Editors' Note

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The articles published in this volume reflect a range of political issues and debates currently burning in the study of politics. While the papers in this volume do not reflect all of the many areas of study being pursued within our department, we have done our utmost to provide the best possible representation of the articles submitted to Problématique for possible publication.

The review process for *Problématique* is undertaken by members of its editorial collective. Papers are submitted anonymously and publishable papers are selected on the basis of originality, currency and readiness for publication. In order to ensure that the papers may speak for themselves, the copy-editing task is limited to matters of stylistic consistency.

We encourage readers to submit critiques of the articles and will offer the article authors the opportunity for response. Additionally, all graduate students are invited to participate in future volumes of *Problématique* through article and book review submissions or by participating in the collective.

Once again, many thanks to all who have aided us in this endeavour.

Lois Harder and Robert Marshall
September, 1992

Lavigne Through the Looking Glass: Labour's Experience under the Charter

Barbara Falk

> "There's glory for you!" "I don't know what you mean by 'glory'," Alice said. "I meant 'there's a nice knock down argument for you!'" "But 'glory' doesn't mean a 'nice knock down argument'," Alice objected. "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> Lewis Carroll, *Through the Looking Glass*

The relationship of the labour movement with the *Canadian Charter of Rights and Freedoms*, has not been a happy one. Although there were a minority of voices within the labour movement who both supported and opposed the enactment of the Charter as part of Canada's patriation of the constitution, by and large the movement was silent.[1] Early judgements in cases such as *Dolphin Delivery* and the *Labour Trilogy* were not only examples of bad strategy on the part of

AUTHOR'S NOTE: I am indebted to Jules Bloch and Gary Stein for their thoughtful comments on earlier versions of this paper, and to Professor Allan C. Hutchinson of Osgoode Hall Law School for encouraging me to pursue this topic.

1. Mandel (1988) describes the labour movement as "asleep at the switch", and points out that the Canadian Labour Congress (CLC) did not make any representations to the Joint Committee hearings on the Charter. Louis Lenkinski, a former senior staff person at the Ontario Federation of Labour (OFL) has commented that almost no analysis took place of the potential impact of the Charter on collective bargaining. The labour movement, in Lenkinski's view, was not only unalarmed by the individualist and liberal orientation of the Charter, but did not blink at the obvious shift of power from elected representatives to the courts.

organized labour, but caused alarm bells to ring at the potential of the Charter to erode rights assumed as "given"—such as the right to picket, the right to bargain collectively, and the right to strike. In 1985, with labour now on the defensive, the Ontario Public Service Employees Union (OPSEU) was pitched against Mervyn Lavigne and the canny and powerful National Citizens Coalition. The case wound its way through the courts, and was finally heard by the Supreme Court of Canada last year. The resulting judgement, six years and many hundreds of thousands of dollars in legal costs later, was exuberantly described by the press and the unions as a "major victory".

However, it is the thesis of this paper that, far from being victory, *Lavigne* is merely a vote on the part of the Supreme Court for the status quo. Moreover, the case does not represent a "turnaround" in labour's dealings with the Charter, but is well within the mainstream. Given that earlier Charter cases have involved union arguments that section 2(d)—freedom of association—includes the right to bargain collectively and the right to strike, this case can be viewed as part of the larger whole of organized labour's experience with the Charter. As such, it symbolizes the ineffectiveness of the Charter as an essentially liberal and individualist document in promoting collective rights, especially when the collectivity in question is a union. Add to the wording of the Charter the conservative nature of judges and judging, and the likely result is a rather bitter pill for the labour movement to swallow.

In this paper, the facts of *Lavigne* and the players involved will be outlined. The three legal decisions, from the Ontario Supreme Court, the Ontario Court of Appeal, and the Supreme Court of Canada will be outlined. The emphasis of the analysis will be on the section 2 (d) arguments rather than the applicability of the Charter. Finally, an argument will be made that *Lavigne* is consistent with other prominent labour decisions concerning freedom of association. Prior to this discussion, however, *Lavigne* must be situated in its proper context—the previous experience of the labour movement with the Charter.[2]

2. It is not possible within the limited scope of this paper to review in entirety labour's experience with the Charter; however, the three cases known as the *Labour Trilogy* and *Dolphin Delivery* have been selected here as representative. Other important cases which are representative of the labour experience include *BCGEU v. AG British Columbia* and *Newfoundland Association of Public Employees v. Government of Newfoundland*. In *BCGEU*, a B.C. Supreme Court Judge issued an injunction against picketing outside a Vancouver Courthouse during a lawful strike on the grounds of criminal contempt. The Supreme Court found that the injunction restricting picketing did violate freedom of expression but was justified as a reasonable limit. Moreover, if s. 7 right to liberty was infringed by the injunction, it was in accordance with the principles of fundamental justice. In *Newfoundland*, the union unsuccessfully challenged amendments to the *Public Service Act*, on the grounds that the restrictions contained in the law were a violation of s. 2 (d) and s. 7.

Labour Trilogy and Dolphin Delivery Decisions

In each of three related decisions in 1987, the Supreme Court "made it clear that it was not prepared to read the Charter as elevating collective bargaining and strike activity to fundamental rights that are beyond the reach of our legislators" (Carter, 1988: 306). The first case, *Retail, Wholesale and Department Store Union, 1987* concerned a Saskatchewan law that ended a province-wide labour dispute between dairy workers who were locked out by the employer after threatening strike action. The second case, *Public Service Alliance of Canada, 1987*, challenged federal public sector wage control legislation. The third case, *Re. Public Service Employee Relations Act (Alberta) (1987)*, examined the constitutionality of an Alberta bill designed to abolish the right to strike for nurses, firefighters and police in favour of compulsory binding arbitration. In all three cases, the legislation involved restrictions on collective bargaining: back to work legislation in the Saskatchewan dairy workers case; the automatic extension of collective agreements and limits on compensation increases in the PSAC case; and the removal of the right to strike for "essential services" workers in Alberta. At stake was the union demand that freedom of association include the right to collectively bargain in general, and to strike in particular.

The result was a narrow interpretation of section 2(d)—it protected the right to join a union, but not to bargain collectively or to strike.[3] Justice McIntyre, writing for the majority in this last case, held that "freedom of association" only protected activities that could be done as a group, that is, in association, if they could also be done individually:

3. It was not unusual or novel for the labour movement to be seeking a broad definition of freedom of association. After all, Canada had ratified I.L.O. Convention 87 in 1972, which explicitly defined freedom of association as including the freedom to bargain collectively and to strike. Moreover, ratification of this convention involved the unanimous consent of all provinces.

> While some provisions in the Constitution involve groups, such as s. 93 of the *Constitution Act, 1867* protecting denominational schools, and s. 25 of the Charter referring to existing aboriginal rights, the remaining rights and freedoms are individual rights; they are not concerned with the group as distinct from its members. The group or organization is simply a device adopted by individuals to achieve a fuller realization of individual rights and aspirations. People, by merely combining together, cannot create an entity which has greater constitutional rights and freedoms that they as individuals possess. Freedom of association cannot therefore vest independent rights in the group (*Re. Public Service Employee Relations Act (Alberta)*, S.C.C.: 219-220).

This view is contrary to the entire notion of collective rights being more than the sum of the rights of all the individuals in the collective. It is also a legal denial of the major reason workers join unions in the first place—to have greater power (if rights can be broadly but roughly stated to translate into power[4]) in effecting change in wages and working conditions than they would have as a collection of individuals going forward at different moments in time, cap in hand, asking the employer to be generous with raises. As Leo Panitch and Donald Swartz have stated, this view of freedom of association is "reduced to what you say or think, omitting what is necessary for workers to do about their subordinate status *vis-à-vis* their employers" (Panitch and Swartz, 1988: 58).

McIntyre also stressed that the right to strike was not of sufficient history and status to be considered as inviolable as individual rights. He stated:

> It cannot be said that [the right to strike] has become so much a part of our social and historical traditions that it has acquired the status of an immutable, fundamental right, firmly embedded in our traditions, our political and social philosophy (*Re. Public Service Employee Relations Act (Alberta)*, S.C.C.: 232).

4. I realise that "rights as power" is a controversial assertion; however, I would argue that the primacy of "rights" in any conflict involving the Charter automatically means that rights de facto equal power. This is because of the very nature of the Charter as a document which is framed in terms of rights and rights-holders. To defend rights on behalf of rights-holders is the ultimate, pardon the pun, Charter challenge.

Furthermore, in claiming that the Supreme Court should take great care in not meddling in policy questions or labour relations—he then sides with business, apparently worried that enshrining the right to strike will bring more such cases before the courts.[5] He argues that:

> Judges do not have the expert knowledge always helpful and sometimes necessary in the resolution of labour problems. ... If the right to strike is constitutionalized, then its application, its extent and any question of its legality, become matters of law. This would inevitably throw the courts back in the field of labour relations and much of the value of specialized labour tribunals would be lost (*Re. Public Service Employee Relations Act (Alberta)*, S.C.C.: 235).

It is also interesting to note that Justice McIntyre describes organized labour and employers as "equally powerful socio-economic forces", uncovering an assumption that in such an even contest, enshrining the right to strike might somehow tip the balance in favour of labour. Of course, the even contest analogy is not accurate, and as Panitch and Swartz observe, conceals "the class relationships and private profit-driven dynamics of a capitalist society" (For a full discussion, see Panich and Swartz,1988: 60-61).

The result of the *Labour Trilogy* demonstrates the failure of the labour movement's strategy—asking for the Supreme Court to give Charter sanction to the right to strike was about as likely to succeed as Oliver Twist walking to the front of the line and asking for more. Contrast this approach with the tentative approach taken by the women's movement, especially as represented by the efforts of the

5. Justice McIntyre is not the only proponent of the view that the issues related to collective bargaining in particular or labour law in general are not adequately addressed by Charter review. For example, Paul J.J. Cavalluzzo has eloquently argued that such issues—such as protection of unions against employers who refuse to negotiate first contracts, the use of agency or closed shop clauses in promoting industrial peace and union security, or broader questions such as the power of unions in society or the general benefits provided to union members by virtue of union membership—do not concern the fundamental freedoms as outlined in the Charter. The appropriate arena for such questions is the legislature, or through delegated legislative authority, specialised labour tribunals. It is not the purpose of this paper to argue for or against such a view—but to demonstrate that the strategy taken by the labour movement thus far has not been successful, and further that the *Lavigne* case hardly represents a turnaround. See Cavalluzzo (1988).

Legal Education and Action Fund (LEAF). LEAF has deliberately chosen to take forward relatively "minor" cases forward to the courts to test out Charter arguments based on the equality provisions, realizing the dangerous nature of precedent. Upon modest success, it is hoped, jurisprudence built on equality will develop.

There are a number of reasons why it might have made sense for organized labour not to pursue any of the cases outlined above. First, a "no" verdict on the right to strike would have clearly been worse than no comment by the courts on the issue. Although the Supreme Court did not say that a right to strike is illegal, but simply not constitutionally protected, the court's commentary can be interpreted as sending a moral message that it is not an important right, therefore it is not condemnatory to legislate workers back to work or remove their right to strike for economic reasons or because of the nature of the work involved. Second, as the Charter cannot provide further meaning through textual analysis alone, the judiciary must rely on common law, previous jurisprudence, the experience of other jurisdictions, and anything else that might lend weight to their decisions. Any cursory examination of the history of labour's involvement with the courts, even in the pre-Charter era, should have raised a few red flags. Third, even when the New Democrat members of the House of Commons did discuss the Charter and possible amendments to it, it is clear from the debates that a right to strike was not envisaged within the confines of section 2 (d).[6] Therefore, even relying on a remote concept like authorial intention would not have helped the union cause. Fourth, the labour movement had previous unpleasant dealings with the Charter, for example, *Dolphin Delivery*.

In *Dolphin Delivery*, the union declared that it had a constitutional right to picket, based on section 2(b) freedom of expression. Specifically, the union wanted a court injunction against picketing another party during a strike, on the basis that a court cannot issue an injunction that violates a charter right. (The restriction against sec-

6. New Democrat M.P. Svend Robinson proposed an amendment to section 2(d) that would have included the right to bargain collectively, but *even by his own admission not* the right to strike. Members of all three parties discussing the issue in the House were careful to point out that the right to strike would not be included, either in Mr. Robinson's amendment (which was voted down) or in the current wording. See Canada, 1980-81, issue 29: 81.

ondary picketing was based in common law, not legislation.) Although some interesting yet puzzling arguments were put forward at the appeal level that picketing did not constitute expression because an element of rational persuasion was not present, in the end the Supreme Court found that the Charter did not apply between private parties and there was no element of government intervention. Most notable was the finding of the court that the injunction was not indicative of government intervention. The implication is that the courts (in the opinion of the highest court) are not in fact the third branch of government after all. Certainly this is news to political science. The judges were worried about widening the scope of the Charter to virtually all private litigation (*Dolphin Delivery*, S.C.C.: 196).

This judgment in isolation seems conservative but not particularly threatening to the labour movement. However, the Supreme Court was all too willing to find jurisdiction in private matters in *Hunter v. Southam* and to grant to corporations similar rights as individuals in *Big M Drug Mart*.[7] This approach begs the questions as to why the courts are then unwilling to grant rights to other non-individuals such as unions on the other side of the political fence. The end result of the courts' actions is the preservation of existing power relations in society.

It is in this broader context of previous disappointments that *Lavigne* must be examined.

Lavigne's Challenge

Mervyn Lavigne, a teaching employee of the Haileybury School of Mines, launched a court action against the Ontario Public Service Employees Union (OPSEU). He objected to a portion of his union dues being used by the union to support political causes with which he disagreed. Specifically, Lavigne did not want his money spent on causes that were, in his view, not related to collective bargaining.

7. In *Hunter v. Southam* the Southam newspaper chain successfully opposed the special search powers of the Combines Investigation Branch as unconstitutional and violating s.8 prohibition against unreasonable search and seizure. Individual rights of a corporation were broadly and generally interpreted in comparison to the collective rights of the elected government. In *Big M Drugmart*, a drugstore open on Sunday in Alberta, claimed "freedom of religion" in opposing the federal *Lord's Day Act*. In both cases, corporations were treated as having similar rights as individuals.

Included were financial contributions to the New Democratic Party, disarmament and peace campaigns, workers in Nicaragua, striking British coal miners, pro-choice organizations, and a campaign to oppose the building of a domed stadium in Toronto.

Lavigne was not a member of the union, but under an agency shop clause within the collective agreement, was required to pay union dues. This type of provision is often called the "Rand formula" after late Justice Ivan C. Rand of the Supreme Court of Canada. In 1946, after a bitter labour dispute in the Ford automotive plant in Windsor, Ontario, Justice Rand ruled that although all employees need not be members of the union, all must pay union dues and therefore share the burden, as well as the benefits, of collective bargaining. This important decision gave unions financial security and increased the potential for membership and involvement of employees. This legal compromise later became enshrined as section 46 of the *Ontario Labour Relations Act*, which allows union security clauses as well as protection for dissenters.[8]

Lavigne was fully funded and supported in his action by the National Citizens Coalition (NCC), a right-wing lobby group whose avowed aim is to reduce government intervention in the lives of ordinary citizens. The NCC has preferred to think of itself as "pro-freedom" and "non-partisan", but serves, in the view of Wayne Roberts, a former OPSEU staffer, as the "designated hitter" on the big business team. The coalition encourages funding for its various causes from corporations, without suggesting consultation with stockholders, rather ironic given the substance of Lavigne's complaint. NCC literature emphasizes support for a free market economy operating with little or no constraint. Needless to say, the coalition is virulently opposed to the welfare state, and all forms of protectionist legislation.

The legal argument made by Lavigne and his backers went as follows: First, the *Canadian Charter of Rights and Freedoms* applies because the Council of Regents (the employer who bargains centrally with all 22 community colleges in the province) can be described as a crown agent and is under the authority and control of the Minister of Colleges and Universities (representing the executive branch of government). Second, section 2(b) of the Charter guaranteeing Lavigne's freedom of expression was violated because the forced payments suggested his support for the causes financially assisted by the union. Finally, section 2(d) of the Charter guarantees freedom of association, and this protection includes freedom to *not* associate, or freedom from compelled association.

8. There are three basic models of union security provisions that are commonly used in collective agreements. Weiler (1990) describes these as follows: "The most limited form, the agency shop, requires only that each employee in the unit pay the standard union dues, thus avoiding financial free-riding by non-member employees who would still enjoy the benefits of collectively improved terms of employment. A second model, the union shop, requires that all employees hired by the employed actually join the union and commit themselves to the obligations in its constitution. [Finally, there is] ... the closed shop, which requires that prospective employees be union members before they are even hired by the employer" (126-27).

This paper will focus solely on the "freedom from compelled association" aspect of the case. Although the applicability of the Charter to the public sector labour relations environment is interesting and has far-reaching implications for the labour movement as a whole, I believe the "compelled association" arguments posed a greater threat to union security. The "freedom of expression" aspect of the case was not upheld in any of the three court decisions, and will not be examined further here.

Freedom of Non-Association

Brian Etherington has written extensively on freedom to associate including under its umbrella the concept of non-association as well:

> In the early days of the Charter some commentators noted the potential for the freedom of association to be used as a "double-edged sword": in its positive aspect protecting the freedom of individuals to form associations and potentially protecting the freedom of association from interference by the state with its internal structure, purposes and activities, but in its negative aspect protecting an individual's freedom not to associate with others (Etherington, 1987: 15).

Etherington explains that Charter litigation has exposed two "predominant and opposing lines of opinion": a narrow, legalistic view that simply protects the ability of individuals to enter into associations, or "consensual arrangements" and a purposive approach where the broad

purpose of the freedom is fulfilled. In the second view (generally not upheld within the courts):

> ...the freedom must extend to protection for the essential purposes of the association and the means or activities which are designed to further those purposes. Without protection for the purposes of association and the means necessary to attain those purposes, freedom of association would be a hollow right, devoid of practical value. Under this view of the freedom, subsection 2(d) would protect the right to bargain collectively and the right to strike, which are necessary means for the attainment of the social and economic purposes of a union (Etherington, 1987: 16).

Etherington's conception is based on the assumption that freedom of association must include protection of the activities for which the association was formed. Workers join unions to bargain collectively and strike, therefore these defining activities also constitute freedom of expression. On the other hand, one can argue, as does David Beatty, that section 2(d) includes the rights of employees to bargain collectively and strike because these activities are no different in substance than the withdrawal of services by one individual, except that it is the combined and co-ordinated activity of many individuals (see, for example, Beatty and Kennett, 1988: 229-31). The analogy is often used of a baseball player who refuses to negotiate a new contract until he is offered a substantial increase by the owners of the ball team. Etherington's view is compatible with the idea of collective rights being more than the sum of the rights of the individuals added together; Beatty's opinion is not.[9]

Perhaps a prior question should be considered before looking more closely at the courts' responses in *Lavigne*. Even though a court could come down on the union side using Etherington's conception above, why is there an issue of compulsion in the first place? Michael Mandel raises this question, and suggests an answer:

9. The fallacy of Beatty's argument is that not all workers are sports stars, and can command the individual bargaining power of a Joe Canseco or a Ricky Henderson. In reality, a sewer and water main worker can be exchanged for another sewer and water main worker at a moment's notice, and the team does not miss a beat. Therefore, the worker's power is only derived through collective struggle and action.

> A threshold issue in the case was why it should violate anyone's freedom of association to be compelled to pay dues to a union if there was no compulsion to join the union or in any way participate in its activities. Here we have the marketplace logic of the NCC's election spending case in reverse [the NCC had argued in an earlier case that federal restrictions on campaign spending interfered with "freedom of expression"]. If protecting one's right to spend (to buy someone else's expression) is as important as protecting one's own expression, then being compelled to pay for the espousal of someone else's case is as offensive as being compelled to actually espouse it... (Mandel, 1988: 210).

Trial Decision

The trial judge, Justice White of the High Court of Justice, ruled on *Lavigne* in 1986, and found that "freedom of association" did include both the positive freedom to associate, as well as, in the words of Professor Thomas Emerson of Yale Law School, "a negative right permitting the individual to refrain from associating which arises out of the concept of individual liberty" (quoted in *Re. Lavigne*, 1986: 495). The narrow legalistic view of freedom to not associate was selected.

With respect to Justice White's s.1 analysis, compulsory dues check-off for all employees (not just members of the union) could only be justified as a reasonable limit to the extent the monies collected by the union were used only for collective bargaining purposes. In the second part of the judgement, which was handed down a year later, White specified which expenditures were related to collective bargaining (for example, support for workers in Nicaragua, and financial aid to striking British coal miners) and which were not (for example, contributions to the New Democratic Party, the pro-choice movement, disarmament campaigns, and to a campaign opposed to municipal funding for a domed stadium in Toronto). Thus, White dealt with the "free rider" concern of the unions—where non-union non-dues-paying employees could potentially benefit from union gains without shouldering their proportionate share of the cost—by allowing for a limited Rand formula to exist.

However, the ability of unions to follow a "social unionism" model

by directing funds to social causes, movements or political parties that advance the position of workers and citizens as a whole, was severely hampered by the judgement.[10] Moreover, White proposed a complex system of double-bookkeeping, which although not the method proposed by Lavigne's lawyers, was welcomed by the NCC as it would force disclosure of information about union funds.

In coming to this view, White relied on American jurisprudence as well. Significantly, he relied on *Abood v. Detroit Board of Education* and other subsequent cases which "restricts the use of an objector's compulsory union dues to purposes germane to collective bargaining" (Etherington, 1987: 20). White noted that such an approach in the United States had not paralyzed the labour movement, but he may have forgotten the different path the Canadian labour movement has taken with respect to social unionism. In this country, organized labour has not only walked picket lines for improved wages and working conditions, but has been in the forefront of political campaigns for medicare, pensions, and protectionist legislation on both the provincial and federal levels.

White's judgement also displayed an inherent bias against unions as political organizations. One of the arguments used by the defendant was the unfair singling out of unions as organizations that enforce dues payment and subsequently use monies for political lobbying. Professional groups such as bar associations are also political, countered the union. White could not see the comparison, and described unions as ideological and political, whereas bar associations existed to "maintain high professional standards and protect the public interest...." (*Lavigne*, Ont. S.C.: 379-380). Politics, as defined by White is left-wing politics, whereas protecting the public interest is somehow an apolitical activity (Mandel, 1988: 211). White makes a common judicial mistake—that support for the status quo is not a political viewpoint, but a balanced position. More news to political science indeed.

10. Canada has a long tradition of social unionism. For example, the 1898 "Platform of Principles" of the Trades and Labour Congress reflected the range of social and economic issues concerning the labour movement—for example, legislation governing standard work hours and the abolition of all labour by children less than 14 years of age. The federal successor to the TLC, the Canadian Labour Congress, has been in the forefront of battles for a national health insurance system, universal pensions administered by the government, public income programmes for families and seniors, publically-funded post-secondary education, and pay equity.

Appeal Decision

The Ontario Court of Appeal overturned White's decision. Specifically, it found that the Charter did not apply, as the case was deemed a private matter, between a union and an individual. The governmental connection, via the employer, the Council of Regents, was not involved in determining dues payment, and therefore did not imply the involvement of the state.

However, in the event the Charter did apply, the Court decided that freedom to not associate was not included. Interestingly, the appellate court did not consider the weighing of collective interests versus individual interests. Rather, the court emphasized Lavigne's ability to oppose the union and the causes it supports, to take actions to decertify the union or to associate with other individuals in opposing the union. To quote the court:

> Putting Lavigne's position at its highest, we shall assume, without deciding the point, that a negative freedom of association is constitutionally protected by s. 2(d). On that assumption, we are nonetheless of the opinion that the simple requirement of a monetary payment to OPSEU is not violative of his freedom not to associate. The compelled payment does not curtail or interfere with any aspect of Lavigne's freedom of non-association or the interests protected thereby. His right not to associate remains unimpaired. He is not forced to join the union; he is not forced to participate in its activities; and he is not forced to join with others to achieve its aims. The compelled payment does not identify him personally with any of the political, social or ideological objectives which OPSEU may support financially or otherwise; nor does it impose any obligation on him to adapt or conform to views advocated by the union (*Lavigne*, Ont. C.A.: 502-503).

What was important was Lavigne's individual right to oppose the union, not the collective rights of the union.

The labour movement seized upon the appeal as a major victory. Jim Clancy, then president of OPSEU, declared that the "decision is important because it upholds the tradition in Canada of social union-

ism" (quoted in Edwards, 1989) and that the result "affirms the right of unions to decide democratically to do whatever they want with their money" (quoted in Hutchinson, 1989). As Hutchinson stated, however, "the decision simply allows the unions to keep whatever they have succeeded in bargaining or lobbying for. It is by no means clear that, if legislators want to restrict such activities, the unions would be able to stop them" (Hutchinson, 1989). The court's comments on dues check-off were not of primary importance in any event; the issue at hand in the mind of the Appeal Court was the non-application of the Charter in this case.

Supreme Court Decision

Finally we come to the decision on *Lavigne* by the Supreme Court of Canada, handed down on June 28, 1991. The court quickly reversed the finding of the Appeal Court that the Charter did not apply, because the Council of Regents can be described as an emanation of government, even though it is the collective agreement and not legislation which compels the payment of union dues (*Lavigne*, S.C.C.: 616-620).

The court then turned to the major issue, that of freedom of association. The court split on the issue: Justice LaForest, writing for the majority, found that Lavigne's freedom of association had been violated, but that it was justified under section 1; Wilson J., for the minority, held that his freedom of association had not been violated. Let us examine these arguments more closely.

Justice LaForest stated clearly that section 2 (d) does require the recognition of freedom from compelled association. He argues that:

> Forced association will stifle the individual's potential for self-fulfilment and realization as surely as voluntary association will develop it. Moreover, society cannot expect meaningful contribution from groups or organizations that are not truly representative of their membership's convictions and free choice. Instead, it can expect that such groups and organizations will, overall, have a negative effect on the development of the larger community. One need only think of the history of social stagnation in Eastern Europe and of the role played in its development and preservation by officially established "free" trade unions,

> peace movements and cultural organizations to appreciate the destructive effect forced association can have upon the body politic. Recognition of the freedom of the individual to refrain from association is a necessary counterpart of meaningful association in keeping with democratic ideals (*Lavigne*, S.C.C.: 624).

Never mind that comparing Lavigne's plight to forced association in Eastern Europe seems a little excessive, Justice LaForest also relies on the words of former Chief Justice Dickson in *Big M Drug Mart* (Dickson's commentary below was also cited by Justice White in the original trial decision):

> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state of the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or constraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain or sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience. [Emphasis in original] (Lavigne, S.C.C.: 624).

Given the arguments presented above, and Justice LaForest's own conclusion that financial contribution alone can constitute association, Lavigne's right to be free from compelled association was said to have been violated.

In the majority's section 1 analysis, the *Oakes* test is applied and in the objectives involved and the proportionality of the impairment, the

union is justified in infringing Lavigne's right.[11] In *Lavigne*, Justice LaForest applied the test as follows:

> The state has two important objectives in compelling dues payment: to encourage union democracy and to permit unions to participate in the broader political, economic, and social debates in society. There is a rational connection between these objectives and the requirement that all members of a bargaining unit contribute to the union without any guarantee as to how their contributions will be used. The state's objectives could not be met as effectively by other methods, such as opting out of government guidelines or acceptable expenditures (*Lavigne*, S.C.C.: 547).

Remember, only the application of section 1 "saves" the union in maintaining the status quo. None of the union's arguments were convincing enough to persuade the majority of Supreme Court justices that Lavigne's rights had not been violated.

However, Justice Wilson writing for the minority states that s.2(d) does not include the right not to associate, and therefore Lavigne's rights were not infringed. In her view the purpose of s.2(d) is to "protect association for the collective pursuit of common goals" (*Lavigne*, S.C.C.: 573) and should not be expanded to include a right not to associate. The real harm produced by compelled association is not the existence of the association, but the enforcement of views. As Lavigne's freedom of expression was not violated, this was not an issue. More troubling is her view that there is no conflict between the rights of Lavigne and the rights of the union. She states that:

> Since s.2(d) protects both individuals and collectivities, if the objects of an association cannot be invoked to advance the constitutional claims of unions, then neither, it seems to me, can they be invoked in order to undermine them (*Lavigne*, S.C.C.: 583).

11. The "Oakes test" is applied by the Supreme Court in order to determine if an action violative of a Charter right constitutes a "reasonable limit" that can be "demonstrably justified in a free and democratic society" in accordance with Section 1. There are two key components of the Oakes test: first, that the objective in limiting the right must be "pressing and substantial", that is, important enough to justify the limitation, and second, that the limit imposed must be in proportion to the objective. Three proportionality objectives must be met: the limitation must be rationally connected to the objective; it should impair the right as little as possible; and cannot be out of proportion to the objective, that is, there must be some relationship between the means and the end.

Given that the "objects of an association" have been rejected by the courts for constitutional protection, according to Justice Wilson, then the claims of either Lavigne or the union have no place in a s.2(d) argument. Although this is the most positive viewpoint in the entire judgement from a labour perspective, it is hardly a ringing endorsement of collective rights.

Lavigne and the Labour Experience

Does Lavigne signal a victory because judicial self-restraint has been exercised? How the press or the labour movement can craft a victory out of a minimal vote for the status quo is beyond the comprehension of this author. The assumption is, of course, that winning a lawsuit is necessarily a victory. After all, *Lavigne* does offer the labour movement maintenance of its pre-existing right to mandatory dues check-off. However, this right or the compromise created by the Rand formula, had never been seriously challenged since 1946. In fact, the only reason it was able to be challenged, according to Harry Glasbeek, was as a result of the Charter in the first place. Prior to 1982, in his words, "no politician would have dared to challenge it" (Author's interview with Glasbeek, Nov. 1991). Another argument that could be put forward to justify *Lavigne* as a victory is that the Supreme Court decision derailed, perhaps only temporarily, the National Citizens Coalition in its attack on trade unions. However, even taking this argument at face value, winning a battle does not necessarily lead to winning the war.

But what of the broader assertion of this paper that *Lavigne* is well within the recent tradition of the courts in applying the Charter to collective bargaining in a manner which is unsatisfactory to unions? My belief here is not supported by all legal scholars. For example, according to Paul Weiler, the judiciary has not, in *Lavigne* in particular or in the body of Charter labour jurisprudence as a whole, "systematically undervalued the interests of labour *vis-à-vis* capital" (Weiler, 1990: 187). He bases his argument on the "explicit assumption of the judges

in the key cases ... that the human needs of workers are vital and worthy of support" (Weiler, 1990: 187). A good deal of the evidence for this view is from cases such as *Re. Wilson and the Medical Services Commission of British Columbia* and *Andrews* where the courts involved could clearly relate to the individuals involved—a doctor and a potential lawyer.[12]

Weiler also refers to the large body of administrative labour law where the Charter has been invoked—cases heard by provincial and federal labour relations boards. However, the vast majority of these cases involve employers attempting to use the Charter in a trivial manner to undermine normal processes of certification, such as challenging the right of a union to exclusive bargaining agency (see the appendix outlining judicial and labour board decisions on the Charter in the workplace following Weiler, 1990: 191-212). None of these cases have struck at the heart of collective bargaining as freedom of association, and the rights involved have not been fundamental in nature. The fact is that the various labour boards have not so much supported unions in Charter cases, but have upheld labour legislation in the face of trivial arguments.

One could argue that Weiler is correct, in so far as the court has been "fair" in applying its own standards to unions; however, one must review the standards themselves. For example, the test enunciated in the *Labour Trilogy* prevents unions from achieving the fruits of their labour, constitutionally-protected economic sanctions (i.e. the right to strike). By re-defining what a union is, the Supreme Court has undervalued the role of the labour movement in Canada.

According to Weiler, the courts have also "generally adopted the view that this is a field of law better left to the legislative and administrative branches of government" (Weiler, 1990: 187). This is a view with which several of Weiler's more left-of-centre colleagues, such as Cavalluzzo, would agree with in principle, but would deny has been

12. In *Wilson*, a British Columbia doctor opposed the government proposal to limit the entry of doctors into the B.C. labour market, and direct where doctors could work within the province. In *Andrews*, a lawyer successfully challenged his exclusion from the practice of law because he was not a Canadian citizen. In discussing Andrews, Weiler mistakenly equates doctors, whose salaries are regulated at a high level and who are not forced to sell their labour in an open market, with average workers. The nature of the employment contract is markedly different.

the reality in practice. The question in response to this view might be: should the courts' polite deference to the political/administrative realm in dealing with questions of labour law also be interpreted as: (a) an ideological predisposition not to take collective rights seriously?; (b) an exaggeration of the power of unions in the political and administrative process, uncovering an assumption that workers are in less need of "rights protection" than say criminals, because they can effectively represent themselves and are quite evenly matched in the contest against capital?; (c) unmasking an opinion, like that held by Justice McIntyre in the *Labour Trilogy*, that the claims of workers are recent and therefore neither fundamental or important? (*Re. Public Service Employee Relations Act, (Alberta)*, S.C.C.: 232)

Despite evidence to the contrary, Weiler considers it a sign of good faith that the judiciary has been willing to defer to legislative and administrative tribunals. Of course, a cynical view might be that this hardly represents victory on any level. For if you cannot "win" anything new under the Charter, or even constitutionally entrench existing rights, you have to be content and consider yourself lucky to keep what you currently have.

I do not claim that *Lavigne* answers conclusively the question of how the courts will apply the Charter to labour law in the future. Nor would I suggest that the above possible interpretations of the courts' actions are necessarily correct. The questions listed above do merit serious consideration. I think it would be naive not to assume that on some level the courts, precisely because they are the third branch of government and are generally representative in make-up and orientation of the broader power interests of society, might be more likely to hand down decisions that would favour capital over the labour movement. As a student of political science and not of law, my attention turns to the "winners" and "losers" of the Charter game, not to the technical and often obscure nature of the arguments put forward, especially when these arguments are often an implicit disguise for patently political positions. My prescriptive advice to the labour movement would be to use the Charter only as a last resort in a possible defensive strategy when under attack, and certainly not to run to the Charter as an offensive tactic.

Conclusion

Upon examination, the court decisions in Lavigne bear witness to the unhappy experience of the labour movement with the Charter. Put in the broader context of the *Labour Trilogy* and *Dolphin Delivery* a trend is evident in favour of individual rights over collective rights. Given the liberal wording of the Charter and the probable intention of the framers, not to mention the predilection of the judiciary in carefully maintaining the status quo (albeit under a guise of interpretation), this trend is not surprising. More surprising is how late the labour movement has come to this realization. Perhaps that is why there has been a rhetorical effort to portray *Lavigne* as a victory.

The labour movement, like Alice in the epigraph at the beginning of this paper, is at first rather bewildered to learn that, in the judicial arena, words mean just what the judges say they mean. Moreover, these meanings are not judicially neutral but are politically loaded. However, the labour movement seems content to play the game of Humpty Dumpty, and call *Lavigne* a victory nevertheless.

Works Cited

Beatty, D. M., and Kennett, S. (1988), "Striking Back: Fighting Words, Social Protest and Political Participation in Free and Democratic Societies", *Queen's Law Journal* 13.2, 214-266.

Carter, D. P. (1988), "Canadian Labour Relations Under the Charter", *Relations Industrielles* 43.2, 305-319.

Cavalluzo, P. J. J. (1988), "Freedom of Association—its Effect Upon Collective Bargaining and Trade Unions", *Queen's Law Journal* 13.2, 267-300.

Etherington, B. (1987), "Freedom of Association and Compulsory Union Dues: Toward a Purposive Conception of Freedom not to

Associate", *Ottawa Law Review* 19, 1-47.

Hutchinson, A. (1989), "Unions Shouldn't Gloat About Check-off Ruling", *Toronto Star*, 23 February.

Mandel, M. (1988), *The Charter of Rights and the Legalization of Politics in Canada*, Toronto.

Panitch, L., and Swartz, D. (1987), *The Assault on Trade Union Freedoms: From Consent to Coercion Revisited*, Toronto.

Weiler, P. C. (1990), "The Charter at Work: Reflections on the Constitutionalizing of Labour and Employment Law", *University of Toronto Law Journal* 40, 117-212.

Cases Cited

Abood v. Detroit Board of Education (1977), 431 U.S. 209 (U.S.S.C.).

BCGEU v. AG British Columbia (1988), 53 D.L.R. (4th) 1 (S.C.C.).

Government of Saskatchewan v. RWDSU (1987), 38 D.L.R. (4th) 277 (S.C.C.).

Hunter v. Southam Inc. (1984), 11 D.L.R. (4th) 112 (S.C.C.).

Law Society of British Columbia v. Andrews (1989), 56 D.L.R. (4th) 1 (S.C.C.).

Newfoundland Association of Public Employees v. Government of Newfoundland (1985), 85 CLLC para. 14 020 (Nfld. S.C.).

Public Service Alliance of Canada et al. v. The Queen in Right of Canada et al. (1987), D.L.R. (4th) 249 (S.C.C.).

R. v. Big M Drug Mart (1985), 18 D.L.R. (4th) 321 (S.C.C.).

R. v. Oakes (1986), 26 D.L.R. (4th) 200 (S.C.C.).

Re. Lavigne v. OPSEU et al. (1986), 29 D.L.R. (4th) 327 (Ont. S.C.).

Re. Lavigne v. OPSEU et al. (1987), (n. 2) 41 D.L.R. (4th) 86 (Ont. S.C.).

Re. Lavigne v. OPSEU et al. (1989), 56 D.L.R. (4th) 474 (Ont. C.A.).

Re. Lavigne v. OPSEU et al. (1991), 81 D.L.R. (4th) 545 (S.C.C.).

Retail, Wholesale and Department Store Union, Local 580 et al. v. Dolphin Delivery Ltd. (1987), 33 D.L.R. (4th) 174 (S.C.C.).