**WORKERS, LABOUR UNIONS AND THE LAW:
CANADIAN LABOUR UNIONS IN THE NEW WORLD
OF BILATERAL FREEDOM OF ASSOCIATION**

by

David Sauve, B.A. Honours

**A thesis submitted to
the Faculty of Graduate Studies and Research
in partial fulfilment of
the requirements for the degree of**

Master of Arts

Department of Law

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ABSTRACT

What are the consequences for the Canadian Labour movement in holding contradictory positions concerning freedom of association? The research into this question conceptualizes Canadian unions as partners with capital and the state in a legally constructed regime of labour relations and collective bargaining. Pertinent Supreme Court of Canada cases concerning labour unions and freedom of association demonstrate that labour unions are inconsistent in their claims concerning freedom of association.

This study reveals that while labour unions claim freedom of association is unilateral, that is, workers do not have a right to dissociate, the courts have found that freedom of association is bilateral and workers have a constitutional right to not associate or associate with whom they choose. To date, the courts have also found that infringing on workers' freedom of association is justified under the *Charter*. However, in the future, the courts may well find these infringements are not justified.

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CHAPTER ONE

Introduction

Freedom of association plays a key role in democratic society. Together with our other codified rights and freedoms, freedom of association (FOA) serves as an encouragement for citizens to participate in society and is also the medium for that participation. It is important to recognize that the associational right of individuals to form collectives is a significant part of Canadian democracy.

Unions play a vital role in the economic, social, and political life of Canada. Their ability to effectively function in their role as representatives of workers cannot be overstated. It is critical to the continued stability of unions that union rights are recognized and protected. At the same time, individual rights and freedoms are also essential in our society.

Recognizing individual rights and freedoms does not detract from the importance of union rights. In fact, I argue that strong individual rights which encourage workers to participate in decision-making processes in the workplace, either individually or through associations of their own choosing may create a more fertile environment for union growth. An interpretation of FOA that restricts an individual citizen from choosing her associations in the workplace can serve to hinder workplace change, can also serve to freeze or impede wider societal change; and as importantly, it prevents an individual from experiencing free human life in a democratic environment.

Involuntary association is unavoidable in contemporary life. We attend schools, go to work, ride on buses, fly on airplanes, a myriad of other things that we must do as we go about living in a complex and crowded society. However, involuntary association

should be rigorously examined for purpose, as its obvious limits on FOA must not be overlooked. Forced association should not be judged only by its impact on the association in question, wider societal issues of ethics and respect for democratic values must be at the forefront. Compelling people to associate must always be an exercise in careful reasoning.

The present day argument by Canadian unions that workers do not have a bilateral FOA and cannot dissociate weakens the meaning of FOA. The consequences for the individual worker's freedom to associate are obvious, she cannot dissociate or associate at will. Union demands have effectively constrained one of her constitutional rights. One of the objectives of this thesis is to illustrate the clash of associational rights between the unilateral interpretation claimed by unions and the bilateral interpretation accepted by the courts.

As will be discussed in later chapters, the courts have acknowledged FOA is a bilateral freedom. At this point in time, the courts have found that compulsory union dues check-off, bargaining agent exclusivity, and forced unionization, are justified. However, it is my main argument that the courts may in the future find that compulsory dues, forced unionization, and exclusivity are violations of the *Canadian Charter of Rights and Freedoms*¹ and are not justified under section 1, and that there will be consequences if this happens.

The consequences for the labour movement in holding contradictory positions concerning FOA if the court finds that violating bilateral FOA is not justified, is

¹ *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.) 1982, c. 11 [hereinafter *Charter*].

unknown. Any claim of what will happen is speculation. Such a finding by the courts would certainly have an effect on labour legislation. How workers will react is not certain. It is possible, and hopeful, that workers will move to multi-union workplaces and participate to a greater extent in decision-making activities. It is also possible that some workers will adopt the attitude that the state has set them free from the tyranny of unionization. This latter type of emotional groundswell is not something that unions would look forward to, but it is something of which unions should be mindful. As will be stressed in this thesis, it is unsound to ignore the fact that the courts have found a bilateral FOA and that they appear to be going in a direction that may ultimately find union security clauses and exclusivity of bargaining agents unjustified.

There are alternative bargaining systems to our present collective schemes. This is noteworthy at this early point in the thesis as it relates to the courts using s. 1 of the *Charter* to decide if infringing worker FOA rights is justified. Part of the s. 1 analysis relies on whether the infringement “impairs as little as possible” the freedom or right in question.² Several European countries have implemented what David Beatty refers to as “Plural” and “Voluntary” representation.³ Plural representation offers the employee a selection of union organizations to choose from or she can choose to not join any of the offered unions. Importantly, employment is not tied to belonging to a union and there

² *Charter* s. 1 guarantees the rights and freedoms subject only to reasonable limits that can be justified in a democratic society. In *R v. Oakes* [1986] 1 S.C.R. 103, at 138-40, the court developed a proportionality test to determine whether the means chosen to override a constitutionally protected right or freedom is reasonable and justified. Once it is established that the objective relates to concerns that are “pressing and substantial,” then the “Oakes” test involves establishing whether the measures are rationally connected to the objective, the measures should impair as little as possible, and there must be proportionality between the effects of the measures and the objective.

³ David M. Beatty, *Putting the Charter to Work* (Kingston & Montreal: McGill-Queen’s University Press, 1987) at 135-155.

are no compulsory dues. However, the ability to participate in any decision-making process is restricted. In the voluntary schemes, workers can choose to belong to any union they wish, or choose to not associate. Either choice does not prevent the worker from participating in workplace decision-making processes, including being elected to represent other workers in bargaining with the employer.⁴ The above two examples are alternatives to our more restrictive collective bargaining system, and clearly cause less impairment to worker's FOA.

Historically, the struggle by workers to associate and to challenge the dominance of capital saw illegal worker "combines" become unions that are legal institutional players in labour relations regimes across Canada. The class struggle that involved workers against capital and the state was founded on the claim that they had a basic right of freedom to associate and through those same associations to collectively address issues both in society and the workplace.

Members of Canadian society in the 1940's witnessed labour relations become entwined within a regime of industrial legality. Industrial legality is a legislative arrangement in which the state intervenes into the realm of industrial relations. Governments enact legislation constructing the arena within which labour and capital live out their economic and social relationships. It will be argued that as unions assumed their place within these labour relations regimes, they removed themselves from their long-held position of leadership in working class struggle against capitalist economics, and became junior partners in economic domination over workers. Another of the objectives of this thesis is to demonstrate that the structure of the present labour relation

⁴ *Ibid.* at 145-147.

regimes, (in particular, the legislation that provides for certification, exclusive bargaining agent status, compelled unionization and compulsory dues check-off) works to cause a degree of separation between the representative unions and the members of the bargaining unit.

In the workplace, workers have fewer rights than they do as citizens or members of the general population. Presently, unions promote a very weak type of workplace democracy. One of the premises taken in this thesis is that in order for unions to retain their rightful position as worker representatives, they need to respect individual worker rights and freedoms and offer stronger democratic rights of association and voice.

Limiting workplace participation to only the workers who wish to associate with the exclusive bargaining agent has created a form of democracy that would not be accepted outside of the workplace, in a society that recognizes the importance of having a multi-party system of political representation. It is logically inconsistent that unions demand a right to FOA and then deny that same right to workers who challenge the majority. Unions should be working to ensure that democratic values flow to all workers and not just to the union majority.

Strength of purpose, or union solidarity, is the one internal characteristic of union association that is critical to the ability of unions to function and, quite simply, to survive. Unions become and remain strong because of the solidarity that is experienced amongst its members. Workplace democracy must be more than the democratic right of unions qua unions to have a voice in the workplace. It must also mean that individual workers also have democratic rights of association and expression. Individuals should

be free to associate with whom they choose, and also to have a voice that is not silenced by the majority.

In *Lavigne*, the state and labour found themselves on the same side, narrowly defining FOA, preserving and protecting systems of labour relations that serve to keep capital in a position of dominance.⁵ The Supreme Court of Canada (SCC) unanimously denied Francis Lavigne's appeal in which he claimed FOA s.2 (d) of the *Charter* included the right to not associate. Three of seven Justices found FOA did not include the right to not associate, one Justice found a right to not associate but said compulsory dues check-off is not a violation of that right, while the remaining three Justices recognized the constitutional right to not associate but found its infringement through compulsory dues check-off was justified under s.1 of the *Charter*.

The defendant union Ontario Public Service Employees Union (OPSEU) claimed that FOA is a unilateral freedom and does not include the right to not associate. They added, however, that if the court did find a right to not associate --- a bilateral interpretation of FOA, then it is also their claim that violating Lavigne's right to not associate would be justified under s.1 of the *Charter*. The failure of OPSEU to recognize a bilateral FOA was repeated in *Advance Cutting*⁶ when the Quebec construction unions also claimed that FOA is unilateral and construction workers must be union members in one of the five "named" unions in order to work in the construction industry in Quebec.

The claim by Canadian unions that FOA is unilateral is in contrast to the belief held by most western industrial unions, excluding American unions, and is diametrically

⁵ *Lavigne v. Ontario Public Service Employees Union* [1991] 2 S.C.R [hereinafter *Lavigne*].

⁶ *R. v. Advance Cutting & Coring Ltd.* (2001), 205 D.L.R. (4th) 385 (S.C.C.) [hereinafter *Advance Cutting*].

opposite to the FOA principles found in United Nations Universal Declaration on Human Rights and other supportive international documents.⁷ Confounding the issue, i.e., this claim for a narrow interpretation of FOA, is the fact that unions also petition the courts to read FOA in a broad manner. Early cases of unions demanding wide interpretations of FOA are many, probably the most well known being *Alberta*,⁸ and most recently *Dunmore*,⁹ the case of the agricultural workers that will be reviewed in chapter four.

This thesis discusses the above issues, not for the purpose of causing injury to the present unionist population, neither to lay blame on past union leaders for their decisions, nor to derisively claim a higher ethical grounding, but rather to posit as my arguments: that the compromise made with capital and the state in the mid 1940's is disintegrating; new social, economic, and political realities are developing; the courts are moving to give wider scope and meaning to FOA; labour unions are clinging to the past by claiming FOA is a unilateral freedom; unions need to address this court movement; and there are consequences for unions holding contradictory positions around FOA.

As associations form they become an entity beyond the sum of their individual parts. Unions, for example, acquire different sets of rights than those possessed by the individual members. Workers may wish to form unions in order to gain the right to collectively bargain with their employers, and in some cases, to withhold their labour to advance their collective agreement demands. Collective bargaining and strikes are legislative rights that attach to the union entity and not the individual member.

⁷ *United Nations Universal Declaration of Human Rights* G.A. Res. 217 A (III), U.N. Doc. A/810 (1948) article 20.

⁸ *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, [hereinafter *Alberta*].

⁹ *Dunmore v. Ontario (Attorney General)* (2001), 207 D.L.R. (4th) 193 (S.C.C.) [hereinafter *Dunmore*].

Right of association allows for class struggle to take place in the political arena. Historically, the demand by labour for the right to unionize was a political demand. In the early part of the twentieth century, workers and their unions found support in the Canadian Commonwealth Federation, the Labour Progressive Party and other political voices that were also advocating for social change. Freely associating with these other organizations gave unions the opportunity to add their voice to the demand prevalent in the 1930's and '40's for social justice and better economic conditions.¹⁰

In the present, at a time when both the state and capital appear to have moved beyond the fordism of the middle twentieth century, unions steadfastly hold to their position as a junior partner to capital and the state. Faced with numerous assaults on their collective bargaining rights,¹¹ either through court injunctions or court decisions, unions continue to operate as control mechanisms to keep workplace peace and to ensure the stability of the present systems of labour relations.¹²

The impulse behind this study finds its home in personal experience and observation during twenty-eight years of union activism. One of my concerns is that unions are not acting to consider their place in a society that has changed since the 1940s. My overriding concern is that unions, as a social force in society, may become less relevant to workers.

¹⁰ Aaron McCrorie, "PC 1103: *Labour, Capital and the State*" p. 15 in *Labour Gains, Labour Pains: 50 Years of PC 1003*, Cy Gonick, Paul Phillips, Jesse Vorst, eds., (Halifax: Fernwood Publishing, 1996) at 26.

¹¹ See Leo Panitch and Donald Swartz, *The Assault on Trade Union Freedoms: From Wage Controls to Social Contract*, (Toronto: Garamond Press, 1993).

¹² Judy Fudge and Eric Tucker, *Labour Before the Law: The Regulation of Workers' Collective Action in Canada, 1900-1948* (Don Mills: Oxford University Press, 2001) at 3.

Methodology

1. Chapter Outlines

Chapter two begins with a historical review of the development of our present labour relations / collective bargaining regimes. We see that unions moved from a predominately counter-hegemonic force against capital domination to a willing junior partner within the capitalist mode of production (CMP). This transformation or reformation required that unions become “responsible” for enforcing the collective agreement, maintaining labour peace, and respecting the law, in exchange for industrial partnership, exclusive bargaining agent status and certification.¹³ This movement by unions into a legally constructed and state supervised regime was something that unions had demanded. This regime continues today, although it appears that the compromise reached in the 1940’s and 50’s is slowly being undermined by state and capital coercions as they adjust to the new geo-political realities of increasing internationalization of production and neo-liberalist politics.

In the second half of the chapter, a structure / agency sociological approach will look at the labour relations structures that connect labour, capital, and the state. This approach will examine how these same structures work to contain labour, at least to the extent that unions appear to not challenge these restraints by engaging in counter-hegemonic activities. Agency will show that unions have the ability to ask for a wide and then a narrow interpretation of their *Charter* rights, which clearly says that unions can, if they wish, untangle themselves from the pact they made in the 1940’s.

¹³ *Ibid.* at 3.

Chapter three begins with a discussion of some of the elements of FOA, those being a unilateral or bilateral right. Bilateral FOA is the prevailing interpretation in most western democracies. It is an interpretation that has been agreed upon by the Canadian state, as a signatory nation to U.N. convention #87, although it is not reflected in labour legislation, as will be discussed in Lavigne, chapter four.

Immunity, when applied to FOA, refers to the extent to which the state can be prevented from interfering with someone's right to FOA. Immunity for rights and freedoms can be found in the *Charter*, although even this immunity can be subject to legislative override or a Charter s. 1 justification. Rights can also be explicit or implicit, derivative or independent. This chapter will explore these issues as they relate to FOA. One of the realities of people exercising their rights is that on occasion, rights claims clash. How some of these clashes manifest themselves and one possible way of solving these clashes will be discussed. This chapter will also cover the issue of certification and free riders, which will be an important point of reference for later discussions in chapter three when the *Rand* decision is reviewed.¹⁴

The socio-economic and political context for *Rand* was a capitalist liberal democracy with fordism as the CMP. Liberalism positions the individual as the key unit to receive the benefits of liberal democracy, this to the seeming disadvantage of collective or group rights. Fordism, as a regime of accumulation and mode of regulation, served capital in its strategy to remain dominant in society. The subordinate position of the worker in a fordist industrial regime will also be discussed in considering the

¹⁴ *Ford Motor Co. of Canada v. U.A.W.-C.I.O.*, 1946, 1 C.L.L.R. [hereinafter *Rand*].

question of whether workers are treated similar to property by capital, the state, and most importantly, by labour.

In 1946, Justice Rand validated fordism and the dominant position of capital in labour relations. We will examine Rand's decision and uncover some of the logic Rand used to settle this dispute. In *Rand*, the union demand for a closed shop and dues check-off, although it is something of benefit to the workers in general, is a demand for contract language that restricts workers' FOA rights. Justice Rand's decision gave the union a compulsory dues security clause, but also attempted to protect the individual worker's right to FOA, to not be forced to become a union member against her will. *Rand* will be examined in the context of the implications for labour's present and future realities.

Chapter four examines *Lavigne*, *Advance Cutting*, and *Dunmore*. As noted earlier, in *Lavigne* and *Advance Cutting* unions argue for a narrow interpretation of FOA, while in *Dunmore* they argue for a wide FOA. The court's steady movement toward possibly finding that compelled unionization is not justified under s. 1 of the *Charter* will be traced. The idea of "ideological conformity" now being the criteria for finding an infringement of s. 2(d) FOA is also discussed. This chapter will serve to map out the arguments presented by the parties to these cases, and importantly, the rationale the courts used in making its decision in each of the cases.

In the conclusion, **chapter five**, it is argued that the continued refusal of unions to accept a bilateral FOA is an untenable claim. It will also be argued that the court's steady move toward expansive interpretations of FOA may put union security clauses in jeopardy. Unions, as they plan for the future, must consider bilateral FOA and the reality that union security clauses may have a finite existence.

2. Methods of Analysis

The method used to address the thesis question is a sociological approach that examines the development of our labour relations in Canada, and looks at the present state of these regimes. The historical review will encompass several different aspects of our labour history to better understand how these regimes came about and how unions came to find themselves arguing for an interpretation of FOA that is logically inconsistent with their own history. The analysis will be concerned with the interaction between labour, capital, and the state. To that end, a combined use of structure and agency as methods of examination will help to focus on the dynamics of these relations. The particular dynamics are that which occur when union agency meets the hegemonic¹⁵ force of capital and *relatively* autonomous state structures.¹⁶

Several different sources are used to follow the development of our present labour relations regimes. The primary sources are legislation, SCC cases, and some international documents. Tracing legislation from the early 1900's to the present, maps out the movement of the state from a relatively "hands-off" approach to labour relations, to a highly interventionist position. Our present labour relations regimes are results of a triadic relationship between labour, capital, and the state.

Another primary source for historical evidence comes from Supreme Court cases and the *Rand* arbitration. *Rand* is a defining moment in Canadian labour history that set the parameters for future labour relations. Justice Ivan Rand devised and implemented a

¹⁵ Antonio Gramsci, Selections from the Prison Notebooks, eds. and trans. Q. Hoare and G. Nowell Smith (London: Lawrence and Wishart, 1971) at 12.

¹⁶ See Nicos Poulantzas, Political Power and Social Classes, trans. Timothy O'Hagan (Thetford, Norfolk: Lowe & Brydone Printers Limited, 1976).

system of compulsory dues check-off; a system that has been adopted in six of Canada's eleven labour jurisdictions. Rand also was very clear in stating that capital must be the dominant force in labour relations, relegating labour to a junior partnership with capital.

The court cases will trace the decisions of the SCC as it interprets FOA in *Lavigne*, *Advance Cutting* and *Dunmore*. Examining these cases reveals the SCC moving steadily toward a more individualistic interpretation of the *Charter*. A movement that I argue could eventually find compulsory dues check-off, forced unionization, and exclusive bargaining agent status to be unjustifiable violations of FOA.

Different methods of analysis; structure, agency, and hegemony, were developed from the work of several theorists. Poulantzas provides a method of structural analysis that is reinforced by agency and hegemony. Gramsci's concept of hegemony and the role played by agency counters the deterministic nature of structuralism. It is the power of agency that offers the opportunity for unions to reconsider their position within our present capitalist mode of production and regulation.

Fudge & Tucker, and Panitch and Swartz, offer an exceptional source of background information and insight into our labour history. Fudge and Tucker's explanation of the "compromise" reached between capital, labour, and the state, is supporting material for the argument that labour played an instrumental part in creating its own place in our present labour relations regimes. Panitch and Swartz's descriptions of the movement 'from consent to coercion' in labour relations exposes the fact that out of the three players involved in Fudge and Tucker's "compromise," only labour appears to be holding to the agreement, while capital and the state have moved on to other economic and political realities.

CHAPTER TWO

Introduction

The system of compulsory dues check-off does not take place in isolation. It is a part of the larger labour relations collective / bargaining system that has several constitutive parts, some of those being the certification process, exclusive bargaining agent status, and several different union security clauses. These processes or structures have been put in place by the state to regulate relations between labour and capital. The result of these various pieces of labour legislation has been to legitimate and legally situate unions within a capitalist economic regime. This chapter will review the history of these structures and look at how these same structures not only regulate labour relations, but more importantly, how they serve to construct the shape of unionism in Canada today.

The use of a structure / agency approach in considering the place of unions in Canadian society and within the confines of the present labour relations systems serves two purposes. First it examines the present union situation, and second, it reinforces the reality that these systems are subject to review and possible change in the future. These structures were created by the struggles between labour and capital and the interventions of government, but as will be noted, these same structures are being undermined by capital and the state.

Historical Background

The collective bargaining system that we have today has its roots in several major pieces of labour legislation. Beginning in 1872 the *Trade Unions Act*¹⁷ and the *Criminal Law Amendments Act*¹⁸ served to declare unions legal entities not subject to criminal conspiracy charges or strike damages. Particularly, the *TUA* declared that unions were not unlawful merely because they acted in restraint of trade, and the *CLAA* permitted peaceful picketing. Prior to these Acts unions did not have legal existence and could find themselves subject to criminal conspiracy and anti-combines laws in their attempts to organize workers. These early pieces of legislation permitted workers to unionize, but did not require employers to recognize unions as exclusive bargaining agents for groups of workers. Employers were legally free to punish workers for belonging to trade unions and could refuse to hire union members or fire those who became union members after being hired.¹⁹

In 1907 *The Industrial Dispute and Investigation Act*²⁰ provided for one stage tripartite compulsory investigation and a “cooling off period” during which strikes and lockouts were forbidden until the investigation was completed. This legislation was applicable to mining, transport, communications, and public utilities and other industries. It was legislation designed to ensure labour peace but not to encourage or facilitate union recognition or organization. However, the compulsory “cooling off” period brought government further into labour relations. Now government was not just refereeing the

¹⁷ *Trade Unions Act* 1872 [hereinafter *TUA*].

¹⁸ *Criminal Law Amendment Act* 1872 [hereinafter *CLAA*].

¹⁹ Fudge & Tucker *supra* note 4 at 2.

²⁰ *Industrial Disputes Investigation Act*, S.C. 1907, c. 20, [hereinafter *IDIA*].

relationship between labour and capital, they had become a part of a triadic relationship, one that remains today.

The gradual move to an era of legality that was being fostered by federal legislation under “Trade and Commerce “ section 91(2) *British North America Act*,²¹ came to an abrupt end with the 1925 *Toronto Electric Commissioners v. Snider* decision.²² The British Privy Council (JCPC) in *Snider* ruled that the *IDIA* was *ultra vires* of Section 91 of the *British North America Act*. This decision meant that federal government labour laws were infringing on provincial powers. The JCPC held that labour and employment were matters of property and civil rights, section 92(13) of the *BNA Act*, and as such were the responsibility of the provinces. Only workers employed within federal jurisdiction would now come under federal labour and employment laws. The decision in *Snider* decentralized labour relations into eleven regimes, ten provincial and one federal regime.

It was the struggle between labour and capital in the 1930’s and during the war period that prompted the federal government to enact several pieces of legislation, culminating in *PC 1003*,²³ legislation designed to exert more state control over labour relations. *PC 1003* was patterned after the American *Wagner Act*²⁴ of 1935 having: worker’s rights to organize; compulsory collective bargaining; establishment of labour relations boards, certification of exclusive bargaining agent, and in addition to *Wagner*

²¹ Now 1867 *Constitution Act*.

²² *Toronto Electric Commissioners v. Snider* in the Privy Council [1925] a.c. 396 [hereinafter *Snider*].

²³ *War-time Measures Act*, Privy Council Order 1003, 1944.

²⁴ *National Labor Relations Act (Wagner Act)*, 29 U.S.C. 151-169, [hereinafter *Wagner*].

Act provisions it also contained compulsory conciliations with no strike / no lockout during investigation, and compulsory arbitration during the life of the contract.²⁵

Prior to *PC 1003*, wartime legislation *PC 3495*²⁶ (1939) extended provisions of IDIA to all war industries. In 1941 *PC 8253*,²⁷ established the tripartite National War Labour Board (NWLB).²⁸ In 1943 the NWLB held an inquiry into labour unrest to explore possible reforms to Canada's system of labour relations. In a two-year period from 1941- 43 there were over 1,100 work stoppages (strikes or lockouts) that involved approximately 425,000 workers and a loss of almost two million paydays.²⁹ At the NWLB hearings the Trades and Labour Congress (TLC) and the Canadian Congress of labour (CCL) demanded legislation that legally enforced union recognition and compulsory collective bargaining on employers, the unions were demanding American *Wagner*- style legislation.

During the war years labour was largely concerned with three main issues: 1) securing representation for labour on all government boards and commissions dealing with labour issues and on the directories of government-operated companies; 2) influencing the governments wage policies as expressed in a number of orders-in-council; and 3) moulding the government's attitude and policy with respect to collective bargaining and unequal treatment accorded organized and unorganized workers by

²⁵ C. Brian Williams, *Trade Union Structure and Philosophy in Canadian Labour in Transition*, Richard Miller ed. (Scarborough: Prentice-Hall, 1971) at 184.

²⁶ *Wartime Measures Act, Privy Council Order 3495*, 1939.

²⁷ *Wartime Measures Act, Privy Council Order 8253*, 1941.

²⁸ The board consisted of representatives from labour, capital, and the state.

²⁹ Bryan Palmer, *Working Class Experience: Rethinking the History of Canadian Labour 1800-1991* (Toronto: McClelland & Stewart Inc. 1992) at 278; McCrorie *supra* note 10 at 23.

employers, which became known as the 'government's labour policy.'³⁰ The above were already issues before the war, but as loyal service to the war effort strengthened labour's position, labour included these items along with their demands for *Wagner*-style legislation.

At the time, employers were under no legal obligation to recognize bargaining agents chosen by the workers, preferring instead to recognize "company unions" or associations. Labour, however, believed that it was their right to not have to associate with a company union or association. Labour argued that they had a right to choose their own bargaining agent.³¹

The government responded to working-class unrest and their demands for legislation, but this response was tempered by capital's influence. Generally, capital's position was a resignation to the inevitability of *Wagner*-like legislation, coupled with a list of its own demands to be included in the impending labour legislation.³² The Canadian Manufacturers Association (CMA) wanted the legislation to make unions responsible for enforcing a contract during its life, i.e., policing and disciplining workers. The CMA also wanted legislation that made it illegal for workers to strike. The CMA and the Canadian Chamber of Commerce (CCC) sought a legislative regime that would treat unions like quasi-corporate structures (registration and publication of financial records) with union members as shareholders.³³ If legislation could not be avoided, capital articulated reforms that saw working-class demands brought into capitalist

³⁰ H.A. Logan, *Trade Unions in Canada: Their Development and Functioning* (Toronto: MacMillan Company of Canada Limited, 1948) at 521.

³¹ This appears to require a bilateral FOA.

³² McCrorie, *supra* note 10 at 27.

³³ *Ibid.* at 29.

economics, attempting to limit through legislative controls the freedom of organized labour and Canada's working class.

Wartime legislation, most notably *PC 1003*, was groundbreaking in that for the first time collective agreements achieved legal status and any disputes over the interpretation of the agreements could be resolved through binding arbitration.³⁴

However, this new status made it difficult for labour leaders, who sometimes lacked legal education, to deal with all of the new formalized manoeuvrings. Labour relations became a legal arena for lawyers and experts, loosened from the grasp of the workers.³⁵ *PC 1003* served to control union and worker behaviour by dividing the two and legislating unions responsible for the radical actions of their members. Unions became agents of discipline, maintaining labour peace during the life of the contract, setting them apart and against workers. For Fudge & Tucker, "the willingness [of the unions] to exercise authority over their members and a commitment to the sanctity of the contracts and the law were the defining attributes of responsible unionism."³⁶

In the early 1940's the Co-operative Commonwealth Federation (CCF-1932) was the political voice for most of labour. In 1943 the CCF surpassed the liberals and conservatives in popular support.³⁷ The CCF and the Labour Progressive Party³⁸ both supported mandatory union recognition and compulsory collective bargaining. The growing labour unrest plus the increasing support for the CCF and the LPP created a

³⁴ Fudge & Tucker *supra* note 12 at 3.

³⁵ Rosemary Warskett, "Bank Workers and the Law," in *Studies in Political Economy*, 1988, 25, (Spring) at 48.

³⁶ Fudge & Tucker *supra* note 12 at 262.

³⁷ McCrorie *supra* note 10 at 25.

³⁸ The Canadian affiliate of the Communist International was the Workers' Party of Canada (1922), which changed its name in 1942 to the Communist Party of Canada, and in 1943 to the Labour Progressive Party.

double-edged threat to the Liberal government. The first threat being electoral, the Liberal party could lose the next election. Secondly, the government's voluntaristic labour relations regime and the general terms of social justice i.e., the lack of a social welfare safety net was being challenged.³⁹

In 1945, the CCL called for a permanent labour code and suggested several amendments, those being: certification of unions instead of individuals as bargaining agents; voting on bargaining agencies by a majority of employees participating not those eligible; provision that the board may order the inclusion in agreements of union security clauses, and that an employer be requested to institute check-off of union dues upon the written authorization of individual employees.⁴⁰

In 1946 labour called again for union security by seeking: compulsory recognition and negotiation in good faith; compulsory maintenance of membership by way of the union shop and check-off, claiming that if they did not have to be concerned about retaining their membership and collecting dues, they could then concentrate on large aspects of unionism, promoting harmonious employee-management relations, dealing with grievances scientifically, and developing greater efficiency in the working force.⁴¹

In the realm of politics, the move by the liberal and conservative parties to Keynesian-welfare state reforms deflated the political challenges from the CCF and the LPP, containing any political and labour radicalism that challenged the capitalist system. With radical labour and political leaders, removed, defeated, or made impotent, labour, through industrial militancy, expressed its continued demands for permanent reforms

³⁹ McCrorie *supra* note 10 at 26.

⁴⁰ Logan, *supra* note 31 at 549; *Labour Gazette*, April, 1945, p. 640.

⁴¹ *Ibid.*

similar to *PC 1003*. In 1948 the *Industrial Relations and Disputes Investigation Act*⁴² came into effect. The *IRDIA* had similar provisions to *PC 1003* but it also included a new method of determining bargaining unit structure. Instead of the structure of the bargaining unit being a negotiated settlement between labour and the employer, it was to now be a determination of the Labour Relations Board. The defeat of political and union movement radicalism left the labour movement operating within the present capitalist system; accepting of the view that labour's rights and freedoms are privileges that have been bestowed upon them by the state and not something won that should be defended through collective action.⁴³

Labour relations and collective bargaining in Canada is legislatively constructed. Labour moves, as an agent, within these regimes representing their own personal constituency via certification and exclusive bargaining agent status. As noted earlier, following *Snider*, labour relations became fragmented between eleven government jurisdictions. In 1948, the federal government enacted the *IRDIA* to structure labour relations involving federally employed workers, while the provinces followed suit enacting similar legislation covering workers in their jurisdictions.

These restrictive labour relations / collective bargaining regimes have remained in force with no substantial structural changes since the *IRDIA* in 1948. If anything, the continuing use of court injunctions, back to work legislation, and government claims of "essential services" has served to further restrict labour's rights. However, as pointed out by Panitch and Swartz, the limiting of worker rights can also be laid at the feet of the

⁴² *Industrial Relations and Disputes Investigation Act*, S.C. 1948, c. 54.

⁴³ Panitch & Swartz *supra* note 11 at 19.

“remarkable conservatism of the English Canadian labour movement, which repeatedly proved itself incapable of taking the initiative in generating demands or mobilizing support for reforms challenging the terms of the post-war settlement.”⁴⁴

Structure and Agency

The preceding brief historical review of the formation of our present labour relations regimes, although not exhaustive, illustrates the dynamics between labour, capital, and the state. Tracing labour’s struggle for rights and social justice from the 1870’s up to the present regimes is a history of worker and union agency. Suggesting to unions, vis-à-vis this thesis, that there may be consequences in holding contradictory positions around FOA assumes that these same unions can address the contradictions, that unions are agents of change and not just passive acceptors --- claiming a position and defending it *is* an act of agency. The structure of these regimes, the partnership between labour, capital, and the state, offers legitimacy and certain financial securities to unions while it binds and constrains them. Gramsci’s hegemony and the concept of agency both suggest unions can gain independence from these constraints and create an opportunity to close the relationship gap between themselves and the workers they represent, and just as importantly, to the unorganized.

Before using Gramsci’s notion of hegemony and agency to review labour’s past, it is important to review Poulantzas’ “structuralism.” This theory of the state serves to identify and explain how relationships may work between capital, the state, and unions.

⁴⁴*Ibid.* at 18.

A structural approach to an examination of labour relations in Canada from *PCI003* up to the present situates labour as a constitutive part of a CMP along with the state and capital. This approach assumes that capitalism is unstable and prone to crises due to economic fluctuations both within national borders and internationally. Also, that where these unknowns or instabilities are not satisfactorily addressed by capital, it becomes the function of the state to attempt to secure the continuation of the CMP.⁴⁵ This approach argues that any mode of production can be studied through the functional interrelations between its ideological, political, and economic structures, which are connected but distinct.⁴⁶ These structures or processes are in support of and constructed by the mode of production. The CMP refers to the structures and processes that are required by capital and the state to satisfactorily continue the regime of accumulation. Our present CMP works with labour as the junior partner in some of these processes, most specifically the relationship between capital, labour, and the state that is our labour relations system.

The ideological structure for a CMP situates capital as the dominant player, the state as the institutionalized power source in a supportive, sometimes relatively autonomous role, and labour as the junior partner in capitalist production, all three ideologically tied to the capitalist dominant discourse of surplus value accumulation. “Relatively autonomous” is Poulantzas’ term that claims the state is autonomous to the extent that it functions not just in the service of capital but can operate independently to act as a cohesive force in social formations. However, when the state acts in this manner

⁴⁵ Ernest Mandel, *Late Capitalism*, (London: Verso, 1978) at 474.

⁴⁶ Poulantzas *supra* note 16 at 12.

it is still acting in the collective interests of capital and thus is not totally autonomous.⁴⁷

The reform of unionism in the 1940's from a social movement in a class war with capital to its present state required unions as agents to not only accept responsibility for the control of workers within the workplace in exchange for legal status and free collective bargaining; it also imposed ideological conformity on union leaders.⁴⁸

The political structure in capitalist economics is the institutional power exerted by the state in its continuing responsibility to support and maintain capital as the dominant player. The labour legislation of the war and post-war years were put in place to bring peace and stability to labour relations. In *Lavigne*, the decision of the court to support labour and capital against Lavigne acts as a continuation of the state functioning to maintain the stability of the present labour relations regimes. Also, in *Advance Cutting*, the court's decision maintained the integrity of the labour legislation governing the construction industry,⁴⁹ an important piece of legislation integral to the labour relations regime in Quebec.

The economic structure of a CMP situates the workplace as the site of struggle between the owners of the means of production and the suppliers of labour, the workers. Generally, pre 1940's unions in Canada were a major part of the class struggle for workers against capitalism along with the CCF and the LPP. The transition of the large industrial unions to a position within Canadian style fordism was accomplished through the institutionalization of labour relations by the state, and by labour abandoning its

⁴⁷ *Ibid.* at 256.

⁴⁸ Fudge & Tucker *supra* note 12 at 3.

⁴⁹ *Act Respecting Labour Relations, Vocational Training and Manpower Management in the Construction Industry*, R.S.Q., c. R-20.

discursive links to class struggle. This abandonment of class struggle saw unions refocus its agency into becoming “responsible unions” within particular labour regimes.

The stability of capitalist society is secure to the extent that the above three processes are operating as a system able to maintain a CMP, i.e., the ability of capital to draw surplus value from workers.⁵⁰ This suggests that the state as an institution and as a process must intervene, when necessary, to act as a cohesive force to support capital and maintain a stable economy. For Poulantzas, the major contribution made by the state to capitalism is its ability to develop and institute policies that control the production of labour power and the means or modes of production.⁵¹

The movement of unions from an ideological opponent of capital to a reformist responsible unionism operating within the CMP requires union agency. Structuralism is focused on the state as a structure that serves to continue capital accumulation, it does not manage to substantially fit into its assumption the recognition that unions or any subordinate class have enough power to effect change. Marx clearly recognized the notion of agency when he claimed that people make their own history but not without pressures from the past.⁵² While structuralism is important for this thesis in that it delineates capital, the state, and labour as separate structures, Gramsci’s conception of hegemony suggests an ability of the dominant group to have its preferred values and operational processes accepted as natural and socially totalizing. Hegemony is the process that is capable of generating:

⁵⁰ Clyde Barrows, Critical Theories of the State (Madison, Wis.: University of Wisconsin Press, 1993) at 52.

⁵¹ Nicos Poulantzas *supra* note 16 at 28.

⁵² Karl Marx & Friedrich Engels, Selected Works (Moscow: Progress Publishers, 1970) at 98.

The spontaneous consent given by the great masses of the population to the general direction imposed on social life by the dominant fundamental group.⁵³

The imposition of the dominant discourse is never complete and is always contestable and contested. The continual need to reproduce this discourse and keep it in a position of dominance requires that the state act as an agent of capital, attempting to balance the needs of capital with the demands of unions or other subordinate groups acting as agents of change. To the extent that the state is only relatively autonomous, it is both an extension of dominant hegemony and its supporter. To the degree that unions act within a CMP, it also plays several roles. Unions are both combatants and supporters of capitalist ideology, and as such, now play a minor role as agents of class struggle, and have a junior partnership in the hegemonic bloc --- within and without the system.

Historically, the agency expressed by unions changed from an agency of social and political change against capitalism to one of reformed responsible union agency within the CMP. This reformed responsibility implies that a degree of "ownership" is part of the new reality for unions and their members. This "ownership" will be discussed in chapter three in "Workers as Property." It is mentioned here as it is a function of agency and needs to be addressed, at least to say that the role of union as representative may also be that of union as owner.

Union agency is today expressed by thousands of union activists working amongst the union membership, attempting to organize the unorganized, and working with other socially active groups to increase the population's share of the surplus of worker production. Recognizing the historical and present power of union agency is important

⁵³ Gramsci *supra* note 16 at 12.

in that it reminds unions that they are agents of change and that change is something that union agents can accomplish.

The legitimate participation of labour as a partner within a CMP bestows upon labour the responsibility to support the continuance of an economic system it had historically fought against. Capitalist production continues with the support and approval of labour and the state, both of which believe they are economically bound to the continuance of accumulation and surplus value extraction from workers.

The acceptance by the unions of their position within the fordist economic regime of the 1940s has not changed. Even as unions find that the coercive tactics of the state has continually weakened union collective bargaining power through legislation and court challenges, unions remain supportive of capitalist economics, and also remain committed to their partnership with capital. Whether we are in a post-fordist or a shrinking fordist economy does not appear to shake union leadership's faith in the present labour relations regime or question their position within it.

The incorporation of unions within capitalism has resulted in relative financial security for unions where there is automatic check-off, allowing them to participate in other areas of interest, whether of a social or political nature. The difficulty for unions as they venture into these other areas is that they are constrained by the ties they have with capital. The financial wherewithal given to them by capital and the state restricts the extent to which labour is willing to challenge the dominant economic system. Union leaders, faced what Panitch & Swartz call the return to coercion by the state,⁵⁴ have not

⁵⁴ Panitch & Swartz *supra* note 1 at 3.

retreated from their support of the present labour relations system. Unions continue to attempt to control their members and rarely act outside accepted legal parameters.

Interestingly, unions do challenge the present system of capitalist production. However, the aim may be to get a bigger share for workers by reducing the amount of surplus that goes to the present owners and to reorient the system to make it more socially responsive to general welfare initiatives. At the moment there does not seem to be an acceptable alternative to the CMP, the dispute is over the sharing of the surplus.

Labour leaders have not shown any signs of wanting to drastically remake labour relations and collective bargaining regimes. The contradiction, representing workers while also dominating workers is an unsolved problem for unions. The idea that unions need to rethink their present status is not new. Panitch & Swartz, among others, have suggested it is time for unions to move toward regaining their position as leaders in a class struggle, through encouraging their members to become more politically active. For Panitch & Swartz, “[r]eliance [by the unions] on the Rand formula and other legal devices is simply unprincipled, and . . . ultimately inadequate.”⁵⁵

Unions have the ability to reposition themselves as working-class leaders in the struggle against capital. The future of unionism in Canada has not been pre-determined. Making use of Gramsci’s assumption of the hegemonic process and counter-hegemonic agency possibilities, combined with Marx’s claim that “men (sic) make their own history . . .”⁵⁶ suggests that the opportunity for agency and more importantly, “agency” created futures is possible.

⁵⁵ *Ibid.* at 185.

⁵⁶ Marx *supra* note 52 at 247.

CHAPTER THREE

Introduction

This chapter will review various facets of FOA which will include: its basic elements, that is, a unilateral or bilateral interpretation; immunity from the state; the source and nature of rights; when rights claims clash; and a discussion of certification and the issue of free riders. These topics will be followed by a discussion of Canada's capitalist liberal democracy and neo-liberalism; Fordism; the notion of "workers as property;" and end with a review of *Rand*.

The flow of this chapter accomplishes several things. By investigating different facets of FOA and then looking at Canada's political and economic reality, including labour's position within this political economy, we are able to get a view of FOA in the context of the present labour relations system. It also serves to note the logical contradictions unions are confronted with as agents for their union constituency and as junior partners in a CMP. These topics, when combined with the historical background and theoretical approaches discussed in chapter two, set the context for the review of SCC cases in chapter four.

Elements of FOA

FOA has two elemental and opposing interpretations, both of which hinge on how we appreciate the meaning of freedom. One interpretation claims that FOA is a unilateral freedom, meaning there is a right to freely associate, but not a right to dissociate. The other interpretation has a bilateral meaning in that there is a recognized right to associate and also a right to dissociate or not associate. Although the main

discussion around the two different interpretations of FOA will be investigated in chapter four, some preliminary positions will be used as examples in explanation of bilateral and unilateral freedom.

A bilateral freedom suggests that someone is at liberty to do something, that is, she is neither under a duty to do something nor under a duty to not do something. She is free to make choices. As an example, a person having the right to freedom of speech is free to speak or not to speak. There is no duty to speak or a duty not to speak. Freedom of speech is understood to have a bilateral quality to it. For some, FOA has this same quality. In the workplace this would involve having the right to associate with a union of choice and also the right to not associate or dissociate from any union. In *Lavigne*, a bilateral FOA would give the worker the choice of associating with the union by becoming a member of the union, choosing to not become a member but voluntarily pay a dues check-off, or choose to neither join the union nor pay the dues check-off.

A unilateral understanding of FOA suggests that someone is at liberty to do something and there is no duty to not do it, but because it is unilateral and not bilateral, there can be an obligation to do it. Sheldon Leader explains this obligation to do something while also being free to do it. For Leader, person X may have the freedom to walk across some land, that is, there is no law preventing X from doing so. At the same time person Y may contract with person X to walk across and inspect the same land. Hence, person X may be free to walk across the land and at the same time be under an obligation to cross the land while carrying out the inspection.⁵⁷ In the workplace, a

⁵⁷ Sheldon Leader, *FOA: A study in Labour Law and Political Theory* (New Haven: Yale University Press, 1992) at 12.

worker may find that she is free to associate to join a union but can still be put under a legal duty to associate through compulsory dues check-off.

Immunity

Bilateral and unilateral interpretations of FOA are both weak versions of a freedom that can be rendered powerless by the state imposing a legal duty to associate or refrain from association. This can also be found in collective labour agreements where employees may be forced to become a union member or pay dues equal to the amount of union dues, in effect being forced to pay a service fee to secure employment. What is needed to reinforce FOA is *immunity* from state actions. It is the understanding that FOA is a fundamental right within the Canadian *Charter* that brings to it the immunity from coercive state interventions. FOA as a “fundamental” or “constitutional” independent freedom indicates that the state may not easily violate this freedom by enforcing a legal obligation to associate or restrict the right to not associate. Although in Canada, section 1 of the *Charter* offers an opportunity for governments to justify violating fundamental freedoms, and section 33 (the notwithstanding clause) offers legislatures the opportunity to ‘override’ fundamental freedoms.⁵⁸ In chapter four, part of the review of the SCC’s decisions will include the application of s.1 of the *Charter*.

Source and Nature

The right to FOA can be an explicit or implicit right. In the *Charter* as in several international instruments the right to FOA is explicitly mentioned. An implicit right is one that is not mentioned in a legal document but it has been decided that it is there as

⁵⁸ *Charter supra* note 1.

part of the essence of the document. An implicit right is a right that is derivative of other rights or is an independent right that exists and is not necessarily part of the contents of another right.

The American Constitution⁵⁹ does not explicitly include as one of its freedoms the right to FOA. However, the courts have found that FOA is a derivative of the First Amendment guarantee of freedom of speech. In *Abood*, Justice Stewart wrote that “[o]ur decisions [in this case] establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments.”⁶⁰ Added to this is “[a]ssociational rights, which to the extent that they exist, are not derived solely from the First Amendment . . . [r]ather they are implied in the whole constitutional framework for the protection of individual liberty in a democratic society.”⁶¹ Here, for Emerson, FOA derives from the desire of individuals to exercise, as a group, their constitutionally explicit right to freedom of speech. FOA is given life to support freedom of speech. To the extent that free speech or other explicit rights exists, so too, implicitly, does FOA.

The other form of implicit right is one that is found to be independent and not fatally attached to other rights and freedoms. In other words, an independent implicit right is understood to exist if it is not forbidden. A right of association exists to engage in a particular activity if that same activity is something that has not been forbidden to individuals. The independent nature of the right is not aimed at a specific activity such

⁵⁹ *Constitution of the United States of America*.

⁶⁰ *Abood v. Detroit Board of Education*, 45 U.S.L.W. 3373 (1977) at p. 233.

⁶¹ Thomas I. Emerson “*Freedom of Association and Freedom of Expression*” (1964) 74 *The Yale Law Journal* 1 at 5.

as playing golf, but at any possible restrictions placed on a group's ability to participate in the activity. There is no constitutional right to play golf. However, if someone is restricted from playing golf with more than two people, then her complaint is that her constitutional right has been violated.⁶² The group complaint is that their restriction is more severe than that which is placed on an individual. There is no symmetry, i.e., "if an individual is permitted to do anything, then she should *prima facie* not be forbidden to do that thing with others."⁶³

When Rights Claims Clash

FOA presents difficulties other than the problem of bilateral or unilateral interpretations, or in the case where rights are not explicit, whether they are derivative or independent. Another common difficulty, and one that is also part of the focus of this paper, is when claims to the right to freely associate clash. This happens when one claim to FOA has been damaged or interfered with by another claim of associational rights.

A fairly common example and one used by Leader is, a group of strikers break the picket line, go back to work, an action that results in the picket line collapsing, causing the strike to fail. Here one group has exercised their right to FOA but in the process of doing so, has hindered or damaged another's FOA.⁶⁴ The collapse of the strike and the damage to one group's associational freedom is but one example of how issues of FOA can become issues of union strength and solidarity in the workplace. In Chapter Four, we review Francis Lavigne's appeal to the SCC which deals with another example of this

⁶² *Alberta supra* note 8 at para 173.

⁶³ Leader *supra* note 57 at 24.

⁶⁴ *Ibid.* at 14.

type of difficulty, and that is when a claim for a bilateral freedom challenges the counter-claim of a unilateral FOA. In *Advance Cutting* the debate over the bilateral nature of FOA continues when a *Charter* challenge to “forced unionization” is countered by the Quebec construction unions’ claiming FOA is unilateral and construction workers do not have a right to non-association.

Certification and Free Riders

The issue of the free rider flows from the exclusivity principle found within the certification approach to collective bargaining. At the demand of labour, certification first became a part of Canadian federal labour legislation in 1944 with the enactment of *PC1003*. Prior to that, in 1943, British Columbia and Ontario had introduced slightly differing forms of certification.

The process of certification grants exclusive bargaining agent status to a union that has demonstrated over 50% support from employees in the bargaining unit. Following the inclusion of certification in labour relations legislation, unions with exclusive bargaining agent status soon found themselves representing and negotiating benefits for employees who, for a variety of reasons, chose not to become dues paying union members. The employees who refused to associate but nonetheless received the benefits of collective bargaining became known as free riders.

The arguments against free riders are centred on the “receiver of free benefits” issue. This is an issue of equality for dues paying members and security for the union itself. This clashes with claims by free riders that they do not want to associate, did not

ask for these benefits, and need not pay for them. Reasoning on either side of the argument never strays far away from the “benefit – burden” argument.

The equality argument made by union members and unions is that free riders are receiving the same benefits or services, are not paying for them, and the cost is being carried by the dues paying members. The argument is, if there are 120 bargaining unit members, and 20 of them are not union members but are free riders, then the cost of the benefits and services provided by unionization is divided amongst the 100 union members. The two points here are that the 20 members are getting benefits and services for free, while the costs are assigned to the union members and the cost per union member is increased, e.g. “costs divided by 120 or costs divided by 100.”

The issue of free riders became part of a labour arbitration case in Windsor (1945) between the U.A.W.-C.I.O. and Ford Motor Company in which Justice Rand, in response to the issue of free riders ordered the compulsory dues check-off system to be implemented. The compulsory dues check-off or Rand formula will be examined in chapter four in *Lavigne*.

Capitalist Liberal Democracy

As a political discourse, liberalism has come to dominate the Western world. It has become *the* political discourse of our time. It is pervasive to the extent that as Richard Bellamy claims, “[f]rom New Right conservatives to democratic socialists, it seems that we are all liberals now.”⁶⁵ Bellamy is not claiming that everyone has converted to liberalism, but that a liberal understanding of what society should look like

⁶⁵ Richard Bellamy, *Liberalism and Modern Society: An Historical Argument* (Cambridge: Polity Press, 1992), at 1.

can be found not only within liberal politics and practice, but are characteristic of other political parties, whether Conservative, Alliance, or the NDP. This suggests that liberal ideas can be used to move from one political formation to another, i.e., liberal ideas of freedom of association and expression could facilitate the move from a liberal democratic system of government to a more socially democratic government --- one of the anxieties of liberalism is that its own tenets can be used to challenge its survival.

The concepts of liberalism that have a role in this thesis are respect for individual autonomy --- citizen's rights and freedoms, the idea that the economic and the political are separate, and the role and rule of law. These three concepts play an important part in the overall slant of this project, each in its own way. Our present systems of labour relations and the movement of unions from an overtly political movement to economic unions within a CMP is the liberal separation of the economic from the political. Unions are intrinsically social, economic, and political in nature. Liberalism and our labour regimes demand unions act as economic unions while involved in collective bargaining and then pursue their political agendas outside of the labour relations frameworks.

Capitalist liberal democracy is one of several types of democracy that have taken root in countries around the globe, the others being forms of communist democracy and democracies driven not by class but by rule of the general will.⁶⁶ For C.B. Macpherson, liberal democracy is a system of power and like other political systems it operates at two levels.⁶⁷ At one level it operates to govern people and groups, such that "it is a system by which people can be . . . made to do things they would not otherwise do, and made to

⁶⁶C.B. Macpherson, The Real World of Democracy (Toronto: CBC Publications, 1965) at 36.

⁶⁷*Ibid.* at 4.

refrain from doing things they otherwise might do.” The other level at which it operates is that it exists to support our particular set of relations between individuals and groups, relations that centre around our conception of rights and claims that people have as individuals or groups, and it also operates to support our capitalist economic system. All of these are “relations of power --- they give different people, in different capacities, power over others.”⁶⁸

Western capitalist liberal democracy was developed to serve the needs of a market society. Competitive markets need liberal themes of rights and freedoms, such as the right to own property, and a relatively autonomous government that can enforce, through the rule of law, these same individual rights and freedoms. For Macpherson, democracy came to be part of capitalist liberalism through the dissatisfaction of the working class with their inability to participate in this capitalist enterprise. The need for the continued support of the working class for capitalist liberalism moved the dominant bloc to offer workers the ability to participate in economic competition. Democratic franchise allowed working-class people to become participants in how our society and its governments operate.

Canada’s capitalist liberal democracy is also a welfare state. Near the end of the Second World War, the federal and provincial governments in Canada were faced with a population that demanded a bigger share of the economic rewards generated by capitalism. As noted earlier, labour unions were politically connected with the CCF and the LPP and demanded legal status to bargain with capital. The general population demanded employment and social welfare programs that addressed the failure of the

⁶⁸*Ibid.* at 4.

market to guarantee full employment and provide economic stability and security. The CCF were campaigning on the promise of a full social welfare program. To address these mounting difficulties, the state began introducing welfare reform programs.

Canada's version of the welfare state is a liberal form of welfare state, one of three models identified by Gøsta Esping-Anderson.⁶⁹ This model of welfare state has means-tested assistance and modest social insurance programs. The welfare benefits that are delivered are directed mainly at low-income state dependents. This type of system serves to stratify the population with the financially poor sharing a relative equality of poverty, and the majority of the population having different forms of social security depending on their employment, i.e., the type of benefits that are available in their workplace or that they can purchase in the marketplace.⁷⁰

The Canadian welfare state began to undergo changes during the 1980's when the state, following the lead of the US and Britain, began to be influenced by neo-liberal politics. Neo-liberalism, for Wendy Larner, can refer to new forms of political-economic policy, ideology or governmentality, which is based on the expansion of market relations and the belief that Keynesian welfare-isms should be replaced with a minimal state intervention in the economy.⁷¹ The social political landscape in Canada is changing and is being influenced by neo-liberalism. The move toward minimal state intervention in the marketplace may have an impact on how governments continue to intervene in labour relations, such that unions could find the post-war compromise confronted by "right to

⁶⁹ Gøsta Esping-Anderson, The Three Worlds of Welfare Capitalism (Cambridge, UK: Polity Press, 1990) at 26.

⁷⁰ *Ibid.* at 27.

⁷¹ Wendy Larner, "Neo-Liberalism: Policy, Ideology, Governmentality" (2000) 63 *Studies in Political Economy* (Autumn) 5 at 5.

work” legislation, a popular idea of neo-liberalism. *Right to work* is a phrase that has several different interpretations. A wide interpretation would be that an individual is at liberty to engage in socio-economic activity free from all outside constraints, such as the state or other individuals. However, “right to work” legislation, such as the type enacted in certain US states, usually means workers are not bound by union security agreements. In a unionized workplace, this would result in workers not having to become or remain union members and not having to pay an amount similar to union dues.⁷² In chapter four, the court in *Advance Cutting* discusses this issue in making its decision about compelled unionization in the Quebec construction industry.

Fordism

The institutionalization of unions as junior partners in capitalist modes of production, and the legislative mechanisms that were put in place to manage the new legally constructed relationship between capital and labour have come to be considered a part of a larger industrial regime called fordism. Taking its name from the automotive company Ford and its modes of production, it came to signify a regime of accumulation that was oriented toward a growing industrialized economy, mass production and consumption, with a type of regulation that aimed for labour peace, high wages, and high levels of employment.⁷³

⁷² Thomas R. Haggard, *Compulsory Unionism, the NLRB, and the Courts* (Philadelphia: University of Pennsylvania, 1977) at 5.

⁷³ Palmer *supra* note 29 at 283.

The system designed by the state, capital, and labour was a compromised, Canadian version of Keynesian economics and fordist industrialization.⁷⁴ Although some state social programmes were put in place, the prominent mode of regulation was privatized collective bargaining legislatively monitored by the state. The combined influences of a capitalist liberal democracy and a fordist industrial regime of accumulation and mode of regulation set the parameters for the construction and operation of social relations in Canada, both within the workplace and in wider society.

For 35 years Canada's fordist regime continued and overcame any minor slumps in the economy. However, by 1975 it was clear that the global economy was spinning downward and that Canada's economy was following suit.⁷⁵ Business was slowing down, exports were decreasing, inflation and unemployment rates were climbing, and Canada's Keynesian-fordist era was coming to an end.⁷⁶ The compromise between labour, capital, and the state, was effectively broken by capital and the state in an effort to address the crisis of capital accumulation. The new alliance between capital and the state was a state assault on trade union rights and freedoms that generally weakened and ignored the compromise reached with labour in the early fordist years.⁷⁷ Fordist-style economics is in decline as neo-liberalism appears to be moving to become the dominant political force in advanced industrial / post industrial societies.

⁷⁴ Jane Jenson, "*Representations in Crisis: The Roots of Canada's Permeable Fordism*" (1990) 23 4 Canadian Journal of Political Science 653 at 680-83.

⁷⁵ Palmer *supra* note 29 at 342.

⁷⁶ *Ibid.*

⁷⁷ Panitch and Swartz *supra* note 11 at 21-43.

Workers as Property

The post-war World War II settlement or compromise between labour, capital, and the state, ushered in an age of industrial legality. In exchange for certification, exclusive bargaining agent status, and the legal right to collective bargaining, unions had to become “responsible.”⁷⁸ This quid pro quo meant ensuring industrial peace, enforcing the collective agreement, and generally acting in a lawful manner.

Certification and exclusive bargaining agent status give unions a sense that they have ownership or “proprietary”⁷⁹ claims to their bargaining units. The fragmentation of workers into discreet certified units had the ability to turn unionism away from primarily class struggles to struggles between unions over union rights to workers and their dues. Unions began to act as owners of these bargaining units and also began considering extending their ownership to other groups of unionized workers, and more importantly, into other union jurisdictions.

The Canadian Automobile Workers taking over already unionized Newfoundland fishers or unionizing airline flight attendants is not about solidarity amongst workers or unions, it is about workers as property, i.e., as a source of power and income for individual union organizations.⁸⁰ Although it may be that by raiding other unions or expanding into areas where particular unions do not usually go, could be described as a form of “democracy in action,” the democratic principle may just be a tag-along effect of fractional warfare over membership dues within the wider union constituency.

⁷⁸ Fudge & Tucker *supra* note 12 at 300.

⁷⁹ Panitch & Swartz *supra* note 11 at 185.

⁸⁰ Palmer *supra* note 29 at 371.

Union leaders may be split along two lines of thought relative to organizational practices. Some union leaders hold that unions should operate within their traditional jurisdictions, while other unions take a more activist stance and strive to unionize or raid unionized workers in other jurisdictions. This difference is secondary to the one thing that all unions strive for, and that is they all wish to expand their base of power by increasing their membership numbers.

While it is true that the current labour legislation imposes certification and exclusive bargaining agent status and a general responsibility on unions, it is not an imposition that was unexpected or unacceptable to the labour movement. As noted in the historical review, a majority of the labour movement demanded *Wagner*-like legislation. In general labour leaders wanted certification, exclusivity, and compulsory dues check-off. These demands, when accepted by the state and subsequently implemented, fragmented unions into separate legally recognized organizations responsible for representing their own constituency. Unions now had a form of property rights.

The international labour movement and the ILO contest the idea that labour is a commodity. Capital has always considered labour as another resource of the production puzzle, a commodity to be bought when needed. The demand by unions that they have legal control over particular workers, to the extent that Canadian unions argue in court that members cannot dissociate, appears to be a stance similar to an employer having property rights over any of its commodities.⁸¹

Unions, as a result of the compromise they entered into with capital and the state, find themselves engaged in a “trustee” relationship with the public. The reason the state

⁸¹ *Ibid.* at 371.

was interested in a compromise was a result of the state having a “trustee” relationship with the public. Governments are responsible to the people for many things, including security and peace. The compromise reached was the state trying to bring peace and order into labour relations, either responding to a general public interest in a smooth running industrial system, or acting as a relatively autonomous state managing relations between labour and capital in order to ensure the continuity of the CMP. Once the compromise was reached, the unions also took on the role of “trustee” to the public,⁸² agreeing to ensure peace and harmony in labour relations.

The relationship between workers and their bargaining agents is more complex than just the union representing the interests of the workers. Unions have a fiduciary responsibility to their members,⁸³ but they also have a bargain with the state, capital, and a public trust duty to the general public. Given that unions are separate from the groups of workers that they represent also has the implication that as organizations they will have duties and responsibilities to themselves, their own organizational health and welfare. It is commonly accepted that collective organizations, such as unions, have a fear of subversion, and also, that like other organizations they develop an independent persona that makes them more than the sum of their constituents. Unions, as an organization, experience needs and ambitions beyond purely serving the needs of the members.⁸⁴ The dilemma and the cause of some logical contradictions for unions is

⁸² Karl Klare, “*Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941* (1978) 62 Minnesota Law Review 265 at 320.

⁸³ *Ibid.* at 319.

⁸⁴ Richard Hyman, Industrial Relations: A Marxist Introduction (Plymouth, UK: The Bowring Press, 1975) at 66.

when these claims bump up against each other. Unions must struggle with these difficulties and find a way of balancing individual and collective rights.

If the above duties, trusteeships, and public trusts can be reasonably assigned to unions as they function within the present CMP, then questions of agency can be asked of any action taken by unions. At any given time, union agency may be operating to fulfill one or several of the above union responsibilities. However, it may not be easily recognizable when a particular union is operating for the benefit of the public, the state or capital, for its constituency, or for itself.

The Rand Decision

The most influential arbitration to come out of the 1940's fordist period was *Rand*, which gave us the Rand Formula or compulsory dues check-off. The two main unresolved issues during the 1945-46 negotiations between the U.A.W.-C.I.O. and the Ford Motor Company in Windsor were that membership in the union becomes a condition of employment, and the workplace becomes a union shop. The Ford Motor Company refused to agree to this contract demand, the union struck Ford and did not return to work until both sides agreed to a plan of settlement that called for an arbitration award on all outstanding collective bargaining issues; the prime issue remaining was the issue of the union shop.

One of the terms of award was the creation of a compulsory dues check-off for all employees of the bargaining unit. This compelled all bargaining unit members to pay union dues whether or not they were union members. It also required the employer to collect the dues from the employees' pay and turn these amounts over to the bargaining

agent. The influence of this award is felt in present day labour relations. *Lavigne* is concerned with an individual worker claiming that his FOA has been violated by the imposition of a compulsory dues scheme, the Rand formula. Rand's decision recognizes that workers have a right to associate with whom they choose. Compulsory dues check-off is an attempt by Rand to limit the extent to which individual worker choice is infringed.

In the collective bargaining struggle between Ford and the UAW, Justice Rand found himself with an unusual arbitration. Normally at issue in arbitration is a claim of contract violation or some other alleged rights violation. The parameters are confined to the issue at hand and the issue itself is clearly defined with all the possible outcomes usually acknowledged beforehand. In this instance Rand found that there were no legal parameters, no restrictions on how or why he made his decision. He found himself in the position of deciding an arbitration that was a "contest of extra-legal relations and interests"⁸⁵ that "must be resolved by the force of ethical and economic factors resting ultimately on the exercise of economic power."⁸⁶

Rand believed that any decision made must be made in the context of a democratic society that has as its driving force, capitalism; the decision tempering the demands of private enterprise with ideas of social justice set within an environment of industrial mass production.⁸⁷ It is noteworthy that Rand saw any decision would have to support capital maintaining its dominance over labour. To begin making a decision with this point of departure firmly in place, speaks to the issue of the neutrality or impartiality that both

⁸⁵ *Rand supra* note 14.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

sides of the arbitration claim as an entitlement. Justice Rand had decided that the outcome of the arbitration must leave Ford Motor Company in a clear and secure place of domination over the union leaders and the workers.

As noted earlier, by 1946 most provinces and the federal government had enacted legislation that recognized and accepted unionism and free collective bargaining. Legislative initiatives had brought the certification process, giving unions sole bargaining agent status for all members of the bargaining unit, whether the members are non-union or union members. For Rand, these pieces of legislation or “machinery” as he refers to them, were created to “adjust toward an increasing harmony, the interests of capital, labour and public in the production of goods and services which our philosophy accepts as the good life[.]”⁸⁸ From a recognition of the wider social impacts, both in a positive and negative way, Rand also saw that people’s economic lives are “hostages” to the general commitment to the continuance of capitalist structures, to free collective bargaining, and overall to a general sense of peace and stability in our wider social and economic life as a nation.

The struggle over union dues between capital and labour is, at heart, a power struggle. Capitalism, by its nature, struggles for existence and dominance. Rand claimed that in an industrial setting capital “must in the long run be looked upon as occupying a dominant position[.]”⁸⁹ however, Rand also saw the need for “. . . the power of organized labour, the necessary co-partner of capital, [to be] . . . available to redress the balance of

⁸⁸ Ibid.

⁸⁹ Ibid.

what is called social justice: the just protection of all interests in an activity which the social order approves and encourages.”⁹⁰

Another issue that Rand commented upon and may have played a part in his decision is the rumour that the leaders of the union were “merely instruments of a communist group which seeks not the realization of private enterprise but its subversion.”⁹¹ Rand did not believe that the union leaders of the bargaining unit were, in fact, driven by communistic motives. However, he was very clear that leaders who are opposed to communism should be supported in a democratic society, as failure of democratic leadership opens the door for, and strengthens the positions of its opponents.⁹² Through addressing this issue in his written decision, Rand is demonstrating the wide social perspective he is bringing to bear on this arbitration. Although Rand recognized an individual’s right to play a role in Canadian society (circa 1946), the three main players in his view of the situation in Windsor were the state, capital, and labour. Rand’s inclusion of the union as one of the three main players in Windsor attests to his recognition of the collective power of labour to help bring about peace and industrial civilization.

The UAW’s demand for a “union shop” agreement would contractually oblige the employer to collect union dues from every member of the bargaining unit and send these funds to the union. It would permit the employer to hire any worker it chooses, but within a given time all of the employees must become union members. There is also a requirement that each employee maintain her union membership status as a condition of

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid

continued employment. This requirement of union status maintenance can be affected by the expulsion of the union member from the union, by the union, or a refusal to accept the worker into the union from the start. Rand recognized the possible negative impact on an individual worker who is exposed to the threat or action of an “unmatured group,”⁹³ the outcome of which could be loss of employment for the individual.

Although Rand does not define “unmatured group,” my sense is that he was referring to the fact that the U.A.W. had only been the bargaining agent at the Ford plant since 1941, and that possibly the union leaders and the rank and file members have not developed the maturity to handle “power” that sometimes comes with time and experience.

In his reach to bring peace and stability to Ford in Windsor, Rand started with three main reference points. First, he made it clear he saw capital as the dominant force, a force that must be kept in a position of dominance. Second he acknowledged his desire for a strong union presence that did not have communistic tendencies. And third, as he nears the end of his written decision, he also sees the need to protect the individual from the power of the union shop, while understanding that all members of the bargaining unit benefit from a strong secure local union with sole bargaining agent status.

At this point in his analysis of the situation, Rand now considers the particular work environment of the auto industry. He suggests that most of the employees need little skill to carry out the required functions of the assigned tasks. Most of the jobs are co-ordinated with mass production techniques. This does not require long apprenticeship, and most jobs can be taken on at once. Rand states that most of the employees are of a class and stature that must be governed en masse and one of the

⁹³ Ibid.

techniques for doing this is to diffuse authority amongst the labour representatives, making administration as flexible as possible. It is the enforcement function, the negotiation and implementation of the collective agreement carried out by the union that Rand sees as a benefit to all bargaining unit members and a cost that he finds equitable that all members must share. For Rand “they must take the burden with the benefit.”⁹⁴ His award in the arbitration refused the union demand for a union shop but allows for compulsory dues to be paid by all members of the bargaining unit, without the requirement that unit members become union members. Rand suggests that this preserves the liberties of the individual employee and the company while offering security and stability to the union.⁹⁵

Rand’s decision supported the maintenance of capital as the principal player in the workplace at a time in Canadian industrial history when Fordism was the dominant regime of accumulation. Rand also acknowledged the role of unions in maintaining peace in the workplace via its control of the workers through the enforcement of the collective agreement. The responsibility of being both worker representative and collective agreement enforcer, helped to establish unions as junior partners in capitalist economics. This partnership aligns labour unions with capital in a position of dominance over workers. Justice Rand’s decision is an excellent example of liberal “high fordist” logic. *Rand* clearly maps out each actor in the workplace; the individual, the union, and the employer. Importantly for this thesis, Justice Rand recognizes that the collective has legal rights that are different than the individual worker.

⁹⁴ Ibid.

⁹⁵ Ibid.

Chapter three has reviewed different understandings of FOA, its source and nature and some of the problems that arise when rights claims clash. The discussions of liberal democracy, fordism, 'workers as property,' and *Rand* will give much needed context to the review in chapter four of *Lavigne*, *Advance Cutting*, and *Dunmore*. Both the individual and the union have rights and freedoms, specifically for this thesis, both have a right to FOA. The struggle over whose rights will prevail, individual or collective, and the consequences that will inevitably flow from this struggle is the focus of chapter four and also the overall concern of this thesis.

CHAPTER FOUR

Introduction

This chapter will review three Supreme Court Cases, *Lavigne*, *Advance Cutting*, and *Dunmore*. In *Lavigne*, OPSEU claims that FOA does not include the right to not associate. This is a narrow interpretation of FOA and one that a four/three majority of the court in *Lavigne* did not agree with. *Advance Cutting* sees the Quebec labour unions arguing for a narrow interpretation of FOA, claiming that FOA does not include the right of non-association. In this case the court in an eight/nine majority found FOA is a bilateral freedom. *Dunmore* will show the United Food & Commercial Workers (UFCW) arguing that Ontario's Labour Relations Act violates s. 2(d) FOA by denying associational rights to agricultural workers. The remedy sought by the UFCW would require the Supreme Court to use the *Charter* as a positive mechanism for social justice, something the Court has shown reluctance to do in the past.

Before beginning the review of *Lavigne*, several topics relevant to the case will be discussed. First will be a general overview of dues check-off and union security clauses. Second will be a review of some of the arguments concerning the unions' claims that security clauses are important.

A compulsory check-off clause requires the employer, at the request of the union, to deduct dues from every member of the bargaining unit, and the worker cannot prevent the employer from making the deductions. An example of compulsory dues check-off is found in the Ontario *Labour Relations Act*,⁹⁶

⁹⁶ *Labour Relations Act 1995*, S.O. 1995, c. 1, [hereinafter *LRA*].

47. (1) Except in the construction industry and subject to section 52, where a trade union that is the bargaining agent for employees in a bargaining unit **so requests**, there shall be included in the collective agreement between the trade union and the employer of the employees a provision requiring the employer to deduct from the wages of each employee in the unit affected by the collective agreement, whether or not the employee is a member of the union, the amount of the regular union dues and to remit the amount to the trade union, forth with. [emphasis added]

51. (1) Despite anything in this Act, but subject to subsection (4), the parties **may** include in its provisions,

- (a) for requiring, as a condition of employment, membership in the trade union . . . or requiring the payment of dues or contributions to the trade union. [emphasis added]

Compulsory dues check-off is found in six jurisdictions, those being Ontario, Quebec, Newfoundland, Manitoba, Saskatchewan, and the federal jurisdiction. The other five provincial jurisdictions have a form of dues check-off that is negotiable and can be either revocable or irrevocable. An irrevocable dues check-off system is a system in which the worker authorizes the employer to deduct regular union dues and cannot rescind that request in the future, revocable dues check-off allows for the employee to rescind the authorization in the future

There are several varieties of union security clauses, the most prominent ones being the closed shop, the union shop, and the agency or Rand shop, and the enabling forms of dues check-off. The closed shop requires that a prospective employee must already be a member in good standing of the representative union before the employer can hire. A union shop would have collective agreement language that requires employees, as a condition of continued employment, to maintain membership in good standing in the union, while new employees must become union members in good

standing within a prescribed time period after becoming employed. The *Rand* or agency shop requires that members of the bargaining unit pay an amount equal to the union membership dues to the union.⁹⁷

Unions claim that as exclusive bargaining agents they are obliged to act on behalf of all members of the bargaining unit, and that any benefits negotiated are for the benefit of the members of the bargaining unit and not just for unions. The costs of collective bargaining and the benefits received should be absorbed by all of the workers who share in these benefits; this is the “benefit-burden” argument that was discussed in an earlier chapter and was a pivotal point in the decision in *Rand*.

As noted earlier in the review of *Rand*, compulsory dues check-off creates a particular kind connection between the worker and the union. The union, by demanding a fee for services, has transformed itself into a service organization, not unlike any other insurance group. However, the worker is still not able to choose her workplace insurance company, she remains legislatively tied to the certified bargaining agent. This compelled association is a violation of the worker’s FOA rights, although it has thus far been found justified under section 1 of the *Charter*. My argument in this thesis is that in the future there is a high possibility the courts will find that it is not justified, and that unions should be preparing for the consequences that will flow from this decision.

The union and closed shop create a tighter association than the *Rand* formula in that becoming a union member requires the employee to follow union rules and

⁹⁷ Morley Gunderson, Allen Ponak, & Daphne Gottlieb Taras, Union-Management Relations in Canada, 4th ed. (Toronto: Addison Wesley Longman, 2001) at 284.

regulations as set down in local by-laws and the union constitution.⁹⁸ Supporters of union and closed shop agreements claim that binding workers into an association fosters union solidarity,⁹⁹ and that this solidarity is needed during contract negotiations and the possible use of “strike action” to support union demands at the bargaining table.¹⁰⁰ In response to these statements I argue that there is no evidence to support the claim that contractually forcing workers into becoming union members fosters solidarity. It appears more likely that forcing someone to unionize against her wishes would generate apathy or hostility not solidarity.

Lavigne

One of the questions the SCC responded to in *Lavigne* is whether Francis Lavigne’s constitutionally chartered right to FOA s. 2(d) had been violated by a compulsory dues check-off system, the Rand formula. The impugned legislation is the *Colleges Collective Bargaining Act*; specifically for this paper, article 53,¹⁰¹ the article that allows the parties to negotiate for union security clauses:

53. -- (1) The parties to an agreement may provide for the payment by the employees of dues or contributions to the employee organization.

The ability to negotiate compulsory dues resulted in the Rand formula being included in the collective agreement between OPSEU and the Council of Regents.

12.01 There shall be an automatic deduction of an amount equivalent to the regular monthly membership dues from the salaries of all employees in the bargaining

⁹⁸ See generally Beatty, *supra* note 3 chapter 12.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Colleges Collective Bargaining Act*, R.S.O. 1980, c. 74.

unit covered hereby.

Although the written decision contained four differing opinions on several aspects of the case, the unanimous decision of the court was to dismiss Lavigne's appeal. However, the court was relatively split on the issue of the bilateral FOA. Before moving into a review of the decisions, it is worth noting the court's differing judgements.

Justices Wilson, L'Heureux-Dubé, and Cory, found that FOA does not include the right to dissociation. Justice Cory's decision, although separate from Wilson's decision, agrees with Wilson on all points except for the issue of government action or involvement, which in this case, Cory agrees with La Forest. Justice MacLachlin found FOA includes the right to dissociation but qualified "association" by linking association with ideological conformity. MacLachlin found that compulsory union dues are not an infringement on the right to not associate. La Forest, writing for Sopinka and Gonthier, found FOA to be a bilateral freedom containing the freedom to not associate and that Lavigne's right to FOA had been violated because the union had used some of the dues for political purposes. However, La Forest found that it was justifiable under s. 1 of the *Charter*. In another case, *Beck v. Communications Workers of America* it was established that 19% of the compulsory dues collected --- paid by employees as a condition to keeping their jobs --- went towards collective bargaining, contract administration, and grievance handling, with the rest towards other activities.¹⁰² Lavigne's appeal was dismissed, but as will be reviewed in this chapter, four of the seven Judges found a bilateral FOA in s.2(d) of the *Charter*.

¹⁰² Leader *supra* note 57 at 94; *Beck v. Communications Workers of America* 108 S Ct. 2641 (Supreme Court).

Justice Wilson (L'Heureux-Dubé and Cory)

Justice Wilson, in denying a bilateral FOA, focused on *Alberta* as the case in which the SCC had already reviewed the range of s.2(d). In doing so, Wilson refers to Chief Justice Dickson's explanation of the role of FOA, which in part he finds that:

“FOA is the freedom to combine together for the pursuit of common purposes or the advancement of common causes. It is one of the fundamental freedoms guaranteed by the Charter, a sine qua non of any free and democratic society, . . . [I]n every area of human endeavour and throughout history individuals have formed associations for the pursuit of common interests and aspirations.”¹⁰³

At page 365 Dickson says:

“The purpose of the constitutional guarantee of freedom of association is . . . to protect the individual from state-enforced isolation in the pursuit of his or her ends.”¹⁰⁴

and, “[a]s social beings, our freedom to act with others is a primary condition of community life, human progress and civilized society.”¹⁰⁵

Dickson's words support the need for the right to FOA and that as social beings it is important that this right be protected. However, there is nothing in these words that claim FOA is only unilateral and does not support the right to dissociate. Using Dickson's words it can be argued that the right to freedom through combining together for a common cause may include the right to dissociate from one group and join another. The act of dissociation and subsequently associating with another group is only possible

¹⁰³ *Lavigne, supra* note 5 at para 67.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.* at para 68.

if the right to not associate is part of the right to associate. Denying an individual the ability to dissociate from one group and join another or to not associate, denies their right to FOA, to combine with others who share the same interests and aspirations. Dickson's claim that our freedom to act with others is "primary . . . in a civilized society",¹⁰⁶ was used by Wilson to support only freedom to associate. Wilson seems to be rejecting the notion that individuals act in isolation or can isolate themselves from outside influence, and that the act of joining together or unionizing is a collective act and should be a collective dissociative act. This supports Michael Mac Neil's claim that the state and the courts need to recognize communalism or collectivism, be sensitive to conditions that favour group action over individual autonomy,¹⁰⁷ and be "sensitive to the unique role that groups play in defining our human situation."¹⁰⁸

In furthering her argument for unilateral FOA, Wilson quotes Justice Sopinka, who in *Alberta* summarized the courts understanding of FOA with four propositions:

" . . . I have come to the conclusion that four separate propositions . . . emerge from this case: first, that s. 2(d) protects the freedom to establish, belong to and maintain an association; second, that s.2(d) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that s.2(d) protects the exercise in association of the constitutional rights and freedoms of individuals; and fourth, that s.2(d) protects the exercise in association of the lawful rights of individuals."¹⁰⁹

The four propositions offered by Sopinka establish a wide understanding of FOA, none of which appear to weaken Lavigne's claim to a right to dissociate. Sopinka, while identifying four propositions that emerge from *Alberta*, did not claim that there was only

¹⁰⁶ *Ibid.*

¹⁰⁷ Michael Mac Neil, "Courts and Liberal Ideology: An analysis of the Application of the Charter to Some Labour Law Issues" in 34 McGill Law Journal, 1989, at 95.

¹⁰⁸ *Ibid.* at 96.

¹⁰⁹ Lavigne, *supra* note 5 at para 71.

four ways of understanding FOA, but merely that four were found to have emerged in *Alberta*. Wilson also makes use of part of Justice Cory's dissenting opinion at page 379 in *PIPS*,¹¹⁰ in which Cory states "[f]reedom of association is the freedom to join together for the purposes of achieving common goals." Here, Cory is making a case for the right to FOA, but there is no qualifier as to whether it is in reference to only unilateral association or that it also includes bilateral association.

The example of *Abood* supports Lavigne's claim to a right to not associate. In *Abood* an agency shop provision that required compulsory dues was challenged on the grounds that some of the dues were going toward political purposes. The claimants in the case said this violated their first amendment rights of free speech. The US Supreme Court agreed and found that their right to not associate had been violated. For the majority of the court in *Abood*, it was the compelled expression of political views that engaged both free speech and the freedom to not associate.

Wilson also discusses the comparison of living in a representative democracy and paying taxes, to working within a mini-democracy, such as a union, and paying compulsory dues. This analogy, on the surface appears to be substantial, but closer examination reveals that these two situations are different systems and not close to analogous. In our representative democracy, we have regular elections in which any citizen can represent a particular party and run for the opportunity to form our government. Usually only one party will hold the reigns of power with a majority of the seats in the House of Commons. The political parties that are not in the majority remain in the house and maintain their political allegiance and party structure; they sit in

¹¹⁰ *P.I.P.S. v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R.

opposition to the governing party. Taxpayers pay their taxes to government that has control of taxpayer dollars and decides how and when it will be spent.

In Wilson's analogy the certified union that was voted for by a majority of workers becomes the sitting government. It is here that the comparison fails. Once a union is established as the certified sole bargaining agent all other unions lose any right to represent workers in the bargaining unit. There is no recognized opposition party that sits and challenges the union government. It is only through the process of de-certification that a ruling union government may be replaced. There are no regular elections to decide which union will become the government and there is no (or little) opposition while the bargaining agent is in power. There are periodic elections to choose the union executive but the bargaining agent remains the same. The process of de-certification and certification is not in any way analogous to regular political elections in a representative democracy.

In our society we pay taxes to the government of the day, a government that has been elected to speak for all Canadians. In the workplace we pay compulsory dues to the bargaining agent, who according to Wilson speaks only for the majority of the bargaining unit. Following the connector line drawn between our representative government speaking for all and our paying taxes, dues check-off should be applied to the members of the bargaining unit for whom the union speaks, that would be the majority but not necessarily all of the members of the unit. If a member of the unit does not recognize that the union speaks for her, she should not be coerced into paying compulsory dues.

Wilson also discusses the issue of opening the "floodgates". Part of the decision in *Abood* was that the US Supreme Court did not decide what constituted legitimate

expenditures of compulsory union dues, instead leaving that to be decided on a case by case basis in the lower courts. The result has been in Wilson's words, "an endless train of disputes in the United States."¹¹¹ In order to avoid the floodgates problem, Wilson says that the courts in Canada have tried to separate serious and trivial violations of s.2(d). Although Wilson finds neither the Canadian or American solution to be commendable alternatives, for Wilson, neither can the courts turn "a blind eye to the problems which a recognition of a right to not associate [would] generate."¹¹²

One of the problems that Wilson discusses, if a bilateral FOA is found in s.2(d), was the impossibility of having to make a decision about whose FOA rights should prevail, the right of association being claimed by the union or the right of Francis Lavigne to not associate. Wilson says that an interpretation of s.2(d) that would give rise to this problem "should be avoided if at all possible."¹¹³ It is true that in a society rights and freedoms can clash, but denying these rights and freedoms to avoid having to make a decision of whose rights and freedoms "should prevail" is not the appropriate action. If rights claims clash to the extent that a decision must be made, then rights can be given differing weights and can be weighed against each other to see which one dominates in the particular instance. Our *Charter* s.1 is just such a mechanism for resolving this type of issue and as will be discussed further in this chapter when Justice La Forest makes use of s.1 to decide if an infringement of FOA is justified.

In Lavigne Wilson held that s.2(d) FOA should not be expanded to include the right to not associate. For Wilson, protection of the right to dissociate is not found in

¹¹¹ *Lavigne supra* note 5 at para 91.

¹¹² *Ibid.* at para 92.

¹¹³ *Ibid.* at para 86.

s.2(d) but may be found in s.2(b) freedom of speech or the legal rights found in s.7, although she also found compulsory dues did not infringe on Lavigne's s.2(b) freedom of speech rights. Having found no infringement of s.2(b) or 2(d) rights, a decision around s.1 was not required. Nevertheless Wilson offered an opinion, finding that the preservation of industrial peace was so "pressing and substantial" that an infringement on a constitutional right would be justified.

In her written decision Justice Wilson has left no room for an interpretation that would recognize FOA as a bilateral freedom. Wilson's finding that there is no right of non-association stands in contrast to the findings of Justice Rand. Rand found that workers did have the right to not associate and he attempted to protect that right by denying the union's demand for a union shop, and instead awarded a compulsory dues check-off system. Rand based his judgment on principles he believed were accepted by the large majority of Canadians. One of the principles identified by Rand being the right for individuals to "seek work and to work independently of personal association with any organized group."¹¹⁴ Rand's judgment supports the over all thesis that FOA is bilateral and forced association is not justified under the *Charter*.

MacLachlin

Justice MacLachlin recognized a right to not associate within s.2(d) but did not find a violation of s.2(d) in this case. MacLachlin's position is that for Lavigne, a right to not associate must be the right to not be compelled into forced ideological conformity,

¹¹⁴ *Rand supra* note 14.

but for MacLachlin compulsory dues is not ideological conformity.¹¹⁵ MacLachlin refers to *Irwin Toy*¹¹⁶ where it was held the test for finding if conduct falls under s.2(b) freedom of expression, was whether the activity was intended to convey meaning. For McLachlin, the payment of dues does not convey meaning and does not bring Lavigne into enforced association with ideas and values to which he does not subscribe.¹¹⁷

For MacLachlin, using a commercial transaction as an example, Lavigne is simply paying for services and benefits received.¹¹⁸ This type of reasoning for compulsory dues is the “free-rider” argument. Claiming “[t]he need for compromises such as the Rand formula arises from the fact that Canadian labour relations generally permit only one union to represent all employees in a designated work grouping.” MacLachlin finds that the formula is a “finely crafted balance between the interests of the majority in the union and individuals who may not wish to belong to the union.”¹¹⁹ The weight given the free rider and service arguments appear over weighted when used to justify compulsory dues. It is giving weight to arguments that coerce money from Lavigne without subjecting these same reasons to s.1 of the *Charter* challenge.

It is true that compulsory dues can be described as a commercial transaction, similar to an individual buying insurance. On the surface this seems to be an acceptable analogy. However, it is important to bear in mind unions do not usually consider themselves insurance companies, they are labour organizations that represent workers in

¹¹⁵ *Lavigne supra* note 5 at para 294.

¹¹⁶ *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] 1 S.C.R. 927.

¹¹⁷ *Lavigne supra* note 5 at para 285.

¹¹⁸ *Ibid.* at para 296.

¹¹⁹ *Ibid.* at para 290.

an economic struggle with capital. Labour unions are ideologically driven and contributing dues to these organizations supports their ideological aspirations.

La Forest

La Forest's decision in *Lavigne* was to find that compulsory dues check-off was an infringement of Francis Lavigne's s.2(d) rights, but also found that it was justified under s.1 of the *Charter*. For La Forest, the Rand formula does not interfere with Lavigne's right to associate with others in order to pursue goals of common interest, so if there is a violation it is in that compulsory payments to the union violates the right to not associate.¹²⁰

It is clear from reading La Forest's decision that the right to the freedom to not associate is an integral part of the right to associate. Although La Forest agreed with Justice Wilson's statement when she wrote "FOA is meant to protect the collective pursuit of common goals,"¹²¹ La Forest adds that FOA is ultimately there to "further individual aspirations"¹²² and also that as stated by Thomas Emerson "association is but an extension of individual freedom."¹²³ Association is more than an extension of individual freedom. As discussed earlier, collectivities form and become more than the sum of their parts. These collectivities have rights that are collective in nature and could not be transferred to individuals. The right to collective bargaining is not an individual right, it is a collective right that is promoted and protected by legislation. FOA can be both a collective and an individual right.

¹²⁰ *Ibid.* at para 222.

¹²¹ *Ibid.* at para 224.

¹²² *Ibid.*

¹²³ Emerson, *supra* note 61.

La Forest's opinion defers to Wilson's claim that s. 2(d) is a collective not an individual right. For La Forest, there is no question the existence of a right to not associate is within the scope of s.2(d). Further in his written decision La Forest does not deny the community interest that exists in FOA, especially in the ability it affords to help sustain democracy, but he finds that the freedom from compelled association must be recognized under s.2(d).

In further clarifying his position, La Forest refers to *Big M Drug Mart* where Justice Dickson says,

“freedom can primarily be characterized by the absence of coercion or constraint . . . if a person is compelled by the state or the will of another to a course of action or inaction that he would not otherwise have chose, he is not acting of his own volition and he cannot be said to be truly free,” and “[f]reedom 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 consciences.”¹²⁴

La Forest adds “[i]t is clear that a conception of FOA that did not include freedom from forced association would not truly be “freedom” within the meaning of the Charter.”¹²⁵

La Forest supports his argument about freedom to not associate by drawing on Article 20 of the *United Nations Universal Declaration of Human Rights*, 1948, which provides that:

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.¹²⁶

¹²⁴ *R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295 at pp. 336-37.

¹²⁵ *Lavigne supra* note 5 at para 227.

¹²⁶ *United Nations Convention #87 supra* note 7 at 71.

La Forest finds that reading the right to FOA with a bilateral interpretation “serves to recognize the often overlooked potential for coercion in association” and that “governmental tyranny can manifest itself not only in constraints on association, but in forced association.”¹²⁷ He does not claim that this right is inviolate. In fact he says that s.2(d) cannot be interpreted to protect us against associations that are an inevitable part of membership in a democratic community, linking us to governments and their policies.¹²⁸ However, he finds that accepting a bilateral interpretation does not “trivialize” the right to be free to associate. “It will do nothing but strengthen it . . . [m]oreover, the purposive approach to Charter interpretation demands such a result.”¹²⁹

In response to Justice Wilson’s statement that the protection to the right to dissociate is not to be found in s. 2(d) but may be found in s 2(b) and s. 7, La Forest says that even though some aspects of FOA may find protection in these other sections, this should not prevent us from giving a full meaning to FOA. Also, he adds that all of the *Charter* liberties are part of the particular freedom we enjoy in Canada. In expanding on this statement La Forest says “a person is not deprived of protection under a provision of the Charter merely because protection may also be derived under another.” For La Forest, rights overlap and are not discreet and he sees no value in “depriving a litigant of success because he has chosen one provision . . . rather than another.”¹³⁰ The idea that *Charter* rights and freedoms, that the values and liberties expressed in the *Charter* are not discreet but overlap, is an important point and finds its way into *Advance Cutting*. In

¹²⁷ *Lavigne supra* note 5 at para 228.

¹²⁸ *Ibid.* at para 231.

¹²⁹ *Ibid.*

¹³⁰ *Ibid* at para 229.

Advance Cutting some of the court brings all of the rights to bear, as a bundle, when determining whether there is a violation of FOA and whether it is justified.

La Forest says that “the core of the guarantee of FOA is the individual’s freedom to choose the path of self-actualization . . . [t]his is an aspect of the autonomy of the individual.”¹³¹ Another way he points out at some of the difficulties with forced payments of dues is by using the “tithes” analogy. In our history, some established Churches demanded a tithe (1/10 of the donators income) be given to them. For La Forest, no one claims that all of the donators approved of the Church, only that they had to donate, quite possibly against their own faith. Eventually it was recognized that this forced payment could be antagonistic to one’s own faith, and a violation of one’s conscience.

Lavigne’s court challenge has a double edge to it. In general he claims that compulsory dues check-off infringes on his s.2(d) freedom of rights. More specifically, he claims that the portion of his collected dues that do not go for collective bargaining purposes are themselves an infringement of his s.2(d) rights. On the issue of having to pay dues for collective bargaining purposes, Lavigne conceded that this was a reasonable limit on his FOA under s.1. La Forest agreed with Lavigne that the monies provided through the Rand formula and used for bargaining issues would be found to not violate FOA. However, La Forest did find that compulsory dues collected and spent on non-bargaining issues was a violation of s.2(d) but that it was justified under s.1 of the *Charter*. We have not covered all of La Forest’s reasons for finding that Lavigne’s freedom to not associate has been violated. However, we have established that La Forest

¹³¹ *Ibid.* at para 234.

has found FOA must include the freedom to not associate, and that his construction of bilateral FOA is heavily in favour of the individual not the collective interpretation.

The decision in the *Lavigne* case, although unanimous in its dismissal of the appeal, clearly maps out disagreements amongst the court as to the full meaning to be found in s.2(d). We have Justice Wilson writing for L'Heureux-Dubé, and Cory agreeing with Wilson's reasoning that FOA s. 2(d) does not include the freedom to not associate, and that joining a union is a collective act and therefore dissociation is also a collective not an individual act. MacLachlin found that there is a right to not associate in s.2(d) but that compulsory dues check-off is not an infringement of this right. MacLachlin sees compulsory dues as a "service fee." The opinion by MacLachlin that in cases where workers are not compelled to become union members but are forced to pay for services goes back to the issue of certification, and exclusive representation, i.e., unions demanding the role of service provider irregardless of "ideological conformity." In the present case, OPSEU claims that compulsory dues are for payment for the service they provide and for the general activities that they, as a union, choose to engage in as socio-political players in society.

La Forest writing for Sopinka and Gonthier found that s.2(d) consisted of the right to not associate, but also found that in the case of compulsory dues check-off it was justifiable under s1. Importantly, four of the seven justices found a right to not associate in s.2(d), a finding that OPSEU, as stated in its submission to the court, does not agree with. What is significant about this decision and a point that needs to be mentioned for the purposes of this project, is that in *Lavigne* a majority of the court (4-3) found a bilateral meaning to FOA, and began the discussion of compelled association, ideological

conformity and FOA. The findings by the court that FOA is bilateral and workers have a right to not associate links back to Justice Rand's opinion that workers have a right of non-association. The trail of judicial reasoning that may culminate in the finding that union security clauses are not justified under the *Charter* has been identified in *Rand*, *Lavigne*, and will continue in *Advance Cutting*. In *Advance Cutting*, bilateral FOA is an accepted interpretation, leaving the courts to consider ideological conformity and compulsory unionization.

Advance Cutting

Following the court's four/three majority split over the right to not associate in *Lavigne*, it was not clear which way the courts would go in the future. However, in *Advance Cutting* eight of nine Justices found a constitutional right to not associate within s. 2(d) of the *Charter*. The debate over whether the right to not associate is part of the right to FOA may continue in other arenas, but for the courts the bilateral nature of FOA is accepted.

In *Advance Cutting*, the Court heard a s.2(d) FOA constitutional challenge to Quebec labour legislation that obliges construction workers to become union members in order to work in the construction trade in Quebec. The decision of the court contained four separate written decisions, each of which will be discussed as part of a general overview of the case. The issue of whether or not this case captured *Charter* scrutiny, that is, government intervention in relations between employers and employees, was not disputed.

Justice L'Heureux-Dubé

In *Lavigne* Justice L'Heureux-Dubé was one of three (of seven) Judges who did not find the freedom of non-association within s.2(d) of the *Charter*. In *Advance Cutting* she was the only Justice out of nine who held this position, the other eight acknowledging the constitutional right to not associate. L'Heureux-Dubé's stand-alone minority position in *Advance Cutting* is in sharp contrast to the slim majority found in *Lavigne*. This contrast serves to reveal the movement of the court from a wavering position, possibly going either way, to a clear pronouncement that FOA is a bilateral freedom.

Justice Iacobucci

Justice Iacobucci's decision agreed with Bastarache and LeBel as to the acknowledgement of a right to not associate, but found that the infringement of this right was justified. Notably, a difference arose over the issue of the criteria for judging an alleged violation, i.e., the test for Bastarache and LeBel was the notion of "ideological conformity," while Iacobucci, borrowing from La Forest in *Lavigne*, questioned whether the compulsory unionization scheme serves the common good or furthers the collective social welfare.

For Iacobucci if the impugned legislation does serve the common good it will be justified unless it infringes on a specific liberty. However, in this case Iacobucci found that forced union association does not serve the common good, membership in these organizations do not require competency tests ensuring public confidence in their ability to carry out their trade. The provisions of the legislation impairs the liberty of workers to

not join a union, i.e., construction workers in Quebec must become union members in order to earning a living in the construction industry, and they must choose between one of five union representatives. For Iacobucci “these factors provide a clear indication that the legislative scheme established by the *Construction Act* results in a serious impairment of individual liberty rights.”¹³² However, Iacobucci finds that the infringement is justified, given the historical context of labour relations in Quebec, and the need to promote social and economic objectives that remain pressing and substantial. Further, Iacobucci accepts LeBel’s reasoning for the legislation’s rational connection and its minimal impairment of the freedoms guaranteed under s.2(d) FOA.

Justice LeBel (Gonthier and Arbour)

Justice LeBel concluded that FOA does include the freedom to not associate but found no infringement of *Charter* s. 2(d) this case. Justice LeBel focuses his analysis and decision on the acceptance that although the right of association represents a social phenomenon involving the linking together of a number of persons, it belongs first to the individual.¹³³ FOA fosters self-fulfillment by allowing individuals to develop qualities as a social being. Although the act of engaging in legal activities in conjunction with others receives constitutional protection, the focus of the FOA analysis remains not on the group, but the individual.¹³⁴

The type of analysis that focuses on individual rights and sidelines collective rights unfortunately seems to ignore social tendencies toward group or communal values.

¹³² *Advance Cutting supra* note 6 at 288.

¹³³ *Ibid.* at para 175.

¹³⁴ *Ibid.*

Groups play a large role in the economic, social, and political life of Canada. However, LeBel plays down the role of groups in society and expresses the belief that the individual must be the focus of FOA analysis, a belief that is also shared by Bastarache. Union claims to FOA rights is secondary to the individual and must be held up to the light of individual rights and freedoms. This supports my argument that the courts are moving to find union security clauses are not justified under the *Charter*.

In finding a bilateral FOA, LeBel also found that this right had not been violated by the obligation to become a union member in order to be employed as a construction worker in Quebec. LeBel suggests that a violation of FOA is not always found whenever a form of compelled association arises.¹³⁵ For LeBel, the trigger would be evidence of the Quebec unions ideologically coercing their members. Also for LeBel, there must be evidence of the unions holding a particular or single ideology and imposing it on the rank and file members, and in this case, the appellants have not provided any evidence of forced ideological conformity.¹³⁶

Reviewing some of the basic ways that this regime operates for both the worker and the unions, LeBel found that for construction workers seeking work in the Quebec construction industry, the obligation is to designate a collective bargaining representative, to belong to the particular union for a given time period (have a card), and to pay union dues.¹³⁷ The unions have no direct authority over employment in the industry. They cannot set up a union hall, and no discrimination is allowed against the members of the different unions. Also, the worker can change his or her union affiliation

¹³⁵ *Ibid.* at para 217.

¹³⁶ *Ibid.* at para 231.

¹³⁷ *Ibid.* at para 140 and 218.

as they wish to, at an appropriate time.¹³⁸ Under section 96 of the *Construction Act*, members are granted clear rights of information and participation in union life. For LeBel, this is the particular way that the relationship between workers, unions, and employers has been structured and he finds no “ideological conformity” in this system.

In *Advance Cutting*, LeBel continues with the court’s deferential position in *Alberta* by choosing to leave the management of labour relations to Parliament, the various legislatures, and their labour relations regimes. However, as pointed out by Michael Mac Neil “Justice LeBel neatly captures the dilemma facing the courts,”¹³⁹ when he says the reluctance to interfere in labour relations policy and the role played by different legislatures does not imply that the Court believes labour laws are immune from *Charter* review.¹⁴⁰

LeBel says that even if the impugned legislation is found to infringe the right to not associate, it would still be justified under s.1 of the *Charter*. Legislatures are entitled to substantial degrees of latitude in policy-making around controversial and complex political issues.¹⁴¹ The law at issue in this case also addresses a pressing and substantial purpose, which was to quiet the labour unrest in the construction industry and provide and maintain a democratic means of worker representation.¹⁴² Moreover, there is a clear rational connection between the means chosen by the legislature and their goal. For LeBel, the obligation to join one of the unions demonstrated the will of the Quebec legislature to involve individual workers in the management of their respective unions,

¹³⁸ *Ibid.* at para 218.

¹³⁹ Michael Mac Neil, “Unions and the Charter: the Supreme Court of Canada and Democratic Values” (2003) 10 Canadian Labour & Employment Law Journal 3.

¹⁴⁰ *Advance Cutting*, *supra* note 6 at para 162.

¹⁴¹ *Ibid.* at para 256-257.

¹⁴² *Ibid.* at para 258.

while the voting procedure constituted the fairest and most effective way to determine the representativeness of the unions.¹⁴³ The limited form of compelled association found in this legislation maintains democratic values, so for LeBel it meets the minimal impairment test.¹⁴⁴

Justice LeBel included in his written decision a review of positions taken by the four union interveners.¹⁴⁵ They asserted that the provisions of the *Construction Act* do not breach the guarantee of the FOA and even if there had been a breach it would be justified as reasonable under s.1 of the *Charter*, but the interveners are also of the opinion that s.2(d) does not guarantee a freedom not to associate.¹⁴⁶ Adding to this summary of the union interveners' positions, LeBel also includes some of the brief submitted by the Canadian Office of the Building and Construction Trades Department, a section of the AFL-CIO, who claimed that the Quebec labour relations regime does not breach the guarantee of FOA, and that it could only be challenged if it were demonstrated that there exists a constitutional right to non-association and that right could only be defined as a right not to be compelled to adhere to a form of ideological conformity, and finally if there is a breach of s. 2(d) it is justified under s.1 of the *Charter*. From the claimed positions of the union interveners it is clear that the Quebec unions remain of the opinion that FOA is not a bilateral freedom.

¹⁴³ *Ibid.* at para 260.

¹⁴⁴ *Ibid.* at para 277.

¹⁴⁵ The union interveners being; the Centrale des Syndicats Démocratiques (CSD), the Confédération des Syndicats Nationaux (CSN-Construction), the Conseil Provincial du Québec des Métiers de la Construction (International). The fifth "named" union having bargaining rights, the Syndicat de la Construction Côte Nord de Sept-Îles Inc., was not present as an intervener.

¹⁴⁶ *Advance Cutting supra* note 6 at para 115.

Justice Bastarache (CJ MacLachlin, Major, and Binnie)

Justice Bastarache, like LeBel, acknowledged the bilateral nature of FOA. Unlike LeBel, Bastarache found in this case that compulsory unionization was an infringement of the right to not associate and was not justifiable under s. 1 of the *Charter*. Both Justices agreed that the criteria for an infringement in this case was “ideological conformity,” although Bastarache did not require the appellants to provide evidence of this forced conformity, instead finding it in the political and social nature of union organizations. Adding to that, Bastarache says that mandating workers join these same unions is ideological conformity.

For Justice Bastarache, the demand for evidence in order to recognize the existence of ideological conformity is too narrow in scope, and that interpretations of ideological conformity must be broader and must take place in context. Part of the context for this case is the political and economic roles unions play in our society, which, for Bastarache, translates into the existence of ideological positioning. To support his “context” claim, Bastarache refers to *Rand* where Justice Rand says “As I conceive it, from the social and economic structure in which we live I must select considerations which have attained acceptance in the public opinion of this country and which as principles are relevant to controversies of the nature of that before me”¹⁴⁷ Connecting Rand’s understanding of the need to consider the wider social and economic realities of the times, with his own understanding that the right to not associate must also be considered in the wider social

¹⁴⁷ *Rand supra* note 14.

context, is in part, reflected in Bastarache's acknowledgement of the relevancy of international documents, part being the interconnectness of *Charter* values.

For Bastarache, referring to the judgement in *Hunter v. Southam Inc.*,¹⁴⁸ an interpretation of a *Charter* right should be "a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection."¹⁴⁹ He also says context also includes the fundamental values in the workplace that must be protected, those being freedom of conscience, mobility, liberty, freedom of expression and the right to work. Bastarache says these interrelated rights, along with FOA, must be considered in their totality when dealing with possible forced association in the workplace.¹⁵⁰

In support of his above claim that a broad view of the *Charter* right to not associate is required, Bastarache brings in various International Conventions:

The United Nations Universal Declaration of Human Rights states;

Article 20:

1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.¹⁵¹

In addition, the *United Nations International Covenant on Economic, Social and Cultural Rights* provides that:

Article 6.1 The States Parties to the present Covenant recognize the **right to work**, which includes the right of everyone to the opportunity to gain his living by work he freely chooses or accepts, and will take appropriate steps to safeguard this right. [Emphasis added]

¹⁴⁸ *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

¹⁴⁹ *Advance Cutting* *supra* note 6 at para 8.

¹⁵⁰ *Ibid.* at para 9.

¹⁵¹ *United Nations Human Rights #87* *supra* note 7.

Article 8.1. The States Parties to the present Covenant undertake to ensure: (a) the right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others.¹⁵²

These international documents clearly hold that FOA is a bilateral right, the right to associate and the right to not associate. They also serve to demonstrate that these same rights are worthy of protection. Article 8.1 of the United Nations International Covenant of Economic, Social and Cultural Rights require no restrictions be placed on FOA other than in the interests of national security or public order. For Bastarache, the history of labour relations in Quebec does not engage national security or public order. Attention must be drawn to article 6.1. “... freely chooses or accepts. . .” and “...the right to work . . .” Bastarache emphasises ‘freely chooses or accepts’ as clearly supportive of the right to FOA, including the right to not associate. For this thesis, it is important to recognize the signal from the courts that although our present labour relations legislation contain union security clauses, the right for individuals to work, as a *Charter* value, plays a role in interpreting FOA.

Expanding on his reasons, Bastarache refers to the *Construction Act* as clear evidence of government coercion whereby construction workers in Quebec are legislatively compelled to join one of five specified unions if they wish to work in the construction industry. He or she must unionize. Bastarache expands on this forced

¹⁵² *United Nations International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3.

unionization by stating it takes away the democratic rights of workers, and adds that being forced to participate in a system that so severely limits the democratic principle is a form of coercion that cannot be completely separated from ideological conformity.

Bastarache also quotes Justice La Forest in *Lavigne*,

“Forced association will stifle the individual’s potential for self-fulfillment 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 memberships’ convictions and free choice. Instead, it expect that such groups and organizations will, overall, have a negative effect on the development of the larger community. . . Recognition of the freedom of the individual to refrain from association is a necessary counterpart of meaningful association in keeping with democratic ideals. Furthermore, this is in keeping with our conception of freedom as guaranteed by the Charter . . .”¹⁵³

In considering the possible violation of the right to not associate, Bastarache looks at FOA not as a discreet right, but as a right that must be considered in context with all the other *Charter* values, including liberty, freedom of conscience and expression, mobility and the right to work. When FOA is considered in this light, it is clear for Bastarache that government mandatory union association infringes on the right to not associate.

In *Advance Cutting*, the evidence brought forth demonstrates that there is a clear violation of the positive right to FOA. Workers must belong to one of the five designated unions, obtain a certificate of competency, have been a resident of Quebec for the past year, have worked 300 hours in that year, and be under the age of 50. There are also regional quotas that limit the number of workers in predetermined regions across the

¹⁵³ *Lavigne supra* note 5 at para 227-28.

province. Bastarache, again bringing in other *Charter* values, finds that the legislation brings restrictions on the admission of workers into the industry, restricts bargaining rights, imposes regional quotas, and reduces worker mobility. These restrictions infringe on the ability of workers to join a union, thus violating the individual's constitutional right to associate.¹⁵⁴

For Bastarache, to determine whether the infringement is justified the court must again consider other *Charter* value including liberty, freedom of expression, the right to work and mobility rights.¹⁵⁵ Bastarache found no pressing and substantial need to force workers to join one of the five unions in order to work in the construction industry. Also, the restrictions imposed on the workers have not been rationally connected to the claimed need for such restrictive legislation. In particular, Bastarache found that the “competency certificate” needed to work had little to do with competency and was more a method of maintaining priority for hiring.¹⁵⁶ Further, Bastarache found that the regional quotas also did not have anything to do with competency and as such were also not minimally impairing. In sum, Bastarache found that neither the limitation of the freedom to associate nor the limitation of the right to not associate has been shown to be rationally connected to pressing and substantial purposes espoused in support of the legislation, neither has the minimal impairment test been met.

In *Advance Cutting* the court established in an 8/9 majority that FOA is a bilateral freedom containing the right to dissociation. The court also continued the “ideological conformity” criteria for determining whether there has been an infringement of FOA.

¹⁵⁴ *Advance Cutting supra* note 6 at para 42.

¹⁵⁵ *Ibid.* para 43.

¹⁵⁶ *Ibid.* at para 47.

The split came over the issue of whether there was a need for evidence of imposed or attempted imposition of ideological conformity. For three of the Justices evidence is required, while four of the Justices held that having to join a union is ideological conformity, due to the recognized place unions have in the social, economic, and political life of Canada. The court is continuing to consider the relationship between FOA and unionization in Canada and applying wide interpretations to this *Charter* freedom, while the unions hold steadfastly to their claim that FOA has a narrow unilateral meaning when it comes to dissociation. This claim for a narrow FOA is contradicted by union claims in *Dunmore* that FOA should be given a wide and positive reading.

Dunmore

In 1994 the government of Ontario enacted the Agricultural Labour Relations Act,¹⁵⁷ legislation that gave trade union and collective bargaining rights to agricultural workers, a group that had historically been excluded from the labour relations regime. However, a year later a new government in power enacted the *Labour Relations and Employment Statute Law Amendment Act*,¹⁵⁸ and under s. 80 of this Act repealed the *ALRA*. This had the effect of again subjecting the workers to the *LRA* section 3(b) excluding agricultural workers from the labour relations regime set out in the *LRA*. Section 80 of the *LRESLAA* also terminated any certification rights and any collective agreements established under the *ALRA*.

¹⁵⁷ *Agricultural Labour Relations Act, 1994*, S.O. 1994, c. 6 [Repealed 1995, c. 1 s. 80] s. 10, [hereinafter *ALRA*].

¹⁵⁸ *Labour Relations Employment Statute Law Amendment Act, 1995*, S.O. 1995, c.1, s. 80, [hereinafter *LRESLAA*].

The United Food & Commercial Workers' application to the courts was filed on the basis that this exclusion infringed their rights under *Charter* ss. 2(d) FOA and 15(1) equality rights,

15. (1) Every individual is equal before the law and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national origin, colour, religion, sex, age or mental or physical disability.¹⁵⁹

In a majority decision, eight of the nine Justices found a violation of FOA and also found that it was not justified under s. 1 of the *Charter*. The lone dissenting opinion from Justice Major found that the legislation did not infringe on activities protected by s. 2(d) FOA. The majority, having found an unjustified violation of s. 2(d) did not consider the issue of a possible s.15(1) violation.

The review of *Dunmore* is not as in depth as the reviews offered in *Lavigne* and *Advance Cutting*. The rationale for a discussion of *Dunmore* is to illustrate that unions have a history of asking the court for a wide interpretation of FOA. The history is replete with many failures but as is shown in this case, the UFCW was extremely successful, to the point that the court saw fit to give positive-right powers to FOA. The three decisions will be reviewed in order to further demonstrate that the court is moving to broaden the meaning of FOA, to the extent that FOA is now being considered as an instrument with positive-rights constitutional facility.

¹⁵⁹ *Charter supra* note 1.

Major

Justice Major found there was no infringement of the agricultural workers s. 2.(d) FOA rights. In his opinion, the appellants did not establish that the state caused the inability of the workers to exercise their fundamental freedoms. Also, Major did not agree that the *Charter* imposes a positive obligation of protection on the state in this particular case. As for a s.15(1) violation, Major found that agricultural workers were not an analogous group, and therefore their exclusion from the *LRA* does not infringe on their equality rights.

L'Heureux-Dubé

L'Heureux-Dubé found a positive obligation on the government to provide legislative protection from unfair labour practices. For L'Heureux-Dubé, that the probability existed the provincial legislature knew the agricultural workers were not capable of organizing themselves without legislative protection was demonstrated by government officials indicating that the legislation's intent was to hinder union-related activities in the agricultural sector.¹⁶⁰ For L'Heureux-Dubé the "government has breached the s.2(d) rights of the agricultural workers because it enacted a new labour statute which leaves them perilously vulnerable to unfair labour practices."¹⁶¹

L'Heureux-Dubé found that the removal of the agricultural workers from legislative protection makes their right to FOA meaningless without a state duty to positively support these same rights. As for any justification under s. 1 of the *Charter*, the Justice found that the exclusion of all agricultural workers from legislative protection is not

¹⁶⁰ *Dunmore*, *supra* note 9 at paras 120, 128, 129.

¹⁶¹ *Ibid.* at para 140.

rationally connected and also does not pass the minimal impairment test. Considering the possible legislative intent to prevent the agricultural workers from unionization, and that the infringement is not justified, the Justice saw the agricultural workers' need to be supported by a positive-right interpretation of FOA.

Bastarache (MacLachlin, Gonthier, Arbour, Binnie, LeBel, Iacobucci)

Bastarache asked whether the state has precluded activity because of its associational nature, thereby discouraging the collective pursuit of common goals?¹⁶² Answering this question in the positive, for Bastarache it is necessary to protect these workers by using the *Charter* as a positive-right instrument, given that it was state legislation that has perpetuated their helplessness. The agricultural workers, because of the organizational restraint imposed upon them by the legislature, found themselves vulnerable to unfair labour practices.

The ability of the workers to form an agricultural employee association lies at the heart of s. 2(d).¹⁶³ In this case the workers are not claiming a constitutional right to the *ALRA* that gave them the statutory right to full unionization, including collective bargaining, but merely the freedom to organize a trade association.¹⁶⁴ For Bastarache, striking down the *LRESLAA* would enact the repealed *ALRA*. Bastarache was not willing to go that far without giving the government an eighteen-month reprieve to address the issue, if they choose.

¹⁶² *Ibid.* at para 16.

¹⁶³ *Ibid.* at para 20.

¹⁶⁴ *Ibid.* at para 12.

In sum, the court in *Dunmore* held that agricultural workers are entitled to legislative protection for purposes of organizing and are free to make representations to the employer and to participate in the lawful activities of their association. However, while the court struck down s. 3(b) of the Ontario *LRA* that excluded these workers from legislative protection, it did not go the full distance and say that FOA protects the right to collective bargaining. In *Dunmore* the UFCW fought for an expansive positive-right interpretation of *Charter* rights. It claimed the agricultural workers had a right to organize but did not demand collective bargaining rights for the agricultural workers, or claim that the workers had a constitutional right to be covered by the *LRA*. Their claim was simply that the rights and freedoms of the agricultural workers to organize should be constitutionally protected.

The Ontario government responded to Bastarache's eighteen-month reprieve by enacting legislation offering protection to agricultural workers. The *Agricultural Employees Protection Act*¹⁶⁵ was created specifically for agricultural workers, and avoids including them in the *LRA*. Employees covered by the Act will have the right to form trade associations and make presentations to the employers. There is no mention in the Act of unionization or collective bargaining. Clearly, if the government intended to give unionization and collective bargaining rights to the agricultural workers, it could have simply included the workers under the *LRA*.

¹⁶⁵ *Agricultural Employees Protection Act 2002*.

Summary (*Lavigne*, *Advance Cutting*, and *Dunmore*)

In *Advance Cutting* the court did not agree on the issue of whether having to associate with unions is ideological conformity or if evidence was needed that unions were attempting to force members to conform. As pointed out by Mac Neil, in *Dunmore* the court suggests that law must recognize that some union activities are necessary and that this could include developing political positions.¹⁶⁶ Mac Neil links the court recognition of union political activity to the kind of activity that “more firmly implants the theoretical importance of unions as political actors.”¹⁶⁷ This is clearly a positive endorsement for union recognition in Canadian society. However, a more acknowledged political credence given to unions by the courts might come with future negative results. The observation by the courts that unions, as claimed by Bastarache in *Advance Cutting*, are ideological and no evidence is required to find that an individual’s FOA right has been violated, may find greater court support following *Dunmore*.

Lavigne, *Advance Cutting*, and *Dunmore* saw unions arguing in court to gain an expansive FOA, while also asking for the courts to narrow FOA to the extent that it has only a very limited unilateral definition. This “swing” back and forth may be caused by the labour movement trying to expand union rights under the *Charter*, while at the same time prevent a wide interpretation of FOA that includes the right to dissociate.

As suggested earlier in the section on structure and agency, unions are agents of change and are capable of affecting change in our present labour relations regimes. It has also been discussed that capital and the state are untying themselves from the

¹⁶⁶ Mac Neil *supra* note 139 at 8.

¹⁶⁷ *Ibid.* at 30.

“compromise” reached with labour in the mid 1940’s. The courts also appear to be moving away from our present labour relations schemes. This may be a reflection of the courts following the lead of state governments and capital.

In the early 1900s, unions were well served by the ideological conformity to unionism expressed by workers. The state and capital acknowledged the power unions exerted over workers, with the result that unions became a partner in capital economics. Presently, ideological conformity is the criteria being used by the courts to decide if unions are infringing on worker rights and freedoms. Some unions are downplaying the importance of ideological conformity and instead are adopting a “fee for service” mentality.

CHAPTER FIVE

Conclusion

Historically, unions in Canada have fought to secure a better life for workers and generally to further the welfare of the Canadian population. The era of industrial legality began taking hold of labour relations in Canada with the introduction of the *IDIA* (1907). State intervention increased dramatically with the myriad orders-in-council that were announced during the second-world-war via the War Measures Act. Union demands for *Wagner*-like legislation, legal certification, exclusive bargaining agent status, and mandatory collective bargaining, was delivered by *PC 1003*. Capital was not silent during this time and part of the legislation placed a ban on strikes during the life of the collective agreement.

By 1944, the age of industrial legality had become a reality. After the war years with *PC 1003* lapsing, the government brought in the *IRDA* (1948) and the provinces followed suit with similar legislation. Pre-war counter-hegemonic agency on the part of the unions was replaced with responsible unionism. This transformation into “responsible unionism” was a compromise that gave unions industrial partnership with capital, collective bargaining rights, certification, and exclusive bargaining agent status in exchange for maintaining labour peace, enforcing the collective agreements, and respecting the law.

The compromise put unions in a contradictory position. Unions were agents for workers but “responsibility” transformed them into a multi-faced representative, at once an agent for workers, for capital as enforcers of industrial peace, and in a particular way,

for their own institutional integrity. Unions qua unions wish to survive, which can, and as we have seen, does create a conflict of interest around rights and freedoms.

Canadian unions appear to be in denial about the bilateral nature of FOA. It is clear from the international conventions and covenants that FOA is regarded as a bilateral right. In 1972, Canada became a signatory nation to the United Nations Convention #87 recognizing that FOA is also freedom from being compelled to associate. The refusal of Canadian unions to accept a bilateral FOA is an issue that should be addressed.

When rights claims clash it is difficult to determine whose rights ought to prevail. In Canada when rights clash and it involves government it can become a *Charter* issue before the courts. Unionized workers, like non-union workers, want their rights and freedoms protected and given meaning. The advantage for the unionized worker is that she has her own agent to fight for her rights. A disadvantage may well be that unions have several different and conflicting “trust” and “agency” responsibilities, not the least of which is their own structural integrity.

Dunmore saw union agency challenging legislation that effectively prevented agricultural workers from exercising their fundamental freedom to associate. It was clear to the court that the impugned legislation was intended to narrow or make “hollow” agricultural workers constitutional right to FOA. The remedy to this violation saw the court read into FOA a positive-right characteristic. This decision is more than a victory for the agricultural workers. It also opens the door for more claims of positive-right *Charter* capability.

Lavigne and *Advance Cutting* saw unions claiming a narrow unilateral interpretation of FOA. The courts may have been split in *Lavigne* over the bilateral nature of FOA, but when *Advance Cutting* came before them roughly eight years later, bilateral FOA was almost unanimously accepted as fact --- the lone dissenter being Justice L'Heureux-Dubé. The other issue of concern for unions should be the fact that “ideological conformity” has become the criteria in which to judge the constitutionality of compelled association.

It may be difficult for unions to argue that ideological conformity is not necessary for the union movement, that unions are not seeking conformity, only service fees. This argument seems to be counter to the history of union solidarity. Unions are workers gathering together in solidarity to counter the oppressive demands of a CMP. It seems for a labour union to claim it is only providing insurance and does not require ideological conformity, denies its own history, its true *raison d'être*.

Three of the Judges, LeBel, Gonthier, and Arbour wanted proof that the unions were actively trying to convert their members to unionism, this they said, is necessary to infringe s. 2(d), otherwise the workers and the unions were simply in a “service contract” relationship. Four of the Judges, Bastarache, MacLachlin, Major, and Binnie found that evidence of ideological conformity did not need to be present. For them, unions have an identified place in Canadian society, that is, in the aggregate, their economic, social, and political perspectives are well known, and that being compelled to associate with these unions via union membership is ideological conformity.

This thesis has examined a particular period in time when unions transformed from overt agents of class struggle to business unions operating within the CMP and the

present labour relations regimes. It has also reviewed several SCC cases that are relevant to FOA and compelled association. The question of whether there may be consequences for unions in Canada if they continue holding to their contradictory positions concerning FOA can be answered in the positive. However, accepting a bilateral interpretation of FOA also creates its own new realities for the union movement. What those consequences (realities) may be creates the argument that unions need to consider the logical contradiction of their position vis-à-vis FOA, in alternately claiming wide and then narrow interpretations of FOA. The fact that the courts have accepted bilateral FOA and are also looking at the labour relations regimes in light of this bilateralism, should be cause for some discussion amongst union people.

Looking at the possible implications for unions if they adopt a bilateral FOA is clearly an exercise in speculation. Unions could agree that FOA is bilateral and also hold to their present claim that forced unionization, certification, exclusive bargaining agent status, and compulsory dues check-off is justified under section 1 of the *Charter*, waiting for any possible change to the present labour relations regimes to come from the courts or the legislatures.

The result of a decision by the court or the legislatures to redo the labour regimes could find labour forced to adapt to new regimes, ones that are similar to those suggested by David Beatty. Exclusivity, and compulsory dues could become union security clauses relegated to the past. The implications of this may be that unions would have to spend more time and money on trying to build support and solidarity amongst the workers, in effect, competing for union dues with other union organizations.

Workers under new labour regimes could find that they have a choice of union representation, or possibly have the right of non-association. This may prompt some workers to become more engaged in union activities. However, it could also increase the strife between the pro-union member and the worker who is labelled as a “free rider.”

New-style labour relations regimes would probably include both positive and negative fall-out. Unions must decide if they wish to move to other methods of labour relations before changes are imposed, or wait and see if any changes actually are in the future. It may be that the courts will not move to change the present labour schemes. In that case, unions can remain within their present labour regimes and continue both representing and dominating workers. In the end, union leadership has to decide if they want to expand workers’ FOA rights and also create opportunities for these same workers to make use of these rights, or deny workers expansive FOA rights and claim justification under s. 1 of the *Charter*.

The arguments presented herein support the thesis that unions should reconsider their position within the present state of capitalist economics and within the present labour relations regimes. As an ongoing process unions, like other organizations, should remain aware of where they started, where they are now, and where they would like to be in the future. In the end, the contradictions of being a partner *with* capital and denying workers their right to associate with whom they choose may ‘blow-back’ toward the union movement --- sitting there waiting is an unsound position.

The future of unionism in Canada requires that we consider our past and our present. In the employment arena FOA and unionization are mutually constitutive. The right to freedom of association is the lifeblood of unionism, but it is not free and it does

come with responsibilities. It requires that union agency works to ensure that workers' rights and freedoms are protected and developed to the greatest extent possible; our present system of collective bargaining does not do that.

This thesis is an attempt to examine the contradictions of the labour movement's claim to a unilateral FOA, and clinging to a "compromise" that may already be undone by capital and the state as they themselves have confronted the new realities of continued global expansion and neo-liberalism. The labour movement in Canada has a proud history of fighting for social justice and rights and freedoms for the people of Canada. It is important that the movement continue to challenge the inequalities that capitalism brings with it. The road for the labour movement has not been an easy one and the future may prove to be even more of a challenge. Workers and the unions that they created found their strength in the right to freedom of association; the future of the labour movement is inextricably tied to that right.

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