# SPECIFIC LAWS, UNLIMITED DISRETION

For presentation “at” Parma, Italy, September 24th,2021, to the Symposium on:

“The ‘leggi provvedimeto’ (private, special, and local laws) and labour law”

**ROUGH DRAFT**

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## 1. Introduction – A Canadian in Italy

The invitation to join you today was a most welcome one – I enjoy spending time with my Italian friends and colleagues and am always delighted, like most people, to be invited to "Italy". Thank you Giampiero for this invitation.

I do not speak Italian (except in my dreams). And I know very little, next to nothing really, about the details of Italian labour or constitutional law. But I have been able, to some extent at least, make my way in the world of Italian labour law because my interests in labour law – whether constitutional labour law, or international labour law, or just plain labour law - are very basic. Some might say "theoretical" - but I prefer "basic". The questions I am interested in are questions such as "what is labour law for?", "what is international labour law for?", "why is labour law a legal subject?", "how is labour law a legal subject?", "what is the moral justification for labour law?", "do we need a new account of labour law?" (The answer to that last question is "yes".) And so on. These are questions which labour lawyers everywhere face. I like the word "basic" because it makes a point which using the word "theoretical" misses. This is that the answers to theses basic questions are not of "mere" theoretical interest – they decide concrete cases.

But that is how I have been able to get along in Italy – by sticking to basic questions. Today is different. This invitation is different. Today I have been invited to intervene in a truly domestic, very Italian, set of controversies.

One of my favourite opening lines to any novel is "The past is a foreign country – they do things differently there".[1] Well, Italy is a foreign country to a Canadian. You do things differently here. This much I have learned from reading the wonderful papers sent to me by Giampiero and Professor Gragnoli. But, of course, much of the value of foreign travel resides in the opportunity it provides to return home and see how "different" you, yourself, are – and how your domestic certainties now seem slightly less stable or at least inevitable. In fact I am in greatly indebted to Giampiero and the organizers of this conference for forcing me to visit an issue I have no studied seriously – because – this diversion ahs helped me see and important link to other matters which I have tried to think and write about before – that is, see those issues in a new and fuller light which provides an additional argument in favour of a way of thinking I have been promoting for some time.

I know that these remarks are cryptic at this stage. In what follows I try to make them clear and transparent.

I try to do so by outlining my thinking about the Italian debate about "leggi provvedimento". I do so by reflecting upon, and telling you about, some Canadian cases and how Canadian law has

[1] LP Hartley, The Go-Between.

sought to control legal abuses which such laws sometimes cause. You will see that I also revert to my standard way of proceeding. That is, I look for the **basic** issues which are really and importantly in play – idea such as legality, equality, and the rule of law. This is precisely where Professors Proia and Gragnoli also believe the true action is, and where they also end up. But they also have a lot to say about real cases and controversies - about flag carrying airlines and steel plants. I will talk about some somewhat similar Canadian cases – about ship builders, officers of the RCMP – the Royal Canadian Mounted Police, and tire makers.

Here are a few travel tips in advance of this little trip to Canada. First, Canada is a federation of 10 provinces and 3 territories. Labour law is, constitutionally, a matter of provincial legislative jurisdiction not a federal one. (There is a federal sector – for example airlines, telecommunications, banking, etc. which covers about 9% of Canadian workers). Second, we do (since 1982) have an entrenched "Charter of rights and freedoms" which applies to all laws whether provincial or federal. Third, and this is a factual claim – almost all of the cases I will discuss – and almost all, if not all, of the cases we have in Canada are about negative, not positive, singling out of a specific group or person. They are all about laws which single out or affect a person or a group with the effect of denying them a right or freedom available to others.

This is, of course, a matter which deserves further study. We do have a (long and checkered) history of government subsidies to specific firms and industries in order to attract or retain investment. Or to protect whole communities. But these are rarely if at all done via labour law. (One of the cases I will discuss - The Michelin case - is an important exception to this normal way of doing business.) Of course, in recent years, international treaties, and a general pro market/anti state trend in political thinking reduced any interest in governments "picking winners". But "bailouts" are still common. For example, during the financial crisis and the pandemic there were very large "bailouts" of the automobile manufacturing and then airline industries (among others). But that was done on a sectoral, if firm by firm negotiation, basis. Firm specific bailouts are somewhat less common – and never, it seems on a quick look around, the subject of litigation but, rather, fought about in the realm of political activity or controversy.

## 2. Basic Truths about the "rule of law" under the common law – as best understood in Canada

In his 2001 book *Constitutional Justice*[2] TRS Allen offered an account of the "rule of law" in which he, rightly in my view, claims that it is a "principle of constitutionalism". It is not simply a

[2] Constitutional Justice. T. R. S. Allan. Oxford University Press 2001.

procedural ideal. Rather, it carries with it a substantive commitment to the ideal of equality. In his words:

> It is a central argument of the book that the procedural ideal of 'natural justice' or due process, if it is to provide real protection against arbitrary power, must be accompanied by the equally fundamental ideal of equality…. The latter ideal imposes substantive constraints on governmental power, ensuring that all citizens are treated alike in certain crucial respects.[3]

A half century earlier the Americans Tussman and tenBroeck also put this point succinctly in their discussion of the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States:

> But early in its career, the equal protection clause received a formulation which strongly suggested that it was to be more than a demand for fair or equal enforcement of laws; it was to express the demand that the law itself be "equal." In Yick Wo v. Hopkins, Mr. Justice Matthews said that "The equal protection of the laws is a pledge of the protection of equal laws." … It is a statement that makes it abundantly clear that the quality of legislation as well as the quality of administration comes within the purview of the clause.[4]

The full implications of this view are still being worked on by public lawyers in the common law world. This is, importantly, a matter of working out the idea of "law itself" – our best understanding of its conceptual structure – its internal rationality. This discussion is part of a long and still important conversation between adherents of the school of "legal positivism" on the one side and others who regard law as having an "inner morality", to use Lon Fuller's way of putting it,[5] on the other. In this project scholars such as TS Allan and David Dyzenhaus are in the intellectual vanguard. Their great insight that the rule of law is a "principle of constitutionalism" conveys that it is part of the fundamental arrangement between the governed and their government. (This is a point which many common law theorists, and public lawyers, miss because they are in the grips of an emaciated view of law driven by a commitment to the tenets of legal positivism.) Working out the implications of this basic insight is still an ongoing struggle in Canada and elsewhere in the common law world. This struggle is a difficult one because it is tied to the seemingly never-ending controversy over, it is said, the relationship of the democratic and judicial processes – between the decisions of the democratically elected governors and unelected judges. But the words "it is said" are important here. This attempted high-jacking of debates

[3] Ibid. Introduction, pp.1-2.
[4] Tussman and tenBroeck, "The Equal Protection of the Laws" (1949), 37 California Law Review 341 at 342.
[5] Lon Fuller, The Morality of Law,

about basic constitutional principle has distracted many from the rule of law's status as a basic constitutional principle. The rule of law is not antithetical to the working of our constitutional democracy but essential to an understanding of it.

One of the rule law's core tenets is that people are to be governed by "general laws" applicable to all. This broad idea underwrites in an important way the protection of citizens from arbitrary power. Generality is, conceptually, an important (if not the only) front in the war against arbitrary power. Another core tenet follows in the name of avoiding arbitrary power – the separation of governmental powers - that those general rules of the legislature as interpreted by the executive, can be reviewed, interpreted, and applied by an independent judiciary. This idea of "judicial review" of administrative actions, is this another vital aspect of constitutional law in the common law world, including Canada. It is often referred to as part of the "unwritten constitution". The rule of law is best understood as a set of "closely interrelated principles that together make up the core if the doctrine, or theory, of constitutionalism"[6].

But then it will be noted that there can be "general laws" which do not apply to all – but only to certain subsections of the population. The law must and will make distinctions, draw lines, classify, differentially allocate benefits and burdens, and so on. Here is where the idea of equality plays its important hand. The idea of equality does not demand that we treat everyone the same. Rather, it demands that we have a good reason - that is, a rational, defensible purpose - for treating people differently. In Dworkinian terms, equality demands not that we treat people equally, but that we treat them as equals.[7]

This idea of equality is a much broader and more important idea than another important and related idea, non-discrimination. Non-discrimination is about prohibited reasons for action (for example, race as a reason for not hiring). Non-discrimination does not demand a good reason – just the absence of a very short list of bad and prohibited reasons (out of the universe of possible irrational reasons for not hiring). Non-discrimination is what our Human Rights Codes are about. Equality is a larger constitutional principle which carries a lot of weight in societies committed to the rule of law – and not rule by arbitrary power. It is the demand of a good reason for treating citizens differently.

Here is an important point. The idea of equality lets us understand the idea of a "general law" – how to know when we have one and when we don't. A general law is one which is based upon and articulates a valid (and not merely prohibited, non-discriminatory under the human rights code) reason – or as common lawyers like to put it, a defensible and rational public "purpose", which it seeks to achieve and which detremiines who falls under its purview of positive or negative treatment. In the absence of such a purpose we do not have a general law. Further we have no way of judging whether a law is properly interpreted and applied.

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[6] Allen, supra n.2 at p.1

[7] Dworkin. See also Bernard Williams.

Let me be specific on this. Specific laws are not general laws. If they cannot satisfy the demand of equality for a rational reason for their specificity, or the distinctions they make (between, say, who is covered and who is not covered by the law), they offend the rule of law. Such laws breach this important bulwark against the exercise of arbitrary power.

So, for example, a law which states that Brian Langille shall never be given a driving licence, or shall be given a especially lucrative public pension, is a bad law. There may be a valid and rational reason for denying me a licence – a medical reason for example, or repeated violations of the traffic code - ( or, on the pension example a good reason for giving me a special pension for extraordinary services to society) but that valid reason is what is required as the legal basis for a law to be a general law which complies with the rule of law. If it is then found by a fair and independent process that the rational and valid reason applies in my case – then I will not be granted a licence or will be granted a pension. And the rule of law will not have been offended.

## 3. The link between Specific Laws and "Unlimited" Discretion.

The basic idea which the wording of my title seeks to lay bare is a simple one. Here is the key and simple point – a law granting the executive an unlimited discretion as to its application (to whom it applies), is simply another way of achieving the same result as a specific law aimed at specific person. Instead of legislating for, or against, a certain individual, or firm, or specific activity, a general power is granted that enables the government to achieve the same result as a specific legislative act but via a general administrative discretion. So, if a law grants a power to the government to grant a licence to carry on an activity – say, driving a car, or selling alcohol in your restaurant, or practicing law – it can, instead of stipulating that Brian Langille shall never ne granted a driving licence, simply stipulate that the licence be issued in the "discretion" of a government official, or administrative agency, or minister in the government of the day. This opens the door to selective, arbitrary, and perhaps corrupt decisions which offend the rule of law. Such as denying Brian Langille a driving licence.

This idea that specific laws and unlimited discretion are "two sides of the same coin" is, I think, an important one, at least in Canada. This is because we have a somewhat limited jurisprudence about "specific laws" being struck down as contrary to fundamental rule of law principles. But we have a rich tradition of judicial control of exercises of state power via official discretion (exercises which do not meet the test of equality – ie the existence of valid reasons for the exercise of the discretion). **The simple idea is that this set of cases *at common law* about discretion offer the key to understanding the problem of "specific laws". They also help expose reveal a fatal flaw in the Supreme Court of Canada's thinking about the *constitutional* idea of equality which I think is now the key to thinking about specific labour laws in Canada.**

In what follows I set out and work within the following schema:

1. The quite well-developed Canadian <u>common law</u> of controlling "unlimited" discretion.

2. The Canadian common law of specific laws and of "sham" general laws – written in general terms, with a plausible purpose, but aimed at specific actors. A specific labour law – the "Michelin Amendment" - is my example.
3. The Canadian constitutional law of "non-sham", "specific laws".

## 4. The Canadian common law of "Unlimited discretion" – the cases of *Roncarelli v Duplessis* and *Smith & Rhuland*

All Canadian lawyers, as well as many other Canadians, are familiar with the facts of *Roncarelli v Duplessis*. In *Roncarelli*, the premier of the province of Quebec, M. Duplessis, ordered a permanent revocation of Roncarelli's restaurant liquor licence in order to punish Roncarelli for undertaking a perfectly legal and political activity - provided bail for Jehovah Witnesses arrested during a period of "bitter controversy" between them and Roman Catholics in Quebec, and during a campaign by the Catholic Church to end their proselytizing.[8] (This is, I understand it, a familiar issue in Italy). The Premier, in revoking the liquor licence, relied upon legislation which provided that the government "may cancel any permit at its discretion."[9] In striking down and giving remedy for this exercise of "discretion" by the Premier, and in one of the most famous of all Canadian legal judgements, Rand J - regarded by many as Canada's greatest judge, wrote as follows:

> A decision to deny or cancel such a privilege lies within the "discretion" of the Commission; but that means that decision is to be based upon a weighing of **considerations pertinent** to the object of the administration. In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted. To deny or revoke a permit because a citizen exercises an unchallengeable right

[8] *Roncarelli v Duplessis*, [1959] SCR 121 at 131-133 [*Roncarelli*].
[9] *Ibid* at 139.

totally **irrelevant** to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred.[10]

In a very real way, this is the only case we need to read to see and understand the basics of a very basic rule of law idea – that the law speaks "rationality to power". Not "truth to power". Rationality.

Here are the key and obvious structural points of speaking rationality to power.

First, this is a case of statutory interpretation. It is about what a "legislative Act ...can be taken to contemplate". Nothing more. But nothing less than that.

Second, only one phrase is up for interpretation: "may...at its discretion". There is a clear grant of a discretion in that phrase. The only issue is the legal meaning of that idea.

Third, the word "may" cannot be interpreted as granting an "unlimited arbitrary power." The proper interpretation is that discretion is impliedly structured and constrained in two ways. First, by fraud and corruption in its use: "Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions."[11] Second, by the purpose of the legislation creating the discretion and of which the discretion is a part. This is the demand of fidelity to purpose and violation of this demand "is just as objectionable as fraud or corruption."[12] Fidelity to purpose, or rational pursuit of legislative purpose, means taking into account considerations "pertinent to" that purpose (and not taking into account irrelevant considerations). So, "Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair?"[13]

(Recall point 1: this is simply a matter of statutory interpretation: "The ordinary language of the legislature cannot be so distorted".)[14]

Fourth, this simple idea of statutory interpretation – "no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute"[15] – leads to a very simple conclusion in favour of Mr. Roncarelli:

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[10] *Ibid* at 140.
[11] *Ibid*.
[12] *Ibid*.
[13] *Ibid*.
[14] *Ibid*
[15] *Ibid*.

> To deny or revoke a permit because a citizen exercises an unchallengeable right totally **irrelevant** to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred.[16]

Next, I will discuss a case I which *Roncarelli* was applied in a labour law context. One of my favourite labour law cases of all time is *Smith & Rhuland Ltd v Nova Scotia*,[17] in which the Supreme Court of Canada spoke rationality to power 6 years before *Roncarelli*, and with Rand J again penning a beautiful and thunderous judgement. The Nova Scotia Labour Relations Board had denied union certification to the workers at the Smith & Rhuland shipyard on the basis that (and remember, this was 1953) the union leader was a member of the Communist Party.[18] There was nothing illegal in that and indeed, as Rand J pointed out, the union official could run for and be elected Premier of the Province on that ticket.[19] The logic behind this decision is just the logic of *Roncarelli*. The statutory language in question provided that "[t]he Board may certify…" (if the normal preconditions regarding such matters as majority support and so on were met, as they were here).[20] The Court overturned the Labour Relations Board's decision on the basis that the Board's discretion was not unfettered, and that the political views of a union's leadership was an irrelevant factor. Every step of *Roncarelli* we identified above is marked out, in advance of that case. It is all there. This is a case of statutory interpretation. There is a grant of discretion. But such discretion has its "limits" and a grant of legislative discretion is tempered by the purposes of the statute. This generates the rationality we require by identifying factors relevant and irrelevant to its exercise. Recall the conclusion in *Roncarelli* quoted above. Here it is again with the facts of *Smith & Rhuland* spliced in by me:

> "To deny or revoke [a liquor permit / certification of a union] because a citizen exercises an unchallengeable right [religious belief / political affiliation] totally irrelevant to [the sale of liquor in a restaurant / labour relations regulation at a shipyard] is equally beyond the scope of the discretion conferred."

Here is the simple point I am after. The legislature could have passed a law prohibiting Mr. Bell, the trade union official, from being a Union Official or forbidding the recognition of any union of which he was an official. That would be a specific law. But the law remained general – too general in fact – which opened the door for a specific exercise of discretion which had exactly the same effect and for the same reason. That exercise of discretion was struck down as irrational – meaning – taking into account irrelevant reasons (legitimate political affiliation) and not sticking

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[16] *Ibid* at 141.
[17] *Smith & Rhuland Ltd v Nova Scotia*, [1953] 2 SCR 95 [*Smith & Rhuland*]. There was a dissent – but on the basis of SRTP.
[18] *Ibid* at 96.
[19] *Ibid* at 97.
[20] *Ibid* at 96.

to considerations relevant to the grant of power/discretion – in this case recognition of a trade union as the representative of a group of workers. To repeat:

> I am unable to agree, then, that the Board has been empowered to act upon the view that official association with an individual holding political views considered to be dangerous by the Board proscribes a labour organization. [*Irrelevant consideration*] … there must be some evidence that, with the acquiescence of the members, it has been directed to ends destructive of the legitimate purposes of the union, before that association can justify the exclusion of employees from the rights and privileges of a statute designed primarily for their benefit." [*Relevant consideration]*[21]

This is the key, I now think, to the logic of identifying and prohibiting specific laws. It is the logic of rational reasons for making distinctions. This is the idea of equality. Rational reasons are general reasons. That is why the rule of law demands general and not specific laws. When we don't have a general and rational reason/purpose for a law we have a specific law. And, in addition we can test the **application** of a general law in just the way we see done in Roncarelli and Smith & Rhuland. The test is fidelity to the reasons (the purpose) for the granting of the power in the first place.

So, controlling general discretion and controlling specific laws come down to the same thing – speaking rationality to power. (And this is at the heart of the idea equality.)

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[21] Smith & Rhuland is critical for Canadians – and it is important to see why. The most compelling and enduring of Rand J's words must be kept in mind. The real victim here, the real freedom trampled on here, was not the political freedom of the union official – rather it was the freedom of association of the shipyard workers to freely choose their representatives. In one of the most powerful of statements ever uttered by a judge of the Supreme Court of Canada, Rand J wrote:

"To treat that personal subjective taint as a ground for refusing certification is to evince a want of faith in the intelligence and loyalty of the membership of both the local and the federation. The dangers from the propagation of the communist dogmas lie essentially in the receptivity of the environment. The Canadian social order rests on the enlightened opinion and the reasonable satisfaction of the wants and desires of the people as a whole: but how can that state of things be advanced by the action of a local tribunal otherwise than on the footing of trust and confidence in those with whose interests the tribunal deals? Employees of every rank and description throughout the Dominion furnish the substance of the national life and the security of the state itself resides in their solidarity as loyal subjects. To them, as to all citizens, we must look for the protection and defence of that security within the governmental structure, and in these days on them rests an immediate responsibility for keeping under scrutiny the motives and actions of their leaders. Those are the considerations that have shaped the legislative policy of this country to the present time and they underlie the statute before us.

I am unable to agree, then, that the Board has been empowered to act upon the view that official association with an individual holding political views considered to be dangerous by the Board proscribes a labour organization. Regardless of the strength and character of the influence of such a person, there must be some evidence that, with the acquiescence of the members, it has been directed to ends destructive of the legitimate purposes of the union, before that association can justify the exclusion of employees from the rights and privileges of a statute designed primarily for their benefit."

## 5. Sham General (labour) laws - The Michelin case.

This is probably the most famous "specific (negative) labour law" in Canadian labour law. I am a native of Nova Scotia and my first academic post was at Dalhousie University which is located there. I lived through the events surrounding the Michelin Bill or Michelin Amendment as it is called. My first academic paper[22] was about that very Amendment to the Nova Scotia Trade Union Act – which is the legislation governing collective labour law in the province. The significance of the case can be seen in the fact that a generally worded law, amending a law of general application, would come to be know by the name of a single corporation. The facts are rather simple – but some appreciation of some of the peculiar details of North American (Wagner Act Model) labour relations also helps.

Here is the basic story. It is a story of a multinational firm threatening to disinvest if the local government did not amend labour standards to its advantage. It also promised more investment (in the form of another manufacturing plant) if the government complied. Specifically, it demanded that the government block a unionization drive at one of its two plants. This the government did by passing what is known as the Michelin Bill or Michelin Amendment. This was a generally worded law but one which was more or less openly admitted to be aimed at Michelin. That is, it was a specific law, and everyone knew it. But it was dressed up as a general law.

From the perspective 2021 we, as sophisticated labour lawyers, would say this was a classic case of social dumping, a race to the bottom in labour standards, a demonstration of the power of mobile capital, a clear demonstration for the need to block such regulatory arbitrage and competition, proof of the need for international standards blocking such behavior, and all the rest. Except that none of that now familiar language was familiar at the time. "Globalization" was not yet a word. "Races to the bottom" were the concern of game theorists, not labour lawyers. And so on.

Nova Scotia is my home. Although I have lived and worked in Toronto for the last almost 40 years I still spend my summers here – and I am speaking to you now from the its norther shore very close to one of the Michelin plants in question. Fewer than 1 million people live here. In the early stages of Canadian history it was a rich and privileged part of the country. Toronto was a hinterland. That has all been turned in its head. Nova Scotia is now an economically deprived, and demographically challenged, part of the country - and was so by the 1970s. Its traditional fishing, lumbering and boat building industries collapsed. It had very little by way of manufacturing capacity. It's coal mining and steel making industries were in steady decline. Michelin Tire was a global firm before globalization became a word. It is famously anti union. Michelin had built two plants in Nova Scotia employing several thousand workers. This represented about 10% of the provinces manufacturing capacity. Neither plant was unionized. The International Rubber Workers Union began a unionization drive at one of the two plants. At

[22] Langille, "The Michelin Amendment in Context", (1981), 6 Dalhousie Law Journal 523.

the time it was clear law that the union, if it could establish majority support at that one plant, would be "certified" by the labour relations board to represent the employees at that plant, placing the employer under a legal duty to bargain with the union. The union organized on that legally clear "plant by plant" basis and applied to the board for certification. Before the board could decide on the application the Government passed the Michelin Amendment which changed the rules on organizing – non longer a "plant by plant" rule but an "all plants at once" rule. This had the (retroactive) effect of ensuring the Rubber Workers application would fail – even if they had majority support at one plant it did not have a majority of the two combined (the had not even started a campaign at the second plant).

The bill was not presented as a labour law bill – but as a "jobs for Nova Scotia" bill. The trade-off of basic freedom of association rights for jobs was express and understood by all. It is a classic case of what would, later on, spend my career in international labour law writing about. Although it was generally worded in the sense that it did not single our Michelin by name, it was limited to manufacturing, to manufacturing operations with more than on plant which were "integrated' in a production process, had strict timelines for application, and there was, in any event, no other firm in the province to whom it would currently apply.

This is an interesting case for the following reasons. The subject matter of the law – the "scope" or "level" of collective bargaining- should it be Geographic? Sectoral (manufacturing)? Specific Industry (automobiles)? Employer (Fiat)? If employer, "all locations" or "plant by plant"? (And so on) – is a legitimate and very real policy issue in ll collective bargaining systems and not only in Canada. This is a matter of much discussed labour law policy and there is at least something to be said against the extreme decentralization of the "plant by plant" bargaining model which the Michelin Amendment sought to change.[23] So, a general law establishing new rules about bargaining structures would be seen as simply a rational policy choice. The problem with the case is that everyone knew such arguments were not motivating the passage of law – rather, it was a specific, single firm directed, retroactive, legislative intervention to defeat a union drive at the behest of an anti union employer. In its motivation it was a very specific law aimed at retroactively changing the legal rules to determine the outcome of a single ongoing case already underway before a legal tribunal. This is the "specific law in the guise of a general law problem" - with the assumption that the general law is not in and of itself irrational or the problem. It is using it as a guise to cover a specific case that is the problem.

But then it might also be said - and was widely said - that the legislative policy choice becomes not "plant by plant" vs "all plants" as a matter of general labour law policy but rather the following choice – defeating the freedom of association rights of several thousand workers employed by Michelin in order to attract more of those jobs, along with many "spin off jobs" in

[23] But see Langille, supra n 22, for a solution to the problem of "balancing" "ability to organize" with "desirable long term bargaining structures".

the community at large, creating a larger tax base in the province, etc. etc.[24] vs respecting those freedom of association rights but losing existing investment and jobs and forgoing future promised investment and jobs. That **was** the issue. Properly framed. What does Canadian law say about that? At the time that properly framed issue was treated as a political one – and it had, in all probability, popular support. But we can now see that it was a specific law albeit with a (alleged/perceived) general benefit to be obtained by violating a fundamental freedom. This is the "fundamental freedom" question.

There are thus two legal problems to be studied here – 1. The specific law masquerading as a general law problem, and 2. The fundamental freedom problem.

There are now – although not at the time of Michelin - two legal structures for dealing with these questions. Canada now has, but did not have at the time of Michelin, an "entrenched" Charter of Rights and Freedoms which protects worker freedom of association. The Supreme Court of Canada has held that this protects a right to collective bargaining[25] (as well as a right to strike[26]). Thus the fundamental freedom question involved in "trade off" embodied in the Michelin Bill now has a constitutional dimension – trading off constitutional rights of some in exchange for improvement of the general good of all. At first blush that sounds like a very bad constitutional argument – akin to "we should enslave a certain number of our fellow citizens because it will make the rest of us better off". It is clear that the Charter restricts intentional and well as unintentional restrictions of fundamental freedoms[27]. If the Charter has existed at the time then the government would have been forced to make exactly that argument.[28] BUT, as we shall see, there is a broader constitutional way of approaching our cases of specific labour laws – laws which take away a fundamental right or freedom from some a very specific group. This is the idea which has been doing so much work, as we have seen at common law. This is the idea of equality. This is the interesting point in my mind - and that is where I will spend the rest of my time in this paper.

But first I put aside that sort of constitutional argument for the moment, turning on the (now but not then) written constitution, and in the next section deal with the issue upon which I have been focussing so far - the unwritten constitutional principles inherent in the very idea of the rule of law and their impact upon specific laws. The questions which the Michelin Bill forces us to come to grips with are, then, the following 1. Is there an unwritten common law rule against such specific laws? and 2. what is the common law of laws aimed at determining one case, but

[24] But the math here would need to be complete - taking into account all the public incentives provide to Michelin in the first place – including tax breaks and so on.
[25] See BC Health Services 2007 SCC
[26] See Saskatchewan Federation of Labour 2015 SCC
[27] See MPAO, SCC 2015
[28] Under the Charter infringements upon fundamental freedoms are permitted only if they a demonstrably justified in a free and democratic society.

adopting the strategy of altering the general rules as the vehicle to determine the outcome of that case?

## 6. The Canadian <u>common law</u> of "specific laws" and "specific laws masquerading as general laws."

The common law held **specific laws** to be illegal. The origins of this lie in the law of "Bills of Attainder" which were a more common phenomenon in the early common law world in England. Such Bills were "legislative acts which convicted a person of an offence"[29]. They are illegal at common law because they offend basic principles, which were discussed above, in a number of ways – they are specific, they deny due process, and they violate the principle of separation of powers (with the legislature usurping the judicial function applying the law to specific cases). (So too are "ad hominen" laws which provide a trial but single out a person for prosecution not under the general law.) As it was put quite recently by the Supreme Court of the United Kingdom (acting as the highest court in Trinidad) in the case of Ferguson v AG Trinidad:

> The objection to a bill of attainder is the same as the objection to any exercise by the legislature of an inherently judicial function. It does not have the essential attribute of law, which is its generality of application. The first requisite of a law, wrote Blackstone (Commentaries, Introduction, Section II), is that
>
> > "... it is a rule: not a transient sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal. Therefore a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law. But an act to declare that the crime of which Titius is accused shall be deemed high treason: this has permanency, uniformity, and universality, and therefore is properly a rule."[30]

I turn now to the second question - what does the common law have to say about the problem of a **specific law masquerading as a law of general application**? *Ferguson v AG Trinidad* is an important and modern case which expressly addresses this second question. Lord Sumption makes exactly our distinction between specific laws which are specific on their face, on the one

[29] Ferguson v AG Trinidad [2016] UKPC 2 at para 19
[30] Ibid at para 20

hand (which are illegal) and those more usual case of laws which are general on their face, but specific in intent and application:

> Direct interference with judicial proceedings is, however, rare. More commonly, legislation impinges on them indirectly by altering general rules of law in a manner which will in practice determine the outcome of particular proceedings or of particular issues in those proceedings, for example by changing the elements of an offence or a tort, or abrogating a special defence, or altering the rules of evidence or a relevant period of limitation, without any transitional provisions to ensure that current proceedings are unaffected. This kind of legislation gives rise to more difficult problems. It is general, not particular. [31]

That is a good description of the problem which the Michelin Bill presented. The legislation at issue in *Ferguson* was a law which reversed a recent and prior law establishing general "limitation periods" for crimes. A public outcry followed when it became clear that this would mean that several high-profile corruption cases would no longer proceed. So, that limitation period law was repealed two weeks after it was passed and this new law was made retroactive. Those high profiled persons accused of corruption, who were now suddenly "back in court", alleged this was a specific law and the result of the public outrage at the effect of the initial reform. They failed in their argument.

The case reveals the difficulty of alleging a specific law when dealing with legislation which, unlike Bills of Attainder or "ad hominen" laws, are general on their face. The key to winning such an argument was, Lord Sumption stated:

> Legislation which alters the law applicable in current legal proceedings is capable of violating the principle of the separation of powers and the rule of law by interfering with the administration of justice, but something more is required before it can be said to do so. The "something more" is that the legislation should not simply affect the resolution of current litigation but should be ad hominem, ie **targeted at identifiable persons or cases**.[32]

He continued:

> How is the court to ascertain a more specific purpose behind an Act of Parliament than its general terms would suggest? Although this question commonly arises in politically controversial cases, in the Board's opinion **the answer does not depend on an analysis of its political motivation. The test is objective. It depends on the effect of the statute**

[31] Id at para 24
[32] Id at 26.

> **as a matter of construction, and on an examination of the categories of case to which, viewed at the time it was passed, it could be expected to apply**. … The reason why in such circumstances as these the statute will be unconstitutional is that the Constitution, like most fundamental law, is concerned with the substance and not (or not only) with the form. There is no principled distinction between an enactment which nominatively designates the particular persons or cases affected, and one which defines the category of persons or cases affected in terms which are unlikely to apply to anyone else.[33] [emphasis added]

The highlighted passage is key. Political motivation is not the key – if it were, the Michelin Bill would be illegal as a specific law. Rather the test is objective – on a reading of the law does it apply to others as well? That is how we tell whether someone is being "targeted". The facts and result in Ferguson reveal how hard it is to meet the objective test. The court reasoned that the specific application of the limitations law to these accused was the cause of the public outcry which motivated the new law repealing the limitations law. But while the impact of the new law on their pending criminal cases was the "occasion" for the new law, it did not follow that they were "targeted". The new law was general – and would apply going forward to many cases. There was no time limit on the new law which would make it applicable only to these cases. So, the court saw the matter as one in which the impact of the recent reform on these specific cases, and outcry about them, simply exemplified the need for a new (general) law repealing that recent limitations law.

If *Ferguson* is good law, and I think it probably is, then it is very hard to see a legal response to Michelin along common law lines. The Michelin Bill was also general and not limited in time or otherwise. In spite of the fact that the motivation was clear and that there were few, or no, other foreseeable circumstances to which it might currently apply – the means used did not amount, on an objective test, to a specific law which offended the rule of law under common law principles by "targeting" in the required sense. So, the Michelin Bill was rational policy choice and it was not targeted in the required sense to be an illegal specific law.

To put this in the language of our "unlimited discretion" cases such (*Roncarelli, Smith & Rhuland*) there were relevant reasons and no irrelevant reasons for the law. A reasonable policy choice (purpose) which was rationally applied (no irrational and illegitimate "targeting").

But we now have in Canada another, constitutional, way of thinking about our issues of specific labour laws. The tragedy, or at least irony, is that the Supreme Court of Canada has seems oblivious to the common law having already been there – an having shown the way forward.[34]

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[33] Id at 27

[34] In the Ferguson case the legal policy question, which the general laws in question addressed, was whether it is a good idea to have limitation periods for certain crimes. That has been, and is, a familiar and much debated issue in many places and at many times. (Now, especially regarding what is now called in Canada "historical" sexual

## 7. The Canadian <u>constitutional</u> law of specific laws, especially labour laws. (Or, Canadian constitutional law lacks the common law's courage – at least thus far)

I now return to what are now, but not then, the constitutional dimension of cases such as the Michelin Bill – labour law cases involving specific groups of workers sometimes in very specific cases - where constitutional rights and freedoms can now be invoked in Canada to attack such selective treatment.

There is a large point I am after here at which the title of this section hints. I will spell it out now. The idea we need to use to sort out these cases is the idea the common law has long brought to bear on the issue of specific laws and general discretion – the logic of equality. This should have been an easy translation from common to constitutional law because there is now a constitutional guarantee of equality before the law. S. 15 of the Charter reads:

> 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The problem as been the following sad truth - Canadian constitution law has witnessed a "reading down" of s. 15 from an equality to a "non-discrimination" guarantee. As discussed

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assault). The problem was that the accused persons in Ferguson got caught up in that debate in a very tangible manner. But no other fundamental rights or freedoms were in issue. In Michelin the case was different. It is true that as a matter of general law reasonable people can debate whether the "plant by plant" or the "all plant" rule is best. But, as we have seen, that was not the question, properly framed, which the Michelin case presented. The real question was an altogether different choice - economic development or respect for freedom of association rights? This was the effect and intent of the Michelin Bill – to trade off or sacrifice fundamental freedoms of the Michelin workers for a perceived general economic benefit for the citizens of the province. What does the common law have to say about that? This is not a question only about whether it is desirable to have a specific law – but a question of fundamental rights. Do they and how do they enter the common law's thinking?

To get a grip on this we need to return to our basic ideas about the rule of law. And to our cases Roncarelli and Smith&Rhuland. I think the simplest way to get a grip on this question is the through the idea which I have suggested – speaking rationality to power. ("SRTP").

The logic of SRTP is to say that legislation – or administrative discretion – is limited in a structured way. Specific laws, and illegal exercises of discretion, suffer the same from the same defect – they do not identify and act upon a defensible public purpose. They rely on specific, indefensible, irrational (irrelevant, and not relevant) considerations. Specific laws, and concrete exercises of discretion can be challenged at common law on just this basis (this is the key idea of SRTP). Here is the puzzle of the Michelin law, understood in terms of SRTP (and leaving aside the simpler constitutional proceedings). It is clear that legislation aimed at economic development is a valid public purpose generally speaking. But, can the intentional suppression of fundamental rights ever be a legislative purpose in support of that end. Can that be a "pertinent" or relevant consideration of the sort demanded by the idea of equality the requirement of SRTP?

above, this means reading s. 15 as protecting against only a list of prohibited reasons (which it clearly is) rather than also containing a much stronger demand of relevant reasons – which is the key, as we have seen, to the idea of equality (not that we must treat everyone the same but that we need a good reason for differential treatment). The irony, or tragedy, lies in the fact that common law judges – such as Rand, in *Roncarelli* and *Smith & Rhuland* – had fearlessly articulated and deployed this idea of equality at common law against unlimited discretion and other common law judges against specific laws (Bills of Attainder etc) - as part of the unwritten constitution. Our current court refuses to do so even though the idea of equality is now part of the written constitution. This has had and will continue to have major and negative repercussions for or labour law.[35] Here are some examples of those repercussions. These are cases in which specific and irrational legal distinctions are made which cry out for equality's assistance – but to no avail.

You will ask, well how then did the constitutional revolution in labour law take place in Canada? It did so not via the available and better s. 15 route but by conjuring a new judicial and constitutional labor code from the 3 words of s. 2(d) "freedom of association". The result of this has been the creation of a constitutionalized version of the Wagner Act Model.[36] That is a lot to digest. Let me now talk about some cases.

The seeds for the constitutional labour law revolutions of 2009 and 2015 were sewn in 2001 in another SCC decision – a case called *Dunmore.* Here is the issue in *Dunmore*. For many years Ontario has had a comprehensive collective labour relations law statute comprehensively dealing with providing concrete legal protection to the right to join a union, to have that union certified as an exclusive bargaining agent if a majority of workers so wish, compelling the employer to bargain in good faith with that union, protecting the right to strike/lockout if negotiations fail, for binding collective agreements, and much more. Is so doing Ontario was, along with all other Canadian governments (such as the one in Nova Scotia in Michelin) implementing the North American "Wagner Act Model" – of complete and heavy legal protection of freedom of

[35] The legal landscape has radically changed with the introduction of the Canadian Charter of Rights and Freedoms in 1982 – but more critically with the judgements of the SCC in 2009 and 2015, which I have already mentioned, which confirm constitutional protection (under s. 2(d) of the Charter which guarantees freedom of association) for collective bargaining by freely chosen unions and a "right to strike". This constitutional battleground is where the legal action is now to be found. But, and this is the critical point, and also the point which the common law of specific laws and unlimited discretion help lay bare – the action is in the wrong constitutional location on the constitutional field. The key to all the cases is not s. 2(d) but s. 15. That is, all or our cases are "equality cases" not cases where freedom of association is in issue. Freedom of association is never the issue. The problem is that everyone has it except some specific group. This is the problem – the problem of inequality of distribution of the freedom which is never in issue for all other non exclude workers.

[36] See Langille, "Why are Canadian Judges Drafting Labour Codes - and Constitutionalizing the Wagner Act Model?" (2009-2010), 15 Canadian Labour and Employment Law Journal 101-128. Langille, "The Freedom of Association Mess: How we got into it and how we can get out of it." (2009), 54 McGill Law Journal 177-215. Langille, "Can We Rely on the ILO?" (2007), 13 Canadian Labour and Employment Law Journal 363- 390. For other writing on the Charter and labor law see;

association for Canadian workers. Except agricultural workers. They were specifically excepted from the law – its expressed freedom of association and its legal protections of that freedom. The agricultural workers righty thought that was unfair. They thought they should not be specifically excepted – rather, that they too should have been included. Theirs's was an equality argument – "we want what everyone else has". The agricultural workers did not argue for equal treatment but rather treatment as equals. Not that everyone should be treated the same but that there has to be a good argument for treating us differently – for singling us out (explicitly), for explicitly "targeting" us for less favourable treatment than everyone else. Further, there is no such good reason. Far from it. In fact, of all workers, agricultural workers should stand at or near the first in line for inclusion based upon on their disparity in bargaining power. That is powerful argument. A good argument. And the agricultural workers won – but not on the equality point, but on the much more difficult and indeed implausible "freedom of association" point. Here the argument was that in virtue of their exclusion from protections that others have, their freedom of association was negatively affected. This is a bad argument – if there were no protection for others they would be in the same situation vis a vis their need for protection. But the agricultural workers were awarded the same protections as all others. (Am equality remedy in fact if not in name.) Does this matter? Yes.

Equality is the prior, best, and only required argument for all the reasons the common law has been making clear all along. *Dunmore* is just *Duplessis* or *Smith&Rhuland* – but with a specific guarantee of equality in play. If the common law can draw the idea of equality from basic unwritten constitutional principle, how can the SCC not do it from written constitutional principle?

Here is how this really plays out for Canadian workers in the context of the most common of specific labour laws – the "back to work" legislation problem. Failure to grasp the constitutional nettle has undermined our best avenue for attacking these specific laws. The most familiar labour law legislation in the public imagination in Canada are so called "back to work" laws. These are laws which order a very specific group of striking workers to end their legal strike, go back to work, and submit their bargaining dispute to "binding arbitration". Sometimes the law adopts an "in advance" strategy than an ad hoc approach – and simply bans strikes by specific groups of workers. But of for years these laws have been ad hoc, aimed at specific ongoing strikes, and retroactive in the sense that what was a legal strike becomes an illegal one. For many years these were common in Canada. Often these laws were used in what were public sector strikes where there is a monopoly or quasi monopoly but often not – for example a favourite industry for attack by such laws was the airline industry, which is deeply competitive. Ordering unions at Air Canada, for example, to end a perfectly legal strike was a common piece of legislative activity. But now that the SCC had constitutionalized a right to strike the question arises - is all of that still possible?

The horrible truth is that to a large extent it still is. How is that possible?

The answer to that question lies in the fact that the SCC "derives" its version of a "right to strike" for those specifically attacked by back to work laws not from s. 15 but, again, from s. 2(d). On this view there is direct right to strike. Rathe the right to strike is merely **instrumenta**l to the right

to collective bargaining – it "drives" bargaining (this is true of all bargaining). In turn, the right to collective bargaining is instrumental to freedom of association at work. Both rights could have been directly **derived** from the right to associate (I am free to bargain and also not to work till terms are agreed as an individual, therefore I am free to do so in association with others.) But that is another point. The first and better point is that the specific denying and retroactive taking away of a specific groups freedom to strike is a violation of the rule of law – of equality under the law. And that is what s. 15, properly read as an equality clause, and not "merely" a non-discrimination clause, is there to constitutionally guarantee. But that is the route blocked by the Court's limited view of s.15.

The consequence of not taking the s. 15 route is evident in the SCC decision which "created" the "right to strike" – *Saskatchewan Federation of Labour (SFL)* (2015)[37] and subsequent lower court cases. Because the right to strike is seen as instrumental to collective bargaining it is only violated when, in the opinion of a court(!), it has actually interfered with a meaningful process of collective bargaining. The real significance of this becomes apparent in later cases saddled with the job of interpreting *SFL*. Here is a glaring example of how things have gone off the rails.

If the equality/Roncarelli/Smith&Rhuland/rule of law approach has been used in *SFL* then the relevant legal reality would be not that you have to treat all the same, but that you have to have a good reason for singling some out for different treatment (for denying this specific group the right to strike generally available). This would lead us int the search for relevant rational reasons for the differential treatment. In the law of strikes this would leas us into discussions of "essential services" and into the ILO and domestic law defining that category. Being an essential worker **is** a rational reason for different treatment – for drawing the line on the right to strike. BUT, if the equality line is not followed then we end up with a much more attenuated and "discretionary" – and unprincipled – right to strike.

That this is the legacy of *SFL* was clearly demonstrated in a case involving a strike by Post Office workers in Canada[38]. No one believes that, in this day and age, Canada Post has a monopoly on delivering messages or packages (as it once might have been argued). No one believes that Post Office workers fit the ILO test, or any known test, for essential workers. But, given the reasoning in *SFL,* that issue never even arose for decision. The judge in the case clearly understood that *SFL*'s right to strike was not the robust one which equality would guarantee. Rather it was the attenuated one which follows from the Supreme Courts's analysis. He posed the question perfectly. After *SFL* the question he had to answer was not whether there was an unjustified interference with the right to strike, but whether, as required by the instrumental approach of *SFL*, whether the government's actions "substantially interfered with a meaningful process of collective bargaining process". The court explicitly refused to accept the view that the right to

[37] Supra n.
[38] Canadian Union of Postal Workers v. Her Majesty in Right of Canada, 2016 ONSC 418

strike could only be taken away for rational and relevant reasons – such as "essential services" are being struck. It instead left the door open for much, much wider restrictions, not limited to rational and relevant reasons put in place by the idea of equality, but based upon the **court's view** of whether collective bargaining was interfered with substantially.

Leaving aside the slightly ridiculous nature of a process in which a high court judge hears evidence about how bargaining is going and seconds guesses workers and their unions as to when they should/need/wish to exercise their right to strike, the points I am after are;

1. That this is all a mistake. The logic we need here is the logic of equality. This is something I have been arguing for a while.[39]
2. This invitation to Italy has let me see for the first time is that this mistake is even larger that I had been able to see before. The issue of "leggi provvedimenti" has opened a door for me to see how my thinking about "speaking rationality to power" and my admiration of cases such as *Roncarelli* and *Smith &Rhuland*, are part of my case against the Supreme Court of Canada's approach. Invoking the common law – seeing the link between specific laws and unlimited discretion – seeing the connection to my equality critique of the current and weak versions of a right to bargain collectively and to strike – has been a breakthrough in my thinking. I owe the organizers a great deal for providing the opportunity to make joining these dots, make these links, and see a wider and better legal argument for my views. I thank them – and you, for listening.

   Mille gracie.

[39] See