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Harry Arthurs*

Charting the Boundaries of Labour Law: Innis Christie and the Search for an Integrated Law of Labour Market Regulation

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Introduction

What an honour it is to deliver the first Innis Christie lecture in labour and employment law. My career and Innis' developed in parallel. Our very first publications dealt with tort liability for strikes; our early research dealt with collective labour law; we worked together on a labour law casebook; we both shuffled sideways from labour law into administrative law and lurched from there into legal ethics; we both became labour mediators and arbitrators and then—a logical progression—deans of law. Finally, we both worked on government policy studies, starting with the Woods Task Force in the mid-1960s, though Innis became far more extensively involved with government than I did.¹

* University Professor Emeritus and President Emeritus, York University. This essay was originally delivered as the inaugural Innis Christie Lecture at the Schulich School of Law, Dalhousie University. I thank Bruce Archibald and his fellow organizers for prescribing the nautical metaphor around which this lecture and an ensuing conference were organized, and Claire Mummé, Katia Diab and Robin Lostracco for their able research and editorial assistance.

1. Amongst his many practical contributions to labour law, policy and administration, Innis Christie chaired the Nova Scotia Labour Standards Tribunal, Workers' Compensation Board and Labour Relations Board and also served as Deputy Minister of Labour.

2 The Dalhousie Law Journal

On the other hand, in several important respects, our paths diverged. I tried to light a fire under my law school; Innis burned his down. Innis was a passionate golfer; I wrote an article on “The Right to Golf.” He was an intrepid sailor; I exhausted my nautical ambitions on the ferry across Toronto harbour. But the biggest difference between us was this: I got around to thinking about the plight of individual, unorganized workers just five or six years ago; Innis taught Canada’s first-ever course in employment law in the early 1970s² and in 1980, he published the first-ever Canadian academic treatise on the subject.³

It is precisely Innis’ pioneering work on the rights of unorganized workers that inspires the title of my talk this evening: “Charting the boundaries of labour law.” By discovering an unexplored continent of individual employment law, an ocean away from the known world of collective labour law, Innis opened up for debate the whole question of how to redraw the map of labour law so as to accommodate this new and important discovery. I will address that question. Then I will suggest that we need a map that is more ambitious yet, one that can accommodate a multiplicity of continents as yet undiscovered, a plethora of tectonic forces as yet unimagined. What we need, I argue, is a map of “the law of labour market regulation.”

I. *The rise and fall of collective labour law*

It is easy to understand why collective labour law preoccupied Canada’s labour policy makers, practitioners and scholars right through the 1960s when Innis and I began our academic careers. Conflict raged over labour’s claims to a fair share of wealth and power, over the right of workers to organize, over the implications of collective bargaining for the national interest in war and peace. This conflict—bitter, emotional, ideological and sometimes violent—ultimately provoked a major if incomplete experiment in labour market regulation: our system of compulsory collective bargaining.⁴ Given this great societal drama, given the legal and policy challenges of introducing a new regulatory system, how could politicians, lawyers and legal academics not be interested in—not be consumed by—collective labour law?

2. This is not quite accurate. As Innis himself noted, a course in “master and servant law” was offered at Dalhousie decades earlier. Innis Christie, *Employment Law in Canada* (Toronto: Butterworths, 1980) at 3 citing John Willis, *A History of Dalhousie Law School* (Toronto: University of Toronto Press, 1979) at 80.

3. Christie, *ibid.*

4. See Judy Fudge and Eric Tucker, *Labour Before the Law: The Regulation of Workers’ Collective Action in Canada, 1900-1948* (Toronto: University of Toronto Press, 2004).

However, just when collective bargaining entered its “golden age,” it seemed to lose its appeal. Or, more accurately, changes in technology, management strategy, working class consciousness and global political economy brought the post-war expansion of trade unionism to a halt, and launched collective bargaining on what has turned out to be forty years of gradual but uninterrupted decline.⁵ Over time, this decline contributed to the restructuring of labour law practice, the repudiation by legislatures of many promising experiments in collective labour law, and ultimately, the redeployment of scholarly energies to other aspects of labour law. Innis, of course, was way ahead of the rest of us in detecting this shift, or at least in noticing the tenuous grip that collective bargaining had on Canadian workplaces, and the consequent need to supplement or complement it with what we now call “employment law.”

II. *The emergence of individual employment law*

I had an early encounter with employment law myself. One of the first letters I drafted as an articling student read roughly as follows: “Dear Sir, You have wrongfully dismissed our client, Mr. A. Unless we receive the sum of \$1 mil. by Monday next, we will be obliged to initiate legal proceedings.” To my astonishment, not a penny was received by “Monday next” nor were legal proceedings initiated by our firm. For obvious reasons: aggrieved employees, like poor Mr. A, could seldom afford to sue, and if they could, they were generally well advised not to do so. Common law doctrine heavily (but not entirely) favoured employers;⁶ common law remedies did not include reinstatement of wrongly discharged employees;⁷ and damage awards were generally very modest.⁸ Well into the 20th century, magistrates’ and small claims courts—the lowest level of criminal and civil courts—still dealt with what was then called “master and servant” law. However, no lawyer ever made much of a living in those courts; their decisions were seldom—if ever—reported; and until recently, they received scant attention from scholars.⁹

5. See e.g. Harry Arthurs, *Labour Law without the State?* (1996) 46:1 UTLJ 1; Harry Arthurs, “Labour Law After Labour” in Guy Davidov & Brian Langille, eds, *The Idea of Labour Law* (Oxford: Oxford UP, 2011).

6. For a general account see e.g. Geoffrey England et al, *Employment Law in Canada*, 3d ed (Toronto: Lexis Nexis Canada /Butterworths, 1998) vol 1 at 1.1 ff; But see also Harry Glasbeek, “The Contract of Employment at Common Law” in John Anderson & Morley Gunderson eds, *Union-Management Relations in Canada* (Toronto: Addison-Wesley, 1982).

7. See e.g. *Red Deer College v Michaels et al*, [1976] 2 SCR 324 at 15.

8. See Christie et al, *Employment Law in Canada*, 2d ed (Toronto: Butterworths, 1993) at 728, 732, 734 and 801.

9. But see Douglas Hay & Paul Craven, *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (Chapel Hill: University of North Carolina Press, 2004).

4 The Dalhousie Law Journal

Thus, for Innis to launch a new law school subject called employment law in the 1970s was pretty much like making bricks without straw. In each decade of the 40s and the 50s only about 60 employment law cases in total were decided by *all* Canadian superior courts—that is, about six cases per year; in the 1960s, this number grew somewhat to about 100 over the decade—still on average only one case per province per year. And even in the 1970s, when Innis began to work in the field, only about 600 cases were decided across the whole country over the entire ten year period—on average half a dozen cases per year per province. The pace really only picked up in the 1980s when more than 3,000 employment law cases were decided. The number has continued to climb ever since.¹⁰

During the 1970s, and especially the 1980s, it became clear that qualitative as well as quantitative changes were taking place. Common law doctrines became more favourable to employees. Judges began to read worker-friendly terms into employment contracts,¹¹ to hold employers to higher substantive and procedural standards when terminating employees for cause;¹² and to provide employees with more generous damage awards if these standards were violated.¹³ These developments were chronicled in (and to some extent prompted by) an outpouring of publications on employment law—practitioners’ texts, guides and handbooks, law school and continuing education teaching materials, government and think-tank studies and, of course academic treatises and articles. In the entire sixty years from 1900 to 1960, less than a dozen books or articles on employment law were published in Canada—less than two per decade; in the 1960s and 1970s, the pace picked up a little, to a dozen publications per decade; but

10. These numbers refer only to court decisions dealing with contracts of employment and with employment standards. They do not include court decisions dealing with human rights and occupational health and safety; first instance decisions of commissions, tribunals and adjudicators; or front-line administrative determinations by labour inspectors, workplace committees and other bodies. They therefore radically understate the overall levels of activity in the field. I am grateful to Claire Mummé, PhD candidate, Osgoode Hall Law School, York University, for allowing me to refer to the preliminary results of her study of employment law litigation.

11. See e.g. *Cohnstaedt v University of Regina*, [1989] 1 SCR 1011 at paras 26-29, [1989] SCJ no 38.

12. See e.g. *McKinley v BC Tel*, 2001 SCC 38, [2001] 2 SCR 161.

13. See e.g. *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701; but see *contra Honda Canada Inc. v Keays* 2008 SCC 39, [2008] 2 SCR 362.

since 1980, things have changed dramatically: there are now about 100 publications on some aspect of employment law per decade.¹⁴

Innis, his co-authors and his students¹⁵ made a crucial contribution to these developments by proposing a new regime of protection for Canadian workers; and they did so just at the moment when it was becoming clear that collective bargaining was going into decline. In fact, as we all know, collective labour law never covered as many workers as individual employment law. Even in its heyday in the 1960s and 1970s, collective labour law covered only some 40 per cent of the Canadian workforce; the rights of the other 60 per cent were determined by individual employment law; and this disparity grew as union density shrunk to its current level, well below 30 per cent.¹⁶

However, I do not mean to suggest that employment law has lived up to its early promise either. The common law of the employment contract—the heart and soul of what we have come to call “employment law”—never provided rank-and-file workers with satisfactory protection, and still does not. Rather it appears primarily to benefit a relatively thin stratum of relatively highly-paid professional, managerial, sales and technical employees.¹⁷ This is hardly surprising. Unlike my poor Mr. A and other rank-and-file workers, the latter can afford to sue; they make higher salaries and therefore stand to recover higher damages if they win their case; and they also benefit from an odd common law doctrine that entitles them to calculate their damages using a more generous formula than the one rank-and-file workers must use.¹⁸

Still, if developments in the common law of employment provided little practical benefit to ordinary workers, they certainly created a whole new market niche for lawyers. On the one hand, lawyers identified a

14. These numbers include all English-language handbooks, guides, teaching materials, treatises and articles on employment law, wrongful dismissal and labour standards legislation and may be somewhat inflated because multiple editions of the same publication are included as individual items. On the other hand, they do not include publications relating to employment discrimination, workers' compensation or occupational health and safety. I am grateful to Katia Diab, JD candidate, Osgoode Hall Law School, York University, for her assistance in identifying these publications.

15. Academics who graduated from the “Christie school” of labour and employment law include Bruce Archibald, Brent Cotter, Geoffrey England, Brian Langille, Lorraine Lafferty, Michael Lynk, Michael MacNeil and Dianne Pothier.

16. OECD, Directorate for Employment, Labour and Social Affairs, *Trade Union Density in OECD Countries 1960–2008*, online: OECD <http://www.oecd.org/LongAbstract/0,3425,en_2649_33927_39891562_1_1_1_1,00.html>.

17. See e.g. England et al, *supra* note 6 at 1.10.

18. *Cronk v Canadian General Insurance Co*, [1995] 25 OR (3d) 505, 128 DLR (4th) 147; Donald D Carter, “Calculating the Length of Reasonable Notice: Has *Cronk* Made a Difference?” (1998) 6 CLELJ 421; G England, “Determining Reasonable Notice of Termination at Common Law: The Implications of *Cronk v Canadian General Insurance Co*.” (1996) 4 CLELJ 115.

new, affluent clientele to whom they marketed their services through publications, conferences and newsletters;¹⁹ on the other, they helped to reshape the contractual provisions, legal doctrines and conventions of compensation that constitute the substantive norms of this field of law.²⁰

I wish I could also report that employment law flourished as rapidly amongst academics as it did amongst practitioners. However, I am afraid that we law professors were slower off the mark. In part, our reluctance to teach or write about employment law can be explained by a near-consensus in academe that the best way to protect workers was to help them to gain access to collective bargaining.²¹ Only when the promise of collective bargaining began to fade did we begin to look seriously at the alternatives—in particular at employment standards, health and safety, workers' compensation and anti-discrimination statutes enforced by labour ministries, inspectorates and tribunals. Until then, as Judy Fudge memorably observed, with the honourable exception of Innis, and his former students and collaborators, we generally treated employment law as “labour law’s little sister”²²—as an un-sexy field unworthy of the attention of serious scholars—despite the fact that it provided the only practical protections for many women and immigrants, for the unskilled and poorly educated and for other vulnerable worker populations. However, a second, more mundane consideration also delayed the growth of an academic discipline of employment law. Law professors tend to teach subjects only if they can find “teachable” cases²³ or other thought-provoking materials. However, few such employment law cases were decided until the 1970s and, as noted, hardly any Canadian secondary literature was published until the 1980s.

19. See e.g. L Edelman, S Abraham & H Erlanger “The Professional Construction of Law: The Inflated Threat of Wrongful Dismissal” (1992) 26 *Law & Soc’y Rev* 47.

20. See e.g. Daphne Taras, “The Micropolitics of *Wallace v United Grain Growers Ltd.*” in J Fudge and E Tucker, eds, *Work on Trial: Canadian Labour Law Struggles* (Toronto: Irwin Law/Osgoode Society for Canadian Legal History, 2010).

21. The consensus was not complete. Critical scholars expressed doubts early on that collective bargaining could or would liberate workers from the subordination that informed classical master and servant law. See e.g. H Glasbeek, “The Utility of Model Building—Collins’ Capitalist Discipline and Corporatist Law” (1984) 13:1 *Ind Law J* 133 at 142-43; Judy Fudge, “Fragmenting Work and Fragmenting Organizations: The Contract of Employment and the Scope of Labour Regulation” (2006) 44 *Osgoode Hall LJ* 609 at paras 24-26.

22. Judy Fudge, “Reconceiving Employment Standards Legislation: Labour Law’s Little Sister and the Feminization of Labour” (1991) 7 *J L & Soc Pol’y* 73.

23. As late as 1948, a distinguished Oxford academic solemnly complimented his own university for excluding from its curriculum “branches of law that depend on Statute and not on precedent.” WTS Stallybrass, *Law in the Universities* (1948) 1 *J Soc’y Pub Tchrs L* (n.s.) 157 at 163.

III. *Labour law is a subset of employment law*

Whatever the reasons, then, it is clear that employment law only emerged as field of professional practice in the 1970s and as an academic sub-discipline in the 1980s, thanks largely to Innis. What relation employment law bore to the rest of labour law is the question I want to pose next. In the preface to the first edition of *Employment Law*, Innis defined his subject as “the *non*-collective aspect of what standard English texts refer to as labour law.”²⁴ This definition appears to sharply differentiate the individual from the collective aspects of labour law. However, as Innis made clear elsewhere, this differentiation was driven by editorial considerations, rather than a desire to keep the various elements of labour law analytically or functionally distinct.²⁵ Not only are there points of intersection and overlap between collective and individual law; not only do the two inform and influence each other; but as Innis’ former student and then-colleague, Brian Langille, argued in an important early article, “labour law is a subset of employment law.”²⁶ Like Brian, Innis himself strongly endorsed the proposition that collective and individual labour law are both indispensable to the larger project of ensuring justice in employment relations.²⁷ In this part of my lecture, I aim to explore the implications of their shared insight.

Let me start this way. Labour law is about workers. However, workers do not arrive on the labour market with “individual” or “collective” stamped on their foreheads, nor do they secrete an antibody that guarantees they will remain employees rather than become “self-employed,” “unemployed” or “precariously employed.” Thus in the 1950s and 1960s, many workers governed by individual employment contracts joined unions and became subject to collective bargaining law; in the 1970s, as union density declined, many moved in the opposite direction, from collective to individual regimes; and since the 1980s there has been a significant shift from full-time long-term standard employment arrangements to self-employment and to part-time, short-term, agency and other non-standard arrangements²⁸—most of which provide workers with fewer rights and

24. Christie, *supra* note 2 at vii.

25. *Ibid* at 2-3. This theme was the subject of lengthier treatment in the second edition by Innis and his co-editors, Geoffrey England and Brent Cotter. See Christie et al, *supra* note 8 at xi-xii.

26. Brian Langille, “Labour Law is a Subset of Employment Law” (1981) 31:2 UTLJ 200.

27. I am grateful to Brian Langille and Brent Cotter, a former member of the Dalhousie law faculty and author of a chapter in the first edition of *Employment Law*, for their recollections of Innis’ position on this point.

28. See e.g. L Vosko, N Zukewich & C Cranford, “Precarious Jobs: A new typology of employment” (October 2003) 4:10 Perspectives 16; and for international comparisons see A Supiot, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford: Oxford University Press, 2001); Katherine Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge: Cambridge University Press, 2004).

lower entitlements. Because of this fluidity in the status and rights of workers, labour law ought to be able to manage transitions, reconcile anomalies and cope with ambiguities. But it can do none of these things well if its administrators, subjects and beneficiaries inhabit multiple policy domains, each regulated by a distinct legal regime.²⁹

A second consideration of equal or greater importance: disparities and discontinuities amongst common law, collective bargaining and statutory employment regimes create incentives for employers to “game the system” to the prejudice of their workers. By resisting unionization they can hire people more cheaply under individual contracts; by not offering them standard employment conditions, they can hire them more cheaply yet; and by sending work down the supply chain, to a subcontractor or offshore, they can avoid hiring workers altogether, escape all forms of labour regulation and achieve even lower “labour” costs—which is why employers have been doing all of these things with increasing frequency. Understanding labour law as an integrated system, I argue, might go some way towards preventing such tactics. If so, it might also lead unionists to see statutory regulation of the workplace as complementary to and supportive of collective bargaining, rather as a poor substitute for it.³⁰

Finally, the persistence of distinct regimes of labour law—common law, collective bargaining and statutory—helps to obscure, and thus to reinforce, inequality amongst groups of workers. To overstate slightly, high status managerial and professional workers benefit considerably from employee-friendly rulings of the Supreme Court of Canada; private sector construction, transportation and manufacturing workers and public sector workers are able to secure favourable wages and working conditions through collective bargaining; but many Canadian workers—unskilled, casual or part-time workers, service and clerical workers—must settle for the minimal protections they receive from under-resourced labour inspectorates charged with enforcing often-outdated labour standards legislation;³¹ and, parenthetically, domestic and agricultural workers must in practice settle for none-of-the-above.³² Now the key point: the

29. For a variety of perspectives on this point see G Davidov & B Langille, *Boundaries and Frontiers of Labour Law* (Oxford: Hart Publishing, 2006).

30. Harry Arthurs, “Reconciling Differences Differently: Reflections on Labor Law and Worker Voice After Collective Bargaining” (2007) 28 *Comp Lab L & Pol’y J* 155.

31. These deficiencies are documented in my report *Fairness at Work: Federal Labour Standards for the 21st Century* (Ottawa: HRSDC, 2006) and in the research studies that accompanied it.

32. See e.g. Jonah Butovsky & Murray E G Smith “Beyond Social Unionism: Farm Workers in Ontario and Some Lessons from Labour History” (Spring 2007) 59 *Labour* 69 at 76-78; Abigail Bakan & Daiva Stasiulus, eds, *Not One of the Family: Foreign Domestic Workers in Canada* (Toronto: University of Toronto Press, 1997).

demography of each of these groups differs considerably. White males predominate in managerial and professional cadres and male semi-skilled workers in most private sector unions. Women are prominent in public sector unions, but, along with people of colour and immigrants, are overrepresented in the service sector and, of course, in the non-waged work of social reproduction. Thus, because different groups of workers are covered by labour law regimes of differing ambition and efficacy, labour law may operate to reinforce gender, racial and class inequality in Canadian society.³³ To say that “labour law is a subset of employment law” is to remind ourselves that we must measure our system of employment regulation by what it does to help the weakest, not the strongest, members of the workforce. An integrated approach to employment law would enable us to see this more clearly.

Against this background I can now sum up what I conceive to be Innis’ great achievement. By exploring the common law of employment and the statutory regimes that regulate employment relations, and by charting their relationship to collective labour law, he redrew our mental map of this whole legal domain. But Innis was a pragmatic person, not a grand visionary. He effectively redrew our map of labour law in much the same way as, say, the Basque fishermen who fished for cod off the coast of Newfoundland revised everyone’s knowledge of the Atlantic. Until the publication of *Employment Law In Canada*, academic and professional lawyers operated with a map on which the law governing individual employment relations was essentially located in a blank space quaintly labelled “heer bee monsters.” Innis removed that label, and by sketching in the main features of that space reminded us that it was inhabited by flesh-and-blood workers who needed and deserved the law’s attention.

Without this initiative, we could neither identify the winds, reefs and cross-currents that make labour policy so problematic, nor find our way to our ultimate destination: justice in the workplace. But in case you think that I have arrived at my own ultimate destination, the end of this lecture, I have to ask you to be patient for a few more minutes.

IV. *New maps of labour law*

While Innis enlarged the boundaries of the known world, he did not capture it in its entirety. In this next part of my lecture, I want to describe three

33. See e.g. David Beatty, “Ideology, Politics and Unionism” in Kenneth P Swan & Katherine Swinton, eds, *Studies in Labour Law* (Toronto: Butterworths, 1983) 299 at 301-21; Anne Forrest, “How Labour Relations Policy and Law Perpetuate Women’s Economic Inequality” (Spring/Summer 2004) 23:3/4 *Can Woman Stud* 64; Judy Fudge & Harry Glasbeek, “The Legacy of PC 1003” (1995) 3 *CLEJLJ* 357.

recent attempts to complete, or at least complement, Innis' work by filling in the remaining unknown spaces on the map of labour law.

V. *Maps of small places: legal pluralism and the law of the workplace*

The first such attempt began by altering the scale of the map. Instead of charting hemispheres and continents, oceans and mountains, this new map began by minutely describing workplaces. There was a certain logic in this new approach. Workplaces are where all forms of labour law intersect: individual and collective labour law, constitutional norms and regulatory statutes, formal contracts and quotidian customs. However, the results of this intersection are unpredictable and vary from one workplace to another. Sometimes, no doubt, workers and employers behave precisely as legislatures, regulators, courts and labour lawyers imagine they will. However, this is relatively rare. Almost always there will be an overlay of private, informal and often implicit understandings about how everyday life is to be conducted in that workplace.³⁴ Quite frequently, those understandings will transgress the formal requirements of state law though sometimes they will replicate, reinforce or extend them. This notion that the parties to an employment relationship create their own "web of rule" is well known in the literature of industrial relations; is the central insight of "legal pluralism," one of the most important post-modern legal theories; and is in fact supported by all regimes of state labour law that allow space for the parties to negotiate and administer the terms of their relationship.³⁵

But for all its descriptive power, "the law of the workplace" lacks normative, analytical or explanatory power. It does not tell us whether prevailing workplace norms are just or unjust; it does not explain why one particular hierarchy of norms has come to prevail in any given workplace, rather than another; and it does not offer an overall account of the formative influences that shape employment relations and labour law in our society. In the end its virtues of small scale and close attention to detail turn out to be its greatest weakness.

VI. *Maps of law's empire: the constitutionalization of labour law*

The same cannot be said of the next attempt to locate labour law on the larger map of the juridical world. Old maps used to colour whole continents pink in order to signify that they belonged to the British Empire. Likewise, contemporary maps of social and legal relationships tend to regard many

34. Harry Arthurs, "Understanding Labour Law: The Debate Over 'Industrial Pluralism'" (1985) 38 *Curr Legal Probs* 83.

35. The literature is reviewed in Harry Arthurs, "Landscape and Memory": Labour Law, Legal Pluralism and Globalization in T. Wilthagen, ed., *Advancing Theory in Labour Law and Industrial Relations in a Global Context* (Amsterdam: North Holland Press, 1998) at 21 ff.

of them as possessions or dependencies of constitutional law. But it is no more useful, in my view, to comprehend labour law as a mere province of constitutional law than it was to understand India as a colony of the United Kingdom. Of course, one can understand the appeal of colouring labour law “constitutional.” Those who favour this approach mean to convey that the most cherished values of our society—equality, dignity, security, freedom of assembly and association—should permeate the workplace where most of us spend most of our lives.³⁶ Moreover, they intend that those values should be translated into constitutional rights, legally enforceable by aggrieved workers. And finally, they hope and believe that if we follow this approach, the courts will be able to transform employment from a relationship of power to a relationship of justice, and to do so without the unpleasantness that accompanies political struggle, social mobilization or economic redistribution.

If only that is what a map of labour law looked like! But alas it does not. Put aside the notorious expense, uncertainty and inefficacy of constitutional litigation—though these are all good reasons to resist the constitutionalization of labour law.³⁷ Consider only what I am going to suggest is a fair, if un-nuanced, reading of Canada’s constitutional texts and the Supreme Court of Canada’s labour law jurisprudence.

- Under our *Charter of Rights and Freedoms*, workers enjoy the procedural freedoms of association and expression.³⁸ But their rights do not include substantive rights to a job, to receive decent remuneration or to have a voice in the management of the enterprise.³⁹

36. David Beatty, *Putting The Charter to Work: Designing a Constitutional Labour Code* (Kingston: McGill-Queen’s University Press, 1987); Roy Adams, “From Statutory Right to Human Right: The Evolution and Current Status of Collective Bargaining” (2008) 12 *Just Labour* 48; Guy Davidov, “Judicial Development of Collective Labour Rights—Contextually” (2010) 15:2 *CLELJ* 235; and c.f. Alan Hyde, “Exclusion Is Forever: How Keeping Labour Rights Separate from Constitutional Rights Has Proven To Be a Bad Deal for American Trade Unions and Constitutional Law” (2010) 15:2 *CLELJ* 25.

37. For an extended critique see Harry Arthurs & Brent Arnold, *Does the Charter Matter?* (2006) 11:1 *Rev Const Stud* 37; Harry Arthurs, “The Constitutionalization of Employment Relations: Multiple Models, Pernicious Problems” (2010) 19:4 *Soc & Leg Stud* 403; Harry Arthurs, “Constitutionalizing the Right of Workers to Organize, Bargain and Strike: The Sight of One Shoulder Shrugging” (2010) 15:2 *CLELJ* 273.

38. *Health Services and Support – Facilities Subsector Bargaining Association v British Columbia*, 2007 SCC 27 at paras 2 and 91, [2007] 2 SCR 391; *Retail, Wholesale and Department Store Union, Local 558 v Pepsi-Cola Canada Beverages (West) Ltd*, 2002 SCC 8 at paras 3 and 32-37, [2002] 1 SCR 156.

39. Judy Fudge, “The Supreme Court of Canada and the Right to Bargain Collectively: The Implications of the *Health Services and Support* case in Canada and Beyond” (2008) 37:1 *Indus LJ* 25 at 32-35.

- The *Charter* also protects workers against abuses by state, as opposed to private, actors.⁴⁰ However, in the employment context, most abuses are perpetrated by private actors, not state actors.
- Workers enjoy quasi-constitutional protection under human rights law not to be discriminated against on a variety of enumerated and “analogous” grounds.⁴¹ But neither the *Charter* nor human rights law protects against the one ground of discrimination that characterizes all workplaces: discrimination on the ground of subordinate economic status.⁴²
- The judicature provisions of our constitution require that courts control the interpretation and application of labour laws and the procedures of labour tribunals.⁴³ But courts have been consistently unable or unwilling to acknowledge the unique dynamic of employment relations or to tolerate interpretations and procedures that deviate from the judicial model.
- Under the federalism provisions of our constitution, employment is presumptively local, private and contractual in nature. Only by exception does it become a matter of national concern, engage societal interests, and warrant regulatory intervention.⁴⁴
- And, finally, under our unwritten economic constitution—which, I argue, is “similar in principle” to that of the United States—labour markets are deemed to operate naturally and optimally when they are unregulated, and enterprises when management enjoys maximum flexibility to deploy and direct the workforce

40. Peter W Hogg, *Constitutional Law of Canada Student Edition* (Toronto: Thompson Reuters Canada Ltd., 2010) at 37 ff.

41. *Vriend v Alberta*, [1998] 1 SCR 493 at paras 67-82 and 150-53.

42. Several Canadian human rights statutes do prohibit discrimination on grounds of “social condition” or “social origin.” See e.g. *Human Rights Act*, RSNB 1973, c H-11, ss 2 and 3(1) which defines “social condition” as “the condition of inclusion of the individual in a socially identifiable group that suffers from social or economic disadvantage on the basis of his or her source of income, occupation or level of education.” See also *Charter of Human Rights and Freedoms*, RSQ c C-12, s 10; *Human Rights Act*, SNWT 2002, c 18, ss 1(1) and 5(1); *Human Rights Act, 2010*, SNL 2010, c H-13.1, s 9(1). And see Wayne MacKay & Natasha Kim, *Adding Social Condition to the Canadian Human Rights Act* (Ottawa: Canadian Human Rights Commission, 2009) at 21-27.

43. See *Crevier v Québec (Attorney General)*, [1981] 2 SCR 220; *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 31, 52-55 and 68, [2008] 1 SCR 190.

44. *Toronto Electric Commissioners v Snider*, [1925] AC 396; *Attorney-General of Canada v Attorney-General of Ontario (Labour Conventions)*, [1937] AC 326; *Reference re Anti-Inflation Act (Canada)*, [1976] 2 SCR 373, 68 DLR (3d) 452; Gordon DiGiacomo, “The Federal Treaty Implementation and International Labour Agreements” (2004) 11 CLEJLJ 31; Thomas S Kuttner, “Federalism and Labour Relations in Canada” (1997) 5 CLEJLJ 195.

as it sees fit.⁴⁵ These unwritten “constitutional” principles of free markets and unfettered managerial discretion are similar to the principles of parliamentary government that derive from the fact that we have a political “constitution similar in principle to that of the United Kingdom.” No one is quite sure where they came from, precisely what their content is, how they can be revised or why they are understood to be quasi-binding despite being unwritten and non-justiciable;⁴⁶ but they are very hard to ignore.

One would be ill-advised, then, to use the constitutional map to navigate the turbulent seas of labour law and policy.

VII. *Maps of the economy: labour law as the law of labour market regulation.*

This brings me to a third attempt to map labour law, one that borrows its coordinates not from sociology or constitutional law but from political economy. The argument runs this way: like all law, labour law has its foundations in the deep structures of political economy. Consequently, how power is organized and wealth is distributed significantly determine the main direction and material outcomes of labour law, if not its detailed content and form. Or to put this point the other way around, public policies and legal strategies that ignore the realities and assumptions of wealth and power are unlikely to succeed.

Let me offer a few examples. The explosion of employment law litigation in the 1980s can best be understood not as a response by powerless employees to the offer of new judge-made rights, but rather as a response by judges to the demands of a new affluent, assertive and influential class of privileged knowledge workers.⁴⁷ Another example: we can understand the widespread failure to comply with, enforce or update employment standards legislation as confirmation of the fact that ordinary unorganized blue-and white-collar workers lack both individual market

45. Some empirical evidence in support of this notion is found in Harry Glasbeek, “Afterword: Looking Back” in *supra* note 20 at 393. See also Michael MacNeil, “Freedom of Association in a Free Enterprise System: Wal-Mart in Jonquière” (2010) 15 CJELJ [forthcoming].

46. *Reference re Resolution to Amend the Constitution (Patriation Reference)*, [1981] 1 SCR 753; Jean Leclair, “Canada’s Unfathomable Unwritten Constitutional Principles” (2002) 27 Queen’s LJ 389; Mark D Walters, “The Common Law Constitution in Canada: Return of Lex Non Scripta as Fundamental Law” (Spring 2001) 51 UTLJ 91.

47. As modest confirmation of this point, topics dealt with in the SSRN list of Top Ten All Time Hits for *Labor: Public Policy and Regulation* (January 2 1997 to August 21 2010) include executive compensation (4); immigrant entrepreneurs (2); the job market for law clerks (1); women in the boardroom (1) and labor standards (2).

power and collective political influence.⁴⁸ And yet another: we can attribute the obsolescence of collective bargaining law not simply to lack of expert advice or to legislative inattention but rather to the failure of the labour movement to maintain working class solidarity, to build strong political alliances with other groups or to invent new direct action strategies to counter the advantages that employers gained through globalization.⁴⁹

If these examples persuade you that political economy may indeed help us to understand labour law—to draw a more accurate map of labour law—what might such a map look like? Its primary aim would be to chart the plate tectonics of dynamic labour markets, rather than the small-scale detail of individual employment relations, the local topography of workplaces and enterprises or the winds and currents of laws and constitutions—though there would be room for all of these as well.

And why labour market tectonics? Because labour markets are regulated by powerful forces of political economy that are invisible, or at least unmarked on conventional maps of labour law. International trade and investment law, for example, has fundamentally restructured our economy by facilitating the export of Canadian corporate head-office jobs to the United States and of manufacturing jobs to developing countries with lower labour standards, as well as the importation into Canada of foreign goods, capital, corporate human resources practices and neo-liberal policy prescriptions. Tax law also regulates the labour market in important ways. For example, it provides incentives and disincentives for job-creation in the private sector, permits corporations to minimize their contributions to the social welfare state, allows government to hire or forces it to fire large numbers of workers, subsidizes pension provision and job training by employers, and provides incentives for workers to become “self-employed” and renounce their coverage under protective labour legislation. The social welfare laws that establish entitlements to publicly-funded health care, social housing, pensions, daycare and education obviously affect the well-being of workers and their families. Without such schemes, workers would have to buy these services at market prices from their own earnings, leaving them increasingly vulnerable to employer pressure. Immigration law is important to labour market regulation because Canadian businesses rely heavily on skilled workers from abroad, and because Canada uses immigration law to regulate the wages and working conditions of domestic, agricultural and other workers

48. I have explored this notion in my report *Fairness at Work: Federal Labour Standards for the 21st Century* (Ottawa: HRSDC, 2006).

49. Arthurs, “Labour Law After Labour,” *supra* note 5.

who come to this country on temporary work permits. One last example: corporations, securities, intellectual property and insolvency laws define important aspects of the employment relationship, not least whether workers' interests must be taken into account in the calculus of corporate decision-making, how workers' long-term intellectual and physical "investments" in an enterprise will be valued and protected, and how the savings they accumulate in pension and benefit plans will be used (or not) to ensure worker-friendly outcomes in capital markets.⁵⁰

I have tried to show how the individual and collective bargaining power of workers is profoundly affected not just by labour law, but by the entire system of political economy that shapes labour market outcomes, as well as political outcomes. The most important labour law decision of the US Supreme Court in the past fifty years—I argue—was its recent holding that Congress cannot limit political expenditures by corporations.⁵¹ Laws are made by elected legislators; the judges who interpret them are appointed by elected presidents. If corporations can dominate the electoral process through their control of campaign financing, labour will have little chance of securing favourable labour legislation and little prospect of winning cases before sympathetic judges.

I believe that I have made a persuasive case for constructing a new map of labour law. However, I am sure that I will be told that such a project is both conceptually flawed and impractical to execute. Let me respond to these objections.

The conceptual flaw first. "If everything is labour law," someone will say, "then nothing is." That is fairly easy to answer. What I am suggesting is that we replace labour law not with a totally open-ended subject—"the law of everything"—but with one I propose to call "the law of labour market regulation."⁵² There are other titles I could think of: European scholars talk of "social law" for example;⁵³ or one might imagine a subject called "the law of economic power and subordination."⁵⁴ But to me, the "law of labour market regulation" does the job well enough: if legal concepts, rules

50. Harry Arthurs & Claire Mummé, "From Governance To Political Economy: Insights From A Study Of Relations Between Corporations And Workers" (2007) 45 Osgoode Hall LJ 439.

51. *Citizens United v Federal Election Commission*, 130 S Ct 876 (US 2010).

52. The nomenclature is not mine. See S Deakin & F Wilkinson, *The Law of the Labour Market: Industrialization, Employment and Legal Evolution* (Oxford: Oxford University Press, 2005); Arup et al, eds, *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Sydney: The Federation Press, 2006).

53. See e.g. Mauro Zamboni, "The 'Social' In Social Law: An Analysis of a Concept in Disguise" (2008) 9 JL & Soc'y 63.

54. See e.g. Alan Hyde, "What is Labour Law?" in Guy Davidov & Brian Langille, eds, *Boundaries and Frontiers of Labour Law* (Oxford: Hart Publishing, 2006).

or institutions affect labour market outcomes in some material way, and if those outcomes ultimately influence the rights and interests of workers, then their influence should be documented by labour scholars, understood by labour law students, litigated by labour law practitioners, and taken into account especially by those who design public policies and enact the laws that give them effect.

Now the practical objection to my proposal: lawyers practice, students study and scholars publish in an economy where time is scarce and resources are limited. It is therefore unrealistic to insist that the hallmark of professional due diligence, success in law school examinations and excellence in legal scholarship is whether we have skilfully used the coordinates of political economy in order to navigate the new map of labour law. My critics will continue: even admitting that immigration or insolvency law or trade or tax law do influence labour market outcomes and, ultimately, the rights and interests of workers, labour lawyers should stick to what they know best, and leave these other areas to people who have a different sort of expertise.

These are compelling practical arguments. However, if we insist on using the old map of labour and employment law rather than the new map of labour market regulation, we risk purveying legal remedies to clients who in fact are in need of economic power; we risk investing in legal strategies no one can afford rather than in more cost-effective forms of political and social mobilization; we risk teaching students about twigs, branches and trees when they have to understand forests and ecosystems; and we risk proposing band-aid statutory improvements or clever tricks of constitutional magic when only fundamental changes in our political economy will make a difference. No legal advice can ultimately be useful—I argue—no legal recourse can be effective, no intellectual insight can be valid, no change in law and policy can be justified if it does not rest on a broad and deep comprehension of the issues in all their complexity. That is why we need to design our new map of labour law around the concept of labour market regulation.

Conclusion

I am not sure that Innis Christie would agree with much of what I have said this evening. In fact, I am pretty sure he would not do so. He was a sensible and fair person who did a great deal of practical good in the world, and a sharp thinker who stimulated a lot of fine young minds and kept his friends and colleagues on their toes—as many here can testify. But Innis never published anything resembling a manifesto. He seldom nailed his theoretical colours to the mast, and he generally undertook navigational

tasks in order to get from here to there, not to make his reputation as a cartographer. Nonetheless, and perhaps despite himself, it was Innis who made the crucial discovery. After he published *Employment Law in Canada*, the rest of us had to face up to the fact that our old map of labour law had to be redrawn. My lecture has been intended to trace the steps in that process and to honour Innis for the intrepid and intuitive seamanship that launched us on a voyage of discovery that has not ended yet, and likely never will.

