

## FEDERALISM AND LABOUR POLICY IN CANADA

By

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### INTRODUCTION

Labour policy in Canada is primarily a provincial responsibility. The federal jurisdiction applies to only about ten per cent of the labour force and governs labour-management relations in a relatively small number of industries.<sup>1</sup>

Provincial paramountcy in labour policy-making is a result of the 1925 decision of the Judicial Committee of the Privy Council (JCPC) in the case of *Toronto Electric Commissioners v. Snider et al.* The Committee declared the federal government's *Industrial Disputes Investigation Act* (IDIA) to be ultra vires the Parliament of Canada. It was the Committee's view that labour relations fell within the property and civil rights power of the provincial governments.

This judgment has been lamented by a number of scholars. Some have been critical of the Committee's legal reasoning while others have focused on the negative consequences of provincial paramountcy. Industrial relations professor, Alton Craig, for instance, has pointed out that the decision has made national bargaining very difficult to achieve in this country.<sup>2</sup> Constitutional scholar, F.R. Scott, strongly criticized the writer of the Committee's decision, Viscount Haldane, for keeping "his mind close to the purely private law concepts of master and servant" and ignoring "the large public realities."<sup>3</sup> Political scientist, Carolyn Tuohy, in her review of industrial relations policy, observed that, "The decentralization of collective bargaining...has militated against the participation of labour in central decision-making about labour market policy."<sup>4</sup> Finally, the 1995 federal task force that examined the industrial relations part of the *Canada Labour Code* criticized "the growing lack of uniformity

in Canadian labour legislation." It noted that the "diversity of legislation" has led to the "over-legalization of Canadian labour relations," reduced the parties' "ability to engage in national bargaining," and made "national employment policies difficult to design."<sup>5</sup>

For these scholars and experts, the current arrangement is unsatisfactory. The question, therefore, arises: Would federal paramountcy in labour policy be a valid response to their criticisms? What are the major arguments to support a larger federal role in labour policy-making? These are the central concerns of this paper. To address them, the paper looks to the experiences of the other major federal countries in the world, namely, the United States, Australia and Germany. In all three, labour policy is primarily a federal government responsibility. This paper seeks to find out why this is so in these countries but not in Canada.

The paper turns also to federal theory to uncover what it has to say about the division of powers. This discussion, which opens the paper, is followed by a review of the court decisions that so severely circumscribed the powers of the Canadian federal government in labour policy. The paper then turns its attention to the United States, Australia and Germany to ascertain why they have ensured that their federal governments remain the preeminent designers of labour policy.

The paper is very much in the nature of an exploration. Questions are raised, hypotheses are advanced and issues are set out. The exploratory approach is made necessary by the scarcity of research on the relationship between Canadian federalism and labour policy. More importantly, very little work appears to have been done on a methodology for evaluating the advantages and disadvantages of federal versus sub-national control of labour policy. In the absence of such a methodology, it is exceptionally difficult to isolate the jurisdiction factor and conclude with certainty that it is the

cause of some employment-related condition, such as the level of income inequality.

Labour policy herein refers to the legislation and programs of government that deal with collective bargaining and employment standards, broadly construed to include such issues as occupational health and safety and pay equity.

## **FEDERAL THEORY**

As indicated, this part of the paper reviews some of the writings on federalism and federal systems in an effort to determine if the theory sets out basic precepts regarding the division of powers that would apply to our exploration of federalism and labour policy. In other words, does federal theory have anything to say about which level of government ought to be responsible for labour policy?

To answer the question, we go, first, to one of the early analysts of federal systems, K.C. Wheare. He defined "the federal principle" as "the method of dividing powers so that the general and regional governments are each, within a sphere, co-ordinate and independent."<sup>6</sup> Federal systems can be contrasted with confederal systems: in the former, both the general and regional governments "operate directly on the people." In confederal systems, it is the regional governments alone that operate directly upon the people.

The major justifications for federalism are that it allows for the accommodation of linguistic, cultural and other minorities, and that, by diffusing political power, it protects democratic government.

Wheare does not discuss labour policy as it is defined in this paper. However, he does discuss social insurance and social assistance by which he means workers' compensation, occupational safety and health, pensions, unemployment insurance, and welfare. For

Wheare, "It is clear that uniformity in all these services is desirable."<sup>7</sup> He proposes,<sup>8</sup>

...either the regulation of all these services by the general government or the co-operation of all the regional governments in their uniform regulation. And since it is so difficult to obtain action by all the regional governments together, or to persuade any one government to impose obligations upon its own citizens which the citizens of other states do not bear, it seems likely that regulation by the general government is essential if any provision is to be made for all these classes of deserving citizens.

The point that Wheare makes here is that, on the matter of social insurance, uniform legislation is desirable, and since agreement among the constituent units would be very difficult to reach, it is preferable to leave the matter in the hands of the central government.

Ronald Watts presents a similar discussion. It is relevant in the Canadian context because advocates of decentralization often propose country-wide policies, programs and standards through horizontal, intergovernmental agreement rather than through federal government action. But like Wheare, Watts is aware of the difficulties associated with this type of decision-making and notes that, "These efforts have generally had limited success because of the confederal character of decision-making involved."<sup>9</sup> In other words, not only is reaching meaningful agreement exceptionally difficult to do in confederal, horizontal arrangements but so also is enforcing whatever agreements are reached.

Echoing federalism scholar, Daniel Elazar, Cheryl Saunders describes federalism as a system of government that combines "self-rule with shared rule." With respect to the powers assigned to the federal government, Saunders

notes that there is commonality among the federations she examined. She explains:<sup>10</sup>

Federal power usually, although not invariably, extends to defense, foreign affairs, immigration, matters physically transcending state boundaries, and key aspects of economic activity for which uniform regulation is deemed important, including currency and postage. Beyond these, however, the allocation of powers reflects the history and values of the polity and the purposes of its federation.

Saunders observes that a "national preoccupation with equity or equality" tends to be reflected in the assignment of power to the federal government or "in other mechanisms designed to achieve the same result."<sup>11</sup> In the European Union, where perfecting the internal market is a key objective, there are "pressures for uniformity or harmonization in different but related areas, including social policy, industrial relations policy, and the environment."<sup>12</sup>

Watts, like Saunders, examined a number of federal systems in both the developed world and the developing world and identified the minimum powers that, in his view, a federal government must retain if a federation is to be effective over the long term. His list is similar but not identical to Saunders' list:<sup>13</sup>

Experience in other federations suggests that although there have been many variations in terms of the precise formulation, federal governments have generally been assigned the major responsibility for defence, international relations, currency and debt, and equalization, and the primary (although not exclusive) responsibility for management of the economy and the economic union.

The constituent governments have usually been given "exclusive or primary responsibility for

education, health, natural resources, municipal affairs and social policy." In general, says Watts,<sup>14</sup>

the more the degree of homogeneity within a society the greater the powers that have been allocated to the federal government, and the more the degree of diversity the greater the powers that have been assigned to the constituent units of government.

Watts does not elaborate on what he means by "homogeneity" and "diversity" but his reference to the U.S. as a "homogeneous society" suggests that his definition of "homogeneous" is quite broad and his definition of "diverse" quite narrow.

This issue is an important one, since Canada's diversity is sometimes used as a justification for the high degree of decentralization in the country's federal system.<sup>15</sup> But it is quite arguable that Canada is no more diverse than the U.S. Hence, defending the extent of decentralization that exists in Canada today on the basis of the country's diversity is not convincing.

Like K.C. Wheare, Ronald Watts found the issue of foreign affairs to be particularly troublesome to federations. It is generally conceded that foreign affairs ought to be the responsibility of the national government. But should this power include the right to conclude treaties with other countries that would be binding not only on the national government but also on the constituent governments? Many federations have said, yes, it should.<sup>16</sup> However, as we shall observe later, the way this issue was resolved in Canada further circumscribed the labour policy-making power of the federal government.

Like other analysts of federal systems, Watts is careful to point out that devolving powers to the constituent units to accommodate

linguistic, cultural, or economic diversity may be desirable in some cases but decentralization will not by itself "hold a federation together." All systems need a "central focus of loyalty" to deal with matters of common concern. To make the point more directly, the members of federal systems must be aware of the extent to which devolution and the recognition of group rights undermine allegiance to, or at least positive feeling for, the larger political entity.

Watts is critical of the "water-tight compartments" approach to federalism. In this view, long thought dormant in Canada but recently revived by the late Supreme Court Justice Beetz,<sup>17</sup> each level of government has equality of status and each is able to act independently within its own sphere of responsibility. Watts points out that the experiences of federations demonstrate that "overlaps of jurisdiction are unavoidable because it is virtually impossible to define water-tight compartments of exclusive jurisdiction."<sup>18</sup> Still, as we shall see later, the approach had a profound impact on the making of labour policy in Canada.

Another approach to federalism is called cooperative federalism. One of its main proponents, Daniel Elazar, says that cooperative federalism rests on the reality that, in federal systems, "more interests are shared than not."<sup>19</sup> Thus, if anything is to get done, shared governmental responses are required; and the way to arrive at these shared responses is through "negotiated cooperation."

Cooperative federalism does not mean that relations between the levels of government are always cordial. It can, in fact, mean "antagonistic cooperation." The word, cooperative, is meant to imply a preference for joint action.

As desirable as cooperative federalism may be, it has its weaknesses. Albert Breton, for instance, has equated it with collusion in the

service of governments rather than citizens.<sup>20</sup> In Germany, where cooperative federalism has, in fact, become joint decision-making, Fritz Scharpf has found joint programs to be "either inefficient, or inflexible, or unnecessary and, in any case, quite undemocratic."<sup>21</sup>

In Canada, cooperative federalism has come to mean executive federalism, a kind of élite decision-making that not only excludes interest groups but also serves to "technocratize" the policy process, making it unintelligible to most citizens.<sup>22</sup>

One of the key benefits attributed to federal systems, and taken up by at least one defender of provincial control of labour relations, is its capacity to stimulate policy and program innovation and experimentation. The American Supreme Court Justice, Louis Brandeis, referred to the states as "laboratories of democracy." Similarly, labour lawyer and scholar, Paul Weiler, described the provinces as "laboratories for legal experimentation" in industrial relations.

Essentially, the argument is that a jurisdiction or a couple of jurisdictions may be prepared to experiment with certain policy ideas that do not have support throughout the country as a whole. If and when the experiment succeeds, the other jurisdictions may be more willing to adopt the policy as well. Two issues can be detected here: the willingness of a jurisdiction to experiment and the diffusion of the experiment across the country.

Kenneth McRoberts, in a discussion of federal structures and the policy-making process in Canada, suggests that the tendency to innovate and experiment "should be especially strong" in Canada, given its "relatively high degree of decentralization." However, according to McRoberts, the tendency has been seriously constrained.<sup>23</sup>

...ever mindful of their relative ability to attract investment, most provincial governments will hesitate to copy these innovations if they are likely to force up levels of taxation - unless a province shares the ideological commitments of the pioneering provincial government and/or the innovations have powerful electoral appeal.

With respect to the diffusion of policy innovations, McRoberts quotes Keith Banting who, in his survey of the impact of federalism on the adoption of social policies, found that,<sup>24</sup>

federalism is clearly a conservative force in welfare politics... Theories which suggest that social reform can be introduced more rapidly in a federal system than a unitary one, since innovations can be established in one province and the "seeds of radicalism" can then spread across the nation, underestimate the withering effects of regional disparity and provincial economic competition.

Banting demonstrated that the growth of the welfare state in this country was dependent on "the post-World War 11 centralization of responsibility for social policy in federal hands."

Canadian medicare, which originated in Saskatchewan and which is perhaps the best known example of a provincial innovation that spread across the country, needed a federal government, determined to involve itself in health care, in order to become a national program.

McRoberts also points out that federalism can constrain the policy process "by impeding the adoption or modification of policies at the national level." If an initiative requires unanimous consent, it can be easily blocked by one or two provinces, even if it had widespread

support across the country. As will be noted later, Canada's approach to international labour issues may have been shaped by this possibility.

Of particular relevance to this paper is McRoberts' suggestion that federal systems may serve to strengthen certain class forces and to weaken others. "More specifically, it appears to strengthen the hand of business over labour." It does so because labour's influence over policy is "much more dependent upon organization and mobilization" than is business' influence. The "fragmentation of its membership over ten jurisdictions and the need to mobilize pressure upon two levels of government impede labour's capacity to exert influence over policy."<sup>25</sup>

## **FEDERALISM AND LABOUR POLICY IN CANADA**

Had labour policy been an issue in Canada during the time of the Confederation debates, it seems likely that the Fathers of Confederation would have placed it in section 91 of the constitution, the section that enumerates federal government powers. One can conclude this from the words of Sir John A. MacDonald. It is evident from his words that the Fathers envisioned a strong central government to which the provinces would be subordinate. Rather than give the residual power to the constituent governments, as the U.S. constitution does and which, in MacDonald's view, was the source of the weaknesses in the American system of government, the Fathers gave the residual power to the federal government to ensure its strength and integrity. In an 1865 speech, MacDonald explained:<sup>26</sup>

Ever since the union was formed the difficulty of what is called "State Rights" has existed, and this had much to do in bringing on the present unhappy war in the United States. They commenced, in fact, at the wrong end. They declared by their constitution that each state was a sovereignty in itself,

and that all the powers incident to a sovereignty belonged to each state, except those powers which, by the constitution, were conferred upon the general government and Congress. Here we have adopted a different system. We have strengthened the general government. We have given the general legislature all the great subjects of legislation. We have conferred on them, not only specifically and in detail, all the powers which are incident to sovereignty, but we have expressly declared that all subjects of general interest not distinctly and exclusively conferred upon the local governments and local legislatures shall be conferred upon the general government and legislature... We thereby strengthen the central parliament and make the Confederation one people and one government, instead of five peoples and five governments, with merely a point of authority connecting us to a limited and insufficient extent...

There are numerous subjects which belong, of right, both to the local and the general parliaments. In all these cases it is provided, in order to prevent a conflict of authority, that where there is concurrent jurisdiction in the general and local parliaments... and that when the legislation of the one is averse to or contradictory of the legislation of the other, in all such cases the action of the general parliament must overrule, ex-necessitate, the action of the local legislature.

In this passage, MacDonald affirmed that he and his colleagues wanted a strong central government. He explains why they wanted this and how they designed the constitution to achieve that end. A clearer statement of intent would be hard to find.

The Preamble to section 91 reiterates the intentions of the Fathers. It states:

It shall be lawful for the Queen by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces; and *for greater certainty*, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated... [Emphasis added.]

Under the provisions of section 91, the residual power went to the federal government; the power to legislate in all areas not assigned exclusively to the provinces, went to Ottawa. The twenty-nine classes of subjects that follow the Preamble were intended, not as a finite list of federal powers, but as examples or illustrations of where the federal jurisdiction could be exercised; hence, the phrase, "for greater certainty."

While some Fathers of Confederation may not have shared MacDonald's enthusiasm for the centralist emphasis of the constitution, it seems clear that a consensus in favour of a "muscular" central government existed among the country's founders. Indeed, F.R. Scott notes that,<sup>27</sup>

Nowhere is there any suggestion that the aim of Confederation was to 'preserve the autonomy of the province,' as suggested in later Privy Council decisions; the aim was precisely to get

rid of this autonomy, except in matters of purely local concern.

How, then, did labour policy fall from federal hands into provincial hands?

The provinces acquired control of labour policy as a result of a 1925 judgment of the Judicial Committee of the Privy Council (JCPC) in England.

In 1923, the Toronto Electric Commission (TEC), which was responsible for the city's electric power transmission and distribution, was involved in a labour dispute with the Canadian Electrical Trades Union over wages and working conditions. The union, as was its right under the *Industrial Disputes Investigation Act* (IDIA), applied for the establishment of a Board of Conciliation and Investigation.

The TEC refused to recognize the authority of the Board (chaired by Colin G. Snider) and sought an injunction from the Supreme Court of Ontario to stop the Board from proceeding with its work on the ground that the IDIA was unconstitutional. Justice Orde of the High Court Division of the Supreme Court of Ontario granted the injunction, arguing that the Act interfered with the civil rights of employers and employees, as well as with the operation of a municipal institution, and both issues were, constitutionally, the responsibility of the provincial governments.<sup>28</sup>

The Commission then applied for a permanent injunction from the Supreme Court of Ontario. This time, the case was heard by Justice Mowat. He believed that labour legislation ought to be a national concern and refused to grant the injunction.<sup>29</sup> Instead, he referred the matter to the Appellate Division of the Supreme Court of Ontario. In a four-to-one decision, the Justices determined that the Act did indeed fall within the jurisdiction of the federal Parliament. They argued that, in its "pith and substance," the IDIA was not about civil

rights or municipal institutions but about providing machinery to look into labour disputes, disputes which could affect the national welfare.<sup>30</sup>

The TEC then took the case to the JCPC. While the Supreme Court of Canada was established in 1875, the final court of appeal in Canada until 1949 was the JCPC. In 1925, the Committee reversed the decision of the Supreme Court of Ontario and declared the IDIA to be ultra vires the Parliament of Canada. It ruled that the Act dealt with civil rights and municipal institutions and both were provincial matters.<sup>31</sup>

In his commentary on the case, F.R. Scott, who believed that the Snider judgment "marked a low point in Canada's constitutional development," drew a comparison between Snider and a similar case, *The Montreal Street Railway Company v. the Board of Conciliation and Investigation et al.*<sup>32</sup> In 1911, a dispute arose between the Company and its workers. A Board was established at the request of the union and, as in the Snider case, an injunction was sought and obtained and the Board was ordered to stop doing its work. The Company then sought a prohibition order to permanently prevent the Board from proceeding, arguing that the IDIA was unconstitutional. A Justice of the Superior Court of Quebec dismissed the request. The case went to the Quebec Court of Review which also dismissed the request and, thereby, upheld the constitutionality of the IDIA.

Scott notes that, of the twelve Canadian judges who considered the constitutionality of the IDIA, ten upheld it and only two argued against it.

The constitutionality of the IDIA was defended on three grounds: the federal power to legislate in criminal law matters; the federal power to regulate trade and commerce; and the federal power to make laws for peace, order and good government, the so-called POGG clause.

With respect to the criminal law power, the JCPC repeated the argument made in previous cases that the criminal law provision applied only "where the subject-matter is one which, by its very nature, belongs to the domain of criminal jurisprudence."<sup>33</sup>

The use of the criminal law provision to defend the IDIA's constitutionality does seem unusual. However, the analysis of Justice Ferguson, who wrote the majority decision for the Appellate Division of the Supreme Court of Ontario, is compelling:<sup>34</sup>

...section 91 of the British North America Act does not confine the power of the Dominion to making criminal law, but that the power extends to making law in relation to the criminal law. My view is that the power to make law in relation to the criminal law in its widest sense, includes power to make laws a paramount purpose of which is the prevention of public wrongs and crime, and the maintenance of public safety, peace and order...

In Justice Ferguson's view, even though the IDIA does not enact a criminal law, its use of penalties to maintain public peace and safety places it squarely within the competence of the federal Parliament.

The trade and commerce power would seem to be the basis of the most convincing case for the constitutionality of the IDIA. F.R. Scott argued that the clear intention of the Fathers of Confederation was to free the new Dominion "from the petty provincial economic policies and barriers to trade which bedevilled the first half of 19<sup>th</sup> century Canadian history."<sup>35</sup> Thus, the Canadian constitution did not "reserve to the provinces intra-provincial trade, as the U.S. Constitution reserved intra-state commerce."

However, beginning with the Parsons case of 1881, the JCPC 'chipped away' at the

handiwork of the Fathers. The federal power was restricted to international trade, interprovincial trade and the general regulation of trade affecting the whole country. Intraprovincial contracts did not fall under this power, even if the impacts of these contracts were felt beyond the borders of a province; they still fell under the provinces' property and civil rights power.

The decision can reasonably be described as shortsighted. A strike at General Motors or Stelco, which would involve an intraprovincial contract, would virtually paralyze the national economy and yet the federal government could not act. Justice Ferguson made a similar point in his judgment: "It cannot be disputed that to deprive the city of Toronto of electric power on which it depends for light, heat and power is to disturb and hinder the national trade and commerce and to endanger public peace, order and safety."<sup>36</sup>

Scott also points out that the Committee's decisions, including its decision in the Snider case, excluded from federal regulation all "trades" (or industries) except those specifically mentioned in section 91. And the only one mentioned in that section is banking. Hence,<sup>37</sup>

even so major a trade as that in wheat has had to have its legal base in federal law bolstered by the clumsy device of declaring all grain elevators in the prairies to be works for the general advantage of Canada.

It was the exclusion of trades from federal regulation that, in Scott's view, did the real "damage" to Parliament's trade and commerce power.

The peace, order and good government defence of the IDIA was considerably more difficult for the JCPC to dismiss, as the Committee itself acknowledged. This was



because a previous Committee decision upheld this federal power.

In 1878, the federal government passed the *Canada Temperance Act*, which gave to local governments the right to prohibit the sale of alcohol. Charles Russell, a Fredericton tavern owner, was convicted of illegally selling liquor. He appealed to the JCPC, arguing that the *Canada Temperance Act* was unconstitutional. The Committee determined that to secure public order, Parliament could involve itself in the sale of alcohol, even though there might be some infringement on the property and civil rights power of the provinces. In other words, if the matter was of nation-wide importance - and the promotion of temperance was perceived to be a matter of nation-wide importance - the POGG provision could be invoked.

Curiously, the Committee members could understand Parliament's desire to have uniform legislation throughout the country to promote temperance, but they could not understand Parliament's desire to have uniform legislation to promote harmonious labour relations.

Justice Mowat - the Justice who sent the Snider case to the Appellate Division of the Supreme Court of Ontario - referred to the Russell case in his decision and observed: "If such an ill as occasional overdrinking is subject to Dominion legislation, it must follow that the prevention of strikes by conciliation which conceivably might occasion the starving of the people should also be."<sup>38</sup>

To resolve the dilemma they faced, the Committee members reduced the POGG power to an emergency provision. In their words:<sup>39</sup>

Their Lordships think that the decision in *Russell v. The Queen* can only be supported today...on the assumption of the Board [the JCPC], apparently made at the time of deciding the case of *Russell v. The Queen*, that the evil of intemperance at that time amounted in

Canada to one so great and so general and pressing that the national Parliament was called on to intervene to protect the nation from disaster.

The legal reasoning of the Committee here comes into question when one reviews the JCPC's decision in the *Labour Conventions* case twelve years later. In this case, the Committee determined that the social and labour legislation of Prime Minister Bennett's government, which included unemployment insurance legislation as well as legislation to ratify three Conventions of the International Labour Organization (ILO), was unconstitutional because it infringed on the provinces' property and civil rights power. Apparently, the Committee members were able to see how "intemperance" could constitute a national emergency but not how the conditions of the Depression could!

As a result of the Snider decision, the applicability of federal labour law was restricted to the public service of Canada; broadcasting; banking; the postal service; airports and air transportation; shipping and navigation; interprovincial and international transportation by road, railway, ferry, or pipeline; telecommunications; and industries declared to be for the general advantage of Canada such as grain handling and uranium mining and processing.

Federal labour law also applies to undertakings of First Nations on reserves and to certain crown corporations such as Atomic Energy of Canada, Canada Mortgage and Housing Corporation and the National Arts Centre. Only Part 1 of the *Canada Labour Code* is applicable in the three Territories.

Today, the major features of Canada's system of industrial relations, common to all jurisdictions, are the requirement for trade union recognition by certification, on the basis of majority support for a bargaining agent with exclusive rights to represent all employees in a

bargaining unit; a duty for employers and recognized unions to meet and bargain in good faith; highly decentralized bargaining; a prohibition on specified unfair labour practices; compulsory conciliation and investigation of labour disputes by government-appointed third parties accompanied by a prohibition on work stoppages during the conciliation process; a prohibition on strikes and lockouts during the term of a collective agreement with a related duty to resolve differences, usually by arbitration; and the maintenance of a labour relations board or similar body to administer the law.

Most jurisdictions in Canada have one set of labour laws to address labour issues in the public sector and another to deal with labour issues in the private sector. In the federal jurisdiction, the *Public Service Employment Act* and the *Public Service Staff Relations Act* apply to the public sector while the *Canada Labour Code*, the successor to the *Industrial Relations and Disputes Investigation Act* and the *Industrial Disputes Investigation Act*, applies to the private sector and some crown corporations.

The *Canada Labour Code* has three parts. Part 1 sets the rules for collective bargaining. Part 2, the only Part that applies to both the public sector and private sector in the federal jurisdiction, deals with occupational health and safety and protects the three basic rights of workers: the right to know about workplace hazards; the right to participate in decision-making about workplace safety and health; and the right to refuse to do dangerous work. Part 3 of the Code sets out certain labour standards in a range of areas, including: hours of work; minimum wages; annual vacations and general holidays; maternity and parental leave; termination of employment; severance pay; unjust dismissal; payment of wages and wage recovery; sick leave; bereavement leave; and sexual harassment.

The Labour Conventions case of 1937, alluded to earlier, further eroded Parliament's jurisdiction over labour policy. In 1935, the federal government ratified three Conventions of the ILO. Convention No. 1 dealt with hours of work, Convention No. 14 with weekly rest and Convention No. 26 with minimum wages. The same year, legislation to implement the Conventions and to effect the Bennett administration's "New Deal" program was enacted by Parliament.

However, when William Lyon MacKenzie King returned to power in 1935, he referred the statutes to the Supreme Court of Canada to determine their constitutionality. The Court split evenly on the matter so it went to the JCPC. In 1937, the JCPC declared the statutes to be ultra vires the Parliament of Canada.

One consequence of the decision was to restrict Parliament's powers with respect to international treaties. The federal government could still enter into treaties with other countries and sign ILO Conventions but, if the subject matter falls within the jurisdiction of the provinces, the implementation of the treaty or Convention requires provincial legislation. In the words of the JCPC, even though the Canadian ship of state now ventures "into foreign waters she still retains the watertight compartments which are an essential part of her original structure."<sup>40</sup>

In this case, the JCPC acted in direct opposition to its decision in the Radio case of 1932. Indeed, Peter Russell has written that, "Most of those who have studied this area of Canadian constitutional law have found it difficult, if not impossible, to square Lord Atkin's judgment in the Labour Conventions case with Viscount Dunedin's in the Radio case."<sup>41</sup>

The question arises here: to what extent has the Labour Conventions case hindered Canada's activism in international labour matters? It is not

an insignificant question. F.R. Scott observed that, "Every time Canada abstains from participating in multilateral conventions aimed at achieving good international standards, because of lack of jurisdiction to implement them, she withholds her influence for peace and cooperation."<sup>42</sup>

The question is difficult to answer. However, it is noteworthy that the idea for a labour side agreement to accompany the North American Free Trade Agreement came not from Canada but from the U.S. Equally interesting is the fact that, seven years after the labour side agreement came into effect (in 1994), only the federal government and four provincial governments have ratified the agreement; that is to say, only the federal government and the governments of Alberta, Manitoba, Quebec, and Prince Edward Island have thus far assumed the obligations of the side agreement. In addition, of the 183 Conventions on labour standards adopted by the ILO, Canada has ratified only thirty, less than a fifth of the total. (See Table 1 on page 26). In a recent article, an official with the International Labour Affairs section of Human Resources Development Canada (HRDC), acknowledged that the need for unanimity among the federal and provincial governments "is one of the reasons why Canada has ratified relatively few ILO Conventions..."<sup>43</sup> It would appear that McRobert's point regarding the policy impact of the unanimity requirement is borne out by Canada's approach to international labour standards.

The unanimity requirement may not be the only factor at work here. It may be that labour policy does not occupy a policy "space" large enough for the federal government to take international labour issues seriously. In other words, if the federal government's responses to labour issues affected the entire country, it is arguable that these issues, including international labour issues, would assume a higher priority.

It should be noted here that the Canadian arrangement with respect to treaty-making and treaty-implementing stands in marked contrast with the arrangements in the United States and Australia. In the U.S., treaty-making and treaty-implementing are entirely within the purview of the federal government. The ratification of a treaty requires only a two-thirds vote of approval in the Senate. In Australia, the courts have held that a treaty may be implemented through federal legislative action alone; state approval is not required, regardless of the subject-matter of the treaty. In Germany, the treaty-making and treaty-implementing procedures are considerably more complex. Suffice it to say here that, according to the country's constitution (known also as the Basic Law), the conduct of foreign relations falls exclusively within the jurisdiction of the federal government, and that, because labour policy is also an exclusive federal power, the approval of the Länder for ILO Conventions or for treaties with labour or economic goals is not required.

A second question that this paper is compelled to ask is: what effect has provincial control of labour policy had on Canadian workers? This question appears to have been as difficult to address as the previous question raised, (see page 10). Garth Stevenson said as much when, in his review of the new political economy and federalism, he noted "the lack of any serious study of what federalism and provincial autonomy have meant for the working class." He hypothesizes that the working class has "paid a heavy price for provincial jurisdiction over industrial relations, the competitive scramble for investment, and the ideological emphasis on 'regional' rather than class interests and conflict."<sup>44</sup>

The hypothesis has been neither confirmed nor disproven but political scientists have often pointed out that the complexities of Canadian federalism, with its numerous governments, force interest groups to spread their limited resources quite thinly, thereby reducing their

capacity to influence policy.<sup>45</sup> Labour and environmental groups are said to be disadvantaged by the structures of Canadian federalism while the power of business interests seems to be reinforced by the same structures. This perhaps explains why, long after the Snider decision was handed down, organized labour continued to urge the federal government to broaden the reach of federal labour legislation. Although both unions and employers petitioned the federal government to revive the IDIA after the JCPC made its ruling, the Canadian Labour Congress, *as late as 1958*, was urging the federal government to use its declaratory power to bring more industries under its jurisdiction.

Law professor, Judy Fudge, is convinced that a major barrier to "the development and implementation of a revitalized employment standards policy" is provincial control of labour policy.<sup>46</sup> She repeats the familiar argument that this arrangement enables jurisdictions to compete for capital "by keeping employment standards low."

Fudge contends that the problem is not insurmountable and that the Workplace Hazardous Materials Information System (WHMIS) is an example of what the federal and provincial governments can do in the area of labour standards. But WHMIS appears to be the exception that proves the rule. The System took years to negotiate and the only reason that the actors persevered was that human health was at stake. The example of WHMIS has never been repeated, leaving employment standards policy in Canada to remain, as Fudge described it, "an uneven and inadequate patchwork of legislation."

Fudge is right to point to the unevenness of Canadian labour standards legislation. Why should a woman in one province not be protected by the same, advanced pay equity legislation that protects women working in another jurisdiction? Why should a man or

woman in Canada have to settle for inferior labour standards simply because he or she lives and works in the 'wrong' part of the country? The answers to these questions may have more to do with ideology than with the constitutional division of powers, but is not federal paramountcy in labour policy a necessary condition for the fair and equal treatment of workers in labour standards?

The provincialization of labour policy has impacted on Canadian workers in another way. It has contributed to the breakdown in national bargaining and to the development of an almost pathological decentralization of collective bargaining. Carolyn Tuohy writes:<sup>47</sup>

As a result of the combination of provincial authority over industrial relations with the Wagner model of plant-level certification, Canada has one of the most decentralized legal frameworks for collective bargaining among western industrial nations.

Overwhelmingly, the dominant pattern is single-plant/single-union bargaining.

Collective bargaining in Canada is not only highly decentralized, it is also highly uncoordinated. As a result, says Roy Adams, "it is difficult for the parties to see the relationship between what they do and the overall public interest."<sup>48</sup> This, in turn, tends to produce excessive wage increases during inflationary times and declines in real wages during periods of high unemployment. Judy Fudge adds another consequence: the perpetuation of wage differentials that entrenches pay inequities between men and women.<sup>49</sup>

Adams proposes that Canada emulate Japan and some European countries and institute annual wage rounds. Specifically, he recommends legislation to require that the wage clauses of all collective agreements expire on the same date each year. This would precipitate,

as Adams says it does in Japan and Northern Europe, public discussion about appropriate wage settlements; such a debate would encourage the parties "to rationalize" their negotiations. Adams' assessment of annual wage rounds is quite positive: "Experience with systems that exhibit these dynamics suggests that the results would be more equity, less conflict and probably lower unemployment."<sup>50</sup>

A major problem with Adams' proposal seems obvious: agreement to enact the necessary legislation would be required from all federal and provincial governments. Is such agreement likely? It would not seem so, if history is a reliable guide.

Decentralized bargaining, fostered by the provincialization of labour policy, makes effective labour participation in national policy-making very difficult to establish. To get some idea of how difficult, we can turn to the works of corporatist scholars, Tarantelli and Lehmbruch, which showed that, of eighteen advanced capitalist countries, Canada ranks near the bottom in terms of corporatist development.<sup>51</sup> Since these scholars emphasized tripartite policy-making in their definition of corporatism, we can say that, comparatively speaking, labour involvement in national public policy-making in Canada is not significant.

Roy Adams has also looked at several countries and classified them according to the degree of labour involvement in decision-making. In "cooperative" countries, labour is "highly integrated into political and industrial decision-making." In "adversarial" countries, labour is either weakly integrated into or excluded from political and industrial decision-making. Of the four countries studied in this paper, only Germany made it to Adams' list of cooperative countries.<sup>52</sup>

The argument can be made that labour union participation in national policy-making does not matter that much if labour is involved at the

provincial level. But again, the fairness question must be raised: why should the unions and workers in one jurisdiction or some jurisdictions have the opportunity to participate in public policy-making, and reap the benefits therefrom, while the workers and unions in other jurisdictions are denied this opportunity? In addition, a labour movement that is so fragmented that it can be ignored, or offer only ineffectual participation, is not serving its members well in the forum - the federal forum - that deals with the "big" economic, industrial and social policy issues.

### **FEDERALISM AND LABOUR POLICY IN THE U.S., AUSTRALIA AND GERMANY**

The objective of this section of the paper is to find out how, in the U.S., Australia and Germany, the federal government came to have primary responsibility for labour policy. The discussion of each country opens with an outline of the major features of the country's industrial relations system. This is followed by a brief explanation of the nature of the federal system that operates in the country, and then by a discussion of the constitutional provisions and court decisions that determined the jurisdictional question. Each section ends with a comment on the impact of federal dominance in labour policy.

#### **a) the United States**

The central feature of the U.S. industrial relations system, say industrial relations scholars, Thomas Kochan and Marc Weinstein, is the role of collective bargaining as the key institutional mechanism to resolve labour-management conflict.<sup>53</sup> As in Canada, collective bargaining in the U.S. is highly decentralized. However, unlike in Canada, union density in the U.S. has declined precipitously since the early 1980s, as Table 2 on page 26 shows.

The second distinctive feature is "exclusive managerial prerogative at the strategic level of

the firm." Both management and labour in the U.S. accept that management's role is to determine the direction of the firm and labour's role is to negotiate the impact of management's policies through collective bargaining.

The third feature is American labour's strategy of "job control" unionism, which has produced an elaborate set of rules that specify the rights and obligations attached to each job.

As indicated earlier, the federal government is dominant in the U.S. and it is this level that has jurisdiction over labour policy. But it was not always so.

The American system of government started out as a confederal arrangement, with the states holding most of the powers. This, however, proved to be highly dysfunctional and it was abandoned in 1789 in favour of a federal system. Today, the government in Washington is so powerful that federalism in the U.S. has been described as "coercive federalism."<sup>54</sup> And this despite the fact that, unlike the Canadian constitution, the American constitution gives the residual powers to the states; that is, the powers not expressly assigned to the federal government go to the state governments.

The American system is noteworthy for two other reasons. First, jurisdiction assigned to the fifty states is symmetrical; all of the states are treated equally with respect to their powers. Secondly, the system provides for the representation of the people of each state in a major national institution, namely, the Senate; each state, regardless of size, elects two Senators. The absence of a similar institution in the Canadian government can be said to be a significant weakness of federalism here, one that has resulted in a heightened sense of regionalism throughout the country.

With regard to the evolution of American labour law, two clauses in the U.S. constitution have been particularly important. The interstate

commerce clause (section 8 of Article I) gives to Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes[.]" Thus, Congress has the authority to regulate a labour dispute if it has an effect on interstate commerce. The supremacy clause (clause 2 of Article VI) requires state law to give way to federal law where the two conflict. This power has been expanded by the preemption doctrine, which requires state law to give way to federal law, even where the two do not conflict, if the federal law has pervasively occupied the area.<sup>55</sup>

Court decisions have allowed the federal government not only to regulate collective bargaining, strikes, boycotts, and picketing but also to forbid the application of state labour laws, whether statutory or judge-made. The Supreme Court in the U.S. even upheld the application of the country's most important labour law, the *National Labor Relations Act*, to small local automobile retailers.

American political scientists, Eric Waltenburg and Bill Swinford, point out that for the first 150 years of American history, the Supreme Court saw itself as the conservative protector of the free market, and indirectly the states.<sup>56</sup> The shedding of this role came in 1937 when the Court ruled in a dispute between the National Labor Relations Board and the Jones and Laughlin Steel Corporation.

The Court found the company to be guilty of an unfair labour practice when it fired ten employees for attempting to organize a union. The company brought the case to the Court on the ground that the relations between it and the employees were not subject to federal regulation. The Court held that employer-employee relations did, indeed, fall within the competence of the federal government because of the interstate commerce clause in the constitution.

Writing for the majority, Chief Justice Hughes stated:<sup>57</sup>

It is a familiar principle that acts which directly burden or obstruct interstate or foreign commerce, or its free flow, are within the reach of the congressional power. Acts having that effect are not rendered immune because they grow out of labor disputes...It is the effect upon commerce, not the source of the injury, which is the criterion...

Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.

The Chief Justice noted the far-flung but integrated structure of the company. Its iron ore was from Michigan and Minnesota, its coal from West Virginia and Pennsylvania. It had ships operating on the Great Lakes and it owned a railway. Its products were processed in Pennsylvania and the company shipped three quarters of its output to other states. The company also maintained warehouses in four states. Thus, Chief Justice Hughes was compelled to write:<sup>58</sup>

When industries organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be 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.

In its references to the nature of modern industry and the actual workings of the economy, Hughes' reasoning is in remarkable contrast to that of Viscount Haldane in the Snider case. Haldane managed to ignore not only modern economic realities but also, as noted, the clear intentions of the Fathers of Confederation.

Prior to the Jones and Laughlin case, the Supreme Court had considered labour-management relations to be of an intrastate character; if they were to be regulated at all, the states were the appropriate authorities to do so. With this judgment, the Court brought labour relations within the federal sphere. The Court's judgment was reinforced almost immediately by several subsequent decisions.

A word needs to be said here about President Roosevelt's reaction to the Court's decisions prior to the Jones and Laughlin case. By those decisions, the Court had effectively scuttled President Roosevelt's New Deal legislation. In response, Roosevelt announced a plan that would allow the president to appoint an additional justice to the Court for each sitting justice over the age of seventy. If approved by Congress, the plan would have allowed Roosevelt to appoint six new justices.

But no sooner had Roosevelt begun to lobby for his plan than the Court retreated from its conservative position and made several judgments in support of the New Deal legislation.

The argument is made that Roosevelt, by bringing forth a scheme to "pack" the Court, had intimidated the justices into acceptance of his social legislation.<sup>59</sup> Regardless of whether or not it is true that the justices felt intimidated, some Canadian scholars, such as F.R. Scott, noted

Roosevelt's aggressive action and wondered why the federal government here did not work more vigorously, after the Snider decision was handed down, for an enlarged federal jurisdiction.

The other dimension of labour policy - labour standards - was confirmed as a responsibility of the U.S. federal government in 1941 by the unanimous decision of the Supreme Court in *United States v. Darby Lumber Company*. The *Fair Labor Standards Act*, passed in 1938 under the auspices of the commerce clause of the constitution, contains provisions on minimum wages, maximum working hours and child labour. In its decision, the Court reiterated that Congress' power over interstate commerce is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed by the constitution."<sup>60</sup>

In 1966, the U.S. government amended the *Fair Labor Standards Act* to cover certain employees of public hospitals and schools. The state of Maryland challenged the constitutionality of the amendments and, again, the Supreme Court, in a 7 - 2 decision, upheld the amendments. The Court argued:<sup>61</sup>

It is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character. As long ago as *Sanitary District v. United States* [1925], the Court put to rest the contention that state concerns might constitutionally 'outweigh' the importance of an otherwise valid federal statute regulating commerce.

The Supreme Court was again asked to rule on the constitutionality of the Act in the mid-1980s in *Garcia v. San Antonio Metropolitan Transit Authority*. The issue was whether the

wage and hour provisions of the federal *Fair Labor Standards Act* applied to employees of the Authority or whether the Authority, as an agency of a state government, was beyond federal jurisdiction. The majority opinion was that the Act did apply as a result of the constitution's interstate commerce clause.

The reasoning of the justices is startling to a Canadian observer. According to Justice Blackmun, the Founding Fathers<sup>62</sup>

chose to rely on a federal system in which restraints on federal power over the states inhered principally in the workings of the National Government itself, rather than in discrete limitations upon the objects of federal authority. State sovereignty interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal powers.

In other words, the restraints on the federal or national government's powers over the states are embedded in the structure of the federal government itself, a major pillar of which is the Senate. There is no need for *the courts* to set limits on the powers of that level of government.

It is said that the pendulum in American jurisprudence is now moving back towards states' rights. Still, the three cases illustrate the influence of the interstate commerce clause in the decision-making of the Court on labour issues.

At first glance, it would appear that the extraordinary reach of the U.S. federal government in labour matters has not been of great benefit to American workers and their representatives. We saw earlier that labour union density has declined dramatically since the 1980s. In 1994, the Commission on the Future of Worker-Management Relations reported the following:<sup>63</sup>



- the U.S. earnings distribution is the most unequal among developed countries;
- lower paid workers in the U.S. earn markedly less than comparable workers in Western Europe;
- after having led the world in reducing hours worked, U.S. employees work about 200 hours more in a year than workers in Europe; and
- roughly one-third of workplaces that vote to be represented by a union do not obtain a collective bargaining contract with their employer.

Canadian industrial relations scholar, Pradeep Kumar, cited a 1990 study comparing labour legislation in Canada and the U.S. It found glaring holes in U.S. legislation at both the federal and state levels. For instance:<sup>64</sup>

- neither federal nor state law prescribes minimum standards for vacations or public holidays;
- there are no individual notice of termination standards or any severance pay laws in the U.S.; and
- pay equity legislation exists in only a small number of states.

In addition, with respect to labour involvement in national policy-making, Wever and Turner note that the American union movement has been unable to engage in anything more than mere political lobbying.<sup>65</sup>

As inadequate as federal labour legislation may be, there is evidence to suggest that devolution of labour policy to the states, were it to take place, would leave unions and workers in an even weaker position. Consider, for instance, that twenty-one states have 'right to work' laws, that is, laws prohibiting compulsory union membership as a condition for the retention of employees.<sup>66</sup> In addition, the competition among U.S. states for investment is particularly intense, suggesting that the states, if they had primary responsibility for labour policy, would not be

reluctant to fashion labour laws to attract the investor.<sup>67</sup>

It should also be remembered that the enforcement of the constitution's commerce clause has enabled the U.S. to develop an economy largely free of internal barriers, which may have contributed to the comparatively low unemployment rate in the U.S. (See Table 3 on page 26.)

From the perspective of an American worker and his/her union, it would appear that federal dominance may be a necessary condition for a progressive labour policy but it is clearly insufficient.

#### **b) Australia**

Until recently, the most distinctive feature of the Australian industrial relations system was its extraordinary degree of centralization. This came about through a network of arbitration tribunals at both the federal and state levels. Since 1904, when the federal tribunal, now known as the Australian Industrial Relations Commission, came into existence, disputes between labour and management have been settled, not by negotiation, but through arbitration. The arbitral awards covered both wage issues and issues related to the conditions of employment.

However, the industrial relations system in Australia has undergone a transformation. Governments at both levels have been encouraging more enterprise-based bargaining. At the federal level, legislative and administrative moves to encourage decentralized bargaining began in 1988 and culminated in 1996 with the passage of the *Workplace Relations Act*. In addition to fostering more enterprise-based bargaining, the Act reduces the importance of arbitral awards. Since 1996, these awards have taken on the status of safety nets underpinning enterprise agreements. As of 1995, 63 per cent of workers in workplaces with

twenty or more employees were covered by enterprise agreements.<sup>68</sup>

An interesting feature of the *Workplace Relations Act* is that it applies to the state of Victoria. The government of Victoria agreed to transfer a number of important labour policy responsibilities, such as those dealing with agreements between employers and employees, conciliation and arbitration, termination of employment, and minimum wages, to the Commonwealth government. This comes after several attempts by the federal government to persuade all of the states to cede their industrial relations powers to the federal government.

Comprised of six states and two territories, Australia has been an independent federation since 1901. The country's founders tended to follow the American model of federalism. For instance, like the U.S. constitution, that of Australia left the residual powers to the states. And like the U.S. model, there is jurisdictional symmetry among the constituent units of the Australian federation.

The country has evolved into a relatively centralized federation. However, the states do have representation at the federal level through the Senate, which has substantive powers, is directly elected and has equal representation from each state.

If the provincialism of the JCPC's judgments can be described as a major factor in the evolution of Canadian labour policy, and if the influence of the constitution's commerce clause has been the key theme in the development of U.S. labour policy, it would appear that the determination of the country's Founding Fathers and the High Court to keep labour policy a federal responsibility has been a decisive factor in the development of Australia's labour policy.

No fewer than six sections of the country's constitution have been identified as sources of

the labour power of the federal government (known also as the Commonwealth government), three of which are particularly important. In addition, section 74 of the Australian constitution established the High Court as the final court of appeal on most constitutional issues. Thus, Australia was able to avoid the kind of experience that Canada had with Britain's JCPC.

The most important constitutional source of the federal government's labour power is section 51 (paragraph xxxv), which has no counterpart in either the U.S. or Canadian constitution. It provides that the federal government may make laws pertaining to "Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State."

The powers of the federal government under this section were confirmed soon after the passage of the *Commonwealth Conciliation and Arbitration Act* in 1904. In 1908, two mining companies objected to the registration of their association as a federal organization for the purposes of the Act. Their argument was that, since the members of the association were only in one state, the federal Act did not apply. The High Court rejected this argument, stating that disputes could extend beyond one state even if employment did not. Therefore, any mechanism which would prevent the spread of a dispute was a permissible exercise of the federal labour power.<sup>69</sup>

In 1920, in *Amalgamated Society of Engineers v. Adelaide Steamship Company Ltd.*, the High Court again upheld federal authority in labour policy. The issue was whether the federal Court of Conciliation and Arbitration could issue a settlement when one of the parties was an agency of a state. The High Court determined that it could. This judgment, said a constitutional scholar, "was a milestone on the

Commonwealth's path to supremacy over the States."<sup>70</sup>

A second constitutional source of the Commonwealth government's power to make labour policy is section 51 (paragraph xxix). It empowers the federal government to make laws with respect to external affairs.

In 1936, the High Court ruled that the external affairs provision gave the federal government the power to legislate for the purpose of implementing an international convention or treaty to which Australia was a party. Chief Justice Latham, writing for the majority, was clear in his ruling:<sup>71</sup>

The Commonwealth Parliament constitutionally possesses the power to legislate as it thinks proper with regard to external affairs, and if any State legislation is inconsistent with Federal legislation on this subject, the State legislation is to the extent of the inconsistency invalid...

The Chief Justice went on to say that,<sup>72</sup>

The Commonwealth has power both to enter into international agreements and to pass legislation to secure the carrying out of such agreements according to their tenure even though the subject matter of the agreement is not otherwise within Commonwealth legislative jurisdiction.

What this ruling did was enable the federal Parliament to pass legislation that gave nationwide effect to Conventions of the International Labour Organization. High Court decisions in 1983 and 1997, (the Tasmanian Dam case and the Toonen case respectively), confirmed this power of the Commonwealth government. Unlike the federal government in Canada, the Australian federal government has the authority to enter into a treaty or convention *and* implement it throughout the country, even if the

subject matter falls within the jurisdiction of the states. For instance, Australia's *Workplace Relations Act*, which covers workers and employers in the federal jurisdiction, includes a provision to give effect to Convention 158 of the International Labour Organization, which deals with the termination of employment. The Act makes clear that this provision applies to "*all employees nationally*."

A third constitutional source of the Commonwealth government's labour power is the trade and commerce provision. The constitution (section 51, paragraph i) gives the federal government the power to make laws "with respect to trade and commerce with other countries, and among the States." Section 92 states further that "trade, commerce and intercourse among the States...shall be absolutely free."

Until the mid-1980s, the High Court consistently demonstrated its view that the federal trade and commerce power is a wide one.<sup>73</sup> For instance, in *O'Sullivan v. Noarlunga Meat Ltd.* (1954), the High Court stated that the trade and commerce power "extended to the supervision and control of all acts or processes which can be identified as being done or carried out for export."<sup>74</sup> The judgment thus provided the federal government with the power to make labour policy for a very wide range of industries, indeed, all those industries that export.

However, a 1988 decision resulted in a much narrower interpretation of the federal trade and commerce power. But this reduction in the federal government's capacity to regulate the economy has been offset by the ascendancy of another federal power, the corporations power. Under section 51 (paragraph xx) of the constitution, the federal government may make laws with respect to "Foreign corporations and trading and financial corporations formed within the limits of the Commonwealth." In *Strickland*

v. Rocla Concrete Pipes Ltd., the High Court unanimously held that the federal government could control all the trading and financial activities of trading and financial corporations, "including intrastate transactions."<sup>75</sup> In 1983, the High Court went further and held, in *Commonwealth v. Tasmania*, that Parliament had the authority to control *all* acts of such corporations done for the purposes of trade.

The once, highly centralized wage determination structure in Australia, facilitated by federal control of labour policy, produced a lower level of wage inequality than that found in many other countries. Indeed, in the early 1990s, the extent of wage inequality between men and women was similar to that found in Sweden.<sup>76</sup> Studies have found that, in general, earnings inequality is inversely related to the degree of centralization in wage bargaining.<sup>77</sup> At this point, it is too early to draw any definitive conclusions about the impact of enterprise bargaining on the Australian earnings distribution.

Federal control of labour policy also made possible effective trade union involvement in a range of national policies. In 1983, the Labour Party government and the Australian Council of Trade Unions (ACTU) entered into an Accord that lasted until 1996 (when the Labour Party government fell from power). The Accord resulted in trade union wage restraint but also in a rate of employment growth that, between 1983 and 1996, was the highest of the OECD countries. According to ACTU officials, the fall in real wages was more than offset by increased employment, tax cuts, improved pensions, and more generous social welfare provisions. The ACTU also pointed to,<sup>78</sup>

the greater influence exercised by union representatives over economic, industry and social policies. The Accord, for instance, set out 'agreed policy details' on the treatment of prices and non-wage incomes, on taxation, and on supportive

policies covering industrial relations legislation, social security, occupational safety and health, education, health, and Australian government employment.

What the Australian experience seems to demonstrate, therefore, is that labour participation in government decision-making is dependent not only on a centralized bargaining structure but also on the ideological orientation of the government in power.

### **c) Federal Republic of Germany**

Unlike Canada, the U.S. and Australia, Germany has a "dual system" of labour representation. At the industry level, traditional collective bargaining provides one vehicle for labour representation. At the level of the undertaking, labour representation occurs through a statutory system of codetermination. As a result, say Baethge and Wolf,<sup>79</sup>

German industrial relations since World War II have been characterized by stability, efficiency, and a high degree of institutionalization. Relations between capital and labour have, for the most part, been marked by the cooperative regulation of interests and a partnership between the actors in order to minimize conflict.

The system of codetermination, or co-decision-making, is based on "two institutional channels of employee representation." First, federal legislation requires that all firms with more than five employees have works councils at both the plant and enterprise levels. The members of the councils are selected by the entire company work force, not just union members. Secondly, federal law also requires that large firms have worker representation on their supervisory boards. Although the law applies to all large firms, that is, firms with 500 or more employees, the coal and steel industries are the only industries where workers and

shareholders elect **equal** numbers of representatives to the supervisory board.

Union density in Germany has fallen to 29 per cent but collective bargaining coverage extends to over 90 per cent of the employed labour force. Baethge and Wolf state that the unions have "earned social acceptance and a lasting position of political strength" by pursuing moderate wage policies and supporting "technical progress." This social acceptance would seem to be another distinctive feature of the German industrial relations system.

The constitution of the Federal Republic of Germany, known also as the Basic Law, was adopted in 1949. The federal form of government set out in the Basic Law has similarities to that set out in the Australian constitution and in the American constitution. For instance, the Basic Law gives the residual powers to the constituent units. But there are also significant differences. One is that the upper house in Australia and the U.S., (the Senate), is comprised of the elected representatives of the people of each state. However, in Germany, the upper house, (the Bundesrat), is comprised of the appointed representatives of the government of each Land.

With respect to the division of powers, the Basic Law specifies areas of exclusive federal jurisdiction; areas of concurrent jurisdiction; and areas of federal framework legislation. Labour relations, occupational health and safety, labour placement, and unemployment insurance are identified in Article 74 (paragraph 12) as areas of concurrent jurisdiction.

In Canada, the phrase, concurrent jurisdiction, means that both federal and provincial governments may legislate. In Germany, it has a different meaning. Concurrent jurisdiction in the Basic Law means that the Länder have the right to legislate only if, and to the extent that, the federal government does not exercise its legislative right in the area (Article

72). To reinforce federal dominance, Article 31 states that the "Federal law shall override Land law."

The federal government has not been reticent about legislating in the area of labour law. Indeed, it has enacted laws on employment relationships; on labour standards; on occupational training; on occupational safety and health; on collective bargaining; and on codetermination.

An additional section of the Basic Law that is of interest is Article 9 (paragraph 3). It states:

The right to form associations in order to safeguard and improve working and economic conditions shall be guaranteed to every individual and all occupations and professions. Agreements restricting or intended to hamper the exercise of this right shall be null and void; measures to this end shall be illegal.

Thus, the right to form and join a union is constitutionally guaranteed in Germany.

The constitutional right of the federal government to legislate in the area of labour policy has not been an issue in Germany. Unlike Canada, the U.S. and Australia, Germany has not had to endure ongoing constitutional challenges to the authority of the federal government to govern the workplace.

It is significant that, of the four constitutions looked at in this paper, the two youngest, the Australian and the German, explicitly assigned responsibility for labour policy to the federal government. It would seem that, as the effects of industrialization and capitalist economics showed themselves, the need for federal control of labour policy became clear to constitutional drafters.

The more recent experience of the European Union (EU) confirms this conclusion. The

European Union began as a league, moved to a confederation and now appears to be moving towards federation. The treaties establishing the Union contained no explicit references to the harmonization of labour laws. However, by the 1970s, the member states perceived that differences in labour standards were "harming the level playing field for economic actors."<sup>80</sup> As a result, the governors of the Union shifted their priority from the harmonization of labour standards to the *establishment* of minimum standards. The Council of the European Union has issued directives on a range of issues, including directives on minimum periods of daily rest, annual leave, the protection of pregnant and breastfeeding workers, and the establishment of works councils. Concludes political scientist, Gerda Falkner:<sup>81</sup>

That most of these laws were passed against the fierce opposition of the UK proves that by the 1990s, a single EC [European Community] government was in fact no longer able to prevent unwanted EC labour law from becoming binding on its territory.

Increasingly, responsibility for labour policy is shifting upwards, from the level of the constituent governments to the EU level.

Partly because labour policy is formulated at the federal level, the structure of collective bargaining in Germany is highly centralized. The main labour union central, the German Trade Union Federation (DGB), is comprised of only eleven unions, organized along industry or multi-industry lines.<sup>82</sup> Although collective bargaining is nominally regionally based, "in practice a pilot region is used to bargain an industry pattern contract that is subsequently extended to all regions."<sup>83</sup>

Due to the influence of the Union of Metal Industry Workers (IG Metall), pattern setting is not only inter-regional but also inter-industry. Indeed, in most wage negotiations, the other

member unions of the DGB wait for a settlement by the IG Metall, which then serves as a benchmark for the other wage negotiations.<sup>84</sup>

On the employer side, collective bargaining is co-ordinated by the Confederation of German Employers' Associations, which is comprised of 80 per cent of all the enterprises in the country.

Although the DGB does not intervene directly in collective bargaining, it does play a co-ordinating role. In addition, its role as representative of German labour is unquestioned. Once the DGB adopts a policy, "compliance is not only expected but enforced." As a result, writes Peter Katzenstein, the DGB has "been able to bargain successfully with both business *and the state*."<sup>85</sup> (Emphasis added.)

Federal control of labour policy, therefore, has not only facilitated centralized bargaining it has also enabled labour and business to establish strong national associations able to participate actively and forcefully in national policy-making. Indeed, the unions were able to defeat a plan by the Helmut Kohl government in 1996-97 to reduce the amount that employers were required to pay absent employees who were sick.<sup>86</sup> Professor Lowell Turner, who has studied labour and politics in Germany for many years, points out that negotiation and collaboration between organized business and labour permeate "the processes of economic and social policy-making."<sup>87</sup>

And the 'social partners' are actively consulted in government policy-making, often quietly and behind the scenes but sometimes formally and with great public fanfare, as in the 1992-93 "Solidarity Pact" negotiations that set the framework for key economic policy decisions regarding the new states of eastern Germany.

The involvement of organized labour in government policy-making seems to occur

whether the government in power is conservative or social democratic.

Germany's centralized and coordinated collective bargaining process has been responsible for high wages and "comparatively little income inequality," say Katz and Darbishire. They found that, even with some decentralization in collective bargaining in the 1980s, "income inequality did not increase during that period." While they do see some growth in income inequality, it is "moderate" by the standards of some other advanced capitalist countries.<sup>88</sup>

Wolfgang Streeck also comments on the comparatively low degree of income inequality. "The difference between high and average wages...was much lower in Germany than in its major competitor countries."<sup>89</sup>

Moreover, during the 1980s, at a time when in all other industrialized countries the wage spread increased, the relation of the high German wage to the median remained essentially unchanged, whereas the low wage increased substantially, from 61 to 65 per cent of the median wage. Furthermore, intersectoral wage dispersion was dramatically low in West Germany compared to both Japan and the USA, and so were the earnings differentials between workers in small and large firms.

Of course, federal control of labour policy is not the sole reason for Germany's egalitarian wage structure. But it has contributed to the growth of strong national labour organizations able to secure from industry and from the state the kinds of policies and decisions that serve to limit the extent of inequality among workers.

## CONCLUSION

The basic purpose of this paper has been to explore the case for federal government control of Canadian labour policy. It sought to address two questions: first, would federal government control be an adequate and a valid response to certain perceived deficiencies in the Canadian system of industrial relations? Secondly, what are the arguments in support of an enlarged federal jurisdiction in the area of labour policy?

For answers to these questions, the paper turned, first, to federal theory. The objective here was to find out if the theory has anything to say about whether responsibility for labour policy ought to rest with the central government or the sub-national governments. The works of a number of analysts were reviewed, notably K.C. Wheare, Cheryl Saunders, Ronald Watts, and Kenneth McRoberts.

The paper then sought to provide some analysis of the judicial decisions that resulted in the provincialization of labour policy in Canada. Some of the effects of provincialization were also discussed. The paper then reviewed the experiences of the U.S., Australia and Germany to ascertain how the federal governments in these countries came to have primary jurisdiction over labour policy.<sup>90</sup>

What, then, can we conclude from this exploration of federalism and labour policy?

First, the legal basis of the current arrangement, that is, the 1925 judgment of the JCPC in *TEC v. Snider*, is weak and highly questionable. The reasons that the JCPC gave for rejecting the three grounds on which the constitutionality of the IDIA was defended are unconvincing. The approach taken by the Committee members enabled them to ignore both the intentions of the Fathers of Confederation and the socio-economic realities of the time. It, therefore, led them to a judgment lacking in moral legitimacy.

Secondly, it would appear that federal control of labour policy is a necessary, though insufficient, condition for fairness in labour policy. To repeat a question already asked: Why should a worker in one part of the country be governed by a set of inferior labour laws simply because he/she works in the "wrong" part of the country?

Control of labour policy is a tool that the government in power can use to promote fairness, to safeguard the rights of workers and, in so doing, promote productivity in the nation's economy. It may choose not to use the tool. Hence, to be meaningful, federal control of labour policy must be in the hands of a government responsive to the fairness issue and to the labour agenda.

Thirdly, federal control of labour policy is preferable to intergovernmental harmonization efforts. As others have noted, the confederal arrangement has had limited success as a public policy-making device. This is confirmed by the experience of an organization called the Canadian Association of Administrators of Labour Legislation, comprised of senior officials from all the jurisdictions in Canada. It was established in 1938 to promote harmonization. What has been the result of the Association's work? According to the Sims Task Force, "There is a *growing* lack of uniformity in Canadian labour legislation."<sup>91</sup> (Emphasis added.)

With respect to the two questions that opened this paper, it is reasonable to conclude that federal control of labour policy would be a valid response to the deficiencies identified by certain scholars and experts, and that the arguments in support of an enlarged federal jurisdiction are persuasive. It could promote fairness. It could result in greater international labour activism on the part of the federal government. And it could encourage more centralized bargaining which, in turn, would

promote greater earnings equality and enable labour to participate more forcefully in national policy-making.

How can the reach of the federal government's labour policy be enlarged? A number of alternative methods have been proposed. One alternative, provincial agreement to cede control of labour policy, does not seem likely. Equally unlikely at this time is the suggestion advanced by F.R. Scott that the federal government make use of its declaratory power under which it could identify certain industries "to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces." (*The Constitution Act, 1867*, section 92, paragraph 10c). In industries so declared, federal labour policy applies. Given the current trend towards provincialism, and given the federal government's apparent willingness to accept the diminution of its powers, the declaratory power is a device that is not going to be used in the foreseeable future.

A third alternative is to rely on the courts. Here, there are firmer grounds for optimism. Constitutional scholar, Thomas Kuttner, has observed in recent Supreme Court decisions a slight but noticeable strengthening of the federal government's powers in four areas: its trade and commerce power; its power to make laws for the peace, order and good government of Canada; the treaty-making power; and the doctrine of federal paramountcy, which makes provincial legislation inapplicable if it conflicts with federal law and the purpose of Parliament in enacting the legislation is threatened. Kuttner suggests that, if the trend continues, the country could see a renewed federal vibrancy in labour policy.<sup>92</sup>

One would hope that, as the dissatisfaction with the JCPC's decisions grows, the federal government would be more willing to maintain, if not expand, its jurisdiction, and to resist the urge to transfer control of parts of its



jurisdiction to the provinces, as it did, for instance, in the *Canada - Newfoundland Atlantic Accord Implementation Act* (1987) and the *Canada - Nova Scotia Off-Shore Petroleum Resources Accord Implementation Act* (1988).

One would also hope that a suggestion advanced by Kuttner would be ignored by federal policy-makers. Kuttner has proposed a "substantive asymmetry" in labour relations policy. He suggests, for example, that the division within the Sims Task Force on the question of replacement worker legislation might have been resolved by an arrangement under which replacement workers in federal industries would be banned in Quebec, where there is provincial legislation banning replacement workers, but not in other provinces. This is precisely the kind of proposal that this paper finds unacceptable, simply because it fails the fairness "test." Why should workers in Quebec be protected by laws banning replacement workers while workers in other provinces have no such protection?

A final conclusion that emerges from this paper is that the jurisdiction question deserves considerably more attention in the future than it received in the past. In assessing which level of government ought to have jurisdiction over labour policy, it is imperative that analysts examine the impacts not only on provincial autonomy but also on workers, on union-management relations and on the capacity of the federal government to strengthen the economic and social union.

**TABLE 1**

**Ratifications of the 183 Conventions of the ILO**

Country	No. of Conventions Ratified
Germany	76
Australia	57
Canada	30
United States	14

Compiled from data displayed on the website of the ILO, March 2001.

**TABLE 2**

**Union Density (%) and Collective Bargaining Coverage**

Country	Trade Union Density			Bargaining Coverage		
	1980	1990	1994	1980	1990	1994
Canada	36	36	38	37	38	36
United States	22	16	16	26	18	18
Australia	48	41	35	88	80	80
Germany	36	33	29	91	90	92

Source: H. Lazar, P. Stoyko, *Labour and Social Policy Among Select OECD Member States: Is Canada an Outlier?* paper prepared for The Labour Policy in the New Millennium Conference, Summerside, PEI, September 23, 1998, p. 45.

**TABLE 3**

**Rates of Unemployment**

Country	Unemployment Rate, 1990s Average
United States	5.9%
Australia	8.9
Germany	9.3
Canada	9.6

Source: H. Lazar, P. Stoyko, *Labour and Social Policy Among Select OECD Member States: Is Canada An Outlier?* prepared for The Labour Policy in the New Millennium Conference, Summerside, PEI, September 23, 1998, p. 37.

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