LAVIGNE v. *OPSEU*: MOVING TOWARD OR AWAY FROM A FREEDOM TO NOT ASSOCIATE?

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The author analyses the significance of the Lavigne *v.* OPSEU *decision of the Supreme Court of Canada on the constitutionality of compulsory union dues and their use for "non-collective bargaining" purposes. He discusses, with trepidation, the potential for the recognition of a general freedom* from *association and its significance in terms of the ability of legislatures to protect and promote workers' interests and to further collective social and economic interests in other spheres of activity. The interpretive approaches of members of the Supreme Court in this case are juxtaposed with their interpretive approaches in previous cases concerning the extent to which the* Charter *protected the freedom* to *associate of workers through collective bargaining activity to further their interests collectively. The author argues that this juxtaposition undermines a liberal romantic analysis of the potential for judical review of labour law under the* Charter *and supports a realist approach, one which recognizes the contingency of the approach of members of the Court depending on the nature of the interests at stake in the claims for* Charter *protection.*

L'auteur analyse la signification de la décision rendue par la Cour suprême du Canada dans l'affaire Lavigne *c.* SEFPO *qui portait sur la constitutionnalité des cotisations syndicales obligatoires et de leur utilisation à des fins « autres » que la négociation collective. Il discute avec appréhension de la possibilité que soit reconnue une liberté générale de non-association et de sa signification compte tenu de la capacité des législatures à protéger et promouvoir les intérêts des travailleurs et des travailleuses et à défendre les intérêts sociaux et économiques collectifs dans d'autres sphères d'activité. Les approches interprétatives des membres de la Cour suprême dans l'affaire* Lavigne *sont comparées aux approches interprétatives qu'ils ont adoptées auparavant dans d'autres affaires portant sur l'étendue de la protection accordée par la* Charte *à la liberté d'association des travailleurs et des travailleuses ayant recours à la négociation collective pour défendre leurs intérêts communs. L'auteur maintient que cette comparaison enlève du poids à une analyse libérale non réaliste qui préconise une révision judiciaire de la législation du travail sous le régime de la* Charte. *De plus, il soutient que cette comparaison favorise une approche réaliste reconnaissant la contingence de l'approche interprétative des membres de la Cour qui dépend de la nature des intérêts en jeu dans les actions intentées afin d'obtenir la protection de la* Charte.

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I. INTRODUCTION

The decision of the Supreme Court of Canada on the constitutionality of compulsory union dues and their use for "non-collective bargaining" purposes in *Lavigne* v. *OPSEU*[1] was awaited with much trepidation by Labour. They had learned from the *Labour Trilogy*[2] decisions that freedom of association under subsection 2(d) of the *Charter*[3] did not provide any protection for the right to strike as a means of protecting the interests of workers or pursuing the fundamental purposes of their association in unions. Labour had also learned from other decisions of the Supreme Court that the guarantees of freedom of association and expression were unlikely to provide any meaningful protection for other forms of collective action by workers, including primary[4] or secondary[5] picketing in support of a lawful strike, taken to protect or further their interests. More recently they had learned that the freedom of association found in the *Charter* did not protect a more limited right to collective bargaining itself, or at least equal access to state procedures for collective bargaining.[6]

In short, it had become fairly clear that, although freedom of association in its positive aspect of freedom *to* associate might provide protection for the purposes and associational activities of some members of society,[7] it was unlikely to play a positive role in protecting or promoting the interests of Canadian workers. What remained unresolved was the extent to which freedom of association under the *Charter*

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[1] (1991), 81 D.L.R. (4th) 545, 126 N.R. 161 (S.C.C.) [hereinafter *Lavigne* cited to D.L.R.], *aff'g* (1989), 67 O.R. (2d) 536, 56 D.L.R. (4th) 474 (C.A.) [cited to O.R.], *rev'g* (1986), 55 O.R. (2d) 449, 29 D.L.R. (4th) 321 (H.C.) [cited to O.R.], additional reasons at (*sub nom. Re Lavigne and OPSEU (No. 2)*) (1987), 60 O.R. (2d) 486, 41 D.L.R. (4th) 86 (H.C.) [hereinafter *Lavigne (No. 2)* cited to O.R.].

[2] *Ref. re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161 [hereinafter *Alberta Reference* cited to S.C.R.]; *PSAC* v. *Canada*, [1987] 1 S.C.R. 424, 38 D.L.R. (4th) 249; *RWDSU* v. *Saskatchewan*, [1987] 1 S.C.R. 460, 38 D.L.R. (4th) 277.

[3] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982*, (U.K.) 1982, c. 11 [hereinafter *Charter*].

[4] *BCGEU* v. *British Columbia (A.G.)*, [1988] 2 S.C.R. 214, 53 D.L.R. (4th) 1.

[5] *RWDSU* v. *Dolphin Delivery*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 [hereinafter *RWDSU* cited to S.C.R.].

[6] *PIPS* v. *Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367, [1990] 5 W.W.R. 385 [hereinafter *PIPS* cited to W.W.R.].

[7] *Black* v. *Law Society of Alberta*, [1989] 1 S.C.R. 591, 58 D.L.R. (4th) 317. McIntyre and L'Heureux-Dubé JJ. agreed with the Alberta Court of Appeal finding that Law Society rules which prohibited residents from forming partnerships with non-residents for the purpose of practicing law violated their freedom of association under subsection 2(d). It is worth noting that although McIntyre J. felt that subsection 2(d) must protect the freedom of lawyers to pursue the practice of law in association with other lawyers, this same judge rejected arguments that subsection 2(d) must protect collective activities which were essential to the purposes of workers' association by analogizing concerted labour activities to "golf", in the now famous phrase "golf is a lawful but not constitutionally protected activity": *see Alberta Reference*, *supra*, note 2 at 408.

included a negative aspect, protection for a freedom *from* association. Labour and many labour law academics were concerned with the potential negative impact of the recognition of a freedom to not associate on the ability of legislatures to enact effective structures for collective bargaining and the ability of unions to gain and maintain strength through effective union security measures. Apart from its implications for labour legislation and the labour community, the ruling in *Lavigne* on *Charter* protection for a freedom of non-association was looked to for its broader implications for the ability of modern Canadian governments to compel the combining of efforts by individuals in other spheres of activity to further collective social and economic interests.

Although ultimately all members of the Court upheld the use of compulsory agency dues by unions for "non-collective bargaining" purposes, a slim majority in *Lavigne* stumbled towards the recognition of some concept of freedom *from* association under subsection 2(d). But there is significant disagreement among that majority as to its content and significance. Three justices, for the reasons indicated by La Forest J., urge recognition of a broad conception of a freedom to not associate, whereas McLachlin J. supports the recognition of a narrower, more purposive conception of the freedom to not associate. Three judges, for reasons stated by Wilson J., reject recognition of a freedom from association in any form under subsection 2(d). Consequently, only La Forest J. and his supporters would find a violation of subsection 2(d) in the use of compulsory agency shop dues for purposes outside the immediate concerns of the bargaining unit, although even he would uphold such usage of compelled dues under section 1 of the *Charter*.

The focus of this article will be on analysis of the views of La Forest, McLachlin and Wilson JJ. on protection for a freedom *from* association. However, I will commence with a brief discussion of the facts and the decisions of the lower courts in the case. I will then canvas briefly the findings of the Court on the *Charter* application issues. I will then discuss the freedom to not associate issues, comparing the tenor, approach and analysis of members of the Court to their rulings in freedom *to* associate cases, and exploring the implications of the decision for future cases involving *Charter* review of collective bargaining law. Finally, I will offer some observations on the significance of the decision for the debate amongst labour academics concerning expectations for judicial review of labour law under the *Charter*.

II. The Facts

Lavigne was a member of the academic staff bargaining unit at one of 20 community colleges established in Ontario under the *Ministry of Colleges and Universities Act*[8] but had never been a member of the bargaining agent, the Ontario Public Service Employees Union (OPSEU). Nevertheless, he was required to pay the equivalent of regular

[8] R.S.O. 1990, c. M.19.

union dues to OPSEU under an agency shop clause[9] in the collective agreement between OPSEU and the employer Council of Regents.[10] The relevant legislation was permissive in nature, leaving it open to the parties to negotiate over the inclusion of an agency shop clause in their collective agreement.[11]

The main thrust of the applicant's *Charter* challenge was the claim that the compelled payment of union dues to OPSEU under the agency shop clause violated his *Charter* freedoms of association and expression, in so far as the compelled dues were used by the union for non-collective bargaining purposes.[12] The expenditures objected to by the applicant as "non-collective bargaining" in nature can be summarized briefly under the following general headings:

1. Financial contributions to a political party.
2. Financial contributions to disarmament and other peace campaigns, including the *Operation Dismantle*[13] litigation.
3. Financial contributions to campaigns concerning the expenditure of government funds, including the expenditure of funds for a domed stadium in Toronto.

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[9] "Agency shop" (often referred to as Rand formula) clauses require all members of the bargaining unit, including non-union members, to pay to the union an amount equal to regular union membership dues. Deductions are usually required to be made by the employer at source as they were in this case. Agency shop clauses must be distinguished from other forms of union security, such as "union shop" clauses and "closed shop" clauses. A union shop clause requires all employees in the bargaining unit to become and to remain members in good standing of the bargaining agent union within a short period of becoming an employee in the bargaining unit. A closed shop provision requires the employer to hire only members of the bargaining agent union for employment within the bargaining unit.

[10] The Ontario Council of Regents for Colleges of Applied Arts and Technology had been designated as the exclusive bargaining agent for college employers in a centralized province-wide scheme of collective bargaining established for all Ontario colleges under the *Colleges Collective Bargaining Act*, R.S.O. 1990, c. C.15, s. 2(3). The Council was established under s. 5(2) of the *Ministry of Colleges and Universities Act*, *supra*, note 8.

[11] *See Colleges Collective Bargaining Act*, *ibid.*, ss 51, 52 & 53(1).

[12] Mr Lavigne sought a declaration that sections 51, 52 & 53 of the *Colleges Collective Bargaining Act* were in violation of the *Charter* and therefore of no force and effect, to the extent that they resulted in the compulsory payment of dues to OPSEU, and the dues were used for a number of specified "non-collective bargaining" purposes. The applicant also sought a declaration that the entering into of a collective agreement by the Council of Regents, which provided for compulsory payment of dues to OPSEU, was in violation of the *Charter* to the extent that the agreement permitted compulsory dues to be used for specified "non-collective bargaining" purposes. Finally, the applicant sought declarations that would effectively require employees to expressly "opt-in" to support the specified "non-collective bargaining" purposes before compulsory union dues could be deducted for those purposes.

Mr Lavigne also challenged other provisions of the *Act* which prohibited workers who continued to work in a strike situation from being paid as contrary to his freedoms of association and expression and his equality rights. These claims were rejected outright before the lower courts and not raised before the Supreme Court.

[13] *Canada* v. *Operation Dismantle Inc.*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481.

4. Financial contributions to unions and workers in foreign countries, including contributions to striking coal miners in the United Kingdom.
5. Financial contributions to other social causes (*i.e.* free choice in relation to abortion).
6. The portion of affiliation dues paid by OPSEU (out of compulsory dues) to affiliated or parent labour organizations — National Union of Provincial Government Employees (NUPGE), the Ontario Federation of Labour (OFL), and the Canadian Labour Congress (CLC) — used for political and social causes of the type described in paragraphs 1-5.

The applicant took the position that compelled payment of dues itself, to be used for any purpose, constituted a *prima facie* violation of subsection 2(d) and subsection 2(b)[14] of the *Charter*. However, he conceded that at the level of analysis under section 1 of the *Charter* compelled payment of dues under an agency shop clause was a reasonable limit on his *Charter* freedoms in so far as the dues were used for collective bargaining activity. But Lavigne argued that compelled payment of dues used for non-collective bargaining purposes could not be justified as a reasonable limit under section 1.

At trial, Mr Justice White found for the applicant.[15] He held that the *Charter* applied due to the presence of a governmental actor (the Council of Regents) and governmental action in the form of entering into the collective agreement. He also found that freedom of association under the *Charter* included a freedom from compelled association which was violated whenever the individual was forced to combine with others to achieve a common end. Thus, compelled contribution of financial resources through compulsory agency dues could only be upheld if found to be a reasonable limit under section 1. White J. held that compelled contribution of dues could be justified to the extent they were used for collective bargaining purposes, but could not be justified under section 1 if used for other purposes.[16]

The Ontario Court of Appeal found in favour of the appellant union. It held that Lavigne's challenge was in substance a challenge against the

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[14] The s. 2(b) claim of Lavigne was rejected by all judges at all levels. In the Supreme Court, La Forest J. dismissed it quickly, finding there was no attempt to convey meaning in the compelled contribution. Wilson J. found that the form of the contribution did not align the employee who refused to join the union with the activities or views of the union in any way or interfere with the employee's freedom to express his dissent. The Court's cursory examination of s. 2(b) issues will not be discussed further herein.

[15] *Lavigne*, *supra*, note 1 (H.C.).

[16] *Ibid.* at 516-17. For extensive commentary on the decision of White J., *see* B. Etherington, *Freedom of Association and Compulsory Union Dues: Towards a Purposive Conception of a Freedom to Not Associate* (1987) 19 OTTAWA L. REV. 1 [hereinafter Etherington].

In separate reasons reported in *Re Lavigne (No. 2)*, *supra*, note 1, White J. held that most of the impugned expenditures were not permissible except for the contributions to other unions. He issued a five-page declaratory order requiring the union to establish a fairly complex "opt-out" mechanism with a procedural framework for objections to union expenditures designed to ensure procedural fairness for dissident employees.

union's use of the compelled dues, which was a private activity by a private organization and hence beyond the reach of the *Charter*.[17] The Court went on to indicate that if the *Charter* did apply there was no infringement of Lavigne's freedom of association by the compulsion to pay dues. Although it refused to rule on whether the freedom did include a negative aspect, it held that if the *Charter* did protect a negative freedom from association, the right to refrain from association does not necessarily include the right not to be required to support an organization financially. It also indicated that any restriction on how a union spent its dues was more appropriately a legislative matter than a matter for the judiciary.[18]

III. The Application of the *Charter*

The ruling of the Supreme Court on the issue of *Charter* application is very significant for determining the scope of the *Charter*'s application to public and private sector labour law. Was the permissive provision in subsection 53(1) of the *Act* which merely permitted the parties to agree to an agency shop clause sufficient, in itself, to invoke the *Charter*? If so, the decision would have major implications for the *Charter* to apply widely to union security provisions in the private sector since much private sector legislation has similar permissive legislation for agency, union shop and closed shop clauses.[19] And if a governmental actor was an essential requirement for *Charter* application, would the *Charter* apply to all provisions in public sector collective agreements, or was there an additional governmental function test that might preclude such broad application to public sector collective bargaining?

A strong majority of the Court (five of seven judges) supported the reasons of La Forest J. on the application of the *Charter*.[20] La Forest J.'s finding in favour of *Charter* applicability continued the focus on requirements of "governmental conduct" by a "governmental actor"[21] established in several prior decisions of the Court.[22] Of great significance for future cases is the finding that the existence of permissive legislation allowing the parties to agree to such union security clauses is not by itself sufficient to implicate the legislature as the government actor

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[17] *Lavigne*, *supra*, note 1 (C.A.).

[18] *Ibid.* at 566.

[19] *See* Etherington, *supra*, note 16 at 8-9. *See also generally* G.W. Adams, Canadian Labour Law: A Comprehensive Text (Aurora: Canada Law Book Inc., 1985).

[20] The reasons of Wilson J. on the application of the *Charter* issues, in which she continued to argue for the adoption of a comprehensive three-part test for determining *Charter* applicability to "non-governmental" bodies, were supported by L'Heureux-Dubé J.: *see Lavigne*, *supra*, note 1 at 559-70.

[21] *Ibid.* at 618-22.

[22] *See RWDSU*, *supra*, note 5; *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229, 118 N.R. 1; *Douglas/Kwantlen Faculty Assn* v. *Douglas College*, [1990] 3 S.C.R. 570, 77 D.L.R. (4th) 94.

and require the *Charter*'s application.[23] Rather, the application of the *Charter* hinges on the finding that the employer was a Crown agency.[24] La Forest J. also rejected arguments from the union that it was not governmental "conduct" which led to the clause which compelled the payment of dues. He held that there was sufficient governmental conduct to attract the *Charter*'s application in the employer's acquiescence to the agency shop clause which granted broad discretion to the union and obligated the Council to deduct dues and remit them to the union.

La Forest J. also rejected arguments that the governmental actors should not be subject to the *Charter* when engaged in activities that are primarily of a private, commercial, contractual or non-public nature. It was important that the *Charter* be applicable to government actors when engaged in commercial or non-governmental activity to prevent governments from circumventing *Charter* obligations by undertaking such activities. As well, to enable the *Charter* to play a positive role in the creation of society-wide respect for the principles it embodied, it was necessary that government provide a model of how Canadians should treat each other when it undertook activities in the private sector.

Court watchers have to be struck by the contrast between this reasoning for applying the *Charter* to government agencies when they engage in commercial or "private" activity and the Court's rejection of similar arguments for the application of the *Charter* to the courts themselves as government actors when enforcing common law doctrines in litigation between private parties in *RWDSU*.[25] One can draw the inference that it is more important for little-known government agencies such as the Council of Regents[26] to provide a model of respect for *Charter* values than it is for our courts to do so in the development and application of common law.

In the final analysis it would appear that merely permissive legislation enabling private parties to agree to particular terms in a collective agreement will not render the *Charter* applicable to collective agreement provisions between private parties. However, the judgment appears to render the *Charter* generally applicable to terms of public and quasi-public sector collective agreements as long as the employer is sufficiently controlled by government to be identified as "falling within the apparatus of government."[27]

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[23] *Lavigne*, *supra*, note 1 at 618-19.

[24] The Court relied solely on the element of government control over the Council in determining that it "fell within the apparatus of government": *ibid.* at 619.

[25] *Supra*, note 5.

[26] "The extent to which government adherence to the *Charter* can serve as an example to society as a whole can only be enhanced if the government remains bound by the *Charter* even when it enters the marketplace": *see Lavigne*, *supra*, note 1 at 622, La Forest J.

[27] *See* note 24.

IV. A FREEDOM TO NOT ASSOCIATE

Four of the seven judges opted for recognition of some form of a freedom from association, but there was strong disagreement between McLachlin J., writing for herself, and La Forest J., writing for Sopinka and Gonthier JJ., over the scope of the freedom to not associate. Wilson J., writing for Cory and L'Heureux-Dubé JJ. on this issue, held that freedom of association did not include protection for a freedom from compelled association.

La Forest J., citing protection of the individual's interest in self-actualization and fulfilment as the essence of both the positive and negative aspects of freedom of association, held that a purposive conception of the freedom must include "freedom from forced association".[28] However, a *Charter* freedom *from* association had to be reconciled with recognition that everyday forms of compelled association were a "necessary and inevitable part of membership in a democratic community, the existence of which the *Charter* clearly assumes."[29] The compulsory payment of taxes to support government policies to which the individual is opposed is but the most obvious example. La Forest J. recognized that the expansive mandate of modern government meant that some degree of compelled association beyond paying taxes would be constitutionally acceptable, where the association is created by the workings of society in pursuit of the common interest.[30] But the Court had to seek a device that would enable state compulsion in these areas to be assessed against the nature of the underlying association activity which was being regulated by the state.

Despite union arguments to the contrary, La Forest J. found that compelled payment of dues, even in small amounts, did affect the autonomy of the individual and amounted to compelled association. Because the freedom to associate consisted of the right to organize, belong to, maintain, and participate in the activities of an association,[31] the denial of any one of those rights denies the freedom and being forced to do any one of those activities interferes with the freedom to not associate. But given the need for compelled combining of efforts to further the collective social welfare in modern society, some limitations on the freedom to not associate had to be recognized.

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[28] *Lavigne*, *supra*, note 1 at 623-24. La Forest J. relied on a passage from *R.* v. *Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295 at 337, 18 D.L.R. (4th) 321 at 354, where Dickson J. (as he then was) emphasized that "[f]reedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices."

[29] *Lavigne*, *supra*, note 1 at 626.

[30] *Ibid.*

[31] This definition of the scope of the positive aspects of the freedom is allegedly drawn from *Alberta Reference*, *supra*, note 2. One might question the veracity of this definition in light of the decision in *PIPS*, *supra*, note 6, which implies that there is no protection for the right of individuals to participate in the activities of the association unless they are otherwise protected activity under another *Charter* right.

La Forest J. began his search for limits by rejecting suggestions that a purposive conception of the freedom should find interference with that freedom only where the compelled combining of efforts threatened one of the constitutional interests which the freedom was designed to protect.[32] In his opinion, this more restrictive approach towards a freedom to not associate[33] should be broadened to allow the Court to interfere with a government decision to compel association on two other grounds which are not related to the political process and individual liberty interests at stake. First, the Court should be able to review the legislature's determination in a particular case that a compelled combining of efforts was required to further the collective social welfare. If the Court approves of the legislature's social policy choice, it can still find the individual's freedom from association infringed either because one of the liberty interests to be protected by the freedom is threatened, or (and this is a very big "or") because the association is acting outside of the "furtherance of the cause which justified its creation."[34]

This latter ground for intervention is, of course, the most sweeping and relieves the dissident individual from having to demonstrate a link between the compelled association and the liberty interests at stake under a purposive conception of the freedom to not associate. It is not necessary to show that the form of association involved entails the government establishment of a particular political party or ideology, impairment of a payor's freedom to associate or express herself as she pleases, the imposition of ideological conformity, or the identification of the objecting individual with particular political causes or ideology. Instead, La Forest J. has adopted the American standard for freedom from association, developed in a number of cases concerning compulsory union dues.[35] He summarizes this standard as follows:

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[32] La Forest J. here referred to the arguments found in Etherington, *supra*, note 16 at 43-44, that a purposive interpretation of the freedom from association would impugn compelled association only where it threatened one of the four primary liberty interests which the freedom was designed to protect. I maintained that a forced contribution did not threaten the constitutional interests at stake unless it:

i) involved governmental establishment of, or support for particular political parties or causes; or
ii) impaired the individual's freedom to join or associate with causes of his or her choice; or
iii) imposed ideological conformity; or
iv) personally identified the objector with political or ideological causes which the association supports.

[33] The purposive approach to freedom from association which would not interfere with legislative judgments concerning the need for compelled combining of efforts to further the collective interest unless it threatened one of the liberty interests intended to be protected by s. 2(d), appears to be adopted by McLachlin J. in her reasons in *Lavigne*, *supra*, note 1.

[34] *Ibid.* at 632.

[35] *See* discussion of American case law in Etherington, *supra*, note 16 at 22-34. The leading United States Supreme Court decisions are *Abood* v. *Detroit Bd of Education*, 431 U.S. 209 (1977) [hereinafter *Abood*]; *Ellis* v. *Broth. of Ry, Airline and S.S. Clerks*, 466 U.S. 435 (1984) [hereinafter *Brotherhood*].

> In my view, it is more consistent with the generous approach to be applied to the interpretation of rights under the Charter to hold that the freedom of association of an individual member of a bargaining unit will be violated when he or she is compelled to contribute to causes, ideological *or otherwise*, that are beyond the *immediate concerns* of the bargaining unit....When that association extends into areas outside the realm of common interest that justified its creation, it interferes with the individual's right to refrain from association.[36] [emphasis added]

Unfortunately, La Forest J. does little to give content to the inherently ambiguous standard of "causes....that are beyond the immediate concerns of the bargaining unit". He acknowledged the difficulty in drawing the line between "activities that are related to the workplace and those that are not"[37] and admitted that where one draws the line "will depend on one's political and philosophical predilections, as well as one's understanding of how society works."[38] However, he suggested at several points in the reasons that he has a rather narrow view of the immediate concerns of the bargaining unit, equating them with addressing the terms and conditions of employment for members of the bargaining unit and "representing Lavigne and his fellow workers in collective bargaining, grievance arbitration, and the like."[39] And La Forest J. held that the impugned expenditures relating to the disarmament movement and opposition to the Toronto SkyDome did violate Lavigne's freedom to not associate because they were not sufficiently related to the concerns of the bargaining unit or to the union's functions as exclusive bargaining agent.[40]

Nevertheless, ultimately La Forest J. upheld agency shop provisions which compel employees to pay dues to unions knowing the dues may be used for other than collective bargaining purposes as reasonable limits under section 1 of the *Charter*. In terms of important governmental objectives, he recognized the importance of ensuring that unions have the resources and mandate necessary to allow them to play a role in shaping the political, economic and social context within which collective bargaining will take place. The second important objective was to contribute to democracy in the workplace. These objectives would be seriously undermined if the government or courts were the ones to decide which expenditures could be said to be in the interest of the union's members. Agency shop measures which required contributions without guarantees as to how they would be used were clearly rationally connected to these objectives. They also impaired the individual's freedom to not associate as little as possible when compared with the alternative of an "opting-out" procedure for dissident employees regarding non-collective bargaining expenditures. An opting-out process could seriously undermine the union's financial strength and its ability to favourably

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[36] *Lavigne*, *supra*, note 1 at 634-35.
[37] *Ibid.* at 635.
[38] *Ibid.* at 639.
[39] *Ibid.* at 632-33.
[40] *Ibid.* at 635.

affect the political, social and economic environment in which collective bargaining takes place. As well, the paternalism and indeterminacy of legislative and judicial attempts to draw the line between appropriate and inappropriate expenses would undermine the status of unions as self-governing and democratic institutions. Indeed, La Forest J. concludes that it would be "highly unfortunate if the courts involved themselves in drawing such lines on a case-by-case basis."[41]

Thus, although the problems of indeterminacy of the standard of 'causes beyond the immediate concerns of collective bargaining' and its invalidity in terms of the role which unions must play in modern society to further workers' interests did not convince La Forest J. to adopt a more restrictive conception of freedom to not associate, these problems are recognized in his section 1 analysis. He attempts to avoid the spectre of judicial entanglement in the form of ongoing judicial review of particular union expenditures which violate the collective bargaining concerns standard, by giving an apparently broad section 1 approval for agency shop provisions which leave the union free to determine union expenditures, even if they include expenditures for items which violate the objecting payor's freedom to refrain from association.

Perhaps the most startling feature of La Forest J.'s reasons (supported by Sopinka and Gonthier JJ.) for rejecting a narrower, more purposive conception of the freedom *from* association are his arguments that we should adopt a more generous and expansive interpretation of the freedom because our *Charter* contains a separate explicit right of freedom of association and the presence of section 1 allows us to give generous scope to the right itself and tailor it to given contexts under section 1.[42] This may appear to be a sudden and unseemly conversion to many readers familiar with the Court's decisions in the freedom *to* associate cases in the labour setting. Most notably, in the leading decision[43] in the *Labour Trilogy*, the four judges who comprised the majority which rejected protection for the right to strike alluded, in two judgments,[44] to the need for the Court to exercise restraint in giving content to the freedom of association. Both judgments pointed to the danger of constitutionalizing aspects or features of labour relations which would require the courts to become involved in questioning the decisions of legislatures on labour relations matters, which by their very nature involve a complex and delicate balancing of competing interests. Le Dain J. noted that the Court had recently affirmed the need for restraint in the judicial review of administrative action in the labour area in light

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[41] *Ibid.* at 639.

[42] *Ibid.* at 634-35. This is given as the reason why our freedom to not associate should be at least as broad as that adopted in the U.S. courts where the American *Bill of Rights* makes no explicit reference to freedom of association, but the right is implied from the freedom of expression in the First Amendment, and there is no counterpart to section 1.

[43] *Alberta Reference*, *supra*, note 2.

[44] Le Dain J. wrote for Beetz and La Forest JJ. McIntyre J. wrote a concurring opinion.

of the limits of court expertise on such matters.[45] McIntyre J. pointed out that experience had shown that courts were ill-suited to resolving questions concerning labour relations policy and the Court should be hesitant to interpret the freedom of association in an expansive fashion to include the right to strike because it could throw them back into the field of labour relations.[46] Finally, in the more recent decision of *PIPS* v. *NWT (Commissioner)*[47] the majority, in judgments by Sopinka J. (supported by La Forest and L'Heureux-Dubé JJ.) and Dickson C.J.C., continued the restrictive approach to the interpretation of subsection 2(d) by holding that it did not protect any aspects of collective bargaining.[48]

La Forest J.'s comments in *Lavigne* would appear to demonstrate that the Court's approach toward the interpretation of subsection 2(d) in a labour relations context, whether it should be generous and expansive or restrictive and cautious, depends heavily on the nature of the claims being asserted and the values of the individual judges concerning the protection of collective rights and individual rights and freedoms. This seems particularly apparent given that La Forest J. had supported Le Dain J. in the *Labour Trilogy* decisions and Sopinka J. had taken a restrictive approach to the interpretation of the freedom in its positive aspects in the *PIPS* decision.

McLachlin J. agreed that freedom of association must contain a negative aspect, a freedom to refrain from association. Nevertheless, she adopted a more restrictive and more purposive approach to the freedom to not associate. The constitutional interest to be protected through recognition of a freedom to not associate is freedom from enforced association with ideas and values to which the individual does not voluntarily subscribe. She refers to it as "the interest in freedom from coerced ideological conformity."[49] Given this purpose for the freedom, when concerned with compulsory payments to an association such as a union, subsection 2(d) interests will not be infringed unless "the payments are such that they may *reasonably* be regarded as associating the individual with ideas and values to which the individual does not voluntarily subscribe."[50]

The payment of compulsory union dues under the Rand formula simply did not meet this standard of enforced ideological conformity. The whole purpose of the agency shop clause is to permit a person who does not wish to associate herself with the union to avoid doing so by

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[45] *Alberta Reference*, *supra*, note 2 at 391.

[46] *Ibid.* at 415-17.

[47] *Supra*, note 6.

[48] In fact, of the four judges who made up the majority in *PIPS*, only two, Sopinka and L'Heureux-Dubé JJ., seemed to find that freedom of association in its positive aspect protected associational activities which were lawful if performed by an individual. La Forest J. expressly distanced himself from this conclusion, implying that it only protected associational activities which were otherwise constitutionally protected activities under other sections of the *Charter*.

[49] *Lavigne*, *supra*, note 1 at 643.

[50] *Ibid.* at 644.

declining to become a member and thereby dissociating herself from the activities of the union. The compelled payment to avoid free riders by its very nature avoids the connotation of personal support for the purposes for which it is used. It is viewed as being similar to the obligation of a taxpayer to pay taxes without any indication of support for particular policies.

McLachlin J.'s analysis is clearly the closest to the purposive conception of a freedom to not associate which I have advocated previously.[51] Her insistence that compelled association be shown to threaten one of the constitutional interests at stake for a violation of subsection 2(d) to be found is motivated by both practicality and policy. To interpret subsection 2(d) to cover compelled financial contributions *per se* or those used for purposes beyond the immediate concerns of the association would recognize the *prima facie* validity of a plethora of claims and put the courts to assessing the justifiability of countless government actions or government supported actions, by trying to distinguish between "immediate concerns" and more attenuated goals either under subsection 2(d) or under section 1 of the *Charter*. This is despite the fact there may be no threat to the constitutional interests at stake by means of the compelled payment. And finally, she notes that the American standard for freedom from association adopted by La Forest J. in his reasons has been controversial and difficult to apply in the United States.[52]

However, Wilson J. held that the freedom of association does not include protection for freedom to refrain from association. Supported by Cory and L'Heureux-Dube JJ., she concluded that the Court's prior rulings under subsection 2(d) restricted the purpose of the freedom to protection for the collective pursuit by individuals of common goals. To interpret it to include the freedom to not associate would overshoot the actual purpose of the freedom and set the scene for judicial contests between the positive associational rights of union members and the negative associational rights of non-members. To restrict the freedom to its positive aspects best suited the Court's serious and non-trivial approach to *Charter* guarantees.[53] And it would avoid the dangers which protection for a freedom from association presented in terms of ongoing judicial review of numerous other forms of compelled association contributions necessary in modern society, not the least of which is government taxation.[54] Wilson J. also expressed great concern with evidence of judicial entanglement resulting from the recognition of compelled contributions as constitutionally impermissible in the United States.[55]

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[51] *See* Etherington, *supra*, note 16.

[52] *Lavigne*, *supra*, note 1 at 648. For fuller commentary on the difficulties with the American standard, *see* Etherington, *ibid.* at 34-42.

[53] *See Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1.

[54] Wilson J. found that the system of compelled dues within the organized workplace was not distinguishable in principle from the system of taxation within a democratic country. *See Lavigne*, *supra*, note 1 at 580-81.

[55] *Ibid.* at 581. She refers to it as having "given rise to an endless train of disputes in the United States."

Madame Justice Wilson also concluded that recognition of a freedom to not associate is not necessary. The other *Charter* rights and freedoms should be sufficient to protect the real constitutional interests at stake in claims for a right to refrain from association. She felt that sections 2(b) and 7 were likely candidates for protection in appropriate cases.

Finally, she argued that even if subsection 2(d) did include a freedom to not associate it would not be infringed in the *Lavigne* case because the negative aspect of the freedom could not be broader in scope than the positive right to associate previously defined by the Supreme Court. Both the *Alberta Reference* and *PIPS* cases made it clear that subsection 2(d) did not protect the objects of the association or activities necessary to the pursuit of those objects. Here Lavigne's complaint was essentially that he could not be compelled to contribute to associational objects of which he disapproved. Wilson J. concluded that if the objects of an association cannot be invoked to advance claims of unions then they cannot be invoked to undermine them. To do otherwise would be to engage in "one-sided justice".[56]

V. Conclusion

In the final analysis we are left with a very uncertain result for the existence and scope of a freedom to not associate under the *Charter*. Three judges (the La Forest group) support recognition of a fairly broad, non-purposive conception of the freedom to not associate. For this group, the individual's right to refrain from association will be infringed whenever she is compelled to support causes which fall outside the realm of common interest that justified its creation. In the union context, the freedom to not associate of the individual will be violated when she is compelled to contribute to causes, ideological or otherwise, that are beyond the immediate concerns of the bargaining unit. But for three other judges (the Wilson group), there should be no recognition of a freedom to not associate. A freedom to refrain from association is not consistent with the purpose attributed to subsection 2(d) in the freedom *to* associate cases, it is not necessary to protect the constitutional interests at risk from compelled association which can be protected under other rights and freedoms, and it raises the spectre of judicial entanglement in the review of numerous forms of compelled association and contribution found necessary in modern democracies. Finally, a single judge, McLachlin J., supports the adoption of a freedom to not associate, but a more narrow and purposive conception than that of La Forest J. She too is concerned about judicial entanglement and her conception of the freedom impugns only those forms of compelled association which coerce ideological conformity. For McLachlin J., the critical question is whether compelled association can be reasonably regarded as associating the individual with ideas and values to which she does not voluntarily

[56] *Ibid.* at 583.

subscribe. But other forms of compelled association and contribution which do not threaten the constitutional interest in freedom from coerced ideological conformity do not warrant constitutional intervention.

Thus the slim majority in favour of *Charter* protection for a freedom to not associate tells us little about the meaning of the freedom and its implications for future cases dealing with compelled association in other forms and other contexts. The majority holding on *Charter* applicability is significant because it indicates that provisions of collective agreements in the public sector, or with employers that are sufficiently controlled by government to be found to be a governmental actor, will be subject to the *Charter*. Absent a governmental actor as a party, provisions in collective agreements would appear to be beyond the reach of the *Charter* unless they are expressly mandated by legislation. Thus other forms of union security clauses in private sector agreements would appear to be beyond *Charter* scrutiny. To the extent agency shop provisions are subject to the *Charter*, they have been upheld either because they do not violate subsection 2(d) at all (as *per* the Wilson group and McLachlin J.) or because they represent a reasonable limit on the freedom to not associate (as *per* La Forest J.). To the extent union or closed shop clauses which compel membership in the union exist in public sector agreements, their fate under the *Charter* would appear to be uncertain. On the issue of whether compelled membership violates subsection 2(d), only the reasons of La Forest J. would clearly support a positive answer. For Wilson J. there would be no subsection 2(d) violation although there might be a subsection 2(b) infringement.[57] And one has to be left with serious doubt over whether compelled membership provisions would pass muster under McLachlin J.'s test for whether they can be reasonably regarded as associating the individual with ideas and values to which she does not voluntarily subscribe.

Finally, the decision is important as a window on the values, assumptions and ideology of members of the Court on individual and collective rights in the collective bargaining context and perhaps in other contexts where modern Canadian governments compel association to further the collective social welfare. This is particularly apparent when the views of the justices in *Lavigne* are contrasted with the views expressed in the Court's freedom to associate cases. For we find that the rather sweeping statements supported by the majority in the *Labour Trilogy*, calling for a narrow and restrained interpretation of the freedom to associate arising from the need to defer to legislative judgments in the complex area of labour policy, are not repeated by members of the Court in *Lavigne*. Indeed two of the supporters of a very restrictive view of protection for collective action to pursue common goals in the prior cases, La Forest J. in the *Trilogy* and Sopinka J. in the *PIPS* decision,

[57] *See* the reasons of Wilson J., where she concluded there was no s. 2(b) violation in *Lavigne* because the two criteria for compelled speech which violates freedom of expression, public identification of the individual with the speech and absence of an opportunity to disavow, were not present: *supra*, note 1 at 595-96. *Quaere* whether the same can be said of compelled membership.

support the broadest interpretation of the freedom to refrain from association. And two of the strongest proponents of broader protection for collective activities in pursuit of common goals, Wilson J. supporting the right to strike and bargain collectively in the *Trilogy* and Cory J. supporting protection for collective bargaining in *PIPS*, refused to interpret the freedom of association generously in its negative aspect in *Lavigne*.

This type of juxtaposition of interpretative approaches on the part of members of the Court, demonstrating the contingency of those approaches depending on the interests at stake, is of great significance to an assessment of expectations for *Charter* review held by labour academics and members of the industrial relations community. It seriously undermines the claims made by romantic liberal academics for the value and legitimacy of judicial review of labour law under the *Charter*. Proponents of the constitutionalization of labour law under the *Charter*, such as David Beatty, have naively attempted to equate judicial activism under the *Charter* in the labour context with liberalism in terms of the protection and promotion of the interests of the traditionally disadvantaged: workers, women and visible minorities.[58] Beatty has at the same time argued that judicial restraint under the *Charter*, through narrow interpretative approaches, is to be equated with conservatism. He has also argued that *Charter* review can have a basic integrity and consistency if members of the Court simply adopt a generous approach to interpretation of the rights and freedoms and a stringent approach to the application of the *Oakes*[59] test for the justification of reasonable limits under section 1 of the *Charter*. He cited Wilson J. as the clearest and strongest proponent of such a liberal vision through strong activism under the *Charter* during the first years of *Charter* review and predicted that application of this approach to compelled union dues would dictate a finding that Lavigne's freedom of association had been violated for the reasons advocated by White J. in the Ontario High Court.[60]

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[58] *See* D.M. Beatty, THE CANADIAN PRODUCTION OF CONSTITUTIONAL REVIEW: TALKING HEADS AND THE SUPREMES (Toronto: Carswell, 1990) [hereinafter TALKING HEADS], in particular c. 4. For an earlier work along the same lines see D.M. Beatty, PUTTING THE CHARTER TO WORK: DESIGNING A CONSTITUTIONAL LABOUR CODE (Kingston: McGill-Queen's University Press, 1987). The amazing thing about Beatty's work, and what so clearly establishes his credentials as a romantic, is that the more his thesis is proven wrong, in fact, by our experience with the Court, the more he seems to become committed to his theory of judicial review. *See also* D.M. Beatty & S. Kennett, *Striking Back: Fighting Words, Social Protest and Politicial Participation in Free and Democratic Societies* (1988) 67 CAN. BAR REV. 573.

[59] *R.* v. *Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200.

[60] TALKING HEADS, *supra*, note 58, c. 7, in particular at 207-14. Beatty basically advocates the adoption of a generous interpretation of the freedom to not associate in the form accepted by the American jurisprudence on compelled agency fees, although he admits that the American standard of whether the dues are used for collective bargaining purposes has been incorrectly applied in several recent U.S. decisions, most notably *Brotherhood*, *supra*, note 35 and *Communication Workers of America* v. *Beck*, 108 S.Ct 2641 (1988).

Of course realists, sometimes referred to as *Charter* skeptics or cynics,[61] have argued against the romantic liberal notions of Beatty from the inception of *Charter* review.[62] They have rejected the simplistic assertion that judicial activism in *Charter* review could be associated with the advancement of liberal causes in promoting the interests of the disadvantaged. Their realism was rooted in an historical perspective which recognized that such disadvantaged groups had not had their interests protected or acknowledged by Canadian courts at common law and instead had to look to the legislature to protect and recognize their interests through collective bargaining legislation, employment discrimination statutes, human rights codes, other employment standards legislation, and family law reforms. As such it was extremely unlikely that judicial activism striking down legislative initiatives would protect and promote the interests of these groups. In fact, such activism could represent conservative judicial initiatives to protect free market forces from the "restraints" of collective bargaining legislation under the rhetoric of rights and enhanced individual liberty.

Certainly the juxtaposition of the decisions in the freedom to associate decisions and *Lavigne* would appear to provide more support for the realist critics than the romantic liberals. At the most basic level of analysis, the decision of La Forest J. (previously identified as a judicial conservative by Beatty) and the decision of Wilson J. (previously identified as the archetype of the activist liberal judge by Beatty) illustrate the naïveté and invalidity of the simplistic equation of judicial activism with support for liberal causes to further worker interests. At a more general level it questions the integrity of Beatty's basic thesis concerning the legitimacy and integrity of judicial review of labour law under the *Charter* and provides support for a realist perspective on its limitations and dangers.

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[61] This terminology to identify groupings of academics and labour lawyers based upon their expectations concerning judicial review of labour law under the *Charter* is becoming all too common in its usage. For recent examples of its usage and a description of the groupings, *see* P. Weiler, *The Charter at Work: Reflections on the Constitutionalizing of Labour and Employment Law* (1990) 40 U.T.L.J. 117 [hereinafter Weiler] and TALKING HEADS, *supra*, note 58. Weiler refers to the groupings of market libertarians, liberal romantics (Beatty) and radical cynics and adds a new grouping, the pragmatic pluralists (who appear to be comprised solely of Paul and Joseph Weiler). The pragmatic pluralists appear to fall somewhere on a continuum between the romantics and cynics, agreeing with the legitimacy of judicial review under the *Charter*, yet sharing concerns about the institutional fitness and wisdom of courts in deciding *Charter* cases on complex labour policy issues, but somehow finding faith that courts will muddle through on a case-by-case basis and take a hands-off approach to cases where they should not interfere and will intervene where it is appropriate. *See* Weiler's fuzzy description of his position at 151-83.

[62] *See, e.g.*, H.J. Glasbeek, *Contempt for Workers* (1990) 28 OSGOODE HALL L.J. 1; J. Fudge, *Labour, The New Constitution and Old Style Liberalism* (1988) 13 QUEEN'S L.J. 61; H.W. Arthurs, *The Right to Golf: Reflections on the Future of Workers, Unions and the Rest of Us Under the Charter* (1988) 13 QUEEN'S L.J. 17 [hereinafter Arthurs] and Etherington, *supra*, note 16.

Of course one must note that the worst fears of *Charter* realists, that the Canadian judiciary would follow the example of their U.S. counterparts and deny constitutional protection for concerted collective activity to promote workers' social and economic interests while providing broad protection for the individual liberty and personhood interests of dissident workers and employers under the freedom of association and other rights and freedoms, are not realized fully in *Lavigne*. Although three judges do adopt a standard for freedom to refrain from association that mirrors the American decisions, all judges were prepared to uphold agency shop clauses in the face of union expenditures that were not directly related to immediate bargaining concerns. However, within the judgments of the majority which recognizes a freedom to not associate, and particularly within the judgment of La Forest J., lie the seeds for future judicial intervention in instances of other forms of compelled association, both within and without the labour legislation context.[63] And there remain issues concerning possible use of the *Charter* to protect *individual* employer interests from collective bargaining regulation in other areas, such as the restraints placed on free speech by regulation of employer conduct during the certification and bargaining process and through the exercise of remedial powers by labour boards to overcome employer unfair labour practices.

In short, although the decision in *Lavigne* is commendable for its refusal to adopt the American approach to compulsory dues, in the final result, for the realist who has watched the Court reject virtually every claim by labour for protection of collective activities and interests, there remain issues to be resolved on which the potential for a detrimental impact on labour and labour policy from *Charter* review is a serious concern. For realists there is concern the Court will develop the same approach to judicial review of labour law under the *Charter* as they have in the area of review of labour boards under administrative law doctrines. Supreme Court jurisprudence in the interval since the famous declaration of deference in *CUPE, Local 1963* v. *N.B. Liquor Corp.*[64] suggests that incidents of continuing intervention can be best explained as cases where the legislative or administrative policy choices were quite contrary to

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[63] There also remains the distinct possibility that the issue of compulsory dues payment and deployment of dues will be addressed again in the future by a differently composed court with a different result. The freedom to not associate challenge against compulsory agency dues was brought to the United States Supreme Court several times over a 20-year period with the Court resisting the outright recognition of a constitutional right to not associate for dues payors who objected to usage of dues for non-collective bargaining purposes. Finally, in 1977, in *Abood, supra*, note 35, a far different court than the one that first considered the issue in 1956 in *Railway Employees' Dept.* v. *Hanson*, 351 U.S. 225, recognized the negative constitutional freedom. *See also IAM* v. *Street*, 367 U.S. 740 (1961), *BRAC.* v. *Allen*, 373 U.S. 113 (1963) and discussion of the development of the doctrine in Etherington, *supra*, note 16.

[64] [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417.

the judges' own basic values and strongly held ideological preferences.[65] If the judicial values and assumptions demonstrated by interventions in the administrative law context[66] are supplemented by what Arthurs[67] has described as a "new, individualistic post-*Charter* legal culture"[68] in which the liberty of individual action is seen as a presumptive good, judicial interventions which do arise under the *Charter* are likely to be hostile to some aspects of collective bargaining law which subordinate individual freedom to promote collective interests.

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[65] My analysis of post-*CUPE* Court intervention in review of labour board decisions is presented in detail in *Arbitration, Labour Boards and the Courts in the 1980s: Romance Meets Realism* (1989) CAN. BAR REV. 405. For cases which postdate but appear to confirm my analysis of post-*CUPE* interventions, *see UES, Local 293* v. *Bibeault*, [1988] 2 S.C.R. 1048 (*sub nom. Syndicat des employés de la commission scolaire régionale de l'Outaouais (CSN)* v. *Union des employés de service, local 298 (FTQ)*) 95 N.R. 161, and *Lester (W.W.) (1978) Ltd* v. *PPF, Local 740*, [1990] 3 S.C.R. 644, (*sub nom. W.W. Lester (1978) Ltd* v. *UA, Local 740*) 76 D.L.R. (4th) 389.

[66] *Ibid.* The values I identified in the administrative judicial review context were primarily classic 19th-Century liberal values; for example, protection for individual rights concerning private property, freedom of contract, the right to trade, and freedom of speech. Other values related to the operation of the market, for example protection for employer interests in uninterrupted production were also identified.

[67] One should note Harry Arthurs' prediction that there would be an initial posture of restraint by the Court which would be "unlikely to prevail in the long run." He suggested that the "development of a legal culture in which the *Charter* emphasizes, legitimates and glorifies the interventionist role of judges is sure to energize them in other areas, including labour law." He foresaw a resulting "resurgence of judicial activity in all aspects of labour law." And given that "protection for the liberty of individual action is seen as a presumptive good under the *Charter*," that activism is likely to manifest itself in ways that are hostile to the collectivist assumptions of labour law and its attempts to recognize and empower groups: *see supra*, note 62 at 27-29.

[68] *Ibid.* at 29.