THE McGILL LAW JOURNAL

VOLUME 6 1960 NUMBER 3

FEDERAL JURISDICTION OVER LABOUR RELATIONS — A NEW LOOK*

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Just thirty-five years ago the case of *Toronto Electric Commissioners v. Snider* was before the Judicial Committee of the Privy Council. A dispute had arisen between the Toronto Electric Commission — a body operating the light, heat and power system of Toronto — and its employees, at whose request a federal Conciliation Board was set up. The Commission took a writ of injunction against the Board, contending that it had no authority to deal with the dispute because the Parliament of Canada had exceeded its jurisdiction in enacting the Industrial Disputes Investigation Act under which the Board was established. In the result, their Lordships held that this Act (hereafter called the IDI Act) was beyond the powers of the Federal Parliament.[1] The decision overruled previous decisions of the Court of Review of Quebec[2] and the Appellate Division of the Supreme Court of Ontario;[3] in other words, the five Law Lords (or a mere majority of them — this cannot be known) disagreed with the opinion of the Parliament of Canada, presumably acting upon advice from the Department of Justice, and with two appellate courts in Canada's most industrialised provinces. The judgment, rendered by Lord Haldane, marked the extreme point in that jurist's career as a special interpreter of the Canadian Constitution, which is tantamount to saying it marked a low point in the judicial definition of federal authority. On two points of

*This article is based upon an address delivered by Professor F. R. Scott to the 11th Annual Conference of the Industrial Relations Centre of McGill University, September 10th and 11th, 1959 and published in the proceedings of the Conference.

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[1]See [1925] A.C. 396.

[2]*Montreal St. Rly. v. Board of Conciliation and Investigation,* (1913), 44 S.C. (Que.) 350. Text is also in "Judicial Proceedings respecting Constitutional Validity of the Industrial Disputes Investigation Act", Dept. of Labour, Ottawa, 1925, pp. 255 ff.

[3]*Toronto Electric Commissioners v. Snider,* 55 O.L.R. 454.

constitutional law enunciated in that judgment — one affecting the trade and commerce clause, the other the criminal law — Lord Haldane has already been overruled by the Privy Council itself,[4] and on another of his leading ideas — the "emergency" doctrine — his views have been badly shaken.[5] But his decision still stands on the central matter at issue, which was the extent of federal authority over the subject of industrial disputes. In consequence, the present Industrial Relations and Disputes Investigation Act which replaces the old Act held *ultra vires* in the *Snider* case is so limited in application that it covers only about 10% of the Canadian labour force amenable to dispute settlement procedures. Ten provinces now have the major responsibility for legislation in a field which grows daily more important from the national point of view, and in which the centralisation of the decision-making power on both the management and labour sides has proceeded rapidly.

It is proposed in this paper to take a new and common-sense look at this situation in the light of the present realities of industrial and trade-union development. The question is not the fairness or utility of any provisions in the present laws dealing with industrial disputes, but rather the distribution of legislative powers in this field, and the effects of that distribution upon the processes of collective bargaining. It is the old problem of the relationship between constitutional law and social fact. It is always dangerous for a country to allow its constitutional law to disregard or get out of line with the facts. If the disparity grows too great, something must give, and usually it will be the constitution. If the constitution holds, as it may for a time, then social relations can be distorted and wise policies frustrated. Unless a federal system of government adapts itself to changing social conditions by amendment or new judicial interpretation, it creates confusion, slows progress and contributes to social tensions. The purpose of state intervention in labour relations is to relieve tensions.

To place the problem in perspective, it is necessary to glance back at the evolution of Canadian law concerning labour relations. The provinces were the first to deal with industrial disputes, Ontario's legislation of 1873 leading the way. Since this Act was restricted to disputes not involving wages (these were then thought to be outside the legitimate sphere of state action) it remained a dead letter and was later repealed. Other Ontario statutes followed, of which the Ontario Railway and Municipal Board Act of 1906 is perhaps the

[4]On Haldane's special views on trade and commerce, see what was said by Lord Atkin in *Proprietary Articles Trade Association v. A. G. for Canada*, [1931] A.C. 310 at p. 326; and on his view of criminal law as confined to acts which by their very nature belong to the domain of "criminal jurisprudence", see *ibid.* at p. 324.

[5]By Lord Simon in *Canada Temperance Federation* case, [1946] A.C. 193.

most important. Margaret Mackintosh[6] says that from 1907 to March, 1923, during which time the federal IDI Act was operative, there were 51 applications to the Ontario Department of Labour for the appointment of Boards of conciliation and investigation in connection with disputes between electric railways in Ontario and their employees. We have thus had experience in Canada of overlapping jurisdictions in labour disputes, the parties having the option of provincial or federal Boards. In Nova Scotia, British Columbia and Quebec there were statutes providing for conciliation and arbitration before the federal government assumed its wider jurisdiction in 1907, but they were either abortive, as in the case of British Columbia, or of minor importance.

Federal legislation affecting trade unions dates from the Trade Union Act of 1872, but we may say that federal concern with the law of industrial disputes begins with the appointment of the Royal Commission on the Relations of Labor and Capital in Canada in 1886. This Commission's report, submitted in 1889, after reviewing some startling evidence on working conditions in Canada, recommended the establishment of local boards of conciliation in all the large centres of trade, combined with a permanent central board. Under certain conditions an appeal would lie from the local to the central board whose decision would be final and binding. Thus as early as 1889 it was assumed that the federal government had a role to play, though the Commissioners cautiously observed that they could not "venture to determine where, in legislation affecting labour and capital, the authority of the Dominion Parliament ends and that of the provincial legislatures begins." No legislation followed this Report until the federal Conciliation Act of 1900 which applied to any industrial dispute, though it contained no compulsory features. The Railway Labour Disputes Act of 1903 also applied to *all* railways, not only to federal lines.

Then came the Industrial Disputes Investigation Act of 1907. This was called "An Act to aid in the Prevention and Settlement of Strikes and Lockouts in Mines and Industries connected with Public Utilities"; the distinction between industries affecting the public interest and convenience, and other industry, was crucial in the Act. It covered all mines in the country (it was passed after a strike among the coal miners of Alberta) and all agencies of transportation and communication, as well as public service utilities. This was a broad, but still limited, coverage; however, by section 63, it was possible for the parties to any dispute whatever, in any business or trade, to agree to refer the matter to a federal board, whereupon the provisions of the Act applied. Thus all industries in Canada in which there was an

[6]"Government Intervention in Labour Disputes in Canada", reprinted in Dept. of Labour, "Judicial Proceedings... etc.", *supra* note 2, at p. 291. A thorough survey of Canadian legislation in labour disputes will be found in W. S. Martin, "A Study of Legislation Designed to Foster Industrial Peace in the Common Law Jurisdictions of Canada", unpublished doctoral thesis at Univ. of Toronto, 1954.

element of wide public interest were compulsorily covered, and all the rest voluntarily covered. Of the 619 applications for Boards received between March 1907 and March 1924, 120 were for disputes not falling clearly within the direct scope of the Act.[7] Canada had grown accustomed, till the *Snider* case intervened, to the use of what we would now call national labour boards. Even after the *Snider* decision, with the consent of the parties, federal boards were quite often appointed.

It was unfortunate that the *Snider* case arose out of a dispute between a municipal body and its employees, for even before the Privy Council decision doubts had arisen about federal jurisdiction in this particular area in view of the provinces' jurisdiction over municipalities. The IDI Act was often used in municipal street railway disputes, but in its later years the federal Minister of Labour adopted the practice of appointing federal boards only in the absence of a protest by the municipality on the ground of jurisdiction.[8] One wonders whether the IDI Act might not have been upheld had the dispute which gave rise to the litigation occurred in, say, the coal mining industry on which, at that time, so many industries in so many provinces depended, and which had given rise to the Act in the first place. Certainly the national aspect of labour relations would have been more apparent, though it may be doubted whether this would have been enough to change the current of Lord Haldane's interpretations.

Few contrasts are more striking in our constitutional law than that between the judicial reasoning about the IDI Act which prevailed in the Canadian courts and that adopted in the Privy Council. When the question came before the Quebec courts in 1912 Mr. Justice Charbonneau issued a writ of Prohibition against a federal Board appointed to investigate a dispute between The Montreal Street Rly. Co. and its employees, though he expressed the view that the claim of unconstitutionality was invalid.[9] Mr. Justice Lafontaine delivered the Superior Court judgment upholding the Act. The following passage indicates his approach to the problem:[10]

> Whereas, the Industrial Disputes Investigation Act, 1907, has for its apparent and ostensible aim the prevention of strikes, which are one of the manifestations, often troubling and irritating, and causing disorder from one end of the country to the other, of a social and economic condition existing throughout the Dominion, to wit: labour and capital; this condition, by its nature, effects and various and multiform manifestations, considerably surpasses the judicial nature and effects of relations between employers and employees resulting from the contract for the hire of labour; this economic and social condition extends beyond the limits of any locality and province and extends indeed throughout the whole country, and is consequently of a general character, and not of a purely local and private character in the province. (Translation)

There we see surely a common-sense, realistic attitude, based on an appreciation of the social facts which gave rise to the legislation being attacked. On this

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[7] *Ibid.*, at p. 281.

[8] Report of Deputy Minister of Labour, 1919, quoted in Margaret Mackintosh, *op. cit., supra* note 6, at pp. 300-1.

[9] *Ibid.*, at p. 255.

[10] (1913), 44 S.C. 350, at pp. 351-2.

point Mr. Justice Lafontaine was upheld by the Court of Review consisting of Justices Tellier, De Lorimier and Greenshields.

A similar realism pervades the judgments of Mowat J. in the Supreme Court of Ontario, and of Ferguson J.A. in the Appellate Division of that Court. Mowat J. said, for example:[11]

> It appears to me that "labour" legislation such as the Industrial Disputes Investigation Act is one of national concern. It is important that a close touch should be kept of the movements and variations of industrial strife and that this can best be done, as such strife existed in 1907 and until the present time by the Federal Government. A general strike in Winnipeg in 1919 was only brought to an end through the voluntary efforts of the non-industrial citizens to break it, and to prevent the misery and underfeeding of children which seemed likely to ensue. All important labour unions in Canada were sympathetically affected by it from ocean to ocean, and if it had spread, as at one time feared, ruinous conditions would have ensued to trade and stable industry. In such a case provincial lines are obliterated and the provinces, not having the means of free and instant communication with each other, or for concert, could ill avert dominion-wide trouble. The simple local strikes, which alone could have been in contemplation of the Fathers in 1864 and 1867, have given place to those of brotherhoods composed in some instances of hundreds of thousands, and dominion-wide in their operations and probably beyond the resources of each province to deal with.

Ferguson J. A., with whom Mulock C. J. and Magee and Smith JJ. concurred, approached the question in this way:[12]

> Industrial disputes are not now regarded as matters concerning only a disputing employer and his employees. It is common knowledge that such disputes are matters of public interest and concern, and frequently of national and international importance. This is so, not because the disputes may result in many plants being shut down, or tens, hundreds and even thousands of employees drawing strike pay instead of wages, but because experience has taught that such disputes not infrequently develop into quarrels wherein or by reason whereof public wrongs are done and crimes are committed, and the safety of the public and the public peace are endangered and broken, and the national trade and commerce is disturbed and hindered by strikes and lockouts extending, not only throughout the Dominion, but frequently to the United States, where most of our trade unions have their headquarters. Being of opinion that the Act is not one to control or regulate contractual or civil rights, but one to authorize an inquiry into conditions or disputes, and that the prevention of crimes, the protection of public safety, peace and order and the protection of trade and commerce are of the "pith and substance and paramount purposes" of the Industrial Disputes Investigation Act and of the enquiry authorized and directed thereby, I think the legislation may and should be supported on the powers conferred upon the Dominion Parliament by section 91, British North America Act, to make laws "in relation to" "the regulation of trade and commerce," and to make laws "in relation to" "the criminal law" "in its widest sense," even though it does not enact a criminal law or a law defining how or in what manner trade and commerce shall be carried on.

How similar is this Canadian approach to that of Chief Justice Hughes when upholding the Wagner Act in 1937. He said:[13]

> We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum... When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be

[11] *Supra*, note 3, at p. 467.

[12] *Ibid.*, at p. 476.

[13] *National Labor Relations Board v. Jones & Langhlin Steel Co.*, (1937), 301 U.S. 1, at pp. 38, 41-2.

> maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience.

Two Ontario judges, Orde J. and Hodgins J.A., upheld the provincial point of view (both with expressed reluctance), chiefly on the ground that municipal institutions were involved and that property and civil rights were improperly trenched upon by the federal law. Thus out of 12 Canadian judges who considered the question, 10 were in favour and 2 against the validity of the Act.

In the Privy Council Lord Haldane found "clear" and "obvious" those propositions which the Canadian courts had rejected. "It is clear that this enactment was one which was competent to the Legislature of a province under s. 92."[14] "It is obvious that these provisions dealt with civil rights, and it was not within the power of the Dominion Parliament to make this otherwise by imposing merely ancillary penalties."[15] He kept his mind on the private law aspects of the matter being dealt with, and did not see the larger realities, the avoidance of public danger and the maintenance of industrial peace, which the Canadian courts had stressed as being the prime purposes of the legislation. He saw no evidence of any emergency "putting the national life of Canada in unanticipated peril"[16] without which, in his view, the "peace, order and good government clause" of the Constitution could not operate if property and civil rights were affected. As stated above, on this point as on his own peculiar limitations upon the exercise of federal jurisdiction over trade and commerce and criminal law, more recent Privy Council decisions have either dissented or have reinterpreted the law.[17] It is in this judgment[18] that there occurs Lord Haldane's famous passage about the evil of intemperance in Canada amounting to so great a menace to our national life in 1878 as to compel the Federal Parliament to intervene with the Canada Temperance Act to save the nation from disaster. Perhaps the simplest way of commenting upon this extraordinary judicial performance is to say that it was wrong, at least in its wider generalisations. With that wrong we are still wrestling.

What happened after the *Snider* judgment came out shows how strong was the feeling in Canada in favour of federal responsibility for industrial disputes. Mr. Lapointe, then Minister of Justice, said he was petitioned by both employers and employees to revive the IDI Act.[19] The Parliament of Canada immediately revised the Act so that instead of applying to the former

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[14] *Supra*, note 1, at .p 404.
[15] *Ibid.*, at p. 408.
[16] *Ibid.*, at p. 415.
[17] *Supra*, notes 4 and 5.
[18] At p. 412.
[19] Hansard, 1925, p. 3153.

industries affected with a public interest, it now applied to a specific list of federal undertakings about which there could be little or no question of authority. The basic idea of the old IDI Act was public interest and convenience; it made no attempt to cover all employment even within federal jurisdiction. The basic idea of the revised Act of 1925 was that all federal industries and undertakings should be covered, regardless of the degree of public interest involved. The law had to be tailored to fit the rules of interpretation of the BNA Act rather than the size and shape of the problem being dealt with. But over and above the enumerated federal undertakings there was a provision that the Act would apply to "any dispute which is within the exclusive legislative jurisdiction of any province and which by the legislation of the province is made subject to the provisions of this Act".[20] The provinces were invited to legislate away the *Snider* judgment.

This invitation to co-operate was promptly accepted. By 1928 six provinces had responded; even Quebec and Ontario adopted the federal law in 1932. Only Prince Edward Island remained out. The divisive results of the *Snider* case seemed effectively to have been overcome, and once again the Canadian intention to have uniform legislation was clearly seen. Professor H.A. Logan[21] states that the powers granted to the Federal Parliament by this permissive legislation were regularly invoked to deal with disputes involving coal mines and street railways which, apart from the enabling legislation, would have been beyond the scope of the Act. He also says that there was considerable opposition, at least on the part of employers, to the provincial adoption of the federal Act.

The depression of the 1930's, among its many social consequences, produced a great development in trade unionism and hence in labour law. The Wagner Act in the United States became a kind of beacon light shining over the troubled industrial waters, and to its concepts of certification, collective bargaining and unfair labour practices, Canadian opinion was gradually drawn. Federal legislation was still restricted by the *Snider* judgment, and the *ILO Conventions* case in 1937 still further narrowed the area of potential federal intervention. In consequence the provinces started to come back into the field, each in its own way. A new era of provincial labour legislation began, and we are in the midst of it now. World War II restored federal authority for the duration, giving us in P.C. 1003 the first taste of uniformity on Wagner Act principles, but the coming of peace deprived Ottawa of its emergency powers and restored the *status quo*. By 1947 the wartime federal labour relations had ended.

Two important Conferences of Labour Ministers met during the war period, one in November 1943 when the Dominion was seeking agreement on its proposed wartime legislation — later P.C. 1003 — and the other in October 1946 in preparation for the transition to peacetime relationships

[20]R.S.C. 1927 c. 112 s. 3(d).

[21]*State Intervention and Assistance in Collective Bargaining*, (1956), p. 6.

between the governments in labour matters. Even at the 1943 Conference certain provinces, such as Quebec and British Columbia, were anxious to limit federal authority to war industries, and wished to keep the administration of the law in their own hands.[22] At the 1946 Conference[23] some lip-service was paid to the desire for uniformity, and apparently some of the smaller provinces were in favour of federal jurisdiction. But the larger provinces were opposed, and the federal government itself made no proposal for any amendment to the BNA Act or any form of National Labour Code which Labour was ardently demanding. The only concession was provided in Sections 62-63 of the new federal law of 1948, by which a joint administration of federal and provincial laws could be arranged wherever they were substantially similar. This is a far cry from the enabling legislation made possible in the revised IDI Act of 1925.

One cannot escape the conclusion that the small concern for uniformity and the preference for provincial jurisdiction reflected the prevailing employers' viewpoint. The Canadian Manufacturer's Association brief to the House of Commons Committee on Industrial Relations on Bill 338, later to become the present federal Act (which I shall call the IRDI Act) contained no recommendation for a wider federal coverage, whereas this was the main burden of the briefs from the two labour Congresses.[24] Professor Logan criticises the federal government for its failure to rise to its responsibilities on this occasion; he wonders whether a stronger and more resourceful Minister of Labour might not have gone further toward securing an enlarged jurisdiction. But we know that the Liberal government at this time was entering upon its blissful period of easeful death, carrying out Mackenzie King's policy of "orderly decontrol", and it is perhaps not surprising that it gave no strong leadership for a national labour policy. Political pressure from the left by this time had greatly eased.

This historical story may be resumed in a few words. Industrial disputes in industries affected with a public interest were appropriated by the Federal Parliament in 1907, with widespread approval from all sections of Canada, whether French or English speaking; when the startling news was received from abroad that the IDI Act was unconstitutional, the country reacted to offset the decision by a revised federal Act followed by provincial enabling legislation in every province except P.E.I.; the rise of trade unionism in the 1930's accentuated the conflict between capital and labour and compelled new legislation which (apart from the war period) came mostly from the provinces with labour almost alone in calling for uniformity. Class consciousness had apparently increased, and the question of jurisdiction became involved in the power struggle which is surely as evident today as at any time in our history.

[22] *Ibid.*, at p. 21.
[23] *Ibid.*, at pp. 38-43.
[24] *Ibid.*, at pp. 43-5.

The extremely large degree of provincial jurisdiction over industrial disputes even in industries almost wholly engaged in inter-provincial and international trade, and organised by a single national or international union, leaves us, therefore, exposed to the sudden swings of opinion which occur more frequently and more violently on the provincial than on the federal level — witness the anti-labour legislation of Prince Edward Island in 1947,[25] in British Columbia and Newfoundland in 1959 — so that anything that might be called a national labour policy seems farther off than ever before. The gap between law and fact, the "décalage", increases instead of decreasing. It is submitted that this is not a healthy situation from any rational point of view.

It may be postulated that Canadians are desirous of seeing sound democratic principles emerging in our federalism. But it must be obvious that in federal states — and this applies to bi-cultural countries as much as to homogeneous ones — the alternative to federal authority is not always or necessarily provincial autonomy; it may well turn out to be anarchy. If the subject-matter of legislation is too vast for a province to control (for instance, an attempt at provincial control of commodity prices set by a national or international market) then an interpretation of the constitution which leaves it to the provinces simply means that no government control of any kind is possible. Private interest, whether of capital or labour, or even of both in collusion, dominates the society, and the public interest tends to get lost in the power struggle. We see this in the international sphere, where the nation state plays the role of the province in a federation, and where excessive national autonomy wrecks so many needed forms of international regulation. As a single human race, we have not grown up to the oneness of our living, and, in a smaller context, as a Canadian nation we have not grown up to the enlarged scale of relationships now existing between capital and labour. Sooner or later we shall have to bring our law into line with the realities that confront us, and if we believe that good laws can reduce tensions, the sooner we prepare for a change the more likely we are to avoid further conflicts.

Two practical illustrations may be given of the difficulties and dangers that can arise through the inadequacy of our present law dealing with industrial disputes. The first is the story of the strike in the packing industry in 1947. In that instance, there was a single union, the United Packinghouse Workers of America, acting as the bargaining agent for all important plants in eight out of the then nine Canadian provinces. There were three dominant firms negotiating the new contract — Canada Packers, Burns, and Swift Canadian, the last being a wholly owned American subsidiary. One union, three firms, all negotiating in Toronto, where national bargaining had begun in 1944. A federal Controller had been appointed in 1945, and federal conciliation had kept the peace till 1947. But in May of that year federal emergency powers

[25]See Forsey, E.A., The Prince Edward Island Trade Union Act, 1948, in (1948), 26 Can. Bar Rev. 1159.

ended and with them federal jurisdiction ceased. Theoretically, before a nation-wide strike could be called separate provincial negotiations should have been started in each province where there was a plant affected, with separate conciliation boards consisting of different people all investigating the same problem and making separate reports to separate Departments of Labour. What a legal absurdity! So absurd was it that little attention was paid to the law; on the passing of the strike-deadline work stopped in all plants. It is a personal opinion, after some investigation of this situation, that had federal authority existed there would have been no strike, since the employers would have realised that the union could easily legalise the strike action which was thought to be impossible in face of the provincial barriers.

This strike gave a revealing example of the anarchy that results from big issues being left to small jurisdictions. Because Ottawa could not act, the provinces thought they would try to combine forces and bring about a settlement. At Premier Drew's suggestion representatives of seven provincial governments met in Toronto on Sept. 26th, 1947, to work out a common plan. There were six Ministers of Labour, one Deputy Minister, one "observer" (P.E.I.) and one message of sympathy (B.C.).[26] Rumour has it that one Minister said the strike was illegal in each province and should be smashed, to which Saskatchewan replied that it was not illegal in Saskatchewan. Nothing came of the meeting except a good lesson in federalism; even the appointment of a common conciliator could not be agreed upon. The delegates went sorrowfully home nursing their provincial autonomies. The strike was settled without benefit of law, but it might not have occurred, and it will be less likely to occur in the future in this or other big industries, if jurisdiction keeps pace with or is brought into line with the facts.

Another example illustrates the cumbersome procedures and dubious expediences which are promoted by the present division of jurisdiction. The Provincial Transport Company runs buses in Quebec and in the city of Kingston, Ontario; it also owns the Colonial Coach Lines which operate from Quebec into Ontario and thus have extra-provincial connections. At one time the P.T.C. buses crossed the provincial boundary at Hull and the U.S. boundary at certain points, thus bringing the Company within the ambit of the federal IRDI Act for all its operations except the Kingston buses. Employees on all three branches are organised by the Canadian Brotherhood of Railway, Transport and General Workers. A short while ago the Company stopped its P.T.C. Quebec buses from crossing the boundary at any point, thus taking these services out from under the Canada Labour Relations Board and bringing them under the Quebec Public Service Employees Act which prohibits strikes and provides for compulsory arbitration. So here is a single Company dealing

[26]See report in Labour Gazette, 1947, p. 1791; also Montreal Gazette for Sept. 26th and 29th 1947, p. 1.

with a single Union with respect to a single operation of bus driving in central Canada, which now (a) comes under Quebec law for the Quebec operations, (b) under Ontario law for the Kingston operations, and (c) under federal law for its Colonial Coach Lines operations. This state of affairs cannot promote industrial peace or efficient service. Nor does the present law seem to benefit the Company, since the Quebec drivers, though deprived of the right to strike, have to be paid the same rates as Colonial Coach Lines which operate out of the same terminus in Montreal and who have the right to strike. The original IDI Act would have covered all the operations, and the revised Act of 1925 would also have applied because Quebec and Ontario had both passed enabling legislation. Constitutionally we have moved backwards.

Our present labour relations Acts are based on the principles of certification, compulsory collective bargaining, compulsory conciliation procedures, and then, as a last resort but always in the background, the strike or lockout. The freedom to strike is still essential to the whole concept. This freedom is curtailed if the law surrounds it with such complicated procedures that it cannot effectively be exercised within the law, which is precisely the situation which the existing division of powers produces in industries which are national in scope. Hence labour is faced in certain industries with the choice of disregarding the law or foregoing its undoubted rights and bargaining under less favourable conditions than the law allows in other industries. This is unfair and inconsistent; the result of judicial accident and not of deliberate national policy. Strong unions faced with a choice either of accepting poor agreements or striking regardless of the confused law will from time to time choose the latter course; if their leaders do not, wild-cat strikes are likely to break out. Hence the present state of the law tends to lawlessness.

Does all this mean that there must be a complete abandonment by the provinces of their jurisdiction over disputes? Remember we are not discussing labour legislation in general, but only those aspects of it which relate to collective bargaining and conciliation procedures. The answer to this question would surely be in the negative. It would not be wise, and politically it would be next to impossible, to provide an exclusive federal jurisdiction. The point is rather that the public interest and the protection of the country against disputes too large for provincial intervention demand an enlargement of federal authority. Some division of jurisdiction will remain, but should be more closely related to economic realities. Nation-wide collective bargaining has already begun and is likely to increase. It should not be compelled by the law, but it should not be inhibited by the law as it is at present. If we enlarged the area of efficient collective bargaining by enlarging the coverage of the IRDI Act, management and unions would be free to work out their own levels of agreement, but under a uniform law.

THE ENLARGEMENT OF FEDERAL JURISDICTION — SOME ALTERNATIVE PROCEDURES.

What could we do about the present situation, assuming there was or there might develop a desire to achieve greater uniformity of law? It seems to be taken for granted in Canada that we are incapable of amending our constitution. Yet as recently as 1951 we did so, with the consent of all the provinces, by making old age pensions a concurrent power. At any rate, any discussion of jurisdiction over labour relations that does not contemplate the possibility of constitutional amendment is incomplete. There is a choice in types of amendment: the federal power may be placed in the list of exclusive federal matters in section 91 of the BNA Act, as was done with unemployment insurance, or may be added to the concurrent powers along with agriculture and immigration. An exclusive power is one which the Parliament of Canada alone may exercise; federal law covers the country to the extent chosen by Parliament, and any part of the field not occupied by federal law remains empty and cannot be occupied by provincial law. This rule operates today with respect to labour relations in federal undertakings. A concurrent power, such as our constitution now contains for immigration and agriculture, is one which both Parliament and the provinces may exercise, with the federal law prevailing over provincial law in case of conflict. Provinces can only legislate outside the area selected by Parliament.

Sound argument can be made for each of these alternatives. The pros and cons of exclusive and concurrent powers are carefully analysed by Professor Cox in a paper read to the National Academy of Arbitrators in Washington in 1954,[27] and while he was dealing with the American situation similar considerations apply in Canada for preferring an exclusive jurisdiction in the central government. But he would not exclude the States from legislating with respect to industries not brought under the authority of Congress; he would merely make sure that State governments did not pile additional laws upon those industries that are taken over nationally. Thus federal authority would be exclusive, but would not cover all industries. This seems to be a sensible approach; it is in fact the existing situation in Canada, our difficulty being that federal authority is too restricted whereas he inclines to the view that in the United States it is already too extensive. Translating this idea into Canadian constitutional terms, it would mean adding some such words as these to section 91: "Labour Relations in such industries and services as are declared by the Parliament of Canada to be of national interest and importance".

Such a concept is not altogether foreign to our fundamental law. The Parliament of Canada can already declare "works" to be for the general advantage of Canada or of two or more of the provinces, whereupon they

[27]Reprinted in *"The Profession of Labor Arbitration"*, ed. by Jean T. McKelvey, 1957, p. 76.

come under federal jurisdiction. Their labour relations today are under the IRDI Act. There would be no constitutional barrier, for instance, to a declaration by Parliament that all the packing houses in Canada, presently existing or to be built, are for the general advantage; whereupon a national law would underpin the nation-wide bargaining that in fact takes place. In theory this could be extended to the plants of all large-scale industry in Canada, as it has to all grain elevators, for instance, for the purpose of enforcing the federal wheat-marketing policy. The trouble with this solution is that by the declaration Parliament takes over much more than the labour relations of the industry, and this it may well not wish to do.

Short of amending the constitution, there are still other roads open. Section 94 of the BNA Act permits the legislatures of the common law provinces to assign to Parliament any matter belonging to the field of property and civil rights, where labour relations belong. Hence these provinces could help to build up a nation-wide law, much as they did after 1925 by their enabling legislation. Some of the smaller provinces have shown a willingness to abandon the field, or part of it, to the Dominion, but not so the larger provinces, and Quebec lacks the constitutional power to make a delegation under Section 94. It should be pointed out, however, that Quebec law on labour relations is not so different in kind from that of other provinces as to suggest that any enlargement of federal jurisdiction would threaten to obliterate cultural institutions that are part of her heritage; there was no substantial law on this subject in Quebec till 1944, and then it was modelled on the Wagner Act. The Professional Syndicates Act, under which the Catholic unions are incorporated, would be unaffected. The Catholic syndicates were founded and developed under the aegis of federal legislation, first in the original IDI Act and then under the 1925 Act which Quebec adopted.

What about judicial interpretation? Might not the Supreme Court of Canada take a broader view of federal jurisdiction than that suggested in the *Snider* case? That case is still law, but strictly speaking all it decided was that the IDI Act could not apply to municipal institutions. The wider language used by Lord Haldane was beside the point at issue. The Supreme Court upheld the present IRDI Act in 1955 on a reference,[28] and an Ontario Judge, in the *Pronto Uranium Mines* case,[29] has upheld its application to workers in uranium mines and concentrating plants. In the IRDI Act reference Judge Rand, as usual seeing clearly the social realities of contemporary society, said "Labour agreements, embodying new conceptions of contractual arrangements are now generally of nation-wide application, and as we know, strike action may become immediately effective throughout the systems".[30] While he was speaking of railways, the argument holds for many other industries. But we

[28][1955] S.C.R. 529.
[29][1956] 5 D.L.R. (2nd) 342.
[30]*Supra*, note 28.

cannot expect a new interpretation until there is either (i) new federal legislation, (ii) a constitutional reference framed to elicit opinions about federal authority over labour relations in inter-provincial industries, or (iii) a daring lawsuit challenging the jurisdiction of some provincial board in a dispute arising in some major industry. We should remember also that the revised IDI Act of 1925 was made applicable to federally incorporated companies and to disputes declared to be subject to the Act by reason of a national emergency, provisions not repeated in the present federal law, and the validity of which has not been tested. The possibility of some judicial rethinking in the future should not be excluded, particularly with respect to the trade and commerce and the peace, order and good government clauses of the Constitution — the *Murphy* case in 1959, upholding the Canada Grain Act,[31] and the *Pronto Mines* case,[32] gave some new leads — but the obstacles to be overcome are considerable.

There is one last provision for uniformity that needs to be mentioned. This is the method of federal-provincial arrangements for federal administration of provincial labour legislation when it is substantially uniform with that of the Dominion. The IRDI Act, as already indicated, provides for such arrangements in sections 62-63. It is interesting to note that seven provinces have adopted somewhat similar provisions in their labour laws, though the wording, as usual, varies considerably, and the two biggest provinces, Quebec and Ontario, with P.E.I., have remained aloof.[33] Alberta and British Columbia confine their possible arrangement with Ottawa to the meat-packing and coal-mining industries. Saskatchewan makes provision for the application to the province of the whole IRDI Act, which shows a willingness to go back to pre-*Snider* days. Most provinces confine their offer to federal administration of provincial law. This is different from, and, it is submitted, not so useful as, the enabling legislation invited in 1925 by which provinces made the entire federal Act applicable to themselves. Here the provincial law remains within provincial jurisdiction; only administration is simplified. If there was a general will for uniformity, no doubt the provinces could improve somewhat the present situation by modelling their legislation exactly on the federal Act and then entering into an arrangement under section 62, but if there were this degree of desire for uniformity then we might look for new enabling legislation or even for an amendment to the BNA Act covering major industries. At any rate, no such arrangements as the IRDI Act and the provincial statutes contemplate have yet been made.

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[31] [1958] S.C.R. 626.

[32] *Supra*, note 29.

[33] The statutes in question are to be found in the following Revised Statutes: Newfoundland, 1952, c. 258 s. 63; Nova Scotia, 1954, c. 295 s. 70; New Brunswick, 1952, c 124 ss. 57-8; Manitoba, 1954, c. 132 ss. 60-1; Saskatchewan, 1953, c. 259 s. 30; Alberta, 1955, c. 167 s. 108; British Columbia, 1948, c. 155 s. 79.

This review of the law poses a question. Why was the desire for uniform labour relations legislation stronger in Canada in the first third of this century than it is today? Are we more disunited? Certainly the disputes to be regulated are larger and more threatening than ever before. When introducing the IDI Act in 1907 the Hon. Rodolphe Lemieux, Minister of Labour, said, "as the country grows, as the area covered by these strikes increases, the danger becomes greater and greater every day."[34] History has borne out the accuracy of this prediction. Once already in the past the ill effects of the *Snider* judgment were overcome, and they could be again if the desire existed, without having to amend the B.N.A. Act. Labour's position is clear. At its 1958 Convention the Canadian Labour Congress adopted the following resolution:[35]

> "BE IT RESOLVED that the Congress urge the Government to declare inter-provincial industries, of nation-wide scope and importance, works for the general advantage of Canada, and so bring them under the exclusive jurisdiction of Parliament, and within the purview of the Industrial Relations and Disputes Investigation Act."

But no voice of equal weight has been raised on the employer's side. Can the answer to the question be that some employers like divided jurisdiction and confusing laws? If so they stand in the way of much needed progress. It is preferable to believe that political inertia and the well-known Canadian capacity for accepting what seems to be but is not inevitable are deeper reasons. Let us hope we do not have to have the rude shock of further national strikes to shake us out of this inertia.

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[34]Hansard, 1906-7, p. 3013.

[35]Proceedings, p. 11.