Craven put it

> King did not deny the legitimacy of collective bargaining between "legitimate" unions and employers: in principle this was a very good thing. What he did deny, in practice, was that it would be either proper or advisable for the state to impose such a relationship upon a recalcitrant employer.[205]

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203 See text infra at note 182.

204 MacDowell, supra note 1, 23.

205 Paul Craven, "King and Context", 4 Labour/Le Travailleur 165-86 (1979).

The test of legitimacy was the union's willingness and ability to ensure workers' adherence to the collective agreement and avoid industrial unrest. In theory compulsory collective bargaining was objectionable to the Liberal government unless it imposed corresponding responsibilities on trade unions. Compulsory union recognition, without a concomitant restraint on organized labour, smacked of class legislation to King's mind. Unions and employers were to be treated as juridical equals although it was obvious that the employer's unrestrained control over the employment relationship gave it an insurmountable advantage over employees. Moreover, King rejected the imposition of compulsory legislation on practical grounds, for he did not believe that the state could impose a continuing relationship where the parties could not achieve it themselves.

Thus King continued to advocate compulsory conciliation whereby expert third parties, acting in the public interest, could work out a compromise solution: "His normal tactic in the face of a recognition demand was to plead its postponement in favour of settlement of specific grievances and immediate demands."[206] But during the Second World War the compromise of employee committees was no longer acceptable to the labour movement. Although (unlike company unions) employee committees enabled workers to freely select their representatives, they differed from unions in that all of the negotiators were

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206 Id., 180.

subject to the employer's superior employment power.[207] King failed to recognize that collective bargaining and trade unions were desired by workers not only to increase their share in the industrial product, but also to give them a new status in the industrial enterprise. Expressing the major concerns of the trade union movement, Cohen stated that:

> Freedom of association and the establishment of collective bargaining are not the expression only of civil rights of workers but of social and industrial functions which are basic and essential in a well-ordered society. Until this is clearly recognized, Government will continue to avoid its responsibility. It will prefer to appear to be filling the role of umpire between competing social forces and behind that role of umpire to conceal the fact that, as Government, it has failed to discharge its primary duty of prescribing rules. Umpiring, without rules, is a make shift process, and that, in the great measure, marks the whole attitude of Government in Canada today on the question of labour relations and collective bargaining.[208]

Cohen, expressing the concerns of the organized labour movement, argued that the state had a responsibility to ensure that the employer did not use its superior economic power to negate workers' civil rights. However, such demands fell upon

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207 During the war both labour leaders and influential labour advocates tended to equate employee committees with company unionism. J.L. Cohen expressed the view of the Canadian labour movement when he stated that: "the essential feature of collective bargaining exists, is the independence of the bargaining medium operating on behalf of the workers so that it meets on equal terms with the employers. Anything which destroys that independence violates the first essential of collective bargaining. Any form of employee representation or employee recognition which destroys the independence of the bargaining medium, and which is acquiesced in by the workers, not on their own violation, but only because of the influence, or control, or dictate of the employer, is a collective bargaining form which emanates from the company and not from the worker. That form of arrangement, whatever the variation is therefore a form of company unionism." (J.L. Cohen, supra note 68, 59 (emphasis added)). Recent commentators have also equated employee committees with company unions, see MacDowell, supra note 1, 90, 230 and Reg Whitacker, supra note 59, 153-54.

However, it is important to acknowledge Craven's point that although employee committees fell short of union recognition, the committees differed from company unions (Craven, supra note 205, 181). There is no evidence that the employee committees were dominated by employers; rather the evidence suggests that they were elected by the majority of employees. However, it is true that employee committees were unable to draw upon the collective strength of a trade union organization. Craven characterizes employee committees as "another facet in King's general strategy of settlement by ad hoc compromise."

208 Cohen, supra note 69, 15.

deaf ears. The government continued to invoke its commitment to the principles of voluntarism and evenhandedness as the explanation for its labour policy, while, in effect, allowing employers to run roughshod over employee's wishes.

By 1943 the federal government could no longer afford to ignore organized labour's demands. Political, economic and industrial changes which began to emerge at the beginning of the war converged to make it apparent to King's government that compulsory collective bargaining legislation was necessary to obtain organized labour's continued support for established political traditions and economic relations in the post-war period. Hence, the debate over the legislation shifted from its implementation to its form and content. As we shall see in the next chapter, the federal government sought to devise legislation which would satisfy organized labour's minimum demands within an overall strategy of maintaining business confidence.

Chapter 4: Crisis and Response: Compulsory Collective Bargaining

I. Constructing the Post-War Settlement

Events and tendencies converged in 1943 to push labour relations to the top of the political agenda. On the industrial relations front, the new-found strength of the trade union movement and its increasing militancy induced the government to reconsider its labour policy. By the end of 1943 the percentage of non-agricultural paid workers in unions had risen to 22.7 per cent of the workforce, representing a doubling in union membership since the outbreak of war.[1] Moreover, the greatest increase in trade union membership was in the strategically placed manufacturing industries, which were organized by the CCL unions. Accompanying this augmentation in trade union power was an increase in the propensity of trade unions to strike in order to express their dissatisfaction. Trade union militancy, as measured by strike action, reached a level comparable only to that experienced during the labour crisis of 1919. In 1943 one out of every three workers engaged in strike action, and the number of working days lost quadrupled from the 1939 figure of 224,588 to 1,041,198.[2] Thus, by the late summer of 1943 King's government was forced both to admit that its dearly held policy of voluntarism regarding collective bargaining was exhausted and to promise to implement a compulsory legislation. This proved to be the turning point in federal labour policy, although such legislation was not introduced until the following year.

Organized labour was dissatisfied with the federal government on two scores. On the first, the government's failure to compel employers to bargain with trade

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1 M.C. Urquhart (Ed.), Historical Statistics of Canada (2nd. ed.) (Ottawa: Statistics Canada, 1983) Series E175-177. Between 1939 and 1943 trade union membership increased from 359,000 to 665,000.

2 Laurel Sefton MacDowell, "The Formation of the Canadian Industrial Relations System during World War Two," 3 Labour/Le Travailleur 175-96 (1978) 195 and Urquhart, supra note 1, Series E 190-197.

unions representing a majority of their employees led to a number of prolonged and vicious recognition strikes. As a result of the reapprochement between the AFL and the National Labour Relations Board in the United States, the TLC was finally united with the CCL in demanding state-sponsored compulsory bargaining and together the Canadian Congresses wielded sufficient power to ensure that their demands were heard. On the second score, the government's continued commitment to a rigid wage ceiling resulted in strikes which were explicitly directed at its wage control policy. The union congresses joined together in denouncing the inequities in basic wage rates, the partial application of the cost of living bonus, the manipulation of the cost of living index, the exaggerated tenderness for the employer's ability to pay and the parochial concern with local wages.[3]

The most pronounced example of organized labour's exasperation with the wage control policy was the 1943 steel strike, which had been building up throughout 1942.[4] When confronted with a nation-wide walkout of 13,000 workers in this crucial war industry the government was forced to make some concessions to organized labour. Among these was the reconstitution of the National War Labour Board (which was responsible for administering the wage control policy) from a politically dominated representative body to an autonomous tripartite agency. Since labour minister Mitchell was regarded by organized labour both as an advocate of the unacceptable employee committee plans and as dominated by the economic ministers who were prepared to maintain the wage ceiling at any cost, his chairmanship of the NWLB tended to bring the government's overall labour

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3 H.C. Pentland, "A Study of the Changing Social, Economic, and Political Background of the Canadian System of Industrial Relations," a draft study prepared for the Task Force on Industrial Relations (Privy Council, 1968) 211.

4 For a detailed and very informative account of the steel strike, see Laurel Sefton MacDowell, "The 1943 Steel Strike Against Wartime Wage Controls," 10 Labour/Le Travailleur 65-85 (1982). For an important evaluation of the significance of the steel strike for the government's decision to introduce compulsory collective bargaining see Daniel Coates, "Organized Labour and Politics in Canada," Ph.D. thesis, Cornel University, 1973, 115-28.

policy into disrepute. In order to neutralize Mitchell without capitulating to organized labour's demands for his resignation, in February 1943 the Cabinet issued PC 1141.[5] This Order substituted a tripartite three member agency which was to function along the lines of a labour court for the political and representative board. In addition to its responsibility for administering the wage control policy, the reconstituted NWLB was also empowered to conduct a public inquiry into labour relations. Although initially the government never intended this power to be used,[6] in April the Board announced that it would conduct a public inquiry into labour relations and wage conditions. The inquiry was a necessary preliminary for salvaging the federal government's wartime labour policy. As Millar pointed out

> Ottawa's policy of holding down wages while evading union recognition meant that the issues became indistinguishable to the ordinary worker. High wages and union security, multiplant bargaining, the fear of the underpaid that their wartime bonuses and jobs would vanish, were issues which were inextricably mixed up in a labour policy that attempted to maintain the status quo ante, added wartime controls on labour mobility, and had created a system of incentives in war industry side by side with a rigid wage freeze.[7]

Thus, the government needed an independent inquiry both to buy time for it to develop an overall strategy and to obtain independent recommendations upon which it could base any changes to its labour policy. Moreover, NWLB's reports, which favoured compulsory collective bargaining, gave additional impetus to the government to introduce such legislation.

The pressures for changes to the government's labour policy were not confined to industrial relations. As both MacDowell and Coates have indicated, an upheaval in the traditional alignment of Canadian politics further prompted the federal government to consider implementing compulsory collective bargaining

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5 Coates, supra note 4, 127.

6 Id., 137.

7 Frederick David Millar, "Shapes of Power: The Ontario Labour Relations Board, 1944-50," Ph.D. thesis, York University, 1980, 138.

legislation.[8] This upheaval centred around the CCF, encompassing both its increasing electoral success (which was first manifested in 1942) and its adoption by the trade union movement as organized labour's political counterpart.

On August 4, 1943 the Liberals were replaced by the Conservative party as the provincial government in Ontario. However, by far the most significant aspect of the election was the surprisingly strong showing of the CCF in Canada's leading industrial province. From never having elected a member to the legislature, the CCF became the official opposition party - returning 34 candidates, 18 of whom were former or existing trade unionists. Further confirming the CCF's popularity was the Federation's victory in the two western seats in the four federal by-elections held on August 9. By contrast, the Liberal party failed to win any of the by-elections; the Quebec seats were split between the Labour Progressive Party (which was the wartime guise of the Communist Party) and the Bloc Populaire (the leftist, Quebec nationalist Party). The CCF victories confirmed King's belief that the social democratic party was the primary threat to the Liberal's tenure in government.[9] According to Pickersgill, King attributed the CCF's victories "to resentment of labour at the wage stabilization policy of the Government and even more to what he felt sure was the failure of some of his colleagues in the government to show sympathy for the aspirations of organized labour for increased recognition."[10] The appeal of the CCF to the traditional constituency of the Liberal party was confirmed by a September 1943 public opinion poll which indicated that the CCF received 29 per cent of popular support, whereas the two traditional parties received 28 per cent

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8 Coates, supra note 4, 216, 221 and MacDowell, supra note 2, 190.

9 J.W. Pickersgill, The Mackenzie King Record, Vol. 1 (Toronto: University of Toronto Press, 1960) 568-72.

10 Id., 571.

each.[11] Equally as important, King feared the attraction of the CCF within his own party; he wrote in his diary that he was worried lest the Liberal party "will begin to have defections from our own ranks in the House to the CCF."[12]

King attributed a further cause of the social democratic party's success to the "combination of the industrial CIO with the political CCF."[13] Although it was true that certain members of the CCL were very active within the CCF, it was the CCF's success in Ontario and the by-elections, rather than the other way around, which led the Congress executive to urge the 1943 convention to pass a resolution recognizing the CCF as "the political arm of labour" and exhort all of the locals to affiliate with it.[14] But the resolution was not won without a battle on the convention floor. The Communist-dominated unions, which comprised one-third of the CCL membership, bitterly opposed the resolution and their opposition was only overcome when the unaligned international unions threw their support behind the resolution in order not to be identified with the Communists.[15] A similar resolution was defeated at the TLC annual convention. Advocates of the CCF could not surmount the executive's traditional support for the Liberal party, the desire of the international craft unions to remain autonomous from political parties and the existence of a strong communist

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11 Alvin Finkel, "Origins of the Welfare State," in Leo Panitch (Ed.), The Canadian State (Toronto: U. of T. Press, 1977) 344-70 at 360.

12 Pickersgill, supra note 9, 571.

13 Pickersgill, supra note 9, 569.

14 Irving Marten Abella, Nationalism, Communism and Canadian Labour (Toronto: U. of T. Press, 1973) 75.

15 Ten out of the CCL's 23 unions, and more than a third of the CCL's membership were under Communist domination or influence. Gad Horowitz, Canadian Labour in Politics (Toronto: U. of Toronto Press, 1968) 85.

presence on the executive.[16] However, a compromise was fashioned; a resolution was adopted authorizing the establishment of Trade Union Committee for Political Action, and recommending that affiliates support candidates who favoured the TLC's post-war policy.[17] Significantly, the statement of postwar policy adopted at the TLC convention read like the CCF's election manifesto.[18] King feared that unless the Liberal government moved quickly, it would loose the TLC's traditional support to the CCF.

In response to the political realignment two provincial governments enacted compulsory collective bargaining legislation in order to co-opt organized labour's support for the CCF. Ontario Labour Minister Henan's 1942 promise to enact such legislation was delayed for an entire year, as the provincial government referred the matter to a Select Committee, which held hearings regarding the appropriate form and content of the legislation.[19] This delay contributed to the Liberal's crushing defeat in the 1943 election. Eclipsing the Ontario government by one month, the British Columbia government modified existing legislation so as to provide for the first effective Canadian compulsory collective bargaining regime.[20] Although differing widely both in form and content, the two provincial statutes demonstrated that such legislation was appropriate for the Canadian industrial relations environment. Moreover, a

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16 J.A. "Pat" Sullivan was the communist Secretary-Treasurer of the TLC. For an account regarding the struggle over the composition of the committee see Id., 92.

17 Coates, supra note 4, 144.

18 Horowitz, supra note 15, 59.

19 Select Committee on the Ontario Collective Bargaining Act (Proceedings and Report) Journal of the Legislative Assembly of Ontario, LXXVII, 20th Leg., 8th Session, 1943, Pt. 2, Appendix 2.

20 An Act to Amend the Industrial Conciliation and Arbitration Act, S.B.C. 1943, c.28.

public opinion poll taken in 1943 indicated that 82 per cent of organized labour and 53 per cent of the Canadian population as a whole supported the introduction of compulsory collective bargaining legislation.[21]

Public endorsement of collective bargaining and support for the CCF was not, however, a temporary wartime phenomena, but part of a larger shift in public opinion concerning the appropriate role of the state in the post-war economy. In 1943 the pre-eminent concern of the Canadian populace was the post-war reconversion to peace.[22] Since 1939 the major preoccupation had been winning the war, but by 1943 the inevitability of the Allied victory seemed assured. Thus, attention turned to reconversion, and "[e]veryone in the government, in the civil service, and in industry seemed afraid that the dislocation that would accompany reconversion would be marked with massive unemployment and unrest."[23] The urgency of the need to devise a solution to the reconversion problem, which was identified with the massive unemployment and industrial unrest at the end of the previous war, was emphasized by the fact that layoffs in war industries were already beginning to take place.[24] The strategy of repression, which successfully (if brutally) crushed the unrest of 1919, was outmoded in light of the altered political and economic conditions that obtained in 1943. Instead, the Canadian political economy of the latter part of the Second World War was propitious for the introduction of lasting institutional change.

During the war Canada developed a manufacturing base and became an

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21 Millar, supra note 7, 141, footnote 123.

22 J.L. Granatstein, Canada's War, The Politics of the Mackenzie King Government, 1939-45 (Toronto: Oxford U.P., 1975) 249-50.

23 Id., 250.

24 Millar, supra note 7, 85.

industrialized country.[25] The dominance of natural resources and agriculture had declined in the face of the rapid growth in the manufacturing sector.[26] Between 1938 and 1943 the real Gross Domestic Product (GDP) relating to manufacturing increased about 125 per cent, and in 1943 the proportion that manufacturing accounted for of the total GDP reached a peak of 32 per cent.[27] Also of great importance was the effect that this rapid growth in the manufacturing sector had on the labour market. Employment in manufacturing doubled between 1939 and 1943, reaching its zenith in 1944.[28] Concomitantly, the state's role in directing the war economy shattered traditional assumptions about the limited economic role of the state and replaced them by the belief that "the state could, and should, assume responsibility for sustaining high levels of employment and economic growth."[29] In turn, this transformation of the Canadian economy and the economic role of the state had a profound effect on Canadian society and politics.

The symptom of this change was the popularity of the CCF; however, the actual change consisted in a massive shift toward the left in public opinion - a shift which, with the exception of the United States, swept across the Western industrialized world.[30] The Conservative party responded to this shift by adding

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25 Paul Phillips and Stephen Watson, "From Mobilization to Continentalism: The Canadian Economy in the Post-Depression Period," in Michael S. Cross and Gregory S. Kealey (Eds.), Modern Canada, 1930-1980's (Toronto: McClelland and Stewart, 1984) 20-45 at 43.

26 Id., 22.

27 Id., 22.

28 Wallace Clement, "Canada's Social Structure: Capital, Labour, and the State, 1930-1980," in Cross and Kealey, supra note 25, 81-101 at 89.

29 David A. Wolfe, "The Rise and Demise of the Kevnesian Era in Canada: Economic Policy, 1930-1982" in Cross and Kealey, supra note 25, 46-78 at 46.

30 Reginald Whitacker, The Government Party: Organizing and Financing the Liberal Party of Canada, 1930-58 (Toronto: U. of T. Press, 1977) 137.

the modifier "Progressive" to its name and adopting a post-war platform which included social welfare and compulsory collective bargaining legislation. The CCF's success, which was that of a movement and not of a party, was vulnerable to the efforts of the traditional parties to recoup their losses by moving leftward.[31] What the CCF offered, and the Conservatives had only just adopted (leaving the Liberal party isolated), was a post-war reconversion programme which took account of the permanent alteration in the economy and reflected the new role of the state.

By mid-1943 King understood the implications of the popular concern for post-war reconversion and the general endorsement for a new role of the state. The political consensus he had sought previously to maintain had crumbled, and he recognized the necessity of the Liberal party's adapting to the changes to forge a new consensus if it was to survive in government. King recognized that the present situation demanded the type of reform legislation that he had promised in Industry and Humanity. King confided to his diary that the new political economy presented him with an opportunity to "redeem the time" lost in implementing his reformist programme.[32] Thus, he turned to the task of constructing a post-war settlement with which the Liberals could win the 1945 election.

The general mood of the country suggested that a fairly radical settlement was necessary to achieve a popular consensus. A national survey carried out by an advertizing firm in 1943 for a large private corporation, which subsequently came into the hands of the Liberals, "'seemed to indicate' that public opinion in favour of the nationalization of private enterprise 'was now close to a majority'."[33] However, a series of interviews with labour leaders conducted by

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31 Walter Young, The Anatomy of a Party: The National CCF, 1932-61 (Toronto: U. of T. Press, 1969) 8, 113.

32 Whitacker, supra note 30, 138.

33 Id., 142.

the same firm suggested that although labour distrusted the two traditional parties, in the main trade union leaders were not committed to a new economic system as the method for securing their post-war demands.[34] Thus, it appeared that a regulated capitalism might be sold as a substitute for public ownership. In determining the form of this new regulatory state, King called upon the expertise of the civil service, in particular W.C. Clark, the Deputy Minister of Finance, other members of the EAC and Jack Pickersgill, his personal secretary. The new political compromise between labour and capital would take the form of the welfare state. In general, as David Wolfe noted in his study of the rise and fall of the Keynesian era in Canada,

> [t]he terms of the compromise left the investment decision-making process in the hands of private enterprise in exchange for the adoption of economic policies to provide stable levels of employment and income for the mass of wage-earners. The key feature of the welfare state was the acceptance of an explicit obligation by the state to provide assistance and support for those individuals who were unable to participate in the labour market adequately enough to provide for their basic needs. This commitment included the institution of social insurance programs to deal with old age, unemployment, ill health, and a variety of disabilities. The post-war compromise also involved an explicit commitment by the state to recognize and support the democratic rights of trade unions to bargain collectively to improve the wages and living standards of their members and, in some instances, to participate directly in the determination of public policies.[35]

This new "welfare" state was to operate within a capitalist economy which, although developing its manufacturing capacity, was still primarily based on the export of staples, and which was to become increasingly integrated with the American economy.

In an attempt to provide details for the strategy of welfarism the National Liberal Federation was reactivated at an advisory council meeting in September 1943.[36] The resulting Liberal platform consisted of a strong emphasis on the

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34 Id., 142.

35 Wolfe, supra note 29, 47 (footnote omitted).

36 Whitacker, supra note 30, 146.

role of government spending in creating full employment, a national housing programme, a greatly expanded social security programme which would cover unemployment, accidents, ill-health, old age and blindness and a consideration of family allowances.[37] In addition, echoing the rhetoric of Industry and Humanity, the NFL proclaimed that "Labour is not a commodity but a partner in industry and a principal mainstay of national life" and went on to describe the post-war role of labour in terms of "labour-management councils, and the participation, wherever appropriate, of representatives of Labour on wartime boards and other agencies of government."[38] Most of the planks in the NFL platform were subsequently implemented. The throne speech of January 27, 1944, which Granatstein characterized as a landmark in the development of a social security state in Canada, contained the Liberal's social welfare programmes,[39] while Howe's White Paper on Employment and Income of April 1945 contained the Liberal's commitment to Keynesian economics. By contrast, the actual definition of labour's role as a "partner to industry" was much more controversial. Both the EAC and the Labour Department continued to object to the idea of bringing labour representatives onto major economic planning committees. As a substitute for introducing corporatist structures, King's government introduced compulsory collective bargaining, which, at its root, involved an affirmation of the adversarial system of industrial relations.[40] More importantly, the fact that compulsory collective bargaining was the sole concession to organized labour served to confine labour's role to industrial relations - just at a time when

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37 Id., 147; Granatstein, supra note 22, 274 and Wolfe, supra note 29, 54.

38 Whitacker, supra note 30, 147.

39 Granatstein, supra note 22, 275 and Wolfe, supra note 29, 53-54.

40 Whitacker, supra note 30, 148-49.

labour seemed sufficiently powerful to assert itself in the broader political economy.

The tendency within the literature on the development of Canadian labour policy has been to concentrate on a number of wartime considerations (for example, the need to placate an increasingly militant labour movement, the construction of a quid pro quo for continued wage restraint and the Liberal's need to co-opt labour's support for the CCF)[41] to explain the introduction of compulsory collective bargaining in Canada. Consequently, the extent to which compulsory collective bargaining was part of the post-war settlement has been overlooked. In so doing, the conventional account has failed to provide any guidance for understanding either the longevity of PC 1003 as the institutional model for labour relations in Canada or the actual provisions of the legislation that was introduced.

By contrast, if PC 1003 is placed within the context of an attempt to forge a post-war settlement it is possible to identify the general thrust of the Order. Although PC 1003 represented a fundamental change in Canadian labour policy in that for the first time the federal government compelled employers to recognize and bargain with duly elected trade unions,[42] it did not radically alter the balance of power to make it any easier for unions to obtain agreements or constrain managerial prerogatives. By introducing PC 1003 the government legislatively underwrote the gains made by organized labour through the exercise of its economic power during the war,[43] but in so doing (I shall argue) it channelled that power to minimize its potential to disrupt production. What PC

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41 MacDowell, supra note 2, 190-95 and Coates, supra note 4, 215-17.

42 Coates, supra note 4, 228.

43 Millar, supra note 7, 178-79 and J.A. Cameron and F.J.L. Young, The Status of Trade Unions in Canada (Dept. of Ind. Rel., Queen's Univ.: Kingston, Ont., 1960) 76.

1003 did was ensure, through the process of certification and the employers' duty to bargain with certified agents, that employers' could not exploit the reconversion to peace in order to crush trade unions. The Wartime Labour Relations Regulations provided that if a trade union won the majority support of the relevant employees it could force the employer to bargain with it; however, the extent to which it actually encroached upon the traditional prerogatives of management continued to depend upon the relative economic strength of the parties. Basically, PC 1003 was part of a post-war settlement which was "ultimately conservative and highly supportive of the existing political economy, although it was also creative and adaptive in the sense of re-establishing the system's equilibrium in the face of what was widely perceived on all sides as a challenge of very serious proportions."[44]

The Liberal's need to construct a settlement which did not radically alter the traditional prerogatives of business (i.e., the ability to determine investment and capital formation) set the outer limits to the collective bargaining regime. However, the form and content of the legislation which was eventually introduced was the result of compromises between the demands of various interest groups, the policy options before the government and the legacy of existing labour policy. Whilst the labour movement was surprisingly unified in its demands regarding the actual content of the legislation, business groups adopted a wide variety of somewhat contradictory proposals. Amongst the existing compulsory collective bargaining models the Liberals could look to were the two provincial statutes, the Wagner Act and the modified policy of the United States National War Labor Board. For recommendations designed to meet the peculiar features of the wartime Canadian industrial relations environment the government could refer to the majority and minority reports of the National War Labour Board and the commentaries produced by the EAC and the Department of Labour. Moreover,

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44 Whitacker, supra note 30, 150.

provincial input was obtained by convening a Dominion-Provincial Conference on the fall of 1943 to discuss the NWLB recommendations. The actual drafting of the Wartime Labour Relations Regulations was a microcosm of King's politics of compromise - so much so that the regulations were not issued until February 1944. In the second part of this chapter, the major options which were considered and the compromises between the various interest groups that were constructed will be identified and discussed.

II. Constructing the Labour Code

1. The Steel Strike

The Steel strike which erupted in January set the tone of industrial relations for the remainder of the year. The origins of the strike lay, in part, in SWOC's attempt to alter the bargaining structure of the steel industry.[45] The steel companies' preference for bargaining on a plant rather than industry-wide basis was reflected in the existing bargaining structure of the industry. Moreover, the government's wage control policy - with its emphasis on regional boards and the local comparability standard - tended to reinforce plant bargaining. From the outbreak of the war Charles Millard led SWOC in a campaign to minimize differentials and variations in conditions throughout the industry in an attempt to establish what was in effect industry-wide bargaining. Earlier skirmishes over the wage control policy (the Peck Rolling Mill dispute, for example) suggested that unless either SWOC or the government was prepared to modify its position, the steelworkers' were destined for a major confrontation with the government before the war was out.[46]

In March 1942 SWOC instituted its plan to circumvent the local comparability standard by having the locals at the Algoma plant in Ontario and the DOSCO plant

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45 MacDowell, supra note 4, 67.

46 For a discussion of the Peck Rolling Mills dispute, see Chapter 3, infra, text at notes 56 to 61.

in Nova Scotia apply to their respective regional war labour boards for declarations that steel was a national industry. That summer the Nova Scotia board reaffirmed the decision of the majority board in the Peck dispute that the local comparability standard should govern in the steel industry. The Ontario board, on the other hand, refused to resolve the issue, recommending instead that the matter be referred back to the parties for voluntary settlement. Dissatisfied with the responses of the boards, the steelworkers at both plants voted overwhelmingly in favour of strike action. In order to avert a nation-wide steel strike the government appointed a three member Royal Commission (called the Barlow Commission after its chairman) to conduct public hearings into the causes of the steel dispute in exchange for the steelworkers immediate return to work.[47]

As the year drew to a close and the Barlow Commission had still not issued its report, the steelworkers grew increasingly restive. In protest against the delay, on January 1, 1943, the Algoma steelworkers set a strike deadline of January 12. Two days before the strike deadline, the Commission released its report. Predictably - since the government failed to give any additional guidelines for interpreting the wage control order - the Commission's recommendations split along the same lines as the board in the Peck dispute. The majority refused to classify steel as a national industry and, rigidly applying the local comparability standard, did not find that the wages were substandard. By contrast, the minority report (written by King Gordon) adopted a flexible approach to the wage control order, recommending that wages be increased on the ground that the work was extremely arduous and that steel be declared a national industry in order to end the wage disparities which led to continued conflict.

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47 PC 8267, issued September 14, 1942, established the Barlow Commission chaired by Justice F.H. Barlow (of the Ontario Supreme Court), with J.T. Stewart (a lawyer practicing in St. Thomas, Ontario) as the management representative and J. King Gordon (a former professor at McGill and prominent member of the CCF) as the union representative.

The recommendations contained in the majority report stiffened the steelworkers resistance to the government's wage control policy. Adhering to their strike deadline, the Algoma workers walked off the job - to be followed the next day by the DOSCO and Trenton steelworkers.[48] Steel production was at a virtual standstill as 13,000 steelworkers struck against the government's wage control policy.

In sharp contrast to the policy of non-intervention evidenced in the earlier goldminers' strike, the government responded quickly to the steel strike by convening a conference of the interested parties in Ottawa. King's skill as a conciliator was sorely tested, for not only did he have to obtain concessions from a frustrated union, he also had to persuade cabinet hardliners to renege on their commitment to maintaining the wage ceiling at any cost. Howe, Isley and Mitchell endorsed the rigid and legalistic interpretation of the wage control order proposed in the majority report of the Barlow Commission; whereas King believed that it was necessary to adopt the minority's more flexible approach and make concessions to SWOC in order to end the strike.[49] The difficulties involved in forging an agreement were exacerbated by Millard's demand that Mitchell be forced to resign. In a bid to distance the government from the dispute, King proposed that the dispute be referred to a reconstituted, politically independent NWLB vested with the authority to resolve the issue of wages in exchange for the steelworkers' immediate return to work. Although Isley believed that any concession would herald a general attack on the wage control policy, Howe persuaded Mitchell that King's compromise was necessary for continued production. Having successfully diffused the Cabinet's opposition, King now turned his attention to fashioning an agreement with the union.

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48 The Trenton Workers wanted to be declared part of basic steel production and thus entitled to a national rate on par with Algoma and DOSCO workers.

49 Pickersgill, supra note 9, 467; MacDowell, supra note 4, 74-5.

After a series of meetings and a flurry of correspondence, Millard and King agreed upon a seven point Memorandum of Understanding which included the designation of steel production as a national industry, an authorization that the union could present its case for wage increases to a reconstituted NWLB and an agreement that 55¢ per hour was to constitute the minimum rate throughout the industry.[50] However, the steelworkers ratification of the memorandum was not immediately forthcoming; it took the personal authority of Millard to persuade his membership to accept the terms of the memorandum. The DOSCO workers voted to accept the Memorandum on the condition that, if the NWLB's decision was not to their satisfaction, they would strike.[51] The Algoma workers initially voted to reject the Memorandum; but they were ultimately persuaded to return to work on the same basis as their DOSCO counterparts.

Mosher, who was a member of the NWLB, was incensed with the steelworkers' threat to strike if the new NWLB failed to produce an acceptable decision. Placing the steelworkers' ultimatum within the context of increasing rank and file strike action, Mosher threatened to resign as President of the CCL and pull the CBRE from the Congress unless union officers, particularly those affiliated to the CIO, began to exercise discipline against members who threatened to or engaged in illegal or unofficial strikes. Failure to discipline or repudiate unofficial action would, he warned, be used by organized labour's opponents to kill the compulsory collective bargaining legislation proposed by

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50 Public Archives of Canada, (hereafter PAC) W.L.M. King, Memoranda and Notes, MG 26, J4, 282, 2935, C193495 to C193502, statement by the Prime Minister regarding the basis of settlement of the strikes at Sault Ste. Marie, Sydney and Trenton; Millard to King, Jan. 22, 1943 with the memorandum attached; King to Millard, Jan. 22, 1943 and the transcript of the proposed interpretation of the memorandum.

51 MacDowell, supra note 4, 79-80.

the Ontario government.[52] Mosher understood that union responsibility for concerted employee activity was a pre-condition for compulsory union recognition.

On February 11, 1943 the NWLB was reconstituted in accordance with the steel memorandum.[53] Justice McTague, the former conciliation advisor to the Minister of Labour, was appointed chairman of the three member board, which was to function more in the nature of an industrial court than a representative board.[54] King had confidence that McTague, whom he felt shared his concern that CIO unionists - Millard, in particular - were using industrial relations to make political gains for the CCF, would be able to resolve the dispute without further alienating organized labour. J.J. Bench, a management consultant and prominent liberal, and J.L. Cohen were appointed industry and labour sidemen respectively.[55] As stipulated in the agreement, SWOC applied to the Board requesting that steel be designated a national industry and that the full cost of living bonus calculated on the 1939 index be added to the 55¢ hourly rate. But before issuing its decision, the NWLB issued a "seemingly innocuous"[56] procedural amendment which allowed the parties (with the consent of the relevant regional board) to appeal the decision of a regional board to the NWLB. In effect, this meant that it was no longer necessary for an industry to be designated as national before presenting its case to the national board.

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52 PAC, MG 28, I103, Box 2, CIO-1943, Memorandum to Pat Conroy, Sec.-Treasurey, CCL, from A.R. Mosher, President of the CCL, February 6, 1943.

53 PC 1141 reconstituted the NWLB.

54 Can., H.C. Deb., 1943, 1889, per MacInnis.

55 Bench was a company lawyer, in addition to founding the Niagara Institute of Industrial Relations, see Millar, supra note 7, 84.

56 MacDowell, supra note 4, 82.

The NWLB issued a unanimous report on March 31. Instead of merely implementing the Memorandum of Understanding the Board formulated its own independent position. It refused to designate steel a national industry - claiming that the designation in the Memorandum was merely a procedural technique to facilitate a hearing before the national board rendering national designation unnecessary. However, the Board failed to mention that the amendment was made after the steelworkers presented their case. The NWLB felt pulled in opposite directions by the need both to maintain the wage ceiling and a desire to ensure SWOC's acceptance of the decision by granting a hefty wage increase. Accordingly, it implemented a compromise solution by exploiting the ambiguity in the language of the Memorandum as to whether the 55¢ hourly minimum was exclusive or inclusive of the bonus. It fixed a minimum base rate of 50¢ an hour and imposed an industry-wide bonus of an additional 9¢ an hour.[57] The close adherence of both Bench and McTague - notorious wage hardliners - to the wage ceiling was expected.[58] However, organized labour was shocked that Cohen (the author of the minority report in the Peck dispute) endorsed the NWLB report.[59] Millard, who exercised his authority to persuade his members to accept the terms of the Memorandum against their better judgement, felt betrayed both by the Board and the government.[60]

The government's technique of ad hoc intervention to avoid articulating a generally applicable labour policy was completely discredited by both its and the

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57 See the Memorandum of Understanding, supra note 50 and MacDowell, supra note 4, 76-7.

58 Millar, supra note 7, 139-40 and 421.

59 G.M.A. Grube, "Doublecrossing the Steel Workers" 23 Canadian Forum 78-80 (1943) 80.

60 For a discussion of Millard's attempts to persuade his members of his good faith concerning their best interests during the wage negotiations with the government see MacDowell, supra note 4, 83-4.

Board's actions during the steel dispute. To preclude further action by SWOC (and the labour movement in general) against its labour policy, on April 9 the government announced that the NWLB was authorized to conduct a public inquiry into and issue a report concerning labour relations and wage conditions. This report, the government intimated, would form the basis of its revamped labour policy.

The labour movement's willingness to curb wage militancy in exchange for collective bargaining legislation was illustrated both by Mosher's concern that the steel-related strikes would jeopardize the implementation of the promised Ontario legislation, and by SWOC's decision not to organize further strike action in light of the public inquiry. Moreover, the steel strike was an example of the shift in the location of power within the industrial union movement which had taken place since the outbreak of the war. The established and strongly disciplined unions, such as Mosher's CRBE, were displaced by the new industrial unions, such as SWOC and the United Automobile Workers (UAW), which owed their strength to the wartime manufacturing drive. The younger unions, which directed most of their energy to organizing campaigns, had not developed internal structures for exercising official control over membership action. Both business and government would later capitalize on this to develop a platform of responsible trade union leadership as a necessary precondition for any concessions to organized labour.

Perhaps most significant in terms of its effect on the ultimate design of the agency authorized to administer labour policy, was the reconstruction of the NWLB which resulted from the steel strike. Although conforming to the established pattern of tripartism, King departed from past patterns by appointing a permanent board which was independent both from the department of labour and the political office of the Minister. By paring the 12 member board down to three members and substituting a judge for the minister as chairman, the Board's autonomy from the government was enhanced while expert knowledge and party

representation was retained. By ensuring the legitimacy of its chosen instrument for conducting the public inquiry, the government contributed to the acceptability of the final report. In any event, even if the Board failed to construct a general consensus regarding the labour policy, on the most cynical interpretation, the inquiry would at least allow the parties to let off steam and postpone further confrontation until the government fashioned a compromise.

2. Options - Compulsory Collective Bargaining in Ontario, British Columbia and the United States

Shortly before the NWLB inquiry got underway, Canada saw the introduction of compulsory collective bargaining regimes in two of its provinces. Although shortlived, the provincial schemes were important as they provided very different models of compulsory collective bargaining - thereby presenting the NWLB and subsequent policy-makers with a range of options from which to draw when constructing the federal legislation. Essentially, the British Columbia scheme was a continuation of the pattern established by the majority of the provinces in the 1930s and consisted of yet another amendment to the provinces compulsory conciliation statute. By contrast, the Ontario legislation (which was the product of a public inquiry) was closely modelled on the Wagner Act - although it contained several unique elements. Indeed, the Wagner Act continued to exert a powerful influence upon the legislative demands of the Canadian labour movement, even though wartime developments had significantly shifted the emphasis in American collective bargaining policy. When designing its own compulsory collective bargaining legislation the federal government turned to these models. But rather than wholeheartedly adopting a particular regime, it took an eclectic approach - borrowing elements from each jurisdiction in order to construct a new system. In what follows the provincial statutes and the American policy will be briefly described in order to provide a basis for identifying the origins - and

the rationale behind - the various policy options considered by the federal government.

i) Ontario

In an attempt to allay the discord evinced in the initial attempt to draft a collective bargaining statute, the Ontario premier appointed a bipartisan Select Committee of the Legislature to conduct public hearings and come up with a suitable draft bill.[61] At the hearings representatives of organized labour advocated legislation along the lines of the Wagner Act.[62] The trade union movement was particularly concerned that the legislation contain adequate prohibitions against company unions. Since the province had announced its intention to introduce compulsory collective bargaining legislation employers began to establish employee committees and to sign collective agreements with them in order to prevent the certification of bona fide trade unions. But even more deplorable from organized labour's point of view was Cohen's suspicion that the federal Department of Labour was honouring these "sweetheart" agreements by refusing to appoint conciliation boards in disputes where a collective agreement subsisted - even in cases where the committee was established with employer connivance.[63]

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61 Millar, supra note 7, 74-79. George Burt of the UAW retained J.L. Cohen to prepare a draft collective bargaining bill. Heenan then offered to pay Cohen's fees out of government coffers. However, business interests objected, claiming that Cohen's presence indicated a pro-union bias. Although Cohen's draft was subsequently watered down by provincial officials, business continued to demand substantial modifications to the draft bill.

62 For a transcript of the proceedings see, Proceedings of the Select Committee concerning Bargaining between Employers and Employees, Journal of the Legislative Assembly of Ontario, supra note 19; the CCL's brief at 445 and the TLC's brief at 563. See also PAC, MG28, I103, 211, 211-6, the CCL's Memorandum on Collective Bargaining submitted to the Select Committee.

63 PAC, A94, 31, 2918, J.L. Cohen to Reid Robinson, Pres. of the Int'l. Union of Mine, Mill and Smelter Workers, Dec. 10, 1942; PAC MG28, I103, 84/381, CCL Executive Council Minutes, Nov. 21, 1942.

Business interests appearing before the Select Committee were adamantly opposed to legislation modelled on the Wagner Act. However, in a strategic retreat from outright opposition, the Ontario Division of the CMA offered a "moderate" position.[64] It argued that any compulsory collective bargaining legislation should permit employee representation plans and works councils (euphemistically known by the Association as "independent" unions) and that the principle of proportional representation, rather than majority rule, should govern the selection of bargaining agents. In addition, it advocated that employers should be able to assist in the formation of unions, all forms of union security provisions should be outlawed, prohibitions against unfair practices by employers should be matched by complimentary prohibitions against trade unions and their members, and strikes and lockouts should be banned for the duration of the war. Perhaps most significantly, the CMA demanded that any legislation declaring the legality of trade unions and compelling collective bargaining should be matched by the imposition of legal responsibility upon trade unions requiring them both to carry out collective agreements and to ensure that their members adhere to the terms of the agreement. Supplementing its demand for the legal responsibility of trade unions, the CMA also demanded that trade unions file their constitutions, by-laws and a list of their officers in order to obtain the benefit of collective bargaining legislation. This call for evenhandedness and legal responsibility were raised each time the CMA addressed the issue of compulsory collective bargaining.

Despite violent employer opposition,[65] the Ontario Collective Bargaining

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64 For the CMA's initial position see its letter to its members regarding the proposed collective bargaining legislation for Ontario, PAC, MG28, I230, ACC. 83/138, Jan. 11, 1943. For the brief actually presented to the Select Committee see, PAC, MG28, I103, 211, 211-8, the Submission of the Ontario Division of the CMA, Mar. 9, 1943.

65 Millar, supra note 7, 87.

Act[66] (which was largely based on the recommendations of the Select Committee) received Royal Assent on April 14 - nearly one year after it was announced. But even more surprising than the introduction of the Act in the face of concerted business opposition, was the fact that the legislation showed little evidence of the government's having bowed to employer demands. With the exception of the agency of administration and the requirement that trade unions file their constitution and by-laws in order to obtain the benefits of the Act, the Ontario statute substantially resembled the Wagner Act. Although provincial precedents of requiring what was in effect trade union registration were followed, the Ontario Act was carefully drafted to ensure that both trade unions and collective agreements retained their common law status.[67] The CMA's demand that trade unions be held responsible for executing binding collective agreements was ignored.

The most prominent feature of the Ontario Act lay in its agency of administration - the Labour Court.[68] This Court, which consisted of a judge of the Supreme Court of Ontario sitting for a two-week period on a rotation system, had exclusive jurisdiction to examine, hear and determine all questions arising under the Act - although it could delegate its non-judicial functions and powers to the Registrar. The Court was responsible for determining the appropriate bargaining unit and certifying the bargaining representative on the basis of

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66 S.O. 1943, c. 4.

67 At common law trade unions were unincorporated associations and, hence, could neither sue or be sued, see A.W.R. Carrothers Collective Bargaining Law in Canada (Toronto: Butterworths), 501-514, 326-30. Moreover, the Privy Council held that in the event of the breach of a collective agreement the employees did not have recourse to the courts to enforce the collective agreement, but rather to resort to economic sanctions; Young v. C.N.R. [1931] AC 83. Section 3 of the Ontario Collective Bargaining Act retained this status.

68 By virtue of an amendment to the Judicature Act, R.S.O. 1937, c. 100, passed on April 14, 1943, a branch of the High Court called the Labour Court was constituted, S.O. 1943, c. 11, s.2.

majority rule. The certification procedure was triggered by an application either from a bargaining representative claiming to represent a majority of the employees in a unit or, in the case of a dispute between an employer and bargaining representative or a dispute in which two or more organizations contended for the bargaining rights over the same unit, by an employer. Once a bargaining representative was duly certified, the Court was responsible for ensuring that the employer fulfilled its duty to bargain in good faith. Bargaining rights were exclusive to the certified representative, although employees were entitled to present individual grievances directly to the employer. The term "bargaining representative" was defined to include any trade union or employees association that was not dominated, coerced or unduly influenced by the employer. Thus, the benefits of the Ontario Collective Bargaining Act were denied to any union, employee committee or works council that was unable to prove itself free from undue employer organization or control.

The Labour Court was empowered to construe the provisions of any collective agreement (although the agreements were not binding). It could exercise a range of remedial powers - from injunctive relief to reinstatement - in order to fulfill its responsibilities under the Act. In addition, it was responsible for prohibiting unfair practices on the part of the employer, which included discrimination against employees on account of trade union membership or activity and seeking to enter into "yellow dog" contracts. Ignoring the CMA's appeal for evenhandedness, the Act did not provide complimentary unfair practices on the part of trade unions. The Court could order decertification of the bargaining representative if it was established that the representative no longer commanded majority support. However, to ensure a modicum of stability in the collective bargaining process, except in cases of fraud, an application for decertification would not be entertained until a year had elapsed from the date of certification.

A large number of employees were not entitled to the benefit of the Collective Bargaining Act. The Act did not apply to agricultural workers,

domestic servants, police officers, Hydro-Electric Power Commission of Ontario, Municipal, school board or commission employees.[69] In addition, persons employed in a confidential, supervisory of official capacity were excluded from the definition of employee and thus denied the benefit of the Act. This class of exclusions was justified on the ground that collective bargaining would generate conflicts between such employees' status as employees and their fiduciary obligations to management.

The legislation permitted closed shop agreements; however, it said nothing about strikes, lockouts or picketing. If a trade union seeking certification was engaged in a strike that was unlawful according to the provincial conciliation legislation, it was feasible for the Labour Court to refuse to entertain the application until the unlawful activity was terminated. Since the Court was to guide itself by what was "just and agreeable to equity and good conscience", it had considerable discretion to develop standards for applying the Act.[70] In fact, as Millar's examination of the application of the Act demonstrates, the

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69 However, a municipality, school board or commission could, upon application, bring their employees within the scope of the Ontario Collective Bargaining Act, s. 24(e).

70 Archives of Ontario, Labour Court files 1943-44, RG27, VI-2, Box 3, File B-7, Ontario Department of Labour, Industrial Relations Section, Ontario Collective Bargaining Act, 1943, Explanatory Memorandum.

Labour Court's legalistic and conservative exercise of discretion led to organized labour's virtual repudiation of the legislation.[71]

ii) British Columbia

The British Columbia collective bargaining scheme - which predated its eastern counterpart by one month - differed from the Ontario Act both with respect to its mode of implementation and its content. Unlike the foofaraw accompanying the Ontario legislation, the British Columbia government responded to the lobbying efforts of the provincial trade union movement[72] by quietly passing an amendment to the Industrial Conciliation and Arbitration Act.[73] In effect, the British Columbia compulsory collective bargaining scheme was superimposed upon the compulsory conciliation legislation and the 1937-38 amendments which guaranteed an employee's right to join a trade union of his or her choice. Consequently, the existing two-part conciliation process, the requirement that a trade union register its constitution, by-laws and the names of its officials, complimentary prohibition of unfair practices on the part of

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71 Although some elements in the labour movement rejected the Act outright (for example, Millard felt the Act fell well short of what organized labour should settle for; PAC, MG28, I103, 221, 211-8, Millard to Mosher, April 5, 1943), in the main organized labour applauded it. See PAC, MG28, I103, 199, 199-20, Mosher to Gordon P. Conant (Premier), July 20, 1943. However, several months after its enactment, organized labour became very critical of the legalistic manner in which the courts were administering the Act. In particular, the CCL protested against the requirement of counsel for arguments before the Labour Court, PAC, MG28, I103, 199, 199-20, A.R. Mosher and Pat Conroy to Peter Heenan (Ontario Minister of Labour) July 20, 1943. In addition, the TLC wanted the Act suspended as it was being use to promote company unions PAC, MG28, I103, 84/131, TLC Executive Council Minutes, Dec. 17, 18, 19, 1943, para. 6. For the CCF's position see C.M.A. Grube, "Legislation for Labour," Cdn. Forum May 1943, 30-31. For a general account of the Labour Court's administration of the Act see Millar, supra note 8, 115-72.

72 PAC, MG 30, A94, vol. 34, 2973, Legislative Brief submitted by John Stanton (on behalf of the BC Executive TLC, Vancouver Labour Council and CCL among others) to John Hart (Premier of British Columbia).

73 S.B.C. 1943, c.28 amending S.B.C. 1937 c.31.

both employers and employees, and reliance upon criminal penalties to ensure compliance were essential features of compulsory collective bargaining in British Columbia. What the 1943 amendment added was a method of ensuring that an employer bargain with the representative of the majority of his or her employees.

Unlike the Ontario or Wagner Act, the British Columbia legislation did not establish an independent agency responsible for determining the appropriate bargaining unit or certifying the bargaining representative. Instead, it provided a mechanism whereby the Minister of Labour would confirm the election of a bargaining representative and then issue a notice requiring the employer to negotiate. The principle of majority rule was to govern the selection of bargaining representatives. In cases where a union alleged that it represented a majority of the employees affected, an election was not necessary if proof was forthcoming that the majority of the employees had been members in good standing for a minimum of three months. Although this provision was characterized as a privilege for trade unions (since they did not need to conduct representation elections), the requirement of three months membership prior to a certification application tended to inhibit organizing drives. Once the Minister confirmed the election, the bargaining representative had exclusive bargaining rights and the Minister was required to notify the employer to begin negotiations. If the employer failed or refused to begin negotiations within 21 days of receiving the Minister's notification it was liable, upon summary conviction, to a maximum fine of $500, a maximum sentence of one year, or both. Although the parties were responsible for establishing the appropriate bargaining unit, the Act provided that if there was a trade union practice of representing a group of employees on a craft basis, the craft was to be severed from any larger group for the purpose of selecting a bargaining representative.

Although the Ontario and British Columbia statutes differed in terms of their mode of administration, technique of enforcement and overall policy, they shared a commitment to the principles of majority rule and exclusive rights. In

addition, they resembled one another in two further respects - by providing a procedure for revoking the bargaining rights of an elected representative and prohibiting company unions. The British Columbia concession to bargaining stability was weaker than that of its Ontario counterpart, as it only required six months to elapse before the Minister would entertain a revocation application. While both statutes prohibited company unions, they did so by radically different methods. Instead of excluding a company-dominated union from the definition of a bargaining representative, the British Columbia statute contained a specific offence directed at employers which consisted of dominating or interfering with the formation of administration of an employee organization.

The response to the British Columbia Act was rather low-keyed, possibly because many fewer trade unions availed themselves of it than took advantage of the Ontario Act. In a letter to Percy Bengough (President of the TLC) Cohen outlined some of his major objections to the Western scheme.[74] He was critical of the fact that the administration of the compulsory collective bargaining provisions was vested in the Minister of Labour, who had virtually unfettered discretion. Ministerial administration, Cohen pointed out, was subject to the winds of political fortune, and thus not the best mechanism for developing and applying a principled labour policy. He also objected to the use of criminal penalties imposed via the police courts to enforce trade union rights - for experience under the IDI Act and the provincial freedom of association statutes had demonstrated that such a procedure was not suitable for ensuring compliance. Perhaps most significantly, Cohen not only criticized the conciliation process as lengthy and clumsy, he questioned the necessity of appending compulsory conciliation, with its accompanying cooling off provision, to a system of collective bargaining. He noted that the case for compulsory conciliation as part of collective bargaining legislation was particularly weak during the war,

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74 PAC, M6 30, A94, 389, 3112A, Cohen to Bengough, Dec. 22, 1943, 1-9.

when questions regarding wages were resolved through binding arbitration by the NWLB. In the end, the federal legislation which replaced the British Columbia scheme for the duration of the war obviated Cohen's first criticism; however, the second and third criticisms continued to apply with equal force to the federal provision.

iii) American wartime labour relations policy

Further complicating the federal policy-makers' choice of the most appropriate system of compulsory collective bargaining scheme for Canada was the American wartime labour relations policy. In contrast to the leftward shift in Canadian politics, the wartime realignment in American politics was to the right. The conservative opposition, which was embodied in the powerful anti-reform coalition in Congress, halted the New Deal in 1939 and strove to reverse the New Deal policies during World War II.[75] The New Deal collective bargaining policy was a central focus of conservative zeal. The war completed the transformation in labour policy that began to emerge with Leiserson's appointment to the NLRB in 1939.[76] According to Lichenstein, although the Wagner Act provided the legal basis for modern industrial unionism, it was the specific social and political context of the Second World War that created the institutional framework for the kind of collective bargaining which dominated in the post-war years.[77]

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75 Richard N. Chapman, Contours of Public Policy 134-45 (N.Y.: Garland, 1981) preface.

76 See Chapter 2, infra, text at notes 61-70.

77 Nelson Lichenstein, "Industrial Democracy, Contract Unionism, and the National War Labor Board," (Aug. 1982) Labour Law Journal 524-531, 524. For a complete discussion of the impact of wartime labour policy on the demands and organization of the CIO see Nelson Lichenstein, Labour's War at Home: The CIO in World War II (Cambridge: Cambridge U.P., 1982).

Immediately following the United States' abrupt entry into the war, Roosevelt called for a conference of leading management and labour representatives to decide on the labour policy which was to govern for the duration of the hostilities. The Wartime Labor-Management Conference was convened in Washington on December 17, 1942 and the following three point programme was agreed to: (1) a voluntary ban on strikes and lockouts for the duration of the war, (2) the peaceful settlement of all industrial disputes, and (3) the establishment of a tripartite board to settle all unresolved industrial disputes. Employers' efforts to have the issue of union security excluded from the board's jurisdiction were defeated, and Roosevelt subsequently issued a clarifying order to the effect that the board had jurisdiction over all disputes.[78]

The U.S. National War Labor Board (U.S. NWLB), which was composed of 12 members (four members each representing the public, labour and industry), was established by executive order on January 12, 1942.[79] It was responsible for adjusting and settling all labour disputes which might interrupt work that contributed to the effective prosecution of the war. The Board had no enforcement power; however, a firm that violated one of the Board's orders was liable to government seizure by executive order. Thus, the establishment of the U.S. NWLB introduced the first element of compulsion into the official labour relations policy. Generally, however, the Board emphasized the voluntary adjustment of disputes, and to that end it required that a dispute be referred to the U.S. Conciliation Service before the hearing it. Between 1943 and 1945 it

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78 Philip Taft, The AFL from the Death of Gompers in the Merger (N.Y.: Harper, 1959) 219-20.

79 The NWLB was modelled on the National Defence Mediation Board (NDMB), which provided a voluntary means for resolving disputes. However, a mere eight months after it was established, the NDMB was abolished, when the CIO pulled its support over the NDMB's decision over union security in the captive mines case. W.G. Rice, "The Law of the National War Labour Board," 9 Law and Contemporary Problems 470-90 (1942) 474-75 for a discussion of the NPMB.

displaced the NLRB as the institution primarily responsible for shaping American labour policy.[80]

On October 3, 1942 the U.S. NWLB was given the additional responsibility of administering the wage stabilization programme.[81] Prior approval by the Board was required for all wage increases and decreases. Six months later Roosevelt issued the "Hold-the-Line" Order, which further restricted the basis on which the Board could grant a wage increase. As in Canada, workers responded to the tougher wage policy with a wave of strikes - the vast majority of which were unofficial. The strikes in the bituminous coal industry sharply illustrated the extent of dissatisfaction with the wage control policy. John Lewis, the leader of the coalminers and former head of the CIO, declared that he no longer considered the strike ban binding. In turn, the coal strikes fuelled those elements within the Congress who were supporting a bill designed to redress the pro-union imbalances of the Wagner Act.[82]

The Smith-Connally War Labor Disputes Act,[83] which was enacted by the Congress over the President's veto,[84] was based on the premise that it was unscrupulous labour leaders who instigated strikes.[85] The Act made it an offence

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80 Christopher L. Tomlins, The State and the Unions Labour Relations Law and the Organized Labor Movement in America, 1880-1960 (Cambridge: Cambridge U.P., 1985) 258.

81 For a discussion of the intricacies of the wage control policy see Fred Witney, Government and Collective Bargaining (Chicago: Lippincot, 1951) 581-96.

82 For a discussion of the origins of the War Labor Disputes Act, see Chapman, supra note 75, 89-91, 144, 229-33.

83 U.S. Stat. 144 (1943).

84 Lichenstein, Labour's War at Home, supra note 77, 168.

85 Id., 168.

to strike against government-controlled firms (including those seized for violating an order of the Board), gave the U.S. NWLB the power to subpoena witnesses, banned direct union contributions to political candidates, required that unions issue written strike notice followed by a 30 day cooling off period, and provided for NLRB-supervised secret strike ballots. The American experience under both the compulsory cooling-off and the strike vote requirements duplicated that of their Canadian forebears, and had the opposite of the anticipated effect; the propensity to strike was increased rather than diminished.[86] Later additional powers were given to the U.S. NWLB, shifting the onus of enforcement from the executive to the Board. Henceforth the Board could impound union funds, seize property and suspend the union shop.

In opposition to the Congress's view that militant union leaders caused strikes, the U.S. NWLB was aware that the vast majority of wartime strikes were wildcat and that the trade union leadership (with the exception of Lewis) supported the voluntary strike ban. In fact, the cornerstone of the U.S. NWLB's collective bargaining policy was to emphasize the contract enforcing role of unions by fostering the institutional control of the union hierarchy over the rank and file.[87] Although the evolution of the U.S. NWLB policy-making was a complicated one involving the specific needs of the various sections of the labour movement,[88] three inter-related elements in its overall policy - union security, union responsibility and grievance arbitration - illustrate the shift

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86 Chapman, supra note 75, 233 and see also James Gross, The Reshaping of the NLRB (Albany: SUNY 1, 1981) 245, where the author discusses Millis (the chairman of the NLRB) objections to the strike vote. For the Canadian experience under the comparable measures see Chapter 3, infra, text at notes 143-151.

87 Lichenstein, "industrial Democracy", supra note 77, 528.

88 Id., 528.

in emphasis from economic reform and industrial democracy to a concern with industrial peace and continued production.[89]

The first major issue confronting the U.S. NWLB was union security. In general the Board followed what Witney referred to as a "neutral approach"; viz., its practice was to institutionalize existing industrial relations patterns rather than to develop new principles.[90] Thus, if a collective agreement contained a union security clause it was continued for the duration of the war. However, in cases where the collective agreement was silent regarding union security the Board was forced to devise a policy. Employers were opposed to the inclusion of union or closed shop provisions where none previously existed; while the unions argued that they should receive a measure of security beyond exclusive bargaining representation now that they had voluntarily renounced their right to strike. Trade union leaders feared that they could no longer retain existing members' loyalty or organize new workers since wages, among other basic conditions of employment, were being set by the government. The compromise finally devised by the Board was a maintenance of membership for the duration of an agreement, provided that members did not exercise their option to withdraw from the union during a 15 day escape period at the outset of the new agreement term.[91]

Significantly, the principal ground upon which the U.S. NWLB declined to direct maintenance of membership was "union irresponsibility." This concept played a central role in the Board's labour policy. According to the U.S. NWLB's

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89 Tomlins, supra note 80, 247; Lichenstein, supra notes 84 and 87.

90 Witney, supra, note 81, 554 and 563.

91 National War Labor Board, The Termination Report of the NWLB; Industrial Disputes and Wage Stabilization in Wartime, January 12, 1942 - December 31, 1945 (Washington: Gov't. Printing Office, 1947) 81-93. The U.S. NWLB also utilized the check-off as a form of union security, see Witney, supra note 81, 556-59.

Termination Report, the test of union responsibility inhered in the "expressed policy of the union to cooperate with management in the keeping of agreements, in maintaining discipline, and in improving production."[92] In practice the test of responsibility was whether the no strike pledge was upheld. Moreover, the test lay not so much in the failure of a union official to avoid a strike as in the lack of a conscientious effort to do so.

Since strike avoidance was the key element in the concept of union responsibility, some sort of mechanism for resolving disputes that arose during the term of a collective agreement without resorting to economic sanctions was necessary. To this end, the U.S. NWLB elaborated a system, first worked out in the pre-war garment and needle trades, which removed industrial disputes from the shop floor and provided a set of formal bureaucratic procedures to resolve them.[93] The Board favoured a multi-stage grievance procedure with binding arbitration by an impartial umpire as the final step; although it was flexible as to the exact structure of the procedure - leaving the decision concerning the number of stages, the selection of the arbitrator and the scope of arbitration to the parties themselves. Where the parties failed to agree to the scope of arbitration the Board would spell it out. However, the Board made it clear that the jurisdiction of the arbitrator did not extend to modifying, altering or amending the collective agreement. Hence the arbitrator's jurisdiction was limited to rights disputes which involved the interpretation and application of a

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92 The Termination Report of the NWLB, supra note 91, 94.

93 Lichenstein, supra note 87, 528. See also Jesse Freidin and Francis J. Ulman, "Arbitration and the National War Labor Board," 58 Harvard Law Review 309-60 (1943-44) 341-43, and David Feller, "A General Theory of the Collective Agreement," 61 California Law Review 663-856 (1973) 745-47 for a discussion of the prevalence of grievance arbitration clauses before, during and after the war.

collective agreement.[94] Thus, the distinction between interest and rights disputes assumed central importance in American labour policy.

Management objected to grievance arbitration on the ground that it interfered with its prerogatives. On the other hand, the union asserted its right to bargain collectively and to be consulted in connection with decisions involving working conditions. In an attempt to delineate the scope of management prerogatives, the U.S. NWLB stated that:

> Changes in general business practice, the opening or closing of new units, the choice of personnel (subject, however, to seniority provisions), the choice of merchandize to be sold, or other business questions of a like nature not having to do directly and primarily with the day-to-day life of the employees and their relations with their supervisors, shall not be the subject of grievances and shall not be arbitrable.[95]

Management continued to maintain unrestricted authority over the formulation and implementation of enterprise policy and in exchange unions were granted a voice in the determination of the conditions of employment of their members. Moreover, the adoption of the grievance arbitration system was so universal "that its development seemed a natural and inevitable evolution of a mature system of industrial relations,"[96] rather than a conscious policy decision. According to Lichenstein, its rapid acceptance derived, in part, from the fact that trade unions found grievance arbitration useful for policing the collective agreement without having to resort to frequent and debilitating confrontations with management.

During the war the NLRB shared the War Labor Board's tendency to combine restraints on unions with a continued respect for a broad conception of

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94 Freidin and Ulman, supra note 93, 347.

95 Id., 348 quoting from the U.S. NWLB's decision in Montgomery Ward and Co., NWLB No. 3930-D (1940), 10 War Labour Reports 415, 420 (Aug. 20, 1943).

96 Lichenstein, supra note 84, 174.

management prerogatives.[97] Central to the decision-making of both boards was the idea that a system of industrial jurisprudence could resolve shop floor conflict and harmonize workers' and managements' interests.[98] The key to such a system was the collective agreement, and a responsible union was one which fulfilled its contractual obligations. The emphasis on the sanctity of the collective agreement and the stress on continuous production which was to be furthered by a grievance arbitration system which guaranteed fundamental management prerogatives, persuaded business that collective bargaining had advantages in terms of industrial peace and stability.[99] On the other hand, the generalization of union security provisions dramatically increased the size and financial stability of industrial unions, although at the cost of accelerating the bureaucratic tendencies within them.[100] The transformation of American labour policy which was signalled by Leiserson's appointment to the NLRB in 1939 was completed, with the help of the War Labor Board, by the end of the war.

In 1943 Canadian policy-makers were confronted with various systems of compulsory collective bargaining which differed both in terms of their actual provisions and their underlying policy. The Ontario Collective Bargaining Act followed the Wagner Act in that its primary thrust was to foster the recognition of trade unions in order to further collective bargaining. It differed from the Wagner Act primarily in its agency of enforcement. Moreover, the Ontario legislation ensured that both unions and collective agreements retained their

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97 Thomlins, supra note 80, 263.

98 Lichenstein, supra note 87, 528.

99 Milton Derber, The American Idea of Industrial Democracy 1865-196 (Chicago: Univ. of Illinois Press, 1979) 393.

100 Lichenstein, supra note 84, 80.

common law status, such that the union was not legally responsible for upholding the collective agreements or the actions of employees nor was the collective agreement legally enforceable. This was in marked contrast to the labour policy in the U.S. during the war, which placed the contract and the union's contract-enforcing responsibility at the centre of collective bargaining. This contrast between the Ontario Act and the American wartime labour policy, illustrates a policy shift from the protection of the nascent labour movement to the encouragement of collective bargaining and the development of administrative techniques for the peaceful resolution of industrial disputes. This transformation in policy was possible because the language of the collective bargaining legislation was sufficiently broad to enable the administrative agency to exercise its discretion in order to give content to the legislative framework. Thus grievance arbitration, contract observance, union security and union responsibility became key features of American collective bargaining policy.

Somewhat paradoxically, although the federal government followed Ontario by instituting a public inquiry in order to construct a consensus concerning collective bargaining policy, it borrowed much more heavily from the British Columbia legislation than the Ontario Act. Like British Columbia, it retained the traditional Canadian emphasis on evenhandedness, compulsory conciliation and criminal sanctions as the method of enforcement. Moreover, in line with their central preoccupation with industrial peace, federal policy-makers incorporated those aspects of the American wartime policy which stressed continuous production - in particular, the grievance arbitration system, the sanctity of the collective agreement and union responsibility. Indeed, Canadian policy-makers went a step further than their American counterparts by making these features compulsory elements in the collective bargaining legislation.

The following discussion of the NWLB public inquiry, the resulting reports and the federal drafting process demonstrates that the federal government adopted

those elements of existing systems which constrained labour's use of its economic power to disrupt production without placing similar constraints on the employer's superior power.

3. The National War Labour Board Inquiry and Reports

Between April 15 and June 27 the NWLB conducted its public inquiry - hearing over 38 briefs from labour organizations, business interests, employee associations and government agencies. The Board's mandate was to inquire into and report on labour relations (directing its attention to PC 2685 in particular) and the government's wage control policy. The inquiry was not, however, as large a concession to organized labour as it initially appeared to be. First, it was redundant - for less than a month had passed since the Select Committee of the Ontario legislature completed public hearings into compulsory collective bargaining. Moreover, the NWLB inquiry could not benefit from the experience under the provincial compulsory collective bargaining statutes since the Ontario Act was not yet operating and insufficient time had elapsed under the British Columbia scheme to evaluate it. Thus, the NWLB inquiry added nothing new to the collective bargaining debate; tending, instead, to emphasize themes - the agitator theory of industrial unrest, the demand for evenhandedness in the treatment of industry and labour, and the notion of union responsibility - discernable throughout the history of Canadian labour policy. But most importantly, the position of the majority of the Board concerning wage control was implicit in its composition - for both McTague and Bench were notorious wage hardliners.[101]

Even before the hearings were completed the government had to act to legitimize the inquiry to organized labour. Organized labour strongly objected to Bench's presence on the NWLB arguing that in his capacity as a company lawyer he had advised employers to establish company unions and enter into collective

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101 Millar, supra note 7, 140-41.

agreements with them.[102] Bowing to labour's demand, the government "promoted" Bench to the Senate and appointed Leon Lalonde in his stead.[103]

The newly constituted Board was unable to achieve a consensus; it split radically over wage controls and significantly, though less profoundly, over collective bargaining. Two reports were issued, differing in their assumptions regarding the value of collective bargaining and the causes of industrial unrest, and, consequently, advocating different collective bargaining regimes. The majority report (co-signed by McTague and Lalonde) rested on the premise that collective bargaining was instrumentally valuable for achieving industrial peace and stability. Hence, it recommended legislation designed to foster institutional stability and prevent industrial unrest. By contrast, the minority report (authored by Cohen) regarded collective bargaining as intrinsically valuable as a participatory process and, thus, advocated measures that promoted trade unionism and participation in the running of the enterprise. The two reports presented very different visions of collective bargaining; visions that were irreconcilable - as the subsequent controversy involving McTague and Cohen illustrates.

At the hearings, organized labour and its supporters identified dissatisfaction with the government's wage control policy and the lack of any legislative machinery to resolve collective bargaining disputes as the primary cause of wartime industrial unrest.[104] Both the TLC and CCL emphasized the refusal of some employers to recognize unions, employer discrimination against union members and the formation of company unions as the root cause of collective

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102 Id., 84.

103 Lalonde was a lawyer who practiced in both Windsor and Montreal, see L. G. 1943, 577.

104 Canada Wartime Information Board, Summary of the Proceedings of the National War Labour Board, Canada Labour Library, 14. Heretofore referred to as the NWLB Summary.

bargaining disputes.[105] Of the various labour organizations appearing before the Board, the TLC presented the most detailed recommendations concerning the content of compulsory collective bargaining legislation. However, with the exception of the Canadian and Catholic Federation of Labour[106] and employee associations,[107] the vast majority of labour organizations and their supporters advocated legislation along the same general lines as that recommended by the TLC.

The legislation proposed by the TLC contained several features of the Ontario Collective Bargaining Act such as: third party determination of the bargaining unit, majority and exclusive rule, certification without challenge for one year, the prohibition of company unions, the exclusion of supervisory employees from the scope of the legislation, the legal duty to bargain regardless of the existence of a strike or lockout, the right of the parties to enter into an entire range of union security arrangements, the abolition of the common law doctrine of restraint of trade, the retention of the common law status of trade unions, the prohibition of a range of employer unfair labour practices and the authority of the body administering the legislation to exercise remedial power.[108] The scheme proposed by the TLC departed from the model of the Ontario Act by substituting an administrative tribunal for the Labour Court, abolishing the requirement that trade unions register and also recommended criminal penalties be imposed against employers violating the legislation. Most

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105 Proceedings of the National War Labour Board Public Inquiry into Labour Relations and Wage Conditions (Ottawa: Kings Printer, 1943) 13 vol. TLC brief at 54-84 and CCL brief at 119-35. Heretofore the NWLB Proceedings.

106 Id., Canadian and Catholic Federation of Labour brief, 144-52.

107 NWLB Summary, supra note 104, 7. The employee associations presenting briefs included the Workmen's Committee of the Consolidated Mining and Smelting Company, Cimico Employees Association, Association of Employees of the Canadian Car and Foundry Co. Ltd. and the Shawinigan Water and Power Co. Association.

108 NWLB Proceedings, supra note 105, TLC brief 9 67-75.

significantly, under the probing of Cohen, the TLC acknowledged for the first time that it would be willing to agree to a statutory ban on industrial action for the term of a collective agreement in exchange for compulsory binding grievance arbitration. Moreover, the CCL agreed with the TLC in this respect, and suggested that the arbitration function might be assumed by the NWLB.[109]

Unlike the general unity within the labour movement, business interests appearing before the inquiry varied in their presentations from the outright rejection of compulsory collective bargaining legislation to a grudging acceptance of a constrained version of compulsory collective bargaining legislation emphasizing union responsibility and evenhandedness.

Leading the hardline group,[110] the CMA rejected compulsory collective bargaining modelled on the Wagner Act arguing that it would promote rather than diminish industrial unrest. The CMA declared the "[t]he suggestion that non-unionization means turmoil and strikes, and that unionization means peace, harmony and maximum production is completely refuted by the facts", and it pointed to the United States' experience where the number of strikes increased after the Wagner Act was introduced.[111] Moreover, it identified "irresponsible, law-defying unions" led by power hungry leaders is the cause of industrial unrest. Collective bargaining was acceptable to the Association only to the extent that it was evenhanded in the use of compulsion, prohibited any type of union security agreement and imposed legal responsibility upon the trade union to fulfill the collective agreement. This latter requirement was the most controversial aspect of the CMA's brief, for the Association advocated the incorporation of trade unions as the best method of achieving union

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109 NWLB Proceedings, supra note 105, CCL brief at 133.

110 NWLB Proceedings, supra note 105, CMA brief, 155-74; Ontario Mining Association brief, 384-394; and the Steel Company of Canada brief, 945-958.

111 NWLB Proceedings, supra note 105, CMA brief, 160.

responsibility. Trade unions, predictably, were completely opposed to incorporation - which they saw as an insidious device to make them vulnerable to court action. Moreover, Chairman McTague raised a conceptual difficulty with the CMA's proposal; he wanted to know how the requirement of trade union responsibility jibed with the CMA's commitment to evenhandedness in the treatment of employers and trade unions.[112] Taking the example of an employer who was a party to a collective agreement and who terminated the agreement by closing down its operations, McTague agreed that the employer was under no legal responsibility to continue to provide employment. Rather, the employer's responsibility under the contract was to provide certain wages and conditions, not to guarantee the employment itself. Accordingly, McTague asked whether the unions' legal responsibility to fulfill the collective agreement consisted in keeping its members at work? Neither the CMA nor the members of NWLB attempted to answer this fundamental question. Moreover, it was never addressed during the drafting process.

The Canadian Chamber of Commerce (CCC) was the leading exponent of the moderate business position at the hearings.[113] Unlike the CMA, the membership of the CCC was dominated by finance interests, which did not have to bargain with the recently organized industrial unions. Thus, it could afford to be more moderate and take the longer view. The Chamber of Commerce avoided the harsh language of the CMA brief, and, instead of condemning union leaders as the cause of industrial unrest, the Chamber of Commerce placed the responsibility for the deterioration in labour relations on the confusion engendered by the lack of coherence in the government's wartime labour policy.[114] Although it adopted a

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112 Id., 162-63.

113 NWLB Proceedings, supra note 105, CCC brief, 181-95.

114 Id., 182.

unitary perspective on industrial relations,[115] the CCC supported compulsory collective bargaining so long as it was evenhanded in the treatment of unions and employers. It demanded strict neutrality on the part of the government in the design and administration of collective bargaining. Whilst the Chamber of Commerce preferred proportional representation to representation on a majority basis, it was willing to accept exclusive bargaining rights on the condition that an enhanced majority of the employees affected, say 60 per cent, voted in favour of the union. However, it believed exclusive bargaining rights should not preclude the right of an employee to present grievances directly to an employer. It also recommended that the Department of Labour, under the control of the Minister, continue to exercise its authority to investigate disputes and appoint a conciliation board where conciliation was appropriate. Moreover, the CCC's proposed legislation would have provided that any strike or lockout - which occurred either without first referring the dispute to the Minister of Labour or NWLB or while the dispute was under consideration by the Minister or the Board - was illegal and its perpetrators subject to criminal penalties. Significantly, the CCC's presentation avoided the controversial issue of the incorporation of trade unions, while still imposing what was, in effect, legal responsibility upon trade unions to fulfill collective agreements. Trade unions would be required to register their constitution, by-laws and a list of their officials, in addition to submitting annual financial returns to obtain the benefits of the legislation. Furthermore, the collective agreement would be legally binding and the legislation would require that each collective agreement provide a minimum term of duration, adequate machinery for dealing with grievances and a method for

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115 See Alan Fox, Beyond Contract: Work, Power and Trust Relations (London: Faber and Faber, 1974), Chapt. 6, "Industrial Relations and Frames of Reference," 248-296. Fox identified three frames of reference, the unitary, the pluralist and the radical and each is characterized by the degree and significance of which the view characterizes the opposition of interests. According to the CCC, the personal touch in labour-management relations would resolve labour unrest, NWLB Proceedings, supra note 105, 186.

renewal. The federal government proved susceptible to the moderate business proposals, and many aspects of the CCC's brief found their way into the final order.

Two months after the hearings concluded Cohen delivered his minority report to the Minister of Labour - to be followed two days later by the majority report. Unlike the polarization over the issue of wage controls,[116] both the minority and majority reports agreed on the need for the implementation of a scheme of compulsory collective bargaining. But although both reports recommended that the federal government enact a National Labour Code to be administered by an independent board, they differed in their identification of the causes of industrial unrest and their recommendations regarding the specific provisions to be included in the Code.

The majority identified the "new type of labour leader," characterized by his failure to represent the long term interests of his constituents and his ambition "to organize quickly by stirring up labour unrest," as the cause of the

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116 The majority report proved to be quite hardline concerning the necessity of maintaining the wage freeze. (Report of the National War Labour Board printed as a supplement to the Labour Gazette, Feb. 1944 (Heretofore referred to as NWLB Report) at 7-10). However, it did respond favourably to the ethical arguments underlying labour's call for a floor to the wage freeze. The majority recommended two methods for satisfying this demand. The first, and preferred method, would be for the government to accede to the TLC and CCL's recommendation that workers earning under 50 cents an hour should be allowed to bargain collectively with their employers free of any controls. The second method proposed would have substituted social security legislation for wage control legislation to deal with the problem of low wages. The majority suggested that the government could introduce a system of family allowances to ensure that low paid workers received a subsistence level of income. This recommendation originated with J.F. Towers, the Governor of the Bank of Canada and a member of the EAC. (See PAC, RG19, 4664, 187-EAC-62, J.F. Towers to W.C. Clark, D.M. of Finance and Chairman of the EAC, June 13, 1943.)

In contrast to the majority report, Cohen recommended that the government substantially revise its wage control policy so as to improve workers' living standards. (NWLB Report, 21-31.) He accepted the majority's recommendation that employees earning under 50 cents an hour should be allowed to resort to collective bargaining to enhance their wages. However, he was adamantly opposed to the use of family allowances to subsidize substandard wages. Predictably, Cohen's report was widely acclaimed by organized labour.

deterioration in labour relations immediately before and during the war.[117] The adoption by employers of every conceivable device to resist union organization was seen as a natural response to the ruthless techniques of this new militant labour organizer. However, the reasons for the growth and acceptance of this new type of labour leader suggested to the majority a solution to end the recent labour unrest. Since it was the feeling of "helplessness and hopelessness" of unorganized labour in response to the resistance of "reactionary industrial employers" to union organization in the post-depression years which led workers to embrace the new militant style of leadership, the majority concluded that if the collective bargaining rights of workers were guaranteed then workers (who were "essentially sound") would no longer support militant tactics.[118]

The majority therefore recommended the establishment of a National Labour Relations Board composed of experts to administer a Labour Code which provided compulsory collective bargaining as a means of fostering industrial peace. Owing to the problem of jurisdiction over labour relations between the provincial and federal governments, the majority suggested that the Code be narrowly restricted to war industries and that the two levels of government agree on their respective jurisdictions over collective bargaining at the end of the war. The majority report further proposed that safeguards against abuses by either labour or industry be provided and that penalties for infractions on the part of industry or labour be provided in the Defense of Canada Regulations. Since prosecutions under the Defense of Canada Regulations were to take place in the ordinary courts, this meant that although an expert board would administer the Code the ordinary courts would have the sole jurisdiction to impose penalties for infractions under the Code. In addition, the majority proposed that all disputes arising under collective agreements, or where no formal agreement existed, should

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117 NWLB Report, supra note 116, 4.

118 Id., 4.

be dealt with by compulsory arbitration under the jurisdiction of the Board and that all strikes and lockouts be prohibited for the duration of the war.

In the minority report Cohen rejected the "approach which seeks to find scapegoats" claiming that "it is wrong to attribute to this or that type of union organization, or to the malevolence of some trade union leader, or to rivalries between unions, the industrial disturbances which have been so seriously affecting the nation."[119] Instead, he identified the cause of industrial unrest in the "policy of exclusion - whether from the deliberations of industry or of government" which excluded workers "from active participation within and with industry, and within and with government."[120]

Cohen saw the labour policy of the government as promising freedom of association while at the same time allowing employers to interfere with and actually destroy workers' organizations as part of the policy of exclusion. After examining the wartime legislation bearing on union organization - Orders in Council PC 3495, PC 2685 and PC 4844 - he concluded that these orders should be revoked and that in their place a nation-wide Labour Code should be enacted by order in council under the War Measures Act. He recommended that this Labour Code should make union recognition and collective bargaining compulsory and that unfair labour practices be listed and prohibited. These were to include all forms of employer intimidation or discrimination to prevent trade union organization or activities, the prohibition of company unions and the refusal by the employer to bargain with the representative of his employees. The Code should extend to all wartime industries, broadly defined to include auxiliary industries or operations which contributed to the effectiveness of the war effort. Cohen recommended that the Code be administered by a board composed of an independent chairman and an equal number of members directly representing

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119 Id., 17.

120 Id., 15.

labour and management. Suitable machinery for the prompt and effective disposition of allegations of unfair labour practices with adequate penalties to secure enforcement should be provided. In addition, he proposed that disputes concerning the interpretation or application of a collective agreement, otherwise known as grievance disputes, should be resolved by means of compulsory arbitration. Cohen further recommended that permanent boards of conciliation, composed of an independent chairman and a representative each of labour and management should be available on the summary application of either party to deal with disputes not otherwise covered by the Labour Code or the wartime wages control order.

Not surprisingly, Cohen's proposed Labour Code closely resembled the recommendations offered by organized labour - for he had previously been hired on separate occasions by each of the major labour Congresses to design compulsory collective bargaining proposals. By contrast, the majority was more selective in adopting elements of the Congresses' briefs. Although it rejected business' extreme position, the majority shared the CMA's belief that aggressive unions were a primary cause of industrial unrest and that the legislation should be evenhanded in its treatment if employers and unions. The differences in the specific recommendations concerning the content of the compulsory legislation in the two reports evinced not merely a difference in detail, but more importantly, contrasting conceptions of the purpose of collective bargaining. Cohen endorsed collective bargaining as a means of obtaining greater worker participation in the governance of an enterprise, whereas McTague saw it primarily as a method of fostering industrial peace. The difference in their proposals concerning compulsory arbitration and industrial action is a good illustration of this. While Cohen recommended compulsory binding arbitration when it came to grievance disputes, the majority proposed that any dispute - regardless of whether or not a collective agreement existed - should be sent to binding arbitration. Even more

to the point, the majority endorsed a ban on all work stoppages, while Cohen did not recommend any restrictions on the ability to strike or lockout.

A further disagreement separating the two reports concerned the composition of the board which was to administer the labour code. Although both agreed on the need for an independent administrative tribunal, the majority advocated an expert board. Cohen, on the other hand, following the tradition in Canadian labour relations policy, recommended a tripartite representative board. Countering McTague's position that an expert board was preferable as it was better suited for adopting a judicial approach, Cohen stressed that it

> is idle to talk about judicial application or a judicial approach until practical standards have been established by which judicial action has to be governed. The establishment of these practical standards is a creative and important aspect of the administration of a Labour Code, and the active participation of direct representatives of management and labour is a prerequisite to a realistic and successful treatment of the whole problem.[121]

Moreover, this disagreement over the composition of the board, and, more precisely, the stance that it should adopt in administering the labour legislation, erupted into a bitter dispute between Cohen and McTague.

In a public letter to McTague, Cohen stated that he would no longer sit on the NWLB when controversial cases came before it until the government made its labour policy clear.[122] Responding in a letter which was also made public, McTague (supported by Lalonde) suggested that Cohen resign, since he was obviously unable to adopt the appropriate detached stance necessary for administering the existing labour legislation.[123] Cohen refused, and during September he addressed the annual conventions of both the CCL and TLC. Enraged by what he saw as a breach of Board confidentiality, McTague wrote King

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121 Id., 19.

122 PAC, M6 30, A 94, 35, 3052-1, Cohen to McTague, Aug. 18, 1943.

123 Id., McTague to Cohen, Aug. 19, 1943.

requesting that Cohen be dismissed. Although representatives of organized labour advised King to retain Cohen, the Cabinet supported McTague. On September 9 the Prime Minister issued PC 7143, dismissing Cohen on the grounds both that he displayed attitudes inconsistent with the judicial and independent nature of the Board and that he had breached confidentiality requirements by discussing the substance of the Board's reports before they were made public by the government.[124] Cohen's dismissal indicated much more than just King's willingness to sacrifice the wishes of organized labour to those of his cabinet - it intimated King's acceptance of McTague's conception of the composition and appropriate approach of the board appointed to administer the government's labour policy. Moreover, it suggested that McTague's report, with its emphasis on compulsory collective bargaining as a means of achieving industrial peace, would form the basis of the government's legislation.

4. The Drafting Process

That the federal government would enact compulsory collective bargaining was a foregone conclusion; questions, however, surrounded the shape of the legislation and the policy that would inform it. The existence of these questions was a consequence of the competing conceptions of both the goal of collective bargaining and the structure of the legislation; it also helps to explain why the drafting process extended from September 1943 to February 1944. Moreover, the disagreement within the Cabinet over the wage control policy contributed to the delay in issuing the compulsory collective bargaining order.[125]

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124 On September 16, PC 7264 was issued appointing J.A. Bell, Chairman of the General Committee of Adjustment, Order of Railroad Telegraphers, CPR as the labour representative on the NWLB. Bell was formerly a member of the original NWLB.

125 Pickersgill, supra note 9, 589-97; Coates, supra note 4, 182-85. The disagreement over wage control policy also contributed to the delay in making the NWLB reports public.

King's government regarded compulsory collective bargaining legislation, in addition to a system of family allowances to deal with the problem of substandard wages, as the sweetener with which it would coat the bitter pill of tougher wage controls.[126] Although it did not want to introduce its wage control and collective bargaining policies at the same time, thereby irrevocably linking them in the minds of the public, the government hoped that the prominent role given to organized labour in drafting the compulsory collective bargaining legislation would compensate for its exclusion from the discussions concerning the wage control policy.[127] Having regard to the upcoming election, the government proposed to end its labour policy on a positive note, thus the collective bargaining legislation was to follow the wage control policy.

The attempt to reach a Cabinet consensus over the wage control policy was delayed by a coal miners strike in the west.[128] However, by the end of November the Cabinet was able to turn its attention once again to the wage control policy and on December 4, 1943, in a radio address entitled "The Battle Against Inflation" King announced the final stage in the policy. On the ground that stronger measures were required to combat inflation, a new more restrictive wage

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126 PAC, MG 26, J 4, 273, 2753, Norman Robertson, confidential memorandum for the Prime Minister, June 8, 1943. Robertson noted that McTague was sympathetic to collective bargaining in order to remedy the problem of substandard wages. Robertson suggested family allowances as a substitute solution to the problem of low wages since it would have the important benefit of maintaining the wage freeze.

127 PAC, RG 27, 254, 719: 7-4, vol. 3, A. MacNamara to H. Mitchell, Feb. 5, 1944.

128 Pickersgill, supra note 9, 591-97.

freeze was imposed.[129] As part of an undertaking designed to placate organized labour, King promised that a code of labour relations, defining and prohibiting unfair practices and providing for compulsory collective bargaining would be introduced in the new year.[130] This constituted King's first and only public announcement of the timing of the legislation.

After receiving the NWLB's reports King sent them to the Economic Advisory Committee (EAC), which at this time was the government's most influential advisory body regarding post-war reconversion policy.[131] The EAC began to prepare a commentary on the reports to submit to the Cabinet. Simultaneously, a committee of senior officials of the labour department was appointed to analyze

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129 Order in Council 9384 abolished the local comparability standard and substituted in its place, a narrow provision allowing wage increases where necessary to "rectify a gross inequality or a gross injustice" and only then where "consistent with the ability of the employer to pay the increase in cost to which such increase may give rise in the business or industry in which the rate or range is to be paid, without increasing the price of the product therefrom or the service rendered therein". It also introduced harsh penalties against both employers and employees acting in breach of the Order. It imposed legal sanctions against employers, employees, and anyone inciting a lockout or strike in breach of the Order. An employer who caused a lockout in order to prevent an application to a board for a wage increase or who contravened a board order was liable, on summary conviction, to a fine of between $100 and $5,000 or imprisonment for not less than one month or greater than one year for each offence. An employee who caused or participated in a strike to prevent an employer's application to a board or contravened a board order was liable, on summary conviction, to a fine of between $25 and $100 or imprisonment for not less than one month nor greater than one year for each offence, up to a maximum fine of $1,000 or imprisonment for one year. Any person inciting a strike or lockout to prevent an application to a board or inciting the contravention of an order issued by a board was liable to a fine not greater than $2,000 or a term of imprisonment not exceeding one year. In addition, a reverse onus provision placing the burden of proof on the person alleged to have contravened the Order was introduced. The Minister of Labour had final authority over who was to be prosecuted, since the Order required the written consent of the Minister for the prosecution of any person alleged to have violated the Order.

130 W.L.M. King, "The Battle Against Inflation," L.G. Dec 1943, 1597-1601, 1601.

131 Granatstein, supra note 22, 256-57, where he notes that although the House of Commons established a Special Committee on Reconstruction and Re-establishment, which in January 1943 became the Advisory Committee on Reconstruction, the EAC dominated the policy debate.

the NWLB's recommendations and prepare a submission to the cabinet.[132] The analyses and recommendations of the two government committees, which built upon McTague's report, tended to compliment one another, although each had a slightly different emphasis.

The EAC, which had the benefit of reading the Labour Committee's report before completing its submission, recommended the implementation of compulsory collective bargaining, but stressed its misgivings in doing so and the political compromises involved:

> In urging this recommendation on the Government, the Committee is fully aware that it is unfortunate that the issue of compulsory collective bargaining should have arisen. It is desirable and indeed inevitable in any democratic state under a system of private enterprise that collective bargaining should become the rule with few, if any, important exceptions. The introduction of compulsion will throw responsibility abruptly on many new ill-organized unions with inexperienced leaders. A more gradual growth would permit the development of strong leadership and internal discipline. However, the Committee believes that gradualness is no longer within the Government's grasp and that only a wholehearted and thoroughgoing acceptance of compulsory collective bargaining will regain the confidence of labour. It is probably not possible to reach a wholly acceptable recommendation on wage policy but on collective bargaining the Government is in a position to accept the Labour contention without compromise or hedging.[133] (emphasis added)

The EAC recommended that the compulsory collective bargaining code provide for administrative determination of the appropriate unit as well as compel the employer to bargain with the representative of the majority of employees on an exclusive basis. However, like the American War Labor Board, the EAC recognized that strong leaders and a system of internal discipline were necessary for responsible trade unions and peaceful industrial relations. Hence, it advocated

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132 PAC, RG 27, 851, 8-3-18-3, V.C. MacDonald to MacNamara, Sept. 4, 1943, Memorandum on the McTague-Cohen Report suggesting the establishment of a Labour Committee. The Committee was subsequently established, and it consisted of MacDonald, the Assistant Deputy Minister of Labour, M.M. Maclean, the Director of Industrial Relations for the Department of Labour, and A.H. Brown, a senior researcher and departmental solicitor.

133 PAC, MG 26, J 4, 362, 3856, C250148-C250158, Report of the Economic Advisory Committee on the National War Labour Board Reports, p. 3. Heretofore referred to as the EAC Report.

a system of compulsory collective bargaining that stressed union responsibility and limited the opportunities in which a union could legally interrupt production.

Union responsibility was also a central theme of the Labour Committee, although it placed greater stress on concluding a collective agreement. In its discussion of the extent of state intervention contemplated under compulsory collective bargaining legislation, the Labour Committee stated that:

> [t]he coercive effect of such legislation usually extends only to ensuring that the parties shall bargain freely as to terms of mutual concern. It does not extend to make them conclude a bargain, or to conclude a bargain in any set form. Compulsory Bargaining in this sense is a misnomer; for bargaining means free negotiation, not compelled conclusion of a contract. Nevertheless, the interest of the State in wartime may require that the parties conclude a bargain and that if they do not do so the State will do it for them (Cf. the U.S. War Labor Dispute Act.) In any event Collective Bargaining legislation must provide machinery to facilitate and compel bargaining, and sanctions to secure an atmosphere favourable thereto and to prevent infractions of its terms.[134] (emphasis added)

To facilitate the conclusion of an agreement the Labour Committee proposed that conciliation be retained, either under the authority of the Department or the board established to administer the labour code, and that the parties be precluded from resorting to industrial action while conciliation was underway. Moreover, the Committee also suggested that it might be advisable to go further than the IDI Act policy of compulsory conciliation and follow the U.S. War Labor Disputes Act example of compulsory binding arbitration of all disputes coupled with a complete ban on industrial action. By contrast, the EAC, while admitting that compulsory binding arbitration of all disputes might have to be adopted as a last resort, preferred that its implementation be threatened in order to encourage the parties to use the machinery provided to promote agreements. However, the EAC agreed with the Labour Committee that compulsory conciliation be

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134 PAC, RG 27, 254, 7197-4, vol. 3, Report to Minister of Labour on Reports of the National War Labour Board, by V.C. MacDonald, M.M. Maclean and A.H. Brown, 4. Hereinafter, referred to as the Labour Committee Report.

retained and recommended that conciliation continue under the auspices of the labour minister.

A central feature of both committees' reports was the distinction between two classes of disputes. In a preliminary memorandum, V.C. MacDonald (the assistant-deputy Minister of Labour and a member of the Labour Committee) distinguished between disputes which arose out of the terms of an existing agreement and involved its interpretation and application, and disputes arising antecedently to an agreement or in the course of negotiating or amending an agreement.[135] He went on to characterize the former disputes (known as grievances or rights disputes) as justiciable; viz., requiring for their resolution adjudication by a quasi-judicial body on the basis of principles. The latter class of disputes, on the other hand, involved the economic interests of the parties and thus were best handled by the parties themselves aided by the conciliation facilities of the state. Accordingly, the Labour Committee recommended that a separate tribunal, known as the National Arbitration Tribunal, be appointed on a tripartite representative basis to arbitrate grievance disputes. However, as an alternative to recommending the establishment of another board, the EAC suggested that "[s]ince it is accepted as good practice by trade unions that collective agreements should provide within themselves for arbitration of disputes over the interpretation of the agreement, there is much to be said for requiring that all collective agreements in industries covered by the measure make such provision ..."[136] But what the EAC failed to note was that prior to 1944 half of the collective agreements which provided a grievance arbitration mechanism did not also require the union to renounce resort to

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135 V.C. MacDonald, supra note 132, 4-5.

136 The EAC Report, supra note 133, 5.

industrial action after a decision had been awarded.[137] Although, the Labour Committee and EAC disagreed over the agency of arbitration (the latter preferring an arbitrator selected by the parties), both committees agreed that as a quid pro quo for grievance arbitration industrial action should be prohibited during the operation of a collective agreement.

Compulsory grievance arbitration coupled with a ban on industrial action during the term of a collective agreement went further than the American War Labor Board in institutionalizing the sanctity of the collective agreement and the concept of union responsibility. In devising enforcement procedures the Department of Labour and EAC focussed on the problem of ensuring that unions adhere to their collective agreements and obey the labour code, and both committees assumed that union compliance was more difficult to ensure that of employers. Accordingly, MacDonald recommended that union registration be made a prerequisite for certification and collective bargaining, and that it be revoked in the event of any breach of the code. The EAC, casting further in its quest to devise sanctions to promote union responsibility, suggested that sequestration of union funds was an appropriate penalty for breaching a collective agreement.

The EAC endorsed the Labour Committee's recommendations concerning the scope of the legislation, the composition of the agency established to administer the code and the appointment of representatives of organized labour to government boards. To avoid the constitutional problem of the appropriate division of powers between the two levels of government, the Labour Committee recommended that the labour code be issued as an order under the War Measures Act and that it apply to industries normally within the jurisdiction of the federal parliament and war industries as defined under existing orders. Furthermore, it suggested (without giving any specific recommendations) that to avoid controversy the order

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137 See Peter Warrian's analysis of pre-1944 collective agreements in Chapter 3 of "Labour is not a Commodity: A Study of the Rights of Labour in the Canadian Post-war Economy," Ph.D. thesis, University of Waterloo, 1986.

should state whether it encompassed federal or provincial government departments or emanations of the Crown, such as Crown companies. The Labour Committee also recommended that an independent agency be established to administer the order and that the selection of board members be made on a representative basis. However, it departed from Cohen's proposal by suggesting that the three members representing the public outnumber the party representatives (1 each for industry and labour). Moreover, both committees took issue with the blanket endorsement of the principle of greater labour representation on all government boards. The Labour Committee stressed that "the dominant consideration must be the functional efficacy of whatever Board is in question, and that not all Boards are equally adapted to the representative principle, and that in the long run it is for the Government, which represents all interests, to determine upon what principle and with what persons it shall staff its various subordinate agencies."[138] The EAC went on to state that there was a clear use for labour representation on the directorates of Crown companies, whereas labour representation was not appropriate for departmental committees (the most influential example being the EAC itself).

On September 16, 1943, the Cabinet passed the EAC recommendations regarding collective bargaining as a minute in council, thus providing a policy skeleton for the labour relations order. From that point onwards, however, the primary responsibility for putting flesh on the EAC's fairly sketchy recommendations passed to the Department of Labour as the sponsoring department. A series of draft orders were considered in which the thrust of the collective bargaining policy was developed.

The November 4 draft followed the Wagner model of administrative determination of the appropriate bargaining unit and certification of the

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138 Labour Committee Report, supra note 134, 12.

bargaining representative on a majority basis.[139] However, it contemplated a much greater degree of compulsion than the American Act. It implemented the Labour Committee's recommendations concerning compulsory grievance arbitration coupled with a peace obligation during the life of a collective agreement. Moreover, it developed the Committee's suggestion of binding arbitration for all disputes, thereby ignoring the EAC's caveat that compulsion should only be used if the parties failed to endorse voluntary methods. The first step for reaching agreement was compulsory conciliation by Department officials. But in the event that both the Director of Industrial Relations certified that the parties had failed to conclude an agreement and the Board (which was constituted on the same basis as that recommended by the Labour Committee) satisfied itself that the failure to agree might lead to substantial interference with the war effort, the Board (subject to Cabinet approval) could issue a binding order establishing the terms and conditions of the agreement. The draft further provided that a strike arising out of the failure of any person to abide by the terms of a board order was an offence. In addition, the board was authorized to fix the duration of an agreement and provide for the revision or revocation of a collective agreement when changed conditions so required.

The November 4 draft also declared the right of employees to join trade unions and for bargaining representatives to bargain collectively with employers on the employees behalf. The employer was under an obligation to bargain in good faith with the employees' representative. Employers were prohibited from engaging in a range of unfair practices and, following the lead of the provincial freedom of association statutes, employees were prohibited from using coercion or intimidation to influence a person to join a trade union. Unlike the provincial statutes, however, there was no provision saving the closed shop agreement. Both

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139 PAC, W.L.M. King, Primary Correspondence, MG 26, J 1, 347, 299472-299484, G.G. Greene, Private Secretary to the Minister of Labour, to A.D.P. Heeney, Clerk of the Privy Council, Nov. 6, 1943, with attached Nov. 4 draft.

the Canadian pattern of providing penalties, consisting of fines and imprisonment to be processed through the ordinary courts as the mechanism of enforcement, and the provincial precedent of requiring a union to register its constitution, by-laws and the names of its officials as a condition of certification were adopted. Moreover, the draft established the scope (with slight modification) of the final order; enterprises normally within federal jurisdiction, war industries as defined in wartime regulations, and the National Habour Board and the Canadian Broadcasting Corporation (ending the controversy created by PC 10802 regarding collective bargaining in Crown corporations) were covered, while agencies and departments of the federal and provincial governments, municipalities, provincial Crown corporations and agricultural, horticultural, fishing, hunting and trapping enterprises were excluded.

The November 4 draft trimmed closer to the Labour Committee recommendations than those of the EAC, since its primary emphasis was on concluding a collective agreement and ensuring continuous production. Moreover, the draft embodied a highly interventionist role for the state, with various agencies having somewhat overlapping jurisdiction in resolving industrial disputes. But although the collective agreement was the central element in the draft, it failed to provide any means of making the union responsible for ensuring that its members adhered to the agreement.

The Conference of Labour Ministers, which met between November 8 to 10, 1943, added little to the substantive provisions of the collective bargaining scheme; however, the conference was valuable in that it laid the ground for an agreement concerning wartime jurisdiction and administration.[140] Moreover, Mitchell indicated that the draft submission constituted tentative proposals, rather than a firm commitment to a particular policy. The ministers agreed to the scope of the draft order, but the decision regarding the level of government

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140 PAC, RG 27, 621, 3, Transcript of the Dominion-Provincial Conference of Labour Ministers, Nov. 8-10, 1943.

which should administer the compulsory collective bargaining regime was more controversial. Several of the provinces did not want to scrap their existing administrative agencies, arguing that provincial boards be authorized to administer the order in the first instance, and that appeals would be heard by the National Board.[141] Ultimately, this proposal was accepted by the ministers. Moreover, the provinces wanted federal assurance that jurisdiction over labour relations would revert to them with the end of hostilities. Regarding the substantive provisions of the draft, several provincial spokesmen argued that unfair labour practices and the duties and rights provided should apply equally to employers and trade unions. During the discussion of grievance arbitration Mitchell suggested that the EAC proposal requiring every collective agreement to contain a procedure for resolving rights disputes be substituted for arbitration by a permanent agency.

Although its major provisions were retained, the November 4 draft was revised in light of the Ministers' Conference. The result (the November 20 draft) implemented the Conference recommendation concerning administration by providing for an arrangement to be made with any province whereby the province would undertake the administration of all matters concerning war agencies.[142] The delegation of administrative responsibility to the provinces was a feature of the final order. However, the November 20 draft departed from the previous draft by following the basic ideas of the British Columbia compulsory collective bargaining legislation; it adopted the two-part conciliation process and granted the National Board jurisdiction over collective bargaining and unfair practices, while vesting jurisdiction over the remaining disputes in the Minister.

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141 Id., per Pearson from B.C. at 10, Blackwell from Ontario at 99. For a summary of the conference see H.A. Logan, State Intervention and Assistance in Collective Bargaining (Toronto: U. of T. Press, 1956) 20-23.

142 PAC, RG 27, 621, 4, V.C. MacDonald to the Minister and Deputy Minister of Labour, Nov. 20, 1943.

Basically, the November 20th draft, which was devised by senior officials within the Department of Labour, followed the major features of the IDI Act. Whether out of deference to King (the author of the IDI Act) or a desire to maintain the labour department's bureaucratic power by retaining conciliation as a chief feature, this draft was committed to maintaining compulsory conciliation backed by penal sanctions as a central feature of any collective bargaining legislation.

On November 25 King spent the afternoon in Cabinet scrutinizing the November 20 draft. McTague and Mitchell disagreed over the proper emphasis of the legislation;[143] McTague stressed union responsibility and party self-governance (following the EAC proposals), whereas Mitchell emphasized the collective agreement and continuous production (as did the Labour Committee). King recommended calling in Bryce Stewart (the former Deputy Minister of Labour who was then a private industrial relations consultant) to prepare another draft. Stewart had earlier identified the lack of responsible trade union leaders as a major cause of industrial unrest,[144] and thus he shared both McTague's and the EAC's concern with fostering trade union responsibility. But he also shared Mitchell's interest in firmly entrenching the conciliatory role of the labour department and ensuring continuous production.

As was noted in an official memorandum to the Minister and Deputy Minister of Labour, Stewart's draft built upon the November 20 draft in that it adopted its basic principles concerning compulsory collective bargaining - the settlement of disputes and the delegation of administration to the provinces.[145] However, Stewart's draft represented a shift in policy in "that as regards Collective

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143 Pickersgill, supra note 9, 597.

144 H.A. Logan, "Canada's Control of Labour Relations," 2(2) Behind the Headlines (1941) published by the Canadian 29. Association for Adult Education and the Canadian Institute of International Affairs.

145 PAC, RG 27, 621, 41, Memorandum re Labour Relations Order by V.C. MacDonald and M.M. Maclean, December 7, 1943.

Bargaining the emphasis is on self-government by the parties, with the National Board intervening only so far as is necessary to determine the appropriate unit for collective bargaining and to certify the representative for that purpose and to establish, when the parties fail to do so, a procedure for the settlement of grievances."[146] Primarily this entailed that the parties themselves would be required to establish a grievance arbitration procedure (as was recommended by the EAC), rather than availing themselves of a national arbitration tribunal. Moreover, Stewart's draft involved a marked change in presentation, for it included "an elaborate statement of rights and duties of each of the parties in almost identical language, some of which, however, were in the previous Order in another form."[147] In addition to emphasizing evenhandedness, Stewart's draft also stressed union responsibility, which it also framed in terms of equivalence - an employers' association being matched with a trade union. The Board was authorized to request trade unions to impose discipline on their members, and where they had done so, to take this into account in any disciplinary measures the board might take against anyone violating the order. Stewart's draft melded the EAC's concern with union responsibility and the Department of Labour's emphasis on concluding a collective agreement into an overarching structure of rights and duties which were directed evenhandedly at both parties. Both McTague and Mitchell endorsed Stewart's draft, as it managed to address and integrate their major preoccupations.

At the same time that Stewart's draft was approved, an official memorandum expressed doubt regarding the firmly established principle of evenhandedness as it was applied in the case of compulsory collective bargaining order. Acknowledging that Stewart's draft order "is built up so that it appears that the same rights and responsibilities are imposed on the employers as on the

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146 Id., 1.

147 Id.

employees" the memorandum went on to note that "[a]ctually, however, the rights granted and responsibilities imposed will have a restrictive effect on the employees in their efforts to build trade unions and at the same time give employers considerable latitude in the direction of influencing employees in the choice of the bargaining agency."[148] Specifically, attention was drawn to the corresponding sections entitling either party to inform the other about its preference concerning the choice of employer association or trade union, as the case may be. Since very few employers conducted their bargaining through associations, and there was no problem with competing organizations vying for the same employer, matching the rights of employees to advise employers of their preference for a particular association with the right of employers to inform employees of their preference of a particular bargaining representative, although formally equivalent, was practically absurd. Moreover, the memorandum pointed out that the employers' right to free speech encouraged the formation of "so-called company unions." This objection was, however, ignored by the Justice Department, which (as the official drafting arm of the government) had the responsibility for putting the finishing touches on Stewart's draft and ensuring that it adhered to drafting conventions.

The Justice Department Draft II, which was dated December 13, 1943, built upon the two central themes in Stewart's draft; viz., apparent evenhandedness in the treatment of employers and unions and the internal responsibility of trade unions.[149] The rights and duties of trade unions and employees were matched by corresponding, if somewhat absurd, rights and duties of employer associations and employers. Moreover, the Justice Draft took Stewart's theme of union responsibility even further, authorizing state intervention into the internal

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148 PAC, RG 27, 621, 4, Confidential Memorandum to the Minister and Deputy Minister, Dec. 7, 1943, 2.

149 PAC, RG 27, 621, 4, Justice Department Draft, Dec. 13, 1943.

affairs of trade unions. It required that before a trade union was entitled to the benefit of compulsory collective bargaining the union constitution must establish a procedure for electing its officials on a majority basis, require official authorization of strike action and impose a secret ballot upon its membership as a prerequisite for industrial action. In other respects, the Justice Draft was an unfortunate amalgam of the Wagner Act, previous drafts and the EAC report. The proposed Board (which was modelled on the Labour Committee's five member representative board) was required to determine the appropriate bargaining unit, certify the majority representative and authorize the prosecution of any person alleged to have violated the order. However, the draft only provided for the certification of narrowly defined trade unions and failed to prohibit company unions. It incorporated the British Columbia two-part conciliation process, and went even further by empowering the Board to establish the terms and conditions of the agreement where the parties failed to do so. Further, it required the parties to establish a grievance procedure, and authorized the Board to establish a grievance procedure in cases where the parties failed to do so or there was no collective agreement. Strikes and lockouts were banned before certification and until the conciliation process was completed; however, industrial action during the life of an agreement was permissible. Finally, it revoked both PC 4020, which enabled the Minister to exercise remedial powers in cases of discriminatory practice, and PC 7307, which was redundant in light of the general requirement that trade union constitutions provide for a secret ballot regarding strike action.

The Justice Draft was submitted to employer organizations, trade unions congresses and the provinces in order to elicit their comments. But even before the outside comments began to trickle in, two fundamental errors were brought to Maclean's attention in a confidential intra-departmental memorandum.[150] The

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150 PAC, RG 27, 621, 4, Memorandum to M.M. Maclean, Dec. 15, 1943.

first error that was identified concerned the government's commitment to evenhandedness in framing the rights and responsibilities of labour and capital and went further than the earlier criticism that formal equality did not lead to equal treatment. The argument was that the formal equality obfuscated a deeper inequality:

> The fact has been disregarded or overlooked that the employer, because of his hiring and firing function, has always had a decided advantage over the employee. To insist on rights and duties bearing equally on each party will simply perpetuate the existing bargaining inequality of the two parties. This is not to say that labour should not have rights and duties but there should be a balance, not equal, in favour of labour to compensate for the present inequitable arrangement.[151]

The second fundamental error lay in the framework of the draft submission as a whole. According to the memorandum, the Justice draft

> is so drawn or framed that its benefits or concessions to labour are not explicit but depend on administrative performances. In brief, the draft provides the administration with loopholes or opportunities for the avoidance of its responsibilities if it so wishes or if pressure for such action is great.[152]

The two fundamental errors identified in the departmental memorandum were never addressed. The final order, in part because King's government was committed to the principle of evenhandedness in the treatment of employers and unions, did nothing to offset the inherent power advantage of the employer as fundamental management prerogatives were not threatened. Moreover, the final administrative procedures were sufficiently flexible and the enabling language sufficiently broad to allow the board administering the order a great deal of discretion in implementing and devising collective bargaining policy. Thus, the administrative decisions and policy of the labour relations board are central to any evaluation of the government's labour policy.

In addition to the two fundamental criticisms, several prominent demands of organized labour were ignored - among them the call for a permanent Act rather

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151 Id.

152 Id.

than a temporary order, the substitution of remedial powers exercised by the board for criminal penalties prosecuted through the ordinary courts as the method of enforcement and the extension of the protection from discrimination on account of trade union membership to include trade union activity. But, as Eugene Forsey (the Research Director of the CCL) reported to M.J. Coldwell (the leader of the CCF), of the 48 criticisms directed by the CCL against the draft submission, the final order met 34 fully, 2 in the main and one in part.[153] Of these, the two most important criticisms met by the government were the unions' objection to state interference with the internal affairs of a trade union and compulsory interest arbitration by the labour board. Also wary of government interference with the actual outcomes of the bargaining process, the CMA joined with the labour congresses in objecting to binding interest arbitration.[154] In accordance with the EAC's recommendation, compulsory interest arbitration was not implemented. Rather, it was used as a bargaining ploy to obtain concessions from organized labour.[155] As the next chapter demonstrates, in exchange for foregoing compulsory arbitration and the absolute ban on industrial action, the government imposed both far-reaching constraints upon the exercise of union power to withdraw labour (and stop production) and legal responsibility upon trade unions for ensuring that its members adhered both to the collective agreement and labour code.

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153 PAC, MG 28, I 103, 4, CCF-1944, Eugene Forsey to M.J. Coldwell, Feb. 18, 1944.

154 PAC, MG 28, 230, acc. No 83/138, Minutes of the Industrial Relations Committee of the CMA, Jan. 24, 1944, 4.

155 PAC, MG 30, A94, 39 3112A, J.L. Cohen, "PC1003 and an Effective Wartime Labour Policy," 3.

Conclusion

From start to finish, the Liberal government's decision to introduce compulsory collective bargaining was a political gesture. Responding to a welter of industrial and political pressures, which included the spreading mood of industrial militancy and the growing electoral threat of the CCF, King developed a post-war reconversion policy which included compulsory collective bargaining. This policy was designed to meet the realignment in politics without threatening the prevailing economic order. In the short term, the introduction of compulsory collective bargaining was intended to draw organized labour's attention from the wage control policy. Moreover, the drafting process itself was an example of King's politics of compromise; a public inquiry was convened, the various positions of interested parties were heard and the demands of one group were played off those of another. In fact, the timing of the order was a prime example of political expediency. The Wartime Labour Relations Regulations (PC 1003) were introduced on February 17, 1944, the day before Bracken (the leader of the Progressive Conservatives) was to make a speech stating his party's labour policy.[156]

From the beginning of the war the most important factor inhibiting the government from introducing compulsory collective bargaining was its belief that trade unions were not sufficiently responsible to engage in peaceful collective bargaining.[157] Moreover, there was a disagreement at the official level concerning the main cause of industrial unrest. Justice McTague, Howe and the CMA identified militant and aggressive trade union leaders as the principle cause

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156 PAC, MG 26, J 4, 362, 3856, J.W. Pickersgill, Memorandum to King, Feb. 8, 1944

157 See Chapter 3, text supra at note 182.

of the wartime strikes.[158] By contrast, the EAC saw industrial unrest as a rank-and-file phenomenon, which could be constrained by greater internal discipline in trade unions and greater responsibility on the part of their leaders.[159] Paradoxically, these conflicting explanations of the cause of industrial unrest resulted from the dual and somewhat contradictory role of the trade union leader - who must both articulate the interests of the membership and at the same time express these interests in a responsible fashion.[160] C. Wright Mills captured this contradiction in his description of the role of the trade union leader:

> He organizes discontent and then he sits on it, exploiting it in order to maintain a continuing organization; the labour leader is a manager of discontent. He makes regular what might otherwise be disruptive, both within industrial routine and within the union which he seeks to establish and maintain.[161]

In Canada, both government and business were particularly worried about the new CIO unions, which had grown at a rapid pace as a result of the industrial mobilization for war production. The government could rely on the established unions, such as the craft unions affiliated to the TLC and the older unions (Mosher's CBRE, for example) which were affiliated to the CCL, to behave responsibly - for they had a long history of peaceful collective bargaining. However, the newer industrial unions had insufficient time to develop internal structures to channel and contain rank-and-file militancy. But as the EAC pointed out, time was exactly what the federal government did not have as the

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158 NWLB Report, supra note 116, 4; Chapter 3, supra text at notes 84-86 and NWLB Proceedings, supra note 105, CMA brief, 158.

159 EAC Report, supra note 133, 3.

160 Rianne Mahon, "Canadian public policy: the unequal structure of representation" in Leo Panitch (ED.) The Canadian State (Toronto: U. of T. Press, 1977) 165-98 at 183.

161 C. Wright Mills from New Men of Power, cited in Cy Gonick, Inflation or Depression (Toronto: J. Lorimer, 1975) 365.

introduction of compulsory collective bargaining was a political necessity by mid-1943.

King had never objected to collective bargaining per se; what he objected to was the use of state compulsion to impose it. In both his writings and official interventions in industrial disputes he advocated collective bargaining with legitimate trade unions as a means of achieving industrial peace. Prior to the war, legitimate trade unions were those which respected the political status quo and did not, like the OBU and the Worker's Unity League, try to use industrial action to attain political ends.[162] But during the Second World War the term "legitimate" as applied to trade unions took on a different connotation. CIO unions were not illegitimate in the sense of the OBU; for although the former were politically aligned, for the most part they were affiliated with the CCF, which respected the rules of Parliamentary democracy. However, these unions were illegitimate to the extent that they were irresponsible. According to Porter's study of Canadian elites:

> [t]rade union power is judged by the other elites in terms of its responsibility. No other institutional elite has had to measure up to this peculiar test of responsibility .... The responsible labour leader is one who does not make too great demands on the system or whose activities do not interrupt the processes of production.[163]

Thus, collective bargaining was desirable as long as it fostered industrial peace and trade unions were legitimate as long as their leaders were responsible. And trade union leaders were responsible as long as they took steps to ensure that employees abided by collective agreements. Thus, responsibility and contract enforcement began to be identified as one and the same thing.

A theme which emerged in the government's labour policy between 1939 and 1942, McTague's NWLB recommendations and the report of the Labour Committee was

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162 Chapter 1, text supra at notes 105-116 and Chapter 2, text supra at notes 6 to 22.

163 John Porter, The Vertical Mosaic (Toronto: University of T. Press, 1965) 312.

that contract observance and a ban on industrial action constituted the quid pro quo for compulsory trade union recognition and compulsory collective bargaining.[164] The EAC, by contrast, was not committed to the compulsory arbitration of all disputes, since it was aware that compulsory arbitration was not often a successful method of preventing unrest.[165] Instead, the EAC recommended that compulsory arbitration be used as a threat to obtain concessions from organized labour. According to Cohen in his discussion of the merits of the government's final order,

> Labour was told in strained whispers of how horribly sick the government authorities would feel if they found themselves obliged to legislate on labour disputes in a way which involved compulsory arbitration. By playing on this chord, plus the usual quantum of cajolery and playing off one section against the other, a measure emerged, hailed with political trumpets, which doesn't and can't do the job at all.[166]

Freedom both from discrimination on the grounds of trade union membership and employer interference with the formation and administration of unions, in addition to the certification of the representative of the majority of employees in a unit determined by a labour board and an obligation upon an employer to bargain in good faith with the certified representative, constituted the minimum requirements sufficient to satisfy organized labour's demand for compulsory collective bargaining legislation. But in devising the actual structure of the wartime collective bargaining order, government officials adopted those elements of the existing regimes which constrained trade union power and promoted union responsibility. The British Columbia model of superimposing collective bargaining on a framework of compulsory conciliation and the postponement of strike action was followed. Moreover, the federal government went even further

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164 Chapter 3, text supra at notes 182 to 183; NWLB Proceedings, supra note 105, 6; Labour Committee Report, supra note 134, 4, 6.

165 EAC Report, supra note 133, 6.

166 Cohen, supra note 155, 3.

than the U.S. War Labor Board in emphasizing grievance arbitration and the sanctity of contract responsibility as central features of collective bargaining by making them compulsory aspects of the labour relations regulations. The final order also maintained King's commitment to avoiding "class legislation" by treating employers and trade unions as juridicial equals - even though labour department officials were well aware that such evenhandedness merely entrenched the superior power of employers. The conventional characterization of PC 1003 as the culmination of the evolution towards a mature system of industrial relations obscures both the fact that it took a unique combination of political, industrial and economic factors to dislodge King's government from its commitment to voluntarism regarding compulsory collective bargaining and the range of alternatives more favourable to organized labour which were available. Cohen's description of PC 1003, as "the recorded result of that policy of drift and evasion which was marked Ottawa since the outbreak of the war"[167] is much more apt. In the following chapter, the extent to and ways in which the compulsory collective bargaining system implemented by the federal government constrained trade union power and institutionalized a specific form of industrial relations shall be described.

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167 Id., 8.

Chapter 5: Recognition and Responsibility - The Administration of PC 1003 to 1946

The Wartime Labour Relations Regulations had the public interest at their core[1] - which, in the long established Canadian tradition, was identified with industrial peace.[2] Moreover, this preoccupation with industrial peace was not confined to ending the national steel strike or the general exchange of compulsory collective bargaining legislation for organized labour's consent to King's post-war settlement, but was etched into the very provisions of the Regulations. PC 1003 explicitly embodied the Department of Labour's emphasis on the conclusion of a collective agreement as the primary method of ensuring industrial peace and promoting stability.[3]

To facilitate the execution of a collective agreement the Order provided for compulsory recognition of bargaining representatives and imposed a duty to bargain in good faith upon the parties, which was to be buttressed by compulsory third-party conciliation where necessary. Moreover, once a collective agreement

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1 See the first sentence of the preamble of PC 1003, "Whereas it is deemed to be in the public interest ..." (emphasis added) and see also A.W.R. Carrothers et al., Collective Bargaining in Canada (2nd ed.) (Toronto: Butterworths, 1986), 53 at footnote 54 citing Alexo Coal Co. v. Livett [1948] 2 D.L.R. 34, 44 (Alta. C.A.), where W.A. MacDonald J.A. states that "[t]hese Regulations were made in the public interest and to encourage collaboration and free discussion between employers and employees, and the settlement of all differences between them by peaceful means."

2 See, in particular, Chapter 1 text supra at notes 59 and 60 for the discussion of the rationale behind the IDI Act. For a similar characterization of PC 1003 see Laurel Sefton MacDowell, "The Formation of the Canadian Industrial Relations System during World War Two," 3 Labour/Le Travailleur 175-96 (1978) 194; and F.R. Anton, The Role of Government in the Settlement of Industrial Disputes in Canada (Don Mills, Ont.: CCH Ltd., 1962) 105.

3 See C.H. Curtis, The Development and Enforcement of the Collective Agreement (Kingston, Ontario: Industrial Relations Centre, Queen's University, 1966) 55.

was concluded, compulsory third party arbitration was provided as the quid pro quo for the ban on industrial action during the life of the agreement - thereby ensuring that production continued uninterrupted until the collective agreement expired. As a means of further guaranteeing the sanctity of the collective agreement, the EAC's emphasis on union responsibility was tacitly promoted by the Regulations. Since the direct imposition of legal responsibility upon a trade union for the actions of the employees it represented was unacceptable to organized labour, union responsibility was fostered indirectly by administrative decisions, rather than directly by legislative fiat.

The emphasis on the collective agreement in the Wartime Labour Relations Regulations signified a change in the status of that document - it was transformed from a private document to be enforced by resort to economic muscle to an instrument of public policy.[4] In turn, this change in the status of the collective agreement signalled the beginning of the transformation in the status of a trade union from a voluntary association with no independent legal status at common law to what Woods described as a quasi-public institution with rights and responsibilities.[5] Moreover, this change in legal status went hand-in-hand with a shift in the preoccupations of the Canadian trade union movement which began to emerge at the end of the Second World War.[6] Instead of organizing new workers, Canadian unions became increasingly preoccupied with institutional security. As part of the exchange for security, trade unions began to accept greater

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4 The Privy Council held that a collective agreement was not enforceable at common law. To enforce the collective agreement the union was required to resort to strike action (Young v. C.N.R., [1931] 1 D.L.R. 645 per Lord Russell).

5 H.D. Woods et al., Canadian Industrial Relations: The Report of the Task Force on Labour Relations (Ottawa: Privy Council Office, 1968) 101-102.

6 Id., 21.

responsibility for ensuring that employees adhered to the terms of collective agreements, thus becoming further embedded in the legal structure.

As was usually the case with Canadian labour relations legislation, there was a gap between the Regulations in theory and their operation in practice. The extent of this gap will be illustrated by an examination of the provisions of the Regulations and their administration with respect to the more controversial areas of collective bargaining. As both organized labour and business interests became accustomed to the new policy, each began to identify major shortcomings in the Regulations. Neither was completely satisfied with the Regulations, and the various agencies authorized to administer PC 1003 sought to achieve compromises which would promote industrial peace. Trade unions were placed in the unenviable position of having to control employee behaviour in order to achieve any gains under the collective bargaining regime. However, the compromises struck were, as we shall see, sufficiently acceptable to both parties for PC 1003 to establish the general framework of the legislative regulation of collective bargaining which exists in Canada to this day. Moreover, the administrative policies adopted under PC 1003 helped to cement the bargaining structure which existed at the end of the war and institutionalize tendencies apparent within trade unions at that time.

The Wartime Labour Relations Regulations are conventionally characterized as and lauded for compelling collective bargaining. However, it is important to recognize that legislative compulsion was limited to the process of collective bargaining - the substantive outcomes of the process continued to depend upon the relative economic strengths of the parties. The exchange of constraints upon economic action for compulsory recognition and bargaining proved to be an unequal bargain for trade unions. Recognition ultimately depended on economic power, which continued to favour employers. Thus, the compulsory collective bargaining regulations managed to preserve voluntarism at the heart of industrial relations.

I. The Wartime Labour Relations Regulations

PC 1003, which came into effect on March 20, 1944, applied to industries normally within federal jurisdiction, to industries essential for the prosecution of the war and to all other industries normally within provincial legislative authority. At the same time the scope of the Regulations was further refined through the definition of "employee" and "employer." Persons employed in a confidential capacity or having the authority to employ or dismiss employees were excluded from the definition of employee. Accordingly, such persons were not entitled to the benefit of the Regulations, although they could rely on their own resources to organize and bargain collectively with their employers. In addition, the definition of "employer" specifically included the National Harbours Board and other Crown corporations within the scope of the Regulations, while excluding civil servants.

The Regulations were administered by a Wartime Labour Relations Board (WLRB), which consisted of a chairman, a vice-chairman, and not more than eight other members - four of whom were to be appointed on the nomination of the central trade union organizations, and four on the nomination of the principal employer associations.[7] Thus, the federal pattern of representative boards, rather than expert boards or labour courts, was followed.

The Board had exclusive authority to give conclusive answers to the question of whether (a) a person was an employer or employee; (b) the unit appropriate for

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7 The Wartime Labour Relations Board (Nation) was appointed on March 16, 1944 under PC 1895. The Board consisted of the following members: Chairman, Mr. Justice G.B. O'Connor of the Supreme Court of Alberta; Vice-Chairman, Mr. Justice J.N. Francoeur of the Court of King's Bench, Quebec City; 4 employee representatives: A.R. Mosher, CCL, F. Molineux, Bro. of Painters, Decorators, and Paperhangers, W.L. Best, Bro. of Locomotive Engineers, and R. Harmegnies, the National Federation of Aluminum Workers, and 4 employer representatives: H. Taylor, Canadian National Carbon Co., W.H. Brown, the Moore Corporation, A. Deschamps, Contractor, and A. J. Hills, C.N.R. The Board appointed M.M. Maclean, Director of Industrial Relations for the Dept. of Labour, as Chief Executive Officer, and Bernard Willson, an Industrial Relations Officer of the Department, as acting Secretary.

collective bargaining was the employer, craft or plant unit or subdivision thereof; (c) an organization of employees or employers was a trade union, employees' organization or employers' organization; (d) an agreement was a collective agreement; or (e) an employer or certified bargaining representative was bargaining in good faith. If one of these questions arose in legal proceedings, the presiding judge or magistrate was required to refer the question to the Board for resolution.

The Regulations authorized the Minister of Labour, with the approval of the Governor in Council, to enter into agreements with the provinces to provide for provincial administration of the Regulations, subject to final appeal to the National Board. British Columbia, Manitoba, New Brunswick, Nova Scotia and Ontario suspended their provincial legislation and made the Order applicable to their jurisdictions, and all of them - with the exception of British Columbia - established provincial boards to administer the Regulations within their respective jurisdictions.[8] By contrast, British Columbia adhered to the administrative principle contained in its 1943 compulsory collective bargaining legislation by vesting the authority to administer the Regulations within the provincial labour minister. In Alberta and Prince Edward Island the Regulations were administered by the National Board; in the former the provincial act applied, while in the latter no provision was made for industries within its jurisdiction. In Quebec and Saskatchewan, on the other hand, new labour codes containing provincial policies were enacted in 1944 and these codes regulated industries within these two provinces.[9]

In addition to its administrative and enforcement provisions (which shall be described later), PC 1003 consisted of three distinctive, though inter-related,

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8 S.B.C. 1944, c.18; S.M. 1944, c.48; S.N.B. 1944, c.38; S.N.S. 1944, c.8; S.O. 1944, c.29.

9 S.Q. 1944, c.30; S.S. 1944, 2nd Sess., c.69.

elements: compulsory recognition and negotiation (the certification procedure), compulsory conciliation and the provisions enforcing contract adherence. The first element clearly established the right of employees to elect bargaining representatives and to bargain with their employers through such representatives by adopting the Wagner Act principle of administrative certification of bargaining representatives for an administratively determined unit. However, PC 1003's certification procedure more closely followed the 1943 British Columbia scheme than the American model.

Certification was a condition precedent for compulsory collective bargaining in cases where no collective agreement existed or the employer refused to voluntarily recognize the trade union. The certification procedure, contained in sections 5 to 9 of the Regulations, included two notable features. First, bargaining representatives, who were individuals either elected by employees or appointed by a union - and not trade unions - were to be certified. This feature, in addition to creating ambiguity regarding the status of trade unions, did not satisfy organized labour, which wanted the union itself to be certified.[10] Second, the Regulations made a distinction between the right to certification of an employees' organization and a trade union - the latter being defined as a provincial, national or international employees' organization or a local branch chartered by, and in good standing with, such an organization. An unaffiliated employees' organization was required to establish that a vote was held for electing bargaining representatives and that the bargaining

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10 The fact that individuals, and not trade unions, were certified as bargaining representatives, has led Peter Warrian to conclude that the order did not make union recognition compulsory, but rather that it made the process of collective bargaining compulsory. (Peter Jon Warrian, "'Labour is not a Commodity': A Study of the Rights of Labour in the Canadian Postwar Economy 1944-48" Ph.D., University of Waterloo, 1986, 36.) However, trade unions were recognized, if only implicitly by the legislation, since under the regulations trade unions were competent to enter into collective agreements and were authorized to appoint bargaining representatives. Thus, while it is true that the failure to impose compulsory recognition of trade unions had symbolic importance, it had little practical significance.

representatives received a majority of the votes of all of the employees eligible to vote in an appropriate unit. By contrast, a trade union was required to establish that it had a majority of members among the employees in an appropriate unit and that it had elected or appointed bargaining representatives. Evidence of trade union membership consisted of paid up membership in a regular fashion or an employees' written authorization that the trade union elect or appoint a bargaining representative on his or her behalf. This difference in treatment resulted from a compromise regarding the competing demands of the provinces - some of whom wished to preserve the status of employees' organizations while other did not.[11]

In answer to the request of the Canadian and Catholic Federation of Labour, the Regulations provided that two or more trade unions might by agreement join in electing bargaining representatives. Moreover, the Regulations allowed for multi-employer bargaining. Where more than one employer and their employees desired to negotiate a collective agreement, the employees of such employers could elect the bargaining representatives by a majority vote of the employees calculated on an employer by employer basis. Thus, the formula laid down in PC 7307 (the strike vote requirement) of insisting on a majority vote with respect to each employer - rather than an overall majority of all of the employees - was adopted. This method of calculating the majority, in addition to the requirement that both the employers and employees agree to multi-employer bargaining, made such bargaining virtually impossible.

Once bargaining representatives were elected, an application could be made to the Wartime Labour Relations Board for their certification as the exclusive bargaining representative for all of the employees in the unit. Upon receipt of an application for certification the Board was required to satisfy itself - by an

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11 PAC, RG 27, Acc. 83-84/206, Box 4, file 7-2-3:1, Discussion of the amendment to PC 1003 proposed by the Harry Taylor (CMA representative on the National WLRB).

examination of records, by vote or otherwise - as to the propriety of the election or appointment of the bargaining representatives and the appropriateness of the unit. In the determination of the appropriate unit, craft groups which were organized in line with established trade union practices were accorded special privileges and could be carved out of a larger unit. In all other respects, however, the Board had unlimited authority over the determination of the unit. If the Board was satisfied with the bargaining representatives and the unit, it certified the bargaining representative; if not, it rejected the application and an application from the same representative could not be entertained for a year from the date of the initial application.[12] The certification of the bargaining representative was secure for a minimum of ten months, as a new bargaining representative could not challenge the original representatives certification until that period had elapsed. If after that time new representatives were certified, they were substituted for the previous representatives - thus becoming parties to the existing collective agreement. Thereupon the new bargaining representatives were entitled to give notice of the termination of the agreement, either in accordance with the terms thereunder or as provided by the Regulations, in order to proceed to the negotiation of a revised agreement. In addition to promoting industrial stability, this mechanism was also the means of regulating jurisdictional disputes.

Upon certification, either the bargaining representatives or the employer could give the other party ten clear days notice requiring that party to enter into negotiations. Furthermore, the Order required that the parties negotiate in good faith with one another with a view to concluding a collective agreement. At their own request the bargaining representatives could be accompanied by an officer or agent of a trade union or employees' organization during such negotiations. If the negotiations were successful and a collective agreement was

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12 PAC, Finkelman Papers, MG 31, E 27, vol. 7, Labour Relations Act, Drafts of Act, 1946, section by section analysis of PC 1003.

concluded, then every employee within the unit was bound by the agreement regardless of whether or not he or she was a member of the union or had voted for the representative. However, the effectiveness of a wage provision in a collective agreement depended upon whether the appropriate War Labour Board decided that it conformed to the Wage Control Order. On the other hand, if the parties were unable to reach an agreement within 30 days of the certification of the bargaining representative, either party was entitled to advise the Board of this fact - thus triggering the compulsory conciliation procedure.

The compulsory conciliation procedure constituted the second distinctive feature of the Regulations - continuing the tradition initiated by the IDI Act of coupling intervention by ad hoc tripartite boards with a compulsory cooling off provision. Like the provincial compulsory conciliation statutes, PC 1003 formally incorporated a two-stage conciliation procedure. But the Order departed from both the provincial and federal models in that the conciliation procedure was only available in cases involving disputes over the negotiation of a collective agreement.[13] Thus, the conclusion of a collective agreement was the focus of the conciliation procedure.

Once the Board had been informed by either party to the negotiations that the negotiations had continued unsuccessfully for 30 days from certification, the Board was required to advise the Minister of this fact. The Minister was required, within three days, to instruct a conciliation officer to intervene in the dispute. Thus, the conciliation procedure was under the jurisdiction of the Minister of Labour and outside the purview of the Board. Within 14 days of receiving instructions the conciliation officer was required to report to the Minister, outlining the matters concerning which the parties could not agree, the terms (if any) upon which the parties agreed and whether an agreement might be facilitated by the appointment of a conciliation board. The conciliation

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13 Curtis, supra note 3, 54.

officer's recommendations concerning the appointment of a conciliation board were determinative of the issue - thus giving the officer some leverage over the parties in the initial stage of conciliation. If the conciliation officer recommended that a board be appointed, the Minister was required to establish one. The ad hoc tripartite board differed from that authorized by the IDI Act in that under PC 1003 the Minister retained some discretion over appointing the nominees of the parties. The Minister was no longer required to appoint the parties' nominees, but rather was only required to consider them before appointing the party representatives and the chairman.[14] Once appointed, the conciliation board continued the work of the conciliation officer, and within 14 days of its appointment it was required to report the result of its endeavours and recommendations regarding a settlement to the Minister. If the conciliation board was unable to effect a settlement, the Minister then sent copies of the report to the parties. In a further departure from the IDI Act, publication of the report was left to the Minister's discretion.

A ban on industrial action operated throughout the entire conciliation process, only to subside 14 days after the conciliation board reported to the Minister. In addition, the Order continued PC 7307, which required a strike vote as a prelude to a lawful strike. Thus, a minimum of three months from the application for certification elapsed before employees were lawfully permitted to strike.[15] Moreover, since the Regulations provided that "no employee shall go on strike until bargaining representatives have been elected or appointed" any trade union seeking to resort to economic sanctions to force concessions from an employer was required to embark upon the lengthy processes of certification and conciliation. In order to help employees to take advantage of the certification

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14 The other requirements for conciliation board members contained in the IDI Act continued to apply.

15 It could be substantially longer since the Minister had discretion to extend time limitations.

procedure, the Regulations contained a status quo provision. In cases where a dispute arose on account of an employer's proposal to change the existing terms of employment, the employer was prohibited, without the consent of the employees, from making any change effective until a period of two months had elapsed from the date when the employer notified the employees of the proposed change. Whether such change would ultimately be effective, depended upon the ability of the employees to organize and bargain collectively.

The third distinctive element of PC 1003 consisted of its emphasis on the collective agreement as the device for stabilizing labour-management relations.[16] It was this element of the Regulations which was unique in terms of legislative embodiment.[17] Under PC 1003 the signing of a collective agreement was the terminal point of the obligation laid on unions and employers to bargain, for the Order's injunction that "the parties shall negotiate in good faith with one another" required them only to "... make every reasonable effort to conclude a collective agreement."[18] While a collective agreement was in operation neither party was required to comply with the request of the other to open negotiations for the revision of the terms and conditions of employment. Thus, in effect, bargaining could be postponed by either party until the existing collective agreement came up for renewal, when once again the parties were required to bargain in good faith.

To ensure that a collective agreement actually promoted industrial peace and stability the Regulations required that a collective agreement be for a period of not less than one year. In addition, PC 1003 provided:

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16 Curtis, supra note 3, 55.

17 The U.S. National War Labor Board stressed adherence to the collective agreement and was willing to give union security to unions which ensured that their members abided by the contract. However, this was an administrative policy and not a statutory provision.

18 PC 1003, s.10(2).

> No employer who is a party to a collective agreement shall declare or cause a lockout and no employee bound thereby shall go on strike during the term of the collective agreement.[19]

Thus, the Regulations fostered industrial stability by preventing industrial action for at least one year in cases where collective agreements operated. Moreover, once the compulsory peace obligation was imposed it was necessary to provide a mechanism for resolving disputes that arose during the term of the collective agreement. This was accomplished by ensuring that every collective agreement contained a provision establishing a procedure for the final and binding settlement, without stoppage of work, of all differences concerning its interpretation or violation. Thus, the Order assigned the task of enforcing the collective agreement not to the Board, but to the parties to the agreement themselves. The Order promoted the maximum amount of party-determination of the grievance procedure, providing only that should the parties fail to agree on a procedure, the Board would, upon application, establish one.

Once the collective agreement was made an instrument of the public policy of promoting industrial peace, the legal status of trade unions was also transformed. Although the Regulations provided that bargaining representatives, and not trade unions were to be certified, trade unions were recognized as competent to enter into collective agreements.[20] Perhaps most tellingly, the Regulations declared a trade union to be answerable for the offences it might commit. A trade union was guilty of an offence and liable to a fine if it authorized a strike in violation of the Order or in any other way contravened the provisions of the Order.[21] Thus, the legal recognition of trade unions tended to

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19 PC 1003, s.21(3).

20 PC 1003, s.2(1)(d).

21 PC 1003, s.41(2).

flow from their capacities and liabilities under the Regulations, rather than from a positive acknowledgement of their legitimacy.

The Order adopted the provincial precedent of evenhandedness in the proscription of unfair labour practices. It also relied on criminal sanctions initiated by the parties as the method of enforcement. Prohibitions against unfair labour practices were addressed specifically to employers and to trade unions, and generally to all persons. The prohibition applicable generally to all persons was against the use of coercion or intimidation to compel or influence anyone to join a trade union. However, union or closed shop provisions were specifically exempted from the prohibition. Trade unions were forbidden (1) to support, condone or engage in a "slowdown" or other activity designed to restrict or limit production; (2) to participate in or interfere with the formation or administration of an employers' organization; and (3) to solicit union membership on an employers' premises during working hours, except with the employers' consent. Trade unions would later complain about this exception, as they believed that an unscrupulous employer could utilize it to favour one organization to the disadvantage of another.

The unfair practices prohibited employers from engaging in activities which would frustrate collective bargaining. Following the lead of the provincial freedom of association statutes, employers were prohibited from (1) refusing to employ a person because of a trade union membership; (2) imposing any conditions on the contract of employment which sought to restrain an employee from exercising rights under the Regulations; or (3) seeking by intimidation, dismissal, threats or any other means to compel an employee from becoming or ceasing to be a member of a trade union or to abstain from exercising lawful rights. These unfair labour practices mirrored the provincial statutes in two other respects. First, the Regulations did not explicitly protect an employee

from discrimination on account of trade union activities.[22] Second, and more importantly, the Regulations specifically stated that the above prohibitions did not interfere with management's right to suspend, transfer, lay off or discharge for appropriate and sufficient cause.

But the most significant employer unfair labour practice, and the one which went to the heart of genuine collective bargaining, was that of fostering company or employer dominated unions. The verbal formula for outlawing such unions was borrowed from the Wagner Act via the British Columbia 1943 amendment. Subsection 19(1) stated that "[n]o employer shall dominate or interfere with the formation or administration of a trade union or employees' organization or contribute financial or other support to it." However, the subsection explicitly exempted from this prohibition, permission on the part of an employer for an employee or trade union representative to consult the employer during working hours without deduction of pay from the scope of the prohibition. This exemption would raise the ire of trade unions, as they once again believed that it could be utilized by employers to the disadvantage of bona fide trade unions. The effectiveness of the prohibition against employer interference with trade union, as was the case with the other unfair labour practices, depended almost entirely upon administrative decisions.

Rather than following the Wagner Act principle of vesting remedial powers within the Board to ensure that the legislation was effective, the Regulations contemplated party-enforcement via the cumbersome and inefficient machinery of the police courts. No remedial power was vested in the Board; however, the Regulations did provide for the continuance of PC 4020 - which entitled the Minister (on the finding of the appropriate conciliation agency) to order the

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22 However, it was possible to read a protection for trade union activities in by implication, PC 1003, s. 4(1) and s. 42. But that would depend upon the interpretation given by the Board.

reinstatement of employees who had been discriminated against.[23] The Regulations departed from the precedent of the IDI Act and provincial statutes by providing that no prosecution for an offence under the Regulations could be instituted without the Board's consent. Accordingly, all complaints of unfair labour practices were required to be made in the form of an application for leave to prosecute.[24] Notice of the petition was then given to the opposing party, and the issue was heard by the Board. In granting or denying leave to prosecute, the Board was required to account for its decision by reasoned judgement, and it was entitled to take into consideration any disciplinary measures that might have been taken by an employer's organization, a trade union, or an employee's organization, against the accused. Offences under the Regulations were to be prosecuted summarily and the extent of the fine was related to the parties' perceived ability to pay.

Consistent with its emphasis on industrial peace, the Order provided specific offences which consisted of violating the cooling off provision and peace obligation. An employer who declared or caused a lockout contrary to the Regulations was liable to a maximum fine of $500 for each day or part thereof that the illegal lockout existed. Employees who struck, or trade unions which authorized strikes in violation of the Regulations, were liable to maximum fines of $20 and $200, respectively, for each day or part thereof that they struck or the strike continued. In addition, a general offence of contravening any of the Regulations was provided, for which an individual was liable to a maximum fine of $100, while a corporation, employees or employers' organization and a trade union were liable to a maximum fine of $500.

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23 However, PC 4020 applied only to industries which were within the scope of the IDI Act see PAC, RG 27, 83-84/206, 7-2-3-4, M.M. Maclean to N.D. Cochrane (Chief Executive Officer of the New Brunswick Wartime Labour Relations Boards), June 20, 1944.

24 PAC, MG 31, E 27, 7, Labour Relations Act, Drafts of Acts, 1946, Unfair Labour Practices (Operation).

Finally, the Regulations made the internal affairs of trade unions, employers' and employees' organizations vulnerable to state scrutiny. Organizations (including trade unions) affected by a certification application or collective agreement, were required by the Regulations to file with the Board a statutory declaration showing the names and addresses of their officers and a copy of their constitutions and by-laws. Moreover, within three months of the end of its fiscal year, such organizations were required to furnish a financial statement to each of its members, in addition to filing a copy with the Board.

The most outstanding feature of the Wartime Labour Relations Regulations was the extent to which it constrained the use of economic sanctions. As Woods emphasized, with the advent of PC 1003, strikes were "rendered unlawful over jurisdictional issues, recognition issues, and application or interpretation issues. Only in the negotiation area were they left, and even there they were to be held in suspension during compulsory conciliation."[25] In this respect PC 1003 went further than the Wagner Act and the 1943 British Columbia and Ontario compulsory collective bargaining statutes. Although British Columbia imposed a compulsory cooling off period, these three compulsory collective bargaining statutes merely prohibited jurisdictional and recognition strikes. In fact, the federal Regulations went even further than the American wartime labour policy in prohibiting industrial action. While the U.S. National War Labor Board sought to prevent strikes during the term of a collective agreement by granting union security (in the form of maintenance of membership and the checkoff) in exchange for binding grievance arbitration, the federal policy required compulsory grievance arbitration as a quid pro quo for a strike ban without any form of union security as compensation.

The argument that the vulnerability of the Canadian economy required severe restraints against disruptions in production is not persuasive, since in the

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25 H.D. Woods, Labour policy in Canada (2nd. Ed.) (Toronto: Macmillan, 1973) 93 (footnote omitted).

latter part of 1944 the recently elected CCF government in Saskatchewan enacted legislation which did not constrain trade union power to the extent that PC 1003 did.[26] In contrast to the federal Order, which was viewed as having the public interest at its core,[27] the Saskatchewan Act was declared to have as its object protecting and further the rights of organized labour.[28] Although the CMA was horrified by the Saskatchewan Act, predicting dire consequences as a result of its imposition,[29] the Act shaped the province's labour policy for four decades.

The Saskatchewan Trade Union Act applied to the Crown (thereby covering civil servants) and did not postpone the right to strike or lockout until the expiry of a period of compulsory conciliation unlike the federal regulations.[30] Furthermore, it did not compel grievance arbitration nor impose a peace obligation during the life of an agreement; rather it left it to the parties to agree to refer interpretation disputes to the labour board, which was required to decide the issue. Instead of relying on criminal penalties to enforce the legislation, the Board had a wide-range of remedial, and punitive, powers.

The Saskatchewan Act followed the 1943 Ontario Collective Bargaining Act in two respects - representation votes and the status of trade unions and collective agreements. Both these aspects were favourable to organized labour. First, the issue of representation was determined by a majority vote of the employees who cast a ballot, rather than a majority of those eligible to vote as under the

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26 S.S. 1944, 2nd. Sess., c.69.

27 Supra, note 1.

28 Id., at footnote 55 citing R. v. Piggott (1947), 89 C.C.C. 360 (Sask.).

29 PAC, CMA Papers, MG 28, I 103, 103, Collective Bargaining 1944-46, E.R. Kennedy (Assistant Secretary, Prairie Div., C.M.A.) to Members, Saskatchewan Branch, C.M.A., Nov. 7, 1944.

30 Supra note 26, s.8(2)(b).

federal Regulations.[31] Second, again in contrast to PC 1003, the Saskatchewan Act preserved the extra-legal status of the collective agreement and trade union. Finally, the Saskatchewan Act contained a hitherto unique provision regarding union security; a union was entitled to a maintenance of membership clause by a simple demand to the employer. Moreover, the Saskatchewan government was not alone in its decision that legislation stronger than PC 1003 was necessary to strengthen the position of employees in the collective bargaining process. The Ontario CCF regarded the Saskatchewan model as suitable for regulating labour relations in the largest industrial province, as its draft bill suggests.[32]

When comparison is made with the other models available to the federal government, it is obvious that PC 1003 was not intended to create actual countervailing power for trade unions.[33] While guaranteeing a limited form of recognition (the recognition of individual bargaining representatives rather than trade unions) and providing trade unions with the opportunity through the grievance procedure to challenge management's unilateral interpretations of a collective agreement, PC 1003 also constrained the nature of bargaining and the exercise of union power in a highly detailed manner.[34] Moreover, the government's commitment to evenhandedness in the treatment of trade unions and

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31 See Gillander J.'s decision in the Dominion Glass case, John A. Willis, The Ontario Labour Court (Kingston: Queen's University, Industrial Relations Centre, 1979), Canadian Brotherhood of Glass Workers, Local 3 and Dominion Glass Comp. Ltd., 185. This interpretation of the requisite majority was closely followed in the Saskatchewan Act. The Saskatchewan Board was required to direct that a vote be taken where 25 per cent of the employees have within 6 months of the application indicated the union as their choice. Thus, it was not necessary that the employees be members of the union.

32 PAC, MG 28, I 103, 4, CCF, 1944-45, Introduction to Draft Trade Union Act of the Ontario C.C.F. Trade Union Committee.

33 Frederick David Millar, "Shapes of Power: The Ontario Labour Relations Board, 1944-50," Ph.D. Thesis, York University, 1980, 416.

34 Leo Panitch and Donald Swartz, "Coercion and Consent in Canadian Industrial Relations," 13 Labour/Le Travail 133-57 (1984) 140-41.

employers - which took its most significant expression in the form of equivalent prohibitions on strikes and lockouts - did not do much to correct the actual disparity of power in favour of employers; as the confidential intra-departmental memorandum pointed out in its discussion of an earlier draft of PC 1003.[35] The formal equality of the ban on strikes and lockouts was illusory, since the lockout was but one of the employer's weapons in an arsenal of economic sanctions. Because of the employer's hiring and firing function, it always has a decided advantage over the employee. Thus, insistence on the application of equal rights and duties to both parties perpetuated the initial equality.

II. The Initial Reaction

Although there were some small pockets of discontent, organized labour's initial response to PC 1003 was generally favourable. The TLC registered the most enthusiastic support; in its annual presentations to the cabinet it "complimented the Government for passing Order in Council PC 1003" and expressed its appreciation for "the fact that consultation had taken place between the Minister of Labour and members of his Department, and officers of the Congress prior to the introduction of the order."[36] The CCL, while it also expressed its satisfaction with the consultative process, from the outset its praise of the Order was tempered with criticisms of the Order's shortcomings.[37] On the other hand, the Canadian and Catholic Confederation of Labour required as a condition of their endorsement of the Order that under it trade unions should be made legal

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35 See Chapter 4 text at supra note 198.

36 L.G., Mar. 1944, 367.

37 William Steward Martin, "A Study of Legislation Designed to Foster Industrial Peace in the Common Law Jurisdictions of Canada," Ph.D. thesis, U. of T., 1954, 389 and L.G., Mar. 1944, 364-65.

entities responsible under the law.[38] The CMA and the CCC shared the CCCL's concern that trade unions be made legally responsible under the Regulations.[39] The CMA's outright antipathy to compulsory collective bargaining, however, gave way to grudging acceptance once the Order was issued. The Association advised its members that PC 1003 was probably quite a good thing, since a general regime of collective bargaining might be expected to head off something worse - a continuation of extensive government intervention in the economy.[40]

This general support was punctuated by a small group of labour partisans, led by J.L. Cohen, who from the outset denounced the Regulations as ineffective.[41] On February 26 Cohen issued a statement citing seven defects, which included the lack of remedial powers to enforce the unfair labour practices and duty to bargain in good faith, and the ineffective prohibition of company unions, as the reasons for his condemnation of the Order.[42] Later, as many trade unions had greater opportunity to study the Regulations and examine them in operation, their evaluation of the Regulations underwent a gradual revision, and a tone increasingly similar to Cohen's was adopted. By April 1945, for example,

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38 L.G., Mar. 1944, 369-70 and PAC, Canadian Chamber of Congress, MG 28, III 62, 10, Meeting of the Executive Sub-Committee on Labour Policy, Feb. 9, 1944, and D.L. Morrell, Secretary of the Sub-Committee on Labour, to H. Mitchell, Min. of Labour.

39 L.G., July 1944, 927-29.

40 Id., 928.

41 PAC, J.L. Cohen Papers, MG 30, A 94, 3112A, J.L. Cohen, "PC 1003 and an Effective Wartime Labour Policy." Cohen's analysis was supported by Local 1817 of the United Steelworkers. See PAC, RG 27, 83-84/206, 6, 7-8-2, pt.1, D.N. Kay, Secretary of Local 1817, U.S.W., to Mitchell, Mar. 7, 1944.

42 PAC, RG 27, 254, 719:7-4, 3, Statement by J.L. Cohen, K.C., Toronto, on the Wartime Labour Relations Regulations, PC 1003, issued on February 26, 1944 and mentioned in the Globe and Mail of the same day. See also PAC, MG 30, A 94, 36, 3065, Cohen to Lewis, Feb. 24, 1944.

the TLC was emphasizing the shortcomings of both the Regulations and the Board's administrative policies.[43]

During the interim period of generally favourable response, PC 1003 seemed to be both an effective means of achieving industrial peace and recapturing much of organized labour's support for King's Liberal government. In the first year of its operation, the number of working days lost because of strikes dropped dramatically from the previous all-time high of 1,041,198 in 1943, to 490,139 to 1944.[44] However, PC 1003's contribution to industrial peace was more apparent than real, as is evidenced by the fact that the immediate postwar years saw an unprecedented increase in time lost on account of strikes: in 1945 the figure climbed to 1,457,420, reaching 4,516,390 the following year - a mark unsurpassed for two decades.

By contrast, the political compromise of which PC 1003 was a central element had a much more permanent effect, for it signalled a change of support by elements in organized labour from the CCF to the Liberal Party. The crest of the CCF's appeal was the Saskatchewan electoral victory in 1944, but the trough quickly followed. A rift emerged within the CCL over support for the CCF, and the TLC shifted back to its traditional support for the Liberal party.

The 1943 decision of the National Council of the CCF to reject the Labour Progressive Party's (the wartime guise of the Communist Party) application for affiliation was the occasion for the rift within the CCL.[45] Affiliation was rejected on account of the Communists' change in position from opposition to the war in 1939-1941 to virtual collaboration with Hepburn against strikes in Ontario

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43 PAC, RG 27, 3506, 1-27-1, pt. 1, Memorandum presented to the Dominion Government by the TLC, April 23, 1945.

44 M.C. Urquhart (Ed.), Historical Statistics of Canada (2nd. ed.), (Ottawa: Statistics Canada, 1983) Series E190-197.

45 Ivan Avakumovic, The Communist Party of Canada, (Toronto: McClelland and Stewart, 1975) 158.

after Hitler's invasion of the Soviet Union.[46] In response, the LPP fought hard to prevent unions from affiliating to the CCF or contributing to the CCF's election coffers. Moreover, the LPP's criticisms of the CCF carried weight within labour circles, as communists were well-entrenched in several major CCL unions and used their union position to promote the Party's line on the CCF.[47] In 1944 the LPP publically supported King's Liberals - under the banner of a Liberal-Labour Coalition. Opposition to the CCF brought together those trade union leaders who were party members or sympathizers and those who were sympathetic to King's brand of liberalism within the CCL.[48]

This, in turn, had a profound effect on the CCL's commitment to implementing its 1943 resolution embracing the CCF as the political arm of labour. In February 1944 a Political Action Committee (PAC), headed by Millard, was established to carry out the resolution. However, at the 1944 annual CCL convention most of the 32 resolutions submitted called for the repudiation of the previous year's endorsement of the CCF.[49] In response to this pressure Mosher clarified the position of the Congress regarding affiliation with the CCF by declaring that no union affiliated with the Congress was under any obligation to affiliate with the CCF.[50] Thus, the CCL retreated from its 1943 position with the result that PAC's operation had little positive effect on the CCF's electoral chances in the 1945 elections.

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46 Id.

47 Id., 159.

48 Bryan D. Palmer, Working Class Experience: The Rise and Reconstruction of Canadian Labour, 1800-1980 (Toronto: Butterworth, 1983) 245.

49 Irving Martin Abella, Nationalism, Communism and Canadian Labour (Toronto: U. of T. Press, 1973) 77.

50 Walter Young, The Anatomy of a Party: the National CCF 1932-61 (Toronto: U. of T. Press, 1969) 83.

Concurrently, the TLC - which in 1943 issued a statement of postwar policy virtually duplicating that of the CCF - shifted position back to its traditional political ties for the 1945 election. CCF organization was weak within the TLC, and, in addition, the Communists were accommodated within the "non-political" labour organization.[51] When King made his concessions to labour in 1944, friendly relations were re-established between the oldest congress and the Liberal party. In May 1945 the TLC performed a hitherto unprecedented act of political partisanship by publishing a statement calling for the re-election of the Liberal party.[52]

The political realignment within organized labour was dramatically emphasized in June 1945: the Conservative government in Ontario received an overwhelming mandate, displacing the CCF as the party of opposition, to be followed one week later by the Liberal's astounding victory in the federal election. Thus, in 1945 the CCF was in political retreat, and the number of unions affiliated with it fell drastically. King's leftward shift of Liberal policy relegated the CCF to the status of a third party federally for the next 40 years. But as a third party the CCF continued to play an important role politically, introducing new ideas which the older parties adapted for their own political survival. The success of King's postwar settlement in regaining labour's support suggests the overall success of the Liberals' policy approach. According to Horowitz "[t]he Liberals ... have not been a party of innovation ... they ... waited for signs of substantial acceptance by all strata of the population and for signs against possible electoral reprisals before actually preceding to implement the innovations."[53] More importantly, these innovations -

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51 That is how the TLC characterized itself in its February 1944 Memorandum to the Dominion Government, L.G., Mar. 1944, 367.

52 Gad Horowitz, Canadian Labour in Politics (Toronto: U. of T. Press, 1968) 105

53 Id., 37.

the introduction of some minimal welfare state protections - took place within the larger commitment to a virtually unmodified capitalist economy which was still dependant upon the external staples market.[54]

III. Return to Unrest

1. Administration

From the outset, lacunae in the Regulations were identified.[55] For example, compulsory conciliation was only available once a bargaining representative was certified and negotiations came to a standstill, and thus did not cover negotiations for the renewal of an agreement.[56] In addition, section 15, (which both provided a minimum term of one year for collective agreements and a method of terminating those agreements which were for more than one year) applied only to agreements concluded after the Regulations were issued. To fill these gaps the government issued PC 6893, which provided compulsory conciliation for the renewal of collective agreements and applied a minimum term of one year and wrote in a termination provision to all collective agreements.[57] In addition, PC 7307 was revoked (the compulsory strike vote requirement) allegedly on the ground that all proceedings under the IDI Act (which was suspended by PC 1003) were

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54 David A. Wolfe, "The Rise and Demise of the Keynesian Era in Canada: Economic Policy, 1930-1982", in Michael S. Cross and Gregory s. Kealey (Eds.), Modern Canada, 1930-1980's (Toronto: McClelland and Stewart, 1984) 46-78, 55.

55 See, for example, PAC, RG 27, 83-84/206, 3, 7-2-2-1, Pt. 1, Memorandum to the WLRB from V.C. MacDonald, J.H. Brown and M.M. Maclean, June 28, 1944 re the conciliation procedure for renegotiation.

56 Motor Products Corp., and Local 195, UAW - CIO, CLLC, 10,404, Sept. 2, 1944, 4-5.

57 P.C. 6893 issued Sept. 6, 1944.

completed.[58] A more likely explanation is that the government revoked the ineffective requirement in order to further placate organized labour.

The most glaring omission was the Order's failure to make any form of union security mandatory. Organized labour perceived union security as one of the most important elements in any legislation designed to protect trade unions from concerted employer attack during the reconversion period.[59] Throughout the war the federal government had demonstrated a marked antipathy to union security agreements - refusing to give unions in Crown corporations closed shop protection.[60] Moreover, although supportive of collective bargaining legislation, the Canadian population was ambivalent about union security - interpreting the closed shop as a threat to individual rights.[61] Even protection short of the closed shop elicited a negative response from both the government and employers; a legislated voluntary dues check-off was characterized by one Department of Labour official as uneven compulsion favouring trade unions.[62] Organized labour failed in its attempt to sell the union shop to the federal government. Labour argued that eventually employers would see the union shop as a "good investment", since "[i]t centralizes all activities through a properly established medium [which] has jurisdiction over all men, and, consequently, is

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58 L.G., Sept. 1944, 1106.

59 PAC, MG 30, A 94, vol. 39, 3112A, J.L. Cohen, "P.C. 1003 and an Effective Wartime Labour Policy."

60 PAC, MG 28, I 103, 190-4, Fed. Gov't. Labour Corresp., Pt. 2, 1939-44, A.W. Crawford, Director of Labour Relations for Dept. of Munitions and Supply, to Pat Conroy, Sec.-Treasurer of the CCL.

61 Millar, supra note 33, 3 at fn. 11.

62 PAC, RG 27, 83-84/206, Box 3, 7-2-2-1, Pt 2, Miss MacKintosh, Chief of the Legislation Branch, to M.M. Maclean, Dir. of Industrial Relations, Nov. 27, 1945.

able to keep its finger on irritations, and adopt preventative action,".[63] The government was not persuaded. Its refusal to provide a legislative solution, like that provided in Saskatchewan, resulted in a number of vicious disputes. Eventually, however, conciliation boards were able to use organized labour's concern over union security as a bargaining ploy. As explained below, union security became the quid pro quo for enhanced union responsibility.

After the first flush of enthusiasm, the omissions, actual provisions and administration of the Regulations served to taint organized labour's initially favourable response to PC 1003. Responding to a request by the Deputy Minister of Labour for a blanket endorsement of the federal government's labour policy (in order to strengthen the government's hand in upcoming negotiations with the provinces over jurisdiction), Bengough (the president of the TLC) questioned "whether this Congress would want to be recorded as being favourable to giving the Federal Government a blanket endorsement to take over ... the activities mentioned."[64] As reason for his hesitancy Bengough stated that "[t]he operations of the Dominion Government in the fields of labour relations and minimum wages so far has not come up to expectation and while, on paper, they were accepted as a general improvement in actual operation they have offtimes been a disappointment."[65]

Organized labour was dissatisfied with the Wartime Labour Relations Board's administration of the Regulations in a number of respects. However, the focus of the Canadian labour movement's criticisms differed considerably from that of its American counterpart regarding the administration of the Wagner Act by the NLRB. Organized labour in the United States expressed particular dissatisfaction with

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63 PAC, MG 28, I 103, 191, 191-10, P. Conroy, Sec. Tres. of CCL, to M.M. Maclean, Dir. of Ind. Rel., Oct. 7, 1942.

64 PAC, RG 27, 83-84/206, 6, 7-2-8-2, pt. 3, Bengough to MacNamara, Aug. 1.

65 Id.

the NLRB's handling of disputes involving jurisdictional rivalry - especially the definition of the appropriate bargaining unit, and the use of an existing collective agreement between a union (which might not have majority support) and an employer as a bar to the certification of a new bargaining representative.[66] Although in Canada certifications were occasionally challenged by rival unions[67] and some unions sought to use automatic renewal clauses to indefinitely postpone a certification challenge,[68] the WLRB's resolution of these issues was not considered controversial by organized labour. Rather, what angered organized labour was the Regulations' built-in bias for local, plant bargaining. The strength of this bias is suggested by the fact that it took SWOC, one of the most powerful unions in Canada, to establish industry-wide bargaining.[69] The craft privilege tended to favour the institutionalization of existing bargaining structures. Moreover, the twofold hurdle for multi-employer bargaining - that both the employees and employers indicate their preference for it and the requirement of a majority vote in favour on a plant-by-plant basis - created

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66 Harry A. Millis and Emily Clark Brown, From the Wagner Act to Taft Hartley (Chicago: U. of Chic. Press, 1950) 138-148, 155-59.

67 Cases appearing before the NWLRB which involved one union challenging the certification of another:
- Intl. Assn. of Machinists, United Steelworkers and Vivien Diesel and Munitions, CLLC, 10,403, Aug. 31, 1944.
- Intl. Industrial Union of Marine and Shipbuilders Wkers., and Port Arthur Shipbuilding Co. Ltd., CLLC, 10,409, Oct. 25, 1944.
- Selkirk Foundry Workers Unit and Manitoba Steel Foundries Ltd., et al., CLLC, 10,444, July 18, 1945.

68 The National Board held that automatic renewal provisions were not a bar to an application for certification, Intl. Union United Automobile et al., and Can. Bridge Co. Ltd., et al., CLLC, 10,426, Mar. 27, 1945; Cdn. Seamen's Union, and Gulf and Lake Navigation Co. Ltd., et al., CLLC, 10,476, Sept. 10, 1946.

69 H.A. Logan, Trade Unions in Canada (Toronto: Macmillan, 1948) 266-267 and Millar, supra note 33, 291-297, for accounts of the Stelco strike in Hamilton in 1946.

legal inhibitions against larger consolidated bargaining units.[70] Woods claims that "[i]t is not unreasonable to assume that units are smaller than they would have been, that they tend to be confined more to the single plant, and that probably more experiments with regional, company-wide, and even industry-wide bargaining involving multi-employer units would have occurred in the absence of the bias in the law."[71] In addition, the Board stated that it did not have jurisdiction to amend bargaining units once certified,[72] and the federal government refused to make the necessary legislative changes to allow the National WLRB to vary or revoke certification orders such that local bargaining units were amalgamated into larger multi-plant ones.[73]

Unlike the first National Labour Relations Board in the United States, which exercised its powers under the Wagner Act to rationalize the bargaining structure by favouring industry-wide bargaining, the policy of the Canadian WLRB was to institutionalize past practices. An interdepartmental memorandum from a labour advisor to the Chief Executive Officer of the WLRB outlined the Board's bargaining unit policy:

> In deciding questions regarding the inclusion or exclusion of employees from a unit the Board must pay some attention to the practices prevailing in

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70 Although multi-employer certifications were uncommon under PC 1003, they were issued more frequently under the wartime legislation than the subsequent peacetime federal legislation. According to Edward E. Herman, between 1944 and 1948 the Wartime Labour Relations Board issued 13 multi-employer certification. See Determination of the Appropriate Bargaining Unit (Ottawa: Canada Dept. of Labour, 1966) 121 and Appendix G.

71 Woods, supra note 25, 362. However, Woods goes on to note that the effect on the institutional arrangements, however, "is not the same thing as the effect on bargained results. The small bargaining unit favoured by current policy might still be served by a large and powerful local or international union. Whipsawing as a tactic by a union might produce effective results."

72 Ford Motor Co. of Can. Ltd. (Winnipeg), and Intl. Union U.A.W., Local 144, CLLC 10,413, Dec. 6, 1944.

73 Millar, supra note 33, 301.

> industry generally and the practice followed by the applicant organization in organizing similar types of employees in similar establishments.[74]

Although the union applied for certification of what it considered the appropriate unit, the employer or the Board could question the appropriateness of the unit.[75] Moreover, the Board had final authority to determine the appropriate unit.[76] Thus, the policy of the WLRB as authorized under PC 1003 was to institutionalize the existing bargaining structure. "In effect," according to Millar, "the code simply legalized the existing structure of the AFL and CIO unionism, especially in mining and manufacturing. It did not favour the spread of unionism in unorganized sectors. It did not declare unionism to be desirable public policy."[77]

It was doubtful that the institutionalization of a fragmented bargaining structure was an unintended consequence of the Regulations. Maintaining regional differentials was an explicit goal of the government's wage control policy. And once wage controls were lifted, a fractured and local bargaining structure prevented trade unions from rationalizing such differentials. The compulsory collective bargaining system introduced by the federal government gave legal support to the fractured and competitive structure of the Canadian labour movement which was historically rooted in the British craft structure.[78]

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74 PAC, RG, 83-84/206, 1, 7-2-1, pt.1, Bernard Wilson to Maclean, Aug. 1, 1944, 1.

75 Id., 2.

76 PAC, RG 27, 83-84/206, 3, 7-2-2-5, pt.1, G.B. O'Connor to Mitchell, Nov. 15, 1944, Demers v. Wartime Labour Relations Board.

77 Millar, supra note 33, 178.

78 H.C. Pentland, "A Study of the Changing Social, Economic, and Political System of Industrial, Relations," A Draft Study prepared for the Task Force on Labour Relations (Privy Council, 1968) 170.

Much of the Canadian labour movement's dissatisfaction with the Board's administration centred on its failure to exercise a creative, interpretive function in applying the Regulations to industrial relations, and its practice of adopting a literal stance to the verbal formulations contained therein. A glaring example of the Board's deference to the literal wording of the Regulations was its decision that only individuals, and not trade unions, could be certified as bargaining representatives. In Ford Motor Co. of Can. Ltd. (Winnipeg), and Intl. Union UAW., Local 144 the Board stated that "although it is the general practice to include the union as a bargaining representative, the regulations do not expressly authorize this."[79] Thus, in cases where it had a majority of the employees in a unit as members, the union was required to appoint or elect an individual as the bargaining representative.[80] However, in response to the employer's allegation that since a union was not a legal entity and thus could not bring an application for certification, the Board made it clear that although an unregistered trade union was not a legal entity "[t]he regulations treat a union as a legal entity by authorizing it to appoint bargaining representatives to enter into a collective agreement and make it liable for penalties for breach of the regulations."[81] (emphasis added)

The labour congresses could not understand the Board's insistence that trade unions appoint bargaining representatives - rather than act as such themselves - especially in light of the fact that under the Regulations they were to be

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79 CLLC, 10,413, Dec. 6, 1944, 18. It may have been that the drafter did not provide for the certification of unions as bargaining agents as a compromise to business interests opposed to the compulsory recognition of unions. However, it soon became clear that the major business interests were not opposed to the certification of unions.

80 U.A.W., Local 240, and Ford Motor Co. of Can., CLLC, 10,417, Feb. 14, 1945, 24.

81 Ford Motor Co. and U.A.W. Local 144, supra note 79, 17.

treated as legal entities[82] and that neither the CMA nor the CCC objected to this.[83] Moreover, Justice O'Connor (the chairman of the National Board) stated in a letter to the Deputy Minister of Labour that he had no objection to this practice - which, he noted, had been provided in the defunct Ontario Collective Bargaining Act, 1943 and the new Saskatchewan Trade Union Act, 1944.[84] Thus, the Board failed to account for industrial relations reality, feeling itself bound by the literal wording of the Regulations.

Regarding other controversial issues of the WLRB's administration, however, the trade union congresses and employers' associations did not find themselves in agreement. A case in point involved the Board's interpretation of the exclusion from the definition of "employee" which consisted of persons "employed in a confidential capacity of having authority to employ or discharge employees."[85] Persons excluded from the definition of "employee" were not entitled to the benefit of the Regulations, but rather had to rely on self-help, which (according to the Board) included striking without preliminary negotiations or conciliation, to obtain recognition from employers.[86] Thus, employers argued for interpretations of the disputed categories which were maximally exclusive, while trade unions offered interpretations which would include the greatest numbers of employees within the scope of the Regulations.

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82 The Amendment of PC 1003, compiled by Bernard Wilson, on file at the Labour Canada Library, Hull, Quebec and PAC, RG 27, 83-83/206, 1, 7-2-1-1, pt. 2, Summary of Amendments to PC 1003, CCL p. 1 and TLC, p. 2.

83 Id., CCC, 3 and CMA, 4.

84 PAC, RG 27, 83-84/206, 6, 7-2-3-2, O'Connor Chairman of the National W.L.R.B., to MacNamara, Deputy Minister of Labour, April 7, 1945.

85 PC 1003, s.2(1)(f)(i).

86 Western Can. Firebosses Assn. and Crow's Nest Pass Coal Co., et al., CLLC, 10,418, Feb. 1, 1945, 25.

With respect to the exclusion of persons "having authority to employ or discharge employees" (commonly referred to as supervisory employees), the Chief Executive Officer of the WLRB (M.M. Maclean) stated that the Board followed a "policy of excluding all of those who can effectively recommend dismissal," which, he noted, went "much further than was in our [labour department officials'] minds when the Regulations were drafted."[87] Maclean went on to recommend that any change in the Board's policy "should be in the direction of getting back to the letter of the Order" since "some of those persons who have been excluded as supervisory personnel have never hired or dismissed an employee and their 'effective' recommendations are subject to review by two or three higher levels of supervision and are very frequently reversed." However, the WLRB continued to apply a test which excluded persons "whose duties clearly involve the discharge of management functions including disciplinary duties ...;[88] thus, the resolution of whether or not a particular employee fell within the excluded category was a question of fact.

The greatest degree of controversy regarding the interpretation of the supervisory exclusion involved the question of whether or not foremen could partake of the benefits of the Regulations. Instead of issuing a general statement regarding the status of foremen as employees, the Board applied the test regarding supervisory employees to the facts of a particular care, sometimes finding that foremen were employees,[89] other times that they were excluded from

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87 PAC, RG 27, 83-84/206, 3, 7-2-2-1, pt. 1, Maclean to Brown, Nov. 12, 1945.

88 Halifax Civic Employees Fed. Union, and Corp. of City of Halifax, CLLC, 10,475, Sept. 10, 1946, 101.

89 See, for example, Indust. Union of Veneer Workers and Canada Veneers Ltd., St. John, CLLC, 10,481, Nov. 13, 1946.

the definitions.[90] The CMA wanted the definition of the exclusions from employee status amended such that the Board would not be able to exercise its discretion to decide in a particular case that a foreman did not have effective authority to employ or discharge employees. In support for its demand the CMA stated:

> [i]t is well-known that, particularly on the larger plants, very few foremen have the power to "employ or discharge." It is obviously undesirable that foremen should be included in any bargaining unit, because they are the personnel in the plant through whom management deals to a great extent, with the rank and file employees.[91]

The exclusion of confidential employees from the benefit of the Regulations also required the Board to articulate a general test which would enable it to balance management's right to manage and the related fiduciary duties of employees, against the rights of employees to organize and bargain collectively in a particular case. However, unlike the test for supervisory employees, which remained relatively stable despite the competing demands of employers and trade unions, the test for applying the exclusion of persons "employed in a confidential capacity" underwent several changes - changes which were made at the instance of employer members of the Board.[92] The initial test applied by the Board followed that of the U.S. N.L.R.B. and the Ontario Labour Court, and was limited to employees "having confidential information as to labour relations."[93] However, the CMA did not like this test as it was too narrow, and wanted it extended to include employees having access "to confidential records and, or

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90 See, for example, Tuckett Tobacco Co. Ltd. and Tobacco Workers Int. Union, Local 269, CLLC 10,512, April 2, 1947.

91 PAC, MG 28, I 230, 83/138, H.W. MacDonnell (Sec., Industrial Relations Dept. of the CMA) to Mitchell, re PC 1003, Aug. 10, 1945, 5.

92 PAC, RG 27, 83-84/206, Box 3, 7-2-2-1, pt 2, Maclean to Brown, Nov. 12, 1945.

93 Western Can. Firebosses Assn. and Crow's Nest Pass Coal Co., supra note 86, 26.

other confidential information."[94] The CMA admitted that the definition it proposed was wide, but it claimed that "if properly interpreted" it would "mean such confidential records and information as will affect the bargaining matters (terms and conditions of employment.)."[95] The Board did not wait for an amendment to the wording of the exclusion, but revised its initial test in favour of a more expansive one which included any employee "engaged in work of a confidential nature" in connection with time-keeping, pay-rolls, and other work for the use of management.[96] Predictably, the TLC was critical of the "unforeseen extent to which the Board has gone in excluding employees from coming under the Act as a result of a legal but not practical interpretation of 'persons employed in a confidential capacity'."[97] Unlike the controversy over whether a trade union could act as a bargaining representative, which the Board resolutely resolved by relying on the literal wording of the Regulations, in the case of exclusions for the definition of "employee" the Board exploited the ambiguity in the phraseology to implement changes in policy.

Trade unions and employer associations were also split over the meaning the Board should attribute to the phrase "majority of employees affected," which figured prominently in the certification procedure.[98] This phrase hearkened back

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94 MacDonnell to Mitchell, supra note 91, 5.

95 Id.

96 The staff members in charge of payroll and the personnel clerk were excluded in British Columbia Distillery Co. Ltd. and United Office and Professional Workers of America, CIO, Local 203, CLLC, 10,513, April 29, 1947. However, similar employees were included in Brotherhood of Railway and Steamship Clerks, et al., and Canadian Pacific Railway Company, CLLC, 10,454, Feb. 5, 1946.

97 PAC, RG 27, 3506, 1-27-1, pt. 1, Memorandum presented to the Dominion Government by the TLC, April 23, 1945.

98 PC 1003, s.5.

to Mitchell's original formula for determining support for employees associations as part of the Industrial Disputes Investigation Commission's recommendations in the Kirkland Lake strike.[99] In cases where the Board ordered a vote to be taken to ascertain the wishes of the employees regarding bargaining representation, it interpreted the phrase as meaning "absolute majority," thereby requiring support for the union of over 50 per cent of all of the employees in the unit eligible to vote before it would certify bargaining representatives.[100] This interpretation contrasted with the practice which under the Ontario Collective Bargaining Act, 1943, and which was subsequently embodied in the 1944 Saskatchewan Act.[101] Interpreting the Ontario provision in the Dominion Glass case, Judge Gillanders held that "where a vote is taken and more than half of the eligible employees in a bargaining unit cast their ballots, and more than half of those so casting their ballots express their desire to bargain through a particular agency, the vote should be viewed as prima facie evidence that such agency represents a majority of the employees in such bargaining unit."[102] In effect, this interpretation entitled 26 per cent of the employees in a unit to secure certification.

The TLC strongly advocated that PC 1003 be amended to embody Gillander's interpretation of the required majority for certification, condemning the formula adopted by the National Board in interpreting the Wartime Labour Relations Regulations as establishing an "invidious distinction between political democracy

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99 See Chapter 3 text at supra note 158.

100 United Electrical Radio and Machine Workers of America, and Packard Electric Co. Ltd., CLLC, 10,415, Jan. 12, 1945, 21.

101 S.S. 1944, 2nd Sess., c.69.

102 Glass Blowers' Association and Dominion Glass Co., et al., supra note 31, 154.

and industrial democracy which is unwarranted."[103] Somewhat surprisingly, the CCC was also in favour of adopting the Ontario procedure for establishing majority support.[104] On the other hand, the CMA equally strongly supported the Board's interpretation that "majority of employees affected" meant a majority of employees entitled to vote.[105] Moreover, it argued that this interpretation should be retained since a high degree of support for a union should be demonstrated for certification as a certified union was empowered to negotiate an agreement which bound all the employees in a unit, regardless of whether or not they supported the union. Apparently, both the government and the Board supported the CMA's argument, since the former did not amend the Regulations, and the latter did not modify its interpretation. However, all three failed to address the TLC's question concerning the reason for imposing a higher standard industrial democracy than political democracy in respect of electoral support.

An additional barrier to certification sprang from the procedure established by the Board for determining majority support in cases where a rival employees' organization or union intervened to challenge an application for certification made by another union. The crux of the matter consisted of whether the board should allow a run-off vote between the two employee organizations in cases where both received substantial support from the employees, but neither received majority support, or whether application for certification from either of the two or more organizations should be prohibited for a period so as to enable either organization to obtain a majority. This issue was decided by the National Board

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103 PAC, RG 27, 83-84/206,6, 7-8-2, pt. 1, Resolution passed at the 60th annual Convention of the TLC, Toronto, Ont., Oct. 1944.

104 See Wilson's summary of amendments requested to PC 1003, supra note 82, 3.

105 MacDonnell to Mitchell, supra note 91, 4.

in Wright-Hargreaves Ltd.[106] which involved an appeal by the employer from a decision of the Ontario Board allowing a run-off vote. Notably, this case, which established the procedure for determining union support, involved Local 240 of the International Union of Mine, Mill and Smelter Workers - the union which failed in its attempt to force recognition by the gold mine operators during the Kirkland Lake Strike.

Following a joint hearing of the two applications for certification submitted by Local 240, the Ontario Board directed that a vote of the employees be taken. The applicant union, the intervening employee organization and the Canadian union were all placed on the ballot. In each case, the international union failed to obtain the support of a majority of those entitled to vote - since a smaller, but still substantial number of employees, voted for the intervening organizations. Upon further application by Local 240, the Ontario Board directed that a new vote of the employees to be taken, and that the names of the intervening organizations be omitted from the new ballot. The Ontario Board justified this procedure on the ground that it would be improper both to ignore the fact that between 85 and 86 per cent of the employees expressed a desire to bargain collectively and to assume that each voter was so committed to the organization for which he or she had voted that he or she would rather forego the privilege of collective bargaining than bargain through another union.[107]

The employers appealed the Ontario Board's decision to the National Board, which allowed the appeal, and set aside the direction for certification in each case. In resolving the appeal the National Board stated:

> In our opinion the purpose of the vote is not to ascertain whether each employee is so committed to the union of his choice that he would rather forego the privilege of collective bargaining than bargain through the other union. The purpose of the vote is set out in sections 7 and 5 of the

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106 Intl. Union of Mine, Mill and Smelter Workers, and Wright-Hargreaves Ltd., et al., CLLC, 10,422, Feb. 28, 1945, 31.

107 Id., 32.

> Regulations - namely "the Board shall ... satisfy itself ... in the case of a trade union, that the trade union acted with the authority of the employees affected as prescribed by sub-section 2 of section 5" namely whether "the majority of the employees affected are members of <u>one trade union</u>."[108] (emphasis in the original)

The Board further opined that the proposed run-off vote would not prove that a majority of the employees affected were members of one trade union because the evidence established that this was not the case.

In order to obviate future difficulties, the Board established an authoritative procedure to be followed when dealing with certification applications by unions. Basically, if the Board was satisfied that a substantial majority of the employees were members of the union it would certify bargaining representatives without a vote. In cases where the majority was not substantial, or the evidence of union support took the form of authorizations rather than membership cards, the Board would direct a representation vote on the application of the employer. In such cases, the Board would refuse to include the name of any intervening or competing unions unless it was satisfied that a majority of the affected employees were also members of the competing or intervening organization. To ensure stability, the Board stated that once a certification application was rejected, a new application by the same union would not be entertained for a minimum of six months. Although elements of these rules were subsequently modified,[109] none of the modifications went to the root of the

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108 <u>Id.</u>, 33.

109 In <u>Retail Clerks Intl. Protective Assn., and Can. Distributors' Union et al.</u>, CLLC, 10,429, April 10, 1945, the Board stated that it had the discretion to hold a representation vote when a union or employee organization requested it to do so. Furthermore, the Board held that in cases where the intervening organization previously had a collective agreement with the employer for the group of employees covered by the certification application, it should not be left without an opportunity to be placed on the ballot. <u>Brotherhood of R.R. Trainmen and Order of Rlwy. Conductors</u>, CLLC, 10,436, May 22, 1945, 52. Finally the Board limited the six months bar on certification applications to cases where the second application was by the same union whose application had been rejected after an unsuccessful vote. <u>Amalgamated Clothing Workers of America, and Northern Shirt Co. Ltd.</u>, CLLC, 10,447, Aug. 14, 1945, 67.

barrier to certification created by the Wright-Hargreaves decision - its prohibition against run-off votes. Consequently, employees who clearly desired to bargain collectively were prevented from relying on the Regulations to compel the employer to bargain in cases where they were undecided, in the first instance, as to which of two organizations they would support.[110]

Although the Board's interpretation of the preceding issues irritated trade unions, its interpretation of the scope of the compulsory grievance arbitration provision was much more significant, as this went to the heart of the balance of power between trade unions and employers. Reversing a decision of the OLRB which established a grievance procedure for all disputes arising under the collective agreement, the National Board limited the scope of the power to establish a grievance procedure under s.18(2) of the Regulations to disputes concerning the interpretation or violation of a collective agreement.[111] In a letter to Maclean, sent shortly before the National Board decided the issue, Finkelman noted that on a literal interpretation of the sections governing the compulsory grievance procedure that:

> there may be issues between employers and employees during the currency of a collective agreement which cannot be dealt with by any of the machinery that has been set up under the Regulations. For example, if the parties fail to make provision with respect to a certain matter in an agreement, an employer may very well say that no justiciable issue has arisen. Even if the dispute was brought before us at some stage of the proceedings, we may well have to conclude that the matter does not constitute a misinterpretation or violation of the agreement. In such an event, there is no remedy through arbitration, and there is no remedy through a board of conciliation as was

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110 PAC, MG 28, I 103, 195, H.J. Padget, Representative of the USW, to Norman S. Dowd, Exe. Sec., CCL, Jan. 11, 1945, 2. Padget suggested that serious consideration be given to amending the Regulations to provide that a union receiving the majority, of a majority of votes cast, be entitled to certification to obviate this problem.

111 United Electrical Radio and Machine Workers of America, and Packard Electrical Co. Ltd., supra note, 90.

> the case under the Industrial Disputes Investigation Act. Nevertheless, the employees are forbidden to strike.[112]

To remedy this, Finkelman recommended that sections 17 and 18 should be amended to provide that all disputes arising between employers and employees during the currency of a collective agreement should be referred to arbitration. Acknowledging that it might be argued that such an amendment would give the arbitrator unacceptable discretion, Finkelman proposed a safeguard in the form of prior authorization by the Board for judicial enforcement of the arbitrator's award. Such a safeguard, he claimed, would ensure that the arbitrator did not overstep the bounds of "reasonableness." Finkelman's argument, however, failed to persuade the federal government. Maclean warned that if the arbitration clause in s.18 was broadly construed, as was done by the Ontario Board, "this would bring about a degree of compulsory arbitration (on new matters which could be stretched to relate to the terms of the agreement) not intended in PC 1003 and for which labour and management are not ready."[113] While organized labour indicated its readiness to extend the scope of compulsory grievance arbitration to any dispute arising during the term of a collective agreement,[114] the CMA made it very clear that it was opposed to any further infringement on management

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112 PAC, RG 27, 83-84/206, 3, 7-2-2-15, pt. 1, Jacob Finkelman, Chairman, Ont. L.R.B., to M.M. Maclean, C.E.O., N.W.L.R.B., Sept. 15, 1944.

113 PAC, RG 27, 83-84/206, 4, 7-2-3-7, M.M. Maclean to H.S. Johnston, Manitoba Dept. of Labour, Dec. 11, 1944, 1-2.

114 For the CCL's view see PAC, MG 30, A 94, 38, 3112, Report of the Special Committee of the Executive Council of the CCL on PC 1003 and PC 9384, 5, approved by the Council on Jan. 15, 1945. And for a recommendation along the lines of Finkelman's see PAC, RG 27, 83-84/206, Box 1, 7-2-1, pt 1, Proposed Amendments to Wartime Labour Relations Regulations adopted by the Executive Council of the CCL, 3, Mar. 23, 1945.

prerogatives which, in its view, included extending the scope of compulsory grievance arbitration.[115]

The National Board's ruling regarding the scope of arbitration and the government's refusal to amend the arbitration provisions gave the employer a decided advantage over the union, since disputes unforeseen at the conclusion of the collective agreement could be unilaterally decided by the employer. The Regulation's provision regarding compulsory arbitration did not cover such disputes, nor could a union resort to strike action to prevent their unilateral resolution by the employer since the peace obligation operated regardless of the issue in dispute. The National Board's limitation on the scope of compulsory grievance arbitration would have far-reaching impact on the future of arbitral jurisprudence, for it embedded the distinction between right and interest disputes and prefigured the reserved rights doctrine. Right disputes, which involved the interpretation, application or violation of a collective agreement, were to be resolved by reference to grievance arbitration; on the other hand, interest disputes, involving the economic interests of the parties were left to the resources of the parties for settlement.[116] Moreover, it appears that the Regulations assumed that "once a collective agreement has been signed there will be no further need to establish additional rights and obligations until the termination of the agreement".[117] Consequently, a mechanism was not provided for resolving interest disputes arising during the operation of the collective

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115 PAC, MG 28, I 230, 83/138, Minutes of the Industrial Relations Committee, Nov. 20, 1944, 3.

116 In an early article H.D. Woods identified the different kinds of disputes that arose in collective bargaining, "Canadian Collective Bargaining and Dispute Settlement Policy: An Appraisal," 21 Can. J. of Econ. and Pol. Sci. 447-65 (1955) 447-48.

117 Woods, supra note 25, 348.

agreement. And, according to the reserved rights doctrine, such disputes were within the right of management to unilaterally resolve.[118]

As organized labour became more familiar with the operation of the Regulations, it identified what it perceived to be their fatal flaw - the ineffectiveness of the requirement to bargain in good faith in compelling an employer to conclude a collective agreement with a certified bargaining representative.[119] The two-step mechanism for enforcing the duty to bargain in good faith (the requirement of board permission to prosecute any violations of the Regulations in the ordinary courts) proved - as anyone familiar with the experience of pre-existing Canadian collective bargaining legislation would have predicted - ineffective as a means of achieving agreements where the employer did not want to recognize the union. Even though it was abundantly clear that the Board had complete authority to determine the issue of what constituted good faith bargaining, it was reluctant to do so. The Board rarely decided that the employer had failed to bargain in good faith, except where the employer refused to meet with representatives of the employees.[120]

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118 For a discussion of the reserved rights doctrine and some possible solutions see Id., 349-54.

119 For examples of organized Labour's concern that PC 1003 failed to lead to collective agreements see PAC, RG 27, Acc. 83-84/206, Box, 7-8-2, pt. 1, Resolution passed at the 60th annual convention of the TLC, Oct. 1944, and PAC, MG 28, I 103, 195, H.J. Padget, Representative of the Limited Steelworkers, to Norman S. Dowd, the Exec. Sec. of the CCL, Jan. 11, 1945 regarding proposed amendments to PC 1003, 3-4.

120 I have found only two cases involving the National Board's finding that an employer had breached its duty to bargain in good faith, Industrial Union of Bakery and Confectionary Workers, Local 1 and Ben's Ltd., Halifax, N.S., CLLC, 10,473, and Canadian Labour Relation Board, Box 769-1-A-769-9, complaints lodged under the Industrial Relations Disputes Investigation Act, a submission to the CLRB on behalf of the Canadian Seamen's Union to hear a complaint against Canada Steamship Lines Ltd. In its submissions, the CSU refers to the fact that the National Wartime Labour Relations Board gave the CSU permission to lodge prosecution against Canada Steamships. The prosecution was later dropped by the union.

Potentially, at least, the conciliation boards, which were involved in overseeing the negotiation process, could provide some content to the duty to bargain in good faith. However, they failed to do so - being content to utter platitudes. Basically, the conciliation boards' pronouncements on the issue of what constituted good faith bargaining amounted to an emphasis on the process of give and take[121] and the willingness of the parties to compromise.[122] Ultimately, even these pronouncements were deprived of all value since the Board could, and would, refuse to give its consent to prosecute for a failure to bargain in good faith.

According to Allan MacLean, the National Director of the National Liberal Federation (the party's chief electoral machine),

> [t]he central and burning grievance of the trade union movement against PC 1003 is that it imposes all the obligations and responsibilities of compulsory bargaining upon the trade union which secures certification as the bargaining agency of a group of workers, <u>but it does not make it obligatory for management to negotiate an agreement with that union even after the Board has certified it as the bargaining agency</u>. This, aside from all other considerations, tends to make PC 1003 a handicap to the workers and an obstacle in their fight for collective bargaining in cases where management follows a calculated policy based upon rejection of the intent of the Order.[123] (emphasis added)

MacLean's concern that the ineffectiveness of the duty to bargain in good faith was eroding organized labour's support for the Liberal party in the crucial pre-election period was echoed by Paul Martin, Mitchell's Parliamentary Assistant.[124]

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121 <u>Report of the Board in the Canadian Rogers Sheet Metal and Roofing Co. Dispute</u>, <u>L.G.</u> Sept. 1945, 1325.

122 Report of the Board in <u>Brown's Bread Ltd.</u> v. <u>Local 847 Baker Wagon Drivers' Union</u>, <u>L.G.</u> Dec. 1945, 1793; <u>Imp. Optical</u>, L.G. Aug. 1945, 1181.

123 PAC, RG 27, 3540, 3-26-51-1, Allan G. MacLean (National Director of the National Liberal Foundation) to H. Mitchell, Dec. 30, 1944.

124 PAC, RG 27, 3540, 3-26-51-1, Jan. 5, 1945, Paul Martin to Arthur MacNamara, D.M. of Labour.

Department of Labour officials considered solving the problem of employer failure to bargain in good faith by amending the Regulations to give the Board authority to write a contract at the request of the aggrieved party.[125] This solution was rejected on the ground that compulsory arbitration of interest disputes had been considered during the drafting of PC 1003 and rejected as unsuitable. But, what the department officials failed to mention was that compulsory interest arbitration had only been rejected after the threat of a complete strike ban had been used to extract concessions from organized labour. A further justification for the refusal to impose a contract was offered by MacNamara (the Deputy Minister of Labour) in his response to Paul Martin. He stated that contract imposition constituted the first step to compulsory arbitration, and that the trade unions were not ready for this step.[126] This response was rather disingenuous, since in October 1944 the TLC had passed a resolution requesting that the Regulations be amended to provide for the compulsory signing of contracts where unions were certified,[127] and Eugene Forsey (research director for the CCL) advocated the compulsory writing of the "bare bones" of an agreement.[128]

The logic of the labour department officials' reasons for rejecting the imposition of a collective agreement is illuminated by the exchange of correspondence between Tim Buck (leader of the LPP) and Mitchell, which also

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125 PAC, RG 27, 3540, 3-26-51-1, Memorandum from A.H. Brown to MacLean, Jan. 8, 1945.

126 PAC, RG 27, 3-26-51-1, MacNamara to Martin, Jan. 16, 1945.

127 PAC, RG 27, 83-84/206, 6, 7-8-2, pt. 1, TLC annual convention, Toronto, Ont., Oct. 1944.

128 PAC, RG 27, 83-84/206, 7-2-8-2, pt. 3, Bernard Wilson to J.S. McCullagh, Sept. 20, 1946 with Forsey's Memorandum attached. See also PAC, CLC Papers, MG 28, I 103, 195, H.J. Padget (Representative of the USW) to Norman S. Dowd (Exec. Sec. CCL), Jan. 11, 1945, 4.

involved the Chairman of the National Board. Buck expressed concern that "tory-minded industrialists" were undermining the Regulations by refusing to bargain in good faith and conclude a collective agreement.[129] In his advice to the Minister regarding a suitable response to Buck's complaint, O'Connor equated contract imposition with compulsory arbitration, which he saw as necessitating a ban on industrial action. He went on to state that:

> [o]ne difficulty about this is that none of the Congresses of Labour have yet passed any resolution supporting compulsory arbitration. As far as I can ascertain, the feeling of the rank and file of Labour is that they do not wish to give up the right to strike if they are not satisfied with the decision of the arbitrators....[130]

Responding to Buck, Mitchell echoed O'Connor's belief that contract imposition was equivalent to compulsory arbitration which in turn required a ban on strike action.[131]

This exchange demonstrates that organized labour and the government had different ideas as to what contract imposition entailed. Organized labour did not regard contract imposition as requiring a ban on industrial action, whereas the government did. The government's automatic coupling of a strike ban with contract imposition underlined its continuing assumption in labour relations that government intervention was dependent upon the parties' willingness to forego industrial action. Industrial peace was the sine qua non of government intervention, and matters such as worker participation through collective bargaining were a secondary concern.

2. Union Security - The Ford Strike

Organized labour's growing dissatisfaction with both the provisions and administration of PC 1003 was accompanied by a number of events which led to

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129 PAC, RG 27, 83-84/206, 6, 7-2-8-3, Tim Buck to King, Feb. 19, 1945.

130 PAC, RG 27, 83-84/206, 6, 7-2-8-3, O'Connor, Chairman of the WLRB to MacNamara, Mar. 1, 1945.

131 PAC, RG 27, 83-84/206, 6, 7-2-8-3, Mitchell to Buck, Mar. 23, 1945, 2.

increased militancy. The end of the war also ended any willingness on the part of organized labour to continue to make sacrifices in the "public interest." Although the most controversial elements of the Wage Control Policy were amended in March 1944,[132] the continued focus on regional differentials to establish wage rates prompted organized labour - again led by SWOC - to attempt to establish national wage structures in key industries. And with the end of hostilities, the Communist Party abandoned its conciliatory stance towards constituted authority and Communist-influenced unions embarked on a series of strikes in order to entrench their wartime gains.[133] This concern with guaranteeing any enhanced status won during the war was shared by organized labour generally - which feared a repetition of the experience at the end of the previous world war when employers acted quickly and ruthlessly to roll back labour's gains. Moreover, trade unions had good reason to fear the repetition of that scenario, for PC 1003

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132 PC 1727 was issued on March 13, 1944 amending the most controversial aspects of PC 9384. The three member board was reintroduced. The reverse onus provision requiring the employer or employee to prove that his or her action was not in contravention of PC 9384 was revoked and the court rules of evidence and proof were to apply in the event of a prosecution under the Order. Although the National Board would continue to review decisions of the Regional Boards at its own initiative, notice and the right to make representations were given to the affected parties in cases where the National Board had decided to vary or revoke a regional board's decision. The Order removed the restriction that a board could not grant an increase, even in cases of gross injustice or inequality, if it found that such proposed increases were not consistent with the ability of the employer to meet the cost without increasing the price of his or her product or services. Finally, the boards were given the flexibility to grant increases in wage rates where it found that previous wage increases and cost of living bonuses had not yielded as much as the full cost of living bonus to the relevant employees as much as the full cost of living bonus. Notably, however, the amending Order failed to implement organized labour's request that workers earning under 50 cents an hour be allowed to bargain collectively free of any governmental control.

133 Palmer, supra note 48, 245-46.

was but a temporary measure - albeit its operation had been extended for duration of the reconstruction period.[134] According to Easterbrook and Aitkins

> [t]he unions therefore lost no time in instituting an aggressive campaign for union security, higher wage rates, and the check off system .... Employers for their part, declining to consider the gains made by labour during the war as necessarily permanent, stiffened their resistance to union demands. The result was a succession of major strikes between September 1945 and July, 1946, in automobile, lumber, rubber, textiles, steel, shipping, electrical manufacturing, and mining.[135]

The Ford automobile plant in Windsor contributed to the dramatic increase in the number of working days lost through industrial action in the immediate postwar period. It involved both the complex interplay of the above mentioned factors and the most important issue in post war collective bargaining - union security. Moreover, the Ford strike indicated that PC 1003 had failed to resolve one of the central problems confronting the post-war relations between capital and labour.

Despite what appeared to be a government policy favouring union organization and collective bargaining (as evidenced by PC 1003), employers attempted to exploit the reconversion period to rid their enterprises of trade unions and roll back workers' gains. In an effort to consolidate their newly won position, trade unions made a concerted attempt to secure their position within bargaining relationships. This could be done by negotiating one of a variety of provisions ranging from the closed shop to the maintenance of membership, as part of a collective agreement. However, a union's ability to obtain one of these forms of security depended upon its bargaining strength in relation to the employer, since the Regulations were silent regarding union security. This issue - alone of all of the major issues of collective bargaining, which included union jurisdiction,

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134 At the end of the war the government enacted the National Emergency Transitional Powers Act, S.C. 1945, c.25 in order to retain the powers contained in the War Measures Act.

135 W.T. Easterbrook and H.J.G. Aitken, Canadian Economic History (Toronto: Gage, 1980) 570.

recognition, grievances and wages - was not subject to compulsory third party resolution, but, rather, was referred to conciliation. Perusal of the Labour Gazette indicates that of all the subjects over which trade unions and employers were unable to agree, union security proposals were by far the most contentious.[136] Although conciliation boards not infrequently recommended the inclusion of such provisions in a collective agreement, generally speaking, such recommendations were ignored by employers. Moreover, the refusal of employers to enter into collective agreements containing a union security provision was the crux of organized labour's complaint that the duty to bargain in good faith did not ensure the conclusion of a collective agreement.[137]

To remedy what it perceived to be a glaring defect in the federal compulsory collective bargaining regime, the TLC proposed that the Regulations be amended such that the employer be required to grant a union shop if the majority of employees in the unit so demanded.[138] The CCL, while agreeing with the TLC about the importance of union security advocated a more flexible solution. It recommended that the Regulations be amended such that the WLRB be given the authority to order the inclusion of a union security clause in a collective agreement whether it be a union shop, maintenance of membership and/or deduction of union dues.[139] Failure to comply with such an order would constitute an unfair labour practice.

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136 See the CCL's discussion of union security in the Report of the Special Committee of the Executive of the CCL, supra note 104, 5.

137 Martin to MacNamara, supra note 124, and Buck to King, supra note 129.

138 PAC, RG 27, 83-84/206, 6, 7-8-2, pt I, TLC Convention Oct. 1944.

139 PAC, RG 27, 83-84/206, 1, 7-2-1, pt 1, proposed amendments to Wartime Labour Relations Regulations, adopted by the Executive Council of the CCL, Mar. 23, 1945, 2. The CCL recommendation also provided that the Board should have no authority to order any union security provision inferior to those which prevailed in an existing agreement or in any agreement which expired automatically before the application.

By contrast, the CMA endorsed the status quo. It was adamantly opposed to the inclusion of union or closed shop provisions within collective agreements - labelling them unwarranted interferences with individual liberty and undemocratic.[140] Most tellingly, the CMA also claimed that such provisions tended "to give the unions so dominant a voice in the management of a business that the balance between management and labour necessary for the effective and socially sound functioning of the enterprise is upset, with results that are harmful to both labour and management."[141] Although most of its obloquy was directed at the closed and union shop, the manufacturers' association tarred the maintenance of membership provision with the same brush - claiming that it was merely a modified version of the former provisions. Stopping short of demanding their outright prohibition, the CMA recommended that the inclusion of maintenance of membership and check-off provisions within collective agreements should be a matter of negotiation between the employers and bargaining representatives, and not forced on employers by the Labour Relations Board. In this respect, the government was in agreement with the CMA. Commenting on the growing crisis in labour relations caused by the disagreement over union security, O'Connor initially advised the Minister that the issue of union security was properly a matter for the provinces.[142] Later, as he became aware that trade unions would not be fobbed off with such an excuse, O'Connor recommended that the government maintain its policy of "co-operation between employers and employees as opposed to compulsion" on the grounds that he doubted "the advisability of changing this

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140 PAC, MG 28, I 230, 83/138, H.W. MacDonnell to H. Mitchell, Wartimes Labour Relations Regulations P.C. 1003, Aug. 10, 1945, 2-4.

141 Id., p. 2-3.

142 PAC, RG 27, 83-84/206, 1, 7-2-1, pt.1, O'Connor to Mitchell, Re: "Union Shop", Aug. 23, 1944.

policy on the eve of an election"[143] - even though it was apparent this was an issue over which the parties refused to co-operate. Officials in the labour department reiterated O'Connor's advice, stating that union security, including the check-off, should be left to the voluntary agreement of the parties.[144] Accordingly, the government refused to make union security compulsory.

The government was, however, willing to manipulate the conciliation process in order to secure concessions from both sides so as to prevent a strike.[145] No where was this technique more apparent than over the issue of union security - where numerous conciliators in succession were sent in or, less frequently, where one of the parties was subject of covert pressure.[146] In the event that these techniques failed to achieve a settlement, the conciliation boards issued normative reports setting out what the parties should agree to. Moreover, these reports built up a body of opinion which would set the pattern for both employers and employees on the union security issue.[147] In 1944 conciliation boards investigated 25 disputes arising from a union's request for a union security and check-off clause in the collective agreement.[148] Typically the union asked for a closed shop or union shop. However, conciliation boards refused to recommend closed shop agreements; and in only three cases did majority boards, with the

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143 PAC, RG 27, 83-84/206, 6, 7-2-8-2, pt.2, O'Connor to MacNamara, April 7, 1945.

144 PAC, RG 27, 83-84/206, 3, 7-2-2-1, pt.2, Miss Mackintosh, Chief, Legislation Branch, to M.M. Maclean, Nov. 27, 1945.

145 Jeremy Webber, "The Malaise of Compulsory Conciliation: Strike Prevention in Canada during World War II," 15 Labour/Le Travail, 57-88 (1985) 59.

146 Id., 59.

147 Id., 81.

148 Recommendations of the Boards of Conciliation on Union Security, L.G., 1945, 138.

employer nominee dissenting in each case, recommend a union shop.[149] Where the union shop was refused, the conciliation boards frequently recommended a maintenance of membership clause as a compromise measure of union security. However, on several occasions boards ruled that a maintenance of membership clause would not be granted where the union had less than a year's collective bargaining experience, and in such cases a check-off provision was frequently granted in its place. Generally the type of check-off clause favoured by conciliation boards was a voluntary one, under which each employee was required to make a written submission to the employer authorizing the deduction of dues and their remission to a trade union. Nevertheless, a conciliation board's recommendation did not guarantee that the employer would accept a union security proposal.

Failure to agree upon union security lay beneath the Ford Windsor strike of 1945. Militancy had been percolating through the rank and file since 1944;[150] however, the communist local leaders (with the support of the national leadership) opposed strike action.[151] This merely delayed the conflagration until the end of the war. The auto workers wanted job security, which for them was indistinguishable from union security and a living wage.[152] The immediate

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149 In two of these cases a modified form was recommended which did not require existing employees who were not union members to join the union, but required all new employees to join after a specified time.

150 Abella, supra note 49, 142.

151 For a brief history of the events involved in the Ford Windsor strike, see PAC, MG 30, E 77, 1, Short Chronological History of Conciliation in Industrial Relations between the Ford Motor Company of Canada Ltd. and Local 200, UAW-CIO Windsor, Ont., G.B. O'Connor, Chairman of the Conciliation board.

152 Millar, supra note 33, 249.

cause of the strike was Ford's response to the conciliation board's report.[153] Just as the conciliation board issued its report recommending a voluntary dues check-off Ford laid off 13 per cent of its workers in Windsor. On September 12, 1945, 10,000 workers walked off the job, this time with the support of the local leadership since the Communist strike ban had recently been withdrawn. The local wanted to end the system of casual labour and achieve parity with its American counterpart - both in terms of wages and security. Campbell, the virulent anti-union president of Ford Canada, wanted to maintain low wages and the open shop so as to increase the Canadian division's profitability vis-a-vis its American parent.[154] The CCL executive (Mosher and Millard in particular) refused to support the strike because it felt that the UAW in Windsor was dominated by Communists. Moreover, the national and international were split over the best strategy for winning the strike; the national director wanted the strike extended across Canada, but the international headquarters ordered it confined to Windsor. However, as Abella describes, the real control of the strike rested in the rank and file and local leaders.[155]

In October union and Ford representatives met with provincial and federal officials. The Ontario government stood firmly behind the CMA's and Ford's line that union security interfered with the right to work. O'Connor and the union's legal representative, Bora Laskin, reiterated the conciliation board's recommendation - the voluntary irrevocable check-off - as a compromise, and not

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153 The conciliation board consisted of Mr. Justice G.B. O'Connor, Chairman of the conciliation board and National W.L.R.B., Bora Laskin, the employee's nominee, and S.L. Springsteen, the employer's nominee. O'Connor recommended a compulsory dues check-off, Laskin recommended a maintenance of membership clause in addition to a compulsory dues check-off, and Springsteen refused to recommend any form of union security. PAC, MG 30, E 77, 1, Report of the Conciliation Board, Ford dispute, Sept. 10, 1945.

154 Millar, supra, note 33, 251.

155 Abella, supra note 49, 145.

the union shop, which Ford U.S. had granted four years earlier. When the federal government suggested that Ford accept this weak form of union security, Campbell responded that if the government endorsed union security it should legislate it.

The strike leaders organized massive picketing and the withdrawal of the power plant workers. Ford managers informed the Ontario government that unless the strikers permitted maintenance workers to enter the powerhouse severe damage would result to private property. Against the advice of the Windsor mayor, provincial police and RCMP were rushed in to reinforce the municipal police in case they decided to smash the picket lines. The workers retaliated by paralyzing the city through an automobile blockade of its major arteries. Mitchell fuelled the fire by publicly raising the spectre of communist agitators and hinting at the similarities between the Ford situation and the Winnipeg strike of 1919.[156]

Fearing an onslaught of picket line violence, the federal government, under the prodding of Paul Martin, suggested that the dispute be sent to binding arbitration. Martin went over the Canadian managers directly to Henry Ford II for an agreement on all points arbitration. Martin was aware that the choice of the arbitrator was the key to the union's acceptance of binding arbitration, therefore he recommended Ivan Rand, a judge of the Supreme Court of Canada with known pro-union sympathies. While the national director of the UAW endorsed a settlement based upon binding arbitration, the rank and file rejected the union's advice to end the strike and allow the issues to be but to arbitration.[157] However, two weeks later, after appeals from their own local leaders, workers voted in favour of accepting the federal government's plan. On December 20 Mitchell appointed Rand, and the workers went back to work - ending the 100 day strike.

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156 Millar, supra note 33, 255.

157 Abella, supra note 49, 145.

Rand's decision in the Ford case was the most important development in the post-war labour policy, setting the precedent for collective bargaining for the next generation.[158] Although his award regarding union security merely institutionalized the major trend in conciliation board decisions,[159] Rand's decision was truly innovative in that it managed to satisfy the predominant concerns of both organized labour and employers. Moreover, it clearly articulated the limits within which collective bargaining was to take place. The most applauded element in the decision - what became known as the "Rand formula" (a compulsory dues check-off for every employee in the unit) - was the favoured compromise of conciliation boards. However, where Rand departed from the usual recommendations of conciliation boards was in giving the employer something in exchange for union security. Moreover, this exchange was suggested in a secret letter to Rand by A. MacNamara, the Deputy Minister of Labour, who stated that:

> All will agree that a union making an agreement should carry it out. The individual membership of the union in permitting the agreement to be made on their behalf assume a responsibility; it is submitted, therefore, that there is good reason for conceding a measure of assistance to the Union for the purpose of bringing home to each individual member his responsibility.[160]

Although MacNamara set the limits to the extent of the security to be provided to union (compulsory dues check off)[161], Rand devised the exact terms of the union's responsibility. The union was required both to conduct a secret

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158 Millar, supra note 33, 263; Abella, supra note 49, 145.

159 PAC, RG 27, 83-84/206, 1, 7-2-1, pt.1, Maclean to MacNamara, Dec. 6, 1947. Of the 110 Boards in which union security was an issue, 74 per cent recommended some form of union security. Of those Boards, 22 per cent recommended both check-off and maintenance of membership, 43 per cent check-off only, and 9 per cent maintenance of membership only. Maclean wrote that he was "arranging to furnish a copy of this statement to the arbitrator in the ford cases...". See also L.G. 1946, 146 for a summary of conciliation board's recommendations re union security in 1945.

160 PAC, Ivan Rand Papers, MG 30, E 77, 1, A. MacNamara to Ivan Rand, Dec. 18, 1945, 1.

161 Id., 1-2.

ballot of its members before calling a strike and repudiate any wildcat strike which arose during the collective agreement. Union responsibility was the quid pro quo for union security - a point usually missed by most commentators. Also ignored is the fact that the terms of the exchange were much more generous to the employer than that imposed in the United States by the National War Labour Board, where the stronger form of security (the maintenance of membership clause) was granted in exchange for the union's responsibility to ensure that the employees it represented adhered to the contract.[162]

Equally as important as the terms of the award was Rand's analysis of what collective bargaining both assumed and entailed - for his analysis soon became conventional wisdom and set the tone of future mainstream discussion in Canada.[163] Rand's starting point was that "[a]ny modification of relations between the parties here concerned must be made within the framework of a society whose economic life has private enterprise as its dynamic."[164] As his minor premise he noted that the federal government had accepted the social desirability of the organization of workers and collective bargaining where workers seek them. A corollary of this was that labour unions became strong in order to "secure industrial civilization within a framework of labour-employer constitutional law based on rational economic and social doctrine."[165] Strong unions would also ensure that communist elements would not take hold within an enterprise. To

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162 PAC, RG 27, 83-84/206, 1, 7-2-1, pt.1, George W. Taylor Vice-President of the U.S. National war Labour Board to L.B. O'Connor, Chairman, WLRB, Aug. 18, 1944.

163 See Woods Task Force Report, supra note 5. H.D. Woods was the chairman of the Task Force and A.R. Carrothers was a member. Moreover, a great many well-known academics of the generation wrote study papers for the Task Force, including Jamieson, Pentland, Arthurs and Weiler.

164 Ford Motor Co. of Can. Ltd., and Intl. Union United Automobile, et al, CLLC, 18,001, Jan. 29, 1946, 159.

165 Id., 160.

become strong, unions required security. However, Rand was unable to give the union the degree of security it demanded, which was the union shop coupled with a check-off clause. Echoing the CMA's arguments against the union shop, Rand declared that it would "subject the companies interest in the individual employee ... to strife within the union" and "deny the individual Canadian the right to seek work and to work independently of personal association with any organized group."[166] But he was willing to order the compulsory dues check-off regardless of union membership, for it was equitable that each employee contribute to the expenses of the union since each benefitted from the union's representation. As further justification of his decision, he stated that "[t]he obligation to pay dues should tend to induce membership, and this in turn to promote that wider interest and control within the union which is the condition of progressive responsibility."[167]

To ensure that the union did not exercise its strength for illegitimate ends, Rand imposed two conditions. A secret ballot of all of the employees within a unit was a requirement of legitimate industrial action - the purpose of which was to guarantee union democracy. Second, and more importantly, the union's right to security was conditional upon its fulfilling certain responsibilities. Since the union was granted security in order to better exercise its function - the peaceful administration of the collective agreement - it was responsible for taking steps to ensure that its function was not hampered. Thus, in the event that the union failed to repudiate a strike called

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166 Id., 163.

167 Id., 164.

during the term of a collective agreement, the compulsory check-off would be revoked.[168]

Rand's emphasis on the maintenance of industrial peace during the operation of a collective agreement served to buttress the Regulations' ban on industrial action for the duration of a collective agreement. PC 1003 had not done away with mid-term strikes, which were manifestly illegal under the Regulations, for there had been no attempt to prosecute striking workers.[169] One contemporary commentator suggested that the necessity of obtaining leave to prosecute and the tendency of various labour relations boards to undertake a conciliatory rather than judicial role were factors which operated against the use of the Regulations as a deterrent. Thus, the Rand formula, which hit the unions financially if they failed to live up to the peace obligation, might prove a more successful means of preventing illegal strikes.

Moreover, the Rand decision answered both the Minister of Labours' and major employers' organizations concern to enhance union responsibility for ensuring contract adherence. In 1946 Mitchell complained that the

> greatest evil is the lack of recognition by unions of the inviolability of contracts with employers. If we could get labour leaders who would insist upon the recognition of such contracts we would have fewer strikes and a much more harmonious relationship between management and labour.[170]

Sounding his recurring theme, Mitchell blamed extremist labour leaders as the cause of industrial irresponsibility and advocated "weeding" them out. While sharing the Minister's concern with union responsibility, both the CCC and CMA

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168 In addition, Rand provided that any employee engaging in an unauthorized strike would be liable to a fine of $3.00 a day for every day's absence from work and to loss of one year's seniority for every continuous absence for a calendar week or part thereof.

169 Harold J. Clawson, "The Rand Formula: Subsidiary and Quasi-Legal Aspects," 24 Cdn. Bar Rev. 879-88 (1946) 882.

170 PAC, RG 27, 3520, 3-26-10-1, pt.1, H. Mitchell to R.W. Gladstone, M.P., Aug. 1946.

advocated the imposition of full scale legal liability upon trade unions for breaches of the collective agreement.[171] However, as Millar points out, the beauty of Rand's decision was that it simultaneously satisfied the demand for union responsibility and liability in case of strikes, confirmed the legal sanctity of the collective agreement as contract and greatly increased the scope of arbitration while avoiding the dangers of common law damage suits.[172] Moreover, it was the first step in the institutionalization of the union's role as an agent of control over employees.[173]

Conclusion

Against the background of this chapter how, then, is one to evaluate PC 1003? It did not create an equivalent countervailing power for trade unions in the bargaining process. The hurdles posed by the certification process (for example, the requirement that a majority of the employees affected vote for the trade union), the bias in favour of local, plant-wide bargaining units, the limitation on the scope of grievance arbitration and the so-called "evenhandedness" in the regulation of strikes and lockouts entailed that the employer's inherently superior position in the employment relationship was never

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171 PAC, RG 27, 3520, 3-26-10-1, pt.2, D.L. Morrell, Exec. Sec. to C.C.C., to Maurice Lalonde, M.P., Chairman, Standing Committee on Industrial Relations, Aug. 12, 1946 and PAC, 627.

172 Millar, supra note 33, 265-66.

173 Subsequently, a line of cases (decided both by arbitrators and the courts) emerged whereby the union was held responsible for upholding the collective agreement and liable for damages in the event of a breach unless it took disciplinary action against employees to facilitate their return to work: Re Polymer Corp. and Oil, Chemical and Atomic Workers Int'l. Union, Local 16-14, (1958), 10 L.A.C. 31 (Laskin); Cdn. Gen. Electric Co. Ltd., in re U.S.R.M.W., Local 507 (1951), 2 L.A.C. 608 (Laskin); A.-G. Nfld. v. Nfld. Ass. of Public Employees (1976), 74 D.L.R. (3d) 195 (Nfld. S.C.); Winnipeg Builders Exchange v. Int'l. Bro. E.W. Union Local 2085 (1967), 65 D.L.R. (2d) 242 (S.C. Can.).

seriously challenged.[174] But if the Regulations did not give unions equivalent power to employers, the main-stream of Canadian labour policy commentary would applaud the Regulations as the pinnacle in the evolution of Canadian labour policy which "can be considered as a movement from interests to rights."[175] In other words, even if PC 1003 did not match the union's and employer's bargaining power, it institutionalized the union's, and hence workers', right to participate in decisions relating to the running of the enterprise. Or, as Woods put it, with PC 1003

> the rule of law replaced overt conflict because the law recognized that collective agreements established a structure of rights and obligations for the signing parties and those they represented, and arbitration, which had been developed by the parties themselves on a voluntary basis, became a statutory requirement and a right, replacing the right to resort to enforcement strikes and lockouts, which were made illegal.[176]

What was the effect of the substitution of dispute resolution procedures for industrial action in jurisdictional, recognition and grievance disputes? Theoretically, on the positive side for organized labour, a union was no longer required to mount a campaign of industrial action in order to obtain recognition from employers. However, as the discussion of the inadequacies in the NWLB's interpretation and enforcement of the duty to bargain in good faith demonstrates, trade unions were forced to rely upon their economic power to attain collective agreements. Moreover, their economic power was regulated and, ultimately, determined by the Board, since only the employees within the appropriate bargaining unit could lawfully withdraw their labour collectively. Thus, certification was no guarantee of a collective agreement - the only real indication that the employer had recognized the trade union for the purpose of

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174 See Woods et al, supra note 5, 95 and the Rand decision in the Ford case, supra note 154, 160 for acknowledgement of the inherent superior/subordinate relationship between capital and labour in labour relations.

175 Woods, supra note 25, 346.

176 Id., 346.

collective bargaining. By the end of 1946, the National WLRB had granted 264 certification applications; however, during the same period only 163 agreements resulted from proceedings under the Regulations.[177] One year after PC 1003 was implemented, industry leaders, such as Ford, Stelco, the Wright-Hargreaves and Sylvanite mines in Kirkland Lake, Canada Bread, Westinghouse, Imperial Optical in Toronto, Electro-Metallurgical in Welland and Halifax Shipyards still refused to bargain with certified trade unions, and there was little the Board could, or would, do to stop this flouting of the Regulations.[178] Certification, without a mechanism for enforcing real negotiations merely took the power over determining bargaining structures from trade unions and gave it to the Board, without any meaningful quid pro quo.

In those cases where collective agreements were signed, grievance arbitration was arguably a boon for trade unions in that they no longer had to resort to economic confrontation to force employers to abide by collective agreements. But this benefit for the trade union was more apparent than real because of the restrictive interpretation placed upon grievances to be resolved under the arbitration mechanism. Disputes involving issues not about the interpretation of application of terms in a collective agreement were outside arbitral jurisdiction, and since trade unions were bound by a comprehensive peace obligation, such disputes were left to the employer unilaterally to resolve. Moreover, as Peter Warrian's analysis of collective agreement terms negotiated under PC 1003 indicates, the formal restrictions on the use of economic action combined with binding grievance arbitration resulted in the introduction of management's rights into the legal framework of post-war collective

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177 The data regarding certification applications was taken from Herman, supra note 162, Appendix AA, p. 208. The data regarding collective agreements resulting from proceedings under the Wartime Labour Relations Regulations was culled from the indices to the following Volumes of the Labour Gazette, 1944, vi; 1945, vi; 1946, vi.

178 Millar, supra note 33, 426.

bargaining.[179] This development aided employers at the expense of trade unions, for it created a sphere of management prerogatives which were virtually impervious to successful challenge. Thus if PC 1003 is regarded as institutionalizing employee participation and the rule of law into workplace relations, it did so only on a limited range of issues in a limited number of circumstances.

Generally, PC 1003 provided the legalization of industrial relations in Canada. As Logan observed, "[t]he powerful weapon of the strike as an aid to negotiation through militant organization, was weakened in its usefulness where the approach to recognition had to be certification."[180] Trade union officials attention was drawn from "mobilizing and organizing towards the juridical arena of the labour boards."[181] A glance through the decisions of the National WLRB indicates that during the four and a half years of its operation leading trade unionists were involved in Board proceedings, thus diverting scant resources from organizing new workers.[182] This, again, tended to cement the bargaining structure that emerged out of the Second World War. Lawyers were widely used to navigate the now complicated procedures of collective bargaining, and their

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179 See Warrian's analysis of the collective agreements negotiated under PC 1003, supra note 10, Chapt. 3, 133-167.

180 H.A. Logan, State Intervention and Assistance in Collective Bargaining (Toronto: U. of T. Press, 1956) 76.

181 Panitch and Swartz, supra note 34, 145.

182 P. Bengough, president of the TLC, appeared before the NWLRB in the following cases as reported in CLLC, 1944-1948: - 10,403; 10,406; 10,418; 10,429; 10,475. Pat Conroy, a prominent member of the executive of the CCL, appeared before the NWLRB - 10,405; 10,418; 10,443; 10,522. J.A. Sullivan, president of the Cdn. Seamen's Union, - 10,414; 10,418; 10,433; 10,447; 10,488. Other leaders of unions, usually representing Canadian districts of international unions, also appeared.

presence became a serious complaint of organized labour.[183] According to Panitch and Swartz, in the new context of Canadian collective bargaining introduced by PC 1003 "it was crucial above all to know the law - legal rights, procedures, precedents, etc." However, reliance upon these skills had a negative impact on collective bargaining for they "tended to foster a legalistic practice and consciousness in which union rights appeared as privileges bestowed by the state rather than democratic freedoms won and to be defended by collective struggle."[184] Legalism, in conjunction with the stress upon union responsibility for contract observance, thus had an important effect upon the goals of trade unions. Unions were treated as quasi-corporate institutions distinct from their membership with a responsibility to suppress any sign of spontaneous militancy. Their continued recognition depended upon their ability to administer the collective agreement.

Taking a broader view, the compulsory collective bargaining scheme contained in PC 1003 was part of the Liberal government's post-war settlement - which was intended to avoid the widespread economic and industrial dislocation which occurred after the First World War. Compulsory collective bargaining was an essential element in the political exchange for organized labour's continued commitment to an economic system in which the vast majority of economic decisions remained in private hands. In terms of the larger bargain, PC 1003 was a successful policy strategem in the part of King's government - organized labour accepted its new institutionalized role, the CCF lost (to a great extent) labour's support, and the Liberal party continued to dominate the federal political scene. Moreover, the post-war settlement brought an end to any hope of corporatist political structures in Canada. Organized labour's role was confined

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183 PAC, RG 27, 3506, 1-27-1, pt.1, Memorandum presented to the Dominion Government by the TLC, April 23, 1945.

184 Panitch and Swartz, supra note 34, 178.

to collective bargaining and the elevation of Howe to the position of Minister of Reconstruction was a clear signal that organized labour's role would not be expanded. Compulsory collective bargaining embedded the economic adversity of unions and employers since the government believed that in a free enterprise economy interest disputes could be resolved only by resort to economic strength. By institutionalizing economic adversity in the manner that it did in PC 1003, the government also institutionalized the economic, and hence bargaining, superiority of the employer.

In the short term, PC 1003 failed to achieve the government's primary goal of industrial peace. The Ford and Stelco strikes demonstrated that there continued to exist key issues over which PC 1003 did not facilitate a consensus. Although the number of recognition strikes dropped, long and violent negotiation strikes took their place as the primary cause of worker days lost through industrial action. The Wartime Labour Relations Regulations shifted the timing of strikes from recognition to contract negotiation. Instead of correcting the power imbalance between workers and employers, PC 1003 merely legalized the power relationship that existed,[185] and ensured that in the future it would be even harder to challenge.

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185 Millar, supra note 33, 417 and Cameron and Young, supra note 1, 71.

Conclusion

From the turn of the century the federal government intervened in industrial disputes which threatened the fragile Canadian economy. Its concern was not to establish collective bargaining, but rather to provide stable productive relations, which it equated with the ideologically charged concept of industrial peace. Instead of implementing compulsory binding arbitration, which was clearly on its legislative agenda, the federal government preferred to limit the extent of its intervention to compulsory conciliation coupled with a cooling off provision in essential industries. The underlying theme of the IDI Act, that "private rights should cease when they become public wrongs,"[1] was mediated both by the government's perception of the appropriate limits to state involvement in industrial relations and the demands of the CMA and TLC. King, the chief architect of the federal government's labour policy, characterized the role of the state in industrial relations as that of an impartial umpire ensuring that the participants adhered to established rules and procedures.[2] The CMA was adamantly opposed to the compulsory arbitration of wage disputes on the ground that substantive issues such as wage rates should be established by the unfettered play of economic forces. After the AFL takeover of the TLC in 1902, the Canadian Congress rejected compulsory arbitration for collective bargaining as the means of establishing terms and conditions of employment. Consequently, by 1903 the federal government was committed to a particular brand of voluntarism in industrial relations; it would provide mechanisms for the conciliation and

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1 In his official report of the Lethbridge strike King used this phrase as a justification for state intervention, L.G., Dec. 1906, 61 and in 1918 he again employed this phrase in Industry and Humanity (2nd Ed.) (Toronto: Macmillan, 1947) 518.

2 King, supra note 1, 195.

investigation of disputes, but it would neither force employees to bargain with trade unions nor establish the terms and conditions of employment. Collective bargaining and its outcomes were viewed as essentially private matters between employers and employees.

The federal government's policy of voluntarism in labour relations was, however, supplemented by overt coercion in order to crush "illegitimate" trade unions. Illegitimate trade unions were defined as those unions, such as the One Big Union and the Workers' Unity League, which in the government's view posed a threat to the established political or economic order. The use of coercion was justified on the ground that such trade unions were using their economic power within the public sphere for illegitimate purposes. The government intervened to re-establish the separation between the private (economic) and public (political) not only in times of widespread industrial militancy; it intervened to structure the very conditions upon which the capitalist economy depended. Capitalism is predicated upon, and distinguished, by the separation of the polity from the economy, and it is the state, with its monopoly on legitimate coercive power, which intervenes to distinguish the economic from the political.[3]

In practice the government shielded the employer because the law as it stood was not neutral: the law tolerated anti-trade union behaviour on the part of employers.[4] As the Canadian economy emerged from the depression in the late 1930s the TLC began to exert pressure on the federal government for legislative protection against the use of contract and property rights by employers to prevent trade union organization and collective bargaining. However, the TLC's legislative demands were tempered by the AFL's criticisms of the Wagner Act,

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3 Dominic Strinati, "Capitalism, the State and Industrial Relations," in Colin Crouch (Ed.), State and Economy in Contemporary Capitalism (London: Croom Helm, 1979) 191-236, 192-93.

4 See Antoine Jacobs, "Collective Self-Regulation," in Bob Hepple (Ed.), The Making of Labour Law in Europe (London: Mansell, 1986) 193-215 discussing the German Strike Order of April 11, 1886.

which the American Federation saw as favouring the rival industrial union movement. The federal government eventually responded to the TLC's demands, which were echoed in Parliament by the social democratic CCF, by enacting ineffective criminal prohibitions against employers who sought to use their employment power to destroy trade unions.

Under the guise of voluntarism, compulsory conciliation, supplemented by repression, remained the federal government's primary labour relations policy until it was forced to impose compulsory collective bargaining in 1944. The longevity of the element of compulsory conciliation in this policy of voluntarism, as the thesis findings show, is attributable to the fact that the administration of the Act was sufficiently flexible to enable the government to modify its policy to meet changes in labour relations and the political economy without having to legislate. As Alan Fox noted, once a chosen strategy has been successfully employed to resolve a crisis its persistence is cumulative, for its success in maintaining order and privilege strengthens the motivation to push its implications to their logical extent.[5]

A number of factors converged during the Second World War which forced the federal government to redefine its policy of voluntarism regarding collective bargaining. Urbanization and industrialism resulted from the federal government's drive to increase production for the war effort. The trade union movement split once again, and the new industrial union congress (CCL) brought increasing pressure to bear upon the federal government to enact compulsory collective bargaining legislation. The TLC followed suit, and organized labour's demands were supported by the CCF, which was attracting increasing public support. Most importantly, organized labour began to exploit the contradictions within the federal government's wartime labour relations policy: at the same time as the federal government continued to advocate voluntarism with respect to

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[5] Alan Fox, History and Heritage (London: George Allen and Unwin, 1985) 437.

collective bargaining it imposed coercive wage controls to prevent inflation. Organized labour complained that the government was violating its commitment to evenhandedness and neutrality.

Faced with these pressures King feared that the Liberal Party would no longer be able to maintain sufficient electoral support to form the postwar government. Compulsory collective bargaining now became a central plank in the federal government's postwar strategy. The principle of voluntarism was reformulated to distinguish between permissible procedural intervention and impermissible substantive intervention.[6] PC 1003 introduced an administrative mechanism which prevented employers from interfering with trade union organization and required them to bargain with the certified representative of their employees. The Order also severely constrained the economic power of trade unions, limiting its use to the negotiation of collective agreements. Moreover, as the quid pro quo for union security unions were to behave responsibly, ensuring that there members adhered to to the collective agreement. The inviolability of the collective agreement became the means of ensuring continuous production.

The institutionalization of collective bargaining helped to contain the labour movement within bounds compatible with the Keynesian solution. Managerial prerogatives were preserved while, at the same time, trade union were given a limited recognition for collective bargaining purposes. Legal statutes replaced organizational activity and conflict was no longer based upon class but upon legal entitlement.[7] The compulsory collective bargaining system contained in PC 1003 recognized trade unions, but it also required trade unions to mediate

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6 Geoff England, "Epilogue: Some Observations on 'Voluntarism'" in Geoff England (ed.), Conference on Governemnt and Labour Relations: THe Death of Voluntarism (Don Mills: CCH, 1986) 263-274, 263.

7 C. Offe and H. Weisenthal, "Two Logics of Collective Action: Theoretical Notes on Social Class and Political Form," 1 Political Power and Social Theory 67-115 (1980) 102.

between the interests of their members and those of a system which was based, ultimately, upon the state's support for private property and contractualism.

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Appendix I - Statutes

Canadian:

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Conciliation and Labour Act, R.S.C. 1906, c.96.

Industrial Disputes Investigation Act, 6-7 Ed. VII, 1907, c.20, as amended by 9-10 Ed. VII, 1910, c.29; 8-9 Geo. V, 1918, c.27; 10-11 Geo. V, 1920, c.29; 15-16 Geo. V, 1925, c.14.

Provincial statutes making the Industrial Disputes Investigation Act applicable within their jurisdiction: British Columbia, 1925, c.19; Alberta, 1926, c.53; Saskatchewan, 1925-27, c.58; Manitoba, 1926, c.21; Ontario, 1932, c.20; Quebec, 1936, c.42; New Brunswick, 1932, c.46; and Nova Scotia, 1926, c.5.

War Measures Act, 1914, 5 Geo. V, 2nd Sess., c.2.

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Saskatchewan, Freedom of Trade Union Association Act, 1938 S.S. 1938, c.87.

Manitoba, Strikes and Lockouts Prevention Act, S.M. 1937, c.40.

Quebec, Fair Wages Act, S.Q. 1937, c.40, amended by S.Q. 1938, c.53.

New Brunswick, Labour and Industrial Relations Act, S.N.B. 1938, 2 Geo. VI, c.68.

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American Statutes:

National Labour Relations Act (Wagner Act), 49 U.S. Stat. 449 (1935).

War Labor Disputes Act, 59 U.S. Stat. 144 (1943).

Appendix II - Major Orders in Council Relating to Labour Relations

Order	Date Issued	Title/Subject
PC 648	March 14, 1916	Extension of IDI Act to industries essential for war production.
PC 1743	July 11, 1918	Statement of wartime labour relations principles.
PC 2525	October 11, 1918	Strike ban and compulsory wage arbitration.
PC 2698	September 4, 1939	Establishes Economic Advisory Committee (EAC).
PC 2576	September 19, 1935	Establishes Wartime Prices and Trade Board.
PC 3495	November 9, 1939	IDI Act extended to war industries.
PC 2685	June 19, 1940	Statement of wartime labour relations principles.
PC 2686	June 19, 1940	National Labour Supply Council established.
PC 4750	September 12, 1940	Defence of Canada Regulations
PC 5922	October 25, 1940	Interdepartmental Committee in Labor Coordination established.
PC 7440	December 20, 1940	Voluntary wage controls administered by IDI Act boards.
PC 892	February 7, 1941	Amendment to the Defence of Canada Regulations permitting peaceful picketing.
PC 4643	June 27, 1941	Revision to and clarification of wage control formula.
PC 4020	June 6, 1941	Establishes Industrial Disputes Investigation Commission (IDIC).
PC 4844	July 7, 1941	Extension of the authority of the IDIC to investigate complaints of discrimination.
PC 5830	July 29, 1941	Authorizes the Minister of Munitions and Supply to require the Minister of Defense to call upon the troops to resolve a Labour dispute.
PC 7063	September 10, 1941	Authorizing the Minister of Labour to reinstate workers if the IDIC has found discrimination.
PC 7307	September 17, 1941	Compulsory strike vote.

PC 8253	October 24, 1941	Wartime Wages and Cost of Living Bonus Order; compulsory Wage controls; creates National War Labour Board (NWLB).
PC 8257 and 8258	November 1, 1941	General freeze on retail prices.
PC 9514	December 5, 1941	Amends the Wage Control Order and creates nine regional labour boards.
PC 1426	February 24, 1942	Disbands NLSC.
PC 26/4430	May 27, 1942	Establishes two panel Consultative Committee on Labour Matters.
PC 5963	July 10, 1942	Partial wage freeze.
PC 8267	September 14, 1942	Establishes Barlow Commission to investigate the Steele dispute.
PC 10802	December 1, 1942	Collective bargaining in crown corporations.
PC 496	January 19, 1943	Authorizes Minister of Labour to delay any essential industry to strike by appointing IDIC.
PC 608	January 23, 1943	Re-establishes EAC as the reconstruction committee reporting to King.
PC 1141	February 11, 1943	Reconstitution of the NWLB.
PC 689	March 31, 1943	NWLB steel award maintaining regional differentials.
PC 4175	May 20, 1943	Penalties to be imposed against employers who defy Ministerial reinstatement orders.
PC 9384	December 9, 1943	Major revisions to the wage control policy.
PC 1003	February 17, 1944	Wartime Labour Relations Regulations providing compulsory collective bargaining.
PC 1727	March 13, 1943	Amendment to the most controversial aspects of the revised wage control policy.
PC 1895	March 16, 1943	Appoints National War Labour Relations Board.
PC 6895	September 6, 1944	Amendment to PC 1003
PC 2901	July 11, 1946	Steel controller (F.B. Kilbourn) appointed.
PC 3689	August 30, 1946	Reimposes strike vote.

Appendix III - Prime Ministers

Prime Ministers	Party Affiliation	Tenure
Wilfred Laurier	Liberal	July 11, 1886 - Oct. 6, 1911
Robert Laird Borden	Conservative	Oct. 10, 1911 - Oct. 12, 1917
Robert Laird Borden	Unionist	Oct. 12, 1917 - July 10, 1920
Arthur Meighen	Unionist	July 10, 1920 - Dec. 29, 1921
W.L.M. King	Liberal	Dec. 29, 1921 - June 28, 1926
Arthur Meighen	Conservative	June 29, 1926 - Sept. 25, 1926
W.L.M. King	Liberal	Sept. 25, 1926 - Aug. 7, 1930
R.B. Bennett	Conservative	Aug. 7, 1930 - Oct. 23, 1935
W.L.M. King	Liberal	Oct. 23, 1935 - Nov. 15, 1948

Appendix IV - Ministers of Labour

Ministers of Labour	Party Affiliation	Tenure
Vacant		May 19, 1909-June 1, 1909
W.L. Mackenzie King	Liberal	June 2, 1909-Oct. 6, 1911
Thomas Wilson Crothers	Conservative	Oct. 10, 1911-Nov. 6, 1918
Gideon Decker Robertson	Conservative	Nov. 8, 1918-July 10, 1920
James Murdock	Liberal	Dec. 29, 1921-Nov. 12, 1925
James Horace King (Acting)	Liberal	Nov. 13, 1925-March 7, 1926
James Campbell Elliott	Liberal	March 8, 1926-June 28, 1926
Robert James Manion (Acting)	Conservative	June 29, 1926-July 12, 1926
George Burpee Jones	Conservative	July 13, 1926-Sept. 25, 1926
Peter Heenan	Liberal	Sept. 25, 1926-Aug. 17, 1930
Gideon Decker Robertson	Conservative	Aug. 7, 1930-Feb. 2, 1932
Wesley Ashton Gordon	Conservative	Feb. 3, 1932-Oct. 23, 1935
Norman McLeod Rogers	Liberal	Oct. 23, 1935-Sept. 18, 1939
Norman Alexander McLarty	Liberal	Sept. 19, 1939-Dec. 14, 1941
Humphrey Mitchell	Liberal	Dec. 15, 1941-Aug. 2, 1950

Postmaster General (Responsible for Labour)	Affiliation	Tenure
William Mulock	Liberal	July 18, 1900-Oct. 15, 1905
A.B. Aylesworth	Liberal	Oct. 1, 1905-June 3, 1906
Rodolphe Lemieux	Liberal	June 4, 1906-May 19, 1909

Appendix V - Deputy Ministers of Labour

Name	Tenure
W.L.M. King	1900-1908
F.A. Acland	1908-1923
Howard H. Ward	1923-1934
M. Dickson	1934-1940
B.M. Stewart	1940-1942
Arthur McNamara	1943-1950