STUDENTS ARTICLES

THE DISTRIBUTION OF LEGISLATIVE POWER IN RELATION TO LABOUR RELATIONS

The need for industrial peace is more necessary and vital today than ever before. Because of the vast interprovincial enterprises, because of the great interdependence between these industries, and because of Canada's role in the world economy as an exporter, any industrial strife has detrimental effects on the whole economy of the nation. A steel strike in the East causes a slowup in construction in the West affecting the livelihood of hundreds of workers; a strike by the transportation agencies causes a major portion of the economy to grind to a halt; a strike in the pulp and paper industry causes foreign purchasers of these products to look for new sources of supply, with a resulting loss of markets for Canada. These and other examples show the dire need for means of preventing industrial strife and if it occurs for quick and efficient government action.

Because in Canada there is a division of legislative authority between the Dominion and the provinces, it becomes necessary to determine, if government action is required, to what extent labour relations are subject to the legislative jurisdiction of one or the other. By labour relations is meant the rights existing between an employer and his employees and how these are to be determined. Thus legislation as regards collective bargaining, fair labour standards, unfair labour practices, conciliation and arbitration touches some of the aspects of labour relations.[1]

The purpose of this short article is, firstly, to present the current constitutional position as regards the division of legislative authority over labour relations; secondly, to consider whether the division as it stands conforms to the present needs of Canada; and thirdly, if it does not, to suggest how the above needs may be better met.

As the British North America Act 1867 did not expressly grant the power to legislate as regards labour relations to either the Dominion or the provinces, it became necessary to determine which of the two had the power. To this question five answers or approaches were possible. Firstly, labour relations being essentially a problem concerning "property and civil rights" are therefore under the exclusive jurisdiction of the provinces. Secondly, labour relations being essentially of nation wide importance are therefore under the jurisdiction of the Dominion. Thirdly, labour relations being "property and civil rights" are under provincial jurisdiction, but labour relations in enterprises under the legislative jurisdiction of the Dominion are under Dominion jurisdiction; if there is Dominion legislation the provincial legislation becomes inoperative. Fourthly, labour relations in enterprises under provincial legislative jurisdiction are exclusively subject to provincial jurisdiction; and labour

[1] Both the Dominion and the provinces have enacted legislation covering these aspects of labour relations.

relations in enterprises under Dominion jurisdiction are exclusively subject to Dominion jurisdiction. Fifthly, labour relations in enterprises of a purely local nature are under exclusive provincial jurisdiction; and labour relations in enterprises of an interprovincial or Dominion nature are under exclusive Dominion jurisdiction.

The first approach was argued by counsel for the railway in *Grand Trunk Ry. Co.* v. *A-G of Can.*,[2] where the validity of s. 1 of 4 Edw. 7. c. 31 of the Statutes of Canada which provided that no railway within the jurisdiction of Canada could contract out of the liability of paying damages for personal injuries to their servants, was questioned. The learned counsel, relying on *Citizens Insurance Co.* v. *Parsons*[3] where it was held that in general the regulation of contracts was a matter within "property and civil rights" (s. 92 ss. 13 of the B.N.A. Act) and thus under the exclusive jurisdiction of the provinces, maintained that as the relationship between master and servant was contractual, the provinces alone could regulate it, and therefore the Dominion legislation was invalid. Lord Dunedin in rejecting this argument and holding the section valid said:

> It seems to their Lordships that, inasmuch as these railway corporations are the mere creatures of the Dominion Legislature—which is admitted—it cannot be considered out of the way that the Parliament which calls them into existence should prescribe the terms which were to regulate the relations of the employees to the corporation. It is true that, in so doing, it does touch what may be described as the civil rights of those employees.[4]

No more need be said, therefore, of the first approach.

The second approach, based on the belief that because labour relations were of national importance Parliament should thereby have jurisdiction over them, was shared by many in Canada. It was admitted that the provinces might legislate as regards the rights between employees and an employer when the employer was a purely provincial enterprise but only when there was no conflicting Dominion legislation.[5] On this theory Parliament enacted the *Industrial Disputes Investigation Act*.[6] The operation of the Act was, by the definition of the word "employer" limited to mining, transportation, and communication enterprises, and to public service utilities. However, by s. 63(1) it was provided that by mutual consent any employer and his employees could invoke the provisions of the Act. Thus the Act could be very wide in its application. It further provided that upon an industrial dispute occurring an application could be made to the Minister of Labour who could appoint a Board of Investigation and Conciliation to hear the disputants. After a reference was made to the Minister a strike or lockout became illegal and penalties for breach thereof were provided in the Criminal Code. Powers of the Board included the summoning of witnesses, inspection of documents and working premises, and of attempting to bring about a settlement. If no settlement was reached the Board was to make recommendations to the Minister.

The validity of this Act was first challenged in *The Montreal Street Ry. Co.* v. *Board of Conciliation and Investigation*.[7] At trial the Act was

[2] [1907] A.C. 65.
[3] (1881), 7 App. Cas. 96.
[4] *Ibid.* at 68.
[5] See for example *Union Colliery* v. *Bryden* [1899] A.C. 580.
[6] 1907 (Can) c. 20.
[7] (1913) 44 S.C. (Que.) 350.

held intra vires. On appeal, in holding that the Act was valid and that it applied to the labour relations between employees and a local work, Greenshields J. stated:

> While it may be true that rights or obligations arising between employer and employee in virtue of a contract are determined and must be determined by the civil law of the province of Quebec, yet a general statute controlling, as far as possible, disputes and differences arising between an employer, and,—not an individual employee—but his employees generally, and which disputes and differences, if not regulated or settled, might result in a breach of the public peace and good order, is, in my opinion, a matter within the legislative authority of the Dominion Parliament.[8]

The validity of the Act and its applicability to the relations between employees and a municipal institution were questioned in *Toronto Electric Commissioners* v. *Snider*.[9] At trial Mowat J. upheld the validity of the Act and its applicability in the instant case on the ground that it was for the "peace, order, and good government" of Canada. On appeal Ferguson JA. delivering the majority judgment said:

> . . . yet my opinion is that according to its "true nature and effect of the enactment", "its pith and substance", the legislation is not law in relation to "municipal institutions" (8), "local works" (10), "property and civil rights" (13), "matters purely local" (16), as these words are used in s-ss. 8, 10, 13, and 16 of s. 92 of the B.N.A. Act, but is legislation to authorize, and provide machinery for conducting an inquiry and investigation into industrial disputes between certain classes of employers and their employees, which disputes in some cases may, and in other cases, will develop into disputes affecting not merely the immediate parties thereto, but the national welfare, peace, order and safety, and the national trade and business.[10]

This decision was appealed to the Judicial Committee of the Privy Council. In holding the whole Act ultra vires and thus rejecting the second approach, Viscount Haldane approached the matter in this way. He first considered whether the legislation could be validly enacted under s. 92. He held:

> It is clear that this enactment was one which was competent to the legislature of a Province under s. 92. In the present case the substance of it was possibly competent, not merely under the head of property and civil rights in the Province, but also under that of municipal institutions in the Province.[11]

He next considered whether, although the legislation could be validly enacted under s. 92, it could not also be enacted under the enumerated heads of s. 91 and thus still be valid. After discussing *A-G for Ontario* v. *Reciprocal Insurers*[12] he held that the legislation could not be enacted under "Criminal Law".

> It is obvious that these provisions dealt with civil rights, and it was not within the power of the Dominion Parliament to make this otherwise by imposing merely ancillary penalties. The penalty for breach of the restrictions did not render the statute the less an interference with civil rights in its pith and substance.[13]

Secondly, he concluded that it did not come under the heading of "trade and commerce".

> Nor does the invocation of the specific power in s. 91 to regulate trade and commerce assist the Dominion contention. . . . The contracts of a particular trade or business could not, therefore, be dealt with by Dominion legislation so as to conflict with the powers assigned to the Provinces over property and civil rights relating to the regulation of trade and commerce.[14]

8 *Ibid.* at 358-9.
9 [1924] 1 D.L.R. 101; aff'd [1924] 2 D.L.R. 761; rev'd [1925] A.C. 396.
10 [1924] 2 D.L.R. 761, 780.
11 [1925] A.C. 396, 404.
12 [1924] A.C. 328.
13 [1925] A.C. 396, 408.
14 *Ibid.* at 409.

Thirdly, he held that the legislation could not be enacted under the "peace, order and good government" provision.

> It appears to their Lordships that it is now not open to them, to treat *Russell* v. *The Queen*[15] as having established the general principle that the mere fact that Dominion legislation is for the general advantage of Canada, or is such that it will meet a mere want which is felt throughout the Dominion, renders it competent if it cannot be brought within the heads enumerated specifically in s. 91. Unless this is so, if the subject matter falls within any of the enumerated heads in s. 92 such legislation belongs exclusively to Provincial competency.[16]

And finally, he held that the legislation could not be maintained under the "emergency doctrine" because there was no emergency, nor was the legislation framed as such, viz. of temporary duration. Thus the second approach was rejected; nothing more need be said about it.

If the *Snider* case is widely construed greatly to limit Parliament's jurisdiction,[16a] and if it is considered in conjunction with the *Grand Trunk* case, it would follow that the fifth approach is also rejected and that the division of legislative authority is typified in the third approach; that is, that the provinces have jurisdiction to enact labour relations legislation for all enterprises but that this legislation becomes inoperative when the Dominion legislates on labour relations for an enterprise under its legislative authority. This view receives support from *Re Hours of Labour*.[17] Duff J. in this case stated:

> Under the scheme of distribution of legislative authority in the B.N.A. Act 1867, legislative jurisdiction touching the subject-matter of this convention is, subject to a qualification to be mentioned, primarily vested in the Provinces. Under the head of jurisdiction in s. 92(13) or under ss. 16 or under both heads, each of the Provinces possesses authority to give the force of law in the Province to provisions such as those contained in the draft convention. This general provision is subject to this qualification, namely, that as a rule a Province has no authority to regulate the hours of employment of the servants of the Dominion Government.
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> It is now settled that the Dominion in virtue of its authority in respect of works and undertakings falling within its jurisdiction by force of s. 91(29) and s. 92(10) has certain powers of regulation touching the employment of persons engaged on such works or undertakings. The effect of such legislation of the Dominion to execution of this power is that provincial authority in relation to the subject-matter of such legislation is superseded and remains inoperative so long as the Dominion legislation continues in force.[18]

The Privy Council in the *Labour Conventions* case[19] and in the *Unemployment Insurance* case[20] did not deem it necessary to approve or disapprove of the decision of Duff J.

However, there have been dicta and even decisions to the effect that in certain areas the Dominion's jurisdiction over labour relations is exclusive. If this were the case then the division of jurisdiction over labour relations would be as set out in the fourth approach. It will therefore be worthwhile to examine these cases in some detail.

Firstly, as regards Dominion Government employees the jurisdiction is exclusive. In *Re Minimum Wage Act of Saskatchewan*[21] Taschereau J. held:

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15 (1882), 7 App. Cas. 829.
16 [1925] A.C. 396, 412
16a Narrowly construed, the case stands for the proposition that a federal statute is ultra vires if it purports to regulate labour relations of a municipal institution.
17 [1925] 3 D.L.R. 1114.
18 *Ibid.* at 1115-6. An inference may be drawn from Duff's statement that the provinces in some cases might be able to regulate Dominion Government employees. This of course is untrue as the following discussion will show.
19 *A-G for Can.* v. *A-G for Ont.* [1937] A.C. 326
20 *A-G for Can.* v. *A-G for Ont.* [1937] A.C. 355.
21 [1948] S.C.R. 248.

> It follows that the fixing of the wages of the Postal employees is a matter in pith and substance "Postal Service Legislation", upon which the provinces may not legislate without invading a field exclusively assigned to the Dominion.[22]

Secondly, Dominion jurisdiction under s. 91(10), "Navigation and Shipping" is exclusive. In *Paquet* v. *Pilots' Corporation* Viscount Haldane said:

> . . . it was, therefore, in their opinion, for the Dominion and not for the Provincial Legislature to deal exclusively with the subject of pilotage after Confederation, notwithstanding that the civil rights and the property of the Corporation of Pilots of Quebec Harbour might incidentally, if unavoidably, be seriously affected.[24]

In *Reference Re Validity of Industrial Relations and Disputes Investigation Act*[25] Taschereau, Rand, Kellock, Estey, and Abbott JJ. also were of the opinion that the Dominion jurisdiction over labour relations under this head was exclusive. The other four judges did not deem it necessary to consider the question.

Thirdly, as regards Dominion jurisdiction under s. 92(10) the position is doubtful. In *C.P.R.* v. *Notre Dame de Bonsecours*[26] Lord Watson said:

> Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management. . .[27]

The opinion in *Re Hours of Labour*, to the effect that the jurisdiction is not exclusive has already been indicated. In *C.P.R.* v. *A-G for B.C.*,[28] Lord Reid left the question open.

> It is also, unnecessary for their Lordships to express any opinion on the question whether if the Empress Hotel could be brought within the scope of either head 10(a) or head 10(c) of s. 92 of the B.N.A. Act, 1867, regulation of the hours of work of persons employed in it would be either within the exclusive legislative authority of the Parliament of Canada or within the domain in which provincial and Dominion legislation may overlap.[29]

In the *Industrial Relations* case, Taschereau, Estey, and Abbott JJ. were of the opinion that the jurisdiction was exclusive. Kellock J. said it was unnecessary to decide but that it was probably exclusive. Rand J. thought it was not exclusive but held that this question did not have to be decided. Kerwin, Locke, Cartwright, and Fauteux JJ. did not consider the question or deemed that it was not necessary to decide. In *Cant* v. *Canadian Bechtel Ltd.*[30] Boyd Co. Ct. J. thought that the jurisdiction was exclusive.

On principle and on weight of authority it may be that the Dominion has exclusive jurisdiction. It is submitted that there is no logical reason why the result should be any different when the Dominion claims its jurisdiction under s. 91(10) or s. 92(10). However, in this whole question of exclusiveness the true position may be that where labour relations themselves are in pith and substance under an enumerated head of s. 91 then the Dominion jurisdiction is exclusive; if however, they are merely

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22 *Ibid.* at 257.
23 [1920] A.C. 1029.
24 *Ibid.* at 1031.
25 [1955] 3 D.L.R. 721.
26 [1899] A.C. 367.
27 *Ibid.* at 372.
28 [1950] A.C. 122.
29 *Ibid.* at 148.
30 (1958) 12 D.L.R. (2d) 215.

ancillary to matters which are in pith and substance under s. 91 then the jurisdiction is not exclusive. This line of reasoning receives support from the fact that Rand J., although emphatic in stating that Parliament's jurisdiction over labour relations under s. 91(10) was exclusive, believed that it was not exclusive under s. 92(10). If this is valid then the jurisdiction over labour relations is a combination of the third and fourth approaches; that is, the Dominion and the provinces each have exclusive jurisdiction over certain enterprises and overlapping jurisdictions over the other enterprises. In the area of overlapping jurisdiction Dominion legislation supersedes provincial legislation and makes it inoperative.

The general scheme of distribution of legislative power in relation to labour relations having been outlined; it is now appropriate to consider whether this distribution accords with the needs of Canada. It is submitted that enterprises of a purely local nature can be most effectively and efficiently regulated by provincial authority and that enterprises of an interprovincial or Dominion nature can be best regulated by the federal government. To the extent that the present position of distribution is not in conformity with the above submission, to that extent the needs of Canada are not being properly met. A statement by Dean Scott will best illustrate the point.

> Two practical illustrations may be given of the difficulties and dangers that can arise through the inadequacy of our present law dealing with industrial disputes. The first is the story of the strike in the packing industry in 1947. In that instance, there was a single union, the United Packinghouse Workers of America, acting as the bargaining agent for all important plants in eight out of the then nine Canadian provinces. There were three dominant firms negotiating the new contract . . . Theoretically, before a nation-wide strike could be called separate provincial negotiations should have been started in each province where there was a plant affected, with separate conciliation boards consisting of different people all investigating the same problem and making separate reports to separate Departments of Labour. What a legal absurdity! . . . It is a personal opinion after some investigation of this situation, that had federal authority existed there would have been no strike . . .[31]

What can be done to remedy this situation? Clearly the adoption of the fifth approach would be an ideal solution. Can this be done judicially today? In the face of the *Snider* case, *Re Hours of Labour*, the *Labour Conventions* case, *and C.P.R.* v. *A-G for B.C.* it seems very doubtful. In the last mentioned case Lord Reid said:

> There are many companies beside the appellant whose businesses extend over all, or most of, the provinces. It was not, and could not be suggested that the Parliament of Canada could regulate the hours of work of employees of all such companies.
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> But their Lordships can find neither principle nor authority to support the competence of the Parliament of Canada to legislate on a matter which clearly falls within any of the enumerated heads in s. 92 and cannot be brought within any of the enumerated heads in s. 91 merely because the activities of one of the parties concerned in the matter have created a unified system which is widespread and important in the Dominion.[32]

What of amending the constitution to provide for the fifth approach? Dean Scott believes this is one way out of our present situation; however, currently there does not seem to be any public concern over the problem and in this light it is doubtful whether any amending will be done.

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[31] Scott, *Federal Jurisdiction over Labour Relations—A New Look*, (1960), 6 McGill L.J. 153, at 161-2. Many other problems can arise which under the present constitutional position can cause great hardships for the unions, management, and the people of Canada.

[32] [1950] A.C. 122, 139.

Although the courts at present could not categorically hold for the fifth approach as such, it is submitted that they could by sound judicial engineering within the framework of the existing legislative division approximate it to a very great extent. With the passing of the *Industrial Relations and Disputes Investigation Act*, and other related Acts,[33] which cover all enterprises under federal authority, questions of jurisdiction will arise more and more for consideration. To bring out the problems that will be encountered more clearly and to devise some possible tests or criteria in solving them, a few select cases will be briefly considered.

In *C.P.R.* v. *A-G for B.C.* the issue was whether the British Columbia Hours of Work Act applied to the employees of the C.P.R. Empress Hotel in Victoria. Counsel for the railway argued that the hotel was an indivisible part of the railway undertaking and thus the B.C. Act was inapplicable. The Privy Council rejected this argument and held that the hotel was a separate undertaking. Lord Reid, however, made the following dictum:

> It may be that if the appellant chose to conduct a hotel solely or even principally for the benefit of travellers on its system, that hotel would be a part of its railway undertaking.[34]

In this case the emphasis seems to have been, therefore, on the quantitative use of a particular enterprise in determining its qualitative character; that is, whether it was under federal or provincial jurisdiction.

In *A-G for Ont.* v. *Winner*,[35] a bus service carried on mainly for inter-state purposes was held to be under Dominion jurisdiction. In so holding the Privy Council emphasized the treating of an enterprise as a unified whole rather than as a composite of divisible parts. Lord Porter said:

> The undertaking in question is in fact one and indivisible. It is true that it might have been carried on differently and might have been limited to activities within or without the province, but it is not, and their Lordships do not agree that the fact that it might be carried on otherwise than it is makes it or any part of it any the less an interconnecting undertaking.[36]

In *Re Tank Truck Transport*[37] only six per cent of a motor carrier's business was inter-provincial. In holding that the federal labour act applied to all the employees of the carrier McLennan J. said:

> . . . if the facts show that a particular undertaking is continuous and regular as the undertaking is in this case, then it does in fact connect or extend and falls within the exception in s. 10(a) regardless of whether it is of greater or less extent than that which is carried on within the province.[38]

In this case again the indivisibility concept was emphasized, whereas the quantitative element was minimized.

In the *Industrial Relations* case the issue was whether the federal Act applied to the clerical staff and stevedors of a company which was under contract to supply stevedors exclusively to shipping companies engaged in inter-state commerce. It was held that the Act applied to them as their activities came under "navigation and shipping."[39] What if, how-

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33 *Canada Fair Employment Practices Act* 1952-53 (Can) c. 19; *Female Employees Equal Pay Act* 1956 (Can) c. 38; *Annual Vacations Act* 1957-58 (Can) c. 24.
34 [1950] A.C. 122, 144.
35 [1954] A.C. 541.
36 *Ibid.* at 581-2.
37 (1961) 25 D.L.R. (2d) 161.
38 *Ibid.* at 172.
39 In the light of this decision, *Re Lunenburg Sea Products* [1947] 3 D.L.R. 195, in which it was held that crews of ships did not come under federal jurisdiction for purposes of labour relations, is probably no longer good law.

ever, the stevedors had worked only seveny-five or twenty-five per cent of their time for the inter-state shippers? Would the Act still apply to them? What if the company rather than having its own staff contracted with another company for clerical staff. Would this staff now come under the Act?

A limit on the extent of the federal jurisdiction under "navigation and shipping", was placed in *Underwater Gas Developers Ltd.* v. *Ontario Labour Relations Board.*[40] The business of the company in question (which operated solely intra-provincially) was to prepare sites for underwater drilling. For purposes of transporting supplies and workers from shore to the drilling site the company employed its own boats. In holding that the provincial labour act applied to all the workers Aylesworth J. A. said:

> It would seem, therefore, that the majority of the learned Judges of the Supreme Court of Canada who sat upon the reference were of the opinion that the business of navigation and shipping or a business, the main object of which was navigation and shipping, when only intra-provincial in scope and extent fell within the exclusive jurisdiction of the Province in which such business was carried on and was not embraced in Dominion jurisdiction under s. 91, head 10.[41]

In *Pronto Uranium Mines Ltd.* v. *Ontario Labour Relations Board*[42] the issue was whether a company operating a uranium mine solely within the province of Ontario came under federal or provincial jurisdiction for labour relations purposes. McLennan J. held:

> . . . it would be incompatible with the power of Parliament to legislate with respect to the control of atomic energy for the peace, order, and government of Canada if labour relations in the production of atomic energy did not lie within the regulation of Parliament.[43]

In this case the emphasis seemed to have been on the intrinsic importance of the uranium mining industry to Canada, in holding that it came under federal jurisdiction. On this basis should not all the industries engaged in defence work also came under federal jurisdiction?

In *Cant* v. *Canadian Bechtel Ltd.*[44] the issue was whether the employees of an engineering firm engaged exclusively in the construction and management of an interprovincial oil pipeline came under federal or provincial labour relations jurisdictions. Boyd Co. Ct. J. held that as the interprovincial pipeline was an undertaking coming within s. 92(10) of the B.N.A. Act then the federal jurisdiction applied.[45] What if in this case the company's object was merely to construct the pipeline? Would it still come under federal jurisdiction? If so, what would happen after it finished the construction job and began constructing a pipeline which was totally intra-provincial? Would it still be under federal jurisdiction or would it then come under provincial control? These questions raise the very difficult problem of certainty and permanence of jurisdiction over a particular enterprise.

From the above brief consideration of cases certain criteria can be ascertained which may be used to determine whether any enterprise

40 (1960) 24 D.L.R. (2d) 673.

41 *Ibid.* at 682.

42 [1956] O.R. 862.

43 *Ibid.* at 869-70

44 (1958) 12 D.L.R. (2d) 215.

45 *In Campbell-Bennett Ltd.* v. *Comstock Mid Western Ltd.* [1954] S.C.R. 207 it was held by the Supreme Court of Canada that an interprovincial oil pipe line was an undertaking coming within s. 92(10)(a) of the B.N.A. Act.

or part of it is or is not, as to labour relations, under federal jurisdiction and are as follows. Firstly, the enterprise has to be in some way related to an admitted head of federal jurisdiction. It would follow that the closer the relationship the more likelihood of the enterprise coming under federal control. Of course, if no relationship can be found that would end the matter.

Secondly, the intrinsic importance of the enterprise *vis a vis* Canada should be considered. Thus a company developing anti-missle defences would more likely come under federal control than a company which kept federal buildings in repair.

Thirdly, it is necessary to consider how much of the enterprise's operations are carried out for purposes federal in nature. Thus in the *Empress Hotel* case it was held that as the hotel was mainly used for general business it came under provincial jurisdiction. It was indicated, however, that had the hotel been used solely or mainly for the railway's passangers it might well have come under federal jurisdiction. It may be noted that this and the second criterion are very closely inter-related. Thus the greater the intrinsic importance of the enterprise to Canada the lesser an amount of its operations would have to be for federal purposes in order to bring it under federal jurisdiction. It would also follow that the greater its quantitative operations in the federal field, the greater would be its intrinsic importance to Canada, and vice versa.

Fourthly, it is necessary to determine whether the enterprise in question can be considered as a unit or as a composite of distinct or separate parts. In the *Industrial Relations* case it was held by the majority of the Supreme Court of Canada that federal jurisdiction applied to the whole company; that is, to both the stevedors and the clerical staff. Locke J., who dissented in part, was prepared to hold that it applied to stevedors but not to the clerical staff; that is, he was prepared to treat the company as composed of two parts: one coming under the federal and the other under provincial jurisdiction.

Finally the consideration of certainty and stability of jurisdiction has to be taken into account. Great uncertainty could arise because the applicable jurisdiction could change as the functions of a particular enterprise change. This uncertainty may be an unavoidable aspect of federalism; nevertheless, it would have to be considered in any given case and may well play an important role in its determination.

It is submitted that if our judiciary in applying these criteria wished to extend federal jurisdiction to a very great extent there is nothing preventing it from doing so. That this can be achieved is demonstrated by the decisions of the Supreme Court of the United States under the *Wagner* and *Fair Labour Standards* Acts. For example, in *Borden Co. v. Borella*[46] the issue was whether porters, elevator operators, and night watchmen working in a building housing the executive officers of a company that participated in inter-state commerce could be considered as engaged in an occupation "necessary to the production of goods for commerce." The Court held that they came within the definition and were thus subject to the Federal Fair Labour Standards Act. Murphy J. said:

[46] (1945) 325 U.S. 679.

> The *Kirshbaum* case made it clear that the work of maintenance employees in a building where goods were physically manufactured or processed had "such a close and immediate tie with the process of production for commerce," and was therefore so much an essential part of it that the employees are to be regarded as engaged in an occupation "necessary to the production of goods for commerce."[47]

It may not be desirable for our courts to go to the extreme of practically eliminating provincial jurisdiction in this area as was done to the States' jurisdiction by the Supreme Court of the United States; nevertheless, they should increase the federal jurisdiction to a much greater extent than it exists at present.

In conclusion, therefore, it can be said that there is a chasm between the needs of Canada today and the ability of governments to meet them by proper legislation. However, as has been pointed out, the situation is not beyond remedy. A social and economic minded judiciary could, and, it is strongly urged should, bring the constitutional position into conformity with the needs of Canada.

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47*Ibid.* at 682.