Relations industrielles
Industrial Relations

Canadian Labour Relations Under the Charter: Exploring the Implications

Donald D. Carter

Volume 43, Number 2, 1988

URI: https://id.erudit.org/iderudit/050410ar
DOI: https://doi.org/10.7202/050410ar

See table of contents

Publisher(s)

Département des relations industrielles de l'Université Laval

ISSN

0034-379X (print)
1703-8138 (digital)

Explore this journal

Cite this article

Carter, D. D. (1988). Canadian Labour Relations Under the Charter: Exploring the Implications. *Relations industrielles / Industrial Relations*, *43*(2), 305–321. https://doi.org/10.7202/050410ar

Article abstract

Can legal tools used by judges and lawyers adequately deal with the public policy issues that underly any alteration of our present system of industrial relations.

Canadian Labour Relations Under the Charter

Exploring the Implications

Donald D. Carter

Can legal tools used by judges and lawyers adequately deal with the public policy issues that underly any alteration of our present system of industrial relations.

The Charter of Rights and Freedoms continues to be the single most important legal influence upon Canada's industrial relations system. The numerous Charter challenges to Canada's existing labour relations institutions have been moving slowly, but inexorably, through the judicial system and now some authoritative decisions are emerging at the top from the Supreme Court of Canada. These decisions are of vital importance, not just to Canada's legal community, but to its industrial relations practitioners because of their potential to re-shape our industrial relations system.

There has been much speculation about the growing impact of the Charter upon Canadian industrial relations. Some commentators, such as David Beatty,[1] have viewed the Charter as a constructive instrument of social change that has the potential to bring about fundamental reform of our existing industrial relations system. Beatty argues eloquently that the Charter guarantees equal liberty for all workers to participate in determining the conditions that govern their working life. This fundamental guarantee, in his view, raises serious questions about the constitutional validity of many features of the present system such as the statutory exclusion of certain employees from both collective bargaining and minimum wage laws; mandatory retirement based on age; mandatory union security arrangements; and even such a fundamental underpinning as the principle of exclusive representation.

• CARTER, D.D., Professor of Law, Director, Industrial Relations Centre, School of Industrial Relations, Queen's University, Kingston, Ontario.

1 D.M. BEATTY, *Putting the Charter to Work: Designing a Constitutional Labour Code,* McGill-Queen's University Press, 1987.

Despite the eloquence of these arguments, many of my earlier doubts[2] concerning the Charter's potential to change our industrial relations system for the better still remain. At the heart of my concern is the fact that in this new era of the Charter the re-shaping of our industrial relations institutions will be carried out, not by politicians responsible to an electorate, but by judges holding tenured appointments, and yet the issues raised by the Charter will have profound political and economic implications for our society. An unanswered question is whether the legal tools used by judges and lawyers can adequately deal with these public policy issues that must now be resolved in the courts rather than the legislatures.

THE SUPREME COURT OF CANADA TRILOGY

Three recent decisions of the Supreme Court of Canada, each of them dealing with the issue of whether Canada's existing collective bargaining system is given some measure of constitutional protection by the Charter,[3] suggest that Canadian courts themselves may have some reservations about entering the dangerous waters of industrial relations policymaking. These three cases each involved a challenge to government legislation that curtailed existing collective bargaining rights. In one case it was Alberta's legislated restrictions upon public sector collective bargaining; in the second case it was the federal government's income restraint legislation of 1982; and in the third case it was special legislation in Saskatchewan to prohibit a work stoppage in the dairy industry. In each of these three cases the Supreme Court of Canada made it clear that it was not prepared to read the Charter as elevating collective bargaining and strike activity to fundamental rights that are beyond the reach of our legislators.

Mr. Justice McIntyre, speaking as one of the majority, read the Charter's guarantee of freedom of association as only protecting «the exercise in association of such rights as have Charter protection when exercised by the individual»[4]. From this reading of the Charter, he concluded that the Charter was intended to guarantee individual rights only, and did not provide any constitutional protection for group rights so that a combination of

2 D.D. CARTER, «Canadian Industrial Relations and the Charter — The Emerging Issues», Kingston, Industrial Relations Centre, 1987.

3 *Reference re Public Service Employee Relations Act (Alta),* [1987] 1 S.C.R. 314, (1987), 87 C.L.L.C. para. 14,021; *Public Service Alliance of Canada* v. *The Queen in Right of Canada,* [1987] 1 S.C.R. 424, (1987), 87 C.L.L.C. para. 14,022; *Retail, Wholesale and Department Store Union, Locals 544 et al* v. *Government of Saskatchewan,* [1987] 1 S.C.R. 460, (1987), 87 C.L.L.C. para. 14,023.

4 *Reference Re Public Service Employee Relations Act (Alta),* footnote 3, *supra,* at p. 12,158.

persons could not create an entity which would have greater constitutional rights and freedoms than they would have as individuals. This view of the Charter as a manifesto of individual rights, however, was not shared by the two dissenting justices, Chief Justice Dickson and Madame Justice Wilson. In the words of the Chief Justice, «[u]nder our existing system of industrial relations, effective constitutional protection of the associational interests of employees in the collective bargaining process requires concomitant protection of their freedom to withdraw collectively their services...»[5]. Despite this strong dissent, one is still left with the fact that a majority of the Supreme Court of Canada was not prepared to read the Charter as providing protection for collective action when it is exercised in an industrial relations context.

The highest court of the land has now spoken on the fundamental question of whether Canada's collective bargaining system is constitutionally entrenched by reason of the Charter's guarantees. What the court has told us is that this system should not be cast in some immutable constitutional mould but, rather, left to be shaped by normal political forces. For Canada's trade unions this decision may not be the setback that many have predicted. What the court has done is to simply confirm that the regulation of our industrial relations system belongs in the political arena where it has always been. It should be kept in mind that over the years trade unions have enjoyed much greater success in obtaining legislative gains than they ever had in obtaining judicial victories. The fact is that Canadian trade unions are quite adept at operating in the political arena so that the apparent reluctance of the Supreme Court of Canada to involve themselves in labour relations issues through the Charter may in the long run be good news for trade unions, as well as for the rest of Canada's industrial relations community.

IMPLICATIONS FOR UNION SECURITY

The most troubling aspect of these decisions for trade unions, however, is Mr. Justice McIntyre's view of the Charter as a guarantee of individual rights. If the guarantee of freedom of association is read as applying to individual employees under collective bargaining arrangements, then union security provisions could become vulnerable to a Charter challenge. In fact such arrangements are already coming under judicial scrutiny to determine if they are consistent with the Charter, and the outcome of this exercise could have a profound effect upon our industrial relations system.

5 *Ibid.*, at p. 12,181.

At this point no judicial consensus has emerged from this litigation. In British Columbia the closed shop has been the subject of a Charter challenge by two motion picture projectionists. Their complaint was that they were unable to obtain full-time employment because a trade union had refused them membership which was a pre-condition to employment, and they sought a judicial declaration that the closed shop provision was inconsistent with the Charter[6]. The British Columbia Court of Appeal dismissed this broad challenge to union security on the ground that the collective agreement, as a matter of private contract, was not subject to the Charter. According to the court, even the fact that British Columbia's Labour Code expressly recognized the validity of closed shop provisions did not transform such contractual provisions into a form of governmental action that would be regulated by the Charter.

A greater threat to union security is the more narrow challenge to the use of trade union dues for political purposes brought in both Ontario and British Columbia. The issue is of utmost importance to Canadian industrial relations since a curtailment of the political role of trade unions is also likely to weaken their economic and collective bargaining roles. In British Columbia the challenge to the use of union dues for political purposes was dismissed by the court on the ground that the Charter did not apply because there was no governmental action in the use of union dues by a trade union[7]. An Ontario court, however, has reached just the opposite conclusion,[8] but has still gone only so far as to allow an employee to opt out of paying that part of union dues that would go to support union activities not related to collective bargaining.

Such an approach requires a distinction to be drawn between collective bargaining expenditures and non-collective bargaining expenditures. According to the court, the test to be used is whether the purpose of the expenditure reasonably relates to collective bargaining or to the administration of the collective agreement. The application of such a test is not without difficulty, however, and may result in drawing the line in a rather arbitrary manner. In the *Lavigne* case, for example, union contribution to the striking British coal miners in 1984 were considered to be a collective bargaining expenditure while donations to the New Democratic Party were not.

6 *Bhindi and London* v. *B.C. Projectionists' Union Local 348* (1986), 86 C.L.L.C. para. 14,001 (B.C.S.C.); (1986), 86 C.L.L.C. para. 14,052 (B.C.C.A.).

7 *Baldwin* v. *British Columbia Government Employees Union* (1986), 86 C.L.L.C. para. 14,059 (B.C.S.C.).

8 *Lavigne* v. *Ontario Public Service Employees Union* (1986), 86 C.L.L.C. para. 14,039 (S.C.O.); (1987), 87 C.L.L.C. para. 14,044 (S.C.O.).

The larger issue of the constitutionality of union security provisions is obviously destined for resolution by the Supreme Court of Canada and the answer to this important question may well depend upon how that court views the collective agreement. If collective agreements are characterized as purely private arrangements, then it is likely that union security provisions would not be curtailed by the Charter. On the other hand, if the court views collective agreements as having an essential statutory underpinning, then collective agreement provisions could well be regarded as having a public, regulatory effect that would fall within the reach of the Charter. A recent decision of the Supreme Court of Canada appears to shed some light on this issue.

THE DOLPHIN DELIVERY DECISION

In the *Dolphin Delivery* case[9] the Supreme Court of Canada was faced with the issue of whether a court injunction restraining picketing was inconsistent with the Charter. The Supreme Court of Canada, except for Mr. Justice Beetz, was prepared to treat peaceful picketing as a form of expression which could fall within the Charter's constitutional guarantee of freedom of expression. Despite this finding, however, this case cannot be regarded as a Charter victory for trade unions since the court also held that in the circumstances of the case the Charter did not apply.

For one thing, the court was prepared to find that the restraining order fell within the broad qualification found in Section 1 of the Charter, providing that the Charter's guarantees are subject to «such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society». In reaching this conclusion the court placed weight on the fact that the restraining order was only of an interim nature, and that it was a limitation on secondary picketing against a third party which was not allied to the principal party in the labour dispute. Madame Justice Wilson, however, disagreed with this approach, pointing out that it placed too much emphasis upon injury to the employer without a consideration of the role of the common law in relation to labour disputes. In other words, she considered that in determining what constituted a reasonable limit upon picketing as form of expression, it was necessary to address broader issues of principle rather than looking to the subjective impact upon the employer in the particular case.

The primary reason for the court's conclusion that the Charter did not apply in this case, however, related to the remedial avenue chosen by the

9 (1987), 87 C.L.L.C. para. 14,002.

party seeking to restrain the picketing. Since the dispute fell within federal jurisdiction, the company sought a restraining order in the courts after the union's application to the British Columbia labour board for an ally declaration was refused on the basis of lack of jurisdiction. The restraining order issued subsequently by the courts was based on a finding that the picketing proposed by the union, being secondary in nature, would constitute a wrong at common law. At issue before the Supreme Court of Canada, therefore, was the question of whether judicial regulation of picketing in this fashion should be subject to the Charter.

The Supreme Court of Canada concluded that, although the common law must be qualified by the Charter, litigation between private parties completely divorced from any connection with government was immune from the Charter's fundamental guarantees. In essence what the court did was to provide to the judiciary itself a wide exemption from the restraints imposed by the Charter. Governmental action was defined by the Supreme Court as only referring to actions of the legislative, executive, and administrative branches of government, and not to the actions of the judiciary themselves when regulating private parties through the application of the common law. As a result, the Court concluded that the Charter did not apply to the lower court judge in this case since the court was merely dealing with a dispute between private parties.

IMPACT OF THE CHARTER UPON GRIEVANCE ARBITRATION

This decision still leaves unanswered the critical question of whether the Charter will leave its imprint upon collective agreements and grievance arbitration. All that the *Dolphin Delivery* case suggests is that, if collective agreements can be regarded as instruments of private ordering only, then both collective agreements and grievance arbitration would not be subject to the Charter. Such a conclusion, however, may be difficult to draw in light of the hybrid nature of grievance arbitration in Canada.

Grievance arbitration, because it is required by Canadian labour legislation, has never been the exclusive product of collective negotiations[10]. There has always been a public element to our grievance arbitration system, and this public element has been manifested by regulation of the process by both courts and legislatures. The reality is that the grievance arbitration process in Canada is a hybrid institution made up of both public and private elements. The hybrid nature of the process has often created a dilemma for

10 See D.J.M. BROWN and D.M. BEATTY, *Canadian Labour Arbitration* (2nd ed.), Canada Law Book, 1984, pp. 3-9.

Canadian arbitrators as they attempted to reconcile the expectation that they apply the internal value systems of the parties with their public responsibility to the general legal system, explaining the rather cautious approach taken by most Canadian arbitrators in using general legislation to resolve collective agreement disputes.

The Canadian Charter of Rights and Freedoms has only served to heighten this dilemma. The effect of the Charter has been to give legal priority to certain values that are external to the collective bargaining relationship. Values such as freedom of conscience and religion; freedom of thought, belief, opinion and expression; freedom of association; due process under the law; and equality before and under the law have now been given constitutional standing, and the question is whether these values will take priority over the more mundane workplace values now recognized and applied by arbitrators. The following example illustrates how the broadly articulated values set out in the Charter could come into conflict with the generally accepted work place values now found in our arbitral jurisprudence.

The «work now, grieve later» rule is one of the most firmly established principles of arbitral jurisprudence. This approach has its roots in the *Ford Motor* award[11] where we are told by arbitrator Shulman that,

«[A]n industrial plant is not debating society. Its object is production. When a controversy arises, production cannot wait for exhaustion of the grievance procedure. While that procedure is being pursued, production must go on. And someone must have the authority to direct the manner in which it is to go on until the controversy is settled. That authority is vested in supervision. It must be vested there because the responsibility for production is also vested there; and responsibility must be accompanied by authority. It is fairly vested there because the grievance procedure is capable of adequately recompensing employees for abuse of authority by supervision.»

In that very short excerpt the work «production» is used four times and the word «authority» also appears four times, leaving no doubt as to the values considered important by that arbitrator. Although this language is found in an American award, the principle of «work now, grieve later» is firmly rooted in Canadian arbitral jurisprudence. The principle itself rests upon two cornerstones — the need to maintain production and the need to maintain managerial authority in the workplace.

An examination of the Charter, on the other hand, reveals that neither of these two workplace values are given any express mention. Instead, a quite different set of values are described as fundamental — values such as «freedom of thought, belief, opinion, and expression» and «the right to

11 3 L.A. 779 (Shulman).

life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice». Do these loftier values mean the beginning of a new form of workplace democracy in Canada.

It is difficult to believe that our judiciary is likely to use the Charter to bring about such a radical change in the workplace. For one thing, the Charter itself provides that its guarantees are «subject to such reasonable limits as can be demonstrably justified in a free and democratic society. This qualification means that, even if Charter values are to be applied in the interpretation of collective agreements, these values need not always prevail, although it should be recognized that the onus now seems to be on those who argue that Charter values should not be given priority. The more troubling question, however, is whether arbitrators should be applying the Charter at all. Do Charter values belong in the workplace and, even if they do, should arbitrators be the ones to impose such values?

Turning to the first question, there is no doubt that the Charter has the potential to alter firmly established arbitral principles. Perhaps the greatest potential is in the area of just cause for discipline and discharge. If just cause now has to be defined by reference to the Charter's guarantees of fundamental freedoms and due process, then this concept could undergo a radical transformation. The earlier example of the «work now, grieve later» rule is only the tip of the iceberg, and it is possible that the entire arbitral jurisprudence dealing with discipline and discharge might have to be rewritten in light of the Charter.

At the present time, as a general rule, employers need not wait until the issue of just cause is adjudicated at arbitration before discharging an employee. Discharge occurs first and the formal hearing of the matter comes later — a procedure that places the discharged employee in limbo until the matter is decided at arbitration. Can this procedure be reconciled with the Charter's guarantee that a person is not to be deprived of «security of the person» except in accordance with the principles of fundamental justice? This guarantee also raises a related issue of whether employers can continue to suspend employees facing criminal charges. On this issue arbitrators have already struck a delicate balance between the interests of the employer and the interests of the employee[12] by requiring a substantial business justification for such suspensions, but this balance could now be altered by the Charter's guarantees of due process.

The potential for the Charter to alter established concepts of discipline and discharge is limitless. Consider the Charter's guarantees of freedom of

12 Footnote 10, *supra*, at p. 403.

conscience and religion; of freedom of thought, belief, opinion and expression; of freedom of association; of due process; and of equality before and under the law. How will these guarantees affect such arbitral issues as mandatory retirement; the permissible extent of union political activities; personal appearance regulations; personal searches; mandatory drug testing and AIDS testing; different treatment of probationary employees; refusal to work for religious reasons; and the application of evidentiary rules in discharge and discipline cases?

Discipline and discharge, however, is only one area of well settled arbitral rules that could be upset by the Charter. Consider the well established principle of seniority. It can be argued that many, if not all, seniority systems are in conflict with the Charter's guarantee of equality since their effect is to discriminate against newer entrants to the work force, many of whom are women and recent immigrants. Will arbitrators now be required to consider the equality guarantee when interpreting seniority provisions and, more important, will this guarantee take precedence over the clear language of the agreement?

Understandably arbitrators have not been unanimous in embracing the Charter since it has the potential to upset a well established body of arbitral principles. Nevertheless, a review of arbitral jurisprudence reveals that Charter values have been given weight by arbitrators in a significant number of cases. A survey of the arbitration reports reveals fifteen reported causes where arbitrators have dealt with arguments dealing directly with the application of the Charter, and in eight of those cases arbitrators were prepared to give some weight to the Charter in reaching their decisions. In two of those cases, moreover, Charter values were taken into account directly in defining just cause for discipline, although in each of these cases it was held that existing arbitral principles supporting discipline could be justified as reasonable limits upon Charter guarantees of free speech and free association[13]. In two other cases a preliminary ruling was made that the Charter did apply directly to a mandatory retirement policy established by a public employer through the exercise of its management rights under a collective agreement[14]. These four cases all involved the direct application of the Charter to substantive arbitral issues but, because of arbitration's statutory roots, the Charter could also affect the evidential and procedural rulings of arbitrators — a development that has already occurred in two cases[15].

13 *Simon Fraser University* (1985), 18 L.A.C. (3d) 361 (Bird); *Surrey Memorial Hospital* (1985), 18 L.A.C. (3d) 369 (Dorsey).

14 *St-Lawrence College* (1986), 24 L.A.C. (3d) 144 (Teplitsky); *Douglas College* (1987), 26 L.A.C. (3d) 176 (McColl); see also *Ontario Institute for Studies in Education* (1987), 28 L.A.C. (3d) 161 (Burkett).

15 *Canada Post* (1985), 19 L.A.C. (3d) 361 (Swan); *Greater Niagra Transit Commission* (1987), 26 L.A.C. (3d) 1 (McLaren), now quashed by (1987), 87 C.L.L.C. para. 14,051.

Another possibility is that the Charter may be applied indirectly by arbitrators as part of the general law to which they must give some weight in the course of interpreting the collective agreement — an approach that has been taken in at least one case[16]. This last case suggests that arbitrators may go so far as to ensure that the «common law» of collective agreement interpretation conform to the Charter. Given the general language of «just cause» provisions and «management rights» clauses, however, such an approach would appear to allow wide latitude for the application of Charter values by arbitrators.

Seven of these eight cases where Charter values were considered by arbitrators arose from the broadly defined public sector, raising the issue of whether Charter values are more likely to be applied to public sector collective agreements than to private sector agreements. Such a conclusion may be premature, however, since in four other reported cases arising from the public sector it was held that the Charter had no application at all to the collective agreement[17]. The possibility, however, of drawing a line between the public and private sectors for Charter purposes could have interesting consequences. Up until now, Canadian arbitrators have not created a distinct and separate arbitral jurisprudence for the public sector. The same general arbitral principles have been applied in both sectors and any deviation from this common approach resulted from express statutory exceptions. The Charter, however, now creates the potential for a sharp division in the arbitral jurisprudence between the public and private sectors.

At least two arbitrators have been prepared to regard the public sector collective bargaining relationship as attracting the Charter by refusing to recognize a distinction between the role government plays as employer and its role as regulator. Each of these cases involved community colleges, one in Ontario and the other in British Columbia, and in each of these cases a mandatory retirement policy was being challenged[18]. The reasoning in each case was the same — that a governmental employment policy articulated under a collective agreement could be considered as a «law» and, as such, was subject to the Charter. As has already been noted, this broad view of the regulatory role of government has not received unanimous support from arbitrators, but there is now some indication that the Supreme Court of Canada might support such a broad view of government law making.

16 *Hammant Car and Engineering Ltd.* (1986), 23 L.A.C. (3d) 229 (Brent), but see now *Bell Canada* (1987), 29 L.A.C. 257 (Devlin).

17 *Algonquin College* (1985), 19 L.A.C. (3d) 81 (Brent); *Foothills Provincial General Hospital Board* (1986), 23 L.A.C. (3d) 42 (Malone); *Mohawk College* (1986), 23 L.A.C. (3d) 347 (Samuels); *Treasury Board (Transport Canada)* (1986), 24 L.A.C. (3d) 214 (Brown).

18 See footnote 12, *supra.*

In the *Dolphin Delivery* case[19] the Supreme Court, while holding that the Charter did not apply to the common law in the absence of any other act of government, still seemed to suggest that the element of governmental action needed to attract the Charter could take many forms. The Charter, according to the Court, extended as far as the executive and administrative branches of government «whether or not their action is involved in public or private litigation». What this statement suggests is that it is the exercise of statutory authority, regardless of what form it might take, that attracts the application of the Charter. Strangely enough, while the court recognized the undesirability of extending the Charter to certain forms of private ordering — so-called «private litigation» — it did not appear to recognize that it might also be desirable to allow governments similar immunity from the Charter while performing their business function. If this approach is continued by the courts, then there is very real possibility that one effect of the Charter will be the development of a separate body of arbitral principles for public sector collective agreements.

Another possibility, however, is that Charter values will eventually spill into the private sector through indirect routes. Even though the Charter might not be applied directly to private sector collective agreements, arbitrators could still begin to interpret the general language of these agreements in the light of the Charter. Take the case of a mandatory retirement policy. If it is found that the mandatory retirement policies of public employers are inconsistent with the Charter, will it be possible for arbitrators to ignore the imperatives of the Charter when interpreting the broad language of private sector collective agreements. Both the just cause provisions and the management rights clauses in such agreements might still have to be construed in light of the Charter, and this indirect application of the Charter could have much the same effect as would the direct application of the Charter in the public sector.

There is another route through which the Charter might also be applied indirectly to private sector collective agreements. General legislation is clearly subject to the Charter and must be interpreted in a manner consistent with its fundamental guarantees. Even before the Charter arbitrators were required to take account of general legislation when interpreting a collective agreement, whether it be in the private sector a public sector. Through a two-step process, arbitrators could now read Charter values into general legislation, such as a human rights statute, and in turn use this general legislation to read these same values into the collective agreement. Such an approach, however, is open to the criticism that arbitrators should not be in the business of applying the Charter to general legislation. Never-

19 See footnote 9, *supra*.

theless, if the courts have already read Charter values into the general legislation, then it would seem to be entirely open to arbitrators to read the general legislation in the same manner as the courts and construe the collective agreement in the light of this judicial interpretation.

This spillover of Charter values from the public sector to the private sector may be difficult to resist. If one regards Charter values as being fundamental, it is difficult to justify a difference of treatment for the private and public sectors, especially when the line between these two sectors is far from distinct. Once it is determined that mandatory retirement based upon age is unconstitutional, is it any more legitimate if it happens to occur in the private sector? If one wants to limit the reach of the Charter, surely the better argument is that the Charter should not apply to any employment relationship in any sector, private or public, since these matters are best left to private ordering, rather than to argue that the Charter only has application to those employment relationships that happen to fall within the public sector. If Charter values are held to apply directly to public sector collective agreements, then it may only be a matter of time before they also reach into the private sector through less direct routes.

At this point it should be recognized that much of what has already been discussed is still a matter of speculation. While the Charter has cast a long shadow over grievance arbitration, the courts have not authoritatively determined the extent to which the Charter applies in this area, or whether it is to apply at all, and it may be some time before clear guidelines emerge from the courts. At issue, however, is the very survival of the grievance arbitration process as we now know it. Two aspects of this issue are of vital importance to grievance arbitration — the question of whether Charter values belong in the workplace and the question of whether such values should be imposed by arbitrators themselves.

The Charter, as already discussed, has the clear potential to disrupt the internal values established by the parties through their own process of private ordering. The increasing use of Charter arguments at arbitration is bound to result in an emphasis of legal values at the expense of existing work place values. Admittedly, it is possible that Charter values in the end might not prevail over work place values if these work place values are considered to be the type of reasonable limits contemplated by section 1 of the Charter. Nevertheless, the very process of weighing Charter values against workplace values could alter drastically the nature of the grievance arbitration process by transforming what were once regarded as labour relations issues (such as the «work now, grieve later» rule) into legal and constitutional issues. Such a development could open grievance arbitration to much closer scrutiny from the courts and increase the frequency of judicial

review. Instead of regarding an issue as being a labour relations matter and deferring to the arbitrator's decision, courts may now view the same matter as having a constitutional element that requires resolution at a higher level. If this does occur, then lawyers and judges would play a much greater role in shaping the arbitration process than they now do.

This possibility brings me to my next concern. Even if grievance arbitration falls within the reach of the Charter, there is still the matter of whether it should be applied by arbitrators at first instance. For one thing, the Charter raises constitutional issues that can only be decided authoritatively by courts. Does it make sense for arbitrators to attempt to resolve these difficult issues knowing that the possibility of judicial review is a virtual certainty? Another consideration is whether arbitrators have the background to assume this new role as interpreter of Canada's constitution. Not all arbitrators have been schooled in the law but they still function very effectively when applying the internal value systems of the parties. Constitutional interpretation, however, requires different skills and some arbitrators may not possess the necessary skills to perform this exercise.

Perhaps more important, however, is the possibility that the process of grievance arbitration could be irreversibly altered if arbitrators were to succumb to the temptation to deal fully with Charter arguments. Instead of being a forum for the adjudication of labour relations disputes, grievance arbitration could become a minor constitutional court where legal expertise prevails over industrial relations wisdom. Grievance arbitration has already met heavy criticism for being too much the preserve of lawyers, but it could well become an exclusive legal preserve if arbitrators assume an active role in interpreting and applying the Charter. The price to be paid by both employers and unions for such a fundamental alteration of the grievance arbitration process is likely to be high as the costs of the process escalates and delays in the resolution of grievances increase.

IMPACT OF THE CHARTER UPON THE INDIVIDUAL EMPLOYMENT RELATIONSHIP

The Charter also has the potential to reach to the individual employment relationship itself. The fact is that the employment relationship is now contained within a tight statutory framework and can no longer be regarded as merely a private matter of contract between employer and employee. Employment standards legislation, human rights legislation, occupational health and safety legislation, pension legislation, to name only some statutes, all have a significant influence upon the respective rights of employer and employee. This legislation, however, must conform to the

Charter which, as a constitutional document, is overriding. In effect the Charter could amend such legislation, altering the existing balance of rights and obligations that now run between employer and employee.

In particular the constitutional guarantee of equality is likely to raise more employment issues than any other provision of Charter, and will require us to rethink our assumptions about equality of treatment. Included in this list of issues are mandatory retirement; equal treatment of men and women under pension schemes; the payment of equal benefits to part-time workers; equal pay for work of equal value; access to employment for disabled workers; mandatory drug testing; the scheduling of employment for minority religious groups; and the unequal application of minimum standards legislation. While this list is by no means exhaustive, it still serves to provide some idea of the kinds of issues that might arise from the Charter's guarantee of equality.

The contentions issues of mandatory drug testing in the workplace provides a good illustration of how Charter arguments might be used. Existing arbitral jurisprudence already suggests that unionized employers may face legal problems if they insist that their employees submit to drug testing. Mandatory drug testing constitutes a clear invasion of employee privacy, and it would take substantial considerations of safety, health, or the employer's reputation to persuade an arbitrator that such an intrusion was a justifiable exercise of managerial rights under a collective agreement. Both unionized and non-unionized employers may also confront equally difficult legal hurdles arising from the protection against discrimination based upon disability found in Canadian human rights legislation. The *Canadian Human Rights Act* now treats substance abuse as a disability,[20] so that federal employers who require job applicants or current employees to submit to drug testing will have to justify such testing by establishing a strong business rationale.

The Charter, however, could place even further legal restrictions on drug testing in the workplace because of its guarantee of the right to be secure against unreasonable search or seizure, and the right to be protected against discrimination based on disability. Even though the Charter might not apply directly to the employment relationship, it could still apply indirectly through its application to Canadian human rights legislation and the subsequent application of that legislation to the employment relationship. Human rights legislation, when read in light of the Charter, is likely to be interpreted in a manner favourable to both the employee claim to privacy

20 The *Canadian Human Rights Act*, S.C. 1976-77, c.33 as am., s.20 expressly provides that disability includes «previous or existing dependence on alcohol or a drug».

and the claim to be protected against discrimination based on disability. This legislation in turn would govern the employment relationship and, in this manner, the Charter could influence indirectly the obligations running between employer and individual employees. The end result could be greater legal protection for employees and, on the other side of the coin, further restrictions on the exercise of managerial rights.

CONCLUSION

The application of the Charter to Canada's industrial relations system is bound to be a long and protracted process, making it difficult at this time to predict any final result. The extent to which the Charter will re-shape out labour relations system is still uncertain, and it is not yet clear whether Canadian courts will place a new emphasis on individual rights or take a more traditionally Canadian approach of giving precedence to collective responsibility. Nevertheless, the Charter has already cast a long shadow over our industrial relations system.

Perhaps the greatest concern is that the Charter could reshape the Canadian industrial relations system in a form more closely resembling the present American model. The Charter has greatly enhanced the authority of the Canadian judiciary at the expense of our legislatures, but the idea of judicial legislation is still somewhat foreign to Canadian judges who have been schooled in a system of parliamentary democracy. Canadian courts are new to the business of making such profound policy choices, and they may feel uncomfortable with their new role of conducting a searching analysis of the political and economic considerations underlying our present labour relations legislation. In this new judicial environment there will be a natural temptation for our courts to fall back upon the tried and true legal technique of justifying their choice by reference to precendent. The lack of Canadian precedent to resolve the difficult issues raised by the Charter may cause Canadian courts to look to the more abundant American constitutional case law[21]. The danger of such an approach, however, is that our courts might rely too heavily upon American case law to resolve Charter issues and fail to recognize the unique nature of the Canadian industrial relations system.

21 The *Lavigne* case, footnote 8, *supra,* provides a good example of this tendency.

Les relations professionnelles au Canada sous le régime de la Charte des droits

La Charte des droits et des libertés est devenue la principale source d'influence légale sur le régime des relations professionnelles au Canada. La Charte a amplifié les pouvoirs des tribunaux canadiens et créé la possibilité que notre régime de relations de travail puisse être transformé par les décisions judiciaires. Une question demeure sans réponse: les instruments juridiques utilisés par les juges et les avocats peuvent-ils être en conformité avec les sujets de nature politique qui sont à la base de toute modification du régime actuel de relations professionnelles au Canada.

Trois décisions récentes de la Cour suprême du Canada indiquent que les tribunaux mêmes peuvent partager cette préoccupation. Chacune de ces affaires soulève la question de savoir si le régime de négociation collective actuel est garanti dans une certaine mesure par la Charte. La majorité des juges de la Cour suprême n'étaient pas prêts à l'interpréter de façon à ce qu'elle assure la protection de l'action collective lorsque celle-ci s'exerce dans un contexte de relations professionnelles. Pour les syndicats canadiens, cette décision peut bien ne pas signifier le recul que beaucoup avait prédit, étant donné qu'elle confirme simplement que la législation à la base de notre régime de relations du travail relève du domaine politique et non du domaine judiciaire.

L'aspect le plus troublant de ces décisions pour les syndicats, cependant, est l'accent que place la Charte sur la protection des droits individuels. Si la garantie de la liberté d'association s'applique aux salariés pris individuellement régis par des conventions collectives, il se peut que les clauses de sécurité syndicale puissent devenir vulnérables selon le texte de la Charte. Peut-être que la plus grande menace pour la sécurité syndicale réside dans l'utilisation des cotisations syndicales à des fins politiques, étant donné qu'un recul du rôle politique des syndicats est probablement de nature à amoindrir leur action économique et leur pouvoir de négociation collective. La décision de la Cour suprême du Canada dans l'affaire *Dolphin Delivery* laisse entendre que les litiges entre des parties privées qui n'ont rien à voir avec le gouvernement sont à l'abri des garanties fondamentales de la Charte. La solution de toute menace de la Charte pour la sécurité syndicale, toutefois, découlera probablement du fait suivant: les conventions collectives devraient-elles être considérées comme des accords strictement privés qui ne relèvent pas de la Charte ou devraient-elles être considérées comme des documents législatifs essentiels qui pourraient donner lieu à l'application de la Charte?

Il faut considérer à la lumière de la décision *Dolphin Delivery* l'importante question de savoir si la Charte va influencer les conventions collectives et l'arbitrage des griefs. Le processus d'arbitrage des griefs au Canada est une institution hybride qui est à la fois le résultat de la négociation collective et de la législation. Si la Charte doit s'appliquer à l'arbitrage des griefs, les principes généraux énoncés dans la Charte auraient priorité sur les règles particulières des rapports collectifs de travail et pourraient modifier considérablement les modes d'arbitrage actuels.

Non seulement la Charte peut-elle faire éclater la réglementation particulière fixée par les parties, mais il lui est également possible de transformer la procédure d'arbitrage elle-même. Au lieu d'être le forum où se décident les différends du travail, l'arbitrage des griefs peut devenir un tribunal inférieur de type constitutionnel où l'expertise juridique l'emporte sur le sens commun des relations professionnelles. Le prix que doivent payer employeurs et syndicats pour un tel changement du processus de règlement des griefs sera vraisemblablement d'autant plus élevé que les coûts de l'arbitrage augmenteront et que s'accroîtreront les délais dans le règlement des griefs.

Il est aussi possible que la Charte modifie les relations de travail individuelles mêmes. C'est un fait que celles-ci se trouvent aujourd'hui incluses dans un encadrement législatif rigoureux et qu'on ne peut plus les considérer comme des matières strictement privées. La législation sur les normes de travail, les droits de l'homme, la santé et la sécurité professionnelles, les caisses de retraite, pour ne citer que quelques lois, ont une influence considérable sur les droits respectifs des employeurs et des employés. Cette législation doit être maintenant conforme à la Charte, ce qui crée la possibilité que celle-ci puisse modifier l'équilibre actuel des droits et des obligations qui existent présentement entre employeurs et salariés.

L'application de la Charte au régime canadien de relations professionnelles est destinée à être un long et pénible processus, ce qui rend difficile de prévoir maintenant le résultat final. Dans quelle mesure celle-ci modifiera-t-elle le régime des relations de travail? Cela est incertain, et il n'est pas encore assuré si les cours canadiennes mettront davantage l'accent sur les droits individuels ou si elles s'en tiendront à l'approche traditionnelle canadienne de donner préséance à la responsabilité collective. Dans cette ambiance juridique nouvelle, cependant, il y aura tendance naturelle de la part de nos tribunaux à s'en remettre à la véritable technique juridique de façon à fonder leurs décisions en s'en remettant aux précédents. Le manque de jurisprudence pour résoudre les questions difficiles soulevées par la Charte peut amener les tribunaux canadiens à s'inspirer de la jurisprudence américaine qui est plus considérable. Le danger d'une pareille approche, toutefois, c'est que nos tribunaux s'appuient beaucoup trop sur les précédents américains pour trancher les questions relatives à la Charte en refusant de reconnaître la nature originale du régime canadien de relations professionnelles.