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When Wage Theft Was a Crime in Canada, 1935-1955: The Challenge of Using the Master's Tools Against the Master

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Abstract

In recent years the term "wage theft" has been widely used to describe the phenomenon of employers not paying their workers the wages they are owed. While the term has great normative weight, it is rarely accompanied by calls for employers literally to be prosecuted under the criminal law. However, it is a little known fact that in 1935, Canada enacted a criminal wage theft law, which remained on the books until 1955. This article provides an historical account of the wage theft law, including the role of the Royal Commission on Price Spreads, the legislative debates and amendments that narrowed its scope, and the one unsuccessful effort to prosecute an employer for intentionally paying less than the provincial minimum wage. It concludes that the law was a symbolic gesture and another example of the difficulty of using the criminal law to punish employers for their wrongdoing.

Keywords

Wages--Law and legislation--History; Canada

Cover Page Footnote

I would like to thank Philip Girard and Jim Phillips for organizing this special issue and for their comments on an earlier draft, the two anonymous reviewers and Alec Stromdahl and Jason Webb for their research assistance.

Special Issue
Law, Authority & History: A Tribute to Douglas Hay

When Wage Theft Was a Crime in Canada, 1935-1955: The Challenge of Using the Master's Tools Against the Master*

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In recent years the term "wage theft" has been widely used to describe the phenomenon of employers not paying their workers the wages they are owed. While the term has great normative weight, it is rarely accompanied by calls for employers literally to be prosecuted under the criminal law. However, it is a little known fact that in 1935, Canada enacted a criminal wage theft law, which remained on the books until 1955. This article provides an historical account of the wage theft law, including the role of the Royal Commission on Price Spreads, the legislative debates and amendments that narrowed its scope, and the one unsuccessful effort to prosecute an employer for intentionally paying less than the provincial minimum wage. It concludes that the law was a symbolic gesture and another example of the difficulty of using the criminal law to punish employers for their wrongdoing.

Ces dernières années, le terme « vol de salaire » a été largement pour décrire le phénomène selon lequel les employeurs ne versent pas à leurs employés les salaires qui leur sont dus. En dépit de son poids normatif important, ce terme s'accompagne rarement d'appels à engager des poursuites au pénal contre les employeurs en cause. Cependant, on ignore

* An earlier version of this article was presented at the Law/Authority/History: A Tribute to Douglas Hay symposium to mark the retirement of Douglas Hay. The symposium took place on 5 and 6 May 2016 at Osgoode Hall Law School and the York University History Department, Toronto.

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souvent qu'en 1935, le Canada a promulgué une loi pénale sur le vol de salaire, qui est restée en vigueur jusqu'en 1955. Cet article fait la loi sur le vol de salaire et examine notamment le rôle de la Commission royale d'enquête sur les écarts de prix, les débats législatifs et les modifications qui ont réduit son champ d'application, ainsi que la vaine tentative de poursuivre un employeur qui versait délibérément des salaires inférieurs au salaire minimum provincial. L'article conclut que cette loi avait un caractère symbolique et qu'elle constitue un nouvel exemple de la difficulté à recourir au droit pénal pour sanctionner les actes répréhensibles des employeurs.

IN RECENT YEARS, activists in the United States and Canada have raised the problem of wage theft, characterized as the failure of employers to pay wages and benefits owing to workers. Research studies speak of wage theft as costing North American workers billions of dollars a year.[1] Yet while the rhetoric of wage theft invokes the language of the criminal law, reformers typically stop short of calling for the imposition of criminal sanctions on employers and instead call for stronger enforcement of regulatory laws, such as the *Employment Standards Act* in Ontario.[2]

There was, however, a time when wage theft was a crime in Canada. From 1935 until 1955 the *Criminal Code of Canada* made it a crime to intentionally pay workers less than the minimum wage stipulated by a law of Canada. The story of this little known law is the focus of this article, which begins by reviewing the history of wage payment laws generally and then considers the specific context of early Canadian female minimum wage laws enacted in the second decade of the twentieth century. Next it turns to the Royal Commission on Price Spread (RCPS), established by the Bennett government at the height of the Great Depression. Although the Commission primarily focused on predatory pricing

1. See *e.g.* Mary Gellatly, "Unpaid Wages, Unprotected Workers" (2011) Workers' Action Centre 1 at 6; Eastern Research Group, "The Social and Economic Effects of Wage Violations: Estimates for California and New York, Final Report" (2014) US Department of Labour ES1 at ES3; Nik Theodore, "The Movement to End Wage Theft" (2011) The Discount Foundation 1; Annette Bernhardt et al, "Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in American Cities" (2009) National Employment Law Project 1.
2. SO 2000, c 41.

by big business, it also investigated working conditions and found considerable evidence of wage law violations, leading it to recommend that intentional violations be made a crime. The article then examines the bill introduced to implement the RCPS recommendations, the lengthy debate that ensued and the amendments made prior to the law's enactment. Next, it turns to the first and only case in which an employer was prosecuted for the crime of wage theft, which resulted in a police court magistrate declaring the law *ultra vires*. Although the wage theft provision remained on the books until 1955, no further prosecutions were attempted.

I. USING THE MASTER'S TOOLS?

A central theme explored in Doug Hay's work is the use of the criminal law to make capitalism work. Of course, it is the use of the criminal law against servants that is his focus, largely in the context of prosecutions under the master and servant laws, which made worker breaches of contract a crime.[3] By contrast, breaches of the contract by masters could only result in a damage award such as an order to pay the wages owing.[4] This difference in treatment was a source of working-class grievance, particularly when the criminal dimensions of master and servant were used with increasing frequency and severity against workers engaged in collective protest. That said, workers did use master and servant law to obtain civil remedies against their masters roughly at the same frequency as masters seeking criminal penalties against their servants. Workers also petitioned Parliament seeking protective legislation against the perceived injustices that accompanied the spread and deepening of the norms and practices of capitalist

3. See *e.g.* Douglas Hay, "England, 1562-1875: The Law and Its Uses" in Douglas Hay & Paul Craven, eds, *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (Chapel Hill: University of North Carolina Press, 2004) at 59-116; Douglas Hay, "Patronage, Paternalism, and Welfare: Masters, Workers, and Magistrates in Eighteenth-Century England" (1998) 53 Int'l Labor and Working-Class Hist 27.
4. The possibility that a servant could have had a master charged with theft under English criminal law statutes was a theoretical possibility that would have been beyond anyone's contemplation at the time. *Statute of Artificers*, 5 Eliz c 4 (1562); Donald Woodward, "The Background to the Statute of Artificers: The Genesis of Labour Policy, 1558-63" (1980) 33:1 The Econ Hist Rev 32. The earlier *Ordinance of Laborers* (1349) 23 Edw III and *Statute of Laborers* (1351) 25 Edw III, stat 2, made no provision for wage recovery. See Robert C Palmer, *English Law in the Age of the Black Death, 1348-1381: A Transformation of Governance and Law* (Chapel Hill: University of North Carolina Press, 1993) at 14-23.

labour markets. This suggests workers still believed that the state and judicial officials could protect them against "the serpent of their agonies."[5]

The master and servant regime was imported into Canada through a combination of reception and local enactment. It resembled the English regime in its key feature: The different treatment of employer and worker breaches of contract. However, the wage-fixing mechanism that had been a feature of early English master and servant law but had fallen out of usage by the late eighteenth century was never a part of Canadian law. One implication of this change is that the duty to pay wages was strictly speaking a civil, not a statutory obligation. Indeed, as Paul Craven's research revealed, many early master and servant statutes did not provide remedies for non-payment of wages and the jurisdiction of magistrates to hear wage claims was based on their expanded civil jurisdiction. Ontario's first master and servant statute, enacted in 1847, set a precedent by empowering Justices of the Peace (JPs) to order the payment of wages up to a limit of ten pounds. In the event the judgment was not paid within twenty-one days, JPs could issue a warrant of distress against the master's goods. This precedent was widely followed in other Canadian jurisdictions and workers frequently used these provisions successfully, although it is not known in what percentage of cases workers actually collected the wages they were owed.[6] The wage recovery procedures of pre-Confederation master and servant statutes survived the decriminalization of master and servant law in 1877 and remain in force today.[7] They are little used, however, as better options are now available through small claims court or employment standards legislation.

The rise of industrial capitalism provided the context for Canadian workers to intensify and expand their efforts to obtain legislative protection against the harms they were experiencing. Hazardous working conditions were high on the list and workers found allies among middle-class reformers concerned with child and female labour. Darby Bergin, a Conservative Member of Parliament

5. Karl Marx, *Capital, Volume 1: A Critique of Political Economy* (New York: The Modern Library, 1906). Originally published in 1867.
6. Paul Craven, "Canada, 1670-1935: Symbolic and Instrumental Enforcement in Loyalist North America" in Douglas Hay & Paul Craven, *supra* note 3 at 177, 198-99; S Prov Canada 1847, c 23. In addition to general master and servant laws, there were also statutes governing particular occupations. Sailors often experienced difficulty collecting their wages at the end of the voyage and so were the beneficiaries of much wage protection legislation. For example, Nova Scotia enacted wage recovery legislation in 1841 that enabled seamen to seek unpaid wages by making complaints to JPs and federal wage protection along the same lines was first enacted in 1873. *An Act for facilitating the recovery of Seamen's Wages*, SNS 1841, c 50; *Seaman's Act*, SC 1873, c 129, ss 53-54.
7. See *e.g. Employers and Employees Act*, RSO 1990, c E12.

from Cornwall, Ontario, then a major textile manufacturing centre, repeatedly introduced factory bills beginning in 1881.[8] It was not until 1885, however, that one of his measures was debated in the House of Commons, where the focus was mostly on the issue of federal jurisdiction. The problem was that the *British North America Act* of 1867 conferred exclusive jurisdiction over property and civil rights to the provinces, while reserving exclusive jurisdiction over criminal law to the federal government.[9] Were laws protecting workers generally, and women and children in particular, a matter of property and civil rights (and hence provincial) or of the criminal law? Bergin made an impassioned appeal to his colleagues that his proposed legislation aimed to protect the moral health of its young people:

> The future of the children is in our hands; they appeal to us for protection, and I feel that that appeal will not be in vain. As I said before their health, their life, their faith and their morals are at stake, and they ask us to give them all the aid and all the assistance which it is in the power of this Parliament to give.[10]

The majority, however, was of the view that there was no Parliamentary power to assist, since the issue was more appropriately conceived as a private matter to be addressed through the employment contract, and thus within provincial jurisdiction.[11]

As the debate made clear, using the master's tools to make employer mistreatment of workers a crime was an uphill fight from the outset, particularly in a constitutional environment that drew very sharp lines between what was properly a public matter for the criminal law and within federal jurisdiction and what was essentially a private matter to be addressed by common law or provincial regulatory law. Furthermore, it was also clear that attempts to use the general criminal law to prosecute employers for crimes like manslaughter in cases where workers were killed by their employers' recklessness were almost certain to fail.[12] That said, regulatory law was within the reach of workers seeking to use

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8. Eric Tucker, *Administering Danger in the Workplace: the Law and Politics of Occupational Health and Safety* (Toronto: University of Toronto Press, 1990) at 82-110 [Tucker, *Administering Danger*].
9. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*BNA Act*].
10. *House of Commons Debates*, 5th Parl, 3rd Sess, Vol 2 (1 April 1885) at 881 (Darby Bergin).
11. Tucker, *Administering Danger*, *supra* note 8 at 101-110.
12. *Ibid* at 66-75; Paul Craven, "Law and railway accidents," (Paper delivered at the Canadian Law in History Conference, Carleton University, June 1987), [unpublished]. The only known conviction was obtained in *R v Brazeau*, [1942] 3 WWR 570. The corporate employer was convicted for manslaughter after a mine explosion in Alberta and fined $5,000. For a discussion of this and other twentieth century cases prior to the enactment of the Westray Bill, see Eric Tucker, "The Westray Mine Disaster and its Aftermath: The Politics of Causation" (1995) 10:1 CJLS 91.

the state as their agency. The Ontario legislature had already enacted a factory act in 1884 and declared the law in force in 1886 once the jurisdictional issue had been more or less resolved.[13] Violations of provincial statutes could result in imprisonment, but in the case of the *Factories Act*, the law imposed a fine of up to $50 and only allowed for imprisonment for up to 30 days if the fine was not paid.[14] Regulatory offence prosecutions, however, were few and far between and no employers were imprisoned for failing to pay a fine.[15]

The issue of wage regulation did not come back onto the political agenda until the first decades of the twentieth century and then it was largely focused on female minimum wages. The first female minimum wage law was enacted in 1917 and within a few years nearly every Canadian province followed suit. These laws established a wage board authorized to issue industry- and region-specific minimum wage orders that were supposed to guarantee that a single woman would be able to support herself at a modest but decent standard of living. These laws reflected and perpetuated gender inequality insofar as they were premised on the belief that women were a vulnerable class in need of protection, while at the same time accepting that women should receive lower wages than unskilled male workers on the assumption that they supported only themselves.[16] Yet despite these significant limitations, these were the first laws since the demise of wage-fixing under the master and servant statutes that imposed a legal obligation on employers to pay a minimum wage. As a result, paying less than the minimum wage was not simply a private wrong, but a breach of statute for which a penalty was provided. For example, in Ontario, the Act provided that an employer who contravened a minimum wage order committed an offence and could incur an penalty "not exceeding $500 and not less than $50 for each employee affected." The statute also provided that the court could order the offending employer to pay the affected employees the difference between the pay received and the minimum wage to which they were entitled. Employers that failed to pay the penalty or sum

13. *The Ontario Factories Act*, SO 1884, c 39; Tucker, *Administering*, *supra* note 8 at 96-110.
14. *Factories Act*, *ibid*, s 31.
15. Tucker, *Administering Danger*, *supra* note 8 at 137-76.
16. For excellent discussions of the female minimum wage laws, see Bob 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; Margaret E McCallum, "Keeping Women in Their Place: The Minimum Wage in Canada, 1910-1925" (1986) 17 Labour/Le Travail 29. On the politics of protection more generally, see Ruth A Frager & Carmela Patras, *Discounted Labour: Women Workers in Canada, 1870-1939* (Toronto: University of Toronto Press, 2005) at 91-113; Nancy Woloch, *A Class By Herself: Protective Laws for Women Workers, 1890s-1990s* (Princeton: Princeton University Press, 2015).

owed to employees could be imprisoned for a period "not exceeding six months and not less than two months."[17] Similar provisions existed in the other female minimum wage acts.[18]

So, in the architecture of Canadian law, minimum wage violations were not a crime but a regulatory offence, just as were violations of health and safety laws. And like health and safety laws, class politics shaped the way the law was enforced. In Ontario, health and safety inspectors were given the task of enforcing the obligation to post applicable wage orders, but not to determine whether affected workers were being paid the minimum. Instead, the board depended on employer self-reporting and on employee complaints which were, at best, resolved by securing payment of what was owed. Employers were rarely prosecuted for violating their statutory duty to pay the minimum. Indeed, in the period between the law's enactment and the end of 1925, only one employer was prosecuted for a minimum wage violation. In that case the employer had provided false information to the board and had not kept promises it had made. The board's belief that maintenance of harmonious relations with employers was essential precluded the use of coercion and punishment except in the most egregious cases of employer defiance of state authority.[19]

II. WHEN WAGE THEFT BECAME A CRIME: THE ROYAL COMMISSION ON PRICE SPREADS

By the time the Great Depression began in 1929, Canadian workers had enjoyed some success in making the state their agent through the enactment of protective employment laws dealing with occupational health and safety, workers' compensation and female minimum wages. Enforcing those laws, however, especially through regulatory offence prosecutions, was often challenging. Unions and worker advocates often called for stronger laws and better enforcement, but there was no movement to mobilize the master's ultimate legal tool, the criminal law, to stigmatize employer practices that harmed workers physically, let alone economically.

The Great Depression ushered in an era of widespread hardship as male unemployment rose sharply and wages fell. Business failures increased and many

17. *Minimum Wage Act*, SO 1920, c 87, ss 21-22.
18. See *e.g. Minimum Wage* Act, SBC 1918, c 56; *The Minimum Wage Act*, SA 1922, c 81.
19. McCallum, *supra* note 16 at 49-54.

employers struggled to remain afloat.[20] There is no data on the frequency of wage violations, including violations of female minimum wage laws and non-payment of wages contractually owed, but as we shall see, there is anecdotal evidence suggesting that wage theft was on the rise. These economic difficulties provided fertile ground for popular unrest, which took many forms from labour radicalism to mobilization by small business owners who felt squeezed by declining prices and intense pressure from big business.[21] Hyper-competition through sub-contracting was not a new phenomenon,[22] but under depressed economic conditions the vicious circle of lower wages, declining consumer demand and reduced profits, leading to increased pressure to cut costs by all means, came to be seen by many as a problem that lay at the root of Canada's economic woes.

H.H. Stevens, a long-serving Conservative Member of Parliament and Minister of Trade and Commerce in R.B. Bennett's government, embraced one strand of populism that combined a concern with farmers, small businesses and workers, seeing them as the victims of large business taking advantage of their market position to impose unfair terms and conditions.[23] Inspired by Roosevelt's New Deal, Stevens aroused public opinion by denouncing abusive business practices in Canadian industry and demanding an investigation into the exploitation of wage-earners, primary producers, and small businesses by big business. Bennett had been resisting New Deal responses to the economic crisis since his electoral victory in 1930. But, by the beginning of 1934, the failure of his policies, combined with the defeat of provincial Conservative governments, was starting to produce a shift, and in February 1934, he agreed to appoint a

20. John Herd Thompson with Allen Seager, *Canada, 1922-1939: Decades of Discord* (Toronto: McClelland & Stewart, 1985). On the importance of attending to gender and ethnicity in understanding the impact of the depression, see Katrina Srigley, ""In Case You Hadn't Noticed!": Race, Ethnicity, and Women's Wage-Earning in a Depression-Era City" (2005) 55 Labour/Le Travail 69.
21. David Monod, *Store Wars: Shopkeepers and the Culture of Mass Marketing, 1890-1939* (Toronto: University of Toronto Press, 1996); Donica Belisle, *Retail Nation: Department Stores and the Making of Modern Canada* (Vancouver: University of British Columbia Press, 2011); Bryan D Palmer, *Working-Class Experience*, 2nd ed (Toronto: McClelland & Stewart, 1992) at 241-67.
22. See *e.g.* Robert McIntosh, "Sweated Labour: Female Needleworkers in Industrializing Canada" (1993) 32 Labour/Le Travail 105.
23. JRH Wilbur, "H.H. Stevens and R.B. Bennett, 1930-1934" (1962) 43:1 Can Hist Rev 1; Monod, *supra* note 21 at 303-306.

Special Parliamentary Committee on Price Spreads and Mass Buying, with Stevens as its chair.[24]

The Committee began its work by inquiring into sweatshops in Ontario and Quebec. Its second witness was Richard Stapells, a former clothing manufacturer who had been appointed as the Chairman of the Ontario Minimum Wage Board, the body responsible for implementing and enforcing the female minimum wage. He described the Board's approach to enforcement, which was to negotiate compliance. Indeed, Stapells talked about the work of the "four specially trained negotiators" tasked with bringing "about a delicate adjustment" in circumstances where firms were found to be in significant arrears of wages because of their failure to pay the female minimum wage.[25] Crown attorneys and provincial police were occasionally used when employers refused to cooperate, but Stapells wanted to be clear that "we have the sympathetic and cheerful co-operation of most of the employers of the province."[26] Some committee members and the committee's counsel, Norman Sommerville, pressed Stapells on the Board's enforcement policy, challenging the adequacy of the small fines and the Board's reliance on manufacturers' reports of their wage rates rather than initiating inspections or following up on anonymous complaints. Stapells defended the Board's approach, citing limited resources, the unreliability of complaints and its focus on wage recovery over deterrence: "[W]e do not institute prosecutions, for that particular reason, as much as we adjust wages."[27]

The following day, 28 February 1934, the committee heard from Gustave Francq, the chair of the Quebec Minimum Wage Board, who had a sympathetic relationship with Quebec unions. He presented a very different view than the one Stapells presented. He described widespread efforts by employers to evade and avoid paying the female minimum wage and the difficulties his board faced enforcing the law, particularly in the non-union sector. According to Francq, "[a]s a rule [the girls] wait until they are discharged or lose their jobs or have quit before they come to the board." When complaints were received, however, the Board sent an inspector to investigate and if violations were detected the employer was called into a meeting in which they were given the option

24. H Carl Goldenberg, "Reform and Politics in Canada" (1936) 9:1 Pacific Affairs 44; DF Forster, "The Politics of Combines Policy: Liberals and the Stevens Commission" (1962) 28:4 Can J Econ Poli Sci 511; Richard Wilbur, *H.H. Stevens 1878-1973* (Toronto: University of Toronto Press, 1977) ch IV.
25. House of Commons, Special Committee on Price Spreads and Mass Buying, *Evidence*, vol 1 (27 February 1934) at 25 [*Evidence*]
26. *Ibid* at 26.
27. *Ibid* at 43.

of paying or being prosecuted, and were warned that future violations would result in charges. Francq also described a recent effort to amend the minimum wage act to increase penalties for violations, including the addition of jail terms for employers who failed to pay fines. He explained that these proposals were motivated in part by the comment of a judge in one prosecution who expressed regret that stiffer penalties were not available: "I would be delighted to send some of these employers to jail."[28]

That afternoon, the committee heard from Professor Harry M. Cassidy who, with F.R. Scott, had conducted an inquiry into conditions in the men's clothing industry in Ontario and Quebec at the joint invitation of the Canadian Association of Garment Manufacturers and the clothing workers' union. He presented a much less complacent view than Stapells of wage violations and their enforcement in Ontario.[29] Both Cassidy and Scott were members of the League for Social Reconstruction, a group of progressive intellectuals advocating for social reform. In his testimony, Cassidy reported their study had found "much violation" of the female minimum wage law, especially in non-union shops, and that enforcement was inadequate. He cited a number of reasons for this state of affairs, including economic pressures that tempted employers to evade the law, fear of job loss that made women unwilling to complain or even willing to swear falsely that they are properly paid, the unreliability of employer records (especially in small shops), inadequacy of enforcement staff, and penalties that were too low to deter employers from breaking the law. Professor Cassidy also discussed the situation in Quebec, where he claimed the problem of violations and inadequate enforcement was even greater. He repeated the recommendations that he and Scott made in their report: The extension and better enforcement of minimum wage laws and the establishment of corporatist-type arrangements to permit self-government within the industry.[30]

Subsequent to the testimony of Stapells and Cassidy, public criticism of the wage board's enforcement practices continued. In an effort to quell the controversy, Stapells wrote to the Minister of Health and Labour, encouraging the government to ignore Cassidy's report: "[T]here is nothing to be gained by

28. *Ibid*, (28 February 1934) at 83-85.
29. FR Scott and HM Cassidy, *Labour Conditions in the Men's Clothing Industry: A Report* (Toronto: T Nelson & Sons, 1934) at 37-64. The report was completed in December 1933, presented to the RCPS in February 1934 and published in December 1934.
30. *Evidence*, *supra* note 25 at 127-33. See also, Cecil C Carrothers, "Why Are Our Social Laws Not Enforced?" (1935) 2:4 Quarterly Review of Commerce 5. It should not have been a surprise to RCPS commissioners that social legislation was not enforced. Carrothers cites lack of worker knowledge and fear of retaliation as two of the reasons for this.

arguing with this theoretical college professor whose views very evidently are dominated by his political leanings, apart from the fact that I consider him to be an unscrupulous, dangerous individual." The government prepared a public statement defending the wage board, stating, "[t]he Act is being enforced as vigorously as possible … [i]t had not been the policy of the board to prosecute employers who perhaps unwittingly had violated the Minimum Wage Act."[31]

The work of the committee continued through the spring. When it became clear that it would not finish its investigations before Parliament was prorogued at the end of June, the committee was converted into a royal commission to allow it to continue.[32] While the attention of the commission shifted to small businesses and primary producers, it continued to receive letters from distressed workers and heard further testimony from their advocates regarding low wages and poor working conditions. In January 1935, Winnifred Hutchison presented a report she had prepared for the YWCA on labour conditions in the Toronto needle trades. She reported that since the commission had begun its investigations, some employees had been warned not to give information, although in some cases piece rates were raised to enable women to earn the minimum wage. The report was scathing in its criticism of the Ontario Wage Board, finding that firms in violation had never been inspected, that investigations often did not result in compliance or enforcement measures, and that in some cases girls were dismissed. As a result, Hutchison reported there was widespread fear that the identity of girls who complained would be made known to the employer. The report concluded, "[a]s the Minimum Wage Legislation stands now it seems purely remedial rather than preventive, that is, the board seems to function as a complaints bureau, rather than as a law enforcement department of Government." The report recommended stiffer fines and imprisonment for second offenders.[33]

While various witnesses described problems with minimum wage enforcement and made recommendations to strengthen it, there was never any suggestion that violations of the minimum wage laws should be treated as Criminal Code offences. Rather, it seems this suggestion originated from within the Commission. To date, however, I have been unable to determine who first

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31. Mercedes Steedman, *Angels of the Workplace: Women and the Construction of Gender Relations in the Canadian Clothing Industry* (Toronto: Oxford University Press, 1997) at 204.
32. Canada, *Report of the Royal Commission on Price Spreads* (Ottawa: JO Patenaude, 1935) at xxvi-xxix [*Report on Price Spreads*].
33. Archives of Canada, Royal Commission on Price Spreads, R1097-0-5-E, vol 165, file: Report No 2, Labour and Wages, "Report on Labour Conditions in Industries in Toronto Employing Women Needle Workers" at 37. The report was summarized by the Trades and Labor Congress journal, "Needs of Wage-Earning Girls" (1935) 14:2 Can Congress J 26.

made this recommendation. The archival holdings are not well organized; there are multiple copies of various typed drafts of report chapters, often with hand-written notes and edits, but without any indication of who was responsible for them. It is notable that a young Lester B. Pearson, the future Canadian prime minister, was appointed the royal commission's secretary (on loan from External Affairs) and worked long hours writing drafts of the report. Bennett subsequently rewarded him with a $1,800 honorarium, an invitation to accompany him to King George V's Silver Jubilee, and an Order of the British Empire. However, Pearson was no radical and in the past had expressed considerable reservations about Roosevelt's New Deal policies, so it cannot be assumed that it was his idea to make wage theft a crime.[34]

Before turning to the RCPS's wage theft recommendations, it will help to put them in the larger context of the report. The commission's general approach reflected the reform thinking of the time, heavily influenced by a rejection of raw capitalism and a growing recognition of the dangers resulting from "one fundamental and far-reaching social change, the concentration of economic power."[35] The development of corporations and large-scale businesses able to exert quasi-monopoly power resulted in unfair competition and the "exploitation of the weak and unorganized."[36] Imperfect competition was found to be associated with unfair trade practices such as price discrimination, and state intervention

34. Wilbur, *supra* note 24 at 134; John English, *Shadow of Heaven: The Life of Lester B. Pearson, Volume 1* (Toronto: Lester and Orpen Dennys, 1989) at 168-171. Pearson was singled out for his work on the commission three times in the House of Commons. *House of Commons Debates*, 17th Parl, 6th Sess, Vol 3 (9 April 1935) at 2548 (Oscar L Boulanger); *Ibid*, Vol 4 (11 June 1935) at 3532 (WW Kennedy); *Ibid*, (3 July 1935) at 4206 (Bennett).

35. *Report on Price Spreads*, *supra* note 32 at 3. For a discussion of the shift among economics from a classical approach towards toward a more Keynesian and interventionist one, see Doug Owram, *The Government Generation: Canadian Intellectuals and the State, 1900-1945* (Toronto: University of Toronto Press, 1986) at 192-220. Owram also discusses the development of a new reform elite and their entry into government circle. *Ibid* at 135-191. During the same period, the League for Social Reconstruction (LSR) was also developing a more radical critique of Canadian society, which called for extensive government intervention. Although its chief influence was on the recently formed Co-Operative Commonwealth Federation, some of its positions resonated with mainstream reformers, such as Stevens. Indeed, a critical review of the LSR's 1935 book, *Social Planning for Canada*, noted, "[a]s propaganda of hatred and envy the book undoubtedly deserves to be placed with such classics as the Report of the Price Spreads Commission and the 1935 speeches of the Hon HH Stevens." FR Scott, et al, "An Introduction" in League for Social Reconstruction Research Committee, ed, *Social Planning for Canada* (Toronto: University of Toronto Press, 1975) i at xvii-xviii. This references a 1936 pamphlet published in Montreal, but without further publication information.

36. *Report on Price Spreads*, *supra* note 32 at 8.

was seen as necessary to address these problems. In particular, the Commission called for the creation of a Federal Trade and Industry Commission with power to enforce existing federal anti-combines legislation, to define and prohibit unfair competitive practices, and to enforce its orders.[37]

The report's chapter on labour and wages began from the premise that the problems encountered in labour markets were "simply one aspect of the more general problem" of the concentration of economic power.[38] The earner suffered from a disparity in bargaining power not unlike that of small manufacturers dealing with quasi-monopolistic buyers like department and chain stores.[39] Low wages and high unemployment were found to be prevalent in many industries and some state intervention was necessary. The report identified two kinds of remedies: The promotion of associations of employers and workers and direct state regulation of employment standards.[40] With respect to the former, the report strongly favoured state support for the development of employer and employee organizations to facilitate industry self-regulation and improve employment conditions generally. Further, based on the evidence it heard, the Commission identified unions as playing a key role in minimum standards enforcement. With regard to direct state regulation, a draft of the labour chapter, labelled "First tentative draft,"[41] placed great importance on improved administration of existing laws, which required more resources and better educated staff. The draft called for the appointment of "specially qualified inspectors" (the underlining presumably an allusion to Ontario's practice of calling minimum wage enforcement officials "negotiators"). It also called for heavier penalties, including jail sentences for second and subsequent offences. The draft acknowledged that punitive measures should be the last resort, but defended their necessity because for the minority of recalcitrant employers, "the penalties should be severe enough to make violation unprofitable."[42] There was no mention of *criminal* prosecution,

37. The boundaries between the federal government's criminal law power and provincial jurisdiction over property and civil rights was a persistent problem for competition laws, including the one enacted on the basis of the RCPS's recommendations. See Michael Trebilcock et al, *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2002) ch 1.
38. *Report on Price Spreads*, *supra* note 32 at 105.
39. *Ibid* at 106.
40. *Ibid*, at 124-42.
41. Archives, Royal Commission, vol 164, file: Report No 2, Labour and Wages, "Chapter V, Concentration and the Wage Earner or (Labour and Wages)."
42. *Ibid* [emphasis in original]. The finding aid to the commission's papers identifies the date of the papers in the volume as 23 February 1934, before the commission had heard testimony on labour conditions.

so I presume that the draft intended that provinces would make these changes to their minimum wage laws.

In a second draft of the chapter, the criticism made in the first draft that existing labour law administration "is hampered by entirely inadequate appropriations and by staffs that are too small but also without the energy, education, and experience" required was crossed out. The recommendations regarding improved enforcement and tougher penalties remained, but still without any mention of the criminal law.[43]

The first mention of using the criminal law to enforce labour standards was found in an archive volume that the finding aid dates 29 January 1935 contains a typed paragraph of a section of the report, headed "A. Amendment of the Criminal Code," with hand-written edits:

> Certain ~~anti-social~~ industrial relations policies and practices are so obviously undesirable and so clearly "fraudulent" that some remedial action might be directed against them the amendment of the Criminal Code. Without entering in either technicalities or details, we recommend that the paying of less than a determined minimum wage rate *or knowingly permitting employees to work beyond the maximum hours fixed by law*, or the falsification of any employment record required to be kept by law, or the ~~fraudulent~~ punching of time clocks with the intent to deceive, or the putting of the pay of more than one worker in the same envelope *with the intent of evading the provisions of any minimum wage law*, or the making of unwarranted deductions from an employee's earnings for any purpose not approved by competent public authority, and other similarly defined practices, be declared indictable offences punishable by heavy fines ~~or~~ *and/or* imprisonment ~~or both~~.[44]

As stated earlier, I have not been able to identify where the idea of using the criminal law originated,[45] who authored the original paragraph, or who edited it. But the edited paragraph must have met with the approval of the commissioners because it appeared in the final report, issued in April 1935. Moreover, although the four Liberal commissioners expressed dissenting views on some aspects of the

43. *Ibid* at vol 166, ch V. There is no date on the document, but the finding aid to the commission's papers identifies the papers in the volume as being from 10 September 1934.
44. *Ibid* at vol 167, file: Report No 2, Labour & Wages. Note that the hand-written deletions are struck through, and the hand-written insertions italicized. The italicized words were those penciled in.
45. I am not aware of any efforts to criminalize employer wage violations in other common law jurisdictions.

commission's analysis and recommendations, they did not distance themselves from the wage theft recommendations.[46]

By the time the Commission's report was released, Bennett had already made his January broadcasts to the Canadian public in which he broke sharply from the non-interventionist approach he followed through the early years of the Depression. He now adopted much of the rhetoric of the populists, criticizing big business, proclaiming an end to laissez-faire, and demanding the abolition of sweatshop conditions. But what was his legislative agenda? According to one observer, he didn't have any because he was expecting to be challenged by Mackenzie King's Liberals and to call an election. However, King decided to hold off, leaving Bennett to scramble.[47] His belated 'New Deal' for labour involved the passage of minimum wage, weekly rest and maximum hours of work laws implementing International Labour Organization (ILO) conventions that Canada ratified late in April 1935, immediately prior to the introduction of the legislation, and a very weak and limited unemployment insurance act. Whatever one made of the merits of these bills, they all suffered from one major problem: Dubious constitutional validity. The constitutionality of the bills implementing the ILO conventions depended on finding that the federal government's power to ratify international agreements also gave it power to legislate in areas otherwise in exclusive provincial jurisdiction and, for national unemployment insurance, there was no accepted constitutional law theory on which to found federal authority to enact such a scheme. But Bennett was running out of time before he had to call an election and he needed to fend off both the Liberals and Stevens, who was seeking to rally support for his populist agenda within the Conservative party and threatening a schism, while at the same time labour unrest was growing as unemployed men were leaving the government relief camps in protest and gathering in Vancouver.[48]

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46. *Report on Price Spreads*, *supra* note 32 at 135, 276-307. We know for sure that Stevens did not take the lead. He resigned from Cabinet and from the Chair of the Commission in October 1934 as the result of increasing conflict with Bennett. See Wilbur, *supra* note 23 at 11-16; Monod, *supra* note 21 at 315-17. An early summary of the Report's recommendations were leaked or given to the press. See William Marchington, "Work-Day Limit And Proper Wage Sought by Probe," *The Globe* (15 February 1935) 1.
47. Goldenberg, *supra* note 24 at 49.
48. On Bennett's 'New Deal,' see Judy Fudge & Eric Tucker, *Labour Before the Law* (Oxford: Oxford University Press, 2001) at 166-68. See also Thompson with Seager, *supra* note 20 at 261-66. In 1937, all this legislation was held to be *ultra vires*. *Reference re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act and Limitation of Hours of Work Act*, [1937] AC 326, 1 DLR 673 (JCPC) [*Weekly Rest & Minimum Wages Reference*]; *Reference Re Employment and Social Insurance Act, 1935,* [1937] AC 355, 1 DLR 684 (JCPC). On the relief camp protests and the events giving rise to the On-to-Ottawa trek, see Bill Waiser, *All Hell Can't Stop Us* (Calgary: Fifth House, 2003).

It was in this political environment that the government supported the implementation of the Commission's recommendations insofar as they were within federal jurisdiction. On 23 May, Hugh Guthrie, the Minister of Justice, introduced Bill 73 to amend the Criminal Code. In addition to a wide range of criminal law reforms, the bill contained two RCPS-inspired clauses, including a new section 415A, which made it a crime to knowingly pay less than the minimum wage "fixed by law or any competent public authority," to permit employees to work longer than the maximum hours fixed by law, to falsify employment records required to be kept by law, to punch a time clock with an intent to deceive, to put the wages of more than one employee in a pay envelope with intent to deceive and to employ children contrary to law. The other significant RCPS provision was section 498A, which made it a crime to discriminate in trade by offering discounts or rebates to preferred customers.[49] In presenting the bill, Guthrie took the unusual step of expressing some doubt about the constitutionality of the wage theft, hours of work, and trade practices sections.[50]

He elaborated at length on those concerns when the bill came up for second reading a few days later. The problem with the employment provisions was that they purported to make it an indictable offence to employ a person at less than a statutory minimum wage or to permit a person to work beyond a statutory maximum number of hours of work, as well as to falsify employment records or engage in other named deceptive practices designed to evade wage and hours laws. At the time, however, all wage and hours laws were provincial except for the recent statutes implementing the ILO conventions, one of which, the federal minimum wage law, had not been declared in force. Moreover, the constitutional authority of the federal government to enact these laws was very much in question. Therefore, this was legislation that in essence established crimes for knowingly violating provincially established minimum wages. Did the federal government have such power? Section 92(15) of the *BNA Act* gave the province exclusive jurisdiction to impose penalties for violations of provincial statutes.[51] Under provincial law, however, an offence was complete without proof of a mental element. It was an offence to pay less than the minimum wage even if the violation was innocent—though, in practice, regulatory offence prosecutions were only undertaken in response to intentional violations. The question of

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49. Bill C-73, *An Act to Amend the Criminal Code*, 6th Sess, 17th Parl, 1935. The bill also made it a crime to sell goods to one customer on more favourable terms than to another, a measure aimed at mass buyers obtaining discounts.
50. *House of Commons Debates*, 17th Parl, 6th Sess, Vol 3 (23 May 1935) at 2996.
51. *Supra* note 9.

federal jurisdiction came down to whether the addition of a mental element—knowingly paying less than a legislated minimum wage—created a criminal offence, and did not just provide a penalty for violating a provincial statute.

In an effort to clarify this question, the government sought legal advice from the law officers of the Department of Justice, who expressed the view that the law was invalid. Not satisfied, the government also sought opinions from two prominent outside counsel, W.N. Tilley from Toronto, and Aimé Geoffrion, from Montreal. Tilley's opinion was read in the House of Commons. He was of the view that the wage theft law was valid because section 92(15) did "not prevent the dominion from making certain practices, in evasion of provincial law, crimes and of punishing them as such." However, Tilley thought that the trade practices provisions were *ultra vires*.[52]

Guthrie openly doubted Parliament's constitutional authority to enact these sections of the bill. In addition, he also made it clear that he didn't think the law would do much good even if passed. He explained that the only reason the government was introducing the bill was because it felt bound to act on the recommendations of the commission.[53] Members of the Liberal opposition expressed astonishment that the Minister of Justice would table legislation of such dubious constitutional validity, but William Kennedy, who had become chair of the RCPS after Stevens resigned in October 1934, came to its defence:

> It would be a criminal offence for one of these girl employees to go into a store and take a loaf of bread … and she could be sent to gaol … We have the jurisdiction to pass laws to deal with such matters and put such people in gaol, but when it comes to a question of making it a criminal offence for a man in authority to steal the time of his employees, at once the constitutional question is raised … I suggest to hon. Members that instead of raising the constitutional question they approach this matter from the other angle and remember that we are endeavouring to improve conditions for workers.[54]

The matter came up again on 10 June and this time Guthrie also read Geoffrion's opinion, which took a different view than Tilley's. He thought the wage theft provisions would be *ultra vires* but not the other provisions in the bill. The debate continued and J.S. Woodsworth, the leader of the recently formed Co-operative Commonwealth Federation, spoke up to support the bill.

> Should an employee break a bit of machinery or smash a window he is considered a criminal, while through a long series of years employers have persisted in practices

52. *Debates*, *supra* note 50, (29 May 1935) at 3166-67.
53. *Ibid* at 3168.
54. *Ibid* at 3169.

> which have undermined the health of workers, which have condemned them to a life in which they have no joy in living, and which have precluded them from the enjoyment of leisure. Yet these employers are not treated as criminals … Human life ought surely to be worth more than property. As yet we have hardly begun to protect human life, and while this legislation is far from being what I should like it to be, I feel that it is a gesture toward protecting the welfare of the employees and as such I welcome it.[55]

Ten days later, the bill received third reading without any amendments.

There was never an opportunity to test whether Bill 73 would have passed constitutional muster,[56] because it still had to be passed by the Senate, not a place known for its sympathies for progressive reform. Bill 73 received first and second reading on 25 June, at which time the legal opinions of Tilley and Geoffrion were read into the record. It was then referred to the Standing Committee on Banking and Commerce,[57] which reported an amended bill on 4 July. Senator George Perry Graham, a Liberal Senator, set the tone. "I hope my grandchildren or their children will not hold it against me when they find my name attached to this legislation."[58] In fact, the Banking Committee had significantly amended the wage theft provision. Whereas Bill 73 made it a crime to knowingly employ a person at less than the minimum wage fixed by "law or any competent authority" the Senate amendments narrowed its scope to "any law of Canada." Arthur Meighan, the former Conservative Prime Minister and now Senator, explained that the effect of this change was to avoid having Parliament create penalties for violations of provincial statutes. It would only apply to federal legislation and a federal minimum wage law had been passed earlier in the session so in theory a knowing violation of that law could be a criminal offence. The problem was that the federal minimum wage law had not been implemented and its constitutionality was almost certain to be challenged.[59] The Banking Committee also stripped away the provision regarding overtime and unlawful deductions, the former because it struck the Committee as preposterous to require an employer to prevent an employee from working overtime, while the latter was seen to be

55. *Ibid*, Vol 4 (10 June 1935) at 3502.
56. See C Wilfred Jenks, "The Dominion Jurisdiction in Respect of Criminal Law as a Basis for Social Legislation in Canada," (May 1935) 13:5 Can Bar Rev 279. Expressing the view that recent Privy Council judgments created space for such legislation.
57. *Debates of the Senate*, 17th Parl, 6th Sess, Vol 1 (25 June 1935) at 402.
58. *Ibid*, (4 July 1935) at 465.
59. *Ibid* at 466.

clearly a matter of contract.[60] The headline for the *Toronto Star's* story summarized the result succinctly: "Minimum-Wage Bill Sheared by Senate."[61] The amended bill returned to the House, which accepted the amendments, and approved the bill.[62] The new section 415A of the Criminal Code provided:

> Everyone is guilty of an indictable offence and liable to two years imprisonment or to a fine not exceeding five thousand dollars, or to both such imprisonment and such fine who, knowingly:
>
> (a) employs a person at a rate of wage less than the minimum wage rate fixed by any law of Canada;
>
> (b) falsifies any employment record with intent to deceive;
>
> (c) punches any time clock with intent to deceive;
>
> (d) puts the wages of more than one employee in the same envelope with the intent to evade the provisions of any law of Canada;
>
> (e) employs any child or minor person contrary to any law of Canada[63]

So wage theft was now a crime. Or was it?

III. UN-MAKING WAGE THEFT AS A CRIME

On the one hand, we might say that getting the wage theft law was easy. Neither workers nor workers' organizations initiated the idea for making wage theft a crime, nor did they lobby for its enactment. It was recommended by a royal commission and supported by the Conservative government of the day. On the other hand, it was actually very hard to make wage theft a crime in any meaningful way. Some members of the government clearly found the wage theft provision an embarrassment and the Senate found a way to emasculate the law, a change to which neither the government nor the Commons objected. The only question that remained was whether anyone would attempt to charge an employer with wage theft and if so whether a judge would give effect to the intent of the Senate amendment to limit the law to knowingly violating a federally enacted minimum

60. *Ibid*. Per Meighen, "I do not know how the most righteous man on earth could himself prevent a person from working overtime." The unfair trade practices provision, however, was not found by the Senate to be *ultra vires* and thus was approved without amendment as s 498A of the Code. *Ibid* at 464-65.
61. *Toronto Star* (4 July 1935) 1.
62. *House of Commons Debates*, 17th Parl, 6th Sess, Vol 4 (5 July 1935) at 4297-98.
63. *An Act to Amend the Criminal Code*, SC 1935, c 56, s 7.

wage, or read the phrase "a law of Canada" more broadly to include any Canadian law, federal or provincial.

The answer came a few years later in the only known prosecution of an employer for wage theft. The case arose out the International Ladies Garment Workers' Union's (ILGWU) campaign to organize the dressmakers in Montreal. The industry had proven to be particularly difficult to unionize because small shops predominated and the diverse workforce of French Canadians and Jewish immigrants proved difficult to unify. The Communist-led needle trade workers led a failed general strike in 1934, leaving in place the dreadful conditions reported to the Price Spreads commission by Gustave Francq, the head of the Quebec Minimum Wage Board.[64] In an effort to address these problems, the Quebec government enacted the so-called *Arcand Act*,[65] which allowed the terms of a collective agreement reached between a union and an employer to be extended across the industry in a particular region. The act also required the parties to establish a joint committee with the authority to enforce those terms. In effect, this created the possibility, through collective bargaining, for unions and sympathetic employers to jointly regulate terms and conditions of employment in the industry, thus preventing the kind of hyper-competition conducive to sweatshop conditions.[66]

With the new law in place and having achieved some success in the men's clothing industry, the ILGWU set out to organize the Montreal dressmaking industry in 1935. They succeeded in organizing the cutters, a smaller group of predominantly male workers in 1936, and used the *Arcand Act* to have the agreement extended across the industry. The following year, a push was made to organize the much larger group of female sewing machine operators, culminating in a general strike of several thousand dressmakers in April 1937. Efforts to circumvent the ILGWU by entering into an agreement with a Catholic trade union failed and, after a three-week strike, the ILGWU reached an agreement with the Dressmakers Guild, representing a group of employers making silk dresses.[67]

That fall, the ILGWU extended its effort to organize the uptown dressmakers who were not covered by the Guild agreement. It met with some success, signing up a few large shops, but other firms resisted, including the Ideal Dress Company, one of Montreal's largest dress manufacturers with over

64. Steedman, *supra* note 31 at 169-77; Evelyn Dumas, *The Bitter Thirties in Québec* (Montreal: Black Rose Books, 1975) at 46-53.
65. *Collective Labour Agreement Extension Act*, SQ 1934, c 56.
66. Fudge & Tucker, *supra* note 48 at 184-87; Steedman, *supra* note 31 at 208-12.
67. *Ibid* at 241-252; Dumas, *supra* note 64 at 56-67.

400 mostly female employees. On 25 November 1937, the union commenced a strike against Ideal after the company fired numerous trade union activists. Picket lines went up and Ideal brought in scabs. Several strikers were arrested and charged with intimidation for their picket line activities while one of the owners, Samuel Lupovitch, was convicted of assault and fined $10. The union also brought legal actions to recover unpaid wages owed to 350 workers from before the commencement of the strike. The employer backed down and paid the wages that were owed.

The turn to law by both Ideal Dress and the ILGWU did not end with those first actions. Ideal Dress subsequently sought and obtained an injunction that severely limited picketing while the union prepared charges in regard to minimum wage violations it alleged occurred prior to the strike. In a December 1937 edition of the ILGWU paper, "*Justice*" Bernard Shane, the ILGWU general organizer for Montreal reported:

> Each worker separately preparing charges for violation of minimum wage law for women … Investigation proves only forty-two workers earned minimum scale. To cover violation firm is charged with ordering people not to punch time clock two or three days a week. Three girls worked on one ticket for one pay envelope of twelve dollars … Union lawyers charging firm with conspiracy to defeat law.[68]

In the 1 January 1938 edition of *Justice*, the union reported that it had consulted with its lawyers, Peter Bercovitch, Jack Spector, and Mr. Fitch and decided to press charges.

> [W]e decided to give the employers a dose of their own medicine. We brought proceedings against them for violating the Federal laws by [sic] habint two and three girls working on one pay envelope; for violating the Provincial minimum wage law by paying to some of the girls wages as low as $2 for a 48 hours week, and for violating the Arcand law, in effect for the cutters' branch of the trade. … We then secured 10 warrants against both brothers for not properly recording workers in their employ.[69]

It is unclear from the reports whether the case proceeded by way of private prosecution or whether the Crown took charge of it. In any event, it went to trial in March 1938, while the strike was still ongoing. The defence argued that the phrase "any law of Canada" should be interpreted to only apply to Dominion legislation, as the Senate amendment intended. If this interpretation was accepted,

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68. Ideal Dress Co, Ottawa, Library and Archives Canada, Strike and Lockout Files, R224-76-4-E, Reel T3002. The quotes are from translations of the original newspaper made by the Department of Labour's correspondent.
69. *Ibid*.

no crime had been committed since the defendant was alleged to have paid less than what was required by a Quebec statute, not a Dominion one. Moreover, there was no federal minimum wage, since the 1935 legislation had never been implemented and had been declared *ultra vires* by the Judicial Committee of the Privy Council (JCPC) in 1937.[70] Magistrate Marin of the Montreal Police Court accepted the defence's argument. He also found that section 164 of the Criminal Code, which established penalties for the violation of federal and provincial statutes that did not stipulate a punishment was inapplicable since the Quebec minimum wage statute provided its own penalties. In the result, the charges were dismissed and there was no appeal.[71] The strike was also lost.

No further attempt was made to prosecute an employer under the Criminal Code for wage theft, although section 415A remained on the books. *Tremeear's Annotated Criminal Code* reported that section 415A was enacted as part of the 'New Deal' legislation that was held to be *ultra vires*. *Tremeear's* recognized that section 415A was not included in the package of laws referred to the courts, but offered the view that it too would presumably fall, with the possible exception of the provisions regarding the falsification of employment records or punching a time clock with the intent to deceive. It went on to state that, in any event, "any law of Canada" according to *Lupovitch* referred to a federal law, but that the federal government could not enact a national minimum wage.[72] This reading of "any law of Canada" would certainly have discouraged any further attempt to prosecute an employer for wage theft, notwithstanding that *Lupovitch* was a police court judgment.

Section 415A remained on the books until 1 April 1955 when a revised Criminal Code came into force.[73] That law was the outcome of a lengthy law reform process that began in 1949. A draft bill was prepared by a royal commission and was introduced in the Senate on 2 May 1952 as Bill H-8. The wage theft provision was removed by the commission and all that remained was the section making the falsification of an employment record a crime.[74] There is no record

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70. *Weekly Rest & Minimum Wages Reference*, *supra* note 48. The legislation ruled *ultra vires* was *The Minimum Wages Act*, SC 1935, c 44.
71. *R v Lupovitch*, [1938] 70 CCC 77, 76 CS 207; The Department of Labour, "Penalties Fixed by Dominion Parliament not Applicable to Quebec Minimum Wage Law," *The Labour Gazette* (April 1938) 468-69.
72. Alan Burnside Harvey, ed, *Tremeear's Annotated Criminal Code*, 5th ed (Toronto: Carswell, 1944) at 480.
73. *Criminal Code*, SC 1953-54, c 51, s 341.
74. *Report of the Royal Commission on the Revision of the Criminal Code* (Ottawa: Queen's Printer, 1954) at 20; SC 1953-54, c 51, s 341. The offence of falsifying an employment record is still on the books. See RSC 1985, C-46, s 398. For a discussion of the revision, see AJ MacLeod & JC Martin, "The Revision of the Criminal Code" (1955) 33:1 Can Bar Rev 3.

that the labour movement objected to this change, although they were concerned with other Criminal Code provisions under consideration.[75]

IV. CRIMINAL LAW AS SYMBOLIC ACTION?

The wage theft law was not the first Canadian criminal law specifically directed against employers. That distinction probably belongs to a late nineteenth-century law that made it an indictable offence to seduce or have sexual relations with a female employee under the age of 21 and of previously chaste character.[76] It was, however, the first legislation that criminalized what would have been recognized at the time as an aspect of the contract of employment or as social or economic legislation. But the law was truly symbolic; there was no federal minimum wage and thus no applicable minimum wage law that could be violated, let alone knowingly violated.

This was not the intent of the RCPS recommendation or of the government Bill as originally drafted and introduced. On their face both intended to use the master's tool against the master. Although the groundwork for the criminalization of wage theft was not laid by a popular campaign, unions such as the ILGWU, progressive intellectuals such as Cassidy, Hutchison, and Scott and some government officials, such as Gustave Francq, had publicized widespread violations of existing provincial female minimum wage laws. While the RCPS could and did address reform proposals to the provincial governments, the constitutional basis for federal social legislation was limited by the division of powers under the Canadian constitution, particularly as interpreted by the JCPC. The criminal law power provided one of the few possible avenues for federal legislation and so, in addition to the populist sentiment that informed Stevens and other commissioners like Kennedy, criminal law was both a means of stigmatizing a practice they found unacceptable and provided a constitutional basis for federal legislation. It also offered the Bennett government another opportunity to cobble together a legislative platform that might be seen as part of his belated new deal. However, the use of the criminal law against employers clearly embarrassed many legislators, and when the bill reached the Senate, it was "sheared" with the intent to reduce it to a purely symbolic measure, except in regard to clearly fraudulent practices.

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75. The Department of Labour, *Labour Gazette* (1953) 533, 537, 541, 545, 1278.
76. *An Act to Further Amend the Criminal Law*, SC 1890, c 37, s 4. On the history of criminal seduction in Canada, see Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: The Osgoode Society, 1991) at 69-80.

We do not know whether section 415A as originally drafted would have passed constitutional muster, but it very well might have based on the fate of another section of Bill 73, which criminalized the widespread practice of charging small businesses more than large enterprises. That section of the bill survived Senate scrutiny and became law, but like most of Bennett's new deal legislation, it was the subject of a judicial reference. The question was whether trade practices were exclusively a matter of property and civil rights and thus within the jurisdiction of provincial legislative power, or could also be treated as criminal activity and thus within the federal government's criminal law power. The JCPC upheld the law and in so doing adopted a rather expansive view of that power.

> [T]here is no other criterion of "wrongness" than the intention of the Legislature in the public interest to prohibit the act or omission made criminal. … The only limitation on the plenary power of the Dominion to determine what shall or shall not be criminal is the condition that Parliament shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in s. 92. … If a genuine attempt to amend the criminal law, it may obviously affect previously existing civil rights. … [T]here seems to be nothing to prevent the Dominion, if it thinks fit in the public interest, from applying the criminal law generally to acts and omissions which so far are only covered by provincial enactments. In the present case there seems to be no reason for supposing that the Dominion are using the criminal law as a pretence or pretext, or that the legislature is in pith and substance only interfering with civil rights in the Province. Counsel for New Brunswick called the attention of the Board to the Report of the Royal Commission on Price Spreads, which is referred to in the order of reference. It probably would not be contended that the statement of the Minister in the order of reference that the section was enacted to give effect to the recommendations of the Royal Commission bound the Provinces or must necessarily be treated as conclusive by the Board. But when the suggestion is made that the legislation was not in truth criminal legislation, but was in substance merely an encroachment on the Provincial field, the existence of the report appears to be a material circumstance.[77]

On the basis of this test, the JCPC could very well have upheld section 415A as originally drafted, although it also could have found the crime of wage theft to be "pretence or pretext" for interfering with property and civil rights. We will never know the answer; the crime of wage theft was dead on arrival in 1935.

For legal historians and criminologists, the story can be seen as evidence of the class-based nature of the criminal law and how it artificially differentiates between the wrongs committed by employers and the wrongs committed by

77. *Reference Re Section 498A of the Criminal Code*, [1937] AC 368 at 689-90, 1 DLR 688.

workers, making it difficult to use the master's tool against the master.[78] This experience has been repeated in more recent efforts to criminalize occupational health and safety in the aftermath of the 1992 Westray disaster, which killed 26 miners. A provincial inquiry into the disaster recommended, in 1997, that the federal government should introduce legislation to facilitate the criminal prosecution of corporate officers so that they can be held properly accountable for workplace safety. It took another six years and an extensive campaign by the Steelworkers union until the federal government finally enacted Bill C-45, which fell short of what the union and the NDP sought, but which nevertheless did increase corporate criminal liability for occupational health and safety.[79] Since the law came into force in 2004, however, prosecutions under Bill C-45 have been exceedingly rare and convictions even rarer, suggesting that the criminalization of employer misconduct is likely to be a symbolic action rather than a transformative one.[80]

Perhaps the lesson of history for activists is that the invocation of the symbolic image of criminal law is more powerful than its actual application against employers. As a result, current wage theft campaigns are not focused on criminalizing employer wage violations, but rather on changing public perceptions of the seriousness of the problem in order to pressure provincial governments to better enforce *regulatory* laws. Whether this strategy is more successful than making wage theft a crime remains to be seen.

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78. See *e.g.* Steven Bittle & Laureen Snider, "Law, Regulation, and Safety Crime: Exploring the Boundaries of Criminalizing Powerful Corporate Actors" (2015) 30:3 CJLS 445; Richard Quinney, *Class, State and Crime* (New York: Longman, 1980).
79. *An Act to Amend the Criminal Code (Criminal Liability of Organizations)*, SC 2003, c 21.
80. Steven Bittle, *Still Dying for a Living: Corporate Criminal Liability After the Westray Disaster* (Vancouver: UBC Press, 2012); Harry Glasbeek, "Missing the Targets—Bill C-45: Reforming the Status Quo to Maintain the Status Quo" (2014) 11:2 Pol'y and Practice in Health and Safety 9; Paul Almond & Sarah Colover, "Communication and Social Regulation: The Criminalization of Work-Related Death" (2012) 52:5 Brit J Criminol 997.