

Labour Law and the Charter in the Supreme Court of Canada

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A recurrent theme that has emerged in Charter litigation has been the tension between individual and collective rights, and certainly the labour cases have not been an exception to that trend. That seems natural enough when it is borne in mind that the Charter is a constitutional document which asserts the primacy of individual rights and freedoms within a political culture that is more collectivist in nature than our neighbours to the south. In any event, individual autonomy cannot enjoy absolute paramountcy in any society, and section 1 of the Charter recognizes that it will often yield to the interests of the collective. Moreover, some of the enumerated rights such as freedom of association under section 2(d) of the Charter reflect the importance of the collective for the betterment of the individual. This debate was once again brought into sharp focus in the recent decision of *Lavigne v. Canada (Attorney General)*.¹ Before getting to that case, I will briefly introduce the subject by reviewing some of the cases that preceded it.

The starting point is the trilogy of freedom of association cases decided in 1987: *Reference Re Public Service Employee Relations Act (Alta), P.S.A.C. v. Canada* and *R.W.D.S.U. v. Saskatchewan*.² The first two deal with public sector laws which imposed compulsory arbitration as an alternative dispute resolution mechanism, and wage restraint legislation respectively. The Saskatchewan case dealt with back-to-work legislation in the dairy industry. Although the various judgments are quite voluminous, the pithy ratio is that freedom of association does not include the right to strike or the right to bargain collectively. This would be to protect action by an association to attain the goals of an association, as opposed to the individual right to associate for the purpose of advancing those goals. Here, it is useful to remind ourselves that the right of freedom of association was not intended to be appropriated for the sole benefit of the labour movement. Rather, as Justice Le Dain pointed out, it is a concept that must be applied to a wide range of associations of a political, religious, social or economic nature.

Freedom of association is fundamentally an individual right and protects the individual's interest in self-actualization and fulfilment that can be realized only through combination with others. In particular, it protects the collective exercise of other fundamental freedoms, such as

freedom of expression and religion, as well as the freedom to work for the establishment of an association, to belong to an association, to maintain it, and to participate in its lawful activity. It does not, however, constitutionalize the objectives and activities of an association or organization, nor does the fact of association in itself confer additional rights on individuals.

The trilogy also illustrates the point that the courts are extremely reticent to tinker with the delicate balance that the legislatures have struck between the competing political, social and economic interests of labour and management. That is an area the courts have long recognized as requiring specialized expertise and in which there should be considerable restraint exercised before entering into any judicial consideration of the legislative choices that must be made. Simply put, a court room is not the proper forum to be hammering out collective bargaining policy.

A more difficult case dealing with freedom of association was *Professional Institute of the Public Service of Canada v. Northwest Territories*.³ There, the appellant Institute sought to be incorporated under the Northwest Territories *Public Service Act*.⁴ This was a requirement for the appellant to bargain collectively for a group of nurses it had formerly represented when they were employed by the federal government. Because the federal government was no longer responsible for health care programmes in the Baffin area of the territories, the nurses became employees of the territorial government and were eligible for membership in the Northwest Territories Public Service Association which had been incorporated to bargain collectively on behalf of all non-excluded territorial employees. The Institute's request for incorporation was declined by the territorial government on the ground that the needs of professionals in the territorial public service were being met by the existing associations certified under the Act.

A majority of the Court held that the impugned legislation merely imposed a restriction on the activity of collective bargaining, and did not impinge upon the establishment or existence of the association which is the protected freedom under section 2(d). The trilogy had firmly rejected the proposition that freedom of association protects activity that is essential to a given

organization's existence, as collective bargaining is said to be for a trade union. Justice Sopinka also endorsed the view that freedom of association protects the exercise in association of the lawful rights of individuals. However, in my own short reasons I refrained from saying anything on that subject, and I shall leave it at that. It would be preferable, in my view, to wait for a case that calls for decision of the point.

The *P.I.P.S.C.* case also foreshadowed another issue later dealt with in *Lavigne* - the principle of exclusive representation which has long been a hallmark of North American labour law. The Northwest Territories legislation provided that the only unions that were entitled to compel the employer to bargain collectively were "employee associations" incorporated under the Act, which differs from other Canadian labour legislation in which conditions are established for the certification of a union as the exclusive bargaining agent for its members. However, the effect on the individual employee is the same - he or she has no choice of bargaining agent by virtue of the statutory monopoly granted to the certified union. In *Lavigne* I expressed the view that the general structure of labour relations in Canada, including the principle of exclusive representation, was constitutionally unimpeachable. A certain degree of association is both inevitable and desirable in a modern democracy. I will have a little more to say on that in a moment when I come to the decision in *Lavigne*.

Before doing so, however, I should make a few remarks on one point that frequently crops up in these labour cases, namely the threshold question of whether or not the Charter applies in the first place. Before the Court can get a constitutional foothold for Charter review, there must be the requisite governmental nexus under section 32 which reads:

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Early in the development of Charter jurisprudence the Court had an opportunity to address section 32 within the labour context in *R.W.D.S.U. v. Dolphin Delivery Ltd.*⁵ In that case the company had obtained an injunction restraining secondary picketing of its premises. Because both of the litigants were private parties acting in the course of a general right accorded by the common law, it was held that the Charter did not apply. Section 32 specified that the Charter applies to the legislative, executive and administrative branches of government, and as such it did not apply to litigation where the government or governmental action is absent from the picture.

More recently, the Court handed down a series of judgments concerning mandatory retirement in which the question of Charter application arose: *McKinney v. University of Guelph*, *Harrison v. University of British Columbia*, *Stoffman v. Vancouver General Hospital* and *Douglas/Kwantlen Faculty Association v. Douglas College*.⁶ In each case it fell to be decided whether the employer was a government entity under section 32. With the exception of *Douglas College*, the Court held that the Charter did not apply to any of these cases. In *McKinney I* reiterated the Court's position that the Charter is an instrument for checking the powers of government over the individual. To allow the Charter to intrude into all areas of private or public action would virtually paralyse the operation of society, particularly the judicial process, and leave at large vast areas of settled jurisprudence.

In particular, the simple fact that an entity is a creature of statute is not in itself sufficient to make its actions reviewable under the Charter. Many statutes are enacted to meet private ends, for example the incorporation of a private company. Nor does the fact that the statutorily created entity is serving a public interest make it part of "government" within the scope of section 32. Examples abound where creatures of statute are furthering the public interest, but are unquestionably not part of government. Charities and symphony orchestras might be mentioned.

In the university cases, it was also argued that the universities were part of government because of their relationship with the provincial government. There was no question that the government in each case exercised considerable control over the institution given its dependence on government funds. But there is a difference between "fate control" and regular and routine control. Universities in large part manage their own affairs and allocate government funds as well as those from other sources such as tuition and endowment funds as they see fit. In short, universities enjoy a large measure of internal autonomy within the more general environment determined by the legislature. This has historically been the case, especially autonomy over decisions regarding appointment, tenure and dismissal of academic staff, which could affect academic freedom. Those are not government decisions and the impugned policies of mandatory retirement did not constitute government action.

The status of the universities, however, was markedly different from that of the institution in the *Douglas College* case. There, the college was created under provincial legislation that made it a corporation and for all purposes an agent of the Crown, and it could only exercise its powers as such. Moreover, the responsible minister exercised direct control over the college and was empowered, among other things, to establish policy or issue directives on post-secondary education and training. Unlike the universities which managed their own affairs, the college was simply a delegate of the government assigned the task of operating a system of post-secondary education in the province, and as such was part of the government and was performing acts of government, including the negotiation and administration of the collective agreement between the college and the faculty association.

Lavigne, to which I now come, raised a more difficult issue of Charter application. There the Court was asked to consider its application to a union security clause of a type variously known as an agency shop provision or a "Rand formula" clause. In general, the clause means that an employee is not compelled to become a member of the union, but that any employee who elects not to join -- like Mr. Lavigne -- must pay the usual union dues. Section 53 of the *Colleges Collective Bargaining Act*⁷ allows for the negotiation of an agency shop clause in a collective

agreement to which the Act applies. The Act also designated the Ontario Council of Regents for Colleges of Applied Arts and Technology as the bargaining agent for the college employers, including Lavigne's employer. The Council of Regents was established under section 5(2) of the *Ministry of Colleges and Universities Act*⁸ and was assigned the task of assisting the Minister of Colleges and Universities in the planning and establishment of programmes for the colleges.

The sticking point for Mr. Lavigne was that a portion of the union dues he was forced to pay was going towards organizations whose objectives were not in harmony with his own beliefs, for example the N.D.P., disarmament campaigns, Arthur Scargill and the striking U.K. coal miners, and abortion pro-choice groups. The first issue, then, was whether or not the Charter applied on the basis that the application, for a declaration that the statutory provisions resulting in compulsory payments were unconstitutional, concerned the expenditure of funds by the union, and not the requirement that Lavigne pay dues to the union. This is what I called the "substance of the application" argument, and I concluded that the nature of the application should not be cast in the narrow sense of the union's expenditure decisions, but rather in broader terms of the conduct of the Council of Regents or the Legislature in permitting the use of union dues for purposes unrelated to collective bargaining.

However, it was clear to me that there was nothing in the legislation itself that compelled Lavigne to make the contribution. The legislation is entirely permissive (seemingly unnecessarily so) in allowing parties to enter into a collective agreement which compels employees to pay dues. Lavigne's rights could not be affected until the agreement was entered into, and so that challenged conduct was not attributable to the Legislature. Thus, there had to be a government actor for the Charter to apply. That was not difficult to find. The Council conceded that it was an emanation of government, and quite properly so. The government, through the responsible Minister, was empowered to exercise the same degree of routine or regular control as in the *Douglas College* case.

The enquiry did not end there, though, as it still fell to be decided whether the inclusion of the agency shop clause in the collective agreement constituted government conduct. Again, the situation here was the same as in *Douglas College* insofar as the collective agreement constituted law, having been entered into by a government actor pursuant to its enabling statute. Nor was this a matter of the government simply acquiescing to the inclusion of the clause at the behest of the union, because it also represented an undertaking by the Council of Regents on behalf of the colleges to deduct dues from every employee in the bargaining unit. The giving and the performance of that undertaking compelled Lavigne to contribute to the union.

I should add here that I was not dissuaded by the fact that the entering into a collective agreement was somehow "commercial" and fell outside the ambit of Charter protection. I doubt if this could properly be described as commercial, but in any event as I saw it, government action always falls within the Charter. It can thus serve as a model to similar activity in the general community.

A minority, Justices Wilson and L'Heureux-Dubé, reached the same conclusion by a different route, but I do not think I need enter into these differences of approach for present purposes. Where the Court really divided was on whether section 2(d) embraced a right to not associate as a concomitant to the right to associate. I, along with Justices Sopinka and Gonthier, was of the view that a truly purposive approach to interpreting section 2(d) inevitably leads one to the conclusion that freedom from compelled association must be recognized under section 2(d). As I said at the outset here, the purpose of the right of freedom of association is for the individual to realize his or her potential by acting in concert with others, and in my view: "Forced association will stifle the individual's potential for self-fulfilment and realization as surely as voluntary association will develop it".⁹ The notion of "freedom" incorporates the absence from coercion by the state to a course of action or inaction which the individual would not otherwise have chosen: *R. v. Big M Drug Mart Ltd.*¹⁰ One need look no further than the experience in Eastern Europe to understand the fundamental importance of this dual aspect to the right of freedom of association.

Justice Wilson, with Justices L'Heureux-Dubé and Cory, clearly held that there was no negative right of association, and were of the view that the issue at bar was more properly characterized as one involving freedom of expression. Justice McLachlin, in separate reasons, differed from my own only to the extent that she did not consider the payments to constitute associative conduct which would bring Lavigne into association with ideas and values to which he did not voluntarily subscribe. Although she did not feel it necessary to deal explicitly with the question of whether section 2(*d*) embraced a right not to associate, she did express support for the proposition that it did, for many of the same reasons I gave.

For my part, I do not feel it is a necessary element of forced association that there be an external manifestation of some link between the individual and the association, by which it may be inferred that the individual has identified himself or herself with an ideological cause. It is enough, in my view, that the person is compelled to associate with others against his or her will, whether or not others would think that he or she has thereby become sympathetic to the association's causes or ideals. The trilogy, as I mentioned, identified the four aspects of association as: the right to establish, belong to and maintain organizations, and to participate in their activities. In this case, the union steadfastly maintained the mandatory contribution of dues under the Rand formula, like any other union security clause, was essential for the maintenance of the organization, and it was therefore evident that the mandatory payment of dues was indeed associative conduct falling within the ambit of section 2(*d*). It was sufficient that Lavigne establish only one aspect of forced association to ground a violation of section 2(*d*), as I am firmly of the view that one need not establish compulsion under all four aspects of association for there to be a violation of the right not to associate, just as one need not demonstrate a denial of all four before a court will find an infringement of a person's right to associate.

The so-called negative right to associate, though, cannot be taken too far and it is certainly not absolute. Some balancing within the scope of section 2(*d*) is necessary so that the right is not trivialized. I drew that line at cases where people in their activities or interests can be said to be associated through the normal workings of social forces. In such cases, it is appropriate for the

legislature to require individuals to become part of a single group to further those activities or interests. The test articulated was the following:

*Where such a combining of efforts is required, and where the government is acting with respect to individuals whose association is already "compelled by the facts of life", such as in the workplace, the individual's freedom of association will not be violated unless there is a danger to a specific liberty interest such as the four identified by Professor Etherington above. This approach only applies, however, so long as the association is acting in furtherance of the cause which justifies its creation.*¹¹

Those particular liberty interests mentioned were:

*[...] [1] governmental establishment of, or support for, particular political parties or causes
[...] [2] impairment of the individual's freedom to join or associate with causes of his choice
[...] [3] the imposition of ideological conformity [...] [and 4] personal identification of an objector with political or ideological causes which the service association supports.*¹²

But the legislature cannot compel association beyond the needs of the association bred by the social forces underlying the association. Applying the foregoing to the case before me, I concluded that the payments in question constituted a compelled contribution to causes that went beyond the appropriate concerns of the bargaining unit. While Lavigne had no legitimate complaint insofar as he was forced to associate with the union on matters which naturally brought him into association with his fellow employees, such as collective bargaining of the terms and conditions of employment for members of the bargaining unit, it was quite another matter when the association moved outside the sphere of common interest for which it was created. To my mind, forced payment to ideological causes unrelated to collective bargaining does remove the association from that realm, and as such it infringes the individual's right not to associate under section 2(d). However, there is nothing impermissible about mandatory contributions *per se* where they simply represent the individual's proportionate share of the union's collective bargaining activities from which he or she derives a benefit.

I found it unnecessary to spell out precisely where the line was to be drawn in that case because of the view I took of the effect of section 1 of the Charter. Even though the forced payment of dues with the knowledge that the dues could be used to support activities that had no relevance to the founding purpose of the association ran afoul of section 2(d), I was of the view that it could be justified under section 1. Following the approach formulated in *R. v. Oakes*,¹³ I identified two closely connected objectives which were sufficiently important to warrant overriding the constitutionally protected freedom of association. The first is to ensure that labour unions can effectively participate in shaping the political environment in which labour interests will be weighed and decided. Second, it helps foster democracy in the workplace by allowing a majority to decide for itself what particular route is to be chosen in attaining its political and economic objectives through the expenditure of union dues.

I also concluded that those objectives were proportional to the means chosen to bring them about. Clearly there was a rational connection between the two, and in my view there was not a viable alternative which could realistically achieve the same objectives. For example, allowing dissenters such as Lavigne to opt out of paying dues when they are used for purposes which they find objectionable could seriously undermine the union's financial base - one of the fundamental rationales for union security clauses. Nor would I envisage any workable scheme in which the government would impose guidelines on what would be deemed legitimate union spending. Not only would that approach subvert the democratic self-governance of the union, but in practice it is extremely difficult to make principled distinctions between expenditures which are validly related to collective bargaining purposes and those which appear to some to be only tangentially or remotely related. Thus, in the end I was persuaded that section 1 of the Charter could sustain the infringement here.

What is perhaps less clear in *Lavigne* is the position taken by the Court to the issue of freedom of expression under section 2(d) of the Charter. Lavigne had argued that the compelled payments constituted an expression of support by him for the causes or ideologies which the union supported, and he was thus forced to participate in the dissemination of political views antithetical

to his own. In my view, compulsory contribution to a union does not have the requisite expressive content in order to qualify for constitutional protection under section 2(d), as describe in *Irwin Toy Ltd. v. Quebec (Attorney General)*.¹⁴ That is not to say that monetary contributions could never convey meaning, but in these circumstances it could not be said that the appellant would be regarded by any reasonable person as responsible for the use to which the money was put. At most, the union's activities would be viewed as an expression attributable to the union as a corporate entity rather than its many individual members. Accordingly, I did not feel it necessary to get into the question of whether the purpose or effect of the impugned legislation restricted freedom of expression.

Justice Wilson (Justices L'Heureux-Dubé and Cory concurring on this point), however, found that the contributions did convey meaning from the perspective of the members of the bargaining unit represented by the union. It was therefore necessary to proceed further with the analysis and determine whether the purpose or effect of the measures taken restricted the appellant's freedom of expression. As far as the purpose was concerned, Justice Wilson had no hesitation in finding that it was never the intention of government that the legislation control the conveyance of meaning. Instead, the purpose of a Rand formula union security clause is: "to promote industrial peace through the encouragement of collective bargaining."¹⁵

Justice Wilson then turned to the effect of the agency shop provision on the appellant's right to express himself freely. Here, she relied on two grounds to find that there was no such effect. First, there was no element of public identification - that is, the compelled payments did not publicly identify Lavigne with the union's activities. I felt that this element of identification was more properly a consideration at the threshold stage, when determining the existence of the necessary expressive content, in order to fall within the ambit of section 2(b). Justice Wilson also found that the appellant's claim faltered for another reason, that being a meaningful opportunity to disavow. In other words, the contributions here did not in any significant manner inhibit Lavigne from espousing a contrary view on the merits of the causes supported by the union. In the end, both Justice Wilson and I reached the same conclusion but for different reasons. There

is no clear majority one way or the other on the approaches taken, since Justice McLachlin simply stated that she agreed with her colleagues that the payments at issue do not constitute expression under section 2(b), although I like to think that her statement is more consistent with my reasons.

I hope that this overview of the developing jurisprudence in this area of Charter litigation has been of some use to you. I say developing, as I have little doubt that both unions and management will continue to use their resources in the future to advance their causes within the judicial forum. Our job never seems to end.

FOOTNOTES

1. *Lavigne v. Ontario Public Service Employees Union* [1991] 2 S.C.R. 211.
2. *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 S.C.R. 313; *P.S.A.C. v. Canada*, [1987] 1 S.C.R. 424; and *R.W.D.S.U. v. Saskatchewan*, [1987] 1 S.C.R. 460.
3. *Professional Institute of the Public Service of Canada v. Northwest Territories*, [1990] 2 S.C.R. 367 [hereinafter P.I.P.S.C.].
4. *Public Service Act*, R.S.N.W.T. 1974, c. P-13.
5. *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.
6. *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483; and *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570.
7. *Colleges Collective Bargaining Act*, R.S.O. 1980, c. 74.
8. *Ministry of Colleges and Universities Act*, R.S.O. 1980, c. 272.
9. *Supra* note 1 at 318.
10. *R. v. Big M Drug Ltd.*, [1985] 1 S.C.R. 295 at 336.
11. *Supra* note 1 at 329.
12. t
Ibid. at 328.
13. *R. v. Oakes*, [1986] 1 S.C.R. 103.
14. *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.
15. *Supra* note 1 at 271.