FREEDOM OF ASSOCIATION IN CANADA: THE DILEMMA FOR TRADE UNIONS IN A LIBERAL SOCIETY

by

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ABSTRACT

Trade unions in a liberal society are caught on the horns of a dilemma over freedom of association. In respect to the Canadian Charter of Rights and Freedoms, unions are faced with relying on the positive freedom to associate as a defence for union security clauses, and, at the same time, denying freedom from association claims of those who do not wish to participate in union membership and/or union activities. The aim of this thesis is to explore that dilemma, and to assess some of the possible strategies union leaders could employ to come to terms with it.

The dilemma that trade unions face consists of several elements. The source of the dilemma is found in the conflict over negative and positive liberty and the nature of freedom, and more specifically over competing visions of freedom of association in the trade union context. This conflict has found its way into the courts; in particular, the Lavigne case, which challenges political expenditures by unions (in certain circumstances), has generated much controversy and resulted in two opposing judicial decisions. However, the courts are not the only arena in which an attempt is being made to balance the competing claims of liberty; the political realm offers another avenue through which trade unions could attempt to influence labour legislation. However, unlike other intervenors such as women's or aboriginal groups, the trade union movement was largely absent from pre-Charter Joint Committee hearings. In hindsight it is quite clear that labour's non-participation represented a missed opportunity to influence the wording of
freedom of association in a way that would make challenges from a negative liberty standpoint more difficult. In addition, the post-Charter prospects of lobbying government to implement legislation which would prevent negative liberty claims from succeeding (possibly through the "notwithstanding" clause in the Charter) appear quite dismal. Thus, a trade union strategy which would look for a political avenue out of its dilemma was not implemented pre-Charter and looks doubtful post-Charter.

Nonetheless, in terms of the individual and his freedom (of association) in a liberal society, a fair balance between negative and positive liberty claims should be struck; one which allows limited coercion of the individual in the form of union security (the agency shop), but also restricts trade unions in the form of limits on political expenditures. This balance may, however, seriously threaten the political role of the trade union community. But, while individuals retain their right to exercise negative liberty claims, whether or not they exercise them depends upon their moral beliefs. And an individual convinced of the importance of the trade union community and the threat to that community posed by negative liberty claims, will be much less likely to exercise his right to invoke freedom from association. Unions might be able to meet this difficulty, however, by working towards a consensus about the importance of the trade union community and, more particularly, its political objectives. Such a strategy may be the most suitable alternative that trade unions can adopt in a liberal society.
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INTRODUCTION

Trade unions meet almost all the principal requirements of associations as defined in law. They are made up of members who are governed by a constitution, and they continue in existence independent of any change that may occur in the composition of the association. In most associations, a member is normally free to join or leave the association at will; but trade union membership in Canada does not have the same voluntary nature. At the very least, workers in a unionized setting are required to pay union dues, whether or not they support the union's objectives and interests. With passage of the Canadian Charter of Rights and Freedoms in 1982, involuntary and voluntary trade unionists have increasingly connected the right of freedom of association with the debate about whether the requirements surrounding trade union membership are reasonable in a 'free and democratic society'.

For example, in 1987 the British Columbia Federation of Labour sent a letter to a number of lawyers whose clients included Federation- affiliated unions, asking them not to take on any Charter cases involving unions until approval had been obtained from the Federation. In March of that same year, the Canadian Labour Congress issued a dire warning: "If these [Charter] cases are not taken seriously, we are going to be right back in the 1930s in terms of what rights labour has in this country." Almost five years after the Canadian Charter of Rights and Freedoms came into force, union leadership in Canada finally began to realize that litigation under the Charter could seriously jeopardize what they took to be union "rights" in
Freedom of association, "the very essence of democracy itself"\(^3\), stands as a beacon in the Charter for unions, guaranteeing their freedom to organize workers. Organized workers, they argue, are more able to redress the enormous inequalities in bargaining power between capital and labour\(^4\), which in turn is important for democracy because economic strength affects the distribution of power within society.

But freedom of association is also an individual right, and therefore also focuses on protection of the individual against the power of a collective. This problem is particularly acute in the industrial relations field, where the desire to protect individual liberty may conflict with the need to maintain stability in the workplace and some kind of a balance-of-power in the collective bargaining process. Unions as a collective entity arguably play an important role in the democratic system, but they do have a negative side vis-a-vis loss of individual freedom, as individual autonomy is forced to give way to the majority of the collective. When a worker does not wish to become a member of the union in his or her workplace, and claims the right not to associate, Canadian courts (emphasizing the freedom aspect of freedom of association) have been divided on the question of whether compulsion to join a union restricts freedom, and if, therefore, the individual's (negative) freedom of association has been infringed.

In effect, the question arises as to whether freedom of association is a discretionary right— an option to associate or not associate— or a mandatory right, in which only one way of
exercising it is permitted. Implicit (and sometimes explicit) in freedom of association as a mandatory right is the assertion this kind of association (i.e. a trade union) is a "guaranteed option" to secure a particularly important benefit; a benefit that is paid for by some sacrifice of freedom, similar to, for example, the right to education. Trade union elites argue that the consequence of a Supreme Court decision defining freedom of association as a discretionary right could be (based on the American experience) a situation of constitutionally legal provincial right-to-work legislation, which would have serious ramifications for (at least) the economic goals of trade unions.

Equally as significant is the judicial interpretation of positive freedom of association as it relates to the protection of the objectives of an association. Trade unions leaders argue that simply to declare freedom of association as a mandatory right is not enough; attention must be paid to the 'association' part of freedom of association. Associational activities such as collective bargaining (ranging from the "right to strike" to financial support for the New Democratic Party) are in need of protection if freedom of association is to have any meaning for trade unions. But the Supreme Court has already ruled that certain aspects of the collective bargaining process are not constitutionally protected.

Clearly trade unions are caught on the horns of a dilemma over freedom of association in the Charter. This dilemma could be defined in a historical frame in two ways; first, before passage of the Charter, as a situation requiring a choice
between equally undesirable alternatives, in this case between no constitutional protection of the "right to associate" and constitutional protection that, from the union elites' viewpoint, may be fatally flawed. That was the situation facing trade unions in the years of debate preceding passage of the Charter, a debate which, as we shall see, unions took little part in. That dilemma was "solved" in 1982 by entrenchment of freedom of association in the Charter. In the second and current dilemma (which arises as a consequence of the solution to the first dilemma), unions are faced with relying on the positive freedom to associate as a defence for union security clauses, and, at the same time, denying freedom from association claims of those who do not wish to participate in union membership and/or union activities. In liberal terms, the dilemma results when the same freedom that guarantees the right to combine with others to pursue mutual interests (for example, economic security) is used by an individual to claim the right not to associate, to pursue his or her interests free from interference (in this case, by the trade union).6 This kind of dilemma consists of two sides, in which "the internal administration of each seems to be impeccable, but their diplomatic relations with one another seem to be internecine."7

The aim of this thesis is to explore the conceptual and legal elements of that dilemma as it effects trade unions, and to canvass some of the possible strategies union leaders could employ to come to terms with the dilemma facing them in the Canadian liberal context. Each of the four chapters that follows sets out different aspects of this theme, beginning with
the philosophical roots of the dilemma.

The first chapter, then, is concerned with the source of the dilemma; in general with the debate about positive and negative liberty and the nature of freedom, and more specifically over competing visions of freedom of association in a trade union context. The chapter concludes with the observation that a conceptual solution to the dilemma appears unlikely, and unions will be faced with the ramifications of the dilemma in court.

Since passage of the Charter, there have been a number of cases before the courts concerning freedom of association, in which a legal resolution to the questions posed by the debate between advocates of negative and positive freedom has been sought. Many of these cases have been brought by individuals who have attempted to convince the court that union security clauses or the expenditure of union dues for political purposes significantly infringe their (negative) freedom from association. In response, the unions affected have argued in the main that the practices in question are not subject to Charter scrutiny (because they do not constitute government action under the Charter), and/or that trade unions are a special type of association, one which deserves protection from negative liberty claims. In particular, the Lavigne case, which challenges political expenditures by unions (in certain circumstances), has generated much controversy about the aforementioned arguments; and it has resulted in two opposing judicial decisions. In contrast, the significant cases brought by unions (rather than individuals) to the court (i.e. the Labour Trilogy) all dealt with protection of the objectives of
an association under the Charter, specifically union "rights" lost under the challenged legislation, and lawyers representing unions were unsuccessful in their attempt to convince the courts that freedom to associate was "meaningless" unless the association could pursue its objectives.

It has become apparent that the doctrine of "government action" is and will continue to be a major factor in the court's response to freedom of association cases involving labour issues; in many of these cases the court has made its reluctance to "interfere" in the labour market (i.e. the balance struck between labour and capital) clear. In the few cases where the Charter has been found to apply, union attempts to resolve their dilemma by denying negative liberty claims have generally not been successful. In the meantime, the challenges brought against trade unions by individuals have not been exhausted, and the possibility remains that some additional aspects of labour law will be decided by the court under the Charter. But courts are not the only arena in which an attempt is being made to balance the competing claims of liberty, and while arguments advanced by trade unions have not met with much success there, the political realm offers another avenue through which trade unions could attempt to influence labour legislation.

However, unlike other intervenors such as women's or aboriginal groups, the trade union movement has been largely absent from pre-Charter Joint Committee hearings. As is clear in Chapter Three, labour's largest umbrella organization, the Canadian Labour Congress, did not take part in any of these hearings in the 1970s or 1980s. In fact, until unions launched
the cases that made up the Labour Trilogy, it would be fair to say that organized labour’s involvement in the Charter process was minimal at best. A number of factors account for this, not the least of which is labour’s traditional economism and its resulting emphasis on "bread and butter" issues. In hindsight it is quite clear that labour’s non-participation represented a missed opportunity to influence the wording of freedom of association in a way that would make challenges from a negative liberty standpoint more difficult. In addition, the post-Charter prospects of lobbying government to implement legislation which would prevent negative liberty claims from succeeding (possibly through the "notwithstanding" clause in the Charter) appear quite dismal. Thus, a trade union strategy which would look for a political avenue out of its dilemma was not implemented pre-Charter and looks doubtful post-Charter.

But what balance between the competing claims of negative and positive liberty would be fair in a liberal society that recognizes the value of choice as an aspect of freedom and therefore the existence of negative and positive liberty? Are there circumstances in which society is justified in restricting the individual’s right to act against the community (in this case by restricting negative liberty claims against trade unions), or are rights simply, as Marx argued, attached to "egoistic man", in essence nothing but "the right of selfishness"\(^8\), to be exercised at will. I will argue that in terms of the individual and his freedom (of association) in a liberal society, a fair balance between negative and positive liberty claims would allow limited coercion of the individual in
the form of union security (the agency shop), but would also restrict trade union political expenditures. However, what is fair in terms of the individual and his rights may seriously threaten the political role of the trade union community. But while individuals retain their right to exercise negative liberty claims, whether or not they exercise them depends upon their moral beliefs. And an individual convinced of the importance of the trade union community and the threat to that community posed by negative liberty claims will be much less likely to exercise his right to invoke freedom from association. Unions may be able to meet this difficulty, however, by working towards a consensus about the importance of the trade union community and, more particularly, its political objectives. Such a strategy may be the most suitable alternative that trade unions can adopt in a liberal society. Let us now turn to a more in depth examination of those competing claims.
CHAPTER ONE: NEGATIVE VERSUS POSITIVE FREEDOM

I am normally said to be free to the degree to which no human being interferes with my activity.
Isaiah Berlin, Two Concepts of Liberty

Human rights in a liberal society are primarily available to the individual for protection against the state, not necessarily because governments are hostile to freedom, but because governments have a unique power to restrict freedom, one that individuals are generally helpless to respond to unless they have specific legal remedies. Positive freedom of association is deemed essential to human liberty in that individuals must have the capacity to make their own choices and pursue their own interests, including the right to be free to combine with others to pursue mutual interests. But controversy arises over what it means in a liberal society to be "free". Disputes over the presence or absence of freedom in societies are often rooted in the relationship between freedom and other social goals. Because freedom is not the only benefit society may secure, disputes over balancing of benefits may occur, and often these disputes relate back to negative and positive concepts of freedom. The philosophical question underlying much of the debate about freedom of association and unions pertains to the circumstances, if any, when individual freedom of choice should be subordinated to that of the group in order to achieve a so-called common good. The freedom of association dilemma for unions arises from this debate.

Gerald MacCallum argues that to define the debate solely in terms of the positive "freedom to" versus the negative "freedom
from" results in emphasizing the importance of only one part of what is always present in any case of freedom. Freedom is a triadic rather than a dyadic relationship, "always of something (an agent or agents), to do, not do, become, or not become something". Thus it encompasses the relationship between agents, "preventing conditions...[such as] constraints, restrictions, interferences and barriers", and "actions or conditions of character and circumstance". Applying MacCallum's variables to the debate at hand will allow the differences between the negative and positive concepts of freedom to become clearer.

The first part of this discussion focuses on the legitimacy of negotiated union security clauses, of which there are three kinds:

1. the closed shop, wherein an individual must be a member of the union before being hired by an employer. This is common in Canada to 'craft' type occupations such as carpentry.

2. the union shop, wherein all employees covered by the collective agreement must become members of the union within a specified number of days.

3. the agency (or dues) shop, the weakest form of union security, wherein no-one is required to be a member of the union, but all employees under the collective agreement must pay dues. Conceptually, the agency shop requires the least degree of solidarity, while the union and closed shop imposes a much tighter association among workers. Although there is no compulsory trade union membership within these clauses in the strictest sense (ie. a worker can choose to find another job in
a non-union environment), unions are not in reality voluntary organizations like clubs, and agents who choose not to associate are likely choosing between working and not working for that employer, and the serious consequences of that decision.

Who are these agents? Adherents of negative freedom define them as real individual persons, while defenders of positive freedom often see agents in a contracted or expanded version, i.e. as the rational or moral person hidden within, who perhaps wants something different than the "selfish" outward individual, or would if he or she was reasonable, or moral, or prudent. This division may be represented by an even larger gap: "the real self may be conceived as something wider than the individual...as a social 'whole' of which the individual is an element or aspect—a tribe, a race, a church, [or] a state". Interests are then influenced by our beliefs concerning ways in which our destinies are tied to the destinies of "our families, nations, and so forth". This expanded view of agents is particularly germane to this discussion because freedom of association under the Charter is an individual freedom, attached to individuals rather than collectivities. Unions argue that the interests of trade union agents are affected by the power of the collective; without the collective there can be no power at the bargaining table for unions, and the destiny of each union member is tied to the destiny of the collective. This entity is then identified as representing the "true self", which (accompanied by the virtue of majority decision-making) is justified in imposing its single will upon recalcitrant members in order to achieve "its own, and therefore, their, 'higher'
Obstacles to freedom for those who argue for negative freedom are what is commonly meant by "obstacle", although the definition changes with variations attached to the ideas of consent and coercion. But the difference between what advocates of positive and negative freedom mean by obstacle can not be revealed solely by focusing on differences in the concept of freedom. Because there are differences on what an agent is, there will be consequent differences on what obstacles are. One way to look at the difference is to focus on restraint; on the negative side, freedom arises from lack of restraint, but for those who take the positive position, freedom can be achieved by means of restraint. For example, a person who tries to cross a road with no crosswalks and where cars have the right-of-way will be restrained from his purpose. When crosswalks are installed, the individual is legally restrained in that he can only cross the street there, but is also freed because he now has the right-of-way in the crosswalk, and car drivers have a consequent duty to stop. This crosswalk, therefore, is not really restraint, because the person "is being helped to do what he really wants to do", i.e. to cross the street with the least risk to his person. Because of the restraint put upon him, a genuine constraint was lifted, and freedom increased. How would the two sides in the debate at hand respond to this analogy?

Those who stand for negative freedom might still complain that the compulsion element must be seen as a option, that the individual still retains the right to choose where to cross the road as long as he or she is not harming someone else in that
choice. But the inducement to join a trade union is strong enough (in the legal sense) to negate any idea of freedom of choice (a "your money or your life" type of question). How can an individual be said to have freedom of association and at the same time be forced to join (or at least financially support) a union? For example, if there was a legal requirement for an individual to join or contribute funds to a gun club, even though that person was opposed to the ownership of guns, would there be much doubt that the individual's freedom of association rights were being infringed? Real freedom for the individual would mean the liberty to have a job free from the requirement that he or she become a member of or be affiliated with a union.

But in his analysis of coercion, Lord Herschell argues that if pressure to associate is applied to further one's own interest, then to compare that situation to a "your money or your life" question

appears to be grotesque...those who see the closed shop simply in terms of coercion might be said to hold a view of individual freedom of a purity which would be quite startling if applied to other comparable situations... such as paying taxes or obeying the law. This argument speaks to the gun club example as well, because clearly the club is not presented as furthering the reluctant member's interest, and thus is not analogous to union security. But there is more in this analogy than furthering one's interest. Paying taxes and/or obeying the law appear to have a much more significant national purpose than paying union dues, so the question arises of whether the benefit trade-off is the same. Being coerced to pay taxes is qualitatively and consequentially different from reluctant
payment of union dues.

We can see in these questions of interest and benefit trade-off the attachment between the variables of agent and obstacle. The reluctant member's interest would be defined by the advocate of negative freedom as whatever he outwardly defines it as, or whatever he chooses or says it to be. The positive stand defines the reluctant member's interest (in the case of trade union membership) as the same as the other union members, partly because the reluctant member would receive the same benefits.

The "free-rider" argument, that elementary notions of justice and fairness would suggest that those who intentionally choose to share in a benefit should likewise be required to share in the costs of obtaining it (both financial and organizational) is bolstered by Mancur Olson's cost/benefit analysis, which demonstrates that persons will not be encouraged to join an association to pursue common goals if non-members share in the fruits of their labour without cost. In addition, the free-rider puts himself in a position to frustrate a collective goal through his non-participation. But Peter Gall argues that the closed shop provision (at least) goes beyond maintaining union strength for collective bargaining purposes; it allows the union to control employment opportunities in an industry, and while this may benefit the union, its members, and even the employers involved, there is a real question whether that benefit is a sufficient justification for infringing employees' freedom of association. Here we see what MacCallum refers to as the kinds of controversies that surround questions of freedom: the weighing or balancing of benefits. The common tactic in this kind of
argument, is

for partisans to link the presence or absence of freedom as closely as possible to the presence or absence of those other social benefits believed to be secured or denied by the forms of social organization advocated or condemned. Each social benefit is, accordingly, treated as either a result of or a contribution to freedom, and each liability is connected somehow to the absence of freedom.25

In this way, (consenting) trade unionists argue that the benefits of economic security and participation in decision-making greatly outweigh the minority "right" to disassociate, while dissenting members argue they have lost a far more important benefit, their liberty and opportunity to negotiate their own terms and conditions of employment.

Advocates of negative liberty argue that union strength is not a prerequisite for economic security. There are those who declare that individuals could easily bargain for their own (and perhaps better) pay26; and, in the same vein, F.A. Hayek argues that the motive for closed shops is to "raise real wages above the level that would prevail in a free market", although this action does not, in the end, raise real wages or sustain employment.27 Hayek assumes that unions provide only or principally economic benefits, rather than, for example, job security, participation in decision making, or training for political roles. This "pure market libertarianism" is perhaps expressed best by Richard Epstein, who argues that labour is like any other commodity in the market. Employers compete for labour and employees compete for jobs, and out of this free competition arises an "optimal package of wage rates and employment
conditions". But the market relationship is disturbed when the state becomes involved in regulating the market through devices such as minimum wage laws or legalizing unions. As a consequence, rights such as the negative freedom of association are required to protect individuals from state interference.28

Furthermore, to reap what one does not sow is not unusual in society because people constantly reap the benefit of voluntary efforts to which they have made no contribution; and "not only those who pay their annual subscription to the National Trust enjoy the scenery and architecture it preserves."29 But, advocates of positive freedom argue, this analogy fails in that the scenery and architecture (i.e. the benefits) are not established by members of the National Trust, as benefits are established by union members through negotiation. Additionally, the argument that some constantly benefit at the expense of others can hardly be used to justify that action.

The third variable in the statement, freedom to do or become, will usually be interpreted by defenders of negative freedom as free or not free 'to do what the particular individual wants', in this case free to join or not join the union (to associate or disassociate); as David Beatty argues, "people are not free to govern their lives by their own lights...if they are required to join with people whose views and purposes they do not share."30 Champions of positive freedom, on the other hand, stress conditions of character rather than actions, and will be influenced in their definition of the third variable by the differences noted in the first two variables. For them, freedom to associate means freedom to join together to obtain economic
strength, or influence political events, or whatever the majority of union members choose to be active in—freedom to become a responsible and active member of the workplace.

The debate about freedom of association in a trade union context is being pushed farther than the question of whether there is freedom from association as well as freedom to associate. An additional question has arisen in Canadian courts in a number of guises; at the heart of the matter is a definition of the positive freedom to associate, i.e. what does association (the third variable—to do, not do, become, or not become something) mean?

The first part of the question involves protection of the objectives of an association, in this case collective bargaining. Paul Cavalluzzo argues that interpreting freedom of association as simply the right to associate is unnecessarily restrictive, because if the state has unbridled power to regulate the means and objects of an association, it then has the ability to nullify the purposes of an association, resulting in an essentially meaningless freedom. The most obvious way in which legal support for the collective interest of a trade union can be expressed is through protection of collective bargaining. This objective, therefore, is in need of protection if freedom of association is to have any utility for trade unions. If union elites are unable to bargain with their corporate counterparts, then what relevance does the right to organize have? Unions would become simply "toothless" organizations, unable to serve the purpose they were constituted for. The denial of labour's right to act collectively is, in effect, a denial of its freedom
to associate, because "the two are too intertwined to be separated". But they can be separated, Gall argues; how can it be that when individuals band together for certain purposes, their purposes assume a constitutional importance of their own, independent from the rights and freedoms of the individuals involved, i.e. why should there be constitutional value in numbers?

The second part of the debate over the definition of association is the question of whether freedom of association is infringed when a union contributes its dues to political parties or causes that a minority of its members do not support. What does it mean to associate in this context? Does union support of a cause a member opposes mean that the member is "associating" against his or her will with the support, and, if that is true, is that member's freedom of association infringed?

Freedom of association in a Canadian context, Beatty argues, "can only be understood as embracing a full, robust 'bilateral' liberty which recognizes the individual's freedom of choice". Freedom of association in a liberal society such as Canada is seen as a right which inheres in the individual, but it also is clearly one which can only be exercised jointly; a freedom "intended to allow individuals to engage in activities together and to pursue commonly held goals which cannot be achieved in isolation". The question facing the courts and the dilemma facing unions is not whether there is freedom to associate, but whether there is also a right not to associate, and when (and if) that right is infringed. Canadian courts are now in the process of answering those controversies about freedom and the weighing
and ranking of benefits.
CHAPTER TWO: THE DILEMMA REACHES THE COURTS

With passage of the Canadian Charter of Rights and Freedoms in 1982, advocates of the negative and positive freedom positions in the trade union context quickly began to employ the courts in an attempt to have their interpretation prevail. The dilemma confronting trade unions is that the same freedom they would rely on to protect their right to organize workers into a union, and protect the objectives of that union, could also be used protect the individual from what he or she perceives as union coercion. Challengers to legislation regulating trade unions focus on the requirement of choice in freedom of association, arguing that freedom of association includes both freedom to associate, and freedom from association. In a liberal context, freedom arises from the lack of restraint and the institution of choice. In response, those advocates of positive liberty attempt to convince the court that choice is not warranted in this setting. Trade unions, they argue, are a special type of association, and would suffer unduly from free riders; those individuals who would accept the benefits that collective action has to offer but would not be subject to the costs inherent in achieving those benefits. The dilemma has reached the courts in a number of guises, and these cases will be the subject of this chapter.

Under the Charter, the courts are charged with the task of judicial review,

literally, the ultimate constitutional power of courts to pass on executive and legislative actions and to rule on their compatibility or otherwise with the constitutional charter's express terms, and also with more general notions of constitutionalism.
Judicial review in Canada is expressly provided for in the Canadian Charter of Rights and Freedoms under section 24, although the Supreme Court has served as the final court of appeal since 1949 in disputes over the division of powers in the Constitution.

Although decisions made by the courts in Canada can be set aside in certain conditions and at certain times by legislatures using the notwithstanding clause\(^37\), (a subject we shall return to later), a number of cases involving freedom of association in a trade union context have been dealt with by the courts, almost all of them controversial and the subject of much scholarly debate. However, a number of these decisions have not dealt with the issue of freedom of association, turning instead on the question of government action. Particularly germane in the trade union context is the Supreme Court's ruling in *Dolphin Delivery*\(^38\), which is concerned with the public/private dichotomy defined by the court to delineate what kind of cases fall under the ambit of the Charter; a division which implicitly relates to the power of trade unions in society.

The question of whether the Charter applies to a case before the court focuses on the doctrine of 'governmental action'.

Section 32 of the Charter reads:

(1) This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect to all matters within the authority of the legislature of each province.

Based on an analysis of the text and the proceedings of the Joint Senate-Commons Committee on the Constitution, part of the legal
and academic community argue that Charter is intended to regulate only the 'acts' of government. According to this interpretation, the Charter "protects our fundamental rights and freedoms only against invasions by our governors and not from abuse by our neighbours and fellow citizens". Accordingly, there is a private realm in which individuals are not obliged to comply with the dictates of the Charter, and the problem in defining what cases are Charter cases can be solved merely by drawing the line between public and private.

Radical left critics call this public/private division "unnatural" and logically unworkable, arguing that all apparently private activities take place within and are effective because of an underlying substratum of legal rights and duties jointly fashioned by our courts and legislatures.

Effectively excluded from the Charter, they argue, is the major source of inequality in our society: "the maldistribution of property entitlements among individuals". The Supreme Court judgment in Dolphin Delivery raises several of these issues.

Dolphin Delivery was the first major decision by the Supreme Court that directly concerned the rights of labour under the Charter. Members of the Retail, Wholesale and Department Store Union were locked out by Purolator Courier Inc., and believed that another courier, Dolphin Delivery, was acting as a business ally of Purolator. The union notified Dolphin by letter that it intended to picket its premises unless it agreed to cease doing business with Purolator. Before that could happen, Dolphin sought and obtained a court injunction preventing the picketing from going ahead. The matter had to be resolved
under common law because the delivery companies were subject to federal, rather than provincial, labour law, and the federal code was silent on the status of secondary picketing. In its attempt to overturn the injunction, the union argued their members' freedom of expression under the Charter was infringed by the common law rule (inducing breach of contract), while the owners of Dolphin Delivery took the position that the Charter had no application in private disputes of this kind. The Court agreed with Dolphin. McIntyre J. ruled that the Charter would apply to common law only when there was a government action attached to it.45

Property and ideology are key to this decision, Alan Hutchison argues; workers are free to express themselves, but not free to use someone else's property to do so. By creating a private realm, judges are protecting the private property status quo, and turning a "blind eye to underlying disparities of wealth and power".46 Some liberals are equally critical of judicial attempts to define a public and a private realm; Beatty, for example, condems the Dolphin Delivery decision as "highly elitist and profoundly undemocratic". The Charter, he argues, is intended to apply to common law (in that the Charter is superior to all other forms and expressions of law), and therefore must apply to (in Beatty's words) "judge-made law". Therefore, the government action required under the Charter is simply the action of the judiciary in applying the law. If the judiciary is not included, Beatty declares, a great deal of coercive authority of the state will be effected by persons who are not directly elected and "without regard to the constitutional entitlements of
In response, one could argue that implicit in Beatty's "judge-made law" is the belief that judges are making law rather than applying principles. But even if they are making law, the Charter clearly states that governments are to be restrained, not private citizens. The intention of the framers of the Charter was to make a distinction between public and private acts, and between courts and the administrative and legislative arms of government (section 32), and if that distinction is ignored, confusions reigns. As McIntryre J. writes in his judgment, of course the courts ought to apply and develop the principles of common law in a manner consistent with the fundamental values enshrined in the constitution...But this is different [and distinct from] the proposition that one private party owes a constitutional duty to another.

Applying the Charter to all law would result in application of the Charter to the private sphere, a situation the framers of the Charter clearly wanted to avoid. Hutchison's criticism, that real property disparities in the private sphere are ignored by the court, is correct; but the Charter does not recognize economic differences between private parties, only the disparity in power between the state and the citizen.

Accepting that there is a line between public and private (however vague), this division is particularly contentious in freedom of association questions in the trade union context. Paul Bender argues that the Charter section which appears most likely to be held applicable to private as well as public acts is section 2, which includes freedom of association. The use of the word 'freedom', he argues "seems somewhat less suggestive of a
government action requirement than does the use of the word 'right'.Certainly the government action doctrine does not affect the conceptual dilemma posed by negative and positive freedom, but the judicial question of whether government action is involved will effect whether the courts (versus the politicians) are the definers of the meaning and scope of freedom of association under the Charter.

The courts have never been given a particularly broad mandate in the formulation of legal principles that make up the federal and provincial labour codes in Canada. By and large rules have been framed by legislators, and their scope and substance has, according to Beatty, changed dramatically since the turn of the century. Legislatures have endeavoured to provide fairer processes of decision-making, through which the competing interests of workers and those who purchase their services can be reconciled more equitably.

This is not to say that the courts have been silent pre-Charter on freedom of association questions.

The historically most important judgment on union security in Canada was delivered by Justice I.C. Rand in 1946 in settlement of the Windsor autoworkers' strike over union recognition. The Ford Motor Company, with the help of the province, desperately strove to break the strike, until Justice Rand of the Supreme Court was brought in to arbitrate a solution. In his award he denied the union's demand for a union shop, and instituted instead the so-called 'Rand formula', which requires employees to pay dues to the union even if they are not members (the agency shop). His judgment presaged Galbraith's thesis that
unions provide a positive countervailing power to business, similar to the theory of checks and balances in the American system of government. Rand noted that unions need to "become strong" in order to redress the lopsided balance of power that favoured capital:

...the power of organized labour, the necessary co-partner of capital, must be available to redress the balance of what is called social justice; the just protection of all interests is an activity which the social order approves and encourages.

However, while the assumption was that unions were essential for all workers, Rand explicitly declared that social justice required that capital should retain the upper hand. Since that time, legislators have attempted to find a middle ground between capital and labour, with mixed results.

Some would protest that the balance between the two has since swung strongly in favour of labour. In Arlington Crane, Dorothy and Richard Foran, owners of a unionized crane rental company, attacked sections of the Ontario labour law that permits closed-shop contracts. The Forans wanted to employ their grandson, but when he applied for union membership, he was turned down (or refused to join) because he was unwilling to undertake an apprenticeship program required by the union for membership. As a consequence, the Forans were unable to hire him. The case has advanced as far as the Ontario High Court, where the Foran's grandson argued that his freedom of choice, the freedom not to associate with the union, was infringed. The respondents' position was that the section of the act permitting closed shop contracts
neither requires nor encourages negotiating parties to include a union security provision in the collective agreement, but leaves that decision to the parties as a matter of free negotiation.  

Judge Henry's decision in this particular aspect of the case turned on governmental action. While he agreed with the respondents that the Ontario Labour Code was "neutral" as far union security clauses, he ruled that the bargaining agents in this case were not governmental actors but private parties, and moreover were not performing a governmental function, but merely instruments in carrying out a public policy. 

Judge Henry's decision relied partly on a similar British Columbia case, Bhindi and B.C. Projectionists, in which the appellants were projectionists who were not members of the union. They applied for membership and were denied entry and therefore could not be employed by Famous Players. In that decision, Nemetz C.J. noted that it is a rare commercial contract which does not ex facie infringe on some freedom set out in s.2, or some legal right under s.7. To include such private commercial contracts under the scrutiny of the Charter could create havoc in the commercial life of the country. 

Contracts entered into by private parties do not reflect public policy, he asserted, and the B. C. Labour Code "neither mandates nor encourages the parties to include a closed-shop provision". 

In contrast, the Lavigne case resulted in acknowledgement of negative freedom of association under the Charter. In the Ontario High Court, White J. concluded that the compulsory check-off provision (i.e. the agency shop clause) in the collective agreement between Ontario Council of Regents and the union
(O.P.S.E.U.) infringed on a college employee's (Lavigne) freedom of association. White concluded that the Council of Regents was a governmental actor performing a governmental action (bargaining), and therefore the collective agreement was subject to Charter scrutiny. Further, he found that there was support for the negative freedom of association in the Charter:

...the recognition of the right not to associate appears to flow from the word 'freedom'. A right to freedom of association which does not include a right not to associate would not really ensure 'freedom'.

Not only was the finding of government action different than the closed-shop cases, but the legislation (Colleges Collective Bargaining Act) was judged to give legitimacy to union security clauses rather than providing merely permissive or neutral ground. However, White J. also found under section 1, the reasonable limits clause, that government interest in fostering collective bargaining and establishing a means of financing it (ie. the agency shop) generally outweighed the non-members' freedom of association.

But in a strong reversal, the Ontario Appeal Court found that there was no governmental action in Lavigne, because the appellant did not challenge the union security clause, only the spending of dues. The Council of Regents was in no way involved in the Union's spending decisions, and "the mere making of the funds available to the union by the Council...does not convert the union's expenditures into governmental action". No action, no Charter scrutiny; but the Court did not stop there. Even if there was an action under the Charter, they argued, Lavigne's
freedom of association was not infringed in any way. The court did not seek to determine whether a freedom of non-association existed (citing the Supreme Court's admonition against commenting on constitutional issues by way of obiter), but did spend some time making a strong case for the positive right.

The question of whether freedom of association can be invoked as the freedom to pursue the lawful objects and activities essential to the purposes of the association, or at least protection of fundamentally democratic objectives, is one that has received most of the attention under freedom of association jurisprudence in the Supreme Court. Cavalluzzo proposes that the objectives of a group be protected if they are an "interest fundamental to our [democratic] society": religious, political, egalitarian, and economic. Economic objectives should be included, he argues, because guaranteed freedoms are frequently used to advance economic interests, and because "advancement of one's economic wellbeing is an important and legitimate goal for any citizen." Needless to say, the protection of economic interests is controversial, particularly in the absence of any constitutional protection of property rights. Besides the assertion that economic interests are not essential components of assured democracy, Gall argues that constitutions are supposed to enshrine the fundamental principles of individual liberty, but (for example) collective bargaining "does not have this same timeless quality".

Freedom of association was immediately seized upon by trade unions as an avenue of attack on legislation imposing restraints
on collective bargaining. From 1980 to 1982, the federal and some provincial governments passed wage restraint legislation affecting unionized public servants. In Ontario, the legislation clearly affected the scope of bargaining by limiting compensation increases, and resulted in Service Employees Union, local 204 v. Broadway Manor Nursing Home. The Ontario Divisional Court ruled that "freedom of association includes the right to organize, bargain collectively, and strike". Galligan J, in a judgment reflecting the need for a "large and liberal construction" of freedom of association, wrote (in what is now known as the "Broadway Manor Test") that "freedom of association, if it is to be meaningful, must include freedom to engage in conduct which is reasonably consonant with the lawful objects of an association." Therefore, freedom of association must protect the fundamental lawful objects and/or purposes of a group, because otherwise the association is rendered "barren and useless". The Inflation Restraint Act, which infringed on freedom of association and could not be justified under section 1, was rendered inoperative and of no effect. Not surprisingly, the case was appealed, and decided on an interpretation issue, completely avoiding the freedom of association question. From a labour lawyer's point of view, "the only satisfying aspect of the judgment was that it left untouched the Divisional Court's pronouncement on the content of freedom of association." That satisfaction was shortlived. The Labour Trilogy, a set of cases propelled into the Supreme Court by union opposition to collective bargaining legislation, turned on a much narrower reading of freedom of association. The cases arose over the
constitutionality of legislation prohibiting strikes in particular public sectors, restraining collective bargaining in others, and ordering dairy employees back to work. However, while the subjects of the legislation were public sector workers (with the exception of the dairy workers), the Court did not confine their remarks to them. In general, the Court ruled that

the right to bargain collectively and to strike are not fundamental freedoms; they are a creation of legislation...the court should not define freedom of association to include the right to bargain collectively...for this would require the court to become involved, under s.1, in a review of legislative policy for which it is really not fitted.76

Thus the positive freedom was narrowed to preclude Charter protection for collective bargaining; and the definition of association was broadened. Justice Le Dain reminded the unions that

it is essential to keep in mind that [association]...must be applied to a wide range of associations...It is in this larger perspective...that one must consider the implications of extending the concept of freedom of association...the premise that without such additional constitutional protection the guarantee of freedom of association would be a meaningless and empty one must be rejected.77

McIntryre J. made more explicit the Court’s thinking. Guarantees in the Charter, apart from aboriginal rights, were individual rather than group rights, thus

freedom of association belongs to the individual and not to the group formed through its exercise...[it] does not constitutionally protect all activities essential to the lawful goals of an association [reference to the Broadway Manor test]...it guarantees the
collective exercise of constitutional rights and insures that whatever action an individual can lawfully pursue as an individual, he can pursue it with others ...[and] there is no analogy between the cessation of work by an individual and a strike.78 [Further], legislative history and the omission of reference to a right to strike in the Charter, taken with the fact that the overwhelming preoccupation of the Charter is with individual, political and democratic rights, speaks against any implication of the right to strike.79

And McIntrye echoed Justice Le Dain's concern about the role of the courts in balancing the forces of labour and capital;

care must be taken in considering whether constitutional protection should be given to one aspect of this dynamic and evolving process while leaving the other subject to the social pressures of the day.80

To protect collective bargaining, in McIntrye's opinion, would curtail the process of evolution "necessary to meet the changing circumstances of a modern society in a modern world".

But the decisions in the Labour Trilogy were not unanimous, which has led legal scholars like Paul Weiler to believe that it is not at all clear that the debate is over.81 One member of the Court's "left-wing"82, Dickson C.J.C., supported protection of the objectives of an association, arguing that

if freedom of association only protects the joining together of persons for common purposes, but not the pursuit of the very activities for which association was formed, then the freedom is indeed legalistic, ungenerous, indeed vapid.83

However, Dickson left open the definition of what activities should be protected. Clearly Dickson disagreed with the majority of his colleagues, but he provided no answer as to whether (for example) economic objectives should be protected under the
Charter. Freedom of association, Dickson argued, is most important in circumstances "where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer", and simply because there are occasions when no analogy involving individuals can be found for associational activity, objectives are not rendered unprotectable. Whether or not freedom of association extends to protection of activities "for the pursuit of exclusively pecuniary ends" (note here he does not define which objectives should be protected), "collective bargaining protects important employee interests which cannot be characterized as merely pecuniary in nature".

However, Dickson was prepared to admit that the federal government was justified in imposing wage controls on the federal public sector under sec. 1 of the Charter, although he did not find that the removal of the right to strike over non-compensatory issues was a justifiable limit under section 1. But generally he endorsed a broad sphere of government intervention, arguing that legislatures are justified in abrogating the right to strike and substituting a fair arbitrating scheme, in circumstances when a strike or lock-out would be injurious to the economic interests of third parties.84

In the other dissenting opinion, Wilson J. (also identified by Russell as a "left-winger" on the Court) agreed with Dickson that the employees' freedom of association had been infringed; but she went further, arguing that the progressive expansion of "essential services" by legislatures means that the definition of injury to third parties is expanded as well, far beyond what it should be.
In particular, ordering dairy workers back in Saskatchewan would not satisfy "injury" to a third party under section 1, because injury would be to the dairy companies, hardly an "innocent" third party.

The Lavigne case, which also seeks to define positive freedom of association, asks the question of whether an individual has the right under negative freedom of association to opt out of expenditure of union dues on political causes to which he is hostile, i.e. does this expenditure constitute a form of unwanted association? Frances Lavigne is a community college teacher and a member of the bargaining union, but not a member of the union. In his action against the union and the college board (Council of Regents), Lavigne objected both to the compulsory payment of union dues by non-union members, and to the use of those dues in support of political and social causes with which he did not agree. White J., in the Ontario High Court judgment, agreed with the appellant that the case involved government action (see above); to hold otherwise, White argued, "would be to permit 'government'...to impose terms in a contract that it could not impose by statute or regulation because they breach the Charter." Accordingly, the field was now open to deal with the question of freedom of association in this case.

While it is true, White admitted, that private associations "can serve to increase opportunities for self realization, counterbalancing the strength of centralized power" in a democracy, "there is support for a negative right as well in these democratic values". Compelled payment of union dues (i.e. the agency shop clause) forces non-members to associate with the
union, and therefore "there is a prima facie breach of their freedom of association". Is this infringement justified in a free and democratic society? Under section 1, the Supreme Court has established the "proportionality test", which attempts to balance the interests of the individual against those of society, recognizing that the rights and freedoms under the Charter are not absolute. The first branch of the test asks whether there is a rational connection between the governmental means and ends. The objective in this case is the fostering of collective bargaining and promotion of labour peace; and the legislative requirement of an agency shop and therefore forced dues paying is rationally connected to this objective. But does the means chosen to achieve the objective "impair the rights and freedoms of the non-members as little as possible"? No, White declares, there is a less restrictive means. It is possible, he argues, to draft a clause in a collective agreement

\[
\text{providing for compulsory dues check-off that restricts the use of such dues to finance activities that are directly related to the objective sought to be achieved, that is to collective bargaining and the administration of the collective agreement.}^{86}
\]

And the third prong of the proportionality test, whether there is a balance between the means and ends, also fails. Political activities of a union are "legitimate and appropriate", but should not be financed by unwilling workers, and workers must therefore have the option of "opting-out" of payment of dues for those purposes.\(^87\)

On appeal, the decision was essentially reversed; the nexus question under governmental action was not the forced payment of
dues, but the (lack of) governmental action involved in decisions taken relating to the expenditure of union dues. The mere making of funds available to the union

without direction of any kind as to use does not convert the union’s expenditures into governmental action. The use of the dues by OPSEU was a private activity by a private organization and hence beyond the reach of the Charter.

Having found no governmental action, the court did not have to consider whether there was a violation of freedom of association, but in view of the arguments placed before them, they did. The agency shop does not impair positive freedom of association, the court argued, and even if the Charter does contain a guarantee of negative freedom, "the simple requirement of a monetary payment to OPSEU is not violative of his freedom". The compelled payment does not force Lavigne to join the union, to participate in its activities, or to be identified with any of the political, social or ideological objectives which the union may support financially or otherwise; "nor does it impose any obligation on him to adapt or conform to the views advanced by the union". A right not to associate does not, in this court’s opinion, "necessarily include a right not to be required to support an organization financially." The interest Lavigne may have

in being left alone or in being unencumbered by any monetary obligation to the bargaining agent selected by the majority of the bargaining unit...is not, in our view, an interest of constitutional status entitled to protection under the Charter.

Judicial values should not be imposed in determining whether a union expenditure is related to collective bargaining. This matter is best left to the unions, or, if restrictions are to be
imposed, they should be imposed by government; "the court should not be called upon to monitor and examine every jot and tittle of union expenditure".

Lavigne is portrayed in this decision as an individual relating to the union almost on a "fee for service" basis. In this kind of relationship, the union is an association that provides a bargaining function to non-members, in return for payment of a fee. The non-members are free to join or pay fees to other associations, and are not identified in any way with the union, just as a client is not identified with the other activities undertaken by a lawyer who is handling his divorce.

The Lavigne case will be heard by the Supreme Court, and there will doubtless be other Charter challenges to union security and union activities. The misgivings expressed by a number of judges about their expertise in balancing the interests of labour and capital, and "freezing" that balance, may signal a retreat from intervention in the name of the Charter in interests deemed "economic". Certainly decisions rendered so far have not revolutionized labour law. Partly this is because of the intermingling of public and private activity; as Finkelstein notes, "private actors work within an elaborate scheme and exercise powers granted by statute within an overarching regulatory scheme", and it is often difficult to sort out what constitutes government action and whether government action has taken place in a particular situation. Additionally, the decisions rendered are situation specific, and it is not clear what effect a decision which recognized negative liberty claims could have on the scope of labour relations generally. However,
the judiciary is clearly going to look at, and take seriously, the negative right of freedom from association; and in the decisions already rendered, positive freedom of association has been given a much narrower reading than many trade union elites would have liked. While Justices Dickson and Wilson realize the dilemma trade unions face under negative and positive freedom, and appear to be willing to go further than their colleagues in giving weight to positive liberty arguments, they do not make up the majority of the court.

It is thus unlikely then that the courts will put an end to the dilemma facing trade unions by grasping the positive "horn". And there are strong arguments why they should not. Besides the aforementioned arguments for choice (particularly the concern over coerced financial support for political causes), to give credence to union initiated positive liberty claims exclusively would seem to be an odd way of balancing negative and positive freedom. In these cases, the discretionary right of the individual must be given weight, as should the need for unions to protect themselves against free-riders. How this balance could be struck will be the subject of Chapter Four.
I want to say that when completed in a just form, I would like this resolution, particularly the Charter of Rights and Freedoms, to hang on the wall of every classroom in every region of Canada.

Ed Broadbent, leader of the NDP, House of Commons Debates

The dilemma facing trade unions arises from the "two concepts of liberty" implicit in freedom of association; the freedom to and the freedom not to associate. In the last chapter, a review was undertaken of the positive liberty arguments advanced by union lawyers in the courts. These arguments did not meet with much success, and the unions involved were unable to persuade the court to resolve their dilemma by grasping only its positive horn. But trade unions might have avoided the legal dilemma they now face by acting politically to persuade the government to adopt wording in the Charter which would limit or prevent the kind of legal cases described in Chapter 2.

Bargaining between capital and labour has been subject to detailed statutory regulation since 1944, when a full system of labour relations law was established by the federal government under regulation PC1003. But at no time have the rules and regulations been made directly by the parties to the relationship; in the main, governments, both provincial and federal, have taken on that responsibility. And labour law, according to Beatty, is

very much a function of the relative influence which the competing interests of consumers, employers, and producers (or, more accurately, organized segments within these groups), are able to exert on the political processes of government.
Both marxists and pluralists are able to subscribe to this
definition of how public policy is made; although marxists would
stress the omnipotent role of employers. Nevertheless, there are
those who argue that organized labour has had some influence on
policy; and many of those who argue that labour law has evolved
to provide a more balanced collective bargaining process give
some credit to trade unions as political actors for those

However, constitution-making (i.e. the supreme law) has
always been an elite process in Canada. Ideologically, Canada
and Canadians emerged from anti-revolutionary roots, reinforced
by the "profoundly anti-democratic strains in the political
ideology of nineteenth-century political leaders like Sir John A.
Macdonald." Institutional barriers to public involvement in
decision-making, the most important being federalism and the
concentration of power in the hands of the Cabinet, serve to
limit participation in the formulation of public policy to
ministers, senior civil servants and well-organized interest
groups.

The Special Joint Committee hearings on constitutional
reform, particularly those in 1980/1981, focused on the charter,
and provided a forum for interest groups to influence the
debate. Both women's and native groups were particularly
successful in getting the issue of their rights on the political
agenda, and in influencing the wording and strength of those
rights. While neither group achieved all they set out to do,
important gains were made. Yet in the debate leading up to
passage of the Charter, trade unions were (for the most part)
curiously silent, even though a structured interest group with funds and experience was already in place.

The Canadian Labour Congress represents 2.2 million trade unionists through affiliation of 92 international and national unions, the three largest of which are public sector unions.98 Neither the CLC, nor any other labour body, attended the Joint Committee hearings on the Charter99; and only the British Columbia Federation of Labour submitted a brief. The BCFL’s interest in the Charter appears to have developed in the late 1970’s, and was first officially recorded in the 1980 Report of the Political Education Committee to the annual conference. The Committee declared that a new constitution should protect the rights of workers by "guarantee[ing] them the constitutional right to organize, bargain collectively with their employer and...[it should include] the right to strike."100 In 1981, that concern was taken more seriously as part of the Executive Council report, which noted that Council research "unfortunately leads us to believe that eventual court interpretations of that Charter [the 1981 version] will not be totally to our liking".101 The BCFL’s submission to the Joint Committee, made that same year, urged the government to protect the right to organize trade unions and the right to strike.102

Not long after the Fed’s submission, Svend Robinson, the New Democratic Party critic on the constitution103, suggested an amendment to the proposed charter to the Joint Committee. Citing precedents in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights, Robinson argued that freedom
of association should explicitly include "the freedom to organize and bargain collectively". Robinson hastened to assure the Committee however, that his amendment, while recognizing "one of the most fundamental values of Canadian society", did not go so far as to entrench in the constitution the right to strike.

The Liberal response was to assert that these freedoms were already implicit in freedom of association, and that by singling out association for bargaining one might tend to diminish all the other forms of association which are contemplated—church associations, associations of fraternal organizations or community associations.

Besides, one of the Liberals asked, if this amendment is so important, why have no labour groups come before the Committee asking for it? The best Robinson could muster was to refer to the briefs from the B.C. Federation of Labour, the United Church of Canada, and one other unnamed group; therefore, he concluded, "there have been a number of submissions in that respect". Needless to say, the other Committee members were not convinced, and the amendment failed. That is the only reference to freedom of association and unions in the Joint Committee hearings (from the 1970 Molgat/McGuigan to the 1980/1981 sessions).

How can we account for labour’s lack of action? No single reason can supply the whole answer, but undoubtedly labour’s "traditional economism" played a large part in the CLC decision not to involve themselves actively in the debate. Trade unions were sharply critical of the federal government’s devotion of "excess time and energy to the constitutional debate at the expense of their other responsibilities". Unemployment had been
hovering around the million mark in the early 1980s, inflation was above eleven percent and rising, and interest rates had "rocketed to levels that threaten[ed] to destroy our economy". Canadians unions were attempting to hold their ground economically by refusing to follow the same path as American unions and engage in concession bargaining. But they had little to celebrate; real wages were in decline, the wage gap between union and non-union workers was closing, and there was a decline in strike activity with a corresponding increase in legislated back-to-work measures. Union members expected their union executive to protect the economic gains they believed they had won from employers, and thus the "official" reason advanced by the CLC executive for its lack of action on the Charter was their concern about the state of the economy and its effect on their members. Although the economy during the early 1970s, when the Molgat-McGuigan hearings began, was not in the same serious condition at it was in the late 1970s and early 1980s, the traditional focus on 'business unionism' remained, complicated by a number of other factors, including the long-standing internal problems at the CLC.

There were a number of divisions in regard to the charter both within and between the CLC affiliated unions; over the need for social and economic rights, over the role of the courts and entrenchment of rights, and, most seriously, over the Quebec/Ottawa crisis that precipitated the new round of constitutional negotiations in the late 1970s. The Quebec Federation of Labour (a CLC affiliate) supported the Parti Quebecois position in the constitutional debate. The province
of Quebec was the central focus of federal/provincial tensions and the election of the Parti Quebecois in 1976, committed to establishing political sovereignty for Quebec, called into question the basic political arrangements of federalism. As Quebec modernized after the Quiet Revolution, a new Quebecois middle-class emerged, much of it unionized public servants. English and French groups began to compete for the same positions, and as English/French tensions grew, economic grievances focused on comparisons between the English economic elite and the French 'factory-workers' and 'elevator operators'. The PQ response on the national level was directed to separation of Quebec from Canada, albeit with a continuing economic relationship. In 1980, the Levesque government "tested" Quebec nationalism with a referendum on sovereignty-association; and even though the "no" vote carried the referendum, arguments for special status continued. This view contends that the Quebec government is and must be the primary political voice of the Quebecois, and therefore requires extraordinary legislative and fiscal powers. Most importantly, it must be able to protect the French language and culture, and have the power to define how that be accomplished.¹¹³

But Prime Minister Trudeau's vision of Canada was in conflict with any notion of Quebec special status. Instead Trudeau placed value on individual rights, making a fundamental distinction between the French linguistic group and the Quebec government. Reform, he agreed, was needed, but reform implied the promotion of individual French-Canadian interests across Canada, not the strengthening of the government of Quebec.
"Renewed federalism" was Trudeau's promise to the Quebecois, but when it came time to sign the constitutional agreement, the Quebec government was not at the table.

This division was reflected in the CLC; the QFL supported the Parti Quebecois, and the rest of the provincial labour federations supported for the NDP. While that division would have perhaps left room for some united action on matters such as freedom of association, the CLC was unprepared or unable to mend the split. As Panitch observes, it was unlikely

that a weak and ideologically confused central labour federation like the CLC would suddenly find the capacity, not just to mediate such sectionalism, but to overcome it and lead a co-ordinated struggle.114

This division resulted partly from years of neglect of the "social movement" side of unionism, with a corresponding emphasis on "business unionism" and economic issues; as C. B. MacPherson notes, unions have (in the main) used their power "to get immediate material benefits or to hold onto their share...".115 Thus it is no surprise that the CLC executive would choose to opt out of the constitutional debate, and stick with the issues it knew and could handle best.116 Besides, the CLC alliance with the NDP was aimed toward a division of labour; politics could and/or should be left to the politicians.

But the NDP did not see the Charter debate as their opportunity to concentrate on advancing or even defending the interests of their most important constituency. While there was a body of opinion in the party opposed to a charter (especially an entrenched bill of rights117), most NDP members supported the
idea(l) of rights, as did the majority of Canadians. The federal party supported the Liberals on the Charter, conflicting only once over property rights. The only NDP Member of Parliament to vote against the Charter was Svend Robinson, not because of his defeated amendment on freedom of association, but in protest over the override clause. Why did the NDP not take any further action than the above-mentioned Committee attempt to amend freedom of association?

Panitch argues that both labour and the NDP either accepted or were willing to believe that the proposed charter "had nothing to do with power, either social power or judicial power, that it was a non-partisan document unambiguously advancing human rights". It is difficult to refute this interpretation, given the lack of action on the part of both labour and the NDP; but equally difficult to support it on the basis of available evidence. However, implicit in Panitch's argument is the assumption that labour and the NDP agreed on a particular approach to the Charter. But there have been and continue to be difficulties in the NDP/labour relationship.

The president of the Canadian Auto Workers, Bob White, offered his public analysis of the 'partnership' between unions and the NDP after the last election in which the NDP was unsuccessful at convincing enough Canadians about the "disaster" awaiting them under free trade. During the debate, unions often worked in free-trade coalitions, circumventing the NDP and what they perceived often as an uninformed "political" debate. The NDP cannot survive without union involvement, White argues, but union members are sceptical about the party. Overcoming that
scepticism requires that the NDP
demonstrates it is really on our side; that
it clearly identifies its constituency and
identifies with this constituency; that it
joins our struggles inside and outside
Parliament, between elections as well as
during elections.\textsuperscript{120}

The attitude of many in the party, White complains, is that union
leaders do not 'deliver the vote'\textsuperscript{121}, and the union link serves
only to decrease the NDP's popularity and thus electability. To
White, and presumably to other union leaders as well, the party
must be ready to defend its "natural constituents", or it will
suffer both at election time and between elections when party
organization and strength could be increased.

But Allan Blakeney, the NDP premier of Saskatchewan, did try
to persuade Dennis McDermott, the leader of the CLC, that he
should become involved in the Joint Committee hearings. However,
McDermott was not about to take advice from "some farmer".\textsuperscript{122} In
fact, the CLC executive had withdrawn their representatives from
a number of ongoing tripartite government-sponsored committees
after Trudeau had instituted the 6 and 5 program in 1975.\textsuperscript{123}
McDermott was furious with Trudeau over wage controls and
absolutely refused to have anything to do with the Joint
Committee, which he saw as simply another attempt by Trudeau to
co-opt labour. McDermott even went to the extent of blocking a
scheduled B.C. Federation of Labour appearance before the
Committee. Consequently, the BCFL brief, which could have had
quite an impact at the hearings, really got 'lost in the shuffle'.
Paul Cavalluzzo, a well-known trade union lawyer, credits
McDermott's personal animosity towards Trudeau as a major reason
why the CLC did not involve itself in the 1980/1981 hearings. 124

Interestingly enough, business was equally as uninvolved in the "debate" over freedom of association. The major lobby groups that represent the business community, such as the Canadian Chamber of Commerce and the Business Council on National Issues, did play an active role at the Joint Committee hearings, but their focus was on property rights, not freedom of association. That campaign was derailed when the NDP threatened to withdraw their support from the Charter if property rights were instituted; but apparently, business, like trade unions, did not attempt to influence the wording of freedom of association. There is likely a connection between those two actions; since the unions did not focus on freedom of association, neither did business. 125

Of course, all these reasons why the unions did not act assume that unions have the power to change (some) government decisions. There is, of course, the debate between marxists and pluralists as to whether labour has the ability to influence public policy; but that question aside, there is, for some union executives, a feeling of powerlessness, an inability to influence the political because of the structural ennui inside their unions. J. C. Parrot (leader of the Postal Workers Union, jailed for two months for refusing to order his members back to work), in an interview in Studies in Political Economy, states that union leaders find themselves overwhelmed by the legal ramifications of "fighting in the streets", unable to maintain grassroots connections with their membership, unable (and often unwilling) to work with other unions, and often unable to develop
their own policies except for those thrust upon them from above by the CLC. If those in the trade union elite feel powerless, or incapable of internal structural control, it is not surprising so little was done to affect the wording and/or meaning of freedom of association under the Charter.

However, on the whole it would appear, as Reginald Whitaker argues, that both the NDP and the CLC accepted that "democracy in Canada seems pretty well defined by liberal limits"; and perhaps this is quite understandable. Freedom of association is a particularly important right for labour, and it may be that both NDP and the CLC members believed that, in a society in which people are educated about and support civil liberties, labour would benefit. At that time labour saw itself as under seige. Public and political opinion was cool, if not hostile, to a legal and social environment which appeared "far too accommodating to the wishes and whims of workers". Against calls for wage and price controls, economic free zones, restrictions on the right to strike in the public sector, and the repeal of progressive labour codes (such as in British Columbia), an "imperfect" freedom of association may well have been perceived quite favourably. But now that the trade unions are aware of the dilemma inherent in freedom of association, there is, perhaps, another avenue of influence open to them; they can appeal judicial decisions directly through the opening left in section 33.

Judicial review in Canada does not have the same final status that it does in the United States. The elite (and somewhat public) debate over parliamentary sovereignty versus judicial review (i.e. whether rights should be entrenched) in the
Charter ended with a 'typical Canadian compromise, the non obstante clause. In the words of Paul Weiler, the notwithstanding clause offered "a compromise between the British version of full-fledged parliamentary sovereignty and the American version of full-fledged judicial authority over constitutional matters". By entrenching rights, Weiler argued, we make it clear to the court that our intent is to give a "deeper legal status to our fundamental rights"; but once the judges have had their 'final say', government should have its. However, in order for a government to override a Supreme Court ruling (or the supposition that the Supreme Court would strike down legislation for infringing on a particular freedom), it will have to overcome considerable political hurdles, including the 'full glare of publicity' and a five year renewal requirement. Section (33), "expressly permit[s] the federal Parliament or a provincial legislature to exempt a statute from compliance with certain provisions". The fundamental freedoms under the Charter—freedom of religion, expression, assembly and association—are subject to legislative override under section 33.

Although the non obstante has been used a number of times in Quebec, forecasts of frequent and excessive provincial use have not come to pass. However, invoking section 33 does offer a way of solving a negative freedom of association judgment for unions, if the political climate is such that a government can be persuaded to overrule a judicial decision. The only time the notwithstanding has been invoked outside Quebec, it was used in Saskatchewan to override freedom of association and order public servants back to work. In that case, the Devine Conservative
government legislated an end to rotating strikes by the Saskatchewan Government Employees Union by inserting an override clause in back-to-work legislation, preventing a challenge to the legislation on the basis of the Charter.\textsuperscript{131} Obviously we can not draw a conclusion based on a single case, but it is perhaps significant that the only time a government has been willing to undergo the 'full glare of publicity' and invoke the notwithstanding (except for Quebec) has been when unions are involved. That factor does not bode well for either government or public opinion regarding unions in Saskatchewan.

Have the other factors that served to prevent action on freedom of association changed? The major difference is in union awareness of the seriousness of the legal cases facing them. A CLC spokesperson acknowledged in late 1985, three years after passage of the Charter, that a victory for Lavigne might "render the labour movement absolutely impotent".\textsuperscript{132} Notwithstanding the outcome of various judicial decisions, the cost to unions in legal fees and direction of energies has been high.\textsuperscript{133} In addition, that time lag allowed a right wing lobby group, the National Citizens' Coalition, to raise funds to pay legal fees for Merv Lavigne, a man they compare to Winston Churchill. Their appeal for "voluntary support" is phrased in terms of 'freedom';

\begin{center}
\textbf{MERV LAVIGNE DOESN'T QUIT.}
\textbf{NEITHER DOES THE NATIONAL CITIZENS' COALITION.}
\ldots Please fill in the coupon below and take a stand for freedom- today.\textsuperscript{134}
\end{center}

The NCC is run by a board of "wealthy business people", who perceive the union movement as their "mortal enemy"\textsuperscript{135}(presumably the same way unions perceive the NCC). So now, besides having to
overcome the above mentioned difficulties, there is organized, well-funded opposition to the present trade union stands on freedom of association questions, opposition that was not organized before the Charter. Add to that the difficulty of changing decisions after the fact, and the continuing "uneasiness" between the NDP and the labour movement, the possibility of trade union elites persuading governments to adopt a mandatory (positive) right of freedom of association in the trade union context seems unlikely.

Trade union elites argue, however, that their unions must to be free to continue their political efforts to influence government, influence that may be seriously weakened by a court decision that allows dissenting dues payers to opt out of union political expenditures. How governments and the courts respond to that argument will depend partly on how much importance they attach to the individual choice. I will argue in the next chapter that the cost (in terms of loss of freedom) to coerce the dissenting individual to financially support political action to which he is in disagreement is too high.
CHAPTER FOUR: THE DILEMMA IN RIGHTS THEORY

The source of the dilemma facing trade unions has been identified as the competing claims of negative and positive liberty, and evidence of that debate have been cited in the legal and political arenas. But marxist theorists would argue that the underlying cause of the freedom of association dilemma for trade unions (while it arises from the conflict between negative and positive freedom) is liberal rights theory, i.e. individuals asserting their rights in a selfish and self-interested manner. What occurs in the legal and political arenas with regard to rights is then simply a manifestation of the underlying problem in liberal rights theory.

The marxist critique is based on a description of rights in liberal society as analogous to having

a warrant, provided by socially established rules, that holds against some at least loosely specified range of objections and that authorizes A, usually on his decision, to engage in a type of action that A judges to be advantageous to himself and that is often judged, or can be expected often to be judged, disadvantageous to some B or Bs.136

The problem with liberal rights, according to Marx, was that none of them went beyond "egoistic man,...an individual withdrawn behind his private interests and whims and separated from the community".137 The individual in a capitalist society, Marx declares, needs some coercively maintained guarantee that acts of others will not imperil the pursuit and fulfilment of his interests (which are concerned mainly with his own property and his freedom to buy and sell). Freedom in a liberal society is a freedom which pertains only to man "treated as an isolated monad
and withdrawn into himself”; and rights accordingly "lead man to see in other men not the realization, but the limitation of his own freedoms". Marx’s critique of rights is bound up with his general view of man in a capitalist society, in which the illusion is fostered of man as an individual free of any essential dependence on others, but which in reality finds man

uncultured and unsocial...corrupted by the whole organization of society, lost to himself, sold, given over to the domination of inhuman conditions and elements...[he] treats other men as means, degrades himself to a means, and becomes the plaything of alien powers. Rights then symbolize the alienation of man from "species-being" (the manifestation of life in and through social activity and social enjoyment) and instead present social life "as a framework exterior to individuals, a limitation of their original self-sufficiency". The liberal theory of rights reflects an individualistic model of society, class divided and conflict ridden. Rights "express the ground rules of a type of society which consists of isolated or atomic individuals in perpetual conflict with each other in a struggle for wealth and domination."

Furthermore, this abstraction of rights principles like freedom of association allows us to neglect or ignore the non-egalitarian aspects of capitalist society: while ‘equal’ holding of rights are emphasized, the differences and inequalities between those who do and do not have control over the means of production go largely ignored. Equal rights, far from bringing equality, simply mean that "each man shall without discrimination be treated as a self-sufficient monad". Real freedom does not
begin, according to Marx, until "labour which is determined by necessity and mundane considerations ceases...and there is time for self-transformation, self-realization, and the free development of the individual".\textsuperscript{144}

But Marx was willing to support one category of rights in a capitalist society, political rights. Unlike the "rights of egoistic man", political rights include democratic rights in general, and are rights that could not be made sense of either as rights of 'an isolated monad withdrawn into himself', or as rights to do something 'without regard for other men'. These rights are "explicitly constitutive of certain forms of action in common with others" and would help to comprise the sort of community that Marx expected to see in the final phases of human emancipation.\textsuperscript{145}

Clearly political rights are rights Marx believed should be taken seriously in a capitalist society. But that is not to say that Marx had no doubts as to their impact. Removal of the property qualification from the franchise, for example, could not count as full emancipation, because people's lives would continue to be dominated by property considerations. While socio-economic differences would no longer hold formal political status, they would still "have an effect in their own manner".\textsuperscript{146}

Furthermore, political rights exist in tandem with the rights of (individual) man. This creates a 'dualism' between species-life and individual life\textsuperscript{147}, and therefore a contradiction between the communal and atomistic character of rights. Thus the concern with freedom of association, according to marxist theory, is that while it has the appearance of a political right (and therefore
should not be rejected out of hand), it can operate also as an atomistic "right of man" when negative liberty is exercised. Moreover, the rights of man, theoretically based on "natural rights", take primacy over the rights of citizens, because "selfishness retains power over community, for under capitalism it is selfishness that is associated with the natural, material life of man". Community is not, and can not, be served by the double "sins" of egoism and individualism.

The radical left critique of the Charter echoes the marxist analysis. The Charter, Hutchison declares, is a "potent political weapon— one that is being used to benefit vested interests in society and to weaken the relative power of the disadvantaged and underprivileged". Because the courts are unable (or unwilling) to recognize "the facts of social power, the false, power-serving assumption of the 'equality' of individuals and the 'freedom' of their choices", they have weighed in on the side of power. Basic inequalities in Canadian society are legitimated, "of which the subordination of labour to business is one of the most basic".

The Labour Trilogy cases, which Panitch calls "the judicial sanctioning of the legislative assault on trade unions", provide a judicial rationale for a state less concerned with securing 'social harmony' in labour relations and more [concerned] with undoing the collective power of labour organizations in the context of... capitalistic restructuring.

Refusing to grant constitutional status to the right to strike on the view that individuals cannot obtain more rights by joining a group (than they could possess as individuals) is to subvert the
whole raison d'etre of unions; to foster social solidarity and to establish a collective presence that could overcome worker vulnerability to the greater power of capital. According to the radical left critique the dilemma facing unions is largely ignored by the courts because the judiciary is biased in favour of capital. Their verdicts largely reflect their own personal values and political viewpoints (old, male and upper class), and there exists no genuinely objective, neutral principles of law upon which decisions can be based.

Some, although certainly not all, liberal critics agree that before passage of the Charter, unions were often unjustly treated in the hands of the court. Beatty, for example, declares that trusting to the processes of law and the institution of the court will not, "be something that will come easily or naturally to the working class and its representatives", given the treatment workers and unions have received in the past. But trust in the Supreme Court they should. Courts will (now?) be guided by "reason not rhetoric, principle, not material resources" and will look more favourably upon workers than the politicians will, because, according to Beatty, the Charter "offers a forum of principle in which their [labour's] relative lack of resources should not count heavily against them". In response to recent Supreme Court decisions such as the Labour Trilogy, which have gone against legal arguments advanced by unions, Beatty asserts that unions should continue to trust in the courts because the judgments have not been entirely one-sided, so presumably there is some opportunity for reversal.

Freedom of association must guarantee individual choice at the
workplace, according to Beatty, because work is a significant part of life, provides a creative outlet and a sense of self worth and accomplishment, a way to self-realization. While he does concede a threat to the individual's fundamental human freedom exists in the employer's power to establish working conditions, he argues that to deny negative liberty (freedom from association) would be illogical. Only one form of union security would be a reasonable limit on liberty under section 1 of the Charter— the agency shop. However, Beatty argues, there must be a limit on how union dues are spent; they should be applied only to the "preservation and enhancement of the collective processes of industrial self-government", a definition he would leave to the courts to flesh out.

Other liberals such as Paul Weiler are critical of the court's role in labour cases. The court, he argues, does not recognize social conditions that exist but are not brought before it. In the Lavigne case, for example, the court "ignored" the fact far more corporate dollars are donated to political parties than union dollars, and with no consenting majority vote taken among shareholders, as there is among union members. Because courts cannot take cognizance of circumstances beyond the case before it, Weiler argues they should not be involved as a "social cure-all" in labour/freedom of association cases. Courts should adopt a "hands-off attitude" and allow public policy to be decided in the political sphere. Beatty, on the other hand, appears to offer litigation as a substitute for politics, in fact, almost a superior form of politics.

What, then, are we to make of this debate? According to the
marxist argument, the problem with rights in a liberal society is twofold: first, they are attached to individuals, and second, individuals act in a selfish, egoistic manner when they exercise those rights. In response to the first critique, Waldron argues that the individual character of rights cannot be exorcised in a liberal society; "we are constructed (naturally or socially) and we treat ourselves as independent centres of consciousness, thought and responsible agency". The theory of rights is a theory based on individuals. Rights secure goods for individuals, even though, in the case of rights like positive freedom of association, the right is exercised in the company of others. In the case of the Charter, rights clearly are, in the main, based on and attached to individuals; and it must be within that parameter that a solution, if there is one, be found for the dilemma facing trade unions.

The second part of the marxist critique- that rights are "nothing but the rights of...egoistic man, separated from other men and the community...the right of selfishness" consists of three separate charges. The first charge is that the possession of a right encourages the individual to exercise that right selfishly, without regard for others. Is this to say, then, that acting selfishly necessarily indicts rights as the cause of selfishness? Waldron argues not. Rights, he states, can be exercised "philanthropically as well as meanly"; therefore, even if we take the view that exercising negative liberty is a selfish act, there is nothing in rights that requires the negative liberty to be exercised. Of course there is, perhaps, an equal danger in exercising rights altruistically.
Berlin, in his critique of positive liberty, warns that those who claim to act altruistically may be mistaken about what altruism requires in a particular circumstance. Furthermore, by claiming to know what is 'truly needed', they risk putting themselves in a position "to ignore the actual wishes of man or societies, to bully, oppress, torture...in the name, and on behalf, of [man or society's]...'real' selves."166

The second charge, that rights lead individuals to see in others the limitation of their freedom (because rights are claims against other people), deals only with circumstances when an individual is claiming a right for himself. But, are there not, as Waldron argues, many cases in which human rights are invoked on another individual's behalf?. For example, there are a number of groups that demand human rights for blacks in South Africa, or university students in China. In the Labour Trilogy cases, governments argue that they are demanding rights for "innocent" third parties, who would be injured unduly by strikes in the public sector. But individuals who do not want to belong to the union, or do not want the union to make certain expenditures, likely see other union members as preventing them from exercising their freedom to not associate. And those who claim positive freedom of association quite possibly see dissenters in the same way. Nevertheless, it can be said that while rights are attached to individuals, individuals are still capable of concern for other's interests.

Still, the charge is made that a liberal theory of rights advocates an individual's freedom of choice regarding rights (in this case to choose either the negative or positive liberty),
even when that choice may be made at the expense of the community. This is, of course, reminiscent of the debate between utilitarianism and rights - that what is best to do is what is best for the majority in the community - the greatest good for the greatest number. But where rights offer a concession to utilitarianism in that they are not absolute, criticisms can be made both of utilitarianism (for example, the impossibility and perhaps immorality of weighing certain factors), and of majority rule (for example, avoidance of "tyranny of the majority"). As is pointed out by Waldron, rights in liberal theory simply set certain standards of democracy, like the freedom to associate, that can not be negated by the majority without negating democracy. However the question remains: are there situations in which society is justified in restricting an individual's right to act 'against' the community?

First, let us define the trade union community in terms that might well be used by individuals like Merv Lavigne. What Lavigne objects to is the 'deviation' from market unionism into social unionism, and the ensuing support of political causes he is fundamentally opposed to. He is not challenging the legal requirement under the Rand formula that he pay union dues. His challenge is directed only to that part of union dues spent on concerns not directly related to collective bargaining. No matter that the union argues it has internal mechanisms by which the members can democratically affect its policy decisions; and no matter that, according to the union, the members are not necessarily associated with the message of the union, that they are free to work against the union position both within and
without its structure.\textsuperscript{167} What Lavigne is, in effect, arguing is that he has the right to disagree (to not be 'tyrannized' by the majority), and to give force to that disagreement by non-payment of part of his union dues. Legitimate union expenses include only those "business" costs of negotiating and administering the collective-bargaining contract, settling grievances and disputes, and the expenses "normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit."\textsuperscript{168}

The Lavigne argument (which is also advanced by Beatty) is compelling. In terms of the individual armed with the discretionary liberal right of freedom of association within the current trade union context (as described in Chapter Three), the best response to the dilemma posed by negative and positive liberty must be found in a balance: a balance between the freedom to associate and the freedom from association; between free ridership and restricting freedom; between positive and negative liberty; and implicitly, between labour and capital. What might this balance look like?

First, recognition must be given to the union concern regarding free riders. The Rand formula has gained wide recognition as a method of balancing union security concerns, and is widely accepted by government, by management, and by organized labour. It is a limit to freedom that can be 'justified in a free and democratic society' on the basis of concerns about free riders and industrial peace\textsuperscript{169}; as Justice Rand noted,
I doubt if any circumstance provokes more resentment in a plant than...sharing of the fruits of unionist work and courage by the non-member.170

The agency shop, according to Beatty, offers both individual choice (which, he argues, is the path to self-realization), coupled with recognition that this form of union security provides some 'insurance' against corporate coercion of employees.

But because union membership is not voluntary in the same way as membership, for example, in a group of company stockholders171, there must be a balance struck in regards to dues expenditures. In defining the 'association' part of freedom of association, Lavigne (and others like him) argue that the union's purpose is to secure job security and economic benefits for its members.

Given this 'market-oriented' view of the trade union community, (and labour's traditional economism) an opt out formula in the same spirit of the Rand formula would seem to stike a fair balance with the agency shop. Those who disagree with non-collective bargaining expenses should have the choice to opt out of them, recognizing, however, the "reasonableness of the requirement of the dissident employee's obligation to make known his dissent".172

Of course, there remains the difficulty of deciding where the line is drawn between collective and non-collective bargaining expenses, especially vis-a-vis contributions to the NDP. The OPSEU argued in the Lavigne case that "some bargaining unit objectives cannot be achieved through collective bargaining and must be pursued in the provincial legislature". Although White J. accepted that political contributions by unions may in a sense
advance collective bargaining causes, "even the probability that workers' interest will be advanced by union support for a specific political party cannot justify" infringing freedom of association.  

Clearly, drawing the line will be difficult and the results hotly debated, but coercing union members into financially supporting political causes they are opposed to (whether or not they are publicly identified with them) places too great a strain on liberal self-realization, and therefore, too great a strain on much needed solidarity.

What this balance does not solve, however, is the dilemma in terms of the way many trade unions leaders (and presumably many members) define the trade union community. Ostensibly, their community is much different than that of the 'Lavignes', and could be seriously threatened by a Beatty-type solution. For example, approximately thirty percent of union members vote NDP in federal elections. If the remaining seventy percent opted out of non-collective bargaining dues (as defined in the Lavigne No.2 case), the union movement would be politically paralysed. While this situation may pose no serious problem to the dissenting individuals, it would to those who hold that trade union interests go beyond (although certainly include) the purely economic.

Galbraith argues that organized workers may provide a "countervailing power" to 'big business', which serves to alleviate social tensions by allowing union members to develop "a greater sense of confidence and equality". In addition, unions, operating under a fair collective bargaining system, establish a much more meaningful liberty of contract between capital and labour. Participation in labour-oriented decision-
making is encouraged and (perhaps most importantly in a democratic plural society), unions act as "politically relevant groups" that facilitate citizen influence on public policy. That union strength not be seriously compromised by free riders or limits to its political actions caused by the exercise of negative liberty is, in this view, of certain importance for democracy. But how is this to be accomplished?

As Waldron argues, a theory of rights does not stand on its own. It accompanies a general theory of moral action which guides the conduct of right-bearers in the exercise of their rights. This moral code is what grants or denies "permission" to act against the community. Individuals have the right to exercise their negative liberty (within certain limits) in the trade union context, but whether or not they exercise that right depends upon their moral beliefs. Trade union members must be convinced that the value of this community is such that it should not be threatened by the right to disagree. If union members work towards a consensus regarding the importance of this kind of trade union community and the potential danger to its purposes posed by the exercise of negative liberty, fewer individuals would be prepared to invoke freedom from association.

But the goal of convincing union members that choice should not be exercised against the community will not be an easy one to attain. Unions must work to overcome what marxists call estrangement. The most important relationship on the "shop floor" is between the worker and the owner of the means of production, the person empowered to hire and fire and direct the processes of manufacture. Thus, the development of worker
solidarity is made difficult when individuals regard each other as competitors for wages, rather than workers with a common group interest.177 By concentrating on "market unionism", trade unions have failed to capitalize on the solidarity of other common interests that potentially exist in a workforce. Certainly the economic common interest is recognized; but work, as Beatty argues, is much more than just economics.

This approach must, of course, be used with care. In view of the current state of trade unions, union elites would be well advised to stay away from controversial issues that are not resolvable through debate, and which inspire much emotion-based rhetoric (like the issue of abortion). The objective is to agree on a perspective that would "concentrate on the quality of people's lives and how those lives could be improved, rather than on entitlements that derive from people's statuses", (to become goal oriented rather than status oriented)178, but the process will of necessity be incremental, as is any major attempt at change.179 This approach would have to be assessed in the light of experience, and may have to be modified, or even abandoned if it is unsuccessful. Of course, the conceptual dilemma would remain, but the legal and political ramifications flowing from the dilemma would be considerably less relevant.

'Less relevant' that is, in that no 'solution' to the trade union dilemma is foolproof. There will probably always be those who do not agree with their union's aims, and governments will retain the ability to pass legislation encroaching on union "rights", although that is perhaps less likely if unions become more politically oriented. But if all but a few members attached
importance to the well-being of the trade union community, then the dilemma unions face over negative and positive liberty would be positively- in fact significantly- effected.

Assuming the right to disagree will remain, this response may be the best one, the best route for union leaders to take if they are to protect their community from the exercise of negative liberty. Union leaders need to present a special case to their members that in this community, the right to invoke negative liberty is outweighed or outbalanced by the community costs of exercising that right. Done successfully, most individuals will not wish to exercise negative liberty claims. Until or unless there is some change in the moral beliefs accompanying the exercise of freedom of association in the trade union context, the dilemma facing trade unions over negative and positive liberty will remain a serious threat to the trade union movement that wishes to accomplish political goals.
ENDNOTES


4. As Frank Scott puts it, "that union is strength is a maxim too obvious to need proof".


6. In other words, freedom of association is not a collective right, a right which would accrue to a group as a group (such as trade unionists).


10. von Prondzynski 1.

   There are, of course, other rights in liberal democracies which could not be characterized this way. For example, participation rights such as the right to vote, or language rights in Canada, would not fit into this category.


15. As Berlin writes, human nature under positive freedom is divided into the "dominant self", identified with reason, with a "higher nature", and "with the self which calculates and aims at what will satisfy it in the long run"; versus the subordinate self, irrational, impulsive, concerned only with the pursuit of immediate pleasures. Berlin 150.

16. Berlin 150.

17. MacCallum 324.

18. Berlin 150.

19. MacCallum 323.

20. MacCallum 331.

While it is true that freedom results for the pedestrian when cars are legally restrained from entering the crosswalk when he is there, freedom also results from the legal restraint on the pedestrian to cross only in the crosswalk, no matter how inconvenient that may be.


25. MacCallum 313.


By sharing in the benefits, non-union employees are not taking away from or adding to the costs of the union that sought the benefit.


33. Gall quoted in Cavalluzzo 191.

34. Beatty 123.

35. Lavigne v. Ontario Public Service Employees Union et al. [1989], 31 O.A.C., 59.


37. The non obstante clause (section 33) provides an opportunity for the federal or provincial governments to set aside judgments of the court, or to protect legislation from judicial scrutiny and review. Fundamental freedoms, including freedom of association, are subject to section 33.


39. Government defined as the executive and administrative branches of government, "rather than all the legal structures and institutions which exercise some coercive authority of the state", i.e. excluding the judicial branch. David Beatty, "Constitutional Conceits: The Coercive Authority of Courts," University of Toronto Law Journal 37
40. Beatty, *Constitutional* 186.

The more radical critique is outlined in Hutchison: "In the Charter vision, the main enemy of freedom is not disparity in wealth or concentration of private power, but the state."


Note this is not Weiler’s opinion.

42. Hutchison 292.

43. Retail, Wholesale 175.

44. In other words, the union believed that Dolphin was in effect "strike breaking" because Dolphin employees were doing the work of Purolator employees by delivering Purolator packages within their area.

45. In his words: "However, the Charter did not apply to private litigation between purely private parties in the absence of any exercise of or reliance on government action that would invoke the Charter."

Retail, Wholesale 175.

46. Hutchison 292.


48. Retail, Wholesale 177.


50. Beatty, *Putting* 44.

51. Free collective bargaining only began in Canada in 1944 under a federal government order in council (#1003). It "established legal recognition of the rights of private sector workers...to organize, to bargain collectively, and to strike, and backed these rights with state sanctions against employers who refused to recognize and bargain with trade unions". The provinces (with the exception of Quebec) adopted broadly similar legislation.

52. For example, when police attempted to break through picket lines, striking workers blockaded all the streets in downtown Windsor and surrounded the plants with their cars-parked, locked, and abandoned. 


54. Quoted in Panith 10.

55. Labour, he argued, is the subordinate force "in a society whose economic life has private enterprise as its dynamic". 
Quoted in Panitch 60.


57. Arlington 263.

58. i.e. neither denying nor requiring a union security clause in a collective agreement.

59. Judge Henry interprets Dolphin Delivery to define private as "neither of the parties relied on a statutory provision, nor was there any governmental presence or intervention". 
Arlington 266.

60. Re Bhindi and B.C. Projectionists, Loc. 348. [1986], 29 DLR (4th) 47.

61. Bhindi 54.


63. Lavigne was actually concerned with application of union dues to purposes other than collective bargaining, but the challenge was on freedom of association and expression grounds.

64. "...charged by statute with the task of assisting the Minister". 
Quoted in Arlington 267.


66. Section 1 of the Charter guarantees the rights and freedoms set out in it "subject only to such reasonable limits...as can be demonstrably justified in a free and democratic
67. Lavigne [1986] 324-325. The issue in the Lavigne case regarding protection of the objectives of associations will be dealt with below.


69. ie. not infringed by paying union dues which could be used for non-collective bargaining purposes.

70. Cavalluzzo 207.

71. Gall 248.

72. Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home et al. [1983] 4 DLR (4th) 231. The Act in question extended the life of collective agreements covering public sector employees and therefore had the effect of depriving workers of the right to representation by the union of their choice, and the right to bargain collectively and to strike in regard to non-compensatory matters.

73. Broadway Manor 232.

74. Cavalluzzo 191.


76. All references in this section come from the three cases mentioned in note 75.

77. See note 75.

78. Here McIntrye is presumably referring to the American Supreme Court case Citizens Against Rent Control v. Berkeley, in which a new doctrine that "whatever action a person can [lawfully] pursue as an individual, freedom of association must ensure he can pursue with others" was advanced by the court. This case arose when the city imposed a financial limit on individual contributions to committees formed to support or oppose referendum decisions, but no limit on individual's action alone. The judgment hinted at protection of the fundamental objectives of an association, but only when individual and collective action could be correlated—so it is not clear how the court would react in cases like "right to strike" where there is no individual/
group correlation.

79. See note 75.
80. See note 75.
81. Weiler also notes that of the six Supreme Court judges involved (so decision made only by plurality of court), three from the majority side have retired and been replaced. Weiler, "The Charter" 11.
83. See note 75.
84. See note 75.
85. The Lavigne case has an interesting predecessor in British Columbia. In a 1963 case, the Oil, Chemical and Atomic Workers International Union v. Imperial Oil Ltd. and the Attorney General of B.C., a majority four to three decision rendered by the Supreme Court declared that an amendment to the labour code which prevented trade unions from using the funds contributed to them through dues for political purposes did not derogate from fundamental political freedoms (even though the legislation was passed after a 1960 election in which the Social Credit party faced a reduced majority, and unions were openly supporting the NDP). The majority argued that "this legislation could be regarded as preventing trade unions from exploiting for partisan political purposes rights conferred on them by the province for the purpose of collective bargaining." Judson J, in dissent, argued the act was not legislation in relation to labour relations but legislation in relation to the political activity of a trade union and therefore outside provincial powers. Abbott J., also dissenting, argued that the legislation did derogate from political freedoms. Peter H. Russell ed., Leading Constitutional Decisions, 4th Edition (Ottawa: Carleton University Press, 1987) 354.

The two lawyers who argued the case for the union, Frank Scott and Thomas Berger, both conclude that the judgment was "an appropriate comment on lawmaking in a capitalist society: there was no equivalent prohibition against contributions by private corporations." Scott xi.


88. The reason for the changed nexus was that Lavigne was not challenging the union security clause itself but the expenditures of union dues for causes he did not agree with.


90. Lavigne [1988] 64.


Don Jordan, of Jordan and Gall (a Vancouver firm that argues on behalf of advocates of negative liberty) believes that the doctrine of government action will be made much clearer in the upcoming Supreme Court judgments on mandatory retirement.


93. Marsh 1155. This legislation was passed under federal government emergency powers.


95. For instance, Beatty argues the most prominent reason for increased fairness in the process is "the formal enfranchisement and increasing influence of all segments of the labour force in the legislative and executive processes of government." Beatty, *Putting* 45.


97. This seems especially true in the face of the Meech Lake Accord.

98. Marsh, Vol.1 343. The public sector unions would come to play a significant role because government legislation aimed directly at them was the subject of the first freedom of association rulings.


The BCFL brief also called for social and economic rights, and declared that while they were prepared to support entrenching rights, they were concerned about the way judges were appointed without any public scrutiny.

103. The CLC joined with the CCF in 1962 to form the NDP.


105. Robinson declared the right to strike was deliberately left out of the amendment because "we are dealing with the fundamental incidence of freedom of association". Canada 69.

106. Canada 70.

107. The amendment was defeated 20 to 2 - the two NDP members members (Lorne Nystrom and Svend Robinson) were the only MP’s in favour.

108. Another way of tracking the lack of action on the part of unions is to note how many times they are referred to in books about the Charter. For example, in a) Roy Romanow, John Whyte and Howard Leeson, Canada ...Notwithstanding: The Making of the Constitution 1976-1982 (Toronto: Carswell/Methuen, 1984), one reference to labour, but not to do with the Charter.

b) Edward McWhinney, Canada and the Constitution: 1979 1982 (Toronto: University of Toronto Press, 1982), no references to labour.

Compare this to the number of references to women’s and native groups:

a) Romanow- women 6, natives 13.

b) McWhinney- women 5, aboriginals 8.


110. Panitch 30 and 100.

There were ten instances of back to work legislation from 1965 to 1969, sixteen from 1970 to 1974, twenty-five from 1975 to 1979, and twenty-two from 1980 to 1984.

112. Mandel 185.


114. Panitch 104.


116. This theory is also confirmed by David Rice, who wrote the B.C.F.L. brief to the Joint Committee. Rice, personal interview.

117. The most notable of which was the NDP premier of Saskatchewan, Allen Blakeney.

118. Romanow 109.

A Gallup poll done in the spring of 1981 showed 62% of Canadians supported the idea of a charter to be included in the patriation plan, and only 15% opposed. Support was generally universal across all regions. Reg Whitaker, "Democracy and the Canadian Constitution," And No One Cheered eds. Keith Banting and Richard Simeon (Toronto: Methuen, 1983) 254.

119. Mandel 186.

Rice agrees: he notes that the "issue didn't seem to be of major consequence". Rice, personal interview.


However, there is no available evidence that the CLC and the NDP position on the Charter were different.

121. Which they do not- only approximately 30 percent of union members vote NDP federally.

122. This information supplied by Paul Cavalluzzo, a lawyer who often acts for trade unions, and writes about these issues. Personal interview, Paul Cavalluzzo, August 30, 1989.

123. Wage and price controls are comprehensive government restrictions on the maximum rate of increase of wages and prices during a specified time period. In response to exceptionally high inflation rates in 1974 and 1975, the federal Anti-Inflation Act established a three year
control system (from 1975 to 1978). Wage guidelines were binding on all firms with over 500 employees, on all federal employees, and (with the co-operation of most provincial governments) on the majority of public sector employees. Profit-margin controls were aimed at the price and cost markup of large firms.

Marsh, Vol. 3 2271.

This action inspired a CLC revolt, beginning with the withdrawal of CLC members from the federal government appointed Economic Council and Labour Relations Committee in March of 1976.

V. Pearson, "If you can't beat 'em, quit 'em," Macleans 89 April 5, 1976: 22.

Then in the early 1980s, the federal (and many provincial) governments also moved to limit the bargaining power of public sector unions through legislation such as the Public Sector Compensation Act 1980-81-82.

In response to the question of why union lawyers did not warn the CLC of concerns about freedom of association and unions, Cavalluzzo declared that first, "unions did not seek our advice". Second, because of many of the decisions of the Supreme Court under the Bill of Rights (particularly the Oil, Chemical and Atomic Workers case described in footnote 87), lawyers did not foresee the judicial activism (as compared with rulings under the Bill of Rights) present under the Charter.

Cavalluzzo, August 30, 1989.

Joe Weiler, a law professor at the University of British Columbia, who was involved in the Charter negotiations. Joe Weiler, personal interview, August 15, 1989.

Quoted in Panitch 95-96.

Whitaker 255.

Beatty, Putting 4.


Quebec, as the only province not to agree to adoption of the Constitution Act of 1982, adopted instead Bill 62, which in effect invokes the override retroactively and for the future, declaring that all such legislation is operative despite section 2 and 7 to 15 of the Charter. Additionally, Quebec invoked the notwithstanding to put French language rights legislation (Bill 178) in place.


134. One of a number of half page advertisements inserted in major Canadian newspapers including the *Globe and Mail* and the *Vancouver Sun*. *Vancouver Sun*, 2 February 1989: B2.

135. Mandel 207.


137. Karl Marx 147.

138. Marx 146.

139. Marx 140.

140. Waldron 129.

141. Waldron 129.


143. Marx 146.


145. Waldron 139.

146. Marx 140.

147. As Marx writes, man "has a life both in the political community, where he is valued as a communal being, and in civil society, where he is active as a private individual." Marx 140.

148. Waldron 132.

149. Hutchison 279.

150. Mandel 58, 185.

151. Panitch 61.

152. As Justice Rand called for.
Panitch 61.

Panitch goes on to argue that the rulings in the Labour Trilogy cases "juridically and ideologically provided space for a much broader assault on trade union freedoms". For example, John Bullock, president of the Canadian Federation of Independent Business, notes that the ruling left his group free to pursue their objective to limit strikes in the post office. Panitch 65.

Hutchison 296.

Beatty, Putting 11.

Mandel notes that the Lavigne decision in the Ontario High Court "showed just how far the fantasies of Beatty are from the actualities of Charter 'participation' and 'conversation'".

Mandel 211.

For example, "a law enacted by a legislature which empowers some employees to compel others to join an association against their will is just as offensive to a person's freedom of association as rules imposed by employers which interfere with the ability of their employees to form unions of their own choosing."

Beatty, Putting 124.

Here Beatty makes a recommendation similar to that of the Ontario High Court—support for collective bargaining, but not for (for example) the independent state of Palestine.

Beatty, Putting 122-127.

"Pragmatic pluralists" is the label Weiler gives to this school of thought.

Weiler, "The Charter" 60.

Although Lavigne may have replied that the cost to shareholders to opt out of a corporation is certainly less than his to opt out of the union.

Alan Cairns, August 9, 1989.

Weiler, "The Charter" 40, 60.

Waldron 184.

Marx 145.

Waldron 191.

Waldron 192.

Berlin 150.
Quoted in McIntosh 24.

168. Re Lavigne and OPSEU (No.2), 109.

Those non-voluntary union members involved in union security cases (like Arlington Crane) presumably would argue that they have the right to disagree with any form of union community, or any form of association that limits their negative liberty.

169. It would be difficult to justify the closed shop under these criteria. An argument could be advanced that the union shop (which requires union membership as well as dues paying) would be a good compromise, but in reality, a reluctant union member may disrupt the trade union much more than a reluctant dues payer, so the union would be better served by the requirement only to pay dues.

170. Re Lavigne and OPSEU (No.2) 100.

171. Here I am referring to shareholders in a corporation, not ratepayers. The relationship between a monopoly utility (such as B.C. Telephone) and its customers is comparable in some respects to that of an individual and his union.

172. Re Lavigne and OPSEU (No.2), 103.
The Court ruled in this case that the opt-out formula was the fairest way to handle dissent (versus Lavigne's argument that members be required to "opt-in").

173. Re Lavigne and OPSEU (No.2) 117.
Probably much less open to debate is the Court's decision that financial support to a group fighting for an independent state of Palestine would an "opt-out" expense.


176. Waldron 194.


179. Seymour Martin Lipset's study of democracy in the International Typographical Union looks at the effect of a number of different variables in an attempt to explain the success of democratic self-government in that particular union. In particular, the "factors affecting membership interest and participation in union affairs" and "factors relating to law, legitimacy and value systems in unions" may offer some valuable lessons to trade unionists working for change. Lipset 466-467.
### TABLE OF CASES


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