Disorganized Labour:
Canadian Unions and Constitutional Reform

by

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ABSTRACT

Constitutional reform dominated the Canadian public policy agenda during the 1980s and early portion of the 1990s. As a pressure group operating within a federal system, the Canadian Labour Congress (CLC) has been unable and unwilling to confront the issue of constitutional reform. The CLC’s confederal structure, combined with its political relationship with the New Democratic Party (NDP), has prevented the CLC from acting as a progressive force for positive constitutional change. Ideological and philosophical differences between the Quebec Federation of Labour and the NDP convinced the CLC to remove itself from the patriation debate in the early 1980s. Labour’s short-sighted non-involvement in the process of patriating the Constitution eliminated the possibility of having collective rights enshrined in the Charter of Rights and Freedoms. Subsequently, the Supreme Court of Canada ruled that the right to strike and bargain collectively were not constitutionally protected. The Meech Lake and Charlottetown Accords provided organized labour with a renewed opportunity to promote a pro-union, class-based, constitutional rights discourse, but the CLC’s internal cleavages over language, region, and identity, once again, proved too powerful a force to overcome. The Canadian labour movement’s vision of social justice and economic equality has been obstructed by its unwillingness to adequately confront divisive constitutional issues. However, in an era of rights discourse and neo-liberalism, constitutional reform may provide organized labour with the best opportunity to have its voice heard.
Completing this thesis would not have been possible without the assistance of a number of important people. I owe the greatest debt of gratitude to the labour activists who agreed to be interviewed for this project. Shirley Carr, Dennis McDermott, John Fryer, Barb Byers, Emile Vallee, and Pat Kerwin all offered important insights and challenged me to re-evaluate core assumptions about the politics of labour. I would also like to thank the Canadian Labour Congress for allowing me access to its records. This thesis would not have been possible without the co-operation of the Congress and its kind staff.

The constructive criticisms of professors Garth Stevenson, Nick Baxter-Moore, and James Kelly were much appreciated and their careful guidance made writing this thesis a thoroughly enjoyable experience. I am also grateful to professors Dan Glenday and Carmela Patrias of the Labour Studies Program for helping me to understand and appreciate the politics of the Canadian labour movement from different theoretical perspectives. Lastly, I would like to thank my colleagues and friends who were always willing to help out. I am especially grateful to Brandy Cox, Patrick Collins, Jen Brown, Karrie Porter, Iain Calder, and Stephen Skelton. Their collective wisdom is unquestionably reflected in the pages of this thesis.
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INTRODUCTION

This thesis is concerned with the Canadian labour movement and its relationship to the Canadian Constitution. The Canadian Charter of Rights and Freedoms, the centerpiece of the Constitution Act of 1982, has fundamentally transformed the Canadian legal system. The Charter, which was supposed to help defend and advance the rights of ordinary Canadians, has certainly not promoted the interests of organized labour in Canada. Nearly two decades have passed since the Charter’s introduction and union leaders continue to cope with the negative impact of the document on the Canadian labour movement.

When the Charter came into effect, Canadian unions were one of the first groups to try and invoke their Charter rights. This may be considered odd given that organized labour had purposely excluded itself from the process of negotiating the fundamental rights contained in the Charter. The handful of anti-union Supreme Court decisions which followed the Charter’s entrenchment subsequently forced Canadian unions to reconsider the wisdom of their strategy in later rounds of constitutional negotiations. In hindsight, organized labour’s official policy of non-involvement in the country’s constitutional development process was a huge mistake.

The Charter’s impact on organized labour has been examined by a number of scholars. However, few social scientists have considered organized labour’s impact on the Charter and the wider issue of Canada’s Constitution. This is probably due to the
fact that, as previously noted, the Canadian labour movement excluded itself from the entire patriation process. Nevertheless, the question of non-involvement provided social scientists with a set of intriguing questions: Why did Canadian unions not involve themselves in the constitutional process? Was non-involvement the correct course of action for organized labour? Can the economic and social goals of organized labour ever be attained through the Canadian legal system? This work will attempt to deal with these unanswered questions.

Canadian labour historians have universally attributed union success to militant working class struggle. It is a generally accepted principle that organized labour is more successful at winning new gains and defending old ones when workers are mobilized and proactive. The right to join a trade union, picket, strike, and bargain collectively were all won in times of militant struggle. In general, unions are willing to defend these past gains because fighting for them presupposes that they understand their necessity and importance. Why, then, did unions fail to recognize the importance of entrenching these hard-fought gains in Canada’s Constitution as part of the Charter of Rights and Freedoms? If unions had mobilized their memberships around a Charter strategy, might it have been more likely that the Constitution could have been broader and more comprehensive in terms of entrenching the collective rights of workers?

In the early 1980s, the Canadian Labour Congress (CLC), the country’s largest labour organization, was virtually silent on the patriation of the Constitution. The CLC, one of the co-founders of the New Democratic Party (NDP) in 1961, purposely stayed
away from the constitutional battles on Parliament Hill in order to avoid a nasty confrontation between members of the NDP, the CLC and the Quebec Federation of Labour (FTQ). NDP leader Ed Broadbent strongly supported the idea of patriating the Constitution with a Charter of Rights and Freedoms. On the other hand, the FTQ, a member organization of the CLC, was lined up squarely behind Quebec Premier Rene Levesque in general opposition to the entire constitutional process. The CLC’s shortsighted attempt to avoid infighting on the left by not participating in the constitutional debate unquestionably weakened organized labour’s position vis-à-vis the state.

The CLC’s decision-making process on Canadian constitutional matters has been based on two sets of competing forces, moving on separate paths. On one path, there is the CLC’s sensitivity towards federalism and Quebec’s role in Confederation. On the other path is the CLC’s historic relationship with the NDP and its concern for the credibility of labour’s parliamentary voice. In the early 1980s, these two paths diverged in a very significant way and the CLC was forced to make a decision between the competing forces of Quebec and the NDP. However, rather than choose sides, the CLC remained silent on the issue of constitutional reform and let its allies fight it out. The CLC’s approach to the Meech Lake and Charlottetown Accords was remarkably similar. While the NDP and the Quebec labour movement took strong policy positions, the CLC opted to sit on the sidelines and watch the constitutional debate unfold. As a result, Canadian unions have had little impact on the Canadian Constitution and the Charter of Rights and Freedoms. This lack of participation is problematic because it stands in stark
contrast to the business community’s overwhelming interest in the Charter and issues of constitutional reform.

In Chapter 1, the labour movement’s historical experience with constitutional issues will be considered. This will be accomplished by reviewing the existing studies of the Constitution and its relationship to organized labour. The first chapter will also outline the historical, philosophical, and ideological differences between the CLC, the NDP, and the FTQ in order to provide a framework for a more comprehensive examination of the relationship between these organizations in future chapters. Chapter 2 will deal with the development of the Charter as part of the Trudeau Government’s nation-building strategy from 1968 to 1982 in order to gain insight into the Charter process and the interest group politics and opportunities it fostered. In Chapter 3, organized labour’s absence from the process of negotiating the rights and freedoms contained in the Charter will be examined. This will be explained in terms of the political and organizational relationship between Canadian unions, the Quebec labour movement and the NDP. Chapter 4 will deal with the Charter’s negative impact on the Canadian labour movement through an analysis of a series of Supreme Court decisions. The labour movement’s failed judicial attempts to win constitutional protection for the right to strike, picket, and bargain collectively will be compared and contrasted with labour’s so-called victories at the Supreme Court of Canada. The chapter is designed to highlight the court’s uneven treatment of labour and capital and suggests that explicitly protected constitutional rights for labour could eliminate the judicial system’s historic anti-union bias. Chapter 5 documents the CLC’s experience with the Meech Lake and
Charlottetown Accords and attempts to explain why the Canadian labour movement has continued to shy away from constitutional debates, even in the face of an increasingly hostile political environment. In Chapter 6, empirical observations from previous chapters will be used to engage in a theoretical examination of the language of rights. This theme will be discussed along with some of the practical difficulties involved in asserting labour rights in a globalized capitalist economy. The thesis concludes by reviewing the major findings from each chapter and by encouraging organized labour to embrace opportunities to advance the collective rights of workers through constitutional rights discourse.

METHODOLOGY

An important portion of the information used in this study was gathered from primary sources. CLC Executive Committee and Council minutes coupled with numerous personal interviews with Canadian labour leaders form the basis for much of this research. Since some of the central argument is based on what organized labour did not do, this study occasionally relies on negative findings and adverse inferences. Although important figures like Louis Laberge, Ed Broadbent and Bob White declined interviews, numerous key players like Dennis McDermott, Shirley Carr, John Fryer, and CLC political action director Pat Kerwin were interviewed intensively in person and over the phone. The information gathered through these primary sources helps to explain why organized labour excluded itself from the Constitutional talks and why non-involvement in the constitutional process represented a missed opportunity for the Canadian trade
union movement to work for positive progressive change within the structure of capitalist society.

A NOTE ON COLLECTIVE RIGHTS

The term “collective rights” will be used throughout this study. The distinction between individual and collective rights is an important issue and deserves clarification. Any reference to the “collective rights” of workers deals specifically with the rights of labour unions to organize, bargain collectively, picket and strike. These rights are designed to protect and advance the interests of a particular collectivity – labour unions. Since individual union members cannot exercise these rights independently, they are necessarily considered collective rights. In order to justify the claim that these rights are indeed collective rather than individual, one must first consider the nature of work in the context of trade unionism.

Working in a unionized environment is undoubtedly a collective act. The fact that workers have organized into a trade union is an indication that they recognize that they are participating in a collective activity. Organized workers do not exist individually within a vacuum. Rather, they work together as a single production process. This is the nature of work in capitalist economies. Work is central to one’s life. It is not a private activity, but a social exercise.¹

¹ Thomas A. McIntosh, Labouring Under the Charter: Trade Unions and the Recovery of the Canadian Labour Regime (Kingston: Industrial Relations Centre, Queen’s University, 1989), 29.
Rights discourse in advanced liberal democracies revolves around the individual, but not all rights can be exercised individually. For example, a worker cannot exercise his or her right to strike or to organize individually. These rights can only be exercised by two or more people collectively. There is room for collective rights in liberal democratic societies. In fact, Canada’s Charter of Rights and Freedoms protects and enhances various collective rights including aboriginal rights, official language minority rights and women’s rights. For example, Section 25 of the Charter recognizes the constitutional rights of Canada’s aboriginal peoples:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
(a) any rights of freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.2

A more generous interpretation of collective rights can be found in Section 27, which reads: “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”3 Admittedly, many collective rights are actually exercised by the individual through the collectivity, but unlike individual rights, they can only be exercised by members of certain collectivities.

If a single theme connects the Supreme Court of Canada’s various labour relations rulings it is the tension that exists between balancing individual and collective rights using the Charter. Of course, this exercise of balancing competing interests is present in

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all Supreme Court decisions, but the overt preference for individual rights over the collective rights of working people in terms of labour relations is one of the most interesting aspects of judicial decision-making in Canada. This theme will be explored in more detail in chapter 4 through an analysis of several important Charter cases dealing with the right to strike and the right to bargain collectively.

\[ \text{idib, 29.} \]
CHAPTER I

LABOUR AND THE CONSTITUTION

This chapter is primarily concerned with the relationship between the Quebec labour movement and the NDP, and the problems that this relationship poses when dealing with issues of constitutional reform. Both the FTQ and the NDP act as key components of the CLC and their often contradictory roles raise serious doubts about organized labour’s effectiveness as a pressure group operating in Canada’s federal system. On the one hand, the FTQ provides the Congress with pan-Canadian credentials as the voice of working families across the country. However, on the other hand, the CLC has had to make political and organizational concessions to the FTQ in order to ensure that Quebec trade unionists feel comfortable within the confederally structured CLC. The political and structural concessions to the FTQ often conflict with the centralist policy agenda of the NDP, which officially acts as the electoral arm of the CLC. The first half of this chapter is devoted to a short literature review which considers the relationship between the NDP and the FTQ in the context of constitutional reform.

Since the introduction of the Charter of Rights and Freedoms in 1982, many scholars have studied the impact of the rights revolution on Canadian political life. However, only a limited number of constitutional experts have considered the specific relationship between organized labour and the Charter. A review of the existing literature regarding the labour movement and the Canadian Constitution is necessary in order to provide a basis for understanding organized labour’s role in the process of constitutional
reform over the last two decades. This short review will attempt to deal with existing scholarly arguments in a general way while introducing the central themes which will emerge from the research.

THE CHARTER AND ORGANIZED LABOUR

This thesis was inspired by the brief analysis offered by Leo Panitch and Donald Swartz in Chapter 7 of *The Assault on Trade Union Freedoms*. Briefly, the authors chastised the CLC and the NDP for failing to act on the Charter in the early 1980s and argued that the FTQ opposed the entire constitutional debate because of the possibility that it might strengthen support for the federalist view among Quebec’s working class.¹ Through the use of primary sources, this thesis reinforces the main points made by Panitch and Swartz. The thesis also introduces a new dimension to the debate about the CLC and the Constitution by presenting new themes and by expanding the analysis to include later rounds of constitutional negotiations.

Among the new themes to be discussed is the CLC’s political position vis-à-vis the NDP and the FTQ. Although both the NDP and the FTQ have been considered individually, both entities are politically interdependent as far as the CLC is concerned. This awkward relationship has important implications for the Congress as a political pressure group. The organizational and structural aspects of the CLC have been thoroughly studied by David Kwavnick. Kwavnick has argued that the CLC, as a pressure group operating in a federal system, has had a difficult time uniting Canadian

¹ Leo Panitch and Donald Swartz, *The Assault on Trade Union Rights and Freedoms* (Toronto: Garamond Press, 1993), 147.
workers behind a single agenda. A modern analysis of the Canadian labour movement must take into account the historical and political context within which the CLC operates. Kwavnick's impressive study of the CLC took place before the patriation of the Canadian Constitution and the 'rights revolution' that followed. While much of Kwavnick's analysis remains relevant, it is important to consider the Charter's significant impact on organized labour. Therefore, it is the goal of this thesis to update a number of Kwavnick's observations by considering the labour movement's response to patriation, Meech Lake, and the Charlottetown Accord.

There is very little research which seeks to explain why Canadian unions were not seriously involved in the process of patriating the Constitution and there is even less written about organized labour's involvement in subsequent rounds of constitutional discussion. The Meech Lake Accord and the Charlottetown Accord are historically important documents which profoundly influenced Canadian politics. However, few social scientists have considered Meech Lake and Charlottetown from a trade union perspective. What did organized labour stand to gain from constitutional reform? What did it stand to lose? And most importantly, why did the CLC have such little impact on the Accords?

In 1988, Pradeep Kumar and Dennis Ryan interviewed the heads of twelve major unions and labour federations. The union leaders were asked what their opinions of the Charter were at a time when the Lavigne case (discussed in Chapter 4) was making its

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way through the judicial system. Most interviewees viewed the Charter as a potential threat to collective rights and labour leaders understood that, for better or for worse, the Charter would have a major impact on labour relations in Canada. Through a similar interview process, this thesis brings the issue of Charter politics one step further by attempting to discover why labour leaders stayed away from the initial process of developing the Charter of Rights. If the Charter is such a bad document, why did organized labour shy away from the process of negotiating its content? The CLC’s relationship with the NDP and the Quebec labour movement may offer some insight into this unanswered question.

LABOUR AND THE CONSTITUTION: A HISTORICAL PERSPECTIVE

The Canadian labour movement, outside of Quebec, has historically supported the notion of a strong central government. Organized labour’s preference for comprehensive national standards and central economic planning reflects its centralist view of the state and the federal system. However, the Canadian labour movement’s support of the federal power of disallowance is perhaps the best indication of how strongly organized labour feels about centralization. The constitutional power of disallowance enables the executive of the federal government to disallow provincial government laws, even if the province is acting exclusively within its own jurisdiction. Disallowance, which theoretically violates the federal principle of two separate and sovereign orders of government, has not been used in over fifty years, but that has not prevented the Canadian labour movement from urging the federal government to use its centralist

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3 Pradeep Kumar and Dennis Ryan, eds. Canadian Union Movement in the 1980s: Perspectives from Union Leaders (Kingston: Queen’s IRC, 1988), 4.
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constitutional power. Quebec’s anti-communist “Padlock Act” of 1937, Prince Edward Island’s repressive Trade Union Act of 1948, and Newfoundland’s undemocratic decertification of the International Wood Workers of America in 1959, all prompted the Canadian labour movement to call for the power of disallowance to be used against provincial governments. However, the federal government consistently declined to use its controversial power to prevent the adoption of anti-union legislation at the provincial level.

In their 1956 joint submission to the Royal Commission on Canada’s Economic Prospects, the Trades and Labor Congress of Canada and the Canadian Congress of Labour, stated that:

Nothing in the Confederation Debates is clearer than that the Fathers intended and expected that Confederation should benefit all parts of the new nation. They would have repudiated instantly, and with horror, any idea that one province, one region, or one group of provinces or regions, should progress, while the others stood still or fell back.

This statement foreshadowed the presentation’s suggestion that “The British North America Act has been amended to transfer jurisdiction from the provinces to Parliament in the case of unemployment insurance and old age pensions. It might conceivably be amended again if the situation warranted.”

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6 Richard Gwyn, Smallwood, the Unlikely Revolutionary (Toronto: McClelland and Stewart Ltd., 1968), Chapter 18.
7 The Trades and Labor Congress and the Canadian Congress of Labour merged in 1956 to create the Canadian Labour Congress.
8 Joint Submission of the Trades and Labor Congress of Canada and the Canadian Congress of Labour to the Royal Commission on Canada’s Economic Prospects, Ottawa (February 27, 1956), 3.
Admittedly, the CLC’s support for the provinces in the dispute over federal wage and price controls and its support for the Charlottetown Accord compromised the labour movement’s historic commitment towards centralist policies, but these two examples should only be viewed as a temporary abandonment of centralist principles. In May of 2000, CLC President Ken Georgetti, reaffirmed the labour movement’s preference for strong centralist policies by unsuccessfully urging the federal government to use the power of disallowance to prevent the Alberta government from passing Bill 11, a law which allowed for the creation of private hospitals.¹⁰

THE CLC AND THE NEW DEMOCRATIC PARTY

In 1961, the Co-operative Commonwealth Federation (CCF) and the Canadian Labour Congress came together to create the New Democratic Party (NDP), which was modeled after the British Labour Party. It was hoped that the presence of a social democratic labour party would realign Canadian politics on a left-right basis, as had occurred in Britain.¹¹ However, class politics have never been particularly effective in Canada. Divisions among anglophones and francophones, orders of government, and regions have been far more prominent.¹² This is because Canadian federalism reinforces the traditional cleavages of language, region, and culture at the federal level. The NDP has never been a serious contender in federal elections because class politics is largely ignored by voters who tend to be preoccupied with the balance of power in the federal system. Thus, despite its lasting presence in Ottawa, the Federal NDP has never

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¹⁰ CLC Press Release “Disallow Alberta’s Bill 11” (May 11, 2000)
managed to win much more than 20% of the popular vote. Its dream of forming the Official Opposition, let alone Government, has never been realized and as of late, the NDP has had to concern itself primarily with maintaining official party status in the House of Commons.

In response to a question posed by a member of the parliamentary committee dealing with the Meech Lake Accord, CLC Vice-President Nancy Riche, who was also serving as Vice-President of the Federal NDP, characterized the relationship between the CLC and the NDP as follows:

Officially we helped form the NDP. Officially we have representation on the executive council of the NDP. Officially locals of unions can affiliate to the New Democratic Party. Officially the Canadian Labour Congress is not an affiliate of the party, does not hold an organization membership card. We may help them financially every now and then.

Despite the appearance of a strong link between the CLC and the NDP, union members have certainly not flocked to the party in large numbers. Political scientist Keith Archer has noted that low rates of direct union affiliation have plagued the NDP since its inception. The institutional and structural failure of the NDP and the CLC to mobilize working people into a dependable voting bloc has long frustrated the leadership of both the party and the Congress. Nevertheless, the modest ties which exist between

14 Nancy Riche, as cited in the CLC’s presentation to the Special Joint Committee on the 1987 Constitutional Accord (August 20, 1987) 10:11.
15 Keith Archer “Canadian Unions, the NDP, and the Problem of Collective Action” in Canadian Working Class History, Laurel Sefton McDowell and Ian Radforth, eds. (Toronto: Canadian Scholars’ Press, 1992), 735.
the CLC and the NDP seem strong compared to the relationship between the NDP and the FTQ.

THE NDP AND THE FTQ

Since its inception, the NDP has been relatively supportive of Quebec’s political demands. At its founding convention, the NDP adopted the following statement:

Our pride in Canada as a nation is enhanced by our consciousness of the two national cultures which form the basis of Canadian life. We are indeed aware that those who have had their roots in the French-speaking community frequently and legitimately use the word ‘nation’ to describe French Canada itself. The New Democratic party believes that true Canadian unity depends upon equal recognition and respect for both the main cultures of our country.¹⁶

This statement reflected the strong influence of Charles Taylor and Michael Oliver, but their influence did not last. The party’s western base was never really sympathetic to the notion of dualism presented at the party’s founding convention.

At a 1961 Quebec City symposium, organized by a law student named Brian Mulroney, NDP MP Doug Fisher responded to Réne Lévesque’s assertion that “you [English Canada] need us more than we need you” by stating that, “for us, the greatest impact of French-Canadian culture has been made by Maurice Richard and Lili St. Cyr.”¹⁷ Maurice Richard was a hockey legend and St. Cyr a stripper (she was also an American). Fisher’s tasteless statement about French-Canadian culture unquestionably had a lasting impact on the party’s fortunes in Quebec.

Despite Fisher’s harmful gaffe, the NDP has generally tried to meet the political demands of Quebec. The party opposed the implementation of the War Measures Act during the October Crisis of 1970, endorsed the Meech Lake and the Charlottetown Accords, and recognized Quebec’s right to self-determination. However, the NDP’s support of Quebec has not been reciprocated. The party has never won a Quebec seat in a federal general election and its former provincial wing in Quebec could only be described as fringe. In 1989, the provincial NDP in Quebec was disbanded for taking a pro-sovereignty position – the party has been without a provincial section in Quebec ever since. When the NDP finally did win a federal by-election in the Quebec riding of Chambly in January of 1990, NDP canvassers reported that the message on the doorstep was “you guys hate us, but we’re voting for your candidate anyways.” The victory in Chambly was short-lived. Phil Edmonston, the NDP’s only elected Quebec MP, decided not to run again in 1993 and endorsed the Bloc Québécois (BQ) candidate instead.

The FTQ also chose to officially endorse the sovereigntist BQ. The Quebec labour movement had never been overly enthusiastic about the NDP, but the FTQ had been endorsing the NDP in federal elections since the 1960s. Around the time of the founding of the NDP, Louis Laberge called himself “un militant zélé du NPD”, but

18 Keith Archer and Alan Whitehorn, Political Activists: The NDP in Convention (Toronto: Oxford University Press, 1997), 69.
19 ibid, 75.
20 McLeod, 71.
22 Laberge as cited in Fournier, 115.
even his support eventually waned. Laberge’s shift from being a committed federalist in the 1960s to a convinced sovereigntist in the latter portion of his career only served to weaken his support for the NDP. In 1979, he called the NDP's position on the National Question "aussi stupide que celle de Trudeau" and after the 1984 election, Laberge confessed:

J’ai voté NPD comme je l’ai fait depuis 1962, mais sans illusion. T’as beau fouetter une vieille picouille, ca n’avance pas vite! Et avec le rôle joué par son chef Ed Broadbent dans le camp du NON lors du référendum, le parti n’avait pas aidé sa cause chez nous. Pour aggraver son cas, Ed avait appuyé le coup de force constitutionnel de Trudeau contre le Québec, le Canada bill.

The Bloc Québécois took 54 of Quebec’s 74 seats in the 1993 federal election, while the NDP’s vote share in Quebec fell from a dismal 14% in 1988 to a hopeless 1.5% in 1993. Today, the NDP has absolutely no ties to organized labour in Quebec. The PQ and the BQ have totally replaced the NDP as the electoral expression of labour in Quebec. Organized labour in Quebec and Canada’s NDP are irreconcilable due to fundamental ideological and philosophical differences which exist as a result of constitutional issues. The Quebec labour movement’s strong support of decentralization and limits on the federal spending power stands in sharp contrast to the NDP’s economic nationalism and preference for a strong central government to set national standards. These contradictory policy preferences were slightly blurred during the Charlottetown Accord talks when the NDP negotiated away many of its core centralizing policy positions, but the NDP compromise did not come close to fulfilling the aspirations of the Quebec working class.

23 ibid, 289.
24 Ibid, 325-326.
THE CLC AND THE QUEBEC LABOUR MOVEMENT

Canada’s regional character and the country’s institutional linguistic duality have created the most substantial divisions within the Canadian labour movement. The vast majority of unions outside Quebec are affiliated to the confederally organized Canadian Labour Congress. However, Quebec unions have gravitated in different directions, affiliating themselves to a number of different labour centres including the Quebec Federation of Labour (FTQ), the Confédération des Syndicats Nationaux (CSN), and the Centrale des Syndicats du Québec (CSQ). The FTQ, which represents the largest number of Quebec workers, is a CLC affiliate, but as political scientist Thomas McIntosh has suggested “there currently exists a relationship between English-Canadian and Quebec labour predicated on what is best described as ‘sovereignty-association’... only the most formal connections exist across the linguistic divide.”

This was not always the case. In the early 1960s, both the CSN and the FTQ were strongly opposed to the prospect of Quebec separation. In fact, the FTQ’s Montreal regional council declared in 1961 that “Le régime fédéral... doit être maintenu. Il a été un des instruments qui ont permis à la nation canadienne-française de se développer, d’affirmer son caractère et de maintenir et répandre sa culture et sa langue.”

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The creation of the separatist and initially social democratic Parti Québécois, the October Crisis, and divisive debates about language policy all increased support for sovereignty among trade unionists in Quebec. In 1975, the FTQ officially endorsed the PQ and, in April 1980, the Federation called on its members to vote OUI in the sovereignty referendum. The CSN also encouraged its members to vote OUI, while the CSQ decided to stay out of the debate over sovereignty-association.

In a 1978 policy statement, the CLC made clear its support for Quebec’s self-determination. The statement, which was produced as a response to the election of the PQ in 1976, contained the following paragraphs about the possibility of Quebec separation.

We, the workers of Quebec, who are members of the Canadian Labour Congress, assert the right to determine our political and constitutional future. This is fundamental; an essential prerequisite to establish the balance for future negotiations. It is an important right, and we have a full appreciation of the importance inherent in our responsibility if we choose to exercise that right.

We, the workers in other parts of Canada, who are members of the Canadian Labour Congress, respect the fundamental right of Quebec workers to exercise that responsibility. In so doing, we express the hope that a continuing dialogue will lead to the restructuring of the relationship between us which will serve the interests of our two communities of people in a vibrant and new Canadian society.

Collectively, we in the Canadian Labour Congress, in making these declarations, embrace the universal principle which guides the democratic structure of our own labour movement. We have confidence that reasoned support for this principle ultimately will serve the best interests of our communities of people.

29 ibid, 384-385.
Linguistic divisions have largely been addressed within the CLC. The asymmetrical status of the FTQ within the Congress and the CLC’s recognition of Quebec’s right to self-determination have helped to ease internal disputes over the Quebec question.\(^\text{31}\)

The federalist victory in the 1980 Quebec referendum and the PQ’s shift to the right in the mid 1980s temporarily calmed the separatist forces within the Quebec labour movement. However, the election of Jacques Parizeau as PQ leader in 1988 and the death of the Meech Lake Accord in 1990 reinvigorated nationalist sentiments among Quebec’s working class.\(^\text{32}\) In the summer of 1990, the CSN, the CSQ, and the FTQ all endorsed the independence option for Quebec and aggressively began promoting sovereignty among their members.\(^\text{33}\) Labour leaders sitting on Quebec’s Bélanger-Campeau Commission issued a joint statement which read: “nous aurions apprécié que le rapport fasse mention d’un autre consensus tout aussi important: une adhésion claire et massive des Québécoises et Québécois en faveur d’un Québec souverain, un pays moderne, dynamique, pluraliste et ouvert sur le monde.”\(^\text{34}\) The defeat of the OUI forces in the 1995 Quebec referendum has not reversed the Quebec labour movement’s support for sovereignty. In fact, the labour movement emerged from the referendum campaign as one of the most ardent supporters of Quebec independence.

**CANADIAN UNIONS AND CONSTITUTIONAL RIGHTS DISCOURSE**


\(^{32}\) Guntzel, 387.

\(^{33}\) Ibid, 389.
Canadian unions have traditionally tried to stay away from debating divisive constitutional issues. Organized labour much prefers to talk about economic problems like unemployment or the state of the country’s social safety net. These social and economic issues can easily be placed on a left-right spectrum and the CLC never has to think twice before taking a strong position in favour of economic equality and social justice for working families. Unfortunately, the labour movement has failed to appreciate that constitutional rights discourse and democratic decision-making are intrinsically linked. In order to foster its progressive vision for society, the labour movement must confront the issue of constitutional reform.

34 Fournier, 366.
CHAPTER II

THE TRUDEAU VISION: CHARTER ORIGINS

Patriation of the Constitution in 1982 was perhaps one of the most important political events in Canadian history. Patriation not only provided Canadians with the Charter of Rights and Freedoms, but also fundamentally changed the process of constitutional reform in Canada. As a result of the patriation round, macro-constitutional change can no longer occur practically in Canada using a process of strict executive federalism. Instead, individuals, collectivities, and organized interest groups have come to demand that their voices be heard through an open, popular, and grassroots process of constitutional reform. This chapter begins by tracing the evolution of rights in Canada and argues that the process of patriating of the Constitution with an entrenched Charter of Rights and Freedoms offered special interest groups a unique opportunity to influence the content of the Charter. The actual process of interest group involvement is considered in more detail in the second half of this chapter by comparing and contrasting the successful lobbying efforts of the women's movement and the non-involvement of the labour movement in the process of patriating the Constitution.

Pierre Trudeau's first-hand experience with human rights abuses under the Duplessis government in Quebec unquestionably fueled his desire to see an effective Charter of Rights entrenched in the Canadian Constitution. Trudeau was blacklisted as a university law professor under the Duplessis Union Nationale regime because of his
political views and propensity to challenge the existing order. Trudeau’s very personal experience with outright discrimination motivated him to fight for a fundamentally altered relationship between the individual and the state. In addition to Trudeau’s personal desire to see human rights entrenched into the nation’s constitution, the advent of a Charter of Rights and Freedoms would be likely to serve a higher political purpose as well.

At first glance, Trudeau’s personal and political motives for pursuing patriation of the Constitution and the Charter may seem far removed from the issue of organized labour’s role in the constitutional process. However, exploring the background of the Charter process is important in order to demonstrate that Canadian unions missed an opportunity to use their collective strength to apply pressure on a government that was looking to form short-term alliances with as many special interest groups as possible.

In that regard, entrenching a Charter of Rights and Freedoms as part of the Canadian Constitution was a key component of the Trudeau government’s nation-building strategy. Trudeau recognized that patriation would inevitably split the country’s politicians along regional and linguistic lines. He therefore included the Charter as an integral part of the overall constitutional package in order to win popular support for his initiative from the average Canadian voter.

2 ibid, 38.
Trudeau’s strategy was supposed to draw attention away from potentially controversial aspects of the Constitution by presenting a Charter of Rights and Freedoms as the centrepiece of constitutional reform. Trudeau reasoned that provincial Premiers and opposition politicians would not engage in a major battle with him over the Constitution if the Canadian public overwhelmingly supported the Charter, but he was wrong. No one could escape the constitutional tidal wave that hammered Canadian politics in the early 1980s. Patriation dominated the national media and became the primary focus of provincial legislatures from coast to coast to coast. Although Trudeau’s constitutionally entrenched Charter of Rights and Freedoms eventually became reality, his vision had to be significantly altered before the country would allow patriation to take place.

THE EVOLUTION OF “RIGHTS” IN CANADA

In the years proceeding World War II, the issue of protecting fundamental human rights was pushed to the forefront by politicians of all stripes. The Canadian left had long supported the introduction of strong human rights laws. In fact, a CCF government in Saskatchewan enacted the first provincial Bill of Rights in 1947. In 1960, under the leadership of Conservative Prime Minister John Diefenbaker, the Canadian Bill of Rights was established. Diefenbaker’s Bill of Rights guaranteed certain fundamental rights and freedoms, but it was statutory in nature and only covered legislative action at the federal level.
The Liberal Party of Canada never seriously considered adopting a cohesive policy on an effective Bill of Rights until Pierre Trudeau arrived on Parliament Hill in 1965. As Minister of Justice in the Pearson government, Trudeau pushed his party to make the issue of human rights a priority. A key component of Trudeau’s vision was a Charter of Rights and Freedoms which would protect the interests of citizens vis-à-vis the state.⁵

In 1970, the Trudeau government appointed a Special Joint Parliamentary Committee on constitutional reform which was dubbed the Molgat-MacGuigan Committee after its co-chairs. The Committee heard presentations and received written submissions from hundreds of groups and individuals interested in the Constitution. For the first time in Canadian history, the Molgat-MacGuigan Committee opened up the issue of constitutional reform to the general public.⁶ During the next two decades Canadians would join their elected representatives and a myriad of special interest groups on a seemingly endless roller coaster ride of constitutional reform.

In February 1980, the Trudeau Liberals won an impressive majority government, but did not elect a single member west of Winnipeg. If Trudeau were going to patriate the Constitution legitimately, he would need the support of NDP leader Ed Broadbent and his 27 MPs from Western Canada.⁷ In September of the same year, Broadbent agreed to support Trudeau’s patriation proposal and the Charter of Rights, provided that the rights

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⁴ ibid, 225.
⁵ ibid, 225.
⁶ Greene, 39.
of women and aboriginal peoples were strengthened. Trudeau agreed and Broadbent endorsed the government’s plan to patriate the Constitution unilaterally. The federal Tory caucus and the majority of provincial Premiers vociferously opposed Trudeau’s actions and vowed to fight the federal government’s plan. In response to opposition criticism, the Liberals set up a Special Joint Committee on the Constitution in order to gain more public input into the Constitution. A series of Supreme Court challenges from three provinces and a two-week long filibuster by the Progressive Conservative opposition convinced the government to extend the Special Joint Committee’s timetable.

The Committee, which was originally supposed to sit very briefly, ended up sitting on a regular basis from November 1980 to February 1981. The long delay provided special interest groups with enough time to organize, mobilize, and lobby effectively for changes to the Charter. Trudeau, desperate to push through his package of constitutional reform, enlisted numerous special interest groups to help him. In return, women’s organizations, aboriginal groups, and civil liberties associations all succeeded in amending the Charter’s provisions through issue-focused campaigns and intense lobbying efforts.

Organized labour, on the other hand, failed to participate in the interest group lobbying which occurred on Parliament Hill while the Special Committee met to discuss the Charter. Consequently, the Canadian labour movement missed an opportunity to

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8 ibid, 245.
9 Romanow, Whyte and Leeson, 247.
have union rights considered as part of the Charter. One cannot predict exactly what would have happened had the rights of organized labour originally been included in Section 2(d) of the Charter. However, one can draw conclusions about the labour movement’s lost prospects for progressive constitutional social change by briefly contrasting the union movement’s non-involvement with the women’s movement’s intense lobbying efforts.

When the issue of the Canadian Constitution and the Charter of Rights and Freedoms gained national attention in the early 1980s, a few leading feminists suggested that the government’s constitutional proposal would threaten past equality gains and jeopardize the possibility of making future progress. This perceived threat to women’s equality rights manifested itself in a powerful special interest group – the Ad Hoc Committee of Canadian Women on the Constitution.\(^\text{11}\) The women’s movement solidified its constitutional position by organizing broad letter-writing campaigns and telephone blitzes which relied on an intricate network of feminist groups from coast to coast. The intense lobbying effort on behalf of the women’s movement succeeded in winning a revision of “non-discrimination” rights, protection for affirmative action programs, and the inclusion of legal equality between the sexes in Section 28 of the Charter.\(^\text{12}\)

\(^{12}\) ibid, 23.
The success of left-wing movements in the legal arena is very important because it provides all social movements with political leverage and contributes to a sense of advancement, accomplishment, and solidarity. These feelings are crucial to any progressive movement dedicated to major, long-term societal change. The women’s movement, unlike organized labour, saw the Charter as a crucial opportunity both to improve its position in the future and to ensure that existing gains were protected. The similarities between the women’s movement and the trade union movement suggest that organized labour could have had a major impact on the Charter process. For example, both movements had a national unifying body. The CLC could have created an Ad Hoc committee on the Constitution for the union movement in the same way that the Ad Hoc Committee of Canadian Women on the Constitution provided a voice for feminist organizations. In addition, the women’s movement could rely on the grassroots efforts of dozens of local feminist organizations, while the trade union movement could have relied on hundreds of local labour councils to mobilize workers at the community level. In many respects, the labour movement was in a much better position to lobby the government. It had more money, a more established power structure, and closer ties to Parliament through its relationship with the NDP.

Adopting an informal Ad Hoc structure helped the women’s movement avoid the internal organizational problems which plague the CLC. Like organized labour, the women’s movement also deals with cleavages relating to language and region. In fact, the Fédération des Femmes du Québec (FQQ) severed its ties to the National Action Committee on the Status of Women (NAC) over a dispute related to the patriation of the
However, this split has not prevented the NAC from working with the FQQ on policy issues affecting women. Both organizations have simply accepted the reality that Quebec and the Rest of Canada are two different nations. The Ad Hoc structure used by the women’s movement was issue-based. This strategy allowed for the participation of as many feminist organizations as possible and ultimately helped the women’s movement secure key amendments to the Charter of Rights and Freedoms.

The unprecedented opportunity provided to special interest groups trying to influence the content and scope of the Charter of Rights and Freedoms was the primary concern of this chapter. Trudeau’s rights-based nation-building strategy in the early 1980s elevated the legitimacy and importance of pressure groups in the Canadian political system. Unlike the women’s movement and other progressive organizations, organized labour decided to forgo the opportunity to influence the final text of the Constitution Act of 1982. The next chapter attempts to explain why the Canadian labour movement purposely absented itself from the most politically significant round of constitutional reform in Canadian history and Chapter 4 deals with the political consequences of that decision.

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13 Ibid, 72-73.
CHAPTER III

THE SILENCE OF THE CANADIAN LABOUR MOVEMENT

"I think we goofed as a labour movement, we should probably have paid a lot more attention to the Charter than we did."

The 1980-81 Special Joint Committee on the Canadian Constitution heard submissions from over one thousand individuals and groups concerned about patriation and the future of the proposed Charter of Rights and Freedoms. Women’s organizations, civil liberties associations, aboriginal organizations, ethno-cultural groups, and the business lobby all made their presence felt; the Committee even heard from a group of British Columbians who wanted the right to use hallucinogenic mushrooms entrenched in the Constitution. But not a single presentation was made on behalf of the Canadian labour movement.

This chapter examines the CLC’s position on patriation of the Constitution and argues that the Congress adopted a neutral position in order to avoid a confrontation with the péquist FTQ. It will also be argued that the CLC’s non-involvement in the process of patriating the Constitution was influenced by its desire not to exacerbate the internal dissension which already existed within the NDP over the issue of the proposed Charter of Rights and Freedoms. The second half of this chapter is devoted to debunking

1 Fred Pomeroy, President, Communication and Electrical Workers of Canada, quoted in Kumar and Ryan, 222.
previously held assumptions about organized labour’s decision not to participate in the process of patriating the Constitution and proposes that CLC’s decision to adopt a neutral position was inappropriate and miscalculated.

Before the 1980-81 Special Joint Committee on the Constitution began hearing submissions, the CLC did take the time to write a letter in support of aboriginal rights, but only the BC Federation of Labour bothered to submit a written brief which addressed the immediate concerns of the union movement. Its brief complained about the exclusion of social and economic rights from the proposed Charter of Rights:

Nowhere does one find reference to a general right to employment, the right to the enjoyment of just and favourable conditions of work, the right to form trade unions, the right to social security, the right to protection of the family, the right to an adequate standard of living, the right to the enjoyment of the highest attainable standard of physical and mental health, or a general right to education. It is our opinion that the failure of the Charter to make provision for this category of rights is its single most important shortcoming.

Organized labour’s absence from the Special Joint Committee’s hearings was odd considering that Canadian unions had historically shown interest in the country’s constitutional affairs. About a dozen labour organizations participated in the Molgat-McGuigan Committee on constitutional reform which sat from 1970-1972. Local 444 of the United Auto Workers led the way by calling on the government to guarantee every Canadian the right to a job. Admittedly, by 1980, both the nature and content of constitutional reform had changed considerably. However, Trudeau’s assertion that

3 ibid, 137.
4 CLC Executive Council minutes, December 9-11, 1980.
5 British Columbia Federation of Labour, BCFL Presentation to the Special Joint Committee on the Constitution of Canada, January 8, 1981. p. 10.
patriation would result in a Charter of Rights and Freedoms ought to have signaled to organized labour that the constitutional talks of the early 1980s deserved unprecedented attention.

Why then did Canadians witness such disinterest on behalf of organized labour? The labour movement certainly did not “fall asleep at the switch” as some observers have suggested.\(^7\) On the contrary, the CLC was acutely aware that the Charter could potentially pose a serious threat to the union movement. For example, at a September 1980 CLC Executive Council meeting, Pat Kerwin, head of the CLC Political Action department, reported that “the Charter of Rights may come up in the next few months which could inevitably threaten collective bargaining rights.”\(^8\) The Canadian labour movement’s decision to stay away from the constitutional battles on Parliament Hill in the early 1980s was entirely political. In retrospect, it was a bad political decision, but it was a political decision nonetheless. In order to understand the reasons behind organized labour’s policy of non-involvement, one must first reconsider the political relationship between the CLC, the FTQ and the NDP.


Although the CLC helped co-found the NDP in 1961, the Congress, which now has 2.3 million members, has never been able to deliver votes to the party in any significant way. Despite the CLC’s million dollar campaign contributions, the federal

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\(^6\) UAW Local 444 presentation to the Special Joint Committee on the Constitution of Canada, Vol. 23 (October 12, 1970): 8.

NDP has never been considered a serious contender. The NDP’s electoral record is even more dismal in Quebec. The provincial Quebec NDP was disbanded over a decade ago and the federal party has never managed to win a Quebec seat in a general election. Quebec voters have historically viewed the party as overwhelmingly anglophone and strongly federalist. As a result, social democrats in Quebec have opted instead for the PQ, the Liberals, and now the BQ.

The sheer size and strength of the province of Quebec unquestionably makes it a key component of the Canadian political system and the NDP is never likely to govern federally without the support of the Quebec working class. The province’s influential trade union movement has identified itself with the nationalist cause since the late 1960s and this has posed a serious problem for the NDP. The National Question has always been the NDP’s Achilles heel in Quebec. How do New Democrats balance a belief in strong central government and national social programs with the sovereigntist and devolutionary demands of Quebec’s labour movement? The debate over patriation and the Charter of Rights and Freedoms did not offer any new answers.

The advent of a Charter of Rights and Freedoms provided organized labour’s elected representatives in Parliament with an ideal opportunity to push for worker’s rights as part of an overall constitutional package, but few politicians seemed to think that entrenching the interests of organized labour into the country’s new constitution was a priority. Only NDP MP Svend Robinson took up labour’s cause by moving a modest

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8 CLC Executive Council minutes, September 15, 1980.
amendment to section 2(d) of the Charter which would have explicitly protected the right to bargain collectively. During the debate which ensued, Robert Kaplan, the Solicitor General who appeared on behalf of the Justice Minister, made the government’s position quite clear.

Mr. Kaplan: Our position on the suggestion that there be specific reference to freedom to organize and bargain collectively is that it is already covered in the freedom of association that is provided in the Declaration of the Charter; and that by singling out association for bargaining, one might tend to diminish all other forms of association which are contemplated – church associations, associations of fraternal organizations or community organizations.10

As a result of Mr. Kaplan’s statement, the NDP amendment was overwhelmingly voted down by the Special Joint Committee dealing with the Constitution. However, his statement is extremely important because it suggests that the government was prepared to accept that labour rights were fundamental constitutional rights. Without any sort of pressure being applied from labour organizations, the government was prepared to concede that freedom of association included the freedoms to organize and bargain collectively. How much more might Canadian unions have gained through a focused lobbying effort? A constitutional alliance between organized labour and the NDP caucus could have undoubtedly produced tangible gains for Canadian unions. It is widely accepted that the NDP was in a position to win certain concessions from the government in exchange for the party’s support.11 Unfortunately for organized labour, union rights were not a priority for the federal NDP.

It is important to note that the collective rights of workers were not of primary importance to any social democratic leader in Canada. The Ontario and Alberta sections of the NDP both made long, detailed presentations to the Special Joint Committee on the Constitution which dealt with a myriad of different issues, but both neglected to mention the absence of specifically categorized labour rights in the Charter. The concerns raised over resource jurisdiction, equalization, and the amending formula were undoubtedly important, but why did the NDP ignore the labour movement? In terms of the Charter, Dr. Garth Stevenson, the Alberta NDP’s constitutional advisor, explained that the party supported “the principle of entrenching Human Rights in the Constitution”.\(^\text{12}\) Stevenson went on to express the view that,

> Of course, we support very strongly, in addition to the ordinary catalogue of individual human rights, two particular categories of collective rights which, in effect, as Mr. Notley [Alberta NDP Leader] pointed out, are inherent in the whole course of our country’s history, the right of our aboriginal peoples and the equal rights of the two official languages right across Canada. We feel very strongly that those rights must be protected as well.\(^\text{13}\)

Although the Alberta NDP opposed extending Charter rights to corporations, it was silent on the prospect of entrenching constitutional collective rights for labour. This oversight would have normally prompted organized labour to act, but instead, Canadian unions remained silent.

NDP leader Ed Broadbent supported the idea of a Charter from the very beginning, but demanded the inclusion of rights for women, the disabled, and aboriginal

\(^{11}\) Sheppard and Valpy, 114.
\(^{13}\) ibid, 110.
peoples as a condition of his party’s support.\textsuperscript{14} Content with the government’s final amendments, Broadbent enthusiastically endorsed the complete constitutional package without the express inclusion of trade union rights.

PQ Premier Réné Lévesque’s opposition to the Constitution stemmed from his belief that it did not recognize collective rights for Quebec. Lévesque’s position was endorsed by Louis Laberge, head of the FTQ, Quebec’s largest labour federation. Laberge’s opposition to the patriation process was so intense that the FTQ actually toyed with the idea of appealing to the British Trade Union Congress for support in preventing the new constitution from being adopted in London.\textsuperscript{15}

Added to the mix was Saskatchewan Premier Allan Blakeney, the only NDP Premier in Canada at the time. Blakeney opposed entrenching a Charter of Rights in the Constitution because he felt that it would shift power away from democratically elected legislators to unaccountable, potentially right-wing, judges.\textsuperscript{16} The difference of opinion between Broadbent and Blakeney caused a major rift in the federal caucus and nearly ripped the NDP apart in the early 1980s.\textsuperscript{17}

Caught in the middle of this entire constitutional mess was the CLC. The Congress did not take any sort of position on the Charter. According to CLC Executive Council minutes dated September 5, 1980, “President McDermott explained that he was

\begin{itemize}
  \item \textsuperscript{15} Interview, Emile Vallé, former Executive Assistant to the CLC President (December 21, 1999)
  \item \textsuperscript{16} Charles Campbell “The Canadian Left and the Charter of Rights” \textit{Socialist Studies, A Canadian Annual} no. 2 (1984), 31.
\end{itemize}
of the view that we should not get involved in the 'circus' now completed, especially because the nature of our organization would not lend itself to us having a consensus even within our Council.”¹⁸ After a brief discussion, it was generally agreed that the Congress should “stay out of the issue of the Constitutional Talks as much as possible at this time.”¹⁹ These two statements are important because they lend support to the view that the CLC’s confederal structure weakens the cohesiveness of the Congress based on internal cleavages relating to region and language.

As previously stated, the CLC operates as a confederal organization with a “sovereignty-association” relationship vis-à-vis the FTQ. Although the FTQ is officially affiliated to the CLC and its President sits on the Executive Council, the FTQ is also free to adopt political positions which are contrary to those of the CLC. The twelve other provincial and territorial labour federations are all represented on the CLC’s Executive Council along with representatives from the larger affiliated unions. As of December 2000, the CLC has expanded its executive to include equity-seeking groups representing gays and lesbians, workers with disabilities, young workers, and retired union members. In addition, four new Vice-Presidents will represent smaller CLC affiliates.²⁰ The CLC’s embrace of pluralism may have only complicated matters by recognizing identity as an important and integral part of the CLC, both politically and structurally. Cleavages relating to language and region have left the CLC ineffective in terms of applying

¹⁷ Steed, 242.
¹⁸ CLC Executive Council minutes, September 15, 1980.
¹⁹ ibid.
²⁰ www.clc-ctc.ca (Press Release December 8, 2000)
pressure to the political system. Promoting new cleavages based on identity may serve only to divide workers and further weaken the CLC as a political pressure group.

Practically, the CLC’s role has been restricted to providing a mechanism to resolve disputes between its affiliated unions. Provincial Federations of Labour and individual unions, which tend to be more homogeneous than the CLC, are in a better position to lobby governments. In fact, some of the larger CLC affiliated unions have large research departments that help produce data for presentations to government committees. In spite of this reality, the CLC has been unwilling to relinquish its role as the labour organization which speaks for all Canadian workers. This tension between the CLC’s practical political influence and its own perception of its role has played an important role in explaining the CLC’s position on constitutional reform over the last two decades.

In an interview, former CLC President Dennis McDermott claimed that Trudeau’s patriation scheme was simply a diversionary tactic, designed to shift the public’s focus away from important economic issues. This sentiment was conveyed at a September 15, 1980, CLC Executive meeting, when McDermott complained that Trudeau’s election promise to strengthen the economy had “been put off by Constitutional Talks”.

McDermott still rejects the notion that the CLC’s unique relationships with either the

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22 ibid, 68.
23 Interview, Dennis McDermott (July 23, 2000)
24 CLC Executive Council minutes, September 15, 1980.
FTQ or the NDP affected the Congress' decision to stay away from constitutional issues, but CLC minutes offer a different point of view.

It will be argued that the CLC recognized the fact that the NDP was internally divided over the issue and that patriation was threatening to hurt the party electorally. It will also be argued that the Congress equally understood that organized labour in Quebec was very much opposed to Trudeau's package of constitutional reform and was extremely sensitive to the needs of the FTQ. Since Broadbent, Blakeney and the FTQ were adamant about their respective constitutional positions, FTQ President Louis Laberge was able to successfully pressure the CLC to stay away completely from constitutional affairs.

Analysis of CLC minutes confirms that the Congress was forced to make a very important political decision over the Charter of Rights and Freedoms. The CLC had several options, but the most practical intervention would have been to demand that the federal NDP make the collective rights of workers a condition of support for constitutional patriation. This option would have unquestionably created a bitter conflict between the FTQ, the CLC, and the NDP. The FTQ would have been angered by the fact that the CLC had entered into the Charter debate, thus lending credibility to the patriation process. Moreover, the NDP would potentially have been troubled by the CLC's insistence on creating a new condition for the party's support of Trudeau's constitutional package. A public split between the NDP, the CLC and the FTQ was certainly not in the interest of the Canadian labour movement, but the long term consequences of not
pursuing entrenchment of labour rights in the Charter has turned out to be even more detrimental.

The CLC’s September 1980 decision to stay out of the constitutional debate did encounter some internal opposition. At the December 1980 Executive Council meeting, Brother Kostiuk of Alberta appealed “for support in making representation to the federal government on the question of the patriated constitution and the entrenchment of the workers’ rights in that constitution.” Kostiuk was immediately supported by Brother Kinnaird of British Columbia and Brother Martin of Saskatchewan: “It was expressed by Brother Martin that in Western Canada there is tremendous pressure being applied by the affiliates to say something about workers’ rights, and he would rather see the Congress say something as a body, by reversing the decision made at the last meeting.”

McDermott clearly did not want to reopen the issue. “If Brother Laberge were here he would be speaking very strongly in disagreement of voicing our opinion.” The CLC President was supported by his colleague Bob White, “who felt we have no choice at this time to reaffirm our position or we will be opening serious wounds we thought had been solved long ago.” McDermott’s view prevailed and the original position of the September 1980 meeting was upheld.

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25 CLC Executive Council minutes, December 9-11, 1980.
26 ibid.
27 ibid.
28 ibid.
The tension which existed between the Saskatchewan NDP and Broadbent, which was discussed earlier, cannot be overstated. Curiously, a similar division was developing within the Congress. CLC President Dennis McDermott opened the March 9, 1981 CLC Executive Committee meeting by expressing his concern over "the continued harassment of Ed Broadbent by the Saskatchewan people with respect to the Constitution". The CLC President's message was clear: "Quit attacking the federal Party; they made a political deal and they cannot now walk away from it." Later that month, at the CLC Executive Council meeting, Nadine Hunt of the Saskatchewan Federation of Labour (SFL) further frustrated McDermott by urging the CLC to adopt a similar resolution on the Constitution to the one adopted previously by the SFL Executive. The resolution stated:

That the SFL, with respect to the Constitution, campaign for the following:

a) abolition of the Senate or at least abolishing their veto power
b) amending formula which recognizes population and regional areas of Canada
c) the Charter of Rights does not infringe on trade union rights such as compulsory membership in legitimate trade unions, compulsory check-off, and the right workers to organize into the union of their choice.
d) On other rights, the Constitution should provide an override clause which would give elected legislators, federal or provincial, the ultimate authority to amend/or implement legislation.

It is interesting to note that three of the SFL's four proposal were eventually adopted. Nevertheless, the CLC President rejected Hunt's resolution by stating that the CLC Council had previously agreed to take a neutral position. The CLC President went on to express his disappointment over the fact that the SFL wanted to enter into the

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29 CLC Executive Committee minutes, March 9, 1981
30 ibid.
31 CLC Executive Council minutes, March 10-12, 1981
constitutional debate. McDermott “appealed to Sister Hunt to exercise restraint”.32

Hunt’s retort that the CLC was “doing a disservice to the workers of this country”33 did not sway the head of the CLC. The minutes report that “President McDermott said that whether our remaining quiet turns out to be right or wrong, it was a decision made by this Council.”34

When asked in retrospect whether or not remaining quiet on the Constitution was the best decision, McDermott answered: “Hindsight is always a wonderful thing... Maybe we could have, maybe we should have, but we didn’t. It’s all history now.”35

ORGANIZED LABOUR’S ABSENCE: ALTERNATIVE EXPLANATIONS AND CRITICAL ANALYSES

Left-leaning critics of the Charter have taken numerous different perspectives on the issue of organized labour and Charter. For instance, Michael Mandel has argued that labour’s non-involvement in the Charter process stemmed from its belief that the Charter was of no consequence to Canadian unions.36 Mandel’s conclusion is partially supported by comments made by legal scholar Joseph Weiler. Weiler contends that:

The union movement’s refusal to attend the Special Committee hearings was not intended to be seen as a boycott or protest against the process of constitutional reform or the entrenchment of human rights in the Canadian Constitution. Rather, the leadership of the Canadian Labour Congress (CLC) decided that the unemployment rate at the time was so high that the unions could not use their limited resources to appear in front of another

32 ibid.
33 ibid.
34 ibid.
35 Interview, Dennis McDermott (July 23, 2000)
36 Mandel, 259-262.
panel of politicians who were talking about the arcane issues of constitutional reform and human rights.\(^{37}\)

The weaknesses in Weiler’s brief analysis are very apparent. He fails to address the CLC’s “Quebec Question” and ignores the internal dissent which existed within the NDP. Weiler’s analysis, which was presented in 1985, is an excellent representation of the CLC spin which emerged after legal scholars first began hinting that organized labour had “missed the boat” or “fallen asleep at the switch” when it came to the Charter.\(^{38}\)

Although Weiler’s analysis omitted important information, it did superficially reflect the labour movement’s desire to see the government deal with concrete economic problems rather than abstract constitutional issues. However, his analysis does not come close to a full explanation of the CLC’s motives. Former CLC President Shirley Carr, who was sitting as a member of the CLC Executive at the time, claims that some of her private sector union colleagues felt that there was no reason for the CLC to involve itself in the Charter process.\(^{39}\) Many labour leaders were under the impression that the collective rights of workers were already protected under the vague heading of “freedom of association” (as Robert Kaplan suggested) and various International Labour Organization (ILO) conventions of which Canada was a signatory. Canada had also ratified several United Nations International Covenants which provided for the right to strike and the right to bargain collectively.\(^{40}\) This rationale for non-involvement makes


\(^{38}\) Interview, John Fryer (January 12, 2000)

\(^{39}\) Interview, Shirley Carr (December 15, 1999)

some sense, but certainly the Canadian labour movement should have been aware that it could not take International Agreements for granted. According to then CLC Executive Committee member John Fryer, governments had been violating these agreements for years. As Fryer put it, “All the ILO could ever do is slap government on the wrist with a wet tea towel.”

Fryer, who headed the National Union of Provincial Government Employees (NUPGE) at the time, remembers that private and public sector union leaders disagreed over whether the CLC should be involved in the constitutional process. Fryer, who felt that public sector unions were treated as “second class” members within the CLC, contends that most CLC Executive members were unsympathetic towards the plight of public sector unions. In the end, he claims, it was support from private sector union heavyweights like Bob White (UAW) and Gerard Docquier (Steelworkers) which ensured that the CLC would respect Laberge’s concerns and stay away from the Constitution.

Unlike Dennis McDermott, who quietly lent his support to Broadbent, union leaders generally rejected the Federal NDP leader’s position in favour of Allan Blakeney’s stand on the Charter. As Premier of Saskatchewan, Blakeney was viewed as a seasoned leader who could be trusted to protect the interests of organized labour.

Emile Vallée, a former Executive Assistant to Shirley Carr, was lobbying on behalf of the Steelworkers in Ottawa in the early 1980s. Vallée remembers watching the hearings of

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41 Interview, John Fryer (January 12, 2000)
42 ibid.
the Parliamentary Committee in person. Initially a supporter of Blakeney's position on
the Charter, Vallée recalls changing his attitude over labour's involvement while
witnessing the way in which the Parliamentary Committee rewrote the Charter as group
after group came to plead its case. Vallée remembers thinking, "Oh my God, these
groups are seeing things that we don't. Somebody should be there protecting workers'
rights. Why aren't we?"44 In retrospect, the CLC should have forced the federal NDP to
deal with collective workers' rights. Although organized labour undoubtedly recognized
that the Charter would have some impact on Canadian labour law, the Congress grossly
misjudged what kind of impact the Charter would have on the Canadian labour regime.45

Although one should not underestimate the significance of the CLC's non-
involveinent in the Charter process, it is important to put the CLC's decision in
perspective. At the time, the Congress was in transition. It was an organization unsure of
its role in the federation and one which seemed trapped in the past of the Quebec
referendum rather than focused on the Charter of Rights and its possibilities for the
future.46

Admittedly, some members of the Congress were genuinely more concerned with
inflation and unemployment than they were about the game of constitutional chess which
was being played on Parliament Hill.47 It should therefore come as no surprise that the
CLC Executive so easily acquiesced to Laberge and the FTQ. Labour leaders figured

43 Steed, 253.
44 Interview, Emile Vallée (December 21, 1999)
45 Interview, John Fryer (January 12, 2000)
46 Interview, Shirley Carr (December 15, 1999)
that the stakes were not high enough to merit a severe sovereigntist headache. In general, dissident unions and provincial federations of labour (with the exception of British Columbia) lined up behind the CLC’s position as an act of solidarity.\textsuperscript{48} However, it would not take long for organized labour to recognize that the CLC’s band-aid solution for dealing with patriation and the Charter would negatively impact the labour movement in the long term.

This chapter has focused on the CLC’s experience with constitutional reform in the early 1980s. The first half of the chapter was devoted to explaining why the labour movement excluded itself from the process of patriating the Constitution. Primary sources strongly suggest that the both the CLC and the NDP were internally divided over the issue of patriation. The FTQ’s strong opposition to Trudeau’s constitutional vision was offset by NDP leader Ed Broadbent’s enthusiastic support for a strong Charter of Rights and Freedoms. Reluctant to offend its political allies, the CLC officially decided to remain a neutral observer as the debate over patriation and the Charter unfolded. The second part of this chapter was devoted to rebutting alternate explanations for organized labour’s absense. It was argued that these explanations were insufficient or simply not rooted in political reality. Patriation of the Constitution with a Charter of Rights and Freedoms was a monumental event in Canadian history. However, it is clear that trade unionists were unaware of just how important an event it was. The CLC’s political miscalculation over patriation did not become apparent until the Supreme Court of

\textsuperscript{47} Interview, Pat Kerwin (January 26, 2000)
\textsuperscript{48} Interview, John Fryer (January 12, 2000)
Canada began handing down rulings which had a tremendous impact on the Canadian labour regime.
CHAPTER IV

"THE CLASS STRUGGLE GOES TO COURT"¹

"The Supreme Court says that the right to associate is a constitutional right, but not the right to bargain or the right to strike. This judgment reduces the right of association in a union to the equivalent of the right of association for a leisure activity. It appears for the Supreme Court, a union is no different than a bowling league or a bingo club."²

This chapter examines organized labour’s experience with Canada’s judicial system by focusing on several important Charter challenges at the Supreme Court of Canada. The impact of Charter decisions on the labour movement clearly suggests that the CLC’s decision not to participate in the process of constitutional reform was a poor political move. In the second half of the chapter, the Supreme Court’s treatment of the labour movement will be compared to the relatively favourable judicial treatment offered to the business community. This comparison is designed to uncover the court’s anti-union bias and to reinforce the importance of explicitly protected constitutional rights for labour.

On April 16, 1985, the Saskatchewan Government Employees’ Union (SGEU) held a Conference entitled “The Charter of Rights: What’s It Worth?”. Larry Brown, Chief Executive Officer of the SGEU, and a speaker at the conference, reinforced the view shared by most labour leaders when he told the membership that “working people

² Gérald Larose, President CSN, quoted in Pradeep Kumar and Dennis Ryan, eds. Canadian Union Movement in the 1980s: Perspectives from Union Leaders (Kingston: Queen’s IRC, 1988), 78.
have made their progress in the streets and on picket lines, in meetings and
demonstrations, in struggle and confrontation... not in the halls of justice". However,
Brown's colleague John Fryer, President of NUPGE, encouraged conference participants
to accept the Charter as a political reality that could not be ignored. Despite his
misgivings about the Charter, Fryer stated that "clearly it is the duty of the trade union
movement to do all we can to use the Charter and its provisions to protect and expand the
existing rights of our membership." Fryer felt that the Canadian labour movement had
to develop a strategic plan to deal with the Charter in order to ensure that it did indeed
"protect and expand" the rights of workers. Unfortunately for organized labour, the
rights revolution was not going to wait for the CLC to devise a comprehensive and
winnable plan of attack.

TRADE UNIONS AND THE FREEDOM OF ASSOCIATION

Despite the fact that organized labour had excluded itself from the process of
negotiating the Charter's fundamental freedoms, Canadian unions certainly did not shy
away from using the Charter once it came into effect. In the face of increasing state-
sanctioned attacks on the labour movement, Canadian unions were among the first
organizations that tried to invoke their perceived Charter rights through a series of
Charter challenges in the 1980s.

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3 Larry Brown, in Saskatchewan Government Employees Union "The Charter of Rights: What's it Worth?
Implications for Collective Bargaining" (April 16, 1985), 3.
47.
The first significant round of labour-related Charter challenges came in 1987 when the Supreme Court made a set of simultaneous judgments on appeals from three separate cases: *Public Service Employees Relations Act (Alberta); Public Service Alliance of Canada v. The Queen;* and *Retail, Wholesale and Department Store Union Locals 544 et al. v. Government of Saskatchewan.* These three cases involving the right to strike became known as the “Labour Trilogy”.

Justice Le Dain, who wrote for the majority in the Alberta Reference case, dismissed the union’s Charter challenge and upheld the government’s legislation which prohibited essential service workers in Alberta from going on strike. The crux of the decision is transcribed below:

> The constitutional guarantee of freedom of association on s. 2(d) of the Canadian Charter of Rights and Freedoms does not include, in the case of a trade union, a guarantee of the right to bargain collectively and the right to strike… The rights for which constitutional protection is sought – the modern rights to bargain collectively and to strike, involving correlative duties or of obligations resting on an employer -- are not fundamental rights or freedoms. They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring special expertise.5

Where was Justice Le Dain when the deputy Minister of Justice explained to Parliament’s Special Joint Committee on the Constitution that section 2(d) implicitly included the right to bargain collectively? The original intent of those who drafted the Charter has not always been in tune with the interpretation of the Charter offered by Supreme Court Justices. The “framer’s intent” argument is important because it helps to show the Court’s anti-union bias, even within the framework of a non-interpretivist method of judicial review. Non-interpretivism gives the judiciary the flexibility to interpret the Constitution in a way that does not impede social progress. By incorporating prevailing
attitudes and beliefs into their judicial decision-making process, the Supreme Court essentially tries to ensure that constitutional principles embody the democratic will of modern citizens. Non-interpretivism has traditionally been associated with judicial activism, a method of judicial review which promotes increased judicial intervention through a broad and generous interpretation of constitutional rights and freedoms.

Charter scholars like James B. Kelly have argued that judge-centred explanations for non-interpretivist Charter decisions are limited because they misrepresent “the historical continuum of activism in Canada by suggesting that judicial activism is an independent creation of the judiciary”. Kelly goes on to suggest that judicial activism is a “response to democratic activism on the part of Trudeau and his attempt to create a Just Society.” However, a brief comparison between the Supreme Court’s handling of labour rights and its approach to gay rights suggests that the Court’s judicial decision-making process lacks principled consistency. In the case of labour, the Supreme Court has failed to extend its judicial activism to meet the expectations of democratically elected political actors in the Canadian political system.

On November 12, 1980, Justice Minister Jean Chrétien, speaking before the Special Joint Committee on the Constitution, appeared to acknowledge that sexual orientation could be added to Section 15(1) of the proposed Charter of Rights via

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8 ibid, 491.
On January 29, 1981, Svend Robinson, an NDP member of the Special Joint Committee was unsuccessful in moving an amendment to have sexual orientation explicitly listed as prohibitive grounds for discrimination under Section 15. Robinson pressured Chrétien to justify why the Liberal government was not prepared to include sexual orientation in the Charter. Chrétien replied by saying "we have explained that there are other grounds of discrimination that will be defined by the courts. We wanted to have an enumeration of grounds and we do not think that it should be a list that can go on forever." Robinson's amendment was subsequently defeated.

A decade and a half later, the Supreme Court of Canada did indeed read gay rights into the Constitution in *Vriend v. Alberta*. This victory for gays and lesbians stood in stark contrast to the judicial defeats of the labour movement. However, what is important to note is that both trade union rights and gay rights were treated in a similar fashion by the Special Joint Committee. A week prior to Svend Robinson’s motion to include sexual orientation in the Charter, he moved his amendment to include collective bargaining rights and the right to organize in Section 2(d) of the Charter. As was previously explained in Chapter 3, the amendment was defeated because the government explained that limited trade union rights were implied in the term “freedom of association”. In both instances, the government was prepared to concede that rights could be extended in the future. In the case of organized labour, Robert Kaplan even suggested that freedom of association already covered collective bargaining rights. Admittedly, the judicial outcomes of these two examples do represent different time

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9 Special Joint Committee on the Constitution of Canada (November 12, 1980) 3:60.
periods of judicial decision-making. However, this fact serves only to strengthen the argument since the Supreme Court was far more activist in the 1980s (when it ruled on the “Labour Trilogy”), than it was in the 1990s, when it ruled on Vriend.

Although the Court majority ruled against the labour movement in the “Labour Trilogy”, a public opinion poll conducted by Gallup, just prior to the Supreme Court’s “Labour Trilogy” decisions, showed that, in general, 68% of Canadians supported the right to strike. In addition, Canada was a signatory to numerous international human rights conventions which explicitly protected labour rights. Unfortunately for organized labour, the International Labour Organization (ILO), an arm of the United Nations (UN), has no real power to enforce its standards. Chief Justice Dickson and Justice Wilson reflected the strong public sentiment and the spirit of international labour conventions in their lengthy dissents. Chief Justice Dickson’s conclusion in the Alberta Reference case read as follows:

If freedom of association only protects the joining together of persons for common purposes, but not the pursuit of the very activities for which the association was formed, then the freedom is indeed legalistic, ungenerous, indeed vapid.

Dickson and Wilson remained true to the activist, non-interpretivist slant of the Supreme Court of Canada, while their colleagues decided that the key functions of unions were not worthy of constitutional protection. The right to strike and bargain collectively are certainly no less fundamental than the right to commercial expression, which constitutionally protects the business community. Collective bargaining, picketing, and strike action are the only tools available to organized workers who want to protect their

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wages and working conditions in a free-market economy. The only commodity union members have to bargain with is their labour. By denying the constitutional validity of strike action, the Supreme Court has placed workers at a disadvantage. Without constitutional protection, public sector unions are especially vulnerable to neo-liberal attacks from the state.

PSAC’s challenge to the federal government’s “6 and 5” wage restraint program and the RWDSU’s challenge to the Saskatchewan government’s prohibition of strikes in the province’s dairy industry also fell victim to the Supreme Court’s anti-labour logic in the “Labour Trilogy” decisions. The same rationale used in the Alberta Reference case was used to dismiss the Charter claims of PSAC and the RWDSU. The Canadian judicial system has rarely been a friend to organized labour, but the Supreme Court’s "Labour Trilogy" decisions were particularly troubling considering the suspect notions upon which the majority's anti-union decisions were based. These issues will be dealt with in more detail in the latter portion of this chapter.

BEYOND THE LABOUR TRILOGY: P.I.P.S. AND LAVIGNE

The “Labour Trilogy” delivered a severe blow to Canadian unions, but the labour movement continued to drag itself to the Supreme Court in an attempt to preserve other aspects of the collective bargaining relationship. When responsibility for health care services was transferred by the Federal government to the Northwest Territorial government, the Professional Institute of the Public Service of Canada (PIPS) challenged a section of the

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Territory’s Public Sector Act which authorized the government to determine legislatively who would represent employees in bargaining.\textsuperscript{15} In a 4-3 decision, the Supreme Court rejected the PIPS claim that collective bargaining warranted constitutional protection. Chief Justice Dickson, regretfully siding with the majority, explained that the “Labour Trilogy” had created jurisprudence which he was forced to uphold.\textsuperscript{16}

The labour movement retreated from the legal arena only to be pulled back in by a business community determined to further undermine workers’ rights. The most high profile of these cases involved college professor Merv Lavigne, who claimed that compulsory dues checkoff violated his freedom of expression and freedom not to associate, since the Ontario Public Service Employees Union (OPSEU) was using the dues to support left-wing political causes with which Lavigne disagreed.\textsuperscript{17} Lavigne’s case, which was bankrolled by the right-wing National Citizens’ Coalition, was finally decided in 1991. The Court agreed with Lavigne that his freedom of expression was indeed violated, but fortunately for the labour movement, the compulsory dues checkoff provision passed the Court’s Section 1 test and Lavigne’s challenge was dismissed.\textsuperscript{18} The Court also ruled that the union was free to spend its dues without government restriction. Justice LaForest explained:

> The integrity and status of unions as democracies would be jeopardized if the government’s policy was, in effect, that unions can spend their funds as they choose according to majority vote provided the majority chooses to make expenditures the government thinks are in the interest of the union’s membership. It is, therefore, for the union itself to decide, by majority vote, which causes or organizations it will support in the interests of favourably influencing the political, social, and economic environment in which

\textsuperscript{14} Leo Panitch and Donald Swartz, The Assault on Trade Union Rights and Freedoms (Toronto: Garamond Press, 1993), Chapter 4.
\textsuperscript{15} ibid, 71.
\textsuperscript{16} ibid, 71-72.
\textsuperscript{17} Mandel, 297.
\textsuperscript{18} Panitch and Swartz, 76.
particular instances of collective bargaining and labour-management dispute resolution will take place…

Some observers have considered the Lavigne case to be a great victory for the unions, but at best it could be considered bittersweet. The decision in Lavigne did nothing to advance the interests of organized labour; it merely upheld the status quo. According to Barbara Falk, Lavigne did not represent “a ‘turnaround’ in labour’s dealings with the Charter”, but rather symbolized “the ineffectiveness of the Charter as an essentially liberal and individualist document in promoting collective rights, especially if the collectivity in question is a union.”

ORGANIZED LABOUR AND THE SUPREME COURT OF CANADA

Left-wing critics of the Charter can roughly be divided into three camps: social engineers, critical legal realists, and left-wing Charter skeptics. Social engineers are essentially social democratic critics of the Charter, who argue that the Charter is inherently a good document, but that it is not being used to its full progressive potential. In The Charter of Rights, Ian Greene argues that the conservative nature of the Canadian judicial system, combined with the upper-class background of most judges, renders the judicial system biased in favour of a pro-capitalist vision for Canada. As a result, Greene contends, the Charter may not be able to realize its full potential as a socially progressive document. Similar criticisms have been made by social engineers like David Beatty,

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who has argued that the Supreme Court of Canada’s labour relations rulings are inconsistent with the activist nature of the Canadian judiciary.\(^{22}\)

For critical legal realists, the degree of judicial activism has little to do with prospects for progressive social change. Both Michael Mandel and Allan Hutchinson have argued from a Marxist perspective that invoking liberal and individualistic Charter rights is actually counter-productive. In *Waiting for CORAF*, Hutchinson argued that the Supreme Court’s Charter decisions “lull citizens into political quietism,”\(^{23}\) while Mandel has argued that “working people have nothing to gain from Charter politics and business has nothing to lose.”\(^{24}\) Both Mandel and Hutchinson agree that the Charter can never mitigate social inequality in a liberal democratic society.

The third category of left-wing Charter critics, the Charter skeptics, question the usefulness of the Charter, but do support using the Charter in certain instances provided that it can be invoked for socially progressive purposes. These critics firmly believe that workers cannot substitute lawyers and legalism for militant class struggle in order to achieve real change. In *Just Words: Constitutional Rights and Social Wrongs*, Joel Bakan states that “in arguing that the Charter’s potential to advance social justice is limited, I have necessarily implied that the possibility of progressive social change depends on work that goes beyond the confines of Charter politics”.\(^{25}\) Specifically in terms of labour relations, Thomas McIntosh has claimed that “while there may be a


\(^{24}\) Mandel, 335.
strong defensive position for trade unions found within the Charter, the problems that face trade unions in the future are not to be solved in the realm of judicial review and rights’ claims.” 26 McIntosh’s conclusion has been accepted by well-known left-wing political scientist Leo Panitch, who has consistently conceded that the labour movement cannot ignore the legal and constitutional arena as a legitimate forum for debate. 27

Generally, social engineers dismiss the Marxist analysis of the critical legal realists by suggesting that a theoretical analysis of the Charter’s impact on labour relations does not practically apply to workers in a modern liberal democratic environment. Critical legal realists like Mandel generally respond by suggesting that workers lose as soon as they enter the court room because they have accepted the legitimacy of an institution which has historically advanced the interests of capital at the expense of the working class. Finally, the left-wing Charter skeptics differ from the critical legal realists in that they reject the notion that every single use of the Charter has a negative impact on Canadian politics.

Despite the wide divergence of views among left-wing Charter critics, moderate social democrats and committed Marxists are united in the belief that the Supreme Court of Canada’s labour relations decisions have been based on faulty logic and erroneous assumptions about the nature of trade unionism in a modern capitalist economy. Beatty, Panitch, Mandel, and Bakan have all condemned the Supreme Court for its treatment of

25 Joel Bakan, Just Words: Constitutional Rights and Social Wrongs (Toronto: University of Toronto Press, 1997), 145.
26 Thomas A. McIntosh, Labouring Under the Charter: Trade Unions and the Recovery of the Canadian Labour Regime (Kingston: Industrial Relations Centre, Queen’s University, 1989), 29.
the labour movement. However, does such a condemnation necessarily help us to understand the labour movement’s relationship vis-à-vis the judicial system? Do we simply accept the implied conclusion that the Supreme Court of Canada is inherently anti-union? What is missing is a comparative analysis which provides something more than a theoretical imperative by which the Supreme Court is expected to judge. Because the Supreme Court of Canada has characterized labour and capital as two equal and competing forces within society, a comparative assessment of the Court’s method of judicial review with regard to the rights of both labour and capital is in order.

In the context of labour relations cases, the Supreme Court’s interpretation of the Charter seems to lack a consistent approach. As Susan Alter pointed out in her background paper for the Law & Government division of the Library of Parliament, the Court’s narrow interpretation of Section 2(d) in the “Labour Trilogy” cases stands in sharp contrast to the generous interpretation that was applied to “Freedom of Association” in the Lavigne case. The history of Charter cases dealing with labour relations suggests that the Court is willing to use a much wider scope when dealing with individual rather than collective rights. Admittedly, in many areas of the Charter, the changing climate of Supreme Court decisions can be attributed to the court’s evolving role in its interpretation of the Charter. However this is not the case in the area of labour relations. Despite the Supreme Court’s shift from a non-interpretivist and activist role in the early years of the Charter to a more restrained role today, the Court has consistently, structurally, and systemically failed to advance the interests of organized labour. This

See, for example, Panitch and Swartz, 148.
phenomenon is unquestionably fueled by the Court’s historic anti-union bias. However, as was previously stated, the only way of testing this assertion is to compare the Supreme Court of Canada’s method of judicial review in labour relations cases with its interpretation of Charter cases dealing with corporate interests.

An anti-union bias can be deduced by comparing and contrasting the Supreme Court’s labour relations rulings with its pro-capital Freedom of Expression rulings. Essentially, the Court has adopted a large and liberal approach when dealing with corporate interests, while using a minimalist and textual approach when dealing with labour interests.

THE SUPREME COURT OF CANADA, THE LIVING TREE, AND NON-INTERPRETIVISM

The Canadian Charter of Rights and Freedoms does not explicitly protect the interests of labour or business. Amendments to include property rights, collective bargaining rights, and the right to organize a union were all rejected by the Special Joint Committee on the Constitution. However, the framers of the Constitution did intend for the Charter to be interpreted according to the “Living Tree” doctrine. Basically, the Court is expected to treat the Constitution like a living, breathing organism, that evolves with the times and adapts to changing circumstances. The “Living Tree” doctrine has traditionally been associated with judicial activism and the non-interpretivist method of judicial review.29

29 Knopff and Morton, 113.
The democratic merits of non-interpretivism and judicial activism are unquestionably in dispute. For example, right-wing Charter critics have argued that the non-interpretivism of the Supreme Court of Canada has undermined the authority of democratically elected governments. However, the debate between interpretivism and non-interpretivism, as the preferred system of judicial review, is beyond the scope of this thesis. For our immediate purposes, it is important to note only that the non-interpretivist model is widely accepted as a valuable and competent form of judicial review.

Historically, corporations and the business lobby have used the judicial system to advance their interests. In fact, Osgoode Hall Law Professor Judy Fudge has argued that the Supreme Court's labour relations decisions reflect the Court's "institutional role as defenders of private property and contract rights." Corporate interests flood court dockets with successful challenges to the state's regulatory agencies. However, in terms of the Charter, big business has been most successful in invoking its rights under Charter Section 2(b).

It is unclear whether any constitutional observers expected the Charter's guarantee of Freedom of Expression to include the right to commercial expression. However, in Ford (1988), a case involving Quebec's controversial language laws, the

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30 ibid, 4.
31 ibid, 98-117.
Supreme Court of Canada ruled that commercial expression was indeed protected by section 2(b) of the Charter. In reviewing the Court’s decision in Sharpe (1987), Richard Moon has suggested that “the Canadian courts accepted that that advertising can convey important ideas and information to consumers and that an individual’s identity and sense of worth are tied up with his or her purchasing power (and perhaps also with his or her business activities).” Cannot the same be said for one’s labour? As was previously stated, organized workers do not exist individually within a vacuum; rather, they work together as a single production process. This is the nature of work in capitalist economies. Work is central to one’s life and thus an individual’s self worth is directly linked to his or her job.

In November 1998, the Supreme Court of Canada’s decision on egg marketing provided corporations with the power to defend themselves against regulations enforced by government bodies in civil proceedings. The Court’s ruling was seen as a “bookend” to the Court’s decision in Big M Drug Mart, which permitted corporations to use the Charter as a defence in criminal proceedings. In Big M, business was also able to use the Charter’s Freedom of Religion provision to convince the Court to strike down laws forbidding trading on Sundays.

In addition to freedom of commercial expression, corporate interests have gained ground in terms of legal rights and mobility rights. However, the most dramatic Charter
victories for business have relied on activist Supreme Court decisions involving Section 2(b) of the Charter. In *Rocket v. Royal College of Dental Surgeons of Ontario*, a group of dentists was successful in convincing the Court to strike down a provincial statute banning advertising campaigns in the medical industry. The Court ruled that Section 2(b) of the Charter protected “commercial speech such as advertising”. By protecting the business community’s freedom of commercial expression, the Supreme Court of Canada has essentially constitutionalized the protection of corporate economic interests.

Important Supreme Court rulings protecting commercial expression have unquestionably advanced the profit-seeking agenda of the business community. In contrast, union victories in the area of freedom of expression have been small. In *UFCW Local 1518 v. K-Mart*, for example, the Court ruled that handing out union leaflets was constitutionally protected, but stressed that picketing, a much more meaningful form of expression in the case of trade unions, was not protected by the Charter.

Whereas business has benefited from an activist court, the Supreme Court of Canada’s labour relations decisions have been much less activist. When ruling on the “Labour Trilogy”, the majority, much to the delight of right-wing Charter critics, exercised the most forceful version of judicial restraint in “the form of placing internal limits on relevant rights, so that the interests or activities regulated by the challenged

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36 Mandel, 313.
37 *Rocket v. Royal College of Dental Surgeons of Ontario* (1990), Supreme Court Record website.
38 *UFCW Local 1518 v. K-Mart Canada Ltd.* (1999), Supreme Court Record website.
policy receive no Charter protection.” In the Supreme Court’s freedom of commercial expression rulings, the Court has not exactly been activist, but it has been loathe to place a definitional limit on Section 2(b). Therefore, although a corporate interest may lose from time to time when legislation is upheld, “such judgments open the door to continuing Section 1 jurisprudence in the future. Even if the Charter violation at issue in the particular case is ‘demonstrably justified,’ other limitations of the same right may not be.”

The right to commercial expression has been read into the Charter by Supreme Court Justices. Whether or not this is a democratic practice is open to debate. However, the fact that the Court majority was unwilling to even consider giving equally significant constitutional protection to organized workers suggests that the Court has been inconsistent, and biased against the labour movement.

CLASS STRUGGLE AS A POWER RELATIONSHIP

In the “Labour Trilogy” decision, Supreme Court Justice McIntyre described the country’s labour relations system as follows:

Labour law... is based upon a political and economic compromise between organized labour - a very powerful socio-economic force - on one hand, and employers of labour - an equally powerful socio-economic force - on the other. The balance between the two forces is delicate and the public-at-large depends for its security and welfare on the maintenance of that balance...
Notwithstanding McIntyre’s claim that the two are co-equal, one need not be a Marxist to understand the power imbalance which exists between labour and capital. The Supreme Court of Canada’s view that organized labour and corporations represent two “equally powerful” forces in society fails to take into consideration the business community’s greater influence in the judicial system. In *Hunter v. Southam Inc.* (1984), the Supreme Court ruled that corporations were entitled to the same constitutional protection as individuals; collectivities of workers have never been extended this right. The business community also enjoys a privileged position in terms of economic pressure since those who own the means of production are responsible for providing employment opportunities.\(^{42}\)

Organized labour represents a substantial minority in society and workers are unquestionably subservient to business. The largest unions in Canada are actually quite small when compared to the size and resources of Canada’s largest multinational corporations. Less than a third of the non-agricultural workforce is unionized and an even smaller number of Canadian workers have actually ever been on strike. Very few trade unionists have an impact on government and even fewer hold elected office. In an anti-union political climate, unions need constitutional protections to protect workers against the excesses of the common law and neo-liberalism.

Business enjoys a privileged position vis-à-vis government. The current public policy agenda caters to the corporate demands of trade liberalization, tax reduction, and

\(^{42}\) Glasbeek, 7.
privatization. Recent history has shown that even social democratic governments will put the interests of business before those of labour. Heavy lobbying by corporate interests convinced Bob Rae's Ontario NDP government to implement its anti-union Social Contract. The legislation unilaterally re-opened collective agreements and forced the broader public sector to take a 5% wage cut. Provincial NDP governments in British Columbia and Saskatchewan have continued the assault by repeatedly ordering unionized employees back to work in order to settle labour disputes. This is significant because it suggests that the political system has failed to protect the interests of unionized workers. Over the course of the last few decades, the most serious defeats for organized labour have come, not from the courts, but from the political arena. The election of neo-liberal governments both federally and provincially have unquestionably hurt the labour movement. However, unlike the special interest groups who have successfully turned to the judicial process to expand their rights, organized labour has not been able to rely on the Supreme Court as an alternative to the political system.

Organized labour's poor performance in the judicial arena has prompted Marxist political scientists to suggest that courts are simply anti-union institutions designed to protect and promote the interests of capital through an anti-worker Charter. This raises an important question for left-wing Charter critics -- can organized labour ever win in the Canadian legal system? Supreme Court Justices are political actors. Although most judges undoubtedly do their best to interpret the Charter in a fair and equitable manner, it is impossible to completely neutralize personal biases and life experiences when ruling

43 Judy Fudge, "Labour, the New Constitution and Old Style Liberalism" in Labour Law Under the Charter (Kingston: Queen's IRC, 1988), 93.
on the meaning of the ambiguous and vague language found in the Charter. The background and personality of judges, combined with the dominant ideological paradigm in which their decisions are made, undoubtedly raise important questions about the nature of judicial decision-making.

The present structure of the Charter’s guarantee of Freedom of Association is more than flexible enough to recognize the rights of organized labour. A non-interpretivist approach to Freedom of Association would gradually allow for an expansion of Section 2(d) of the Charter to include the collective rights of workers. However, the Supreme Court’s labour relations rulings have not been consistent with the court’s activist approach in other areas. This inconsistency is a direct result of the court’s anti-union bias.

A comparative analysis of judicial decision making methods suggests that Supreme Court Justices do indeed “work-to-rule” in labour relations cases. Admittedly, corporate interests have only been mildly successful at the Supreme Court, but as Michael Mandel has pointed out, “it is more than labour can say for itself”.

The Charter is neither overtly anti-union, nor is it explicitly pro-business. However, the background of judges and the nature of judicial interpretation unquestionably favour corporate interests when labour and capital clash in the courtroom. The narrow, textual analysis used by the Supreme Court in labour relations cases stands in sharp contrast to the liberal, non-interpretivist method of judicial review used by the Court when assessing the validity

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44 Panitch and Swartz, Chapter 8.
45 Mandel, 308.
of Charter claims brought forth by members of the business community. This divergence in methods of judicial review could have potentially been avoided had labour rights been expressly included in the Charter under Section 2(d) Freedom of Association.

The Charter was created by democratically accountable politicians with a progressive and egalitarian vision for Canada. However, working people have not been invited to partake in the “Just Society” created by the Charter. The Supreme Court of Canada has essentially denied the existence of class cleavages in Canadian society. As a result, labour can only hope for superficial neutrality in a courtroom which unjustly views workers in classless and ahistorical terms. However, it is important to note that the CLC did nothing to avert the Supreme Court’s anti-union rulings. As was previously discussed in Chapter 3, the Canadian labour movement purposely excluded itself from the process of negotiating the content of the Charter in the early 1980s. The controversy surrounding the Supreme Court of Canada’s interpretation of the Charter prompted many trade union activists to demand that labour make the collective constitutional rights of workers a priority. However, as will be argued in the next chapter, the CLC was unwilling to alter significantly its strategy towards the issue constitutional reform. Rather than confront its judicial phobia by adopting an explicitly pro-labour rights discourse, the CLC continued to play a minor role in constitutional debates. As a result, the opportunity to lobby effectively for progressive changes to the Charter was dashed.
CHAPTER V

ORGANIZED LABOUR AND CANADIAN FEDERALISM -- THE MEECH LAKE AND CHARLOTTETOWN ACCORDS

One of the primary reasons for examining organized labour’s performance at the Supreme Court of Canada was to determine whether or not such a negative experience would prompt the CLC to attempt to change its position vis-à-vis the judicial system by participating in future rounds of constitutional reform. The Meech Lake and Charlottetown Accords offered parties and interest groups a decent opportunity to promote and advance their rights-based constitutional agendas, but organized labour continued to resist confronting complex constitutional issues.

THE CLC AND THE MEECH LAKE ACCORD

As was briefly outlined in the introduction, the CLC’s constitutional decision making process has been based on balancing the competing interests and objectives of the NDP and the FTQ. These organizations form two distinct pillars of strength inside the Canadian labour movement and they have very different views of federalism and the country’s future. Patriation unquestionably divided the FTQ and the NDP, and the Meech Lake Accord only made a bad situation worse. Instead of appealing to class sentiments through a campaign for the entrenchment of constitutional workers’ rights, the labour movement decided to join the fray and argue century-old questions about federalism, language, culture, and geographic alienation.
The CLC approached the Quebec round of constitutional reform in much the same way that it approached the constitutional debate of the early 1980s -- by making a politically safe statement in support of aboriginal rights. In a March 11, 1987 statement, the CLC declared that “There can be no real justice for aboriginal people until their rights to full self-determination are both recognized and respected.”

Once the April 30th First Ministers Conference at Meech Lake led to an agreement on amending the Constitution, the CLC's narrow statement on aboriginal rights became unsatisfactory. The CLC was acutely aware that the prominence of constitutional issues in the early 1980s had effectively reduced the voice of the labour movement. If Meech were the only game in town, organized labour would be forced to play a role. Canadian unions could not afford to be shut out once again. CLC President Shirley Carr wrote to the Prime Minister in June of 1987 asking for public hearings to be held on the Accord. A month later, the Executive Committee of the Congress approved a motion to make a presentation to the Special Joint Committee set up to hear the public’s concerns over Meech Lake.

In an August 1987 presentation to the Special Joint Committee on the 1987 Constitutional Accord, the CLC criticized the secretive process of constitutional reform, but barely considered its content. Although the CLC dealt briefly with the spending power, amending procedures, and the equality provisions of the Charter, it once again failed to advocate constitutionally entrenched rights for organized workers. This approach was consistent with the discussion paper on the Charter of Rights which was

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1 Statement on behalf of Shirley Carr, President CLC, March 11, 1987, p. 2.
produced by CLC staff in the Spring of 1987. It is important to note that this discussion paper was prepared less than a month after the Supreme Court’s “Labour Trilogy” rulings on April 9, 1987.

The CLC’s Charter discussion paper tried to put the labour trilogy loss in the best possible light by suggesting that “the impact of the Court’s decision is neutral. We are no worse off now than we were before the Charter came into force.” This questionable assertion was followed by a number of rhetorical questions aimed at discrediting the Canadian legal system. On page 3, for example, the report states that “the Congress needs to make a decision on the fundamental issue of whether, in light of this judgement, it wants to have the right to bargain collectively and the right to strike put in the Charter. Do we as a Congress want to give the Courts power to determine our future, or do we want this to remain a matter for the legislatures?” The discussion paper goes on to ask: “In light of these decisions by the Supreme Court, is it not better for labour to reaffirm its support for electing NDP governments which will be good employers and which will also protect labour rights through sound labour legislation?”

Today, many trade unionists would ridicule the suggestion that NDP governments make “good employers”. The provincial administrations of Bob Rae, Roy Romanow and Michael Harcourt certainly helped to dispel the myth that the NDP is controlled by the labour movement. However, in 1987, when the discussion paper was prepared, it could be argued that NDP governments had a poor track record as employers. Dave Barrett’s
provincial NDP government put an end to major labour disputes in British Columbia with back-to-work legislation in 1975. As a result, thousands of workers were denied the ability to bargain collectively and B.C. Federation of Labour President, Len Guy, called the NDP’s strike-breaking legislation a complete betrayal of party principles. Allan Blakeney’s provincial NDP government imposed the “Maintenance of Operations of Saskatchewan Power Corporation Act” on workers in January of 1975. The Bill essentially ordered members of the International Brotherhood of Electrical Workers back-to-work in that province. In Manitoba, NDP Premier Ed Schreyer infuriated many rank-and-file trade unionists in the CLC by supporting the Trudeau government’s wage and price controls. Labour disputes are inevitable no matter which party is in power. However, the NDP governments in British Columbia, Saskatchewan and Manitoba proved that they were willing to use coercive tactics against workers despite the social democratic rhetoric of cooperation and consent.

The CLC’s discussion paper on the Charter concluded as follows: “If we want good employers and good governments which will give labour the legislative protection it needs, we need to stay the course and fight it out in the political arena. We know how to fight for our rights with the politicians, but the Courts have never been an area on which we could rely.”

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4 ibid, 4.
6 ibid, 105.
7 Leo Panitch and Donald Swartz, The Assault on Trade Union Rights and Freedoms (Toronto: Garamond Press, 1993), 217.
8 CLC, Discussion paper on the Charter of Rights and Freedoms, p. 3.
Despite the poor analysis put forward in the CLC’s Charter discussion paper, the anti-Charter view eventually prevailed. The Congress was clearly not interested in the Charter or the expensive lawyers that came with it. Instead, it would concentrate on electing NDP governments. However, the fact that the CLC decided to shy away from the judicial arena did not stop its affiliates from questioning the decision of their labour leaders. In PSAC’s presentation to the Parliamentary Committee dealing with the 1987 Constitutional Accord, President Daryl Bean chastised the Supreme Court for misinterpreting the guarantee of freedom of association in the Charter:

With regard to clarity or lack therof in constitutional language, the PSAC knows of what it speaks. In our submission we address at length the interpretation of freedom of association that was imparted to the special committee on the Constitution by the Acting Minister of Justice on January 22, 1981, where he stated — to a member of the committee, by the way — that freedom of association included freedom to organize and bargain collectively. Subsequently, a majority decision the Supreme Court rendered on Bill C-124, the Public Sector Compensation Restraint Act, on April 9 of this year came to the conclusion that the Charter guarantees unions neither the right to collectively bargain nor strike.9

Robert Kaplan, the then Acting minister of Justice referred to in Bean’s comments, was sitting on the Committee dealing with the 1987 Constitutional Accord as a member of the opposition Liberals. Kaplan responded to Bean’s statement in a very candid manner:

Now you have reminded me that I believe that the freedom of association contained in the 1981-82 accord covered rights to strike and rights of association. I am glad to see that although the court disagreed, I had some pretty good supporters in the court, including the Chief Justice of Canada who shared that view.10

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Although Kaplan reconfirmed his support for the Liberal government’s 6-and-5 program and the Charter’s reasonable limits clause, he did assure the PSAC President that “I still think this section of the Constitution Act of 1982 can work for the union movement and that you should not hesitate to argue it again in other cases…” Kaplan’s remarks are important because they appear to suggest that the Supreme Court majority did indeed misinterpret the government’s intentions about freedom of association. Of course, the Supreme Court cannot be blamed for Kaplan’s ambiguity. However, Kaplan’s belated admission that freedom of association ought to have been interpreted as incorporating the right to strike is significant. Although there was some discussion about including collective bargaining rights in the Charter, neither the labour movement nor the NDP had pushed for the inclusion of an explicit right to strike in the Constitution. If Mr. Kaplan, a key Liberal Minister, was prepared to accept that freedom of association included the right to strike, it is safe to assume that a concerted lobbying effort on behalf of the NDP and the CLC could have convinced the government to make the right to strike explicit in section 2d of the Charter.

Unfortunately for PSAC, the Trudeau government was no longer in power and the neo-liberal Mulroney government was certainly not interested in constitutionally entrenching collective rights for organized labour. Not even the Congress representatives presenting the CLC position on Meech seemed to be able to agree on whether the Charter should be amended to protect the collective rights of workers. When asked why the CLC did not mention the recent “Labour Trilogy” decisions in its brief to the Special Committee dealing with the Accord, Dick Martin, an Executive Vice President of the

\[11\text{ibid, 6:51}\]
CLC, responded that the Congress "wanted to comment directly on what was in the Meech Lake Accord rather than be here proposing substantial amounts of amendments." Martin added that the CLC would "be most happy to be back if the committee and the government sees fit to start the process over and consider our concerns about the right of association." Martin's answer obviously did not sit well with the CLC's Director of Policy and Planning, Ron Lang, who felt the need to clarify the CLC's position on labour rights in the Charter by suggesting that:

There is a fundamental point on the question of enshrining labour rights in the Charter of Rights. The question is whether they should be enshrined in a Charter of Rights, thereby handing the power to interpret our rights to a court, or whether those rights should remain silent in the Charter. We will fight it out with the politicians provincially and federally on election day.

Lang was later supported by Executive Vice-President Nancy Riche, who confirmed the CLC's judicial phobia in a response to question from NDP MP Pauline Jewett. Riche stated that "as much as we are not crazy about a lot of the politicians who are in power across the country, we would still want to take our chances with the political leaders and the lobby effort and the pressure we could bring to bear on getting change as it affects the trade union movement, as opposed to leaving it to the courts."

Although the CLC leadership seemingly did not want constitutionally entrenched labour rights, many rank-and-file trade unionists were acutely aware of the importance of meaningful participation in constitutional affairs. In fact, several labour organizations

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12 Dick Martin in the Minutes of the Special Joint Committee on the 1987 Constitutional Accord (August 20, 1987) 10:12
13 ibid, 10:13
14 Ron Lang in the Minutes of the Special Joint Committee on the 1987 Constitutional Accord (August 20, 1987) 10:12
sent resolutions to be debated at the 1988 CLC Convention advocating a constitutionally entrenched Bill of Rights for labour. A resolution submitted by the St. Catharines and District Labour Council read as follows:

Whereas the Canadian Constitution has no provision for a Bill of Rights for labour; and
Whereas there is an increased use by the state, of the courts and police to break strikes and thereby weaken the labour movement; and
Whereas governments are increasingly introducing legislation which interferes with workers' rights to organize and bargain collectively; Therefore be it resolved that the Canadian Labour Congress initiate a coordinated programme to secure a Bill of Rights for labour enshrined in the Constitution; and
Be it further resolved that included in a Bill of Rights for labour is the guarantee of unfettered right to organize, to bargain collectively, to strike and to picket.¹⁶

The fact that this resolution did not even reach the convention floor did not deter other labour organizations from trying again in future years. In April 1990, PSAC's Daryl Bean brought up the issue of a Workers' Bill of Rights at a CLC Executive committee meeting. The following passage is contained in the official CLC minutes:

Workers' Bill of Rights
Brother Bean explained that the Legislative and Government Employees' Committee has some Resolutions dealing with Workers' Bill of Rights and wondered how the Executive Committee felt about any of these Resolutions reaching the floor. Several members of the committee felt that if possible, it should be avoided.¹⁷

Between 1987 and 1990, the scope and character of the debate on the Meech Lake Accord changed enormously, but the CLC's position remained constant. Pierre Trudeau emerged as a strong, outspoken opponent of Meech and solidified opposition to the

¹⁵ Nancy Riche in the Minutes of the Special Joint Committee on the 1987 Constitutional Accord (August 20, 1987) 10:17
Accord in English Canada. Frank McKenna’s New Brunswick Liberals, riding a wave of anti-Meech protest, swept every seat in the provincial legislature, and the NDP government in Manitoba was soundly defeated by Meech Lake skeptics. Subsequent First Ministers Conferences failed adequately to address the concerns of the newest Premiers, and a week before the CLC’s convention in May 1988, the House of Commons approved a motion to entrench property rights into the Constitution.

These controversial new developments prompted labour activists to draft a CLC convention resolution which essentially denounced the content of the Meech Lake Accord. The resolution, which was put forward by the CLC’s Legislative Committee, read as follows:

WHEREAS the Meech Lake Accord on the Constitution places additional powers in the hands of the provinces and therefore weakens the ability of the Federal government and undermines the universality of social programmes by allowing provinces to opt out of the universal federal programmes; and

WHEREAS the Congress has developed a sensible credible position on Meech Lake;

THEREFORE be it resolved that this 17th Convention of the Canadian Labour Congress demand appropriate amendments be made to enshrine the status in confederation of Quebec, the meaning and scope of aboriginal title, recognition of women’s rights and the opportunity for provincial status for the Territories, if they so choose.18

The Meech Lake resolution was never debated at the 1988 convention because it was immediately referred to the CLC Executive Council once it was introduced. At a September 1988 Council meeting, labour leaders defeated a motion to adopt the Meech

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17 CLC Executive Minutes, April 10, 1990, p. 4.
18 Position of the CLC on the Meech Lake Accord, September 5, 1989, p. 3.
Lake resolution. The following exchange took place after the motion was defeated: "In response to a question by Brother Wilson on what position the Congress now takes on Meech Lake, President Carr replied that the position is the same as in the submission made to the Parliamentary Committee."¹⁹

By 1990, the CLC’s 1987 submission on Meech Lake had become out-of-date and irrelevant. At an April 1990 CLC Executive meeting, which took place a couple of days after the Newfoundland legislature rescinded its approval of the Accord, "Brother Hunter pointed out that the issue of Meech Lake was never discussed on the floor of the CLC convention. He stated that his union is against Meech Lake, and went on to say that everyone is discussing Meech Lake except the Congress, which he thinks is wrong."²⁰

In response, "Brother Rose expressed the view that he would be willing to duck entirely again to avoid a confrontation with Quebec."²¹

Although CUPE’s Jeff Rose favoured keeping silent, many in the labour movement did not. Among those who felt strongly about Meech Lake was Shirley Carr, who was elected CLC President in 1985 after Dennis McDermott’s retirement. Carr, a CUPE member, was the first woman and the first public sector trade unionist to lead the CLC. Carr felt that the Congress could not afford to ignore the constitutional crisis which was dividing Canadian workers along regional and linguistic lines. The CLC President favoured the position that the Congress take a firm stand on Meech Lake. In response to Brother Hunter’s concerns, the CLC Executive voted to make a second presentation to

¹⁹ ibid, 4.
²⁰ CLC Executive Minutes, April 10, 1990, p. 3.
the Parliamentary Committee dealing with Meech Lake, but a month later, Carr reported that “the presentation never took place because the Congress could not find a position which incorporated the concerns of most union affiliates without offending others”. In retrospect, Carr acknowledges that the CLC’s structure made it difficult for the Congress to develop a clear position on the Meech Lake Accord.

To borrow a phrase from Richard Schultz, the CLC was “caught in the vices of federalism”. In his study of highway transport regulation, Schultz argued that Canada’s federal system had a negative impact on interest group cohesion, both internally and externally. As was previously stated, the CLC is a federally-structured organization made up of provincial federations of labour, community-based labour councils, and affiliated national and international unions. Canada’s historic regional cleavages and split jurisdiction over labour issues practically necessitates this type of organization. In his study of the CLC, David Kwavnick argued that the CLC was an ineffectual pressure group because of its structure. In terms of practical functions, Kwavnick noted that “it is obvious that almost every function now performed by the Congress could be performed by affiliates themselves.” Kwavnick went on to suggest that “the primary function of the CLC is to police its constitution which, in turn, is an agreement among union leaders to respect the integrity of each other’s organizations.” Kwavnick’s key argument that the Congress acts as a referee rather than as a leader is still true today. In fact, the CLC’s

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21 ibid, 3.
23 Interview, Shirley Carr (December 15, 1999)
institutional lack of leadership is what prevented the Congress from fully participating in the constitutional debate over the Meech Lake Accord.

The CLC’s non-involvement in the Quebec round frustrated some members of the CLC Executive Council. “For the record, Brother Hunter voiced his disappointment, and stated that it was a sad commentary on the Congress and on the Canadian labour movement that it had not faced this issue.”

The CLC’s May 1990 convention provided the Canadian labour movement with one last opportunity to take a stand on the Meech Lake Accord, but the debate over Meech was cancelled after FTQ President Louis Laberge privately threatened to pull the Quebec Federation out of the Congress. According to CLC minutes, “Brother Laberge reported that the [FTQ] caucus had met, and that as a result, he was strongly urging the Council not to bring the resolution on Meech Lake before the convention.”

The resolution, Laberge argued, “was considered to be in direct contradiction to the one adopted by the FTQ at their convention in Quebec, in violation of their good faith, and an insult to their common sense. He added that the delegation would not only be walking out, but would not be coming back.” Later that day, the CLC Executive Council decided to appease Laberge by arranging for the controversial resolution to be withdrawn. The minutes read as follows:

**Meech Lake Resolution**
Brother Laberge advised he had met with his Executive Committee and that they were quite agreeable to the presentation of a straightforward statement to the delegates asking for their support [to withdraw the resolution]. Following discussions, the Council agreed Brother Laberge would make a statement Thursday morning before the Report of the

26 ibid, 45.
29 ibid, 28.
Legislative and Government Employees Committee. This would allow some time for the Council to talk with their caucuses. It was also agreed that the resolution be referred immediately to the Executive Council and that Brother Holder move the referral. It was suggested that the referral be prepared in advance, and the convention start 10 minutes late to have time to reach delegates on the floor.\textsuperscript{30}

Laberge told delegates on the convention floor that the Accord “can only divide us at a time when we need so much to be united and fight together... This is not a political issue – this is a politician’s issue.”\textsuperscript{31} Laberge’s passionate plea for solidarity earned him a standing ovation from convention delegates, but the CLC’s failure to confront the issues surrounding the Meech Lake Accord was hardly cause for celebration. On June 22, 1990, Meech failed and the labour movement failed with it. The CLC was unwilling to introduce a class-based dimension to the Accord for fear of alienating the anti-Meech Quebec labour movement and the pro-Meech NDP. Instead, the Congress pretended that Meech Lake was some obscure and unimportant issue which was distracting the Canadian public. The FTQ President’s rhetoric blinded CLC delegates to the fact that Meech Lake was an extremely important political issue that merited a strong political response from the Canadian labour movement. Instead, the CLC’s refusal to participate in the debate over the Accord merely prolonged Canada’s constitutional crisis and showed the ineffectiveness of the Congress as a political pressure group.

THE CLC AND THE CHARLOTTETOWN ACCORD

The Belanger-Compeau Commission and the Allaire Report kept constitutional issues in the media spotlight in the early 1990s. On December 4, 1990, the CLC resisted

\textsuperscript{30} ibid, 30.
the role of helping rebuild Canadian federalism by deciding not to participate in the Citizen’s Forum on Canada’s Future. However individual affiliates did decide to participate and, once they began making contradictory statements about the vision of organized labour, the CLC was once again forced to enter into the constitutional debate. The following passage is contained in the CLC minutes:

The Question of Canadian Unity and the Question of Quebec
Sister Carr opened this discussion by saying this was a sensitive issue to all of us, but this should be a discussion on where we, the Labour Movement are going. The position of the Congress essentially has been to stay out of the debate. Now the Labour Movement must develop a firm position on the future of Canada.

The long discussion which followed produced a successful resolution which established a sub-committee to establish “points of discussion in cooperation with the NDP”. The FTQ’s Louis Laberge, who was obviously annoyed by the discussion, concluded the meeting by warning the CLC “to be very careful when getting into this.” There was not a single NDP Premier in Canada when Meech died, but the Charlottetown Accord offered organized labour a promising new reality – three NDP provincial governments representing over half the Canadian population in Ontario, British Columbia and Saskatchewan, and a Territorial government in the Yukon. The NDP’s new strength convinced the Congress that alienating the FTQ was a political risk worth taking.

31 Laberge quoted in Jennifer Lanthier, “Cautious CLC re-elects Carr and avoids Meech Lake debate” Financial Post (May 18, 1990) v. 3 (62) p. 4
32 CLC Executive Minutes, December 4, 1990.
33 CLC Executive Minutes, April 4, 1991, p. 2.
34 ibid, 4.
On February 4, 1992, the CLC presented its position on the Constitution to the Special Joint Committee on a Renewed Canada. The centerpiece of the CLC submission was its proposal to include a Social Charter in the Constitution. The Social Charter, which was originally proposed by the Ontario government, soon became the constitutional crusade of the CLC. The popular Social Charter would have constitutionalized a statement of political and social objectives designed to protect workers' rights, universal healthcare, access to education and housing, and other social programs. Unlike the Charter of Rights and Freedoms, the Social Charter would have promoted the notion of positive economic and social rights. The Social Charter clause, however, would have been non-justiciable because a number of Premiers were worried about the increased strength that would be given to the judiciary. Nevertheless, supporters of the Social Charter argued that the clause would still play an important role in Canadian political life because it would act as the social conscience of future provincial and federal governments.

In addition to the Social Charter, the CLC's submission to the Special Committee on a Renewed Canada included prescriptions for the country's traditional regional and linguistic woes. The Congress conceded the idea of an elected Senate, opposed the government's neo-liberal economic union proposal, defended the Notwithstanding Clause, and stated its opposition to entrenching property rights in the Charter. In terms of workers' rights, the CLC made the following statement:

We would like to see a statement that recognizes the presence and value of the trade union movement and of the working people of Canada, as well as a recognition of some basic labour principles regarding union organizing
and free collective bargaining. However, such statements must not replace the defining of concrete labour rights in a social charter.\textsuperscript{35}

In the spring of 1992, Carr resigned as CLC President. Her successor, Bob White, of the CAW, was elected in June 1992. White was well known for his key role in forming the CAW in 1984 and had been a high-profile opponent of the Free Trade Agreement during the 1988 Federal election.\textsuperscript{36} In an interview after his election, White identified the Constitution as one of the key issues facing the labour movement and expressed the view that “we have to debate on these issues from a perspective of a national labour central.”\textsuperscript{37} However, in the same interview, White touched on the CLC’s special relationship with the FTQ by stating that, “they do currently have a lot of autonomy. They really represent the CLC in educational matters in Quebec. On political matters they support the Parti Québécois, they support the Bloc Québécois, they don’t support the NDP in large numbers. On social issues they’ve taken their own positions.”\textsuperscript{38}

The relationship between the CLC and the FTQ was particularly strained in the period before the referendum on the Charlottetown Accord because the FTQ’s candidate for Executive Vice-President of the CLC was defeated at the Congress convention, leaving the FTQ without any top Executive positions within the CLC.\textsuperscript{39} This episode caused a major rift within the labour movement because the FTQ had traditionally been guaranteed one of these positions.

\textsuperscript{35} CLC Presentation to Special Joint Committee on a Renewed Canada, (February 4, 1992), 10.
\textsuperscript{36} Bob White Biography, www.clc-ctc.ca/about/white/html
\textsuperscript{37} Bob White as cited in George Manz “Bob White” Briarpatch Vol. 21 no. 8 (October 1992) p. 43.
\textsuperscript{38} ibid, 44.
\textsuperscript{39} Glen Makahonuk “The CLC” Briarpatch Vol. 21 no. 7 (September 1992) p. 16.
On August 30, 1992, the NDP federal council voted unanimously in favour of endorsing the Charlottetown Accord. The next day, the CLC’s Executive Council met with Lorne Nystrom, the NDP member who sat on the Beaudoin-Dobbie unity committee. According to CLC minutes:

Mr. Nystrom’s remarks were brief. He felt that because of the input by the NDP and the labour movement on the Constitution, significant gains had been made since last September and these gains would continue because of the four NDP Premiers. He felt from an NDP viewpoint that this agreement, although not perfect, was the best possible compromise that could be reached and, therefore, the decision of the NDP would be to endorse this accord.

Brother White thanked Mr. Nystrom and opened the floor for questions.

Several comments both pro and con were raised regarding this document. Some felt that more time should be given to examine the document more thoroughly, but most felt that now was the time to make a decision and to put this issue behind us.

Several concerns were raised regarding various issues such as equality on the Senate; training; section 26 regarding the 5-year maximum; immigration; section I A-3, linguistic communities in New Brunswick, etc.

M/S/C that the Canadian Labour Congress cautiously endorse the Constitutional Package put forward by Canada’s First Ministers.

The same day, the CLC publicly declared “cautious endorsement” of the Accord in a press release. Less than three weeks later, all three major Quebec labour federations, including the CLC-affiliated FTQ, officially came out against Charlottetown. The new FTQ President, Fernand Daoust, publicly indicated that the FTQ was in the process of reassessing its position within the CLC, and former President Louis Laberge appeared in a series of anti-Charlottetown television advertisements with other prominent

40 Graham Fraser “NDP federal council votes unanimous support for deal” The Globe & Mail, August 31, 1992. A1
41 CLC Executive Council Minutes, August 31, 1992, p. 3-4.
43 Glen Makahonuk “The CLC” Briarpatch Vol. 21 no. 7 (September 1992) p. 16.
Québécois leaders supporting the NO side.\(^4^4\) In a publication entitled “Pourquoi la FTQ dit NON a l’entente du 28 Aout 1992”, Daoust wrote, “Comme en 1980, la FTQ ne peut rester muette. En tant que centrale syndicale representative, nous avons la responsabilité de nous impliqué dans le debat, de prendre une position claire et surtout, de tout mettre en œuvre que ces offres soient rejetées.”\(^4^5\) The Quebec labour movement’s militant and resolute stance stood in stark contrast to the weak and indecisive position taken by the CLC.\(^4^6\)

On September 29, 1992, the Canadian Union of Postal Workers (CUPW) broke ranks with the CLC and declared that it would advise its 45,000 members to vote NO in the referendum on the Charlottetown Accord. CUPW objected to the Accord because the union felt that Charlottetown would limit the federal spending power and jeopardize equality rights for aboriginal women.\(^4^7\) The Congress was unquestionably divided over the Charlottetown Accord and its provisions. Especially problematic was the fact that the National Action Committee on the Status of Women (NAC), traditionally a strong ally of the CLC, endorsed a NO vote. In response to the flurry of labour defections, CLC President Bob White told The Globe & Mail “I would hope that most of the affiliates will stay the course. I didn’t make this decision on my own.”\(^4^8\)

\(^4^6\) Only the 6000-member Provincial Association of Protestant Teachers of Quebec endorsed the YES side. (The Globe & Mail, September 24, 1992)
\(^4^7\) Virginia Galt “Postal Workers against accord despite CLC’s YES position” The Globe & Mail, September 29, 1992. A4
\(^4^8\) Bob White quoted in the The Globe & Mail, September 29, 1992. A4
A sense of solidarity is what convinced Saskatchewan Federation of Labour President, Barb Byers, to publicly support the unpopular Accord in her home province. In the months leading up to the October 26 referendum vote on Charlottetown, Byers invited Bob Mitchell, Saskatchewan’s Minister of Intergovernmental Affairs, to address delegates at the SFL Convention. According to Byers, “To say that he was lambasted by the delegates would be an understatement.”\(^4\) The SFL did not take an official position on the Charlottetown Accord and Byers claims that she cannot remember how she voted at the CLC Executive Council Meeting which voted to “cautiously endorse” the Constitutional package. Byers does remember sharing the concerns of members of NAC about the equality provisions in the Accord, but ultimately, the SFL President felt bound by the CLC Council’s decision. Her only regret is that the Congress did not canvass its membership properly before taking a position on the Accord.\(^5\)

According to a press release, CLC President Bob White stated that “the CLC believes that the current constitutional debate has dragged on far too long and has diverted national energies from restoring a shattered economy and broadening our social safety net.”\(^5\) This statement infuriated the labour-friendly editor of Canadian Dimension magazine, who wrote,

However much the NDP and others try to sugarcoat the recent constitutional accord, we don’t buy it… On August 28, 1992, corporate Canada won a substantial victory… The inability and unwillingness of the NDP to unite the three provinces and one territory where it holds power in promoting an alternative, progressive vision for Canada shows, once again, the political bankruptcy of the social democratic movement in Canada. The NDP has run out of ideas and seems more suited to arrange

\(^4\) Barb Byers, interview, April 10, 2001.  
\(^5\) ibid.  
deck chairs on the Titanic than governing our provinces or leading our country. More disturbing is the endorsement of the accord by the Canadian Labour Congress. Bob White...misses the point. The constitutional debate is not diverting us from dealing with the economy – it is fundamentally a debate about whether democratically elected governments are to be allowed to manage the economy...Is it possible that organized labour does not yet see that the constitutional proposals are part of the corporate agenda?52

It is clear that the Congress was unenthusiastic about the deal. It is also clear that the CLC did, in fact, understand that the Charlottetown Accord contained elements of neo-liberal public policy. There is evidence to suggest that Bob White personally wanted no part of Canada's constitutional crisis. During the debate over patriation, White had supported the CLC's neutral position because he felt that patriation might divide the labour movement. White adopted a similar stance when the Congress was faced with the Meech Lake Accord. According to The Financial Post, White told reporters that debating the merits of the Meech Lake Accord "would have served no purpose" and "could have created rifts in the labour movement".53 The Charlottetown Accord was different for White because the political stakes were much higher.

The CLC's support for constitutional reform in 1992 was not driven by a desire to see the constitutional debate end or to see workers' rights enshrined in the Constitution. Rather, the CLC's "cautious endorsement" of the Charlottetown Accord was more a product of pressure from the provincial NDP administrations in Ontario, British Columbia and Saskatchewan. These governments would have been in a far better position to pursue their own parochial agendas under the provisions of the Charlottetown

52 Editorial "We're Voting NO" Canadian Dimension Vol. 26 no. 7 (October 1992), p. 3.
Accord. Although the CLC has traditionally supported national standards and a strong central government, it was willing to help its provincial NDP allies promote their agendas of regional self-interest because it understood that, under Canada’s federal system, responsibility for labour issues was mostly a provincial concern. The CLC also understood that failed constitutional negotiations would hurt its provincial NDP allies and the Congress was determined to see the party re-elected in as many provinces as possible. This viewpoint is supported by comments made by labour leaders at a CLC Executive Council meeting in Regina. The CLC’s task at that meeting was to decide if and how to participate in the upcoming referendum on the constitutional package. President White, a staunch New Democrat, opened the discussion with a brief overview:

With the new Constitution we should remember where we are, what we have gained, i.e., equal senate, social clause, sharing of powers, recommendation of distinct society, aboriginal rights, free collective bargaining, right of workers to join a union, etc. He continued by stating we had a role to play in forming this package, now we have to decide what role to play in the referendum.54

Executive Vice-President Nancy Riche, who also served as President of the Federal NDP, suggested that the CLC officially join the Canada Committee, which was also dubbed the YES Committee. However, “discussion followed where it was felt that the Congress should not participate in the Canada Committee.”55 Labour leaders felt that associating themselves with a national campaign “would complicate the problems, confuse the membership and put the Congress in conflict with various organizations.”56 However, “it was agreed that support must be given to the provinces, especially those

53 Jennifer Lanthier, “Cautious CLC re-elects Carr and avoids Meech Lake debate” Financial Post (May 18, 1990) p. 4
55 ibid, 4.
with NDP governments. The national and provincial/territorial campaigns are different."\(^{57}\) Bob White and Nancy Riche were among the strongest NDP supporters at the CLC. Their influence within the party and within the Congress was sufficient to convince the Canadian labour movement that supporting the Charlottetown Accord was a political risk worth taking.

In a bid to bolster the support of the country’s two largest NDP governments, Ontario Federation of Labour (OFL) President Gord Wilson and BCFL President Ken Georgetti joined the official YES Committees in their respective provinces. Earlier in the summer of 1992, Wilson complained that Ontario Premier Bob Rae was “distracted” by aboriginal issues and that he had overlooked important constitutional provisions which affected workers, especially in the areas of training and unemployment insurance.\(^{58}\) However, the Ontario NDP government’s pending anti-scab legislation was enough of a trade-off for Wilson. He would serve as one of five vice-chairpersons of the YES! Ontario Committee.

Bob White hit the campaign trail late in the referendum campaign as it became clear that the Accord was losing popular support. White’s focus was on the Social Charter. “Originally, the Tories and their corporate friends tried to entrench an unfettered, free trade and competitiveness into our Constitution. Instead, labour and social partners made sure that didn’t happen and they were successful in replacing it with

\(^{56}\) ibid, 4.
\(^{57}\) ibid, 4.
\(^{58}\) Ross Howard “Did Bob Rae sell out the Workers?” The Globe & Mail, September 12, 1992, D2.
a social charter.\textsuperscript{59} White also appeared in the television ads for the YES side in an attempt to convince union members that the Accord was worth supporting.\textsuperscript{60} Despite White’s rhetoric, and despite the fact that former B.C. Premier Bill Vander Zalm called the Accord “socialist doctrine,”\textsuperscript{61} it has been widely acknowledged that the non-justiciable social charter in the Charlottetown Accord was symbolic rather than substantive. The right to organize and bargain collectively were included in the Accord, but there was no mechanism in place to force governments to comply with Social Charter commitments. To be fair, it must once again be emphasized that White’s attempt to rally labour votes was mostly the product of pressure from the NDP, which had sacrificed much of its core social democratic philosophy during the constitutional talks. Canadian feminists and the country’s left-wing political intelligensia, which both operate at the electoral periphery, did not have the same pressure to support the Accord because they had no direct affiliation or stake in the NDP as a political organization vying for power.

The Canadian labour movement’s endorsement of the YES position was “strategically critical” according to political scientist Richard Johnston because the union movement was traditionally viewed as a clear opponent of the Mulroney government. If labour were able to accept the government’s economic union proposals and the Accord’s decentralizing features, it would indicate that “the compromise was honourable, as the crisis was grave.”\textsuperscript{62} However, the CLC’s intervention had the opposite impact. Although the YES side had built an impressive left-right coalition, which included support from

\textsuperscript{60} Barry Wilson, “Mixed Views on Social Charter” \textit{Western Producer}, Vol. 70 issue 12, October 22, 1992, p. 16.
\textsuperscript{61} \textit{The Globe & Mail}, October 3, 1992. A4
both business and labour, “the union movement was utterly ineffectual in overcoming its allies’ natural aversion to the Accord. Indeed, there is a hint that awareness of the union movement’s position increased resistance to it.”^63

Leading up the 1992 referendum on the Charlottetown Accord, Jane Jenson accused the Conservative government of treating “the crucial decisions of constitution-making as nothing more than another moment which requires brokering among interests.” Jenson went on to portray the government’s proposals as “an effort to buy off as many interests as possible”.^64 Mulroney’s brokering tactics did not prove successful, but they did provide organized labour with an opportunity to win substantial gains in terms of workers’ rights. However, rather than negotiate from a class-based perspective, the CLC allowed the NDP to take control of the “progressive” agenda. The Charlottetown Accord offered a new reality for social democrats in Canada – three provincial NDP governments representing over half the country’s population and a strong contingent of federal MPs in Ottawa. For the first time in history, the New Democrats found themselves in a powerful bargaining position. The NDP governments of Ontario, British Columbia, and Saskatchewan had ample opportunity to structure the constitutional debate around class-based issues. However, the class interests which united the NDP Premiers were apparently not as strong as the parochial electoral considerations of each provincial section. B.C. Premier Mike Harcourt, for example, rejected the Ontario government’s proposal for a justiciable Social Charter which would have bestowed positive rights upon

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^62 Johnston, 64.
^63 ibid, 139.
^64 Personal note from Jane Jenson to Duncan Cameron, General Comments on Shaping Canada’s Future Together: Proposals (September 30, 1991), 4.
citizens in order to protect social programs, labour rights, and the environment.  

Instead, Harcourt, who felt that the courts would use their powers to undermine social democratic policies, advocated more legislative powers at the provincial level.

Federal NDP leader Audrey McLaughlin, a strong centralist, was suspicious about the B.C. Premier’s proposal for the devolution of powers. The Saskatchewan government’s support for an elected Senate also made McLaughlin uneasy – the NDP had long advocated abolition of the second chamber. The process of executive federalism had forced the federal NDP leader, potentially the next Prime Minister of Canada, to sit on the sidelines while her provincial counterparts shaped the NDP message on constitutional issues.

Driven by considerations of regional self-interest and desire for increased provincial powers, NDP administrations in Ontario, B.C., and Saskatchewan took the lead and dragged their allies in the Canadian labour movement into an unholy alliance with the Mulroney Conservatives and the business community. The political pressure was simply too much to bear for the internally weak CLC. Charlottetown was defeated on October 26, 1992. The next day, the CLC issued a short press release. “The Canadian Labour Congress urges all Canadians, especially the politicians and the analysts, not to

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67 ibid, 46.
spend valuable time and energy dissecting every aspect of the process which brought us to this point in history. There is no time for 'what if’s’ or for laying blame…”

Theoretical imperatives and empirical findings may not be the primary concern of the CLC, but social scientists cannot afford to ignore the connection between Canadian unions and constitutional reform. Research concerning organized labour and the Constitution has almost exclusively revolved around the Charter of Rights, the Supreme Court, and the labour movement’s poor performance in the judicial arena. However, the CLC’s experience with constitutional issues has been far more broad. Organized labour’s experience with constitutional reform suggests that the CLC has been far less concerned with securing constitutionally protected rights for workers than with keeping peace within the Canadian labour movement. In fact, there is evidence to suggest that the structure and organization of the Congress prevents effective pressure group activity. Labour’s involvement, or lack of involvement, during Meech Lake and Charlottetown demonstrated that the CLC’s structure and internal political struggles prevented the Congress from putting forward strong class-based constitutional positions. These obstacles will only complicate the problems facing organized labour in an era of neo-liberal globalization. This problem is the focus of Chapter 6.

CHAPTER VI

LABOUR RIGHTS IN A MODERN GLOBALIZED ECONOMY

My union represents workers in the provincial public sector who are really under attack. Last year, the Conservative government brought in Bill 70, an ad hoc compulsory wage freeze. On paper we have the right to strike but every time we use it the government legislates us back to work. This is the sort of thing that the Congress should be looking at. Leading a political battle for collective bargaining rights for public workers.

One of the conclusions drawn by Thomas A. McIntosh in his study of the Charter and organized labour is that “while there may be a strong defensive position for trade unions found within the Charter, the problems that face trade unions in the future are not to be solved in the realm of judicial review and rights’ claims.” Many trade union leaders have expressed similar sentiments. After the Supreme Court ruled on the “Labour Trilogy” cases, Ontario Federation of Labour President Gord Wilson dismissed the decision by stating that “The courts have seldom been the worker’s friend.” At the 1987 “Charter of Wrongs” conference organized by the labour movement and law professors at the University of Western Ontario, Jean-Claude Parrot, President of the Canadian Union of Postal Workers, asked how labour should deal with the Charter: “Should we try to repeal it? Should we try to get around it? Should we try to change the judges that interpret it?”

Parrot curiously left out one other option which is presented in this paper:

1 Joanne Maciag, member of the Manitoba Government Employees Association, quoted in Canadian Dimension Vol. 26. No. 6, p. 31.
2 Thomas A. McIntosh, Labouring Under the Charter: Trade Unions and the Recovery of the Canadian Labour Regime (Kingston: Industrial Relations Centre, Queen’s University, 1989), 58.
The labour movement should try to amend the Charter in order to ensure that it more effectively protects the rights of workers.

In *Putting the Charter to Work*, David Beatty argued that organized labour could have benefitted from judicial review by developing a comprehensive Charter strategy. Essentially, Beatty contends that the judicial arena is far more effective than the political arena when it comes to empowering subordinate groups like the labour movement. He concluded his work by arguing that organized labour’s main task was to convince the Supreme Court of Canada to entrench labour rights in the Charter in order to protect the labour movement from political attacks.\(^5\) Beatty’s support for developing a constitutional labour code has drawn much criticism from left-wing legal scholars.

Joel Bakan, for example, points to the handful of anti-union Supreme Court decisions to demonstrate that the liberal notion of freedom of association found in the Charter has done little to advance the cause of organized labour. Bakan argues that, even if the Supreme Court had granted unions the right to strike or bargain collectively, these rights would be rendered meaningless in a globalized capitalist economy. Like McIntosh, Bakan concludes by proposing that organized labour’s battles must take place in the political arena in order to ensure that government policies shield the labour movement from the uncertainty of global capitalism.\(^6\)

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\(^6\) Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997), 77-86.
If, as Beatty suggests, the courts have greater potential than politicians to promote and protect the rights of the underprivileged, than why do allies of the labour movement like Bakan and McIntosh insist that Canadian unions must concentrate on politics rather than the courts? Their preoccupation with political action as the sole route towards workers’ emancipation must be challenged on a practical level. Political action, on its own, cannot ensure that the interests of organized labour are protected and promoted. The Ontario labour movement certainly learned this lesson from Bob Rae’s NDP government. A constitutionally entrenched labour code which protected the right to strike and bargain collectively could have potentially stopped the NDP government from implementing its infamous “Social Contract” which arbitrarily re-opened collective agreements and rolled back the wages of Ontario’s public sector. What happens when labour’s “own” government turns it back on unions? The labour movement certainly could not turn to the Liberals or Conservatives for help.

Admittedly, electoral politics is only one component of our political system, but it is unquestionably the most pervasive and important component for organized labour in Canada. Canadian working class culture is historically not suited for more direct ways of applying pressure to the political system. Bloody confrontations between labour and capital are certainly not unheard of, but the mass syndicalist actions which would be required to challenge the state are alien to Canada’s modern trade union movement. The fact that the Ontario labour movement was split over whether or not to condemn the NDP government for its anti-union legislation demonstrates the lack of solidarity and cooperation which exists within organized labour in Canada.
Relying solely on either political parties or the courts to guarantee workers’ rights is tactically flawed. A balanced approach, which focuses on immediate concerns while taking into consideration the long-term objectives of the Canadian labour movement, is necessary for the working class to prosper. A key component of this vision must take into account constitutional issues and rights discourse. The language of rights is so widespread and so influential that, if the labour movement disregards it, Canadian unions might find themselves without a way to further their common cause.

Much of Bakan’s argument relies on the assumption that globalization will lead to the “dissociation” of workers through new forms of work organization, and consequently, result in a decline in the rate of unionization. Although Bakan’s assumption seems reasonable, the latest workforce survey statistics tell a different story. Union density levels have remained surprisingly steady over the course of the last few decades. Despite anti-worker labour law reforms in several provincial jurisdictions and despite the fact that globalization has created increased pressure on capitalists to downsize, the Canadian trade union movement has been able to maintain a reasonably high union density rate. This may suggest that globalization and economic restructuring are not the primary causes of union density decline. If this is the case, organized labour has a duty to fight for the entrenchment of labour rights in the Charter. Roughly 80% of public servants

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7 ibid, 83.
belong to trade unions. The labour movement simply cannot afford to ignore such a large constituency of workers.

Bakan has further argued that, even if the Charter were to protect labour rights, these rights would be practically ineffective in a highly globalized capitalist system. Bakan has a point: labour relations have unquestionably entered a period of what political scientists Leo Panitch and Donald Swartz call *permanent exceptionalism*. The term refers to government’s treatment of Canadian unions after stagflation and monetarist economic policies killed the post-war compromise. This new coercive climate has fundamentally changed the relationship between labour and capital. Capitalism no longer relies on the checks and balances of a strong labour movement for self-preservation. Instead, the labour movement is expected to help ensure that capitalism is maintained, and even strengthened, through concessions and cutbacks.

Despite the existence of a period of permanent exceptionalism, Panitch and Swartz acknowledge the merits of fighting for constitutionally entrenched labour rights. In an open letter to prominent Canadian labour leaders dated December 17, 1991, Panitch, Swartz and Rosemary Waraskett called on organized labour to “make its voice heard” in the constitutional debate leading up to the Charlottetown Accord. The authors argued that “any constitutional alternative advanced by the labour movement must propose the Section 2(d) of the Charter be amended to specify that freedom of association

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encompasses the right to bargain collectively and to strike.”\textsuperscript{11} While fully recognizing
the arguments of legal scholars such as Bakan and Mandel, Panitch et al. warn that
organized labour cannot afford to ignore constitutional issues. “The labour movement
has nothing to gain by silencing itself – and the whole country has much to lose if so
significant and progressive a social force does not play a role in this crisis.”\textsuperscript{12}

When assessing the usefulness of a Charter of Rights, one must not forget the fact
that a majority of organized workers in Canada belong to public sector unions and that a
pro-labour Charter would become of paramount importance when dealing with
government labour disputes or privatization. Quite simply, having labour rights
entrenched in the Charter would put public sector unions in a far better bargaining
position with government. Admittedly, the existence of a Section 1 “reasonable limits”
clause could still allow the courts to uphold government legislation which contravened an
enhanced Section 2(d) freedom of association clause, but in that instance the courts
would, at the very least, be forced to apply the rule of proportionality and demonstrate
that the infringement of labour rights is “demonstrably justified in a free and democratic
society.”

This increased pressure on the judiciary to justify its actions could have the effect
of leveling the playing field between unions and employers in Canadian courts. Much of
this argument is based on speculation; however, the experience of trade unions around the
world does provide us with some useful examples of what can be constitutionally

\textsuperscript{11} Leo Panitch, Donald Swartz, and Rosemary Warskett “ Labour and the Constitution: An open letter to
Canadian labour leaders” (December 17, 1991), 4.
attained. The constitutions of Italy, Sweden, Brazil and Portugal for example, explicitly protect the right to strike.\textsuperscript{13} In Germany and Spain the right to organize unions is specifically protected.\textsuperscript{14} The fact that labour rights were entrenched into these constitutions suggests that inclusion of these rights into the Canadian Charter of Rights and Freedoms was, and still is, an attainable goal. Whether or not these rights have advantaged labour in other societies is another question altogether and is beyond the scope of this thesis. However, the entrenchment of labour rights in many constitutions around the world signifies formal recognition of the legitimacy of unions as an integral part of society.

The addition of labour rights to the Charter is important because of their symbolic value. Entrenching labour rights into the Charter certainly could not hurt the trade union movement. Marxist critics of the Charter would undoubtedly disagree with this statement. Instead, they would argue that the Charter is simply a tool of class oppression which can never guarantee social rights or mitigate systematic discrimination. Revolutionary socialists would further suggest that support for a progressive legal framework within a capitalist system breeds false consciousness. These anti-legalism arguments are theoretically sound, but practically flawed. Support for the concept of the Charter does not necessarily imply support for the present interpretation or impact of the Charter. However, in order for a socialist theory of rights to gain credibility, it is important to demonstrate a commitment to civil liberties and the independent legal institutions which protect them.

\textsuperscript{12} ibid, 5.
\textsuperscript{13} Constitutions Around the World, www.uni-wuerzburg.de/law
This is not to suggest that the status quo in the Canadian legal system is acceptable. On the contrary, Canadian unions and other progressive organizations have an obligation to participate in what Mandel disapprovingly calls the “legalization of politics”. The participation of these groups is required in order to fundamentally transform the way in which law and politics operate. The Left will never be able adequately to protect the rights of organized labour in Canada until it is prepared to admit that the language of rights has eclipsed class-based politics for the foreseeable future.

The labour movement must recognize that the Charter can be used as an instrument of social reform. Inevitably, the political struggle will gain momentum and importance as the neo-liberal assault becomes unbearable, but that should not preclude organized labour from using the language of rights when the political process has failed to address the needs of Canadian workers. Again, this is not to suggest that legal strategies and tactics can substitute for collective political activity. Rather, the implication is that politics and law have been fused, in many respects, as a result of the Charter. By refusing to participate in constitutional politics, the Canadian labour movement has legitimized the court’s traditional practice of viewing workers in classless and ahistorical terms. As a result, the labour movement has, by its inaction, helped to reinforce the economic inequality and rigid division of labour inherent in capitalist society.

The inclusion of detailed labour rights in the Charter would also help organized labour in the long-term battle against capital by providing confidence to workers and allowing working class struggle to start at a higher level after a period of class peace.

\[14\] ibid.
The fact that the right to strike was never part of the Charter makes it less likely for unions to mobilize against anti-union decisions made by courts and politicians. Invoking obstacles such as Section 1 or the Notwithstanding clause, when the right to strike is expressly protected by the Charter, could potentially increase working class militancy to the point at which governments would be forced to back down from regressive anti-union tactics.

Lastly, left-wing anti-legalism arguments, like Mandel’s, which are directed towards the Charter and the legal system in general, are not rooted in political or economic reality. The language of rights is a useful tool for progressive organizations in their quest for the protection and enhancement of collective rights. In order for the Left to advance, it must abandon theoretical objections to the law and legal systems and embrace practical opportunities to strengthen progressive positions.\(^{15}\)

The argument presented in this chapter challenged several perspectives on the usefulness of rights-based claims by organized labour in a globalized capitalist economy. Although capitalist globalization unquestionably poses a threat to the strength and vitality of the working class, Canadian unions are not without the tools to confront the challenges of global neo-liberalism. Globalization is a state-sanctioned phenomenon and the trade union movement has the capacity to change the direction of the state through various means. Electoral politics and, more recently moderate direct action, have been the preferred options for the Canadian labour movement. These tactics are useful and important, but the present political climate has presented labour with an excellent
this page contains printed text.
opportunity to complement these activities by promoting its agenda through an explicitly pro-labour rights discourse.

\[\text{Campbell, 43-44.}\]
"Labour unions have often been a significant force – in fact, the main social force – for democratization and progress."¹

The objective of this thesis has been to determine why organized labour failed, as a pressure group, to confront the issue of constitutional reform in the 1980s and 1990s. The labour movement’s experience with two decades of constitutional reform suggests that the CLC’s confederal structure and its political relationship with the NDP prevents the Congress from adopting strong positions on constitutional issues.

The failure of the CLC to adequately address these complex and divisive constitutional issues contributed to the exclusion of labour rights from the Charter. The Supreme Court’s interpretation of the Charter of Rights and Freedoms has permanently altered the Canadian labour regime. By legitimizing state-sanctioned attacks against organized labour, the Supreme Court’s various labour relations rulings have put Canadian unions increasingly on the defensive. When trade unionists “work-to-rule”, they are exerting pressure on an employer by refusing to perform duties which, though related, are not expressly defined in their job descriptions. Supreme Court Justices, through their interpretation of the Charter, have essentially adopted a work-to-rule mentality in their labour relations decisions by providing workers with an ungenerous and unproductive definition of freedom of association. Although the Supreme Court accepted that the

Charter protected the right to organize a union, it would not extend Charter protection to the related union activities of collective bargaining and strike action.

Many left-wing Charter critics have criticized the Supreme Court for its minimalist labour relations rulings. In *Dolphin Delivery* (1986), the Court dismissed the union’s claim that secondary picketing was protected under freedom of expression. In the labour trilogy decisions (*Alberta Reference* [1987], *Public Service Alliance of Canada* [1987], and *Saskatchewan Dairy Workers* [1987]), the Supreme Court ruled that the Charter’s “freedom of association” did not grant unions the right to strike. In *Professional Institute* (1990), the Court similarly ruled that collective bargaining was not protected under section 2(d) of the Charter.

The only labour relations cases which did not negatively affect organized labour were *Lavigne* (1991) and *K-Mart* (1999). In Lavigne, the Supreme Court disappointed the right-wing National Citizen’s Coalition by upholding the constitutionality of the Rand Formula, and in *K-Mart* the Court ruled that the union’s right to hand out literature was protected under Section 2(b) of the Charter. However, neither case can really be considered a victory for unions. The decisions did nothing to advance the interests of organized labour, they simply upheld the status quo. Law professors Harry Glasbeek and Judy Fudge have explained (with tongues firmly in their cheeks) that “when unions are allowed to keep a right they have won through bloody struggles over the last century, it is
greeted as a Charter victory, as an indication that, after all, the courts are not that antediluvian."^2

The Supreme Court of Canada’s ungenerous interpretation of the Charter may have adversely affected organized labour, but left-wing critics of the Court ought to take a more critical look at the actions (or lack of action) taken by the Canadian labour movement. Canadian unions consciously did nothing to influence the content of the Charter of Rights and Freedoms. Rather than develop a cohesive Charter strategy in conjunction with the federal NDP and the country’s most prominent unions, the CLC timidly decided to pacify the péquiste FTQ by excluding itself completely from the process of developing the Charter in the early 1980s.

In retrospect, few trade union leaders would dispute that the labour movement has paid a big price for appeasing the FTQ and steering clear of the NDP’s internal debate on the Charter. A focused Charter strategy which called on the government to entrench in the Constitution the right to organize, bargain collectively, picket and strike would have had the effect of bringing issues of organized workers to the forefront. At best, these rights would have been entrenched in the Charter. At worst, labour rights would have been excluded and the CLC would have had to engage in a process of reconciliation with its allies. However, even if a well-financed lobbying effort on behalf of Canadian unions had failed, organized labour’s mere presence would have forced politicians to broaden the scope of Charter debate and consider issues of class.

As was stated at the outset of this chapter, one of the obstacles which has prevented the CLC from fully participating in constitutional debates is its confederal structure. After initially taking a position against the secretive process behind the development of the Meech Lake Accord, the CLC remained quiet for the next three years while its affiliates adopted contradictory positions on the Accord. The NDP endorsed the constitutional package from the very beginning, but could not convince its allies in the CLC to do the same. Instead, the Congress eventually decided to appease its Quebec affiliate once again by refusing to take a stand on the final constitutional offer.

Although the CLC did take a firm position in support of the Charlottetown Accord, it is clear that this decision was not guided by a genuine interest in constitutionally protected labour rights. The Congress officially told the media that support for the Accord was driven by a desire to end Canada’s constitutional crisis. However, unofficially, there is evidence to suggest that the political climate forced the CLC to stand with the country’s four NDP governments in support of the Accord. Such a stand unquestionably offended the nationalist aspirations of the Quebec labour movement, but in the early 1990s, the benefits of supporting the NDP seemed to outweigh the risk involved in alienating the FTQ.

Canada’s federal system has had a major impact on the relationship between the CLC, the FTQ, and the NDP. Hypothetically, the prospect of constitutional reform should not pose a serious problem for social democrats who have adopted class-based
policies defined on a left-right axis. However, the CLC, the NDP, and the FTQ have certainly had their share of disputes over important constitutional issues. Canadian federalism serves to reinforce the traditional cleavages of language and region at the national level, while overshadowing class divisions. Social democrats in Canada have been unwilling or unable to reverse this long standing reality.

Constitutional reform has not been a very popular proposition in Canada. The failure of Meech Lake in 1990 and the widespread rejection of the Charlottetown Accord in 1992 have left politicians without the political will to reopen the issue. Yet, the volatile arena of constitutional reform offers the labour movement the best opportunity to have its voice heard. In an era of globalized capitalism and neo-liberal dominance, the trade union movement is in retreat. On its own, constitutional reform will not save organized labour from a hostile free enterprise system or an unfriendly judiciary, but in an era of rights discourse, a pro-labour constitutional commitment would unquestionably serve as an indispensable tool in the Canadian labour movement’s pursuit of economic equality and social justice.
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LIST OF INTERVIEWS

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