

XIX

Labour and the Liberal State: Regulating the Employment Relationship, 1867–1920

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WHEN CANADIAN HISTORIANS SPEAK of the national policy, they generally mean that policy of national economic development initiated by the federal Conservative government led by John A. Macdonald and continued by his Liberal successor, Wilfrid Laurier. This policy, as most historians describe it, had three components: completion of a transcontinental railway, promotion of land settlement and wheat farming in the prairie west, and stimulation of domestic manufacturing behind the protective wall of high tariffs on imported manufactured goods. Supporting and integral to the policy was a fourth element: the articulation and elaboration of a regulatory framework for employment relationships, to encourage investment and promote capital accumulation.¹ Accordingly, both federal and provincial governments searched for strategies that would minimise work stoppages, especially in infrastructure industries such as transportation and communications, increase the availability of low-waged, highly-mobile workers for resource extraction, and contain class conflict in the workplace without limiting management prerogatives. This chapter examines state labour policy from the Macdonald-Laurier years to the end of the First World War, as it was developed through master-servant and mechanics' lien legislation, fair and minimum wage policies, workplace health and safety standards, workers' compensation, administrative intervention in industrial disputes, and restrictions on recruiting immigrant workers.

With Confederation and the beginning of the Macdonald years, workers faced a legal system which, by and large, treated employees as juridical equals of employers and left the two alone to agree on the terms and conditions of employment. The state did not intervene directly in labour relations, although it supplied troops at employers' requests, to help maintain production during strikes. By the 1920s, in contrast, federal and provincial legislation prescribed some minimum standards for wages and working conditions, provided mechanisms to compensate workers for on-the-job injuries, and encouraged employers and employees to mediate their differences. Although the dominant rhetoric was still that of individual freedom and a *laissez-*

¹ For the argument that labour policy was the fourth element of the national policy, see J. Webber, "Compelling Compromise: Canada Chooses Conciliation Over Arbitration 1900–1907" (1991) 28 *Labour/Le Travail* 15. Macdonald identified the protective tariff as "The National Policy" during the 1878 election campaign, in which he regained the government benches after four years in opposition. See C. Brown, "The Nationalism of the National Policy" in P. Russell, ed., *Nationalism in Canada* (Toronto: McGraw-Hill Ryerson, 1966).

faire state, legislation set some limits on what had been regarded previously as private contractual relations between juridical equals.

For the legal historian, the legislative record is much easier to find and follow than the records of labour's treatment in the courts. Nevertheless, the judiciary played a significant role in shaping labour policy. Judicial willingness to impose penalties for union activity contributed to passage of the federal *Trade Unions Act* of 1872, widely celebrated by contemporaries and later historians as marking the decriminalisation of labour unions.² Scattered evidence suggests that, despite this legislation, the judiciary continued to limit union activity by granting employers' requests for injunctions and damage awards to curb boycotts, picketing and even verbal taunting of strikebreakers. The significance of legislation to limit employers' freedom of contract must be assessed against a background of judicially-imposed limits on workers' ability to take collective action in support of their rights. More research on labour law in the courts would likely demonstrate that, for many workers, local judges issuing *ex parte* injunctions regulated employment relationships more directly than legislation imposing minimum standards in employment contracts.³

Because most workers had neither opportunity nor inclination to create numerous boxes of papers to be preserved in archives for future researchers, labour history often focuses on an unrepresentative group of skilled workers who created and sustained benevolent societies, unions, and federations of unions. These sources privilege the male, urban worker, and ignore three important structural determinants of working class life. First, most workers, male and female, lived in households

² S. C., 1872, c. 30. For discussion of the events surrounding the passage of the *Trade Unions Act*, see S. F. Zerker, *The Rise and Fall of the Toronto Typographical Union, 1832–1972* (Toronto: University of Toronto Press, 1982) at 78–88; G. S. Kealey, *Toronto Workers Respond to Industrial Capitalism, 1867–1892* (Toronto: University of Toronto Press, 1980) at 128–138; D. Creighton, "George Brown, Sir John Macdonald, and the 'Workingman'" (1943) 24 *Canadian Historical Review* 362; J. M. S. Careless, *Brown of the Globe*, vol. II (Toronto: University of Toronto Press, 1963) at 288–300; B. Ostry, "Conservatives, Liberals and Labour in the 1870s" (1960) 41 *Canadian Historical Review* 93; M. Chartrand, "The First Canadian Trade Union Legislation: An Historical Perspective" (1984) 16 *Ottawa Law Review* 267; E. Tucker, "'That Indefinite Area of Toleration': Criminal Conspiracy and Trade Unions in Ontario, 1837–1877" (1991) 27 *Labour/Le Travail* 15.

³ In providing these remedies, the judiciary was not defying the legislative will, as the *Trade Unions Act* was accompanied by the *Criminal Law Amendment Act*, S.C., 1872, c. 31, prohibiting a wide range of labour union activity. For examples of employers' success in the courts, see J. D. Honsberger's brief description of some of the cases handled by a Toronto general practitioner and financier in "E. E. A. Du Vernet, KC: Lawyer, Capitalist, 1866 to 1915" in C. Wilton, ed., *Essays in the History of Canadian Law: Beyond the Law: Lawyers and Business in Canada 1830 to 1930* (Toronto: Butterworths for The Osgoode Society, 1990) 167 at 179; D. J. Bercuson's account of the use of injunctions in labour disputes in Winnipeg beginning in 1906, in *Confrontation at Winnipeg: Labour, Industrial Relations, and the General Strike* (Montreal: McGill-Queen's University Press, 1974) at 16, 50–51; W. Roberts, "Toronto Metal Workers and the Second Industrial Revolution, 1889–1914" (1980) 6 *Labour/Le Travail* 49 at 66–68; I. McKay, "Strikes in the Maritimes, 1901–1914" in P. A. Buckner and D. Frank, *Atlantic Canada After Confederation: The Acadiensis Reader*, vol. II. (Fredericton: Acadiensis Press, 1985), 216 at 255; C. Heron and B. D. Palmer, "Through the Prism of the Strike: Industrial Conflict in Southern Ontario, 1901–14" (1977) 58 *Canadian Historical Review* 423 at 451–452; P. Craven, *An Impartial Umpire: Industrial Relations and the Canadian State 1900–1911* (Toronto: University of Toronto Press, 1980) 200–207, 244; *Industrial Canada*, from 1900 the monthly publication of the Canadian Manufacturers' Association, included information about the latest labour injunctions.

maintained only through the waged work of men, women and children. Wages were supplemented by rent from boarders and by women's ingenuity in stretching the available cash by raising vegetables, birds and animals for food. Second, most workers faced substantial periods of seasonal unemployment or underemployment, making occupational pluralism a necessity, as workers moved from job to job in response to seasonal production needs. Third, occupational pluralism involved considerable rural-urban interpenetration. Farmers sought off-farm waged work in the city, on other farms, or in resource extraction jobs such as mining or lumbering, while urban workers returned to the farm during hard times. Despite the emphasis in the literature, then, most Canadian workers at the turn of the century were not male workers, living in urban centres and earning enough to support themselves, their families, and their unions. Statements about work in nineteenth and twentieth centuries' Canada must be carefully limited to particular times, regions, and industries, and must take account of the way that workers' opportunities were structured by class, race, ethnicity and gender. Nor did each region adopt identical labour legislation. In the last two decades, labour historians have recognised the diversity of workers' experience, but more empirical research is needed on the particular regulatory régimes developed in each Canadian jurisdiction. This chapter emphasises developments in Ontario because it has received much of the scholarly attention to date. Although its legislation often provided models for other jurisdictions, to generalise from the Ontario experience is to court quick contradiction.⁴

Success in achieving legislative objectives has been rare in Canadian labour history, despite lobbying efforts of unions and union federations beginning as early as the 1870s. Reform legislation was usually not accidental and never inevitable. The process of industrialisation by itself did not determine the ensuing legal régime; legislation was the product of human choices, made within certain structural constraints, but made nonetheless.⁵ When labour supporters held the balance of power in a legislature, they could articulate demands where decision-makers would have to listen and act. For example, in the 1898 provincial election in British Columbia,

⁴ Despite labour law's pre-occupation with union recognition, and creation and maintenance of collective bargaining relationships, close to two-thirds of Canadian workers today are not covered by a collective agreement. For a history of the early development of union organisations, see E. Forsey, *Trade Unions in Canada* (Toronto: University of Toronto Press, 1982). On the historiography of labour history, see G. S. Kealey, "Canadian Labour in History: A Case of Uneven Development" in G. S. Kealey and G. Patmore, eds., *Canadian and Australian Labour History: Towards a Comparative Perspective* (St. John's: Australian-Canadian Studies, 1990) 21; for a now-dated debate on the merits of the new labour history, see K. McNaught, "E.P. Thompson vs. Harold Logan: Writing About Labour and the Left in the 1970s" (1981) 62 *Canadian Historical Review* 141; G. S. Kealey, "Labour and Working-Class History in Canada: Prospects in the 1980s" (1981) 7 *Labour/Le Travail* 67; D. J. Bercuson, "Through the Looking-Glass of Culture: An Essay on the New Labour History and Working-Class Culture in Recent Canadian Historical Writing" (1981) 7 *Labour/Le Travail* 95; and, B.D. Palmer, "Listening to History Rather Than Historians" (1986) 20 *Studies in Political Economy* 47.

⁵ For an introduction to the political economy of law reform, see A. Bartholomew and S. Boyd, "Toward a Political Economy of Law" in W. Clement and G. Williams, eds., *The New Canadian Political Economy* (Kingston: McGill-Queen's University Press, 1989), and P. O'Malley, "Law Making in Canada: Capitalism and Legislation in a Democratic State" (1988) 3 *Canadian Journal of Law and Society* 53; for a description and critique of the various approaches to describing how law changes, see R. Gordon, "Critical Legal Histories" (1984) 36 *Stanford Law Review* 57.

workers helped elect a handful of pro-labour members. Over the next few years, they secured legislation prescribing an eight-hour day in the province's metal and coal mines. Elsewhere, a legislated eight-hour day remained on the list of labour's lobbying priorities until after the Second World War.⁶ Even when labour had some political leverage, some demands were more readily accepted than others. Securing favourable labour legislation required more than mobilising support and negotiating an acceptable compromise with opposing forces; what was demanded had to fit within the range of possibilities that politicians were prepared to consider. Even when policy-makers and politicians passed legislation requested by labour supporters, the effect could be negated by lack of enforcement. For a liberal democracy, in which the state promoted development on capital's terms, while presenting itself as a neutral arbiter between capital and labour, historical explanations of reform legislation must address both structural and political levels. To paraphrase Karl Marx, people make their own history but not in circumstances of their own choosing.⁷

I. The Myth of Equality

One constraining circumstance was ideology.⁸ Classic liberal legal ideology postulated that the good society resulted from juridical equals meeting in the market-place in self-interested pursuits, unimpeded by legal restrictions except those necessary for public order. That nineteenth century liberal view became the late-twentieth century conservative view: individual fulfillment and economic development came only when individuals created rights and obligations for themselves through contract. For the law to intervene by setting minimum standards for employment contracts would introduce inequality between juridical equals, by strengthening the bargaining position of one of the parties. That employment contracts often contained harsh terms for employees was not the concern of the law.

⁶ *An Act to Amend the Inspection of Metalliferous Mines Act*, S.B.C., 1899, c. 49; *An Act to Amend the Coal Mines Regulation Act*, S.B.C., 1903-04, c. 38; see M. Robin, *Radical Politics and Canadian Labour, 1880-1930* (Kingston: Queen's University Industrial Relations Centre, 1968) at 42-43, 46-49; P. Phillips, *No Power Greater* (Vancouver: B.C. Federation of Labour, 1967) at 30-32, 41-43; A. R. McCormack, *Reformers, Rebels and Revolutionaries* (Toronto: University of Toronto Press, 1977) at 63-64. The B.C. labour group included Canada's first socialist MLA, J. H. Hawthornethwaite, winner of a by-election in 1900 and re-elected in 1903.

⁷ On the distinction between structural and political, see E. Tucker, *Administering Danger in the Workplace: The Law and Politics of Occupational Health and Safety Regulation in Ontario, 1850-1914* (Toronto: University of Toronto Press, 1990) 115; "The structural level focuses on the general development of industrial capitalism and the stresses that development placed on social processes of production and reproduction, including their patriarchal ordering, while the political level examines the actual responses of various groups to these developments." On the role of the state in an industrial democratic society, see L. Panitch, "The Role and Nature of the Canadian State" in L. Panitch, ed., *The Canadian State: Political Economy and Political Power* (Toronto: University of Toronto Press, 1977) 3; G. Albo and J. Jenson, "A Contested Concept: The Relative Autonomy of the State" in W. Clement and G. Williams, eds., *The New Canadian Political Economy* (Kingston: McGill-Queen's University Press, 1989) 180; M. Carnoy, *The State and Political Theory* (Princeton: Princeton University Press, 1984); P. Evans, D. Rueschmeyer, and T. Skocpol, eds., *Bringing the State Back In* (Cambridge: Cambridge University Press, 1985).

⁸ On the meaning of ideology, see A. Hunt, "The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law" (1985) 19 *Law and Society Review* 11.

In 1875, one of England's distinguished equity judges was loathe to accept responsibility for the content of the contracts which the courts enforced: "... if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice."⁹ Employers, too, invoked the magic words, "freedom of contract," in defence of unfettered management rights. For example, a committee created in 1902 by the Canadian Manufacturers' Association to consider the labour question asked rhetorically: "Why should one body of men be permitted to unionize the shop or factory of their employer? In every trade or community there are many who are opposed to unionism and who stand for freedom of contract. This is their right."¹⁰

The paradigm of juridical equals, however, obscured the way in which social relations were constituted by the legal régime. Although law professed merely to enforce contracts freely made, not to set any terms for their making, it was the law that supported the employer's claim to exclusive ownership of the profits brought into being by the employees' labour. The law also upheld claims to private ownership of land, water power and raw materials such as timber or minerals which, under a different legal régime, might have been regarded as community property, not subject to private appropriation. And, if workers united to exert pressure on the employer to accept their terms for the employment contract, the law punished their activity as criminal conspiracy and provided police officers or troops to protect strikebreakers; there was no protection for the workers property in their jobs.¹¹ Workers' consent to the terms of the employment relationship, then, was not "free," but was coerced by the law's definitions of property and management rights. Workers did not meet as equals with their employers to negotiate terms of the employment contract; rather, they accepted terms presented to them because that was the legally sanctioned way to gain access to material resources necessary for productive labour. Given the employers' legally sanctioned right to exclusive control of the means of production, wage-earners had to work on employers' terms, or not at all.¹²

⁹ M.R. Jessel, in *Printing and Numerical Registering Company v. Sampson* (1875) 19 Law Reports, Equity Cases 462 at 465, quoted in B. J. Reiter, "The Control of Contract Power" (1981) 1 Oxford Journal of Legal Studies 347.

¹⁰ Quoted in C. Heron and B. D. Palmer, "Through the Prism of the Strike: Industrial Conflict in Southern Ontario, 1901-14" (1977) 58 Canadian Historical Review 423 at 449.

¹¹ Resort to the use of troops was frequent during labour-management disputes, despite Canadians' belief that ours has been "the peaceable kingdom." See D. Morton, "Aid to the Civil Power: The Canadian Militia in Support of Social Order, 1867-1914" (1970) 51 Canadian Historical Review 407; D. MacGillivray, "Military Aid to the Civil Power: The Cape Breton Experience in the 1920s" (1974) 3 *Acadiensis* 45; for a primary source, see R. H. Roy, "The Seaforths and the Strikers: Nanaimo, August 1913" (1979) 43 *B.C. Studies* 81, reprinting an account written by Captain William Rae, Adjutant of the 72nd Regiment, Seaforth Highlanders of Canada, of an expedition to Nanaimo to maintain order during a coal strike.

¹² Despite widespread invocation of *laissez-faire* principles, there was never a period of complete freedom of contract, with no statutory regulation of the employment contract: P. S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford: Oxford University Press, 1979) and K. Polanyi, *The Great Transformation* (Boston: Beacon Press, 1957).

Liberal legal ideology treated employer and employee as juridical equals when it came to negotiating terms and conditions of employment; since both parties were considered equally capable of protecting their respective interests, the law would not intervene to establish minimum standards. But the parties were treated differently when employers needed help in enforcing the employment contract. The *Ontario Master and Servant Act*, 1847, gave jurisdiction to local magistrates to rule on complaints arising from the employment relationship. Workers who complained that employers had mistreated them or failed to pay wages could be released from contractual obligations to their employers and obtain an order for payment of money owing. If employers brought the complaint, the matter was a criminal offence punishable by fine or imprisonment. The difference in treatment was justified by one contemporary observer as only common sense, because the employer, but not the employee, had property with which to remedy the wrong. In 1877, the federal Liberal government repealed the criminal provisions of the provincial *Master and Servant Acts*, with passage of its own *Breaches of Contract Act*. Edward Blake, minister of justice, explained that ordinary breaches of employment contracts should be treated like any other breach of contract. The criminal sanction was retained, however, for breaches of contract which endangered, or would be likely to endanger, persons or valuable property, or which interfered with the provision of utility services, or the carriage by rail of mail, freight or passengers. To meet the charge that in criminalising these breaches, the Liberals were enacting class legislation, the *Breaches of Contract Act* provided for the appearance of equality of treatment with fines for companies, such as suppliers, if, through breach of any of their contracts, they interfered with utility services or railway operations.¹³

II. Mechanics' Lien Legislation

Concern about differential treatment of different classes also surfaced in discussions of mechanics' lien legislation, introduced in Ontario in 1873.¹⁴ As subsequently amended, mechanics' lien legislation permitted unpaid construction workers and building supply dealers to enforce claims through registering a lien against

¹³ Canada, House of Commons, *Debates* (20 March 1877) 855–856; P. Craven, "The Law of Master and Servant in Mid-Nineteenth Century Ontario" in D. Flaherty, ed., *Essays in the History of Canadian Law*, vol. I (Toronto: University of Toronto Press, 1981) 174 at 176, quoting from *Canada Farmer*; D. Morton, "Taking on the Grand Trunk: The Locomotive Engineers Strike of 1876–7" (1977) 2 *Labour/Le Travail* 5 at 32–33; E. Tucker, "That Indefinite Area of Toleration": Criminal Conspiracy and Trade Unions in Ontario, 1837–77" (1991) 27 *Labour/Le Travail* 15; S. C., 1877 (4th Sess.), c. 35; Quebec and Prince Edward Island also had provincial statutes imposing criminal sanctions for breaches of employment contracts.

¹⁴ S.O., 1873, c. 27. Manitoba developed its *Mechanics' Lien Act* at the same time as did Ontario; the Manitoba legislation received royal assent before Ontario's. See S.M., 1873, c. 31. For the first mechanics' lien legislation in the other provinces, see S.B.C., 1888, c. 19; S.N.B., 1894, c. 24; S. N. S., 1899, c. 29; S. A., 1906, c. 21; S. S., 1907, c. 21; S. P. E. I., 1938, c. 16. This discussion of the Ontario legislation is based on M. E. McCallum, "Mechanics' Liens in the Mowat Era" (1986) 19 *Histoire Sociale/Social History* 388. For legislation providing for an analogous lien for woodworkers' wages, see *Protection of Workmen's Wages Act*, 1888, S.B.C., 1888, c. 40; *The Woodmen's Lien for Wages Act*, S.O., 1891, c. 22; *The Woodmen's Lien for Services Act*, S. M., 1893, c. 38; *The Woodmen's Lien Act*, S. N. B., 1894, c. 24; *The Woodmen's Lien for Services Act*, S. S., 1908, c. 21; *The Woodmen's Lien Act*, S. A., 1913, c. 28; *The Woodmen's Lien Act*, S. N. S., 1913, c. 4.

property that had been improved by their labour or materials, ultimately forcing a sale of the property to pay the lien claims. Most construction jobs, even small ones, involved a main contract between property owner and contractor, who arranged for sub-contracts with materials' suppliers and workers in various trades. Since sub-contractors did not contract directly with the property owner, they had no remedy against the property owner if the contractor failed to pay for supplies or labour. Mechanics' lien legislation therefore imposed financial penalties on owners of property who failed to ensure that contractors fulfilled their contractual responsibilities under the sub-contracts. In effect, mechanics' lien legislation provided a remedy where there was no privity of contract between the property owner and the creditor. To this extent, mechanics' lien legislation was vulnerable to charges that it was "class legislation," giving rights to construction workers based on status rather than on freely-created contractual obligations. Of course, the title of the legislation contributed to the effectiveness of the "class legislation" charge, suggesting, quite erroneously, that it benefited only construction workers, not materials suppliers.¹⁵

Defenders of the legislation did not deny the class legislation charge, but justified this intervention into free contractual relations by appealing to a persistent and competing ideology, based on the idea of a fair return for all productive labour. In its celebration of all honest labour, mental or physical, managerial or menial, this producer ideology could be used to mute class antagonisms. Workers, however, whose labour, although equally valued, was not equally rewarded, could also use the producer ideology to support claims for due recompense for their role in creating the nation's wealth. Specifically, workers whose labour increased the value of real property should have some claim against that property for their wages. Otherwise, they might lose faith in a legal régime dedicated to private property which nonetheless failed to protect their only source of property, their right to be paid for their labour.¹⁶

III. Fair Wage Standards

Workers also invoked the idea that labour was entitled to a fair return, just as was capital, in demanding that the state assume some responsibility for setting and maintaining fair wage standards. In 1897, a Conservative newspaper published an article on "Toronto and the Sweating System," documenting appalling working and living conditions, especially in the garment trades, where jobbers would sub-contract

¹⁵ Ontario's 1873 *Mechanics' Lien Act* belied its title, since it provided a remedy only for contractors, not for anyone working for them or from whom they had purchased materials. The Mowat government, which had passed the legislation, was quite content to let the mistake go unchallenged, as in subsequent election campaigns it cited the *Mechanics' Lien Act* as evidence of its responsive attention to labour issues. For example, see *The Progressive Labour Legislation of the Mowat Government, Ontario: The Record of the Mowat Government, 22 Years of Progressive Legislation and Honest Administration* and other election pamphlets available at the Metropolitan Toronto Library.

¹⁶ For an example of the use of producer ideology, see "Mechanics' Lien Law", *The [Toronto] Globe* (20 January 1882) 4. R. Cook, "Tillers and Toilers: The Rise and Fall of Populism in Canada in the 1890s" (1984) *Canadian Historical Association Historical Papers* 1, explores the unsuccessful efforts of organised labour and organised farmers to form a lasting political alliance based on shared perceptions that they were exploited producers. For a modern critique of finance capitalism based on similar ideas, see E. Kierans and W. Stewart, *Wrong End of the Rainbow* (Toronto: Collins, 1988).

work at piece rates to individuals or families who worked long hours for subsistence wages in small workshops or in their homes. The article's author, future Prime Minister William Lyon Mackenzie King, privately informed the federal Liberals that uniforms for its postal employees were produced by sweated labour, and noted that no action had been taken on a report commissioned by the previous Conservative government on working conditions in sweated industries. The Liberal government responded by inserting fair wage provisions in its purchasing orders, requiring contractors to pay the going wage rate.¹⁷ Yet the decision, formalised in a Fair Wage Resolution passed by the House of Commons in 1900, did little to improve working conditions for the most vulnerable workers, the women and children who were the majority of sweated piece-workers in the garment trades, because it applied primarily to men employed on railways and other public works central to state economic development policy. The resolution was justified on the same basis as mechanics' lien legislation, as necessary to ensure that contractors fulfilled obligations to those they hired or from whom they obtained materials; but it contained no provisions to that effect, leading to criticism that its only purpose was to attract labour votes. Despite calls for including in the resolution an eight-hour workday, and a requirement that contractors purchase death and disability insurance for employees, regulation of working conditions was left to the provinces.¹⁸

IV. Minimum Standards for Factories

Ontario was the first jurisdiction in Canada to attempt to regulate working conditions in factories. Its *Factories Act*, passed by Mowat's Liberal government in 1884 and proclaimed in force in 1886, applied to most industrial work-sites where twenty or more worked. The *Act* set the minimum age for factory employment at twelve for boys and fourteen for girls, imposed a maximum work-week of sixty hours for women and children, and contained a general prohibition against keeping a factory in such a condition that "the safety of any person employed therein is likely to be endangered, or so that the health of any person therein is likely to be

¹⁷ R. McIntosh, "Sweated Labour: Female Needleworkers in Industrializing Canada" (1993) 32 *Labour/Le Travail* 105; H. Ferns and B. Ostry, *The Age of Mackenzie King* (Toronto: James Lorimer, 1976) at 40–42; Canada, House of Commons, "Report Upon the Sweating System in Canada" Sessional Paper # 61, 1896; A. W. Wright, author of the Report, was a journalist and labour proponent of the producer ideology; on his career, see G. S. Kealey and B. D. Palmer, *Dreaming of What Might Be: The Knights of Labour in Ontario: 1880–1900* (Cambridge: Cambridge University Press, 1982) at 177–187.

¹⁸ Canada, House of Commons, *Debates* (22 March 1900) at 2466–2560; B. Russell, "A Fair or a Minimum Wage? Women Workers, the State and the Origins of Wage Regulation in Western Canada" (1991) 28 *Labour/Le Travail* 59 at 70–72; the problem of contractors defaulting on payments to sub-contractors had already been addressed in part by legislation passed by the former Conservative government. *An Act Respecting the Liability of Her Majesty and Public Companies for labour used in the construction of public works*, S. C., 1896, c. 5, provided for security deposits from public works contractors or retention of a portion of the amount due as subsidy, advance, loan or bonus to any one constructing a railway or other work, for the payment of unpaid wage claims. The *Act* also made all federally incorporated companies that were engaged in the construction of railways, canals, telegraph lines and other works responsible for up to three months' wages for all workers employed on their projects, regardless of whether they had been hired directly by the company or by a contractor or sub-contractor.

permanently injured." More specific sections dealt with ventilation, guards on dangerous machinery, drains, provision of toilet facilities, and fire prevention.¹⁹ The Ontario act followed the efforts of federal Conservative member Dr. Darby Bergin, who introduced the first of his six private members' bills on factory working conditions in 1879. Bergin, who represented the textile mill town of Cornwall, Ontario, spoke from his medical experience of the health hazards, especially for children, of long hours of intense labour, without access to fresh air or natural light. He also feared that factory work rendered women unfit both morally and physically for their primary work of mothering. Such concerns had already prompted factory legislation in England and Massachusetts, but Bergin received press attention only with introduction of his third factories bill in 1881.²⁰

Three main factors finally put factory legislation on the political agenda. First, it appealed to both Conservative and Liberal politicians who were courting the labour movement, then experiencing a period of growth after the lingering depression of the 1870s. With the Liberals in power in Ontario and the Conservatives in Ottawa, labour could pursue its demand for protective legislation for factory workers with which ever party it felt would be most likely to respond. Questions about which level of government had authority to regulate working conditions provided Oliver Mowat, the Liberal premier of Ontario from 1872 to 1896, with yet another opportunity to skillfully manipulate constitutional questions for partisan political advantage. When the labour movement pressed Mowat to proclaim the *Factories Act*, he demurred, saying he wanted a ruling on its constitutionality first. Yet the *Act* was proclaimed without waiting for a reference to the Supreme Court of Canada, just before a provincial election in which Mowat needed something to counter the Conservative's appointment of the Royal Commission into the Relations of Capital and Labor. Second, manufacturers who benefited from high protective tariffs implemented after

¹⁹ S. O., 1884, c. 39; for the earliest equivalent legislation in other jurisdictions, see *The Quebec Factories Act*, 1885, S. Q., 1885, c. 32; *The Manitoba Factories Act*, S.M., 1900, c. 13; *The Nova Scotia Factories Act*, S.N.S., 1901, c. 1; *The New Brunswick Factories Act*, S.N.B., 1905, c. 7; *An Act for the Protection of Persons Employed in Factories*, S. B. C., 1908, c. 15; *The Factories Act*, S. S., 1909, c. 10; *The Factories Act*, S. A., 1917, c. 20. On the Quebec legislation, see R. Chartier, "L'Inspection des établissements industriels et des édifices publics (1885-1900)" (1962) 17 *Relations Industrielles/Industrial Relations* 43. Most jurisdictions also limited the work-week for women and children employed as clerks in shops, and required employers to supply stools for female shop-clerks. For example, see *The Shops Regulation Act*, 1888, S.O., 1888, c. 33; *The Manitoba Shops Regulation Act*, 1888, S. M., 1888, c. 32. Separate legislation dealt with mine and railway operations.

²⁰ The following account relies heavily on E. Tucker, *supra* note 7. See also E. Tucker, "The Determination of Occupational Health and Safety Standards in Ontario, 1860-1982: From the Market to Politics to . . .?" (1984) 29 *McGill Law Journal* 260; L. S. Bohnen, "Women Workers in Ontario: A Socio-Legal History" (1973) 31 *University of Toronto Faculty of Law Review* 45; E. Forsey, "A Note on the Dominion Factory Bills of the Eighteen-Eighties" (1947) 13 *Canadian Journal of Economics and Political Science* 580; C. Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: Women's Press, 1991), 269-276; J. Ursel, *Private Lives, Public Policy: 100 Years of State Intervention in the Family* (Toronto: Women's Press, 1992) at 91-94. On Mowat's constitutional claims, see C. Armstrong, "The Mowat Heritage in Federal-Provincial Relations" in D. Swainson, ed., *Oliver Mowat's Ontario* (Toronto: Macmillan, 1972), 93; and P. Romney, *Mr. Attorney: The Attorney-General For Ontario in Court, Cabinet and Legislature 1791-1899* (Toronto: University of Toronto Press for The Osgoode Society, 1986) chap. 6. For an analysis of shifting class alliances for and against protective tariffs and industrialisation, see P. Craven and T. Traves, "The Class Politics of the National Policy, 1872-1933" (1979) 14 *Journal of Canadian Studies* 14.

the Conservatives' return to power in 1879 feared the consequences of farmers and workers uniting around a populist critique of the national policy. They did not want manufacturers linked in the public mind with sweatshops, the degradation of women and children, and opposition to any and all state intervention to protect workers from exploitation. Manufacturers did not ask for any state meddling with their management prerogatives, but once factory legislation reached the bill stage, they lobbied quietly and effectively to make the bill as innocuous as possible.

Third, identifying women and children as principal beneficiaries of factory legislation answered a plethora of ill-defined but deeply felt fears of changes in work and family organisation under the pressure of rapid industrialisation and urbanisation. Capitalist development, in separating workplace from home, reduced formerly self-sufficient artisans to dependence on daily wages and forced women and children into low-paid wage labour, thus undermining the patriarchal authority of the male head of the household and denying the Victorian ideal of a separate sheltered sphere of domesticity and nurturance for women and children. Factories acts symbolically restored women to their appropriate place, recognising their weakness and providing them with state protection in place of the father or husband who had once been master of workplace and home. In emphasising special treatment for women and children, instead of protection for all workers, the factories acts did not directly contradict liberal ideas about the importance of citizens making their own agreements, because women and children were not full citizens anyway.²¹

Factories acts, then, meant quite different things to different people. For the labour movement, the Ontario *Factories Act* was a victory, establishing legitimacy for some state imposed restrictions on what employers could demand of employees. Despite its limitations the legislation was a step toward safer workplaces, and its passage marked a shift away from *laissez-faire*. Employers, too, had secured a victory. By appearing to respond to labour's concerns, employers and the party in power encouraged workers' acceptance of the existing order. And, under a régime of voluntary compliance rather than aggressive enforcement, employers retained considerable power to determine the balance between profit maximisation and the health and safety of workers.²²

V. Compensation for Workplace Injuries

Passage of factories acts, therefore, did little to reduce the frequency or severity of workplace injuries. Yet injured workers or dependants of workers killed on the job had little chance of obtaining compensation in the courts. Even if victims of

21 Women did not yet have the right to vote, to engage in certain occupations, or to sit on juries; married women suffered from some legal incapacity with respect to making contracts or bringing civil actions. See M. Eberts, "The Rights of Women" in R. St. J. Macdonald and J. P. Humphrey, eds., *The Practice of Freedom* (Toronto: Butterworths, 1979), 225; C. Backhouse, "Married Women's Property Law in Nineteenth-Century Canada" (1988) 6 *Law and History Review* 211; on the struggle for the vote, see C. Cleverdon, *The Woman Suffrage Movement in Canada* (Toronto: University of Toronto Press, 1950).

22 For a thoughtful and detailed analysis of implementation of the Ontario *Factories Act*, see E. Tucker, *supra* note 7, chap. 6 and "Making the Workplace 'Safe' in Capitalism: The Enforcement of Factory Legislation in Nineteenth-Century Ontario" (1988) 21 *Labour/Le Travail* 45

workplace accidents could afford a lawyer, proving an employer's negligence was almost impossible, especially if the employer was a corporation or even an individual not personally involved in managing the workplace. And any contributing fault of the worker or a work-mate, however slight, was a complete bar to recovery. Early in the nineteenth century, common law judges on both sides of the Atlantic developed the fellow-servant rule, effectively exempting employers from liability for workplace injuries if the negligence of another employee had been part of the cause; when employees accepted a job, the judges argued, they bargained for wages high enough to compensate for any risks, including injury caused by a workmate's carelessness.²³ In 1886, as part of its election package for labour, Mowat's Liberal government in Ontario enacted legislation to remove some of the common law barriers to recovery for workplace injuries. Copied from an English statute of 1880, the legislation made an employer liable for injuries caused by any defect in plant or machinery, or by the negligence of workers who had authority over other workers, unless the injured employee knew of the defect or negligence and failed to bring it to the attention of the employer or supervisor. In exchange for these concessions, the legislation set an absolute limit of three years' wages on the amount recoverable by the injured worker. In 1899, extensive amendments to the Act provided for arbitration of compensation claims, at the option of the claimant.²⁴

For both employers and employees, litigation was expensive, results uncertain, and awards vulnerable to being set aside on appeal. In 1899, as an alternative to tort actions, Thomas Crawford, a Conservative opposition member, introduced a bill providing for compensation for injured workers regardless of fault. Disputes about entitlement and quantum were to be settled by arbitration. The government refused to adopt the bill, because it had not been requested by labour groups, and was opposed by the Canadian Manufacturers' Association and the Toronto Board of Trade. Instead, the government appointed James Mavor to study the issue. Mavor, a professor of political economy at the University of Toronto, warned that increased

²³ *Priestley v. Fowler*, (1837) 3 M & W 1, 150 ER 1030 (Exch.); *Farwell v. Boston and Worcester Rail Road Corporation*, (1842) 45 Mass. (4 Met.) 49. For discussion of these cases, see R. C. B. Risk, "This Nuisance of Litigation": The Origins of Workers' Compensation in Ontario" in D. H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. II (Toronto: University of Toronto Press for The Osgoode Society, 1983) 418 at 419-421; and Tucker, *Administering Danger*, ch. 3; for discussion of a particularly dramatic workplace accident, see R. W. Kostal, "Legal Justice, Social Justice: An Incursion into the Social History of Work-Related Accident Law in Ontario, 1860-86" (1988) 6 *Law and History Review* 1.

²⁴ *Workmen's Compensation for Injuries Act*, S. O., 1886, c. 28; S. O., 1893, c. 26; S. O., 1899, c. 18; *Employer's Liability Act*, 1880 (U.K.), 43-44 Victoria, c. 42; Ontario, Legislative Assembly, "Return to an Order of the House for copies of extracts from the proceedings of the Special Committee appointed ... to enquire [re:] render[ing] employers liable for injuries occasioned to their servants" in *Sessional Papers* (1885) no. 56; for the government's account of this legislation, see Ontario, Legislative Assembly, "Laws to Assist and Protect the Working Classes" by T. C. L. Armstrong in "Annual Report of the Bureau of Industries for the Province of Ontario, 1886" *Sessional Papers* (1887) 228. This account of the workers' compensation legislation is drawn from Risk's excellent and detailed article, "This Nuisance of Litigation" cited in note 23; see also D. Guest, *The Emergence of Social Security in Canada* (Vancouver: University of British Columbia Press, 1980), c. 4; E. J. Campbell, "The Balance Wheel of the Industrial System: Maximum Hours, Minimum Wage, and Workmen's Compensation Legislation in Ontario, 1900-1939" (Ph.D. thesis, McMaster University, 1980); and M. J. Piva, "The Workmen's Compensation Movement in Ontario" (1975) 67 *Ontario History* 39.

employer liability for workplace injuries might be a disincentive to investment. In the absence of public pressure for action, the government accepted Mavor's recommendation to do nothing until more information was available on the operation of the English Act, on which Crawford's bill was modelled.²⁵

In 1910, following discussion of workers' compensation legislation at a convention of the American Federation of Labor held in Toronto, Ontario labour leaders raised the issue with Conservative Premier James P. Whitney, whose election victory in 1905 ended the long Liberal rule. Whitney appointed former Conservative leader William R. Meredith, Chief Justice of the Court of Common Pleas, to head a royal commission on the issue. The government implemented the recommendations in Meredith's final report, issued in 1913, with legislation creating an administrative tribunal, the Workmen's Compensation Board, to provide no-fault compensation for workplace injuries, funded by premiums paid by employers. Civil suits, including damage claims for pain and suffering, were barred. In effect, the legislation created a non-profit mutual insurance scheme administered by the state.²⁶

Compensation was limited to fifty-five per cent of the injured worker's wages and determined by the extent of the disability. Widows and dependant children of workers killed on the job received a monthly pension, but widowers qualified only when "physically or mentally incapable of earning." Widows lost their pensions if they married.²⁷ Workers' compensation payments were intended as substitutes for lost wages of male breadwinners; limiting payments to barely half of a worker's earnings was justified as the injured worker's contribution. Labour representatives argued unsuccessfully for a minimum level of compensation sufficient to prevent the recipient from becoming the object of charity. Meredith dismissed the suggestion as "just an amplification of the idea that every man, good or bad, should get the same

²⁵ Other provinces, however, did enact legislation based on the English model. See *Workmen's Compensation Act*, S.B.C., 1902, c. 74; *Workmen's Compensation Act*, S. A., 1908, c. 12; *Workmen's Compensation Act*, S. M., 1910, c. 81; *Nova Scotia Workmen's Compensation Act*, S.N.S., 1910, c. 3; *Workmen's Compensation Act*, S.S., 1919-11, c. 9; *An Act Respecting the Responsibility for Accidents Suffered by Workmen*, S. Q., 1909, c. 66; on the Quebec Act, see J. T. Copp, *The Anatomy of Poverty: The Condition of the Working Class in Montreal 1897-1929* (Toronto: McClelland & Stewart, 1974) 123-6; on Mavor, see S. E. D. Shortt, *The Search for an Ideal: Six Canadian Intellectuals and Their Convictions in an Age of Transition 1890-1930* (Toronto: University of Toronto Press, 1976), c. 7; on Quebec's workers' compensation legislation of 1909, see D. Guest, *supra* note 24, 40-41.

²⁶ *Workmen's Compensation for Injuries Act*, S. O., 1914, c. 25, effective 1 January 1915; when other provinces created workers' compensation boards, provincial branches of the Canadian Manufacturers' Association called on the Association's legal counsel, F. W. Wegenast, to help them draft appropriately restrictive compensation legislation. On Wegenast's role in New Brunswick, for example, see National Archives of Canada [NAC], MG 23, I, 230, v. 12, Canadian Manufacturers' Association Executive Council Minutes, 24 January 1918, 25 February 1918; New Brunswick Legislative Assembly, *Journals* 1917, Appendix, Report of the Commission Appointed to Enquire into the Working of the Ontario and Nova Scotia Workmen's Compensation Act; *Workmen's Compensation Act*, S. N. B., 1918, c. 37; for legislation creating compensation boards in the other provinces, see *Workmen's Compensation Act*, S.N.S., 1915, c. 1; *Workmen's Compensation Act*, S. M., 1916, c. 125; *Workmen's Compensation Act*, S.B.C., 1916, c. 77; *Workmen's Compensation Act*, S. A., 1918, c. 5; *Workmen's Compensation Act*, S.S., 1928-29, c. 73; *Workmen's Compensation Act*, S.Q., 1930-31, c. 100; *Workmen's Compensation Act*, S.P.E.I., 1949-50, c. 51.

²⁷ *The Workmen's Compensation Act*, S.O., 1914, c. 25, s. 2(e), 2(j), 33, 34, 37; the widow received a lump sum payment equivalent to two months' pension on her remarriage.

wage, that there should be a minimum wage for a man whether he is worth it or not."²⁸

For injured workers and employers, the Workmen's Compensation Board promised an end to the aggravation, delay, uncertainty and unpredictable expense of litigation. Employers especially believed that protracted court battles threatened harmonious relations between employers and workers. They complained that private insurance companies seemed to care only about avoiding liability, and lawyers fomented litigation that made voluntary, fair and prompt settlements impossible. Too, if injured workers did not have to prove fault in order to get compensation, employers might avoid possibly damaging inquiries into the extent to which workplace injuries were caused by the pressures of piece-work payment, long hours, monotonous work done at high speed, inadequate protective guards on factory equipment, and other matters within the employers' control. Proponents of workers' compensation legislation described it as "social legislation," to express the belief that consumers, who enjoyed the benefits of industrialisation, should pay for the consequent carnage, rather than individual workers and dependants. By socialising costs of workplace injuries, Meredith hoped that workers' compensation would bring "the blessing of industrial peace and freedom from social unrest."²⁹

VI. Framework for Maintaining Production

Securing industrial peace was, and is, a major objective of labour policy in a liberal democracy. Legislation providing workers with some protection from the worst abuses of industrial capitalism helped secure this objective, by removing some obvious incitements to class antagonism, and by demonstrating to workers that their needs, as well as those of employers, would be addressed by the state. Governments also used legislation to promote industrial peace in its more limited meaning of strike prevention. In the late nineteenth century, arbitration, mediation and conciliation were widely hailed as peaceful means for settling labour-management conflict without strikes. Prominent citizens, on an *ad hoc* basis, attempted to secure agreements between disputing employers and employees in their communities. In industries in which unions were relatively well-organised, third-party arbitration was sometimes part of the on-going practice of dispute resolution.³⁰

Although the provinces experimented first with arbitration legislation, their statutes were little used, and it was the federal government's initiatives which set the

²⁸ Ontario, Legislative Assembly, *Final Report on Laws Relating to the Liability of Employers to Make Compensation to Their Employees for Injuries Received in the Course of Their Employment*, xvii, Minutes of Evidence, 16 January 1913, 456–58, quotation at 458.

²⁹ Quoted in Risk, *supra* note 23 at 463.

³⁰ As researchers in this area have frequently noted, the terms arbitration, mediation and conciliation have not always had the highly-technical and differentiated meanings which they have acquired in modern industrial relations literature. Employers, employees and state officials used these terms to refer to everything from collective bargaining with no third-party involvement to binding third-party adjudication. Generally, conciliation and mediation were used interchangeably and denoted a procedure somewhat less formal than arbitration. Arbitration was often viewed as the next step if mediation failed, and it differed from mediation in that the arbitrator would issue a report. Generally, such a report would not bind the parties.

pattern for state regulation of collective bargaining.³¹ Between 1900 and 1907, the Liberal government enacted three different statutes intended to minimise work stoppages with third-party intervention before an industrial dispute escalated into a strike or lock-out. The first, the *Conciliation Act*, permitted conciliation of labour disputes by individual officers of the federal Department of Labour. Organised labour and employers opposed mandatory binding arbitration of labour-management disputes; but in 1903, after consultation with railway unions, the government enacted a two-step process for non-binding arbitration of disputes on railways, including street railways. The *Act* was used only once, in a 1904 strike of telegraphers on the Grand Trunk Railway. Nonetheless, a lengthy strike in 1906 in the coal mines of southwestern Alberta prompted the Laurier government to increase both coverage and effectiveness of this legislation. The new *Industrial Disputes Investigation Act*, passed in 1907, applied to public utilities, an ill-defined category that included metal and coal mines, steam railways, shipping companies, street railways, telegraph and telephone companies, and gas, electric and water works. In its attention to the economic sectors significant in urban and western expansion, the *IDIA* reveals the link between labour policy and economic development policy.³²

The *IDIA* was a step toward compulsory mediation, providing the framework for state intervention in collective bargaining in provincial and federal jurisdictions until the Second World War.³³ By prohibiting strikes or lock-outs unless the parties first submitted their dispute to a tri-partite board for investigation, the *IDIA* made strikes more risky for workers. Though prosecutions under the *Act* were rare, and

³¹ Ontario (S. O., 1873, c. 25; S. O., 1890, c. 40; S. O., 1894, c. 42; S. O., 1897, c. 25; S. O., 1902, c. 22) and British Columbia (S.B.C., 1893, c. 21; S. B. C., 1894, c. 23) enacted legislation providing for *ad hoc* local arbitration panels and a permanent central board, to which the parties could voluntarily submit their disputes, and whose awards would be binding on the parties only with their consent. Nova Scotia (S. N. S., 1888, c. 3) provided for compulsory binding arbitration of disputes in the province's coal mines. See M. E. McCallum, "Labour and Arbitration in the Mowat Era" (1991) 6 *Canadian Journal of Law and Society* 65 and "The Mines Arbitration Act, 1888: Compulsory Arbitration in Context" in P. Girard and J. Phillips, eds., *Essays in the History of Canadian Law: Nova Scotia*, vol. III (Toronto: The Osgoode Society, 1990). W. S. A. Martin, "A Study of Legislation Designed to Foster Industrial Peace in the Common Law Jurisdictions of Canada" (Ph.D. thesis, University of Toronto, 1954).

³² *Conciliation Act*, S.C., 1900, c. 24; *The Railway Labour Disputes Act*, S.C., 1903, c. 55; these two statutes were consolidated in the *Conciliation and Labour Act*, R.S.C., 1906, c. 96; *The Industrial Disputes Investigation Act*, S. C., 1907, c. 20; the following account of these statutes is drawn primarily from J. Webber, *supra* note 1 and P. Craven, *supra* note 3. See also B. Selekman, *Postponing Strikes: A Study of the Industrial Disputes Investigation Act of Canada* (New York: Russell Sage Foundation, 1927); on the 1906 coal strike, see W. Baker, "The Miners and the Mediator: The 1906 Lethbridge Strike and Mackenzie King" (1983) 11 *Labour/Le Travail* 89 and "The Miners and the Mounties: The Royal North West Mounted Police and the 1906 Lethbridge Coal Strike" (1991) 27 *Labour/Le Travail* 55.

³³ In *Toronto Electric Commissioners v. Snider* [1925] A.C. 396, the Privy Council ruled that the *IDIA* was an unconstitutional invasion of provincial jurisdiction over property and civil rights. The federal government re-enacted the *IDIA*, limiting its application to workers within the federal jurisdiction, and enabling provincial governments, by passing complementary legislation, to make the *IDIA* applicable to disputes within provincial jurisdictions too. See S.C., 1925, c. 14. By 1932, all provinces except Prince Edward Island had done so; see E. Lorentsen and E. Woolner, "Fifty Years of Labour Legislation in Canada" (1950) *Labour Gazette* 1412 at 1441; and F. R. Scott, "Federal Jurisdiction Over Labour Relations—A New Look" (1960) 6 *McGill Law Journal* 153.

not generally initiated by the government itself, one or two notorious examples of severe penalties for striking, or providing support to strikers, could intimidate other workers into complying with its provisions. Moreover, workers knew that their employers would use the slightest illegality as an excuse to call for intervention by police or the military. Undoubtedly, having to postpone a strike reduced labour's bargaining power, especially as the employer faced no sanctions during the waiting period for such strike-breaking activities as stockpiling products and supplies, recruiting scabs, and firing union leaders.³⁴

Notwithstanding official rhetoric that public investigations into labour-management disputes would compel the disputants to compromise, or risk the sanction of adverse public opinion, the *IDIA*, like its predecessors, was used to facilitate behind-the-scenes mediation rather than public exposure. In its ban on strikes and lock-outs, the *IDIA* tacitly recognised that modern employment relations were no longer adequately encompassed within the liberal framework of the individual employment contract. Workers, who as individuals could quit their jobs if they did not like the terms and conditions, were prohibited from taking the same action collectively, unless they complied with the *IDIA*. But the *IDIA* did not compel employers to recognise and bargain with a union chosen by the majority of employees. Instead, the *IDIA* mediator would convey the union's demands to the employer; union representatives had standing only as a committee of employees. The goal of mediation was to minimise work stoppages, not to redress any inequality in bargaining power between the two parties. Thus, the *IDIA* functioned primarily to maintain production on capital's terms, while allowing the state to present itself as the impartial mediator facilitating industrial peace while favouring neither side.

The importance of maintaining production was evident in the federal government's failure to enforce its *Alien Labour Act* of 1897. This legislation prohibited paying transportation costs, or providing other assistance in emigrating, to anyone under a contract for employment, or offering employment contracts as an inducement to emigrate. The Laurier government passed the *Alien Labour Act* reluctantly, in response to pressure from Conservative opposition members and labour organisations, in retaliation for American legislation to keep Canadians out of jobs in the United States. Politically, the Act served to counter labour's complaint that manufacturers enjoyed freedom from international competition because of the national policy, while workers had to compete with subsidised immigrants from the world's poorest countries.³⁵ Despite repeated reports of the use of imported foreign workers to break strikes, or to undercut established wage rates, the Laurier government

³⁴ The Trades and Labour Congress, a union federation, initially supported the *IDIA*, but at its 1911 Annual Convention resolved to ask the government for the *Act's* repeal, in light of its use against those who had paid strike benefits to Cape Breton miners in the unsuccessful struggle of the United Mine Workers for recognition as the miners' union. See Craven, *supra* note 3 at 285–287, 316–317; "Report of the Deputy Minister of Labour on Industrial Conditions in the Coal Fields of Nova Scotia" (1909) *Labour Gazette* 677 at 682.

³⁵ S. C., 1897, c. 11; Canada, House of Commons, *Debates* (9 September 1896) 930–951; (7 April 1897) 622–660; E. Forsey, *Trade Unions in Canada 1812–1902* (Toronto: University of Toronto Press, 1982) 402, 413, 425, 431–32, 458; Webber, *supra* note 1 at 23; Craven, *supra* note 3 at 193; Craven and Traves, *supra* note 20 at 22.

preferred conciliation to coercion in raising the issue with employers. Prominent members of the government or of the Department of Labour might ask offending employers to comply with the law, but if they refused, the matter was generally dropped.³⁶ In British Columbia, attempts to use provincial versions of the *Alien Labour Act* against Asian immigrants were thwarted by major employers and the federal government. Neither wanted to interfere with access to cheap labour, especially during construction of state-subsidised transcontinental railways.³⁷

VII. Maintaining Legitimacy

By the beginning of the First World War, the national policy of railroad building, settlement of the prairie west, and tariff protection for manufacturers had, to some extent, run its course. Canada had not one but three major east-west rail lines, the prairies were the world's granary, and Canadian manufacturers had preserved protective tariffs despite attacks from agrarians, populists, free-trade liberals, and provincial governments anxious to pursue their own economic strategies. With the outbreak of war and passage of the *War Measures Act*, the federal government took control over many areas otherwise within provincial jurisdiction, thereby limiting alternatives to the national policy or to the federal government's ham-fisted handling of labour matters. As the war created new demands, the federal government moved into new areas, from imposition of personal and corporate income tax to funding rehabilitation and retraining for disabled veterans. Lacking the technical, managerial and bureaucratic underpinnings of a modern state, the federal government hoped to leave organisation of the war effort in the hands of private enterprise. By 1917, however, private initiatives gave way to state direction, and voluntarism to compulsion. With this shift, the federal government also moved to include organised labour in planning for the war effort and for post-war adjustment. But this tentative tri-partism was intended only to secure labour's help in selling the government's program. The government did not support labour's demands for a fair wage clause

³⁶ Webber, *supra* note 1 at 23, discussing the importation of strikebreakers in the metal mines in the Kootenay region in southwestern British Columbia in 1899–1900. See also Craven, *supra* note 3 at 244–45 and McCormack, *supra* note 6 at 37–40, discussing a strike at the Rossland mine in the same area in 1901, in which Mackenzie King noted violations of the *Alien Labour Act* but did not recommend prosecuting the company. D. Avery, "Dangerous Foreigners": *European Immigrant Workers and Labour Radicalism in Canada, 1896–1932* (Toronto: McClelland and Stewart, 1979) at 33, discusses the same strike, but notes that two convictions were secured.

³⁷ On B.C.'s exclusionary labour legislation, which was only one of many efforts to limit Asian immigration, see P. E. Roy, *A White Man's Province: British Columbia Politicians and Chinese and Japanese Immigrants, 1858–1914* (Vancouver: University of British Columbia Press, 1989), particularly chapter 6. B. Ryder, "Racism and the Constitution: The Constitutional Fate of British Columbia Anti-Asian Immigration Legislation, 1884–1909" (1991) 29 *Osgoode Hall Law Journal* 619. Labour's complicity in racist assumptions and practices of the day has not been adequately explored by historians; on anti-Asian sentiment in B.C. generally, see W. P. Ward, *White Canada Forever: Popular Attitudes and Public Policy Toward Orientals in British Columbia* (Montreal: McGill-Queen's University Press, 1978); E. Comack, "'We will get some good out of this riot yet': the Canadian State, Drug Legislation and Class Conflict" in S. Brickey and E. Comack, eds., *The Social Basis of Law: Critical Readings in the Sociology of Law* (Toronto: Garamond Press, 1986) 67; G. Creese, "Class, Ethnicity and Conflict: The Case of Chinese and Japanese Immigrants, 1880–1923" in R. Warburton and D. Coburn, eds., *Workers, Capital and the State in British Columbia: Selected Papers* (Vancouver: University of British Columbia Press, 1988) 55.

in munitions contracts or for wage settlements to protect against run-away inflation, although orders-in-council imposed restrictions on individual rights to bargain for higher wages or to quit an unsatisfactory job. Like prairie farmers who watched the government put a ceiling but not a floor on wheat prices, labour concluded that government rhetoric extolling sacrifice to preserve democracy meant maintenance of existing power relations.³⁸

Nonetheless, some change was necessary to quell demands for something more fundamental. Workers' concerns about post-war unemployment and a sharp drop in real wages were expressed in unprecedented levels of strike activity in 1918 and 1919, including the celebrated Winnipeg General Strike of 1919.³⁹ Government and business, mindful of the success of the Bolshevik Revolution in Russia, saw workers' willingness to strike for a decent standard of living as evidence of political radicalism. Police violence and the arrest, incarceration and deportation of strike leaders ended the Winnipeg General Strike; but blatant use of state violence to support one class over another undermined the state's appearance of neutrality. In an attempt to refurbish its image as a facilitator of co-operation between labour and capital, and to deny class differences, the federal government hosted a National Industrial Conference. Representatives of employers, labour, and the government met in Ottawa in September 1919, to discuss recommendations of the federally-appointed Mathers Commission into Industrial Relations and labour reform measures included in the peace treaty negotiated at Versailles. When employer resistance to compulsory collective bargaining, the eight-hour day, and a living wage threatened to wreck the conference, organisers turned with relief to a resolution on which they could obtain agreement: that all provinces should create boards to set wage rates for female workers. Employers rejected proposals for a minimum wage for men, arguing that men's freedom to make their own contracts should not be restricted; but they accepted state intervention to ensure that the mothers of the race earned enough to feed themselves without being forced into prostitution.⁴⁰

Beginning before the war, the reformers challenged the idea that wage rates should be determined entirely by the parties to the employment contract. Even conservatives worried that permitting individuals to sell their labour for less than they needed to support themselves would undermine confidence in the morality and thereby threaten the stability of the existing economic and political order. The papal

³⁸ J. Naylor, *The New Democracy: Challenging the Social Order in Industrial Ontario, 1914–25* (Toronto: University of Toronto Press, 1991) 25–26, 31–39; D. Owrton, *The Government Generation: Canadian Intellectuals and the State, 1900–1945* (Toronto: University of Toronto Press, 1986), ch. 4; D. Morton with T. Copp, *Working People: An Illustrated History of Canadian Labour* (Ottawa: Deneau, 1980) at 101–114.

³⁹ On the Winnipeg General Strike, see D. J. Bercuson, *Confrontation at Winnipeg* (Montreal: McGill-Queen's University Press, 1974); N. Penner, ed., *Winnipeg 1919: The Strikers' Own History of the Winnipeg General Strike* (Toronto: James, Lewis, and Samuel, 1973); K. Osborne, "Winnipeg 1919: A City in Crisis. A Review" (1994) 34 *Labour/Le Travail* 239; on working days lost due to strikes, 1901–1934 see (1935) *Labour Gazette* at 105, 107.

⁴⁰ Canada, Department of Labour, *Official Report of Proceedings of National Industrial Conference* (Ottawa, 1919) viii, 100–114; on the Mathers Commission and strike activity in 1919, see G. S. Kealey, "1919: The Canadian Labour Revolt" (1984) 13 *Labour/Le Travail* 11 and Naylor, *supra* note 38, chap. 2, 6 and 7

encyclical, *Rerum novarum* (1891), articulating limited official Roman Catholic support for the labour movement, recognised that labour was not a commodity:

[E]ach one has a right to procure what is required in order to live; and the poor can procure it in no other way than by work and wages. Let it be granted, then, that as a rule workman and employer should make agreements, and in particular should freely agree as to wages; nevertheless . . . the remuneration must be enough to support the wage earner in reasonable and frugal comfort. If through necessity, or fear of a worse evil, the workman accepts harder conditions because an employer or contractor will give him no better, he is the victim of fraud and injustice.⁴¹

The war provided additional arguments for legislation compelling payment of a living wage. A high percentage of volunteers and conscripts for overseas military service were rejected as physically unfit, proof to some that low wages denied workers adequate accommodation and food.⁴² But the end of the war shifted attention from a living wage for all adult workers to a minimum wage for women. By the end of 1922, all provinces except Prince Edward Island and New Brunswick provided for the creation of minimum wage boards to set wage rates for females in selected industries.⁴³

Administrative tribunals to set minimum wages, however, were not the first or the most effective approach to ensuring that workers received a living wage. Alberta was the first province to enact minimum wage legislation, in its *Factories Act*, 1917, fixing \$1.50 per day as the minimum wage for adult workers, male and female, in some factories, shops and offices. Labour and labour supporters began to pressure the Manitoba government to introduce similar legislation and, in the midst of increased labour mobilisation and militancy, employers resisted by arguing for a federal act that would apply equally across Canada. When Manitoba persisted in going ahead on its own, lobbyists for the Canadian Manufacturers Association persuaded the government to abandon a statutory minimum for all workers in favour of an elaborate administrative procedure for determining wage rates for females only, on an industry-by-industry basis. The *Manitoba Minimum Wage Act*, passed in 1918, provided for a five-person board, with labour and employer representatives, to determine, after consultation with employers and workers, the wage rate "adequate to supply the necessary cost of living to employees, and to maintain them in health." The other provinces also provided for administrative boards to set wages for female employees, rather than flat statutory minimums, and by 1922 Alberta fell in line.⁴⁴

⁴¹ Quoted in J. Ryan, *A Living Wage* (New York: 1906) at 32–33.

⁴² M. Prang, *N. W. Rowell, Ontario Nationalist* (Toronto: University of Toronto Press, 1975) 274, 294

⁴³ *Minimum Wage Act*, S. M., 1918, c. 38; *Minimum Wage Act*, S.B.C., 1918, c. 56; *Minimum Wage Act*, S. S., 1918–19, c. 84; *Women's Minimum Wage Act*, S. Q., 1919, c. 11; *Minimum Wage Act*, S. O., 1920, c. 87; *Minimum Wage for Women Act*, S.N.S., 1920, c. 11; *Minimum Wage Act*, S.A., 1922, c. 81; for a summary of the provisions of these statutes, see K. Derry and P. H. Douglas, "The Minimum Wage in Canada" (1922) 30 *Journal of Political Economy* 155, Table IV.

⁴⁴ *Factories Act*, S.A., 1917, c. 20, s. 16, s. 24; M. E. McCallum, "Keeping Women in Their Place: The Minimum Wage in Canada, 1910–25" (1986) 17 *Labour/Le Travail* 29 at 34–35; *Minimum Wage Act*, S. M. 1918, c. 38, s. 4; L. Kealey, "Women and Labour During World War I: Women Workers and the Minimum Wage in Manitoba" in M. Kinneer, ed., *First Days, Fighting Days: Women in Manitoba History* (Regina: Canadian Plains Research Centre, 1987) 76; Russell, *supra* note 18 at 81; *Minimum Wage Act*, S. A., 1922, c. 81.

Under the direction of its first chairperson, Dr. J. W. Macmillan, the Manitoba Minimum Wage Board proceeded cautiously, setting wage rates as much in response to employers' representations on the industry's ability to pay as by estimates of the cost of living. Indeed, the basic minimum wage was a subsistence wage, with no allowance for savings, holidays, unemployment, illness or retirement; a lower minimum applied to women under eighteen and workers without seniority. The *Act* provided for prosecution of employers who paid wages below prescribed rates, but Macmillan regarded coercion as an appropriate means of securing compliance only when all attempts at persuasion had failed. Given the influence employers had in wage rates set by the Board, and the Board's willingness to believe that employers wanted to pay decent wages, there were few prosecutions.⁴⁵

VIII. Conclusions

Women's minimum wage boards were not created at the request of women wage earners, and did nothing to further women's struggles for equal rights in the workplace. Instead, they were a political response to a range of concerns and, like the earlier factories legislation, did little to improve working conditions or strengthen labour's bargaining power. Factories acts, workers' compensation, and minimum wage boards shared several features. First, all were justified in part as protective legislation for women and children. Health and safety standards, maximum hours and minimum wages helped ensure that women could fulfill their role as mothers, while workers' compensation legislation provided some financial support for dependants of injured workers. Second, since employers had considerable say over content and implementation of the legislation, the standards were generally accepted by most firms; by codifying industry standards, the state protected the better employer from competition from sweatshops. Third, the state's apparent willingness to respond to workers' concerns helped contain labour radicalism, as did tri-partite administration of the legislation, with designated representation and patronage appointments for labour, employers and the public. Fourth, failure to comply with statutory requirements was not prosecuted as a crime; only rarely were violators punished. Rather, the administrators assumed that violations were unintentional and would end once employers understood the legislation.

Liberalism has always been rife with contradictions. It exalts private property and freedom of contract, but in its limited conception of property rights severely curtails the freedom of those who must sell their labour to survive. Passage of legislation regulating the employment relationship was possible because policy makers recognised the discrepancy between liberal ideas of freedom of contract and the reality of modern employment relationships. Yet the legislation helped maintain a political economy in which women, children and men sold their labour-power on terms

⁴⁵ Kealey, *supra* note 44 at 79–80, 92–94; E. M. Burns, *Wages and the State* (London: P. S. King, 1926) 160, 276, 279; J. W. Macmillan, *The Limits of Social Legislation* (Toronto: Clarke, Irwin, 1933), "Minimum Wage Legislation in Canada and Its Economic Effects" (1924) 9 *International Labour Review* 507, and "Minimum Wage Administration" (1928) 18 *American Economic Review* 248; on the work of the Ontario Minimum Wage Board, to which Macmillan moved, see McCallum, *supra* note 44, and M. Hobbes, "Dead Horses and Muffled Voices: Protective Legislation, Education and the Minimum Wage for Women in Ontario" (M.A. thesis, University of Toronto, 1987).

acceptable to employers. By providing minimal regulation of the employment relationship, the government helped forestall demands for a guaranteed subsistence income for all, or for further limits on employers' freedom to determine terms and conditions of employment. By presenting the legislation as a response to concerns about women and the family, policy-makers minimised the direct challenge to liberal legal ideology. Each reform in turn was justified in terms that reaffirmed the existing order, so that even when the minimum wage was extended to cover male workers, or when employers were compelled by legislation to bargain with the union chosen by a majority of employees, employers still invoked the idea of freedom of contract in defence of management rights. Empirical evidence of its irrelevance notwithstanding, the rhetoric persisted. It is used today to resist further entrenchment of labour's right to union representation, job security, a living wage, and a safe workplace. Legal inheritances for Canadian working people have, indeed, been ambiguous.