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Analysis of the Charter and its application to Labour Law

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This paper: (1) lists the provisions of the *Charter of Rights and Freedoms*[1] which may have relevance to labour law; (2) suggests a possible framework for analysis of the provisions, and; (3) applies the provisions and analysis to aspects of labour law.

I. *Provisions of Charter*

1. *Application of Charter*

Section 32(1) states that the *Charter* applies to Parliament, the legislatures and to the federal and provincial governments. The question remains whether the actions of a private person or organization, not under the *aegis* of government or authority of legislation, may be challenged for violation of the *Charter*. Section 32 is under the title "Application of Charter", and likely will be interpreted to impliedly exclude application to private actions not pursuant to legislation.

On the other hand, s. 52(1) states that the *Charter* is the "supreme law of Canada," s. 1 affirmatively "guarantees" the rights and freedoms, and ss. 2-15 affirmatively grant the rights variously to "everyone," "every" citizen or permanent resident or "every" individual. There is no express exclusion of the *Charter's* application to actions of private individuals or organizations.

2. *Substantive Rights and Freedoms*

The following substantive rights and freedoms guaranteed by the *Charter* may have bearing on labour law. The preamble recognizes "the rule of law." Section 2 accords to everyone the fundamental freedoms of: "conscience and religion"; "thought, belief, opinion and expression including freedom of the press and other media of communication"; "peaceful assembly"; and "association." Section 6(2) accords to every citizen and permanent resident the right to

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1. *Canada Act, 1982* (U.K.), 1982, c. 11.

move to any province and to "pursue the gaining of a livelihood in any province."

Section 7 accords to everyone the right to "life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 15(1) states:

> Every individual is equal before and under the law and has the right to the equal protection and 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.

By s. 32(2) this provision will not come into force until 1985.

The *Canada Act* describes other democratic, legal, and language rights which should not have direct bearing on labour law. By s. 26, the guarantee of rights by the *Charter* does not deny the existence of other rights and freedoms which exist outside the *Charter*.

3. *Limitations on the Substantive Rights and Freedoms*

The only limitations upon these substantive rights and freedoms are by express legislative exclusion under s. 33 or judicial interpretation under s. 1.

Section 33 authorizes Parliament or a legislature to expressly state in a statute that the statute shall operate notwithstanding the following sections of the *Charter*: s. 2 (fundamental freedoms), ss. 7-14 (legal rights) or s. 15 (equality). The legislative exclusion will expire unless re-enacted after five years. By s. 28, the legislative exclusion may not interfere with sexual equality. Section 1 authorizes a court to restrict the rights and freedoms to "such reasonable limits prescribed by law as can be demonstrably justified in a free and a democratic society."

4. *Consequences of Contravention of Charter*

If an individual has suffered interference with his substantive rights or freedoms guaranteed by the *Charter,* and if the interference is not justified under ss. 1 or 33, what are the consequences? By s. 52(1), any law inconsistent with the guaranteed right or freedom is of no force or effect. So no tribunal or other authority could apply, exercise or enforce the law. Section 32(1) states that the *Charter* applies to the Parliament, the legislatures and federal and provincial governments. So a governmental action which contravenes the guaranteed right or freedom may be challenged.

By s. 24(1) "anyone whose rights or freedoms, as guaranteed by the *Charter*, have been infringed or denied" may apply to a court for such remedy as the court considers appropriate. By s. 24(2) this may include exclusion of evidence obtained in violation of the *Charter* if admission "would bring the administration of justice into disrepute."

II. *Framework of Analysis of Charter*

1. *Effect of Interpretation of Canadian Bill of Rights*

The courts have restrictively interpreted wording in the *Canadian Bill of Rights* that is quite similar to the guarantees in the Charter. The *Canadian Bill of Rights*[2] is a statute, and was interpreted restrictively because it was not constitutionally entrenched. In *Curr* v. *Queen*[3], Laskin, J. stated:

> Assuming that 'except by due process of law' provides a means of controlling substantive federal legislation-a point that did not directly arise in *R.* v. *Drybones*-compelling reasons ought to be advanced to justify the Court in this case to employ a statutory (as contrasted with a constitutional) jurisdiction to deny operative effect to a substantive measure duly enacted by a Parliament constitutionally competent to do so, and exercising its powers in accordance with the tenets of responsible government which underlie the discharge of legislative authority under the *British North America Act 1867*. These reasons must be related to objective and manageable standards by which a Court should be guided if scope is to be found in s. 1(a) due process, to silence otherwise competent federal legislation.[4]

This statement has been applied repeatedly to limit the interpretation of the "due process" phrase in s. 1(a) of the *Bill of Rights*,[5] the guarantee of "equality before the law" under s. 1(b)[6] and fundamental freedoms such as freedom of speech in s. 1(d).[7]

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2. *The Canadian Bill of Rights*, S.C. 1960. c. 44 (see also R.S.C. 1970, Appendix III.).
3. (1972), 26 D.L.R. (3d) 603 (S.C.C.).
4. *Id.*, at 613-14.
5. *R.* v. *Morgentaler* (1975), 4 N.R. 277 (S.C.C.), at 323-24.
6. *R.* v. *Burnshine* (1974), 2 N.R. 53 (S.C.C.) at 66; *Bliss* v. *A.G. Canada* (1978), 23 N.R. 527 (S.C.C.) at 536-27; *Marchak* v. *A.G. Canada* (1980), 116 D.L.R. (3d) 397 (F.C.A.), affirming (1980), 102 D.L.R. (3d) 745 (F.C.T.D.) at 753.
7. *Gordon and Gotch Canada Ltd* v. *Minister of National Revenue* (1978), 20 N.R. 467 (F.C.A.) at 472-73.

The consequences of this restrictive interpretation have been most apparent respecting the guarantee of "equality before the law" in s. 1(b). Under the guarantee of "equal protection of the laws" in the 14th amendment of the American Constitution, courts have struck down legislation or state action which discriminates against individuals on the basis of factors which the judges consider to be invidious according to judically-determined standards external to the legislation. Canadian courts, on the other hand, have stated that "equality before the law" in s. 1(b) is satisfied if the federal legislation is enacted for a "valid federal objective," interpreted to mean virtually any objective which is *intra vires* under s. 91 of the *British North America Act*[8] (hereafter the *B.N.A. Act*) (now *Constitution Act, 1867*). Legislation which discriminates against Indians satisfied "equality before the law" because Parliament has constitutional jurisdiction to legislate respecting "Indians" under s. 91(24) of the *B.N.A. Act*.[9]

There have been several exceptions where judges have applied standards external to the legislation in order to test whether the legislation satisfies the standard of "equality before the law" in s. 1(b).[10] The weight of authority, however, has reduced the determination a question-begging exercise. However the statute discriminates, there is "equality before the law" if the statute was enacted for a "valid federal objective", being almost anything within federal legislative jurisdiction.

The courts understandably have been reluctant to use a statutory bill of rights to strike down *intra vires* legislation. The entrenchment of the *Charter* should remove this inhibition. Legislation must now be reviewed on substantive grounds according to standards external to the statute. The rationale for the approach under the *Canadian Bill of Rights* no longer exists. The courts should start afresh their analysis of the entrenched *Charter,* and the

8. *R.* v. *Burnshine* (1974), 2 N.R. 53 (S.C.C.) at 66; *Prata* v. *Minister of Manpower and Immigration* (1975), 3 N.R. 484 (S.C.C.); *Bliss* v. *A.G. Canada* (1978), 23 N.R. 537 (S.C.C.) at 536-37; *R.* v. *McKay* (1980), 33 N.R. 1 (S.C.C.) at 7-8; *Marchak* v. *A.G. Canada* (1980), 116 D.L.R. (3d) 397 (F.C.A.), affirming (1980), 102 D.L.R. (3d) 745 (F.C.T.D.) at 759.

9. *Canard Estate* v. *A.G. Canada* (1975), 4 N.R. 91 (S.C.C.) at 109, 117-18; *A.G. Canada* v. *Lavell* (1973), at 38 D.L.R. (3d) 481 (S.C.C.) 489.

10. *R.* v. *Drybones,* [1970] S.C.R. 282; *R.* v. *McKay* (1980), 33 N.R. 1 (S.C.C.) at 21-3, *per* McIntyre, J. concurring; *Bliss* v. *A.G. Canada* (1977), 16 N.R. 254 (F.C.A.) *per* Pratte, J., affirmed (1978), 23 N.R. 527 (S.C.C.).

jurisprudence under the *Canadian Bill of Rights* should have minimal precendential value. The early case law under the *Charter* indicates that the courts may take this approach.[11]

2. *Legitimacy of Judical Role under the Charter*

Under the *Charter,* the court must determine whether statutory provisions or policy-based decisions of government should be struck down on substantive grounds. While challenging the political expression of the government, the court will remain a judicial body. The legislature and executive control finances and law enforcement. The court relies for these functions upon government, and indirectly upon respect for the judiciary by the government's popular constituency. Further, the court relies directly upon respect of the people and governments for the voluntary compliance with its judgments necessary for effective operation of the judicial system.

The legislature and executive find legitimacy for their political decisions in the electoral consent of the people. A tenured judge has no constituency or electoral process to justify political decisions. Without some accepted objective standard from which to reason a judge under a bill of rights would be in an impossible position: he would have to know better than the people know themselves, and to make political decisions better than the politicians. These political decisions would vary from judge to judge and from time to time. Collegiality in a court would be most difficult to maintain.

Political whim may be appropriate for a legislature. Popular dissatisfaction is directed more to the incumbent politicians than to the legislative system. An election is the outlet. Popular dissatisfaction with judicial decisions has no outlet except disrespect for the judicial system, which impairs the effectiveness of the judiciary.

Several commentators have considered this question and concluded that the court under a bill of rights should base its judgment on a foundation of "legitimacy."[12] This means that the Court must exercise its judgment according to standards other than the political opinions of the judge, namely objective standards

11. *R.* v. *Pugsley* (1982), 55 N.S.R. (2d) 163 (S.C.A.D.) at 166; *Re Section 94(2) of the Motor Vehicle Act* (B.C.C.S., February 3, 1983); *Re Skapinker* (O.C.A.), January 27, 1983.

12. See Cox, *The Role of the Supreme Court in American Government* (New York: Oxford University Press, 1976).

which command popular respect. Popular consent is essential for a legislature; popular respect is essential in the long run for a court.

This has not always been easy. In the early decades of this century, the American courts struck down legislation which redistributed wealth as supposedly violating "due process of law" under the 5th and 14th Amendments. By the time of the Great Depression, people questioned the right of the Supreme Court to act as a supra-legislature. The Court had overreached its "legitimacy." President Roosevelt threatened to pack the Supreme Court with New Deal sympathizers. Judicial reasoning began to reflect the popular views, and substantive due process abated.

How then to achieve "legitimacy" under the Canadian *Charter?* The answer is not for the court to avoid the functions of review commanded by the *Charter*. To interpret the *Charter* as restrictively as the courts treated the *Canadian Bill of Rights* would be as "illegitimate" within the above meaning as excessive intervention. The Court would be seen as an appellate legislature repealing individual rights guaranteed and entrenched in a popularly supported and validly enacted constitution.

The American experience with substantive due process is perhaps a lesson in "legitimacy." The court if possible should avoid basing its judgment upon principles which may change with shifts in popular outlook and political circumstances. Rather, the court should base its judgment upon objective and permanent standards. This will only take the court part of the way. It must then deduce from the constitutional postulates in a manner unlike the inductive reasoning of the common law.

Euclidian deduction will be simpler in theory than in practice. Value-laden judgments will be inevitable. In Canada though, objectivity for the standards will be more accessible than in the United States. Section 1 of the Canadian *Charter* entrenches broad principles which define the limits of all the guaranteed rights and freedoms. A judge may draw his postulates from s. 1 instead of his personal view of natural law. The development of a balanced and coherent philosophy under s. 1 will be important for the legitimacy of the judicial role under the *Charter*.

3. *Section 1 of the Charter*

Section 1 of the *Charter* guarantees the rights and freedoms "subject only to such reasonable limits prescribed by law as can be

demonstrably justified in a free and democratic society''. Each time a court invokes one of the rights or freedoms, the court must determine whether the infringement is justified under s. 1.

The Victoria Charter, 1971, Article 3 stated:[13]

> Nothing in this Part shall be construed as preventing such limitations on the exercise of the fundamental freedoms as are reasonably justifiable in a democratic society in the interests of public safety, order, health or morals, of national security, or of the rights and freedoms of others, whether imposed by the Parliament of Canada or the legislature of the Province, within the limits of their respective legislative powers, or by the construction or application of any law.

The Final Report of The Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada,[14] 1972, Recommendation 21, stated:

> The rights and freedoms recognized by the Bill of Rights should not be interpreted as absolute and unlimited, but should rather be exercisable to the extent that they are reasonably justifiable in a democratic society.

The proposed Constitutional Resolution of October, 1980 stated:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government.

The Special Joint Committee substituted the present wording of s. 1 by an amendment of January 22, 1981.

The *Charter* retained the basic test of the Joint Committee of 1972 with the addition of the requirements that the limitations be ''prescribed by law'' and be ''demonstrably'' justified in a ''free'' as well as a democratic society.

Under s. 1 of the *Charter,* the infringement is justified if (1) the infringement is prescribed by law and is (2) demonstrably (3) a reasonable limit in a ''free and democratic society''.

The first condition raises the question to what extent an infringement may be prescribed by common law or subordinate legislation. Sections 1 and 52(1) each refer to ''law''. It may be argued that whether the reference to ''law'' includes common law

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13. Canadian Constitutional Charter, 1971 (Victoria Charter, 1971) Article 3 in *Constitutional Conference Proceedings* (June 14, 1971) at 52.
14. Can. *The Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada* (Ottawa: Queen's Printer, 1972) at 18.

should be considered in the same manner under both sections. The Ontario Divisional Court has stated that limits whose standards are left to the unbridled discretion of a tribunal are not "prescribed by law".[15]

The second condition probably means that the onus to show the existence of the other conditions is upon the party who seeks to justify the infringement.

The third condition requires more analysis. It could be argued that any infringement prescribed by statute is justifiable in a "democratic" society. The additions of the *Charter* to the formulation of the Joint Committee make clear that an infringement will not be justified merely because it is prescribed in a democratically enacted statute. This is because: (1) the requirement that the infringement be prescribed by law is stated elsewhere, and a repetition of this test would be tautological; (2) the infringement must be justified in a "free" as well as a democratic society; (3) the infringement must be "reasonable" which implies an objective standard external to the challenged statute, and; (4) the interpretation would render s. 52(1) meaningless.

On the other hand, s. 1 clearly contemplates some restrictions upon the unbridled rights and freedoms in the *Charter*. Total license to disobey the laws of the legislative majority is "free" but not "democratic." Section 1 makes sense only if the words "free" and "democratic" are interpreted to be mutually consistent. This affords a theoretical framework. The word "democratic" invokes the ideal against which to measure the actual. An ideal democracy draws its sustenance from the rights and freedoms guaranteed by the *Charter*. The Committee on the Constitution of the Canadian Bar Association[16] stated:

> A more particularized objection is that a Bill of Rights offends against the doctrine of the supremacy of Parliament. While this is true to a degree, that doctrine combined with a Bill of Rights can be seen as naturally supportive of the democratic system.
>
> A democracy is the basis and prerequisite for the operation of the supremacy of Parliament. That being so, it would seem justifiable to entrench in a Constitution principles which are prerequisite to the existence of democracy. Democracy is the periodic determination of the common will by the free expression of the genuine and informed will of the individual. There must be

15. *Re. The Theatres Act* (O. Div. Ct.), March 25, 1983.
16. *Towards a New Canada,* (Montreal: Canadian Bar Foundation, 1978).

> freedom of thought, conscience and opinion, or there can be no expression of the genuine will of the individual. There must be freedom of information, assembly and association, or there can be no expression of an informed will of the individual. There must be freedom of speech, or there can be no "expression" of the will of the individual at all. There must be universal suffrage and free elections, representation by population and required sittings and elections of legislative institutions, or there can be no 'expression of the common will'. The right to privacy is a prerequisite to freedom of speech, expression, thought, conscience, opinion, assembly and association. It is inconsistent to guarantee these rights directly when a person's knowledge that his privacy may be violated will indirectly inhibit the exercise of the guaranteed rights. All the above rights are prerequisite to the proper exercise of democracy, which in turn is a prerequisite to the proper operation of the principle of the supremacy of Parliament. There is, therefore, no conflict between the entrenchment of these rights and the principle of the supremacy of Parliament.
>
> Supremacy of Parliament means supremacy to create law. Law will only operate effectively if it is enforced by an impartial tribunal after giving all sides equal opportunity to present factual and legal arguments. It is therefore a prerequisite to the proper operation of the principle of the supremacy of Parliament that the courts apply principles of natural and fundamental justice.[17]

Under this model, interference with the fundamental freedoms in s. 2 would not be justified in a free and democratic society to the extent that these freedoms nourish ideal democratic principles and foster the determination of truth as the premise of ideal democracy. Infringement with legal rights guaranteeing fundamental justice would not be justified insofar as the legal rights ensure that the tribunal accurately determines and applies the facts and law as intended by the ideal legislature and presumably the actual legislature.

An element of ideal democracy is a safeguard against undue oppression of the minority by the majority. This applies whether the regime is a corporation, bargaining unit or political unit. Certain discriminatory actions or classifications inherently may be without legitimate purpose. By s. 15(1) every individual is equal before and under the law and has the right to equal protection and benefit of the law "without discrimination." Race, nationality, and sex are examples of illegitimate classifications, but are not exclusive. The courts will have to determine what other actions or classifications

17. Id., at 16.

are inherently illegitimate in an ideal democracy which protects the minority against undue oppression by the majority. To that extent infringement of the Equality Rights would not be justifiable under s. 1.

The theory of the *Charter* would be to ensure that the organs of government conform as closely as possible to the model of ideal democracy. Beyond this, the control of government would be left to political rather than judicial review, and the protection of rights and freedoms would be left to statutory human rights codes. This approach would not be entirely consistent with the American approach. The American Bill of Rights and its interpretation owe much to the philosophy of John Locke.[18] Locke felt that rights and freedoms belonged naturally to individuals without government. Government could not create rights, but further to the social contract among individuals could act only as a fiduciary to better guard the rights and freedoms of the individuals. So, an individual may enjoy and enforce the fundamental rights not specified in the Bill of Rights, a principle implicit in the American 9th Amendment. A corollary is that the rights and freedoms may take a life of their own and may not necessarily be restricted to the limits necessary to ensure the effective operation of democratic government. Thus American courts have found entrenched rights such as the right to privacy unspecified in the constitution but embedded in the "penumbra" of the Bill of Rights.

Section 26 of the *Charter* is similar to the American 9th Amendment and may well provide a basis for an argument that constitutional guarantees of Canadians be interpreted as broadly as in the United States. But with Canada's traditions of supremacy of parliament and reduced emphasis on sovereignty of the individual, the word "democratic" in s. 1 might be interpreted to delimit "free" instead of the reverse. If so, it is hoped that the courts interpret "democratic" as the ideal not the actual. This would exclude the notion prevalent under the *Canadian Bill of Rights* that a statute democratically enacted is beyond review.

Most of the cases under the *Charter* have not analysed s. 1 in depth or with precision. In *Quebec Association of Protestant School Boards* v. *A. G. Quebec*[19], Chief Justice Deschenes analysed s. 1 differently than suggested above. His Lordship stated that: (i) the

18. Locke, *Second Treatise on Civil Government* (London: George Routledge, 1903).
19. (1982), 140 D.L.R. (3d) 33 (Q.S.C.) at 53-89.

party seeking to limit the fundamental right or freedom has the onus to prove all the elements of s. 1; (ii) the limit must be prescribed by "law"; (iii) the limit must be "reasonable" and; (iv) the limit must exist in a "free and democratic society". Chief Justice Deschenes considered items (iii) and (iv) separately. He found that Quebec society was "free and democratic" which satisfied condition (iii). He stated that a limit would be "reasonable" if it was "a proportionate means to attain the purpose of the legislation." The difficulty with this pattern of analysis is that it may well be argued that the purpose of an enactment is to do no less than what the enactment says. The Court would either apply a question-begging test similar to the "valid federal objective" under the *Canadian Bill of Rights,* or would engage in policy review without an objective standard to gauge whether the words of the enactment are disproportionate to its purpose. A statute whose purpose is to infringe a guaranteed right or freedom would be justified under section 1.

III. *Application to Labour Law*

To a considerable degree, the application of the *Charter* to labour law involves the management of reformulation of familiar concepts. The hard decisions will be to determine the effects of constitional entrenchment of these concepts.

1. *Application of the Charter*

A fair argument can be made that the *Charter* applies to all disputes, including those between private individuals unrelated to statute or government action. Under s. 52(1) the *Charter* is the "supreme law of Canada" and any inconsistent law is of "no force and effect." So, the *Charter* could prevail over common law as well as statute, and a private law suit could draw from the *Charter* to the extent that it is inconsistent with common law principles. But s. 32(1) of the *Charter* applies to the federal and provincial governments, and might arguably affect execution by government action on a private judgment.

It is more likely that the *Charter* will be limited to government and legislative action. These limits are expressed in s. 32(1), and are consistent with the possible interpretation of s. 1 to guarantee only those rights and freedoms needed for ideal democratic government.

Actions of government as employer should be fully susceptible to challenge for breach of the guarantees in the *Charter*. Quasi-governmental organizations such as publicly-funded universities or hospitals, or activities which depend on a high degree of government intervention may be similarly affected. American courts have held that functions of state universities may be "state action" subject to the Bill of Rights.

The application of the *Charter* through legislation raises many interesting questions. Certain unions in the public sector are incorporated by private statute. It may be argued that the actions of the union exist because of the legislation and may be challenged for breach of the *Charter*. It may as reasonably be argued that the actions of any corporation incorporated under companies legislation may be challenged. These propositions might stretch the principle too far.

A strong argument can be made that the bargaining and enforcement functions of a union certified as exclusive bargaining representatives under general provincial labour relations legislation are subject to the *Charter*. American courts have accepted this argument, at least under The Railway Labour Act.[20] In *Michaels* v. *Red Deer College*[21] Chief Justice Laskin appeared unsympathetic to a similar argument. Nonetheless, as certified bargaining agent, the union may bind employees in the unit to a collective agreement and may make decisions respecting the enforcement of that agreement, against the will or interests of particular individuals within the unit. The trade union legislation requires the employee to accept the certified union as his exclusive bargaining agent, obligates the employer to bargain in good faith, provides that the collective agreement binds the employee, and specifies the method of settlement of disputes under the collective agreement by arbitration or otherwise. If the union negotiates or enforces the agreement in a manner which deprives an individual in the unit of a right or freedom guaranteed by the *Charter*, the employee might reasonably say that his right or freedom is denied because of the authority vested in the union under the trade union legislation. The union's action might be challenged for violation of the *Charter*. If the statute could not deprive the individual of his right or freedom

20. *Railway Employees* v. *Hanson* (1956), 391 U.S. 225. *IMA* v. *Street* (1961), 367 U.S. 740. *Steele* v. *Louisville & Nashville R.R.* (1944), 323 U.S. 192.
21. (1975), 5 N.R. 99 (S.C.C.) at 118.

directly, then presumably the statute could not authorize an intermediary to deprive the individual against his will. The Ontario Labour Relations Board has ruled that, as a statutory tribunal bound by statutory standards, it will apply the Charter to labour relations in the private sector.[22]

The question may arise whether arbitration under a collective agreement is subject to the prescriptions of the *Charter*. Again, the arbitration clause of the agreement binds the employee because of the trade union legislation. Some statutes require arbitration, while others require final settlement by arbitration or "otherwise." Arbitration is often the required method in the construction industry. Arbitration awards are enforceable according to arbitration statutes. A reasonable argument could be made that the arbitration award sufficiently depends on the legislation to subject the proceedings to the *Charter*.

Even if the *Charter* may apply under s. 32(1) to various aspects of the negotiation and enforcement of collective agreements, the subjection of the individual to the group interest under the trade union act legislation may be protected as a justifiable limitation in a free and democratic society under s. 1.

It is difficult to see how internal union action may be subjected to the *Charter*. Trade union legislation may give the union legal status for purposes of litigation, negotiation, or enforcement of collective agreements.[23] It is the union's constitution and by-laws which authorize most internal action, such as discipline. Neither government action nor legislation establishes the union's constitution or by-laws. A union whose constitution discriminates racially or denies a fundamental freedom may suffer under human rights legislation or before the Labour Relations Board. Unless the courts extend the application of the *Charter* beyond s. 32(1), it is unlikely that such action may be challenged constitutionally.

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22. *International Ladies Garment Workers Union & Third Dimension Manufacturing Limited* (1983), 83 C.L.L.C. 16.022 at pp. 14.200-14.202.

23. *Teamsters* v. *Therien,* [1960] S.C.R. 256; *O'Laughlin* v. *Halifax Longshoremen's Association* (1978), 28 D.L.R. (3d) 315 (N.S.S.C.A.D.); *Maritime Employers' Association* v. *International Longshoremen's Association* (1978), 3 N.R. 386 (S.C.C.).

2. *Freedom of Association*

The premise of labour relations legislation is the association of individual workers to equalize their bargaining power against an employer whose resources usually comprise a concentration of capital or an association of shareholders. The guarantee of freedom of association in s. 2(d) of the *Charter* should protect the fundamental rights of employees to organize, at least without interference from government or private persons acting under the authority of legislation. American courts have struck down ordinances which require licenses before union organizers could solicit members and legislation which prohibits public sector employees from joining unions. Anti-union discrimination by government employers might give the employee a constitutional cause of action under the *Charter*. The Ontario Labour Relations Board has held that a statue which interferes with collective bargaining but not with the employees' choice of a bargaining agent does not infringe upon freedom of association under the Charter.[24] Unless the courts apply the *Charter* to non-governmental action, interference with unionization by private employers should not have constitutional implications.

Unions may find that freedom of association is a double-edged sword. It has been argued that the necessary concomitant of freedom to associate is freedom not to associate. An employee is only free to associate when he has a choice. So, employees may have a constitutionally protected right to abstain from joining a union. Freedom of association in the Irish, West German and Indian constitutions has been interpreted to imply a right of the individual to disassociate from a union.[25] Similar challenges have been attempted but have failed under the implied freedom of association in the American 1st Amendment. The American courts have upheld the union security provisions, but have placed some restrictions on a union's spending of compulsory check-off funds for political purposes against the will of individual employees.[26]

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24. *Service Employees Union* v. *Broadway Manor Nursing Home* (1983), 83 C.L.L.C. 16.019 at pp. 14.177-8.

25. See A. Staines, *Constitutional Protection and the European Convention on Human Rights — An Irish Joke?* (1981), 44 Mod. Law Rev. 149; J. Casey, *Some Implications of Freedom of Association in Labour Law: A Comparative Survey with Special Reference to Ireland* (1972), 21 Int'l and Comp. L.Q. 699.

26. *Railway Employees* v. *Hanson* (1956), 351 U.S. 225; *IMA* v. *Street* (1961), 367 U.S. 740; *Abood* v. *Detroit Board of Education* (1977), 431 U.S. 209.

Union security provisions, either maintaining union membership as a condition of employment or mandatory check-off, are authorized by most collective agreements and by provincial trade union legislation. The Canadian courts will probably determine one day whether the *Charter* guarantees a freedom of "non-association" which protects an employee dismissed because he had not joined the union or signed a check-off card.

Analysis of the concepts of freedom of association and disassociation must start with the purpose of the union under labour legislation. The employer is backed by a concentration of capital. Unless employees associate, the countervailing bargaining power of the individual will be no match and the individuals in the unit will suffer under contracts of adhesion with their employers. Solidarity is essential for effective union action. Striking down the union shop or a mandatory check-off under a constitutional freedom of "non-association" will engender friction and dissent within the unit. Employees could obtain the benefit of collective bargaining in the unit without paying the price by union membership or dues. Employees who pay this price would resent the free riders. Solidarity could disappear, and the benefactor would be the employer at the expense of every individual employee in the unit. Freedom of "non-association" which impairs the effective representation of all employees by the union is a mirage.

3. *Freedoms of Thought, Belief, Opinions, Expression and Assembly*

Unions and employers may have different standards of protection of freedom of speech under the *Charter*. Challenges to an employer's freedom of speech generally arise under the unfair practice provisions of the labour relations legislation, usually respecting employer speech to employees during the union's organizing campaign. The *Charter* applies to legislation, so the employer will have the opportunity to challenge these legislative infringements on its speech. Picketing is the form of union speech most frequently challenged. Restraint upon picketing is often authorized by the common law of tort. The *Charter* may not apply to the common law, and the union may not be able to take full advantage of the guarantee of free speech in order to protect its picketing activity. The applicability of the *Charter* to common law may well be tested in the picketing context.

Free speech is meant to permit appeal to reason, so that the interlocutor may assess the information and determine a course of action. Such free speech by employer or union should be protected, to the extent of the *Charter's* application. The Constitution should not protect communication which exceeds an appeal to reason, but contains an express or an implied threat. The difficulty is to determine which conduct contains implied threats or innuendo beyond communication of fact, opinion and appeal to reason.

Employer speech to employees during a union organization campaign may easily contain an implied threat of repercussion for supporting the union. The threat need not be expressed. The employees know that the employer does not want the union. The employer may frame its words in the form of a "prediction" of consequences rather than a threat. In form, the employer's speech is unimpeachable, but the employee gets the message. This may affect the supposed free will of the employee and his decision whether to vote for the union.

The labour relations boards have devised various tests to govern employer free speech. The standards of review have ebbed and flowed from time to time with the prevailing attitudes towards unions. There have been various formulations, such as the "captive audience" and "laboratory conditions" doctrines, requirements of equal access to the employees by union and employer, and prohibitions against speech by either union or employer within a specified period before the representation vote. Generally, however, a careful employer with good legal advice may craft his words so that his speech will not be an unfair practice. Latent threats and silent assumptions are difficult to establish by evidence.

The ideal would be to give the union and employer equal opportunity to appeal to the reason of employees, with the employees free to decide whether to listen. The speech should contain only accurate information, and the representation vote reflect purely the free will of the employees in the unit. This speech would be "free" and protected by the *Charter*. Determinations can only be made on a case-by-case and factual basis, and the board or court would review the substance of the speech not the form.

Employer free speech bears interesting comparison to union free speech in the form of picketing. Picketing may have different purposes. Some picketing is intended to be solely informational, to communicate facts to anyone who may read the placard. Other picketing may be for the purpose of placing economic pressure upon

the person who is picketed. In the latter case, the pickets impliedly communicate that individuals are requested not to cross the picket lines. This is the real message, and the words on the placard are incidental.

It is tempting to say that this message is an implied threat exceeding the bounds of protected speech. This is not necessarily correct. The message received by the person who approached the picket line might be: This union wishes to place economic pressure upon the person who is picketed. I also belong to a union, or I support union objectives. Union objectives, either mine or theirs, succeed only by solidarity against the countervailing economic power of the employer. So I will maintain solidarity and I will not cross the picket line, because I agree with the principle and perhaps these persons will return the favour when my union is on strike and I am on the picket line.

The message appeals to the reason of the recipient, who decides not to cross the picket line of his own free will, either because he believes in the principles of solidarity or feels that solidarity may in the future benefit him reciprocally.

Picketing may well contain implied threats of violence or repercussion. Such activity would not be protected free speech. But, as with the employer speech discussed above, each case should depend upon the circumstances. The question should be whether the message interfered with the free will of the recipient. This is largely a question of fact. The courts have often treated the question as one of law, for instance stating that certain types of picketing are *per se* illegal, whatever the message communicated and the state of mind of the recipient. To the extent that the *Charter* applies to picketing, it may be that in certain circumstances unions will attempt to justify as free speech picketing which to date has been presumptively illegal.

Another consequence of the Charter might be to narrow the breadth of injunctions issued to restrain picketing. At present, once the employer shows illegal activity separable from the picketing, the court may enjoin both the activity and the picketing itself. If the free speech component of picketing is protected under the *Charter* then at least in cases where the illegal activity and the picketing are separable, the courts might issue "bullet" injunctions restraining the illegal acts, but not the protected free speech component. The Ontario Divisional Court has ruled that, even when a prior restraint of free expression is justified under Section 1 of the *Charter,* the

restraint will be invalid unless the standards for the exercise of the restraint are prescribed by law.[27] This principle might narrow the wording of injunctions against picketing protected as free speech.

To the extent that picketing is free expression guaranteed by the Charter, the courts will be required to resolve conflicts between the freedom of expression of the employees and the union and the property rights of the employer. Free speech might justify the union in soliciting union membership among employees, but the question will remain whether the union may require the employer to give access to the employer's premises for this purpose. Property rights in the United States are constitutionally protected under the 5th Amendment, which prohibits deprivation of property without due process of law, and which applies to the states through the 14th Amendment. The Canadian *Charter* pointedly omits reference to property rights, and s. 7 does not guarantee fundamental justice before an individual may be deprived of property. It may be, therefore, that constitutionally protected free speech will have greater prevalence over property rights in Canada than in the United States.

The issue has come to a head in cases which involved picketing on quasi-public property, such as shopping centres. These are privately owned properties given to public access. The American courts have differed in their assessment of the balance between protected free speech and protected property rights.[28] The Supreme Court of Canada has expressed reluctance to consider the broad social and economic issues of this question in the absence of constitutionally entrenched guidelines.[29]

Freedom of political belief probably will be protected more meticulously by the *Charter* than non-political modes of speech. The American courts have generally held that the union may not, against the will of an individual employee, use his contributions under a compulsory checkoff to support political or ideological campaigns unrelated to negotiation or enforcement of the collective agreement.[30] The Canadian courts have not considered this question

27. *Re Ontario Film and Video Application Society and Ontario Board of Censors*(O. Div. Cf), March 25, 1983.
28. *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza Inc.* (1968), 391 U.S. 308; *Lloyd Corporation Ltd.* v. *Tanner* (1972), 407 U.S. 551.
29. *Harrison* v. *Carswell* (1975), 5 N.R. 523 (S.C.C.) at 529-31.
30. *IMA* v. *Street* (1961), 367 U.S. 740; *Abood* v. *Detroit Bd. of Educ.* (1977), 431 U.S. 209.

in a constitutional context, although the Supreme Court of Canada has upheld provincial legislation which prohibits political contributions by unions.[31] This case might well be decided differently under the *Charter*. An individual employee might be able to prevent a union from spending the employee's contributions for political purposes with which the employee disagrees. But, when there is no question of dissent by an employee, it may be doubted whether legislation may prevent a union from making political contributions in the face of the guarantees of freedom of political belief and expression in the *Charter*.

Political expression by public servants should have constitutional implications under the guarantee of freedom of thought and expression. The American courts have approached this question from different angles, with varying results. The courts have upheld the Hatch Act which restricts partisan political activity by federal public servants.[32] On the other hand, the courts have held that a government may not condition employment upon the waiver by an employee of his constitutional rights. So, public employees who are dismissed for publicly criticizing the government have successfully challenged their dismissals on constitutional grounds.[33] Finally, the American courts have held that dismissal of public employees for reasons of political affiliation is an unconstitutional interference with the rights of those employees to freedom of political thought and expression. Generally, patronage dismissals are justified only when the employer can demonstrate some rational relationship between the functions of the job and the political beliefs of the employee.[34]

There are competing interests involved in determining the extent of a public servant's free speech on a political question. In one sense, he should have the same freedom to speak as any other individual whose rights are guaranteed by the *Charter*. *The Charter* applies specifically to governments, and only indirectly under a

31. *Oil, Chemical & Atomic Workers International Union Local No. 16-601* v. *Imperial Oil Limited*, [1963] S.C.R. 584.
32. *Union Public Workers* v. *Mitchell* (1947), 330 U.S. 75; *Civil Service Comm.* v. *National Assoc. of Letter Carriers* (1973), 414 U.S. 548.
33. *Keyishian* v. *Board of Regents* (1967), 385 U.S. 589; *Pickering* v. *Bd. of Education* (1968), 391 U.S. 563; *Perry* v. *Sindermann* (1972), 408 U.S. 593; *Mt. Healthy City School District Bd. of Educ.* v. *Doyle* (1977), 429 U.S. 274; *Givhan* v. *Western Line Cons. School District* (1979), 439 U.S. 410.
34. *Elrod* v. *Burns* (1976), 427 U.S. 347; *Branti* v. *Finkel* (1980), 100 S. Ct. 1287.

statute to the private sector. So, it may be argued that the actions of the government employer are subject to special constitutional scrutiny. On the other hand, criticism by government representatives of the policies that the government is elected to implement may to some extent undermine the democratic ideal established in s. 1 of the *Charter*.

Freedom of speech may have special significance to employees for whom speech is a function of the job. The media, for example, are expressly included in the guarantee of free expression. Persons in the teaching profession cherish academic freedom. The courts may one day have to determine the extent to which government employers or private parties under collective bargaining statutes may interfere with the speech of such employees.

4. *Mobility*

Section 6 of the *Charter* guarantees to every individual the right to move to any province and pursue the gaining of a livelihood in any province, subject only to the laws of general application except those which discriminate primarily on the basis of province of present or previous residence. This might jeopardize the provisions of certain civil service statutes which give preference to provincial residents, unless these are justified under s. 6(4) as economic affirmative action for provinces where the rate of employment is below the national average. If collective bargaining in the private sector is affected by the *Charter* by virtue of the exclusive representation granted in trade union legislation, then s. 6 might adversely affect hiring practices established under certain collective agreements.

This could have its greatest impact on collective agreements with province-wide units and hiring hall systems. In the construction industry, the province is divided into sectors and employers' associations are accredited to bargain with the unions representing the trades. Generally, construction employers obtain employees from lists kept by the unions. Usually there is one list for each local. The union constitutions may provide for transfer of an employee from one local to another if the employee obtains a working permit from his new local. Without the union's permission, the employee will not be able to practice his trade in the new local. Even if the employee is admitted, the union locals would not dovetail their lists in order of seniority and the transferred employees would appear on the bottom of the list.

Work in the construction industry is transient and intermittent. The hiring hall system has a tendency to inhibit inter-local mobility by construction workers. There may be a court challenge under s. 6 by a tradesman who wishes to move to a new province or local, cannot obtain a working permit, and is unable to practice his trade in his new province. The trade union legislation is of general application under s.6(3) (a), but the collective agreement authorized by the legislation may inhibit the trademan's mobility.

The Ontario Court of Appeal has held that the right to pursue a livelihood in s.6(1) (b) applies not only to persons moving to a province, but also to persons remaining in their province of origin.[35] A plenary right to seek employment, subject only to the exceptions in sections 6(3), 6(4) and 1, may have a significant impact on the labour relations.

5. *Equality under Law*

Section 15(1) guarantees equality before and under the law and equal protection and equal benefit of the law without discrimination. As always, the first question will be whether this provision applies to the challenged action. The provision should apply to public sector employers. In the private sector, it may again be argued that a collective agreement may bind an employee against his will, only because of the exclusive bargaining representation granted to the union by the trade union legislation. So, the equality provision may apply to the terms and conditions of employment of bargaining units in the private sector.

Perhaps the courts' most difficult task under the *Charter* will be the definition of the ambit of equal protection under s.15(1). The listed classifications, race, sex, and age, etc. are deemed by the constitution to be inherently irrational. Yet there will be occasions where discrimination on these bases will be justified. A minimum age for obtaining a driver's license will always be legitimate, s.15(1) notwithstanding.

Section 15 prohibits all "discrimination" and denial of "equality" before and under the law. Total equality is a chimera. Individuals have personal differences, which justify different treatment. A blind person needs training in braille, while a deaf person needs training in sign language. A cripple needs crutches, while an illiterate needs education. Discriminatory treatment may

35. *Re. Skapinker* (O.C.A.), January 27, 1983.

be justified according to the different characteristics of the individual. A court determining which classifications are or are not justified will have few objective standards to guide its decision. Essentially, the court will decide what is right and what is wrong.

Several American courts have struck down laws for denial of equal protection when the classification in the law is not rationally related to what the court feels to be the object of the legislation. A provision stating that only veterans with an honourable discharge could be employed by municipal government was held to be an irrational classification and denial of equal protection.[36] Dismissal of a government employee for unwed parenthood was similarly invalid.[37] Mandatory maternity ledre at a specified month of pregnancy has been held to be an irrational denial of equal protection because the commencement of the leave was not related to the needs or safety of the individual employees.[38] Denial of access by resident aliens to examinations for civil service employment has been struck down on the same basis.[39]

To strike down a provision in the statute because it is not rationally related to the legislative purpose is to find that the legislature did not mean what it said. The alternative is for the court to apply reasonable standards outside the legislation in order to review its substance. In either case, the court has little guidance. The courts may be reluctant to act under s.15(1) in the absence of one of the specified forms of prohibited discrimination.

Presumably, if a court is satisfied that a public employee is dismissed for arbitrary or irrational reasons, on whatever definition of equal protection is adopted, the employee will have a constitutional remedy. The same result might be obtained in the private sector, if the employee is denied equal protection because of the exclusive bargaining apparatus of trade union legislation. In *Bhadauria* v. *Seneca College*[40] the Supreme Court of Canada held that human rights legislation ousted any common law tort of discrimination. It may be that the employee will now have a constitutional remedy under s.24(1) which will provide similar results to those sought by the plaintiff in *Bhadauria*.

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36. *Thompson* v. *Gallagher* (1973), 489 F. 2d 443 (5th Cir).
37. *Andrews* v. *Drew Municipal Separate School District* (1975), 507 F. 2d 511 (5th Cir.).
38. *Cleveland Board of Education* v. *LaFleur* (1974), 414 U.S. 632.
39. *Hampton* v. *Mow Sun Wong* (1976), 426 U.S. 88.
40. (1981), 37 N.R. 455 (S.C.C.).

There are several areas where litigation may be anticipated. Denial of the right to bargain collectively to certain vocations might deny equal protection unless there is a rational basis for the distinction between these employees and others subject to the trade union act. In *The Ontario Human Rights Commission* v. *The Borough of Etobicoke*,[41] the Supreme Court of Canada held that a mandatory requirement provision in a collective agreement violated the prohibition against discrimination on the basis of age in *The Ontario Human Rights Code*.[42] It may be that the similar prohibition in s.15(1) will invalidate mandatory retirement ages in public service statutes and collective agreements and perhaps in private collective agreements if the *Charter* applies to the private sector.

Fringe benefits may be another focus of litigation. If an employer appropriates equal monies for fringe benefit contributions for male and female employees, either women will be denied pregnancy leave, or they will have pregnancy leave with reduced employer contributions for other benefits. Similarly, if an employer makes equal pension contributions for male and female employees, the annuity purchased on retirement will give the male employee a greater monthly pension benefit than the female employee. This is because female employees have a higher average life expectancy. This offers no solace to the individual female who receives a lower pension benefit than her male colleague, but dies before the female average expectancy. In cases like these, the courts will have to determine whether inherent differences in the classification justify discriminatory treatment.

In 1979 the Nova Scotia Legislature added to the Trade Union Act[43] s.24A, which provides that the appropriate bargaining unit respecting an employer who has two or more interdependent manufacturing locations will consist of all employees at all the locations. This severely inhibits the effectiveness of a union's organizing campaign. Other employees are subject to the normal rules of unit determination, where interdependence of employer locations is one fact, which may or may not be determinative depending on all the circumstances of the case. A reasonable argument could be made that s.24A denies equal protection of the

41. (1982), 40 N.R. 159 (S.C.C.).
42. R.S.O. 1980, c. 340, s.4(1) (g).
43. S.N.S. 1972, c.19.

law within the meaning of s.15(1) of the *Charter*. For employers other than those who have two or more manufacturing locations, interdependence is only one of many factors. For manufacturing companies, interdependence is determinative. The question is whether the discrimination between employees of companies with two or more manufacturing outlets and other employees is sufficiently rational to satisfy whatever tests of equal protection the courts adopt under s.15(1). Possible bases for challenge to s.24A include the following:

(i) Deemed units for interdependent locations do not apply to interdependent locations outside the manufacturing industry. There may be interdependent outlets of an employer in the service industries. The employer may have a vertically integrated operation, for example, with one location involved in resource extraction, another location in manufacturing, another for transportation, and another for administration. Despite the interdependence, s.24A would not apply.

(ii) There is almost always interdependence of functions within the business of an employer, even if there is only one location. It is quite normal to separate the units. In a single plant, administration and production are interdependent, but separate units are normal and appropriate. On a construction site, the trades are interdependent with separate bargaining units. Yet, s.24A does not apply.

(iii) Section 24(6) excludes the application of the joint unit concept from interdependent manufacturing employers for whom the union has already been certified or voluntarily recognized. These employers might do the same business as companies subject to s.24A, but their employees are treated differently for purposes of unit determination.

(iv) Employers not subject to s.24A have their units determined according to all the circumstances of the case. If interdependence is considered by the Board to be of predominant importance, then interdependence would determine the appropriate unit. If not, then interdependence would not determine the appropriate unit. The effect of s.24A is to exclude this discretion from the Board. Even in cases where interdependence is outweighed by the merits of other factors, the employees of an employer subject to s.24A will be required to organize the interdependent unit.

It may be that s.24A will one day be challenged under s.15(1) of the *Charter*. Section 15 does not come into force until 1985 and, of course, the Nova Scotia Legislature may always act under s.33 to expressly exclude the application of the *Charter of Rights and Freedoms* to s.24A of the Trade Union Act.

6. *Rule of Law*

The preamble of the *Charter* recognizes the "rule of law."

In *Crevier* v. *Attorney General of Quebec*[44] the Supreme Court of Canada held that a privative clause which excluded judicial review by the provincially appointed tribunal on grounds of jurisdiction would violate s.96 of the *British North America Act* (hereafter *B.N.A. Act*):

> It cannot be left to a provincial statutory tribunal, in the face of s.96, to determine the limits of its own jurisdiction without appeal or review.[45]

In *Re MacLeod*[46] Chief Justice Laskin held that there could be no curial deference to an arbitrator on questions of statutory interpretation.

These decisions rest on a foundation of the rule of law. Section 96 may be an awkward instrument to apply the principle. First, s.96 does not regulate the conduct of federally appointed administrative tribunals. These should be subject to the rule of law no less than provincial tribunals. Second, *Crevier* defines the ambit of constitutionally protected review in terms of "jurisdiction." This is a loaded word. Each case involves a chain of reasoning, and a mistake of law anywhere along the chain will deprive the tribunal of jurisdiction to go further. A court which hears the merits and denies liability has no jurisdiction to award the plaintiff a remedy. Various courts have described almost every conceivable type of error as an error of "jurisdiction." The word "jurisdiction" gives the semblance of deference while permitting an undeferential court to conduct virtual appellate review.

If, as *Crevier* suggests, a standard of judicial review is entrenched in the constitution, it may be preferable to draw the power from the preambular recognition of the "rule of law" in the *Charter* than from s.96. The principle would apply to federal as well as provincial tribunals. The court could draw its standards of review and deference from the generic principle of the rule of law, and avoid the confusion which usually follows in the wake of the word "jurisdiction".

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44. (1981), 38 N.R. 541 (S.C.C.).
45. *Id.*, at 559.
46. (1974), 2 N.R. 443 at 449 (S.C.C.).

7. Fundamental Justice

Section 7 guarantees the right not to be deprived of "life, liberty and security of the person" without "fundamental justice".

Section 7 appears under the heading "Legal Rights" along with a list of other rights applicable to criminal procedure. The collocation of "liberty" with "life" and "security of the person" might indicate that the liberty guaranteed by s.7 is freedom from bodily restraint by incarceration. If this is the meaning of "liberty", then the guarantee of fundamental justice should have little bearing on labour law.

The American courts have adopted a much broader definition of "liberty". The 5th Amendment prohibits denial of life, "liberty" or property without due process of law. In *Bolling* v. *Sharpe,*[47] the Supreme Court stated:

> Although the Court has not assumed to define 'liberty' with great precision, that term is not confined to mere freedom from bodily restraint. Liberty under the law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective.[48]

Other cases have held that "liberty" includes freedom to work or to seek employment. A dismissal of a public employee which impairs the employee's reputation and interferes with his freedom to obtain new employment might interfere with his "liberty" and invoke the due process guarantee.[49]

The antecedents of the due process/fundamental justice concept might also justify a broad definition of "liberty". The concept in Anglo-Saxon law derives from Article 29 of the *Magna Carta* (1225) which stated that "no free man shall be taken or imprisoned or deprived of his freehold or his liberties or free customs, or outlawed or exiled, or in any manner destroyed, nor shall we come upon him or send against him, except by a legal judgment of his peers or by the law of the land." The freedoms referred to include much more than mere absence of bodily restraint. In *Quinn* v. *Leathem,*[50] Lord Lindley stated:

> As to the plaintiff's rights. He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way,

47. (1954), 347 U.S. 497.
48. *Id.*, at 499-500.
49. *Board of Regents* v. *Roth* (1972), 408 U.S. 564; see also *Perry* v. *Sinderman* (1972), 408 U.S. 593.
50. [1901] A.C. 495.

> provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognized by law; its correlative is the general duty of everyone not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him.[51]

This passage was quoted by Locke, J., concurring, in *Orchard* v. *Tunney*.[52]

If the courts adopt a broad definition of "liberty" then s.7 may afford a general standard of procedural fairness. The broader the reach of fundamental justice, the more important it will be that the courts define the standards of fundamental justice flexibly according to the circumstances of the individual cases. To demand more procedural safeguards than practical is to effect substantive review in disguise. This was one of the reasons for the emergence of substantive due process which has caused difficulties in the United States.

The Supreme Court has in recent cases developed a broad and flexible definition of procedural fairness in administrative law.[53] Fairness is required whether the function is quasi-judicial or administrative. The standards of fairness differ with the circumstances of each case. In *Kane* v *The Board of Governors of the University of British Columbia*[54] the Supreme Court stated: "A high standard of justice is required when the right to continue one's profession or employment is at stake."[55]

On the basis of the Supreme Court's treatment of administrative procedural fairness in recent decisions, there may be a reasonable expectation that the Court will interpret "liberty" broadly in s.7. Deprivation of the ability of free persons to exercise their will would

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51. *Id.*, at 534-35.
52. [1957] S.C.R. 536.
53. *Martineau* v. *Matsqui Institution Disciplinary Board 119* (1979), 30 N.R. 119 (S.C.C.); *Nicholson* v. *Haldimand-Norfolk Regional Board of Commissioners of Police* (1978), 23 N.R. 410 (S.C.C.); *Inuit Tapiristat of Canada* v. *A.G. Canada* (1980), 33 N.R. 304 (S.C.C.); *Homex Realty and Development Co. Ltd.* v. *Village of Wyoming* (1980), 33 N.R. 475 (S.C.C.).
54. (1980), 31 N.R. 214 at 221 (S.C.C.).
55. *Id.*, at 221.

be subject to fundamental justice, interpreted flexibly according to the circumstances of individual cases. If this approach is adopted, then employers in the public sectors will be affected by the requirement for fundamental justice. Dismissed public employees might have a constitutional remedy analogous to the administrative remedy fashioned in *Nicholson*.[56] Whether fundamental justice would apply to labour relations in the private sector depends laregly on whether the courts find that the *Charter* applies to the private sector by means of the exclusive bargaining regime established by trade union legislation.

The case law to date under section 7 has been inconclusive. The courts have not defined "liberty". The New Brunswick Queen's Bench has broadly defined "security of the person" to include property rights, an interpretation not adopted by the New Brunswick Court of Appeal.[57]

"Substantive fundamental justice" has appeared under s.7 as did "substantive due process" under the American Bill of Rights. The British Columbia Court of Appeal has stated that s.7 not only regulates procedure in adjudicatory tribunals but also invalidates statutory provisions which, in the court's view, are fundamentally unjust.[58] This approach could have wide implications. The courts would pass upon the "justice" of a statute without objective standards to guide their review. It may be argued, for example, that a statutory wage freeze interferes with "liberty" to contract. If the court finds this to be fundamentally "unjust", the freeze may violate section 7. The Supreme Court of Canada may eventually consider the American experience with "substantive due process" and rule that s.7 guarantees only procedural fairness.[59]

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56. *Supra* note 53.

57. *The Queen* v. *Fishermen's Wharf Ltd* (1982), 135 D.L.R. (3d) 307 (N.B.Q.B.), affirmed for other reasons (N.B.C.A.), Dec. 31, 1982. See *The Queen* v. *Easterbrooks Pontiac Buick Ltd* (N.B.C.A.), December 31, 1982.

58. *Re. Section 94(2) of the Motor Vehicle Act* (B.C.C.A.), Feb 3, 1983. To the same effect *R.* v. *Campagna* (1982), 70 C.C.C. (2d) 236 (B.C. Prov. Ct.). *Contra: R.* v. *Duff* (1982), 17 M.V.R. 225 (B.C. Prov. Ct.); *Re. Jamieson* (1982), 70 C.C.C. (2d) 430 (Q.S.C.).

59. Eg. see *Curr* v. *The Queen* (1972), 26 D.L.R. (3d) 603 (S.C.C.) at 615 where Laskin J. described American "economic due process" as a "bog of legislative policy making" by the courts.

8. *Waiver or Contracting out of Charter*

Whether an employee may contract out of or waive his guaranteed rights under the *Charter* is an especially interesting question under a collective bargaining regime. A collective agreement may contain terms which inhibit the employee's exercise of his guaranteed freedoms, or which if embodied in legislation would deny the employee equal protection of the law. A dismissed employee may be unable to grieve because the union has decided not to support the grievance or has missed the time limit and deprived the arbitrator of jurisdiction. The courts generally say that an employee under a collective agreement has no jurisdiction to commence an individual lawsuit. Such an employee may be deprived of his job without "fundamental justice".

If the employee personally signed a contract which authorized a deprivation of his guaranteed rights or freedoms, then there may be a basis for saying that he waived his constitutional guarantees. A collective agreement, however, may be imposed upon the employee through the will of the majority in the unit and against the wishes of the employee affected. The Constitution guarantees these rights and freedoms to individuals, and through the collective bargaining regime, the individual may be deprived of a right or freedom without his assent.

The American courts have on occasion stated that a public employee may not be dismissed for doing something which is protected by the Constitution, and that the government employer may not require the employee as a condition of employment to waive his constitutional rights. In *The Ontario Human Rights Commission* v. *The Borough of Etobicoke*[60] the Supreme Court of Canada held that the prohibition against discrimination on the basis of age in the *Human Rights Code of Ontario*[61] prevailed over a provision in the collective agreement which authorized mandatory retirement. The court stated:

> Although the Code contains no explicit restriction on such contracting out, it is nevertheless a public statute and it constitutes public policy in Ontario as appears from a reading of the statute itself and as declared in the preamble. It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of the provisions of

60. (1982), 40 N.R. 159 (S.C.C.).
61. R.S.O. 1980, c. 340, s. 4(1) (g).

such enactments and that contracts having such effect are void, as contrary to public policy.[62]

If human rights in a statute prevail over the contract because of public policy, then it may be presumed that the courts will restrict contracting out or individual waiver of the rights and freedoms in the *Charter*. This raises a number of questions. For instance, when an employee is dismissed and his union refuses to take the grievance or acts in an untimely fashion depriving the arbitrator of jurisdiction, may the employee claim that he was deprived of his liberty without fundamental justice and obtain a constitutional remedy in court? When a collective agreement classifies employees in an irrational manner which would deny equal protection of law if placed in a statute, may the employee challenge the collective agreement under the *Charter*? May an employee refuse to abide by the union's security or other provisions of the collective agreement because joining a union allegedly interferes with his freedom of conscience, association, mobility or other guaranteed rights?

The *Charter* guarantees the rights and freedoms to individuals. A collective bargaining regime by its nature subjects the interests of the individual to the interest of the group. If the analysis stops here, the two may be seen as antithetical. But the analysis should not stop there. It should be recalled that the purpose of collective bargaining is to protect the *individual* against the employer, and the mechanism for protection is solidarity. The *Charter* should not be interpreted to weaken the common front of employees against the employer. This should be left intact, but the constitutional guarantees should rather be directed towards a duty of fair representation between the union and employees.

9. *Rights of Individual Employees*

In the discussion of the application of the *Charter* to labour relations, the recurrent theme has been that there is some inconsistency between the position of the individual, whose rights and freedoms are guaranteed in the *Charter*, and the rationale for collective bargaining legislation, which subjects the individual to the group in order to better protect the interests of all individual employees against the employer. If a statute could not directly withdraw rights or freedoms from employees without violating the *Charter*, then it may strongly be argued that the trade union

62. (1982), 40 N.R. 159 (S.C.C.) at 170.

legislation may not authorize exclusive bargaining representation which leads to such deprivation against the will of the employee. To permit employees to fully enforce all their individual rights, without reference to the group concept represented by the union, could seriously affect the solidarity needed for effective representation of all individual employees against the employer. The best course might be to draw by inference from the *Charter* a duty of fair representation of the union towards the employee. The relationship of the union plus employees against the employer would remain the same. The interests of the individual against the union *inter se* would have constitutional protection.

The American courts found a duty of fair representation by inference from the labour legislation. There is a reasonable basis for argument that had the duty of fair representation not been found to exist in the statute, the labour legislation might have been constitutionally suspect. Canadian legislation is generally based on the same model as the American labour legislation. The crucial factor is the exclusive bargaining representation further to the vote and approval by a majority of employees in the unit. There is a reasonable basis in Canada for argument that a duty of fair representation should be inferred either from the labour legislation[63] or from the *Charter*. Otherwise, the subjection of the interest of the individual to the group against the will of the individual might be constitutionally suspect.

The American courts have held that an employee who suffered by reason of a breach of the union's duty of fair representation may sue the union or in certain circumstances sue the employer in court on the merits of his claim.[64] Canadian courts have accorded the employee some procedural rights to notice in arbitration.[65] Generally, however, the employee has no individual rights to enforce the collective agreement in arbitration. The Courts usually dismiss individual actions upon a collective agreement for want of

63. Eg. See *The Queen* v. *Easterbrooks Pontiac Buick Ltd* (N.B.C.A.), December 31, 1982 where the Court applied s.26 of the *Charter* (preserving other rights not mentioned in the *Charter*) to interpret a statute in a manner which would not impair property rights.

64. *Vaca* v. *Sipes* (1966), 386 U.S. 1971; *Steel* v. *Louisville & Nashville R.R.* (1944), 323 U.S. 192; *Humphrey* v. *Moore* (1964), 375 U.S. 335 at 343; *Republic Steel Corp.* v. *Maddox* (1965), 3790 U.S. 650 at 653.

65. *Re Hoogendoorn* (1967), 65 D.L.R. (2d) 641 (S.C.C.); *Re Bradley* (1967), 63 D.L.R. (2d) 376 (O.C.A.).

jurisdiction.[66] The Canadian courts will probably be asked to determine whether s.24(1) of the *Charter* gives jurisdiction to a court to hear an action by an employee either against his union or on the merits against his employer where the employee argues that there has been a breach of the duty of fair representation, or that the actions of the union or employer othewise denied the employee his rights and freedoms guaranteed in the *Charter*.

The following might be an example of such an argument. The Canadian courts have generally held that failure to follow the grievance procedure in timely fashion deprives the arbitrator of jurisdiction to hear the grievance.[67] So, the arbitrator will have no jurisdiction, and the courts generally refuse to hear cases for the enforcement of collective agreements. A dismissed employee would be without a remedy. The employee might argue that this deprives the employee of his "liberty" to be employed without "fundamental justice" as guaranteed by s.7. An employee in the private sector would say that the *Charter* applies to this action by virtue of s.32(1) and the exclusive bargaining regime established under the trade union legislation. The employee would claim his remedy in court under s.24 of the *Charter*.

As with the implied duty of fair representation, the court might deal with the above example of interpreting the legislation in order to avoid a constitutional question. In *McGavin Toastmaster Ltd.* v. *Ainscough*[68] the Supreme Court of Canada held that the collective agreement is *sui generis*, and common law principles of contract are generally excluded from interpretation of the collective agreement. The court held that breach by one party of a provision of the collective agreement did not "repudiate" the agreement, and did not justify the refusal by the other party to abide by its terms. The application of this reasoning to the "procedural bar" question might mean that the failure by the union or employee to comply with the procedural time limits in the grievance procedure does not exculpate the employer from his own breach of the substantive provisions of the agreement. Rather, the employer could claim a set-off for losses

66. *Brunet* v. *General Motors of Canada Ltd.* (1977), 13 N.R. 233 (S.C.C.); *Binder* v. *Halifax County Municipal School Board* (1978), 84 D.L.R. (2d) 494 (N.S.S.C. A.D.).
67. *Union Carbide Canada Ltd.* v. *Weiler* (1968), 70 D.L.R. (2d) 333 (S.C.C.); *General Truck Drivers Union, Local 938* v. *Hoar Transport Co.* (1969), 4 D.L.R. (3d) 449 (S.C.C.).
68. (1975), 54 D.L.R. (3d) (S.C.C.).

suffered as a result of prejudice from the untimely action. Interpretation of the trade union legislation and collective agreement in this manner would avoid the constitional question which might otherwise arise.

IV. *Summary*

Probably the most important question in this subject will be whether the courts apply the *Charter* to collective bargaining in the private sector. Section 32(1) states that the *Charter* applies to legislation. The collective bargaining regime which grants exclusive representation to a union supported by the majority of employees in the union is a creature of legislation. This regime permits deprivation of rights or freedoms of the individual in the name of group interest. The *Charter* protects the individual. So there is a basis for argument that the *Charter* applies to private sector collective bargaining.

If the courts adopt this reasoning, then the *Charter* may have resounding implications for labour relations. In determining the scope of these implications, the courts should keep in mind that the legislative purpose of labour legislation is to protect the individual employee through enforced solidarity against the employer. Labour legislation does not exist to benefit unions, but to benefit individual employees. If the courts keep this in mind, then the *Charter* may be interpreted not to limit the powers of the union against the employer, but to provide to the employee a duty of fair representation by his union. The duty of fair representation would balance the group interest of all the individuals in solidarity against the employer, and the individual interest of the employee to protect his rights and freedoms guaranteed by the *Charter*.