CONSTITUTIONALIZING THE RIGHT OF WORKERS TO ORGANIZE, BARGAIN AND STRIKE: THE SIGHT OF ONE SHOULDER SHRUGGING

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Introduction

The Supreme Court may well conclude in *Fraser*\(^1\) that the Charter confers upon agricultural workers the full panoply of bargaining rights provided under contemporary Canadian collective bargaining legislation, from the right be represented exclusively by the bargaining agent chosen by the majority, to the right to engage their employer in good faith negotiations, to the right to strike. If it does so, its decision will be greeted with delight by progressive legal scholars, proponents of countervailing power as a strategy of labour market regulation and true believers in the potential of constitutional and/or international rights discourse to transform political economy and social relations. There will be congratulations all ‘round: to the skilled advocates who will have achieved a famous victory against long odds; to the imaginative academics who will have erected the conceptual scaffolding on which counsel’s arguments will have been constructed; and not least, to the judges who will have finally liberated themselves from the tyranny of precedent and sloughed off 200 years of curial antipathy to workers and their interests.

Of course, not everyone will be delighted. Dour devotees of legal logic and historical accuracy are likely to grimace and roll their eyes;\(^2\) neo-liberals who

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favour unregulated labour markets and managerial unilateralism will cry havoc; and sceptics who question the capacity of courts to bring about deep and lasting change, and the wisdom of asking them to do so, will simply shrug. I consider myself to be a progressive scholar who recalls the bygone era of collective bargaining with great fondness; I admire skilled lawyers and free-thinking judges and have built the odd conceptual scaffold for both in my time; and I retain an atavistic attachment to logic and historical accuracy. But most of all, I’m a sceptic. I will shrug.

Of course I will shrug with one shoulder only. I believe that the Agricultural Employees Protection Act\(^3\) was a cynical attempt to perpetuate the unjustified exclusion of agricultural workers from the regime of collective bargaining. And I believe that workers on farms and in food processing plants should have the same rights to organize, bargain and strike as workers in auto plants and banks. So if the Supreme Court reaches the same conclusion, I will smile benignly, and one shoulder will remain firmly in place. But the other will shrug nonetheless.

Let me explain why.

**The inefficacy of constitutional litigation**

I recently co-authored an article entitled “Does the Charter Matter?”\(^4\)

Essentially, the article was an attempt at legal epidemiology. It presents all the social and economic data we could find that might help to determine whether since 1982 Canada had changed in the direction the Charter sought to promote. Our methodology was far from perfect, as we would be the first to admit; but as no one has so far challenged it or proposed a better one, I stand by our

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\(^3\) Stat Ont 2002 c 16.

conclusions: despite the profound changes it has brought about in legal theory, doctrine, practice and institutions, essentially the Charter has made little actual difference in our social, economic and political life. Some things have got better; some have got worse; but mostly, they have remained about the same. Moreover, where they have got better — for gays and lesbians for example — it is an open question as to whether the Charter is the cause or whether judicial rulings in these cases are a consequence of widespread changes in social attitudes that produced equally positive outcomes in countries with no Charter equivalent. And where things have got worse — as in the criminal justice system — one must similarly ask about cause and effect: has the Charter made things worse, by stirring up police militancy and populist outrage, much as the school desegregation decisions did in the United States; or would the trend towards strong-arm policing and punitive sentencing been even worse in the absence of the Charter?

In the same spirit, let me propose a thought experiment. Imagine that ten or twenty years after Pepsi Cola\(^5\) and Dunmore\(^6\) and BC Health Services\(^7\) and Fraser\(^8\) we were to undertake a similar epidemiological study of the effects of Charter rulings on Canadian workers. What do you think that we would find? A higher proportion of union members in the workforce? Greater union militancy and greater public support for collective bargaining? Improved wages and working conditions? Enhanced job security and a more effective voice for workers in corporate governance? Easier access to labour markets and more generous provision for those who are excluded or retired from work?

For reasons I will mention in a moment, I think that none of these outcomes are likely. Moreover, if they did it is hard to imagine that they would have resulted from Charter decisions, rather than from other causes such as a reaction to

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\(^5\) R.W.D.S.U., Local 558 v Pepsi-Cola Canada Beverages (West) Ltd. [2002] 1 S.C.R. 156
\(^6\) Dunmore v Ontario (AG) [2001] 3 S.C.R. 1016
\(^7\) Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia [2007] 2 S.C.R. 391
\(^8\) Supra note 1.
growing income inequality and a deepening economic crisis. Indeed, it is pertinent — or perhaps impertinent — to note that the recent improvements in labour’s legal fortunes under the Charter coincide closely with a decline in union membership and bargaining power, in workers’ job security and real incomes, in the effectiveness of systems of labour market regulation and social protection, and in labour’s political influence and cultural salience.

Why is labour’s lot unlikely to improve regardless of what the Supreme Court has to say about workers’ Charter rights? Here are some possible answers: technology; neo-liberalism; globalization and a new international division of labour; Canada’s integration into a US-dominated economic space; changes in HR management; outsourcing and offshoring; demographic change and enhanced diversity in the labour market; the end of internal labour markets; the rise of non-standard and precarious employment; the business community’s insurgency against market regulation and the taxpayer revolt against the welfare state. All of these have contributed to the erosion of labour’s identity and solidarity, to the unravelling of labour’s postwar industrial and political strategies and to the diminished coverage and efficacy of our collective bargaining system and social legislation.

If, as I argue, “labour’s” collective identity and solidarity are indeed dissolving; if “labour” as a class or workplace collectivity is no longer capable of effective concerted action; if many prospective targets of such action are no longer within reach of Canadian law; if traditional labour objectives like job security and pensions can no longer be secured by concessions won from individual employers, the Supreme Court’s recent guarantees of labour’s right to organize, bargain, picket and (perhaps) strike will have arrived too late to make much of a difference.

But then, the difference made by Supreme Court decisions — and by the Charter itself — may always have been overrated. Social and economic relations —
including employment relations — are largely determined not by the formal, juridical constitution but by what I have called the “real constitution”9 — the steep gradient of wealth and power that determines so much in our society. People who have more wealth and power are likely to enjoy better health outcomes, housing, education and careers than those who have less. They are also more likely to participate in politics and civic life, and to receive respectful treatment from public officials and the police. And finally, they are more likely to know their rights and to possess the psychic and financial resources needed to vindicate them.10 Nonetheless, the Court has so far declined to recognize poor people and workers as “analogous groups” whose members are entitled to equality with their more affluent fellow citizens under section 15;11 nor, if the Court reversed this position, is it possible to imagine how it could bring about such a fundamental transformation of our society without engaging in a far-reaching redistribution of wealth for which it lacks both a mandate and institutional competence.

The role of constitutionalization in reducing the autonomy and effectiveness of labour law

The historic trajectory of labour law has been in the direction of autonomy and away from the values, doctrines, processes and institutions of the “regular” legal system. This was not just because individual judges were often consciously hostile to the interests of workers. It was because that system was premised on a paradigm of social relations in which workers occupied a

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10 I have developed these ideas in several articles: “Does the Charter Matter?” supra note 4; “Labour and the Real Constitution” supra note 9; “Constitutionalism - An Idea Whose Time Has Come … and Gone?” (2008) 75:3 Amicus Curiae 3.
subordinated rank. Labour law’s autonomy project was in many ways successful. The substantive law of employment relations was increasingly codified on the basis of a new and different paradigm of workers as “citizens at work” (not new enough or different enough, some would argue). And the new labour law was increasingly administered by special labour tribunals, with some degree of expertise in industrial relations, and with procedures and powers that permitted timely and efficacious responses to the power-sensitive and fast-moving world of industrial relations. But there has always been resistance to the autonomy project in the courts and to some extent, in legislatures as well. Examples include: the requirement that cross-examination be permitted in certification proceedings as in adversary-style criminal and civil trials; the refusal to acknowledge that arbitrators possess inherent procedural and remedial powers; the denial of deference to their interpretations of the collective agreement and the general law; the resistance to replacing the common law torts with statutory rules for waging conflict, and especially the constitutional entrenchment of judicial review.

However, the current run of Charter cases favouring unions has tempted some former supporters of labour law’s autonomy project to abandon it. I can understand the temptation: labour statutes, boards and ministries aren’t what they used to be. In some cases, they have been actively mobilized to advance the cause of neo-liberalism; in others they have simply withered away for lack of

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12 In re Ontario Labour Relations Board, [1953] 2 S.C.R. 18
15 The margin of deference accorded arbitral and labour board decisions by reviewing courts has fluctuated considerably over the past half century. Is it possible that successive restatements of that margin of deference is affected by the reviewing court’s wishes to sustain or overturn the tribunal’s decision? Surely not. For the most recent iteration of the deference debate see New Brunswick (Board of Management) v. Dunsmuir 2008 SCC 9.
17 Crevier v Québec (Attorney General) [1981] 2 S.C.R. 220
regular updating, sufficient resources or committed and knowledgeable personnel. But labour law will not be well served by being reincorporated into the general law, especially if this is done from the top down — by judges — rather than from the bottom up by experts in labour law and industrial relations.

Perhaps I can make my point by asking what precisely the Supreme Court would be deciding if it were to uphold the decision of the Ontario Court of Appeal in Fraser. There are many possibilities:

- The Court might decide that agricultural workers must be treated in precisely the same way as all other “employees”. That is to say, they should have the right to strike after selecting a bargaining agent, securing certification, engaging in good faith negotiations, and exhausting the conciliation procedures laid down in the Labour Relations Act. However, such rights might avail them naught: each stage of the statutory procedures is so lengthy that agricultural workers (at least those employed in seasonal work) might be unable to exercise them.

- Or the Court might permit legislatures to establish a separate but equal collective bargaining regime for agricultural workers, as presently exists for civil servants, teachers, public safety, college, construction and hospital workers. Such a regime could presumably be designed to take account of special features of industrial relations in this field. Obviously, no one can predict what degree of deference courts would give to legislative determinations about what is “equal” and what needs to be “separate”. However, one can predict, based on past performance, that the Supreme Court is unlikely to do a good job of

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18 Crown Employees Collective Bargaining Act Stat Ont. 1993 c. 38 as amended
20 Education Act RSO c. E-2 part X.1
21 Colleges Collective Bargaining Act 2008 SO c. 15
22 Ontario Labour Relations Act Stat Ont. 1995 c. 1 ss. 126 – 168 as amended
23 Hospital Labour Disputes Arbitration Act RSO 1990 c. H.14
assessing the special dynamic of labour-management relations in agriculture, and the rules, processes and institutions selected to regulate them. I offer as Exhibit A the Court's attempt in Weber\textsuperscript{24} to protect and expand the jurisdiction of labour arbitration boards, thereby rendering them virtually incapable of performing their core functions.\textsuperscript{25} Exhibits B to Z are available on request.

- Or the Court might be less prescriptive. It might say, as it did in \textit{Pepsi Cola} with regard to picketing,\textsuperscript{26} that agricultural workers are free to strike at any time so long as they do not commit a crime or tort (or, for that matter, a breach of statute or contract). Anyone familiar with the common law or criminal law of picketing will recognize how drastic a restriction lies concealed within this apparently modest caveat.\textsuperscript{27} Postmodernism has been described as “private jokes in public places”.

The same might be said of the \textit{Pepsi Cola} decision, and indeed of many Charter decisions, once their post-history unfolds.

To constitutionalize the right of workers to participate in a particular system of collective bargaining, then, is to initiate a process of institutional design, and possibly re-design, under curial supervision. The problem is that courts and industrial relations experts operate on very different assumptions. Courts believe in the power of normativity to transform reality; industrial relations experts believe in the reality of economic and social power. Courts believe in the permanence and solidity of law; experts are all too aware of its transience.

\textsuperscript{24} Weber \textit{v} Ontario Hydro, [1995] 2 SCR 929
\textsuperscript{26} Supra note 5 at para. 68.
and fragility. Courts believe in the generality of law: everyone is bound by the constitution; everyone should enjoy the protections of the Charter. Experts often believe in law’s specificity: different circumstances and situations call for different treatment; if statutes cannot be drafted *ab initio* to provide it, it can and should be achieved by delegating regulation-making powers or adjudicative discretion to an expert administrative body.

Of course I accept that legislators — also known as politicians — may act in ways that conform to neither expert advice nor judicial ideals. And of course, I accept that the result of legislation may be bad both for democracy and for industrial relations. *BC Health Service, Dunmore* and now *Fraser* are cases in point. I do argue, however, that to embed the deep structures of industrial relations in the constitution is to ensure that over the long term, the approach of courts will prevail over that of experts.

Finally, constitutionalizing particular aspects of any social or economic system is likely to ensure its ultimate obsolescence. Will we, for example, always conclude that a conflict-based system which entrenches the right to strike is intrinsically fairer or more efficient than a principles-based system in which wages and working conditions are adjudicated? or a system in which important benefits are delivered to workers by the state rather than through collective bargaining? or a power-sharing system based on worker share ownership and union representation on corporate boards of directors? I am not advocating these systems over our present system; but I am arguing that we ought to be as wary of constitutionalizing our present exclusive-representation strike-driven

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28 See supra notes 18 to 23.
29 For the fullest adumbration of this idea in the Canadian context, see Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (1980).
30 This argument is made by passionate defenders of collective bargaining, as well as by more suspect critics, such as employer counsel in *Fraser*. See e.g. Roy J. Adams, *Industrial Relations under Liberal Democracy: North America in Comparative Perspective* (USC Press 1995); and Roy J. Adams, *Labour Left Out: Canada’s Failure to Protect and Promote Collective Bargaining as a Human Right* (Ottawa: Centre for Policy Alternatives, 2006). However it was rejected by Chief Justice Winkler in *Fraser* at paras. 86-93
model as (in hindsight) we ought to have been in constitutionalizing seven denominational schools systems in Newfoundland or the ferry to Prince Edward Island.

**What does constitutionalization signify?**

What remains, of course, is to clarify what we mean by “constitutionalization”.\(^{31}\)

Much of the discussion has proceeded on the basis that constitutionalization involves embedding in our basic law a legally enforceable right from which no legislature or court can derogate. Used in this sense, constitutionalization requires that we identify some specific constitutional provision and determine whether an activity, say a strike, is protected or guaranteed by it. Thus, the Court of Appeal in *Fraser* held that the right to bargain collectively, as understood in our present system, is guaranteed by section 2 of the Charter as the exercise of freedom of association.\(^{32}\) Brian Langille has argued to the contrary, that the right of agricultural workers to be treated like other workers should be guaranteed under section 15 of the Charter as an equality right.\(^{33}\) And conceivably – nothing is beyond conceiving after *Chaoulli*\(^{34}\) — since collective bargaining, and ultimately strikes, may in given circumstances be the only means by which these workers could defend their “liberty” or the “security of [their] person”, they should be guaranteed under section 7.

I will leave that debate to others. Instead I want to note that an older and different meaning of “constitution” is rooted in British public law and therefore, because of its “constitution similar in principle” preamble, in our Constitution Act as well. In this usage, the word “constitution” is less prescriptive and more descriptive: it identifies, explains and give legitimacy to the way in which things

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\(^{32}\) Supra note 1 at para. 101.

\(^{33}\) Supra note 2

\(^{34}\) *Chaoulli v Québec (Attorney General)* [2005] SCR 791.
are presently constituted. This may explain Chief Justice Winkler’s reasoning in *Fraser* to the effect that since “labour relations policy in Canada has long recognized” the desirability of our present collective bargaining system, the main features of that system are entitled to “constitutional” protection.35 A not dissimilar argument is often made by workers who rely on “custom” or “past practice” to justify their claims and by employers who rely on “management rights” to justify their unilateral control of the workplace or enterprise governance.

Such arguments are not without their difficulties. For example, if the longevity of a system automatically entitles it to constitutional protection, how will they ever be superseded by new ones? Nonetheless, the notion of describing a privileged and presumptively entrenched *status quo* as “constitutional” does serve a useful purpose. If forces us to look carefully at “how things are constituted”, and to scrutinize proposed changes with equal care.

Juridical effects aside, then, the real importance of attributing Charter significance to workers’ rights is that we bring them into clearer focus as established elements of our political economy and social order — as conventions of public life, as it were, or the traditional prerogatives of working people. This is an attractive development; but note: it represents a profound reversal of our traditional characterization of workers’ rights. Legislative power in this field resides by default with the provinces, precisely because labour issues are relatively trivial matters of “civil [i.e. contractual] rights”, and of a “merely local and private nature”36 under s. 92 of the Constitution Act. By contrast, if one were to take recent judicial rhetoric at face value,37 courts now seem to perceive that much more is at stake. Labour legislation, common law doctrine bearing on workers’ rights, and the actions of public employers attract

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35 *Fraser* supra note 1 at para. 87–88  
36 *Toronto Electric Commissioners v Snider* [1925] A.C. 394.  
37 A stirring early example was the dissenting judgment of Dickson CJC and Wilson J in *Reference re Public Service Employees Relations Act (Alberta)* [1987] 1 SCR 313.
Charter standards — the courts seem to be saying — precisely because they implicate issues of self-fulfillment, personal identity and dignity, the well-being of individuals and families, freedom, justice and power.

This shift in the characterization of workers’ rights and interests is also manifest in the Court’s changing attitude to international labour standards. Such standards were once adjudged so remote from “local” wage bargains struck “in the province” and under its legislative authority that even their ratification by the federal government gave them no legal effect.\(^\text{38}\) Now, it appears, they are so fundamental to our jurisprudence that even without federal accession or enactment they pour new meaning into the Charter, delegitimize provincial legislation and re-write provincial common law.\(^\text{39}\) Is this new (and possibly exaggerated) deference to international norms a mere rhetorical device used by judges to reinforce their preferred outcome in a particular case? Or is it their belated acknowledgement of what the rest of us have known all along: that employment relationships are now constituted by global and national labour markets; that a decent system of industrial relations is a prerequisite for Canada’s civil peace, social justice and economic development; and that the time has come to characterize labour issues as public and national or global, not contractual, private and local?

This re-conceptualization of labour issues would also allow us to integrate labour market policies with those in adjacent fields. Minimum wage statutes do not merely define the terms of the employment bargain; they help to reduce the incidence and eliminate the effects of poverty. Pension laws do not merely regulate arrangements under which wages can be deferred and tax-sheltered until retirement; they define the life prospects of a rapidly-increasing segment of


\(^{39}\) Dunmore supra note 6; Hospital Services supra note 7; Pepsi Cola supra note 5; and see Geoffrey England, “The Impact of the Charter on Individual Employment Law in Canada: Rewriting an Old Story” (2006 13 CLELJ 1.
Canada’s population. And collective bargaining legislation does not merely create countervailing power in individual workplaces; it enables large aggregations of workers to influence debates on issues ranging from health care to immigration to foreign policy (which they once did, and may again).

Charter analysis may indeed be self-referential; constitutional litigation may be unavailing. But the implied invitation to reconsider our traditional constitutional characterization of “labour” has its attractions. It may open our eyes to new policy approaches, engage new actors, remind us of normative regimes whose influence we have not previously suspected and, especially, show us new connections amongst ideas and events, interests and institutions. The debates triggered by these revelations may ultimately generate constitutional changes — not changes read into the formal constitution by judges, but changes wrought in the “real constitution” by the contending forces of political economy.

If so, neither shoulder will shrug.