

THE RIGHTS STUFF: LABOUR AND THE CONSTITUTION

**IF LABOUR WERE CHARGED WITH POSSESSING CONSTITUTIONAL RIGHTS,
WOULD THERE BE ENOUGH EVIDENCE TO CONVICT IT?**

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INTRODUCTION

Before I speak to my announced topic – surely a long-winded topic even for an academic – I want to set the record straight on two questions. First, what am I doing at this lecturn? Second, why am I talking about the constitution?

As for the first question, I am here because it is an honour to be asked to give a lecture in honour of Larry Sefton who, with his brother Bill, was a leader of the Canadian labour movement and a distinguished social democrat. When I was 14, I worked to get one of the Sefton brothers elected to Parliament, though I can't recall which. The outcome of that campaign pretty much ended my own political career, and his too. But it wasn't the end of my association with the Seftons. No one who studied or taught labour law, or wrote or read about it, or practised it as an advocate or arbitrator, could fail to appreciate the central role played by the Steelworkers' Union under the leadership of Larry Sefton. Truly, labour law without the Steelworkers and Larry Sefton would have been like Hamlet without the Prince of Denmark. That's why I'm here.

But why am I talking about the constitution? I'm not a constitutional expert. In fact, I'm not even a constitutional amateur. However, we Canadians spend an inordinate amount of time worrying about the constitution, editorializing about it, renegotiating it, litigating it. According to public opinion polls, constitution-worship is arguably Canada's fastest growing religion and constitutional fetishism our most widespread sexual obsession. Even unions are not immune from these perverse tendencies. That's why I thought it might be interesting to take a closer look at what the constitution has actually meant for labour.

Here is what I propose to do. First, I will describe our experience with the Charter of Rights and Freedoms in the field of collective rights. Second, I will describe how the Charter has - or hasn't - advanced equality in the workplace and elsewhere. Third, I

will describe how other features of the Canadian constitution have tended to frustrate the interests of unions and workers. Fourth, I will try to put the first three points in context by reflecting on the inherent limits of constitutional litigation as a strategy for social transformation. Finally, in a surprise ending - which I have now given away - I will introduce you to what I call “the real constitution” - the constitution which in fact determines labour rights and much else that is significant in our national life.

CONSTITUTIONAL LITIGATION CONCERNING COLLECTIVE RIGHTS

a. Background

When we adopted the Charter of Rights and Freedoms in 1982,¹ the trade union movement did not argue for the entrenchment of labour rights, though it had ample opportunity to do so. There are many reasons why this might have been the case: unions had a running feud with then-Prime Minister Trudeau - the prime proponent of the Charter; they were preoccupied with their ongoing struggles against employers; they failed to perceive the potential importance of the Charter; they did perceive its importance but were concerned that if they sought to constitutionalize labour rights, business would then seek to constitutionalize property rights, thereby hobbling the state’s regulatory powers; and finally, they almost certainly believed - for good historical reasons - that even if labour and social rights were entrenched, judges were unlikely to interpret them sympathetically.

These are all plausible explanations. However, whichever was the right one, the fact is that labour made no attempt to entrench the rights to unionize, to bargain collectively, to strike or to be protected from insecurity and want. Thus, labour and social rights did not find their way into the Charter, except for so-called mobility rights - the right to move to and pursue a livelihood in any province² - and a vague promise that Canadians in all parts of the country would enjoy reasonably equal access to public goods and services.³ It is worth noting, however, that mobility rights and

equalization programs also benefit employers, and ultimately serve more to promote federalism than they do to protect workers.

That said, even though labour and social rights were not entrenched, other more generic rights were. These generic rights included freedom of peaceful assembly, association and expression⁴ - all potentially important to labour – and the right “not to be deprived of life, liberty and security of the person ... except in accordance with the principles of fundamental justice...”⁵ which on its face offers workers no more or less protection than anyone else in trouble with the law. However, important elements of labour were clearly intended to benefit from Charter provisions which guaranteed equality “before and under the law ... without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability”.⁶ By judicial interpretation, the protection of this section has been extended to “analogous groups” - a concept to which I will return. First however, I will map out how Charter jurisprudence has affected collective labour law

b. Collective labour law under the Charter

Our Supreme Court got off to a disappointing start in the mid-1980s, when it dealt with a trilogy of cases in which workers claimed that by guaranteeing freedom of expression and association, the Charter had actually entrenched the right of workers to organize, strike and picket.⁷ That first trilogy ended with the score of management *three*, labour *nil*. However, the Court very recently decided a second labour rights trilogy. In one case, the Court extended Charter protection of freedom of association to agricultural workers; in a second it characterized picketing as free speech; and in a third it ruled that provincial legislation requiring construction workers to be union members was justified even though it might otherwise violate their freedom of association.⁸ This time ‘round the scoreboard read labour *three*, management *nil*. Or so it seemed. However, appearances deceive. On closer examination, in each case in this second trilogy, the Supreme Court merely instructed legislatures to carefully balance labour’s

Charter rights against economic exigency, public safety and private rights of property, person and reputation. If legislatures can offer a reasonable justification, said the Court, legislation restricting labour rights will be upheld.

As you can imagine, the cases in these two trilogies make good reading. They contain passionate statements about how work defines our status and sense of self-worth; about the virtues of an open society; about the need of the powerless to be able to band together for mutual support against powerful governments and employers. All most admirable if you happen to believe in labour rights. And there are some interesting passages on the other side. One judge, for example, analogized picketing to playing golf: neither one, he says, is illegal just because it involves concerted action; but neither one is constitutionally protected. I wrote a short piece at the time, entitled "The Right to Golf", in which I pointed out that this was in fact a brilliant analogy, that both activities often involved taking time off work, carrying around sticks, doing a lot of swearing and once the activity was concluded, a trip to the bar to celebrate the resumption of normal, friendly relations.⁹ Another judge - having affirmed in no uncertain terms the freedom of downtrodden agricultural workers to associate - suddenly became coy: "We neither require nor forbid the inclusion of agricultural workers in a full collective bargaining scheme", he said.¹⁰ Ontario's Conservative government got the joke. It enacted the Agricultural Workers Protection Act severely punishing any interference with their right to associate - but forbidding farm workers to bargain collectively or to strike. A third judge wrote herself into the history books by using the Charter's guarantee of freedom of expression to overturn earlier decisions which had held all secondary picketing to be illegal *per se*. She then wrote herself out of the history books by acknowledging that such picketing would be illegal if it "amounts to a crime or a tort".¹¹ Since, as any labour lawyer knows, virtually all forms of picketing have been held to be criminal or tortious, the Supreme Court gaveth, but in the same breath it tooketh away.

Perhaps you will agree, then, that at least on the basis of the record to date, Canadian

workers have no reason to be optimistic about using the Charter to protect their collective rights.

c. Equality in the workplace

The equality provisions of the Charter involve a somewhat different story. These provisions have been repeatedly invoked over the past twenty years to force governments and employers to address issues of workplace discrimination against women and against gays and lesbians, who have been deemed an “analogous group” entitled to protection. Partly as a result of this litigation, governments have forced employers to eliminate overt workplace discrimination, to prevent harassment, to provide equivalent benefits for workers of all types and persuasions, and even to modify workplace arrangements to accommodate disabled people and people with non-standard religious customs. I reiterate: Charter litigation has played *some* role in forcing governments to promote equality in the workplace. But not a *big* role. Much more important have been social, economic and political mobilization by advocacy groups, interventions by human rights agencies, the changing demography of the workplace, and shifts in social attitudes from one generation to the next.

What I want to point out, however, is that while the legal rights of various groups of workers have expanded considerably since the Charter was adopted, their actual experience of life at work has not changed that much. In fact, some of my own recent research suggests that changes have not only been quite modest; they have not always been positive. For example, the wage gap between men and women has been narrowed a little; but very little; the wage gap between recent immigrants and other workers has actually grown. There are a few more women and minority group members in managerial positions; but the percentages are still derisory. Unemployment rates for aboriginal peoples and people of colour remain radically higher than the rates for white workers. Disabled people continue to suffer discrimination in many workplaces, despite the new duty to accommodate. And so on.¹²

The only people who might be surprised by these findings, I'm afraid, are constitutional lawyers. Everyone else is at some level familiar with the social gradient that defines Canadian society. That gradient works in the following way: if you can imagine a line sloping down from the most affluent to the least affluent people in our society, at each lower level you will find not only less wealth, but less health, less education, less access to decent jobs, less political rights, less protection from official abuse and so on. And you will also find at each point on the downward sloping line an increasing percentage of women, disabled people, recent immigrants, racial minorities and so on. The Charter is not intended to alter that wealth gradient. Workers and poor people, unlike gays and lesbians, have not been deemed an "analogous group" entitled to Charter protection. Nor are they likely to be. Nor if they were, would it matter much. The result is that even an aggressive and largely successful campaign to build a constitutional foundation for equality has produced very modest results in the workplace or elsewhere.

THE CONSTITUTION AND LABOUR RIGHTS: STRUCTURAL AND INSTITUTIONAL DIMENSIONS

The constitutional provisions with the greatest impact on labour, I believe, are not found in the Charter; nor are they provisions which even mention the word "labour". Rather they deal with the architecture of the Canadian state and of our federal system.

As to the structure of the state, suffice it to say that in a number of recent creative - not to say self-aggrandizing - decisions, Canadian judges have given themselves constitutional preeminence and powers they were never intended to enjoy.¹³ This may have its good side, but so far as labour law is concerned, there is little to recommend it.

The problem begins with judicial review of labour tribunals. From the beginning, courts often adopted perverse interpretations of labour legislation and collective agreements, and imposed inappropriate procedural requirements on labour tribunals. At first, legislatures responded by enacting specific amendments to overrule each such decision. However, judges seemed to get things wrong faster than legislatures could put them right again. Clearly, the solution was to simply take away the power of courts to review labour board decisions which - everyone thought - legislatures had a perfect right to do. However, in 1982 the Supreme Court of Canada suddenly “discovered” - 115 years after the fact - that the right to review and overturn tribunal decisions had actually been written into the constitution in 1867 and couldn't be written out again.¹⁴ Ironically, a couple of years before the Supreme Court held that judicial review was constitutionally entrenched, it also announced that judges ought to use their reviewing powers more sparingly, because their interventions were doing more harm than good. It seems that judges, unlike most of us, can suck and whistle at the same time.

Why does judicial review matter? Because it is slow and costly and can be used to drag out and ultimately defeat arbitration or labour board proceedings; because it prevents labour tribunals from using their expertise to interpret the fact patterns and legal language they work with on a daily basis; and because it injects courts back into the equation of power, despite the fact that special expert bodies like labour boards had to be created in the first place precisely because courts handled labour matters so badly.

Judicial review long antedated the Charter. However, when the Charter arrived in 1982, it altered the dynamic of labour board and arbitration proceedings. Charter arguments are frequently advanced by the parties; this means that tribunal members must be legally trained and that the parties must be represented by counsel; it also means that costs are enhanced, that proceedings are more adversarial and protracted and that the likelihood of review proceedings is greatly increased. Moreover, the

Supreme Court recently held that Charter claims which arise in the context of collective bargaining must not come directly to the Courts, but must be taken first to labour boards or arbitrators.¹⁵ In my view, the result of all this Charter-related litigation is that labour tribunals have lost forever their ability to deal rapidly, informally, knowledgably and effectively with complex and fast-moving employment disputes.

And finally, there is the difficult matter of Canadian federalism. During the 1920s and 1930s, our highest courts held that labour law was a matter of “property and civil rights” and of “a merely local and private nature in the province” and therefore prima facie subject to provincial, not federal, authority.¹⁶ Moreover, they held that neither the federal government’s general powers, nor its treaty power nor its power over interprovincial and international commerce authorized it to regulate the labour market.¹⁷ Only in a few sectors where federal authority was specifically enumerated - banking, transportation and communications - was there room for federal labour law. As a result, 90% of Canadian workers come under provincial jurisdiction, only 10% under federal jurisdiction.

This decentralization of legislative authority has one positive aspect: it enables the provinces to experiment with progressive labour legislation; but of course it also enables them to experiment with repressive labour legislation, which some of them seem quite willing to do. Worse, these constitutional interpretations have prevented the federal government from developing Canada-wide labour policies, except in the context of national emergencies, such as war or economic crisis. Thus, we have a national economy, where all the factors of production effectively operate across the country; but we have no means of constructing an integrated system of labour market regulation. In fact, the situation is even worse. When Canada joined NAFTA, it not only became part of an integrated continent-wide economy; it became party to the North American Agreement on Labour Cooperation - the NAALC - which establishes a rudimentary trans-national regime of regulation. But because of our own constitutional constraints, the NAALC contains a protocol which makes it applicable to Canada only when a

prescribed number of provinces sign on, and then, only in respect of industries 90% of whose employees work in those provinces. Consequently, the auto industry – Canada's largest single source of exports, an industry which is truly continental in scope - is not covered, because it is located in Ontario which has never acceded to the NAALC.

To sum up, the Canadian state cannot create national or transnational regimes of labour regulation; the provinces cannot effectively regulate beyond their own borders; and even within their borders, they often cannot regulate effectively because they can neither immunize labour tribunals from judicial review, nor prevent them from sinking into the legalistic bog known more respectfully as the constitution.

And there are further problems. Not only can regulatory structures not be made congruent with the structures of industrial relations and labour markets, but in fact provinces are encouraged to engage in regulatory competition, ratcheting down labour standards as a means of attracting new investment. Finally, the structure of Canadian federalism has deflected the labour movement from developing a national identity or focus. This has caused divisions and distractions which have cost labour dear in terms of its political influence and industrial power.

No wonder some idealistic academics and union lawyers hoped that the Charter - which is undeniably national in its reach and universal in its appeal - might prove to be the means by which some kind of shared consciousness might be promoted amongst Canadian workers.¹⁸ Alas, the working class is not an "analogous group" entitled to protection. Whatever gains the Charter has brought to workers has accrued to them not as workers but as women, disabled people, gays, aboriginals and so on. And the resulting identity politics have created centrifugal influences which have actually made things more difficult for the labour movement, rather than less so.

All in all, then, the Canadian constitution has not been kind to labour. Nor will it ever

be.

WHY CONSTITUTIONALIZING LABOUR RIGHTS IS DOOMED TO FAIL

The reason is that litigation is unlikely to accomplish very much whatever the constitutional text may say, whoever the judges may be, however skillfully and audaciously the bar and legal academe may construct new theories and arguments. As I hinted earlier, the deep structures of political economy are not going to be transformed by judicial proclamations. Constitutions may declare that workers have rights; but they do not and cannot endow workers with the financial and political means to claim and exercise those rights. Courts may adopt novel interpretations and award imaginative remedies, as they actually have in some countries, but they cannot change the deep structures of the system. I would be hard pressed to think of a single example in history where constitutional litigation has made a positive difference for workers - and I consciously include here the United States, with its glorious constitutional traditions, its brilliant judges and scholars, its aggressive counsel - and the lowest rates of unionization, the least politically influential labour movement, the least secure workers, the least equal distribution of wealth and power of any of the world's advanced democracies.

It isn't that things can't be made better. It's just that constitutional litigation can't do much to make them so. But litigation can make things worse whether by design or unintentionally. We have two hundred years of experience with judges revealing their hostility to unions, their indifference to workers and their ignorance about the world of work, with judges reading down workers' rights or enlarging those of employers. But, you will rightly say, that's another time; judges today are more knowledgeable about labour; new constitutions can give them scope to be more creative and progressive. This is true, to a certain extent, but several obstacles still stand in the way.

The first is that judges and constitutions are not so much the problem as the

adjudicative process itself. Most issues which generate social controversy, especially labour issues, can't be dealt with on a zero-sum basis, by declaring a winner and a loser. Resolving constitutional conflict requires subtle trade-offs between principles and material interests, between majority interests and minority rights, between present imperfections and future improvements, between symbolic gestures and practical outcomes, between devils we know and those we don't. The same holds true of labour conflict, as any knowledgeable labour lawyer will tell you. Trade-offs in labour law involve power, not just logic or ethics. They are polycentric not unidimensional. They are dynamic not static. That is why labour laws have to be negotiated in the first place, then constantly renegotiated over time as power shifts, as the economy changes, as technology and demography change, as social attitudes change, as we learn from experience, as new insights emerge.

Of course lawyers pretend that labour controversies can be chopped up into bits small enough to be processed one at a time through the court machinery we happen to have available to deal with them. But that doesn't mean that these bits actually become detached from larger social and political processes. When the dust settles, it usually turns out that litigation has produced only an illusion of settlement, not a lasting resolution of fundamental issues.

Here's why: Litigation can't accommodate all affected parties, present and future; it is controlled by the primary litigants. Counsel can't explore issues open-endedly, only from the perspective of their clients. Briefs can't - or don't - convey the whole spectrum of relevant social facts, only those which fit within the conceptual framework of relevance established by legal doctrines and defined by the claims of the parties. Judges can't conduct open-ended independent investigations; in fact, they are hard-pressed to process information supplied by the parties - a task they often assign to their law clerks, some of whom may once have taken a course in economics or sociology. And court judgments don't cope with power, don't deal with problems not mentioned in the briefs, don't leave space for ongoing reconsideration. On the contrary, judgments

are written as if they lay down “the law” for all time, though we know that they actually last only until another court is brave enough to overrule them, clever enough to distinguish them or unfastidious enough to ignore them. So constitutional adjudication is the antithesis of what we need to deal with societal conflict.

However, this doesn't mean that constitutional litigation has no consequences in the real world of industrial relations. It may help to change public understanding of and sympathy for labour - but in which direction is unpredictable. It may siphon off the scarce resources and energies of unions and social movements from political and industrial mobilization into litigation. And it may teach workers to see themselves not as members of a mass movement or an oppressed class, but as identity-asserting, rights-bearing constitutionally empowered individuals, thus helping to dissolve union solidarity. These possibly unintended outcomes of the constitutionalization of labour rights are very serious indeed.

And now, having trashed constitutional litigation so thoroughly, I want to say that in the great scheme of things, the constitution – the document which has “Constitution” written in bold letters across the top - is relatively innocuous. It is the “real constitution” we ought to be concerned with.

LABOUR LAW AND THE “REAL CONSTITUTION”

Earlier on I mentioned that while Canada's constitution assigns power over labour and employment law to the provinces, in fact the economy in general and labour markets in particular operate nationally. Employers can and do shift production from one province to another; they move employees about; employees themselves pursue jobs across provincial boundaries without a second thought. Capital is even more mobile. Work shifts across international boundaries. Company policies which define how workers will be treated in Canada or South Africa may be established in Germany or, more likely, the United States. And ideas are mobile as well: how management should be organized, how new technologies may change job requirements and remuneration

structures, how to deal with racial diversity or disabled workers.

Given all these formative influences in the workplace, it doesn't matter very much what the constitution says about labour rights, or where it assigns responsibility for them. Where there is dissonance between rights and reality, reality is likely to prevail. Labour legislation can be amended; labour tribunals can be staffed with less progressive members; pro-labour interpretations of legislation can be altered; enforcement of labour laws can be privatized, made less aggressive, or abandoned altogether; government policies can encourage employers to take a hard line. All of those things are happening today, in this age of neo-liberal globalization.

So the first rule of the "real constitution" is that the fundamental laws of nation states must be subordinated to global regimes, the values they embody and the policies they propagate. And the real constitution has a second rule, delightfully captured by a graffito I once read scrawled on a wall in London: "the economy is the secret police of our desires". Constitutional rights, statutory entitlements, administrative initiatives, the terms of the implicit contract between the state and civil society: all of these must give way to economic realities. These first two rules combine to produce the third rule of the real constitution: ultimate responsibility for labour rights must be vested in the Ministers of Finance and International Trade and the Head of the Central Bank, not the Attorney-General or the Minister of Labour.

All of this may lead you to think that I believe that labour's rights count for nothing under the real constitution. However, I promised you a surprise ending and here it is: I believe that labour rights are at least as likely to be protected under the real constitution as under the impressive document which hangs on the wall of every courthouse and lawyer's office. This is why: Like any conventional constitution, the "real constitution" is likely to be riddled with ambiguity, obfuscation and contradiction which is how it accommodates fundamental change. Moreover, like any conventional constitution, the real constitution identifies the institutions and processes which manage

change or for, that matter, prevent change. And finally, like any conventional constitution, the real constitution has its own justificatory rhetoric, its symbols and myths, which it uses to claim and confer legitimacy. In other words, it ought to be possible for labour to assert its rights under the real constitution by taking advantage of its ambiguities, by focussing on where power actually lies and by challenging the state to live up to its own standards.

Now I offer you this intriguing thought: the real constitution has a lot in common with the British constitution which, in turn, was one of the cornerstones of our own constitutional arrangements. We therefore ought to remind ourselves of the history of labour rights in the United Kingdom. British labour won its rights by social, industrial and political struggles, not by constitutional litigation. British labour lost its rights in just the same kinds of struggles, not by constitutional amendment. It is just possible, then, that the future of labour rights under Canada's real constitution might look a lot like the history of labour rights under the British constitution.

So members of the jury, you will recall that the subtitle of my lecture was framed as a question: "if labour were charged with possessing constitutional rights, would there be enough evidence to convict it?" It is time for you retire to consider your verdict.

¹. Constitution Act 1982 , Part I.

². Section 6.

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3. Part III.
4. Section 2.
5. Section 7.
6. Section 15.
7. The Supreme Court's so-called "labour trilogy" comprised: Reference re Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313; Retail, Wholesale and Department Store Union, Locals 544, 496, 635 and 955 v. Government of Saskatchewan, [1987] 1 S.C.R. 460; Public Service Alliance of Canada v. Canada, [1987] 1 S.C.R. 424. In each of these cases the Supreme Court declined to use the Charter of Rights and Freedoms to protect the right of workers to bargain collectively or to strike. The literature criticizing the trilogy is extensive. See e.g. D. Beatty & S. Kennett, "Striking Back: Fighting Words, Social Protest and Political Participation in Free and Democratic Societies" (1988) 67 Can. Bar Rev. 573; J. Kilcoyne, "Developments in Employment Law: the 1986-87 term" (1988) 10 Supreme Court Law Rev. 183; P. Weiler, "The Charter at Work: Reflections on the Constitutionalizing of Labour and Employment Law" (1990) 40 U. Toronto Law J. 117; B. Etherington, "An Assessment of Judicial Review of Labour Laws under the Charter: Of Realists, Romantics, and Pragmatists" (1992) 24 Ottawa Law Rev. 685.
8. R. v. Advance Cutting & Corning Ltd., (2001) 205 D.L.R. (4th) 385 (Quebec legislation requiring union membership for all construction workers upheld); Dunmore v. Ontario (Attorney General), (2001) 207 D.L.R. (4th) 193 (total exclusion of agricultural workers from collective bargaining struck down); Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd., (2002) 208 D.L.R. (4th) 385 (common law prohibition of secondary picketing as illegal per se struck down).
9. "The Right to Golf: Reflections on the Future of Workers, Unions and the Rest of Us Under the Charter" (1989) 13 Queen's L.J. 217.
10. Binnie J in Dunmore supra note 8.
11. McLaughlin CJC in Pepsi-Cola supra note 8.
12. The evidence is reviewed in H. Arthurs and B. Arnold "Does the Charter Matter?" (2005) Review of Constitutional Studies (forthcoming).
13. I have developed this critique in "Constitutional Courage" (2004) 49 McGill Law Journal 1.
14. Crevier v. AG Quebec (1982) 127 DLR (3d) 1.
15. Weber v Ontario Hydro [1995] 2 SCR 929.
16. Toronto Electric Commissioners v. Snider [1925] 2 DLR 5 (PC).
17. Canada (Attorney General) v. Ontario (Attorney General) [1937] A.C. 326 (P.C.) (Labour Conventions Reference).
18. D. Beatty, *Putting the Charter to Work: Designing a Constitutional Labour Code* (Kingston and Montreal: McGill-Queens University Press, 1987); T. Kuttner, "Constitution as Covenant: Labour Law, Labour Boards and the Courts from the Old to the New Dispensation" (1988) 13 Queens Law

J. 32.