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Aller au sommaire du numéro

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Résumé de l'article

Même si la constitution officielle du Canada ne fait aucunement mention du droit du travail ou de l’emploi, et quoique la jurisprudence ait depuis longtemps établi la prépondérance de la compétence provinciale dans ce domaine, les droits constitutionnels des syndicats et des travailleurs ont récemment fait l’objet de nombreux litiges et d’un examen approfondi dans la doctrine. Cet article passe en revue les tentatives de se servir des dispositions de la *Charte canadienne des droits et libertés* afin de protéger les intérêts des syndicats et des travailleurs et de faire progresser la cause de l’égalité en milieu de travail. Il explore ensuite la manière dont l’architecture constitutionnelle du Canada a eu tendance à contrecarrer les intérêts des syndicats et des travailleurs. En dernier lieu, il suggère que les intérêts des syndicats et des travailleurs seront tranchés en grande partie non pas par la constitution officielle mais bien par la « véritable constitution », soit la structure de son économie. Bien que la « véritable constitution » soit généralement défavorable aux droits et intérêts des syndicats et des travailleurs, à l’instar de la constitution officielle, elle est vague et laisse ample place à l’évolution et pour faire valoir des oppositions.

Labour and the "Real" Constitution*

Harry W. ARTHURS**

While Canada's formal constitution does not mention labour or employment law, and while jurisprudence has long established the primacy of provincial jurisdiction in this field, labour's constitutional rights have been the subject of extensive recent litigation and scholarship. This article reviews attempts to use the provisions of the Canadian Charter of Rights and Freedoms *to protect labour's interests and to advance the cause of equality in the workplace. It then explores how Canada's constitutional architecture has tended to frustrate the interests of unions and workers. And finally, it proposes that labour's interests will largely be determined not by the formal constitution but by the "real constitution"—the structure of its economy. While the "real constitution" generally disfavours labour's rights and interests, like the formal constitution it is vague and leaves ample room for challenge and for change.*

Même si la constitution officielle du Canada ne fait aucunement mention du droit du travail ou de l'emploi, et quoique la jurisprudence ait depuis longtemps établi la prépondérance de la compétence provinciale dans ce domaine, les droits constitutionnels des syndicats et des travailleurs ont récemment fait l'objet de nombreux litiges et d'un examen approfondi dans la doctrine. Cet article passe en revue les tentatives de

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se servir des dispositions de la Charte canadienne des droits et libertés *afin de protéger les intérêts des syndicats et des travailleurs et de faire progresser la cause de l'égalité en milieu de travail. Il explore ensuite la manière dont l'architecture constitutionnelle du Canada a eu tendance à contrecarrer les intérêts des syndicats et des travailleurs. En dernier lieu, il suggère que les intérêts des syndicats et des travailleurs seront tranchés en grande partie non pas par la constitution officielle mais bien par la « véritable constitution », soit la structure de son économie. Bien que la « véritable constitution » soit généralement défavorable aux droits et intérêts des syndicats et des travailleurs, à l'instar de la constitution officielle, elle est vague et laisse ample place à l'évolution et pour faire valoir des oppositions.*

The word "labour" does not appear in the Canadian constitution, nor do the words "worker", "trade union", "strike" or "picketing". This seems odd. After all, the constitution concerns itself with matters great ("peace order and good government") and small ("beacons, buoys and ... auctioneer

... licenses")[1]. Its text not only invokes the sublime principles ("the rule of law ... a free and democratic society ... principles of fundamental justice") which bridge the deep fault lines of society ("race, national or ethnic origin, colour, religion, sex or...disability")[2] but also prompts almost Proustian recall of the other factors of production ("sea coast and inland fisheries ... patents of invention and discovery ... bills of exchange and promissory notes... ships, railways, canals, telegraph ... heavy crude oil ... sawdust ... wood pulp")[3]. However, "labour" appears only when it ceases to labour—when it is pensioned off or becomes "unemployed"[4].

I have noted elsewhere the recent disappearance of "labour" as an industrial power, a political force, a socio-cultural category and a department of public administration[5]. Paradoxically, however, although Canada's fundamental law dares not speak its name, labour has not disappeared from Canadian constitutional discourse. To the contrary, labour's constitutional rights have been the subject of extensive recent litigation and scholarship. In this article, I will first review attempts to use the provisions of the *Canadian Charter of Rights and Freedoms* to protect labour's collective interests and to advance the cause of equality in the workplace and, more generally, in society. Next, I will explain how the architecture of the Canadian constitution has tended to frustrate the interests of unions and workers. And finally, I will suggest that what I call Canada's "real constitution" largely determines labour rights and interests.

1 Labour and the *Canadian Charter of Rights and Freedoms*

1.1 Background

The *Canadian Charter of Rights and Freedoms* was adopted in 1982[6]. While some progressive academics and union lawyers hoped that the Charter might serve as a vehicle to promote shared consciousness

1. *Constitution Act, 1867*, (U.K.) 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 91 [hereinafter *Constitution Act, 1867*].
2. *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (U.K.), c. 11, Preamble ss. 1, 7, 15 [hereinafter *Constitution Act, 1982*].
3. *Constitution Act, 1867*, ss. 91, 92A.
4. *Constitution Act, 1867*, ss. 94A, 91(2A).
5. H.W. ARTHURS, "What Immortal Hand or Eye? – Who Will Redraw the Boundaries of Labour Law?", in G. DAVIDOV & B. LANGILLE (eds.), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work*, Oxford, Hart Publishing, 2006.
6. *Constitution Act, 1982*, Part I.

amongst Canadian workers[7], the trade union movement itself notably failed to argue for the entrenchment of labour rights in the Charter. There are many possible reasons why it failed to do so: Québec unions and those in the rest of Canada differed over entrenchment of the Charter; unions in general were preoccupied with their ongoing struggles against employers and Prime Minister Trudeau, the Charter's principal architect; they failed to perceive the potential importance of the Charter; they were concerned that if they sought to entrench labour rights, business would seek to entrench 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[8].

These are all plausible explanations. However, whichever was the true one, the crucial fact is that labour made no attempt to ensure that the Charter protected workers' rights to unionize, to assert their collective power or to be sheltered 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 province[9]—and a vague promise that Canadians in all parts of the country would enjoy reasonably equal access to public goods and services[10]. 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 expression[11]—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..."[12] which on its face offers workers no more or less protection

7. D.M. BEATTY, *Putting the Charter to Work: Designing a Constitutional Labour Code*, Kingston and Montreal, McGill-Queen's University Press, 1987; T.S. KUTTNER, "Constitution as Covenant: Labour Law, Labour Boards and the Courts from the Old to the New Dispensation", (1988) 13 *Queen's L.J.* 32.
8. B. Perry, "The Role of Popular Mobilizations in the Struggle for the Canadian Charter of Rights and Freedoms", (1994) 22 *Crime, Law and Social Change* 192-194; J.M. WEILER, "The Regulation of Strikes and Picketing Under the Charter...", in R.M. ELLIOT and J.M. WEILER (eds.), *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms*, Toronto, Carswell, 1986, p. 212-213.
9. *Canadian Charter of Rights and Freedoms*, 1982, section 6.
10. *Id.*, Part III.
11. *Id.*, Section 2.
12. *Id.*, Section 7.

than anyone else in trouble with the law. However, significant numbers of workers 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"[13]. By judicial interpretation, the protection of this section has been extended to "similarly situated" or "analogous" groups such as gays and lesbians[14].

For better or worse, neither the working class nor poor people have been identified as an "analogous group" entitled to protection; nor are they likely to be[15]. Consequently, any legal gains the Charter has brought to workers or poor people have accrued to them as women, people of colour, disabled people, gays, aboriginal peoples and so on. Moreover, since the Charter was enacted, social and political mobilization occurs with increasing frequency around these Charter categories, rather than by virtue of "labour" or "working class" solidarity. While no doubt mobilization around Charter identities has led to some improved legal rights and social benefits for members of these groups, even in an era of neo-liberalism, one unintended consequence has been to distract attention from, if not actually to hasten, the disappearance of "labour" in all the senses mentioned above.

In succeeding sections, I explore the effects of the Charter on labour in its collective or solidaristic sense, on equality seeking groups and on social rights.

1.2 Collective labour law

The Supreme Court of Canada in the mid-1980s decided a trilogy of cases arising out of workers' claims that by guaranteeing freedom of expression and association, the Charter had actually entrenched the right of workers to organize, strike and picket[16]. That first trilogy ended with

13. *Id.*, Section 15.
14. *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R 143.
15. M. JACKMAN, "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination under the Canadian Charter and Human Rights Law", (1994) 2 *Rev. Const. Stud.* 76.
16. The Supreme Court's first "labour trilogy" comprised: *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 [hereinafter *PSERA*]; *Retail, Wholesale and Department Store Union,* v. *Saskatchewan*, [1987] 1 S.C.R. 460 [hereinafter *RWDSU* v. *Saskatchewan*]; *Public Service Alliance of Canada* v. *Canada*, [1987] 1 S.C.R. 424 [hereinafter *PSAC*]. In each of these cases the Supreme Court declined to use the *Canadian 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

the score of management *three*, labour *nil*. However, a dozen years later the Court decided a second labour rights trilogy extending Charter protection of freedom of association to agricultural workers, characterizing picketing as free speech, and upholding a statute designed to reduce labour conflict by requiring workers to join a union—a *prima facie* violation of their freedom of association[17]. This time 'round the scoreboard read labour *three*, management *nil*. Or so it appeared. However, appearances deceive. On closer examination, in its decisions 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[18].

Many judgments in these two labour trilogies 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 admirable sentiments for those who believe in labour rights[19]. And the judgments denying or limiting labour's constitutional rights are no less engaging. One judge, for example, analogized picketing to playing golf: neither activity, he said, is illegal just because it involves concerted action; but neither is constitutionally protected[20]. Another

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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 *S.C. Law Rev.* 183; P. WEILER, "The Charter at Work: Reflections on the Constitutionalizing of Labour and Employment Law", (1990) 40 *U.T.L.J.* 117; B. ETHERINGTON, "An Assessment of Judicial Review of Labour Laws under the Charter: Of Realists, Romantics, and Pragmatists", (1992) 24 *Ottawa L. Rev.* 685.

17. The Supreme Court's second "labour trilogy" comprised: *Dunmore* v. *Ontario (Attorney General)*, (2001) 207 D.L.R. (4th) 193 (S.C.C.) [hereinafter *Dunmore*] (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 [hereinafter *Pepsi-Cola*] (common law prohibition of secondary picketing as illegal per se struck down); *R.* v. *Advance Cutting & Coring Ltd.*, (2001) 205 D.L.R. (4th) 385 [hereinafter *Advance Cuttingg & Coring*] (Québec legislation requiring union membership for all construction workers upheld).

18. *Dunmore*, *supra*, note 17, para. 49; *Pepsi-Cola*, *supra*, note 17, para. 107; *Advance Cutting & Coring*, *supra*, note 17, para. 267.

19. *PSERA*, *supra*, note 16, para. 95; *RWDSU* v. *Saskatchewan*, *supra*, note 16, para. 69; *PSAC*, *supra*, note 16, para. 48; *Dunmore*, *supra*, note 17, para. 115; *Pepsi-Cola*, *supra*, note 17, para. 33; *Advance Cutting & Coring*, *supra*, note 17, para. 16.

20. McIntyre J. in *PSERA*, *supra*, note 16, para. 176. See also H.W. ARTHURS, "The Right to Golf: Reflections on the Future of Workers, Unions and the Rest of Us Under the Charter", (1988) 13 *Queen's L.J.* 17.

judge, having unequivocally affirmed the freedom of downtrodden agricultural workers to associate, suddenly turned Delphic: "I neither require nor forbid the inclusion of agricultural workers in a full collective bargaining regime," he said[21]. Ontario's then-Conservative government, whose withdrawal of the right of these workers to unionize had provoked the litigation, interpreted the oracle's message in accordance with its own inclinations. It enacted the *Agricultural Employees Protection Act* severely punishing any interference with the right of farm workers to associate—but forbidding them to bargain collectively or to strike[22]. A third judge imaginatively invoked the Charter's guarantee of freedom of expression to overturn earlier lower court decisions which had held all secondary picketing to be illegal *per se*. However, she then remarked that "of course" such picketing would still be illegal if it amounted to "tortious or criminal conduct"[23]. Since over the years virtually all picket line conduct has been held to be criminal or tortious[24], the practical consequences of her original holding are, to say the least, modest.

At least on the basis of the record to date, then, Canadian workers have no reason to be optimistic about using the Charter to protect their collective rights.

1.3 Equality in the workplace

The equality provisions of the Charter have been repeatedly invoked over the past twenty years to force governments and employers to address issues of workplace discrimination especially against women[25] and against gays and lesbians, who have been deemed an "analogous group" entitled to Charter protection[26]. In some cases the Charter has been used in litigation

21. Bastarache J. in *Dunmore*, *supra*, note 17, para. 68.
22. *Agricultural Employees Protection Act*, 2002, S.O. 2002, c. 16.
23. McLachlin C.J. in *Pepsi-Cola*, *supra*, note 17, para. 66.
24. See e.g. H.W. ARTHURS, "Tort Liability for Strikes in Canada: Some Problems of Judicial Workmanship", (1960) 38 *Can. Bar Rev.* 346; A.W.R. CARROTHERS & E.E. PALMER, *Report of a study on the labour injunction in Ontario*, Toronto, Ontario Dept. of Labour, 1966; I.M. CHRISTIE, *The Liability of Strikers in the Law of Tort: a Comparative Study of the Law in England and Canada*, Kingston, Queen's University, Industrial Relations Centre, 1967; S.A. TACON, *Tort liability in a collective bargaining regime*, Toronto, Butterworths, 1980.
25. *British Columbia (Public Service Employee Relations Commission)* v. *BCGSEU*, [1999] 3 S.C.R. 3; 176 D.L.R. (4th) 1; *Service Employees International Union, Local 204* v. *Ontario (Attorney General)* (1997), 35 O.R. (3d) 508 (Gen. Div.).
26. *Egan* v. *Canada*, [1995] 2 S.C.R. 513.

to force governments to enlarge the coverage of human rights legislation[27]. For the most part, however, Charter rhetoric has been used to rally public support for legislation designed to force employers to eliminate overt workplace discrimination, to prevent harassment, to provide equivalent benefits for workers of all backgrounds and persuasions, and even to modify workplace arrangements to accommodate disabled people and people with non-standard religious customs. But the role of the Charter should not be over-estimated. Social, economic and political mobilization by advocacy groups has been much more effective than legislation in advancing equality in the workplace, as have the changing demography of the workforce, intergenerational shifts in social values and episodic interventions by human rights agencies[28].

Indeed, even when Charter and human rights litigation has clarified and expanded the equality rights of various groups of workers, their actual experience of discrimination at work has often not changed much[29]. For example, the wage gap between men and women has been narrowed a little—but very little; and the wage gap between recent immigrants and other workers has actually grown. There are more women and minority group members in managerial positions; but the percentages are still derisory. Unemployment rates for aboriginal peoples, new immigrants and workers of colour remain higher than those for white workers. And disabled people continue to suffer discrimination in many workplaces, despite the constitutional and statutory duty of employers not only to forbear from discriminating against them, but to accommodate their special needs so that they can lead full working lives[30].

1.4 Social and economic rights

The Charter makes no specific mention of social rights, except those accruing to minority language groups[31] and, in somewhat looser language,

27. See e.g. *Commission scolaire régionale de Chambly* v. *Bergevin*, [1994] 2 S.C.R. 525; *Vriend* v. *Alberta* (1998), 156 D.L.R. (4th) 385; *Granovsky* v. *Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703.
28. See generally W.A. BOGART, *Consequences: The Impact of Law and its Complexity*, Toronto, University of Toronto Press, 2002.
29. The evidence is reviewed in H.W. ARTHURS & B. ARNOLD, "Does the Charter Matter?", (2005) 11 *Review of Constitutional Studies* 37.
30. For example, the Ontario Human Rights Commission's most recent report revealed that disability complaints comprised 55 of all new employment-related complaints, a higher percentage than any other ground of discrimination. ONTARIO HUMAN RIGHTS COMMISSION, *Annual Report 2005-2006*, Toronto, Government of Ontario, p. 46.
31. *Constitution Act, 1982*, ss. 16-23.

to aboriginal peoples[32]. It is also silent on economic rights other than so-called mobility rights[33] and those which are implicit in its equality provisions.

Moreover, Canadian courts had—until recently—declined to interpret general Charter language guaranteeing "security of the person" in such a way as to require the state to provide everyone with at least minimum standards of economic and social security[34]. While these court holdings were disappointing to advocates of constitutionally-protected social rights, they were not unreasonable, given that the phrase "security of the person" was found in a provision of the Charter dealing with the prevention of procedural abuses in criminal cases. However, the Supreme Court's 2006 decision in *Chaoulli* seems to signal a fundamental shift in interpretation[35]. In *Chaoulli* the Court held that similar language in the Québec Charter conferred on individuals the right to timely access to medical procedures under its public health care system:

> In the face of delays in treatment that cause psychological and physical suffering, the prohibition on private insurance jeopardizes the right to life, liberty and security of the person of Canadians in an arbitrary manner, and is therefore not in accordance with the principles of fundamental justice[36].

By way of remedy, the Court required Québec either to provide timely public services or to amend its health care legislation to permit individuals to purchase insurance to cover the cost of securing services in the private sector.

The *Chaoulli* decision has been widely, almost unanimously, criticized by legal scholars, as both juridically indefensible and politically inexcusable[37]. However, it does have one intriguing aspect. If "security of the

32. *Constitution Act, 1982*, s. 35.
33. *Constitution Act, 1982*, s. 6.
34. *Constitution Act, 1982*, s. 7. See e.g. *Gosselin* v. *Québec (Attorney General)*, [2002] 4 S.C.R. 429.
35. *Chaoulli* v. *Québec (Attorney General)*, [2005] 1 S.C.R. 791, para. 34.
36. 12 *Id.*, para. 153.
37. J.M. GILMOUR, "Fallout from Chaoulli: is it Time to Find Cover?", (2006) 44 *Osgoode Hall Law Journal* 327; A.C. HUTCHINSON, " 'Condition Critical': The Constitution and Health Care ", in C.M. FLOOD, K. ROACH & L. SOSSIN (eds.), *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada*, Toronto, University of Toronto Press, 2005; M. JACKMAN, "'The Last Line of Defence for [which?] Citizens': Accountability, Equality, and the Right to Health in Chaoulli", (2006) 44 *Osgoode Hall Law Journal* 349; A. PETTER, "Wealthcare: The Politics of Charter Revisited", in C.M. FLOOD, K. ROACH & L. SOSSIN (eds.), *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada*, Toronto, University of Toronto Press, 2005.

person" is impaired by denial of timely access to medical assistance, is it not also arguably impaired by public policies which fail to provide "the person" with reasonable access to other forms of "security" such as food, shelter, education and opportunities for work? Such a reading of the decision would be ironic, given that the holding has generally been excoriated as subverting the Canadian welfare state. However, it is most unlikely that *Chaoulli* can be or will be used to ground a new approach to social rights. It is too easily distinguished on its facts or confined by narrow interpretations; and the potential political consequences would be too far-reaching. Nor would it be prudent for friends of the welfare state to attempt to use *Chaoulli* in this way: as the actual result of the case indicates, social engineering by judges is highly erratic at best. Nor would it be appropriate as a matter of democratic principle: Canadians voted against constitutionalizing social and economic rights in 1991 when they resolutely rejected the Charlottetown Accord with its proposed "Social Charter"[38].

1.5 Conclusion

While the Charter has been credited (and blamed) for many developments in Canadian legal and political life, it cannot be said that it has been a major force in extending legal or social protection to working people either collectively or as individuals. Even its equality provisions, according to some observers, have contributed less to the improvement of the position of marginalized workers than have legislative initiatives and changes in social attitudes.

2 Constitutional Architecture and Labour Rights

The constitutional provisions with the greatest impact on labour, I believe, are not found in the Charter. Rather they deal with the architecture of the Canadian state and of its federal system.

2.1 Constitutional Jurisdiction to Regulate Labour Standards and Collective Labour Action

During the 1920s and 1930s, Canada's highest courts held that labour standards and labour disputes were matters of "property and civil rights" and of "a merely local and private nature in the province" and therefore

38. K. McRoberts & P. Monahan (eds.), *The Charlottetown Accord, the Referendum, and the Future of Canada*, Toronto, University of Toronto Press, 1993; R. Johnston, A. Blais, E. Gidengil *et al.*, *The Challenge of Direct Democracy: the 1992 Canadian Referendum*, Montreal, McGill-Queen's University Press, 1996.

subject to provincial—not federal—jurisdiction[39]. This characterization represents an impoverished and anachronistic view of employment relations as involving "merely private" arrangements and resting only on contractual ("civil") rights. It forecloses the possibility that labour market regulation for public purposes—to enhance social protection, prevent conflict or promote economic growth—might have independent constitutional significance. And especially, by conceptually locating the employment relation "in the province" it flies in the face of contemporary economic realities: all but the smallest business enterprises are likely to have suppliers, customers and/or workers in more than one province and to operate across provincial and national boundaries on a daily basis; Canadian workers and employers treat the labour market as national (and indeed are encouraged to do so by the mobility provisions of the Charter)[40]; and crucially, "local" labour market policies involving industrial relations, job creation, skills training and social insurance invariably have national effects[41]. In short, viewed from the perspective of social and economic policy-making in today's highly integrated national and continental economy, these early constitutional interpretations seem anachronistic and impractical.

Nonetheless, it is now settled law that the provinces, not the federal government, will normally regulate labour markets. Only in the event of war or economic crisis[42], and in a few economic sectors where the constitution specifically establishes the primacy of federal jurisdiction—banking, broadcasting and telecommunications, trans-border shipping and aeronautics, nuclear energy and works declared to be "for the general advantage of Canada"—may the federal government enact labour legislation[43]. As a result, over 90% of Canadian workers come under provincial jurisdiction, less than 10% under federal jurisdiction[44].

This distribution of constitutional powers has significant consequences for the content and administration of Canada's labour policy and practice. It forecloses the development of national industrial, labour market and

39. *Toronto Electric Commissioners* v. *Snider*, [1925] 2 D.L.R. 5 (P.C.) [hereinafter *Snider*].
40. 13 *Constitution Act, 1982*, s. 6.
41. 14 By way of example, Quebec sought to protect job opportunities for locally-based skilled construction workers by excluding Ontario workers. Ontario retaliated by enacting a statute banning Quebec workers. See *Fairness is a Two-Way Street Act (Construction Labour Mobility)*, 1999, S.O. 1999, c. 4 (repealed in June 2006).
42. *Snider*, *supra*, note 39; *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373.
43. P.W. HOGG, *Constitutional Law of Canada*, 5th ed., vol. 1, Toronto, Carswell, 2006, at p. 21-12 to 21-15.
44. Federal Jurisdiction Workplace Survey (Ottawa; Statistics Canada, 2005) available online at www.statcan.ca/English/sdds/5076.htm.

training strategies. It occasionally impedes the resolution of labour disputes which—the constitution notwithstanding—sometimes occur on a nationwide basis[45]. It helps to reinforce the strong atomistic tendencies of North American industrial relations systems, which generally favour plant—level rather than enterprise—or sectoral-level bargaining[46]. It diminishes the authority, and perhaps the influence, of the Canadian Labour Congress and has inhibited the formation of a national labour-based political alignment[47]. And while it permits Canada's provinces to experiment with progressive labour legislation, it also tempts them to engage in regulatory competition in which they seek to attract investment by reducing labour standards or curbing union rights[48].

On the other hand, these effects are to some extent mitigated by the fact that Canadian policy-makers, employers, union leaders, workers and other citizens live in a nationwide discursive community and political culture, that provincial and federal labour statutes are generally cut from the same cloth (though not necessarily to the same pattern) and that the Charter of Rights and Freedoms, the criminal code, provincial and federal labour legislation and even decisions of provincial common and civil law judges and of labour tribunals are all subject to the ultimate reviewing jurisdiction of the Supreme Court of Canada.

Finally, special mention must be made of Québec. From the beginning of Québec's "quiet revolution" in 1960, the trade union movement associated itself closely with the "national project"—the assertion of Québec's dignity, prosperity, functional autonomy and, some propose, legal sovereignty. At least until recently, Québec employers also tended to support the national project by cooperating in corporatist and statist initiatives, and by minimizing overt ideological conflicts with labour. As a result, Québec has been able both to enact some of Canada's most advanced labour legislation and to maintain one of its highest tax rates and most generous social welfare systems. More recently, however, anti-tax and neo-liberal approaches have gained support in Québec, especially in the business community, and the

45. F.R. SCOTT, "Federal Jurisdiction Over Labour Relations: A New Look" in F.R. SCOTT, *Essays on the Constitution: Aspects of Canadian Law and Politics*, Toronto, University of Toronto Press, 1977.

46. R.J. ADAMS, *Industrial Relations under Liberal Democracy: North America in Comparative Perspective*, Columbia SC, University of South Carolina Press, 1995.

47. K. MCROBERTS, "Federal Structures and the Policy Process", in M.M. ATKINSON, *Governing Canada: Institutions and Public Policy*, Toronto, Harcourt Brace Jovanovich, 1993, p. 171.

48. K.V.W. STONE, "'Flexibilization', Globalization, and Privatization: Three Challenges to Labour Rights in our Time", (2006) 44 *Osgoode Hall Law Journal* 77.

days of "Québec Inc"—of activist government, corporatism and social dialogue—may be numbered, However, this ideological shift will not likely weaken the strong sentiment of Québecers favouring control of their own social and labour policies, whatever those polices may be. Nor, given the always-delicate politics of Canadian federalism, is anyone outside Québec likely to challenge that sentiment by attempting to revisit the constitutional premises on which provincial authority over labour and social policy is based[49].

For all of these reasons, the current distribution of authority over labour market and industrial relations policies within Canada's federal system—however detached from contemporary labour market realities—is unlikely to change any time soon. This is a fact of special significance in the context of Canada's increasing integration into regional, hemispheric and global economic regimes.

2.2 Constitutional Jurisdiction over Labour in Light of Globalization and Regional and Hemispheric Integration

In the 1937 *Labour Conventions* case[50], Canada's highest appellate court (then the Judicial Committee of the Privy Council in the UK) held that neither the federal government's general powers to legislate for Canada's "peace, order and good government", nor its implied power to make treaties, nor its power to regulate interprovincial and international trade and commerce, authorized it to enact legislation implementing international treaties or conventions on matters otherwise within provincial jurisdiction[51]. Thus, although Canada is a member of the ILO and has ratified many of its conventions, it may constitutionally enact legislation to implement those conventions only with regard to the 10% of the workforce which operates under federal jurisdiction. The provinces must legislate if these conventions are to be given effect in the rest of the Canadian labour market. If, for example, Canada were to agree to a social clause in the WTO dealing

49. L. BERNIER, M. BOUCHARD & B. LEVESQUE, "Attending to the General Interest: New Mechanisms for Mediating between the Individual, Collective and General Interest in Québec", *Annals of Public and Cooperative Economics*, vol. 74, n° 3, September 2003, p. 321 ; P. GRAEFE, "The Quebec Patronnat : Proposing a Neo-Liberal Political Economy after All", *Canadian Review of Sociology and Anthropology*, vol. 41, n° 2, 2004, p. 171 ; D. BÉLAND & A. LECOURS, "Sub-state nationalism and the welfare state: Québec and Canadian federalism",*Nations and Nationalism*, vol. 12, n° 1, January 2006, p. 77.

50. *Canada (Attorney General)* v. *Ontario (Attorney General)*, [1937] A.C. 326 (P.C.) (Labour Conventions Case).

51. R.L. HOWSE, "The Labour Conventions Doctrine in an Era of Global Interdependence: Rethinking the Constitutional Dimensions of Canada's External Economic Relations", (1990) 16 *Canadian Business Law Journal* 160.

with, say, the right of workers to a "living wage", that clause would have no domestic effect unless provinces chose to enact statutes to give it force. And while Canada has in fact negotiated the so-called *North American Agreement on Labour Cooperation* (NAALC), under which it obligates itself to observe its own labour legislation, the federal government cannot require the provinces to observe theirs. Their obligation to comply is triggered only by their accession to the agreement.

This has created some serious anomalies. For example, for want of provincial agreement, Canada's extensive auto industry is unaffected by the NAALC even though production is seamlessly integrated across the Canada-US border[52]. Nor could the federal government coordinate its efforts with US federal or state governments with a view to developing joint labour market or industrial relations policies either in the auto industry or more generally. Likewise, bilateral agreements between Canada and its hemispheric trading partners, as well as obligations assumed under inter-American and international treaties[53], are unenforceable insofar as they relate to labour market, labour standards or industrial relations issues under provincial jurisdiction. So too, presumably, are UN human rights conventions bearing on labour issues.

The consequences are not merely juridical. As a result of federal initiatives, the Canadian economy has become deeply integrated into a continental economic space dominated by the United States, and into the broader hemispheric and global economic systems. Whatever its merits might be, this integration has led to the restructuring of many sectors of the economy, a significant change in the balance of power between workers and employers and a reduction in the ability of workers to assert their rights and protect their interests. Because the provinces exercise no constitutional authority over tariffs or the making of treaties, however, they are unable to influence the content or consequences of trade regimes in ways which might protect the interests of their workers. The result overall is a potentially significant disjuncture between trade and economic policy, on the one hand, and labour market and industrial relations policy on the other.

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52. Annex 46 of the *North American Agreement on Labor Cooperation* [hereinafter NAALC] specifies that the NAALC comes into force as regards Canada only after provinces representing 35 % of the population have acceded to it, and even then, only with regard to industries 55 % of whose workers reside within those provinces. Since Ontario has never acceded, the auto industry – almost entirely located in Ontario – is not covered by the NAALC although it is completed integrated on a continental basis.

53. A. BLACKETT, "Toward Social Regionalism in the Americas", (2002) 23 *Comparative Labor Law & Policy Journal* 901 ; P. VERGE, "La Place des droits relatifs au travail dans le projet d'intégration des Amériques", (2003) 44 *C. de D.* 53.

2.3 Social legislation

As for social legislation more generally, specific constitutional amendments gave the federal government responsibility for unemployment insurance (1940) and old age pensions and supplementary benefits (1964)[54]. The former provision, moreover, has been used to justify programs of income support, such as parental leave, during periods when employment income is interrupted, but not (for example) to institute job training schemes to reduce the likelihood of unemployment[55].

That said, federal power is both less and more than might appear from this bare description of the formal distribution of constitutional power and responsibility. On the one hand, recognizing the political dynamic of the Canadian federation, the federal government has agreed to allow Québec to establish and administer its own pension and employment insurance schemes, loosely coordinated with the national scheme[56]. On the other, the Canadian Constitution establishes the shared commitment of the federal and provincial governments to "promoting equal opportunities for the well-being of all Canadians, ... furthering economic development to reduce disparity in opportunities, ... and providing essential public services of reasonable quality to all Canadians"[57]. Although only a declaration "in principle", the Constitution also records their agreement to a system of "equalization payments" intended "to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation"[58]. In practice, this means that taxes collected by the federal government from residents of the richest provinces are used to subsidize public services for citizens in the poorest.

Apart from equalization payments, the federal government has also used its extensive powers to tax and spend in order to forge national frameworks for the delivery of social programs, notably health care and post-secondary education. These frameworks take the form of federal-provincial agreements which provide that in exchange for a promise by the provinces to deliver social programs which adhere to national standards, the federal government will contribute a significant proportion of the cost. At various

54. *Constitution Act, 1940*, (U.K.), 3-4 Geo. VI, c. 36; *Constitution Act, 1964*, 12-13 Eliz. II, c. 73 (UK).
55. *Reference re Employment Insurance Act (Can.),ss. 22 and 23*, [2005] 2 S.C.R. 669.
56. J. POIRIER, "Federalism, Social Policy and Competing Visions of the Canadian Social Union", (2002) 13 *National Journal of Constitutional Law* 355.
57. *Constitution Act, 1982*, s. 36(1).
58. *Constitution Act, 1982*, s. 36(2).

times, similar programs have been developed concerning social housing, skills training, immigrant settlement, income support for the poor and other programs with direct or indirect effects on the labour market[59].

Enthusiasm for this so-called "fiscal federalism" or "cooperative federalism" waxes and wanes, as the federal government seeks to lower taxes and reduce its financial commitments, as provincial governments grow restive with national standards, and as provinces ascend and descend the league tables of prosperity. However, the system has sustained the Canadian welfare state and held the federation together for several generations. It must be reckoned as representing a triumph for political necessity, pragmatism and good will over constitutional doctrine[60].

2.4 The Judiciary Power

The structure and powers of the judiciary are potentially of great importance in determining the scope and efficacy of labour law. Until quite recently, Canadian courts were generally unsympathetic, and often actively hostile, to workers and unions. Tort doctrines, such as conspiracy to injure, inducing breach of contract and wrongful interference with economic rights were developed with the transparent purpose of curbing union power. Contract doctrines which made collective agreements unenforceable, deprived workers of the right to specific performance of the employment bargain and imposed on them implied obligations of faithful service, placed them at a disadvantage vis-à-vis their employers. And judicial inventions such as the labour injunction provided employers with speedy remedies while depriving workers of procedural protections.

For these reasons, the administration of modern labour legislation was generally removed from the courts and assigned to non-curial tribunals which operated with rules, powers, procedures and personnel appropriate to their specialized functions. The relationship of these tribunals to the overall legal system has always been somewhat troubled, largely because

59. D. GUEST, *The Emergence of Social Security in Canada*, 3rd ed., Vancouver, University of British Columbia Press, 1997; D. LAYCOCK & G. CLARKE, *Framing the Canadian Social Contract: Integrating Social, Economic and Political Values since 1940*, Ottawa, Canadian Policy Research Networks, Discussion Paper no. P/02, 2002.

60. See e.g. P.M. BOOTHE, *Reforming Fiscal Federalism for Global Competition a Canada-Australia comparison*, Edmonton, University of Alberta Press, 1996; H. LAZAR (ed.), *Canada: State of the Federation, 1999/2000: Toward a New Mission Statement for Canadian Fiscal Federalism*, Kingston: Institute of Intergovernmental Relations, McGill Queen's University Press, 2000; S. CHOUDHRY, "Recasting Social Canada: A Reconsideration of Federal Jurisdiction Over Social Policy", (2002) 52 *University of Toronto Law Review* 163.

courts have insisted on reviewing their decisions in order to ensure that they comply with the general law of the land and that they adhere to procedures which judges can recognize as "fair". In doing so, unfortunately, reviewing courts often adopted perverse interpretations of labour statutes thereby frustrating the intent of legislatures which had, after all, established special labour tribunals in the first place because judicial attitudes, procedures and doctrines were deemed inappropriate for labour disputes.

The constitutional basis of judicial review has always been somewhat obscure. However, for years it was generally understood to rest on the principle of *ultra vires* whereby the legislature is presumed to intend that everyone to whom it delegates powers must use them in accordance with the governing statute[61]. Over the years, however, legislatures had sought to prevent the application of this principle to labour tribunals by negating this presumption, through so-called privative clauses which precluded judges from reviewing tribunal decisions. And judges, responding both to the legislative signals and to telling critiques of their decisions, developed habits of self-restraint, in the form of doctrines which permitted tribunals to reach their own legal interpretations so long as they were "reasonable" and to develop their own procedures so long as they did not violate principles of fundamental fairness[62]. Both tendencies were abruptly terminated by three almost-simultaneous developments.

The first was attitudinal. While the advent of the Charter in 1982 did not directly affect the jurisdiction or operation of labour tribunals, it did signify that courts in general would play a more interventionist role in political, economic or social controversies. This shift in the perception of the appropriate role of judges seems to have triggered an attitudinal change on their part, leading them to modify or abandon the doctrines which they had only recently adopted to justify their new posture of self-restraint with regard to labour tribunal decisions[63].

The second was doctrinal. In a series of startling decisions interpreting the judiciary power under Canada's Constitution, judges began to award themselves constitutional powers and perquisites they had never previously been understood to enjoy[64]. Particularly material was the Supreme

61. H.W. ARTHURS, "Rethinking Administrative Law : A Slightly Dicey Business", (1979) 17 *Osgoode Hall Law Journal* 1.
62. M.-H. BLAIS *et al.*, *Standards of Review of Federal Administrative Tribunals*, Toronto, Butterworths, 2005 ; B.A. LANGILLE, "Judicial Review, Judicial Revisionism and Judicial Responsibility", (1986) 17 *R.G.D.* 169.
63. J.M. EVANS, "Jurisdictional Review in the Supreme Court : Realism, Romance and Recidivism", (1991) 48 *Administrative Law Review* 255.
64. I have developed this critique in "Constitutional Courage", (2003) 49 *McGill L.J.* 1.

Court's "discovery" in 1982 that the right of courts to review and overturn decisions of labour tribunals and other administrative bodies had actually been entrenched in the constitution upon its adoption in 1867[65]. This belated discovery effectively ended attempts by legislatures to totally preclude judicial review, although it left open for debate the minimum scope of review which would be permitted.

The third was jurisdictional and institutional. The Supreme Court held in 1995 that Charter claims which arise in the context of a collective bargaining relationship must not come directly to the Courts, but must be dealt with initially by the appropriate labour tribunal[66]. Since Charter arguments are frequently advanced by the parties, this holding effectively requires that tribunal members be legally trained and that the parties be represented by counsel. The result is that legal costs are enhanced, that proceedings are more likely to be adversarial and protracted, and that the probability of review proceedings is greatly increased. The result of this new Charter-related litigation is that labour tribunals have lost—probably forever—their ability to deal rapidly, informally, knowledgably and effectively with complex and fast-moving employment disputes.

To recapitulate, because judicial review is slow and costly, it can be used to attenuate and ultimately frustrate labour tribunal proceedings, even if tribunal decisions are ultimately upheld. Because judicial review gives the last word to judges, it puts pressure on tribunal members to adopt legalistic interpretations, attitudes, procedures and values rather than those grounded in their own expertise in industrial relations. And because in these ways judicial review injects courts back into the equation of power, it weakens the position of workers who were the intended beneficiaries of labour legislation.

2.5 Conclusion

The architecture of the Canadian state does not permit the federal government to create either national or trans-national regimes of labour regulation which are congruent with labour markets and patterns of business activity. Thanks to financial and constitutional innovations, the federal government has been somewhat more successful in establishing nation-wide standards for social legislation, and in ensuring that all Canadians enjoy reasonably comparable access to social programs. However, these achievements are rendered somewhat precarious because of centrifugal forces at work within the Canadian federation. Finally, the provinces mostly lack the

65. *Crevier* v. *Attorney General of Québec*, (1982) 127 D.L.R. (3d) 1.
66. *Weber* v. *Ontario Hydro* [1995] 2 S.C.R. 929.

financial means to establish their own schemes of social legislation; they are vulnerable to regulatory competition from each other; they have no legal capacity to regulate labour and employment relations which extend beyond their own borders—as most do; and even within their borders, they often cannot regulate effectively because they can neither immunize labour tribunals from judicial review nor relieve them of constitutional burdens which undermine their capacity to act swiftly and effectively.

3 Labour and Social Rights under Canada's "Real Constitution"

I have tried to show that Canada's formal constitution—its Charter of Rights and Freedoms, its federal system, its institutional architecture—affects labour and social law only at the margins, and in unexpected and often negative ways. In this concluding section of my essay, I will suggest that labour and social rights are largely determined by a different constitution—by Canada's "real constitution".

The principal features of the "real constitution" can be deduced from a crude but essentially non-controversial account of the actual operation of our economy and legal system and of the relationship between them. Imagine a downward-sloping socio-economic gradient. At the top of that gradient are located Canada's most affluent people, at the bottom, the least affluent. At each level, as one descends the gradient, one would find not only fewer people with property or with decent job prospects, but also more people with poor health, family dysfunction, low levels of education, minimal access to civic amenities and diminished rates of voting or community involvement. One would also find at each descending point on the gradient an increasing percentage of women, disabled people, recent immigrants, aboriginal peoples, and members of racial minorities. And to connect this description to our legal system, one would also find that in increasing numbers people towards the bottom of the gradient lack knowledge of their rights or the means to secure legal representation; they experience higher levels of abuse by public bureaucracies and by landlords, retailers and employers; and of course, they enjoy very limited access to even the meagre labour and social rights which the formal constitution purports to provide.

If this is indeed an accurate—if over-simplified—picture of how Canada's economy and legal systems work, it would seem to follow that the *grundnorm*, the fundamental principle, of our "real constitution" is pithily captured by a graffito I once read scrawled on a wall in London: "the economy is the secret police of our desires". Entrenched Charter rights, statutory entitlements, administrative initiatives to alleviate the effects of

poverty, all the terms of the implicit social contract must give way in the face of "economic realities".

If this is indeed the fundamental principle, as evidence suggests, a number of second-order rules can be identified. The first has to do with the distribution of legislative power. The current configuration of the Canadian federation, it turns out, is highly appropriate to an era of neo-liberalism and globalization, especially with regard to responsibility for labour and social legislation. The national government has significant capacity to restructure the economy through its control over Canada's external commerce, tariffs and other trade-related matters. Restructuring has altered the balance of power between workers and employers, to the prejudice of the former. However, the national government has no independent capacity to initiate labour market legislation which might redress the balance or offer workers compensatory social benefits. It does have control over domestic fiscal and monetary policies, but because these are especially sensitive to the judgment of markets and investors, they must be exercised with great restraint. Likewise existing federal influence over social programs which largely derives from its taxing powers: given the tenuous state of the federation, this too must be exercised circumspectly. Finally, provincial governments may effectively veto international treaties which affect labour markets and employment relations, but in a nationally and continentally integrated economy and labour market, they largely lack the capacity to protect labour and social rights. To sum up the distribution of powers under Canada's "real constitution", then, they are optimally arranged so that labour and social policies remain subordinate to global trade regimes, the values they embody and policies propagated to make them effective.

A second feature of the "real constitution" has to do with institutional architecture. Given the silence of the formal constitution on the matter, and the subordination of labour law and legislation to economic policy, ultimate responsibility for establishing and enforcing labour and social rights is vested not in the Minister of Labour but in the Ministers of Finance and International Trade or the head of the central bank. Of course, the primacy of economic over social ministries is a fact of life in many countries to the point where, in some, Labour ministries have simply ceased to exist, and in others, they have been largely stripped of their advocacy and policy-making functions[67]. The consequence is that labour and social rights are seen as a residual by-product of economic policy rather than as an independent good in themselves.

67. See H.W. ARTHURS, *op. cit.*, note 5.

A third example of how the "real constitution" differs from the formal constitution has to do with the relationship between the judiciary and the other two branches of government. The Canadian constitutional tradition emphasizes parliamentary sovereignty, with the executive in turn being accountable to parliament. This tradition was obviously modified by the requirement that each level of government in any federal system must remain within its defined jurisdiction, as interpreted by the courts, and by the adoption of the Charter, which gave courts the right to overturn legislation which violates the rights and freedoms it guarantees. However, a potentially more radical revision of parliamentary sovereignty has been accomplished by domestic and trans-national advocates of open markets, who emphasize the primacy of the rule of law in preventing "arbitrary" interference by the state. In Canada, the *Chaoulli* decision may turn out to be the first of many in which judicial power is used to ensure that social goods are provided through the market rather than through government programs. In the domain of global trade, the EU, the WTO and NAFTA have established tribunals with jurisdiction to hear complaints brought by corporations against the social and economic policies of national governments. As a result, not only domestic judges but also international arbitrators and tribunals are now able to prevent activist legislatures or administrations from pursuing labour and social policies that impede the free flow of trade or otherwise prejudice business interests.

However, none of these features of the "real constitution" means that labour and social rights have necessarily to be disregarded or diminished. Like any conventional constitution, the "real constitution" is likely to be characterized by considerable ambiguity, obfuscation and contradiction; if it were not, it could never accommodate change and would soon collapse of its own weight. Moreover, like any conventional constitution, the "real constitution" establishes the institutions and processes which will manage change. These institutions inevitably acquire a degree of autonomy, and sometimes produce outcomes that could not have been contemplated when they were first established. And finally, as with any conventional constitution, the "real constitution" has its own justificatory rhetoric, its symbols and myths, which it uses to claim and confer legitimacy. Legitimacy, however, depends ultimately not on rhetoric or symbols but on performance. If the "real constitution" does not deliver on its promises to make life better by facilitating the operation of markets, it will cease to command the respect and obedience of citizens. It may be possible, then, 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 make good on its promises of a better life for all.

Finally, in its ambiguities, contradictions and deference to power and privilege, the "real constitution" has a lot in common with the British constitution which, in 1867, Canada explicitly accepted as the model for its own. We ought therefore to remind ourselves of the history of labour and social rights in the United Kingdom[68]. British labour won its rights by social, industrial and political struggle, not by constitutional negotiation or litigation. With the onset of neo-liberalism and globalization in the 1980s, British labour lost its rights in just the same kinds of struggles, not by constitutional abridgement or amendment.

It seems, then, that "real constitutions" are what we make them. If so, labour and social rights under Canada's "real constitution" will not be magically conjured up by a process of constitutional exegesis. They will be hard won, by workers' struggles on the shop floor and picket line, by political and social campaigns, and by clear thinking and effective advocacy.

68. S. POLLARD, *Labour History and the Labour Movement in Britain*, Aldershot, Ashgate, 1999; W.H. FRASER, *A history of British trade unionism, 1700-1998*, New York, St. Martin's Press, 1999; D. POWELL, *British politics and the labour question*, 1868-1990, New York, St. Martin's Press, 1992.