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Collective Bargaining and the Charter: Assessing the Impact of American Judicial Doctrines

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Résumé de l'article

Cet article cherche à évaluer l'effet de la jurisprudence américaine sur les décisions récentes rendues en vertu de la *Charte canadienne des droits et libertés* eu égard aux lois canadiennes sur la négociation collective. À ce sujet, nous nous demandons si la Cour suprême du Canada s'efforce d'établir une jurisprudence «faite au Canada» ou si elle s'inspire profondément de la jurisprudence américaine. La réponse à cette interrogation a des impacts sérieux sur l'avenir du droit du travail au Canada.

Nos conclusions sont nécessairement sujettes à révision vu le nombre limité d'arrêts de la Cour suprême en ce domaine. Même si l'influence américaine semble avoir été présente, il faut noter que la Cour suprême n'a pas entièrement adopté le raisonnement de la jurisprudence américaine. Cette approche s'explique par l'effet combiné des différences institutionnelles et socio-politiques entre les deux pays, différences que la Cour suprême n'a pas manqué de souligner. Nous soutenons cependant que la décision à venir dans l'affaire *Lavigne* c. *O.P.S.E. U.* (N.D.L.R. au moment de mettre sous presse, cette décision a été rendue) est très importante à cet égard. En effet, l'approche adoptée par la Cour suprême dans cette affaire montrera jusqu'à quel point la jurisprudence américaine influencera le statut constitutionnel des lois actuelles visant la négociation collective au Canada.

Dans la première partie de cet article, nous examinons les fondements constitutionnels des deux régimes de droit du travail à la lumière des valeurs fondamentales qui leur sont sous-jacentes. Pour ce faire, nous analysons et critiquons les travaux de S.M. Lipset sur les différences entre la culture politique du Canada et des États-Unis. Même si nous questionnons la signification des différences identifiées par Lipset, notre propos est plutôt d'explorer comment la *Charte canadienne des droits et libertés* va influencer ces différences à court et à long terme.

Dans la seconde partie de cet article, nous faisons une revue du régime du droit du travail sous la Charte tel qu'articulé par le régime judiciaire canadien et en particulier par la Cour suprême. Notons qu'en y recherchant les influences américaines, nous avons pris soin d'examiner de très près la manière dont les cours canadiennes ont traité les précédents importants dans la jurisprudence américaine. Les résultats mitigés de cette analyse nous amènent à conclure, sous toute réserve, que l'affaire *Lavigne* va probablement indiquer l'étendue de l'influence américaine sur les lois canadiennes visant la négociation collective par l'interprétation et l'application de la Charte.

Collective Bargaining and the Charter

Assessing the Impact of American Judicial Doctrines

Donald D. Carter
and
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This study analyses the impact of American judicial doctrines upon recent Charter decisions relating to Canada's collective bargaining laws. The first section of the paper explores the constitutional foundations of the Canadian and American labour regimes in terms of the fundamental values entrenched in their respective constitutional arrangements. The second section of the paper is an overview of the Charter era labour regime as it has been articulated by the Canadian judiciary and, in particular, by the Supreme Court of Canada. It is the mixed results of this part of the investigation that led us to some tentative conclusions about the impact upon Canadian courts of American judicial influences.

It has become a truism over the last eight years that the adoption of the Canadian Charter of Rights and Freedoms in 1982 has irrevocably altered the nature of the Canadian legal system. Now Canadian laws, both federal

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and provincial, must be read in light of the fundamental guarantees of the Charter, giving the Canadian judiciary a new power to override government legislation. Recognizing this new reality, different interest groups within Canadian society have embraced the language of constitutional rights as a means of promoting and protecting their interests.

From its very inception the Charter has been a controversial document. It is a clear break with Canada's constitutional past — a break so wide as to leave the judiciary with few guide-posts with which to lead the country through what political scientist Peter Russell has come to call "Charterland" (Russell 1985:367). An oft repeated concern stemming from this initial paucity of constitutional precedents has been the question of where the judiciary will look for such guidance (Smiley 1983). The most obvious answer is that the American experience will begin to play an important role in the meaning the Canadian judiciary chooses to give to the Charter. After all, Canada and the United States share the North American continent, and the United States is an English speaking liberal democracy with many values and institutions at least resembling those found in Canada. The American Bill of Rights, therefore, with its longer history and its substantial body of case law, has the potential to become a prime influence over the direction of Canadian law and politics over the next few years.

As the title suggests, this study is an attempt to analyze this potential impact with reference to Canadian collective bargaining laws; that is to say, to the body of laws that govern the relationship between organized labour and capital (whether private or state owned). In essence we are asking whether, in terms of collective bargaining law, the Canadian courts are creating a 'made in Canada' jurisprudence or whether, through the application of American jurisprudence, they are encouraging a convergence between the legal regime that has been in place in the United States since the end of World War II and what can now be called the Charter era labour regime in Canada.

The implications of this question could prove to be quite profound for, if there is such a convergence in the legal framework of these two labour regimes, it would belie the divergence between the two labour movements in other areas that is often noted (McIntosh 1989; Lipset 1989; Coates, Arrowsmith and Courchene 1989). In recent years the Canadian labour movement has shown much greater strength than the American labour movement which has been steadily shrinking for more than a decade (Coates, Arrowsmith and Courchene 1989:19). On the political front Canadian labour has attempted to launch campaigns against the Canada-U.S. Free Trade Agreement, the federal government's Goods and Services Tax,

as well as a number of other government initiatives ranging from a new abortion law to its day-care policy. In the United States organized labour has been far too weakened by both government policy and the attacks of private capital to take any significant action on the political front (Moody 1988; Ferman in Summers 1984).

It is fair to say that prior to 1982 organized labour in Canada had it easier than did its American counterpart in terms of the legal framework in which it operated (Weiler 1980). At the same time both labour movements suffered significant losses in the 1980s as the recession brought about demands for contract concessions from capital and restrictive legislation from the state (Panitch and Swartz 1988). It is within the context of the political battles of the 1980s that the Charter era law labour regime began to take shape.

Trade unions were the first to recognize the potential of the Charter by taking governments to court. They argued that newly enacted legislative restrictions imposed upon the existing collective bargaining order violated the Charter's fundamental guarantees (*Reference re Public Employees Relations Act (Alta)* (1987), 87 C.L.L.C. 14,021). Soon after, business began taking unions to court arguing that previously accepted trade union practices were no longer legal (*Arlington Crane Service Ltd.* (1989), 89 CLLC 14,019). At the same time, individual employees, with either the implicit or explicit support of business, also turned to the Charter arguing that the collectivist practices of trade unionism violated the individual rights that constitute the bulk of the Charter's guarantees (*Baldwin* v. *BCGEU* (1986), 86 CLLC 14,059; *Lavigne* v. *OPSEU* (1989), 89 CLLC 14,041). Freedom of association, freedom of expression, freedom of conscience, equality rights, and a number of other Charter guarantees were cited in case after case as the courts were asked to begin to determine how the Charter would alter union-capital-state relations in the future.

A recently published digest of Charter cases concerning collective bargaining lists 115 cases across the country at all levels of the court system between 1982 and 1990 (Ryan 1990). Obviously it is beyond the scope of a study such as this to adequately canvass all of these cases to determine the impact of American judicial doctrines on the decisions rendered. Instead, the cases to be examined deal with some of the most fundamental aspects of the Canadian labour regime. It seems reasonable to assume that, if the Canadian judiciary is beginning to take its cues from the American jurisprudence, it should be demonstrable with reference to these fundamental questions concerning freedom of association, freedom of expression, and the limits of union rights.

The heart of the paper is essentially an overview of the Charter era labour regime in Canada. This exercise presents us with a perplexing methodological dilemma. While we are certain of our quarry — the presence of American judicial doctrines in labour-related Charter cases — we are somewhat uncertain how to take the measure of that quarry. Obviously, we are interested in more than a textual exegesis of the relevant decisions, yet there is the danger of erring in the other direction and attributing influences that may not be legitimate.

Any conclusions based on this assessment of the influence of American judicial doctrines upon these Charter decisions are necessarily tentative. The Charter is but nine years old, there are still too few Supreme Court decisions on labour issues, and the Court's approach to the Charter is still far from clear. Indeed, a recent study suggests that, after an initial spurt of judicial activism, the Supreme Court of Canada may have ended its honeymoon with the Charter and that Canadians can expect an increasing degree of judicial restraint with the Court becoming more reluctant to strike down legislation or expand the Charter beyond its written contents (Russell and Morton 1990: *passim*).

Given the admission that any conclusions we reach will necessarily have to be taken as somewhat speculative this study must therefore be seen as preliminary. To reiterate, the prime motivation for pursuing the questions outlined above is to begin the investigation into the changing nature of Canadian jurisprudence in this new era of the Charter. The Constitution Act, 1867 (formerly the British North America Act, 1867) guaranteed Canada a "Constitution similar in Principle to that of the United Kingdom", and for 115 years Canada got by as a result without a constitutional rights document. Now, however, we have jumped on the rights bandwagon with the Charter and the upshot is that we have added a dimension to our politics that is of significant but as yet indeterminate import. Our hope here is to shed a little light on just one aspect of the Charter's impact.

THE POLITICAL AND LEGAL FRAMEWORK FOR TRADE UNIONS IN CANADA AND THE UNITED STATES

Fundamental Values and Constitutional Arrangements

This study is primarily interested in the changing legal context in which trade unions in both Canada and the United States find themselves. It should be noted, however, that the law is itself a political creature. Law,

whether it be in the form of statute, common law, or constitutional law, is a reflection of the society of which it is a part. At the same time, the law also serves to reinforce and legitimize the particular structures, institutions, and values within that society. Indeed what Clauswitz said about war holds true for the law; it is politics by different means.

Thus, in attempting to sketch the development of the legal context in which organized labour operates in the two countries, one cannot lose sight of the political context which gave rise to our labour laws. The history of trade union development in Canada and the United States is essentially a history of a struggle for power and legitimacy by working people. The laws that govern their relationships with capital and the state reflect and reinforce the relative power and legitimacy of the actors in what can be characterized as a labour regime (Huxley, Kettler and Struthers 1986; McIntosh 1989). It is not the intention here to present a detailed look at the history of trade unionism in the two countries as that task has been better done elsewhere (Davis 1986; Moody 1988, Heron 1989). In legal terms much of the Canadian labour regime is clearly modeled on the American experience with the Wagner Act, although it must be stressed that over time some important differences have evolved in Canada.

The first task of this part of the study, then, is to attempt to come to grips with the social and political contexts of the two nations being looked at. If some insight into the "political cultures" of Canada and the United States can be gained, a better understanding of the subsequent collective bargaining systems can be arrived at.

This exercise leads, however, into some very murky territory for the very phrase "political culture" does not have any one agreed upon meaning within the disciplines of sociology or political science. If the term has an essence, it can be said that the attempt to characterize a nation's political culture revolves around identifying the broadly shared values or ethos that constitute the manner in which a nation's citizenry tend to view themselves, their polity, and the world in general. Simply, though somewhat crudely, the concept is captured in the notion of *weltanschauung* or "world view" that comes to us from the German sociologists.

What is most important here is the recognition that such values that make up a nation's political culture are tendencies derived from the aggregate of a population which may display a wide range of values on an individual basis or within sub-groups of a particular nation. Indeed, as is argued below, it is perhaps the most disturbing feature of some political culture arguments that they tend to look solely at the aggregate and tend to

ignore the variations that more often than not underlie the data examined. This methodological problem is particularly important when discussing societies such as Canada and the United States.

To begin with, since both countries are federal nations, formal political power is divided amongst geographically differentiated sub-units. Secondly, the diversity within the populations of both nations simply cannot be ignored in favour of aggregate data. Simple observation of both countries can clearly demonstrate that Western Canadians are different from Quebecers who are different from Atlantic Canadians and that Texans are different from Californians who are different from New Yorkers. The prevailing mythologies of Canada-as-mosaic and the United States-as-melting-pot are just that, mythologies. Like all myths there is some degree of truth, but Americans are not as homogeneous as the myth implies and the Canadian mosaic is not as tolerant and accepting as has been asserted.

These problems associated with attempting to describe an over-arching set of political values within a nation does not necessarily invalidate political culture arguments. They do, however, require social scientists to be conscious of the limitations of the applicability of their generalizations. The values are "tendencies" and must be seen as such. To amalgamate all the data and create, say, a proto-typical American or a proto-typical Canadian is to engage in a kind of distortion that can call into the question any conclusion that is asserted.

Perhaps the greatest strength of political culture analyses is that they are by definition comparative in nature. When, for example, Lipset says that Americans society is "liberal" and Canadian society is "conservative", these labels are not to be taken in absolute terms. What is being asserted is that Canadians are more conservative in their social values than are Americans, who are more liberal than Canadians. Even though it might be possible to discuss in abstract terms the values that would be held by a perfectly liberal person, such a discussion would not allow the social scientist to classify the values held by any community except to say that they do not meet the absolute criteria set out in the abstract model.

Of interest here is the most recent work by Lipset on Canadian and American values as they relate to trade unions and, by extension, to the system of collective bargaining laws in each country. Such laws, as argued above, can be seen as manifestations of the broad set of values that Canadians and Americans tend to share amongst themselves. In turn, these laws reinforce and legitimize the values that they reflect.

Like all political culture arguments, Lipset's is historical in nature. Political culture is seen as a fluid thing; temporal by definition. Lipset

argues that the formation of both Canada and the United States results from a single 'formative' event — an event of such profound impact that its effects are still felt today. In Lipset's argument that event is the American Revolution. Lipset opens the latest version of his argument in the following manner:

> Americans do not know but Canadians cannot forget that two nations, not one, came out of the American Revolution. The United States is the country of the revolution, Canada of the counterrevolution. These very different formative events set indelible marks on the two nations. One celebrates the overthrow of an oppressive state, the triumph of the people, a successful effort to create a type of government never seen before. The other commemorates a defeat and a long struggle to preserve a historical source of legitimacy: government's deriving its title-to-rule from a monarchy linked to church establishment. Government is feared in the south; uninhibited popular sovereignty has been a concern in the north (Lipset 1989:1).

It is from this picture of revolutionary America and counterrevolutionary Canada that Lipset begins to paint his picture of the modern political values that the two nations tend to hold. Lipset is careful to emphasize that the political cultures of these two nations have not remained static over the past two hundred years. The United States is less fearful of government involvement than it once was, and Canada (especially with the adoption of the Charter of Rights in 1982) has become more accepting of an individualistic way of thinking (Lipset 1989:3).

> The changes that have occurred still leave many differences, however. The United States and Canada continue to vary along lines that flow from their distinctive national traditions ... The United States is still more religious, more patriotic, more populist and anti-elitist, more committed to higher education for the majority and hence to meritocracy, and more socially egalitarian then Canada ... It remains the least statist western nation in terms of public effort, benefits, and employment (Lipset 1989:37).

Thus, Lipset identifies four main characteristics that describe the value tendencies of Americans: antistatism, populism, individualism, and egalitarianism. Canadians are seen to embody the opposite number for each of these characteristics: statism, traditionalism, a group orientation and a tolerance for hierarchical structures (Lipset 1989:26). These differences are, as should be expected, reflected in the constitutions of each of the two countries.

Following a profound ideological debate amongst the founding fathers, the American Constitution was amended in 1791 by the addition of ten new articles which has become popularly known as the American Bill of Rights. These amendments spell out the basic liberties that are to be protected and put restraints on the ability of the state to infringe individual liberty. Even prior to 1791 the Constitution of the United States reflected

much of what Lipset calls "the American ideology"; the preamble invests the authority of the constitution in the will of people and their desire "to form a more perfect Union, establish Justice ... and secure the Blessings of Liberty to ourselves and our Posterity". In Lipset's terms the Constitution of the United States is a reflection of the liberal ideology upon which the nation was founded and at the same time serves as a means of reinforcing and legitimizing those values. This observation is particularly true of The Bill of Rights which has promoted the overriding individualistic, antistatist ideological tendencies of Americans.

On the other hand, the Canadian constitution reflects an entirely different set of political values according to Lipset. Where the American constitution appears to view the state as a necessary evil, the Constitution Act of 1867 (formerly the British North America Act, 1867) sets its goal as "peace, order, and good government". While it has been argued that the Canadian constitution reflects nothing more than a political compromise between competing elites (Black 1975), a new body of literature argues convincingly for the ideological content of not only the Confederation debates but also of the Constitution Act itself (Resnick 1988; Smith, J. 1988; Smith, P. 1987).

Again where the American constitution pays homage to an ultimate popular sovereignty, Canada's constitution outlines the supremacy of Parliament and the importance of the monarchical (and thus hierarchical and aristocratic) tradition. The original constitutional documents make no mention of individual rights and invest ultimate authority in the institutions of the state. This, argues Lipset, is a reflection of Canada's 'counterrevolutionary' past — Canada as an attempt to counter the liberalism of the U.S. by entranching a conservative, more paternalistic set of institutions (Lipset 1989: *passim*).

When looking at the respective constitutions as reflections of commonly held values, it cannot be stressed enough that one is dealing with tendencies as opposed to absolutes. The above characterization of each nation should not lead one to conclude that Canadians place little or no value on individual liberty or that Americans consistently resist any type of state led activity. Such characterizations are at best broad generalizations about each society.

Despite the generalizations made by Lipset and others, it must be said that the differences between the two nations in terms of the values expressed by the populations are quite small — indeed, it could be said that the degree of value-convergence between the two societies is greater than the degree of divergence. If Lipset's analysis has any great flaw, it lies in the fact that

when one goes searching for differences one has assumed exist there is a tendency on the part of the social scientist to emphasize those differences and de-emphasize the similarities.

Readers should also note that the national differences reported by crossborder opinion polls are frequently small — five to ten percentage points. Given the structural similarities between the two North American societies and the fact that they differ in comparable ways from Britain and much of Europe, there is no reason to anticipate large differences... As noted, it is precisely because the two North American democracies have so much in common that they permit students to gain insights into the factors that cause variations (Lipset 1989:xvi-xvii).

What cannot be lost sight of in this kind of analysis is what is best termed the temporal-historical element. Values, even fundamental values, change over time and each generation adds a new kind of twist to the set of values and ideological predispositions that they inherit from their forebears. Of equal importance (and something that it is fair to say that Lipset ignores) is the fact that institutions themselves also change over time. While it may be true that the constitution of Canada invests ultimate authority in the institutions of the monarchy, it is ludicrous to suggest that either Buckingham Palace or Rideau Hall wields anything more than ceremonial power over the politics of the nation. Liberal democratic principles in Canada are too well entrenched to tolerate a monarch's or a Governor-General's interference in the operations of Parliament.

Similarly, the balance of power between institutions also shifts through time. In the U.S. the Senate has eclipsed the power of the House of Representatives and in terms of the federal arrangement, the central government in Washington, D.C. has grown in power at the expense of the state capitals. In Canada, the highly centralized state of the late nineteenth century has been replaced by the comparatively stronger provinces of the late twentieth century.

Within the realm of collective bargaining law, a very important difference between the two countries must be noted. The important pieces of legislation governing the American labour regime are federal statutes such as the National Labour Relations (Wagner) Act of 1935 and the Taft-Hartley Act of 1947. The division of powers in the Constitution Act of 1867, on the other hand, gives the Canadian provinces responsibility for labour law and has resulted in eleven labour regimes demonstrating a significant divergence in detail. Thus, one of the most important questions concerning the Charter is whether it will act to eclipse provincial power and create an internal convergence between the provincial labour regimes as well as a convergence between the American and Canadian regimes.

What made the Charter so controversial at the time it was adopted was the very fact that it did constitute such a break with Canada's constitutional past. The Charter can be seen as an outgrowth of the post-World War II fascination with rights and the language of rights. Beginning with the United Nations Declaration, the language of rights has exploded on the political and social scene throughout the world and it became increasingly important in all nations to pay at the very least lip-service to the notion of protecting the rights of their citizens. Yet, in a parliamentary democracy such as Canada, the ultimate authority for such protection rested with Parliament, not with a constitutional document, nor a judiciary, nor even with the citizens themselves. For this reason the Charter profoundly changes Canadian politics and law. In essence it creates within the judiciary a new focus of power out of the reach of either the federal Parliament or a provincial legislature.

On a sociological level it must be realized that Canada is not the same country that it was prior to 1945. The simple dichotomy of Canada as constituting an agreement between French and English linguistic groups no longer holds true. While the linguistic cleavage is still significant, Canadian society is also cross-cut by cleavages based on gender, ethnicity, race, sexuality and region to name but a few. Thus, it is wrong to see Canada as consisting of two homogeneous groups. It is the increasingly heterogeneous nature of Canadian society that makes a document like the Charter important as an element that binds together disparate communities by emphasizing their shared identity as rights holders. Indeed, it may be the Charter that comes to be the one element of the individual Canadian's identity that he or she shares with other Canadians. Again it can be said that this is one element that Lipset tends to underplay, while other authors have sought to explore it more fully (Williams and Williams 1990:106-128).

The strongest political opponent to the entrenchment of the Charter in the 1981-82 period was Manitoba's Premier Sterling Lyon. In essence he argued that entrenchment of a constitutional bill of rights would "Americanize" the Canadian political system, leaving immense power in the hands of the judiciary, dismantling Parliamentary supremacy and creating a system whereby social policy and moral standards are no longer in the hands of Parliament. Lyon concluded:

> Our constitutional history ... our governmental system, our federal structure, our cultural needs, our social ideals all dictate the answer. Our elected and accountable representatives must retain the ultimate authority to define and reflect our basic social values as a nation. (CICS 1980:474-475).

Academic critics were no less harsh in their judgement on the Charter. Again, one of the prevailing themes in much of their work is the potential of Americanizing the Canadian political and judicial processes.

[T]he damage done to our legal, political and constitutional order outweighs the gains ... The Charter imposes on the judiciary a set of responsibilities ill-equipped to deal with. And by embodying in the constitution important provisions which were hastily drafted, we have done what has been done in an inexpert and unsophisticated way (Smiley 1983:93).

The literature on the entrenchment of the Charter is vast and varied. Similarly, commentaries about its future impact continue at a pace that is enough to bewilder the most dedicated constitutionalist (Banting and Simeon 1983; Romanow, Whyte and Leeson 1984; Milne 1989; Mandel 1989; Shepard and Valpy 1984). We have no intention of presenting a digest of this literature, though a few comments must be made about the nature of the Charter (and by association the U.S. *Bill of Rights*) as a rights document and its possible impact on the political culture of Canada.

Lyon's fears may contain as much political rhetoric as they do philosophic reasoning, but there is some truth in them. The Charter has limited, though by no means destroyed, the supremacy of Parliament and it has without doubt increased the importance and the power of Canada's judiciary. Despite the assertion that the Charter is uniquely "Canadian" in many of its guarantees by which is usually meant that there is some recognition of collective rights (the limitation clause of s.1 preserves the Canadian concern with order as a prerequisite of liberty, and the override clause of s.33 preserves the supremacy of Parliament), the Charter is essentially cast in a liberal individualist mould.

At first glance the Charter bears little resemblance to the U.S. Bill of Rights. The language of the Bill of Rights is clear, simple, and unqualified in its assertion of the citizen's rights. The Charter's language is more complex, legalistic, and the rights therein are subject to a number of qualifications and clarifications. Each of the documents clearly reflects the historical era in which they were created. The components of liberty were much easier to define in late eighteenth century than they are in an era sensitized to racism and sexism, committed to multiculturalism and bilingualism, and challenged by technological complexities unimagined by the likes of Jefferson.

Yet both documents must be seen as more than mere legal texts. Each is subject to interpretation, and whatever the attempts of the Charter's drafters to present Canadians with a readily comprehensible document, constitutions are inherently vague. More important than what each says is what each means and it is here that the controversies really begin. There is no accepted means by which to interpret a constitution, and bills of rights prove particularly slippery when one attempts to pin one meaning and only one meaning on a particular clause.

Rights, as Dworkin cautions us, are to be taken seriously. In liberal democratic societies there is no greater claim a person can make against another, against society or against the state than a claim of rights. They are indeed trump. Yet the rights tradition of the two countries are quite different and these differences may well have an impact on the way the Charter will be interpreted.

The American tradition relies heavily on notions of 'natural rights'; that is rights that are recognized as inhering in people by virtue of their humanness. Such rights are 'self-evident'. Canada has a far more muted natural rights tradition and Charter rights are granted to people by the government. As the preamble and s.1 of the Charter seem to state, the granting of rights must be placed in the context of the values of Canadian society as a whole.

Yet the differences in the origins of the two rights documents do not preclude the influence of one upon the other. Given the more established tenure of the American Bill of Rights, it would seem clear that any such influence would travel south to north with the Canadian judiciary looking to the U.S. experience for guidelines in their own struggle with the meaning of the Charter's guarantees. This prospect has lead to a great deal of commentary on the part of Canadian constitutionalists concerned with the importation of American judicial doctrines into Canada (Smiley 1983; Hogg 1985; Manfredi 1990).

For his part Peter Hogg calls clearly for the rejection of what he sees as the two dominant modes of constitutional interpretation within the American tradition. The first he calls interpretivism which he characterizes as the belief that "judicial review of legislation must be based on the language of the constitution" and must not attempt to stray beyond the text of the constitution itself. The second school of interpretation, which he dubs noninterpretivist, holds that the text is too vague to provide proper guidelines for interpretation. Such guidelines can come from "the values of the judge, the moral values of society, or some variant of natural law, usually in the form of a theory of justice, democracy, or morality (Hogg 1987:91).

Hogg rejects both of these schools of thought as being inappropriate for Canada. The interpretivist school denies the relative and temporal nature of the meaning of a constitution, while the noninterpretivists would allow far too much leeway to override the decisions of democratically elected legislative bodies. The Charter must be given, Hogg argues, a purposive interpretation. That is, the Charter contains within it a variety of purposes, and will be used to effect others in the future and, thus, the courts are obliged to recognize those purposes and view legislation with an eye as

to how it would affect the purposes of the Charter (Hogg 1987:112-13). Hogg's views have been soundly attacked by others (Devlin 1988), but his work does illuminate the problems now faced by Canada's judiciary.

LOOKING SOUTH?: TRADE UNIONS, THE CHARTER AND THE CANADIAN JUDICIARY

Setting the Stage

Although there is a growing literature on the Charter's impact on organized labour in Canada (Beatty 1987; Mandel 1989; McIntosh 1989; Carter 1987a; 1987b), it remains the case that the body of important judicial decisions is too small to indicate clearly the scope and nature of that impact. The nature of the Charter era labour regime is still open to interpretation in many respects, but the decisions discussed should be seen to constitute at least a partial 'jelling' of the realignment and redistribution of power within that regime. Thus, what we are interested in here is the judicial reasoning behind these early decisions so that we might be able to anticipate (albeit tentatively) the future decisions that the courts will render.

In terms of our ultimate objective, an assessment of the impact of American judicial decisions and principles on the Canadian Charter cases relating to labour law, it should again be stressed that the methodological dilemma spoken of above remains with us. Our quarry remains something more than a bare analysis of the American case law and something less than seeing the Charter as Americanizing almost by definition. In deference to this methodological dilemma we have stalked our quarry cautiously lest we wind up shooting at every shadow and jumping at every noise.

A recent study has confirmed the suspected propensity of the Canadian judiciary to consult American case law in Charter adjudications (Manfredi 1990). However, as we stated before, we are interested in more than counting references to American case law in Charter decisions. Simply referring to a case does not indicate the kind of influence that a particular American case has had on the resulting Charter decision. Thus, what we are interested in is the substantive or qualitative impact that American judicial reasoning is having on the interpretation of the Charter.

The rights guaranteed in the American Bill of Rights are unqualified in their application and definition, while the Charter begins with an important qualification. This difference means that, while the American judiciary was left on its own to determine the meaning and scope of the Bill of Rights'

guarantees, the Canadian judiciary by contrast was given the means by which to apply a specific test to determine whether the limitation of fundamental rights could be justified. Section 1 of the Charter states that its guarantees are subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

Section 1 effectively divides judicial review of government legislation into two distinct sections. First the courts must decide whether there is a violation of one of the Charter's guarantees. If a court determines that there was indeed such a violation, then it must determine whether such violation can be justified under the terms of s.1 (Hogg 1985:678-680). The existence of s.1 has the potential to have a significant impact on the role that will be played by American jurisprudence in the shaping of Charter decisions. As Peter Hogg noted:

> [T]he American courts have had to imply qualifications on the rights in order to accommodate legitimate restraints on free speech and legitimate distinctions between different groups. This has been accomplished as a matter of "judicial legislation" and without any express direction in the Bill of Rights ... This formal difference between the American Bill and the Canadian Charter does not make the American jurisprudence irrelevant, of course, but it does require the Canadian courts to develop their own patterns of reasoning, which must take account not only of the guaranteed rights but also of the limitation of clause of s.1 (Hogg 1985:680).

Freedom of Speech and Expressions: The Dolphin Delivery Case

The first Supreme Court of Canada decision dealing directly with the exercice of union power came in 1986 with *Retail, Wholesale and Department Store Union, Local 580 et al.* v. *Dolphin Delivery Ltd.* (1987), 87 C.L.L.C. 14,002. In furtherance of a strike against one employer, the union picketed another employer deemed to be an ally of the first employer. This type of picketing is often used to make effective a strike against the primary employer. What is of particular importance in this case is whether picketing is a form of expression protected by the Charter and to what extent the Charter applies to the private relationship between an employer and an employee.

The facts of the case were relatively straightforward. The union in question was a federally certified bargaining agent for the employees of Purolator Courier which was an Ontario based company doing business in B.C. While in the midst of contract negotiations Purolator locked out its employees. Dolphin Delivery made deliveries for Puralotor within the latter province and, during the course of the lockout did business with Supercourier Ltd., a company connected to Purolator. The union applied to the

British Columbia Labour Relations Board for a declaration that Dolphin Delivery and Supercourier were in fact allies of Purolator, a declaration that would make the picketing legal under B.C. law.

The B.C. Labour Relations Board refused to deal with the union's application because the matter fell within federal jurisdiction. Since the *Canada Labour Code* is silent on the issue of picketing, the determination of the legality of the union's request to picket Dolphin Delivery fell to be determined by the common law. When Dolphin Delivery applied for and was granted an injunction against the proposed picketing, the union went to court to have the injunction overturned on the basis that secondary picketing in a labour dispute is protected as freedom of expression under S.2(b) of the Charter and, therefore, not the proper subject of an injunction to restrain it.

The important questions arising from this case can be phrased as follows. Is secondary picketing a protected form of expression under s.2(b) of the Charter? If such picketing is intended not only to bring about economic pressure but also to induce the common law tort of breach of contract is such picketing still protected by the Charter? Does the Charter apply to the common law, and if so to what degree? Finally, given that the Charter (under the terms of s.32) applies to government action, can a court injunction be considered to be a government action and therefore subject to the jurisdiction of the Charter?

On the question of whether picketing, and secondary picketing in particular, was a protected form of expression the court answered in the affirmative. The court accepted the union's argument that the distinction between speech and conduct that is evident in American case law was not appropriate in Canada. In American jurisprudence there is an important distinction made between speech and conduct whereby speech is constitutionally protected but not all forms of conduct enjoy this same protection (*Thornhill* v. *Alabama,* 310 U.S. 88 (1940); *Milk Wagon Drivers Union* v. *Meadowmoor Dairies* 312 U.S. 287 (1941)). In *Thornhill* the issue was whether the picket line was a protected form of conduct, and in that case the U.S. Supreme Court held that picketing did not enjoy constitutional protection.

The union was less successful with its other arguments in *Dolphin Delivery.* Although the Supreme Court of Canada dealt with the Charter's implications for union picketing, in the end it held that in the absence of any link with governmental action the Charter did not apply. It reasoned that, as a neutral body, the court was merely determining a dispute between two private parties so there was not a sufficient connection to government action for the Charter to apply.

Dolphin Delivery is indeed a curious decision. The Supreme Court of Canada gave constitutional protection to picketing as a form of freedom of expression, but at the same time refused to strike down as unconstitutional one means by which an employer can restrain such supposedly legitimate expression. The end result is all the more incongruous given the strong manner in which the Court chose to view the legitimacy of picketing as a means of expression. Regardless of the picket line's inducing a common law tort of breach of contract and the concomitant economic hardship experienced by the employer, the Court explicitly said that the picket line was fundamental to a union's ability to exercise power within the collective bargaining regime and thus protected by the Charter. Yet in the end the Court effectively removed this protection by characterising the matter as a private dispute that lacked the element of government action necessary for the Charter to apply.

This decision is particularly important in the ongoing jurisprudence that is developing on the extent of the Charter's application. Separating the public and private realms is a complex exercise, yet the Supreme Court of Canada does not appear to be looking to American jurisprudence for much guidance on this issue. Where the Court does look to American jurisprudence it does so on matters of broad philosophical import as witnessed by those elements of *Dolphin Delivery* that concern the importance of freedom of expression to liberal democratic states.

The nature of this impact should become clearer in the discussion of the cases that followed *Dolphin Delivery*. What will be seen is a growing tendency to view the Charter as protecting individual rights as opposed to collective rights — a view which has serious implications for collective bargaining laws in particular and trade unionism in general. Thus the Supreme Court has taken a number philosophical cues from American case law while at the same time tailoring the interpretation of particular cases to the text of the Charter and the context of Canadian public policy objectives.

Restraint, Restructuring and Union Rights: The Labour Trilogy

The so-called labour trilogy decisions of 1987 involved union challenges to government attempts to restrict the exercise of union power. In Canada the recession of the early 80s and a general turn to the right in thinking of both the federal and numerous provincial governments led to the adoption of legislation designed to reorient the labour regime more in favour of capital through the restriction of both public and private sector collective bargaining rights (Panitch and Swartz 1988). Unions attempted to challenge this restraint legislation by arguing that such legislation violated

their right to strike and their right to bargain collectively which they felt were subsumed under the Charter's s.2(d) protection of the freedom of association. On April 9, 1987 the Supreme Court of Canada handed down a trilogy of decisions relating to the constitutional status of the freedom of association.

The most substantial of the three cases was the *Reference re Public Service Employee Relations Act (Alta.), Labour Relations Act (Alta.), & Police Officers Collective Bargaining Act (Alta.)* (1987), 87 C.L.L.C. 14,021, commonly referred to as the *Alberta Labour Reference.* The government of Alberta had referred seven questions to the courts relating to the above pieces of legislation. The first three questions dealt with the constitutionality of the compulsory arbitration provisions of this legislation which were designed to replace the ability of affected union members to strike or for the employer to lock them out. Questions four through six dealt with the constitutionality of the method of arbitration set out in this legislation and question seven dealt with the government's ability to exclude certain classes of employees from bargaining units.

At issue in all of these cases was whether the guarantee of freedom of association set out in the Charter included those elements of the labour regime which, since the 1940s, had been recognized or enshrined in legislation. Most important was the question of whether the freedom of association conferred upon the association any degree of constitutional protection or rights. In particular, did freedom of association encompass the union's right to bargain collectively and its right to strike in the event of a breakdown in bargaining.

The majority decision made it clear that freedom of association granted no rights to an association as distinct from the rights held by its constituent members. This interpretation of the Charter's guarantee of freedom of association was best expressed in the concurring judgement of McIntyre J. He states:

> I interpret freedom of association in s.2(d) of the Charter to mean that Charter protection will attach to the exercise in association of such rights as have Charter protection when exercised by the individual. Furthermore, freedom of association means the freedom to associate for the purposes of activities which are lawful when performed alone. But, since the fact of association will not by itself confer additional rights on individuals, the association does not acquire a constitutionally guaranteed freedom to do what is unlawful for the individual *(Ref. re Public Service Employees Relations Act (Alta.)* (1987), 87 C.L.L.C. 14,021 et p. 12,158).

This approach is supported by explicit reference to the work of American constitutionalist L.H. Tribe and a quotation from Brennan J. in *Roberts* v. *United States Jaycees* (1984), 468 U.S. 609 who wrote at p. 618:

[T]he Court has recognized the right to associate for the purpose of engaging in those activities protected by the First Amendment — speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensible means of preserving other individual liberties.

This view of the Charter as an instrument to protect individual rights means that no trade union can claim Charter protection in respect of a strike on behalf of a collective membership. The right to strike is a right in legislation only, a right won through the development of the labour regime over time through the political process, but not one that enjoys constitutional protection. If unions lose the political battle and restrictive legislation is enacted, then they cannot count on the courts to enter the political arena to reverse the results through the application of the Charter.

In a strong dissent, however, Dickson C.J. explicitly rejected the majority's use of American jurisprudence as overly restrictive and as denying any real content to the freedom of association. He states:

The derivative approach would, in my view, largely make surplusage of s.2(d). The associational or collective dimensions of s.2(a) and (b) have already been recognized by this Court in *R.* v. *Big M Drug Mart Ltd.* without resort to s.2(d). The associational aspect of s.2(c) clearly finds adequate protection in the very expression of a freedom of peaceful assembly. What is to be learnt from the United States jurisprudence is not that freedom of association must be restricted to associational activities involving independent constitutional rights, but rather that the express conferal of a freedom of association is unnecessary if all that is intended is to give effect to the collective enjoyment of other individual freedoms *(Ref. re Public Service Employee Relations Act (Alta.)* (1987), 87 C.L.L.C. 14,021 at p. 12,178).

Given the length of the decision in the *Alberta Labour Reference,* it is not surprising that the decisions in the other two cases in the labour trilogy are relatively short and rely a great deal on the reasoning given in the first case. In respect of the Public Service Alliance's challenge to the *Public Sector Compensation Restraint Act,* the Court held that the Act had a valid legislative objective and, while it did restrict collective bargaining, it did not restrict the union's freedom of association because the union remained the bargaining agent for the employees (*Public Service Alliance of Canada* v. *The Queen in Right of Canada* (1987), 87 C.L.L.C. 14,022). At the same time, the Court also upheld the preemptive no-strike legislation passed by the government of Saskatchewan for the dairy industry in that province.

Freedom of association has a longstanding relationship with trade unionism. Indeed, when the provisions of the Charter were being debated by the House of Commons Justice Committee, the government members explicitly assured New Democratic Party Justice critic Svend Robinson that as far as they were concerned the contents of s.2(d) did in fact encompass

the right to strike (Mandel 1989: chap. 5). The judiciary, however, is under no obligation to take into account such statements of legislative intention as is evident in the labour trilogy.

Where American jurisprudence was clearly rejected in *Dolphin Delivery,* it is every bit as clear that it was explicitly embraced in the labour trilogy. If anything can be taken from the trilogy about how the Court is coming to view the relationship between trade unions and the state, it is the impression that the Court would prefer that the labour regime remain a political creature and not become constitutional in nature — an attitude that appears to mirror the approach taken by the American judiciary (Sedler 1988).

Recently the Supreme Court of Canada reaffirmed their interpretation of freedom of association in *Professional Institute of the Public Service* v. *Commissioners of the Northwest Territories and Northwest Territories Public Service Association* (1990), 90 C.L.L.C. 14.031. In a majority decision, that curiously included previous dissenter Dickson C.J., and written by Sopinka J., the Canadian Supreme Court held that the Charter's guarantee of freedom of association did not include a right to bargain collectively and hence did not even protect the acquisition of bargaining rights by a trade union. This decision effectively precludes any argument that freedom of association can have any bearing on the rights of unions.

This conclusion has important implications for the Charter challenges to union security now before the Supreme Court of Canada. Clearly, the majority of the Court is unwilling to take the political rights gained through the struggle of unionism and imbue them with constitutional status in the post-Charter era. The question now is whether these political rights will be eroded by an interpretation of the Charter that gives priority to the rights of individual employees.

Waiting for Lavigne

It is far from an understatement to suggest that *Lavigne* v. *Ontario Public Service Employees Union* will, when it is decided by the Supreme Court of Canada*, be the most significant case in the shaping of the Charter era labour regime. In many respects, Lavigne's challenge to union security cuts to the core of unionsim in Canada and will have a major impact on the issue of convergence between the Canadian and American labour

* This decision has now been issued by the Supreme Court of Canada and can be found in (1991), 91 C.L.L.C. para. 14,029.

movements. At issue are those pieces of legislation that enshrine the Rand Formula and the automatic check-off of dues as well as the right of the union movement to engage in political and social activities not directly tied to their collective bargaining functions. These two elements of organized labour's status in Canada can be said to constitute the core of the difference between the Canadian and American union movements. Lavigne cuts to the heart of the social-business unionism dichotomy and may well prove to be a harbinger of the manner in which the Charter will impact on the fundamental values of Canadian society.

Francis "Merv" Lavigne is a teacher at an Ontario community college who, while not a member of the Ontario Public Service Employees Union (OPSEU), was required to pay union dues pursuant to a collective agreement that covered academic staff. At the same time OPSEU, under the authority of its own union constitution, spent dues collected in this manner on various social and political causes that Lavigne argued were not related to collective bargaining. Lavigne argued his freedom of association was being violated because he was forced to contribute money to causes he did not agree with and sought to have the compulsory check-off of dues limited only to financing the collective bargaining functions of the union.

Before looking at the two major decisions concerning Lavigne's challenge, it is appropriate to turn to another similar case that was decided earlier in British Columbia, *Baldwin* v. *British Columbia Government Employees Union* (1986), 28 D.L.R. (4th) 301 (B.C.S.C.). Like Lavigne, Baldwin was not a BCGEU member but was required to pay union dues and objected to the manner in which they were being spent — specifically on organizing previously unorganized unions and in support of Operation Solidarity (the union coalition created to oppose the B.C. government's restraint legislation of the early 80s).

Of importance in this case was whether the disposition of funds, the collection of which is governed by statute, was subject to the Charter. In other words, Baldwin sought to have the manner in which the union spent its funds declared to be an action governed by legislation because of the collection of funds was in fact governed by statute. At no point did Baldwin object to the collection of funds or seek to have the relevant sections of the statute that authorized it declared invalid; his sole objection was the manner in which the union spent such funds (*Baldwin* v. *B.C.G.E.U., supra,* at 305-306).

In support of his argument that the disposition of funds by the union involved governmental action, Baldwin cited *Abood* v. *Detroit Board of Education* (1977), 431 U.S. 209 (U.S.S.C.). In that case the U.S. Supreme Court held that the agency shop permitted by Michigan legislation, by

forcing non-union members to pay union dues and allowing the union to spend money on political cause, violated Abood's rights to freedom of speech and freedom of belief under the First Amendment. The Supreme Court of British Columbia, however, concluded that the Charter did not lead it to the same conclusion.

[T]he court did not say that as a result of the compulsion to pay dues there was therefore state involvement in the use of those funds. It simply held that in the circumstances it was the compulsion to pay which violated the appellant's constitutional rights ... The question before me is whether s.32 of the Charter applies here. The American Constitution contains no such section. Therefore the constitution considerations in *Abood* were differently approached.

Unlike the statute in *Abood* the Act herein does not attempt to legalize previous illegal expenditures. Nor does the petitioner claim that the compulsion to pay dues violates any of his Charter-guaranteed freedoms (*Baldwin* v. *B.C.G.E.U.* (1986), 28 D.L.R. (4th) 301 (B.C.S.C.) at 307).

Having rejected the American precedent on the grounds that Baldwin was not challenging the collection of dues *per se* and concluding that what was relevant was the interpretation of s.32's declaration of the Charter's applicability, the B.C. Supreme Court turned directly to Canadian constitutional authorities and precedents in the determination of whether the union's disposition of dues was private or public in nature. The court held that the extent of governmental action ended with the collection of dues. The disposition of dues by the union was governed by the union constitution and by-laws and carried out by the democratically elected executives of the union. Such action on the part of the union was purely private in nature and the Charter did not apply to private actions (*Baldwin* v. *B.C.G.E.U.* (1986), 28 D.L.R. (4th) 301 (B.C.S.C.) at 309).

Only months after the *Baldwin* decision in British Columbia, the Supreme Court of Ontario handed down its decision in the *Lavigne* case. Unlike Baldwin, it should be noted that Lavigne was challenging the compulsory dues check-off itself because of the political and social contributions made by the union. The Court, while rejecting the argument that compulsory dues check-off violated either Lavigne's right to freedom of expression or equality under the law, found an infringement of freedom of association. White J. concluded:

I have found that the Board of Regents is, in the context of facts of this case, a governmental actor; that its action in entering into a collective agreement with the union was accordingly governmental action; that included in that governmental action was the negotiation of compulsory dues check off provision in the collective that abridges the applicant's freedom of association... (*Lavigne* v. *O.P.S.E.U.* (1986), 86 C.L.L.C. 14,039).

What is interesting to note in this decision is the extensive citation of American precedents that is evident in the court's decision, particularly with reference to the violation of freedom of association. Emphasis was placed on the *Abood* case where one of the prime reasons that the United States Supreme Court gave for declaring the compulsory check off law in Michigan unconstitutional was that, because unions are by their nature ideological and political organizations, forced financial support of them would violate a person's First Amendment rights which was laid out in *West Virginia State Board of Education* v. *Barnette* 319 U.S. 624 (1943) and *Wooley* v. *Maynard* 430 U.S. 705 (1977).

> Labour unions are organizations with a strong tradition of political activism behind them. I cannot see that they are analogous to a state bar association, which exists to regulate the practice of law in a given geographic area in order to maintain high professional standards and protect the public interest... The word "union" in the labour context is practically synonymous with a certain ideological and indeed political perspective. Our Charter of Rights recognizes that Canadians, unlike Americans, have an independent and explicit right to freedom of association. If a governmental agent acts so as to force an individual to financially support a union when he opposes the union, its objects and its methods, then his freedom of association has been abridged (*Lavigne* v. *O.P.S.E.U.* (1986), 86 C.L.L.C. 14,039).

Almost a year to the day later, the Ontario Supreme Court (Toronto Motions Court) delivered the second part of the *Lavigne* decision which dealt with the remedy to be accorded to Lavigne. In this decision the court held that the entire provision of the compulsory dues check off sections of the collective agreement should not be struck down. Instead the court devised a line of demarcation between collective bargaining and non-collective bargaining activities whereby those who objected to the non-collective bargaining activities could have a proportion of their dues returned to them (*Lavigne* v. *O.P.S.E.U.* (1987), 87 C.L.L.C. 14,044).

What is curious about this decision is that the court accepted from the beginning that such a demarcation line could be drawn even when it recognized the difficulty involved in such a distinction. Inevitably the court wound up making distinctions that appear to be essentially arbitrary in nature. For example, the court ruled that contributions to the Ontario New Democratic Party were not related to collective bargaining while contributions in support of the British Mineworkers Union during its protracted dispute with the Thatcher government were acceptable (Carter 1987a:6). What the court failed to come to grips with was the fact that, if a union is to represent adequately its members' economic interests, then pursuing political objectives is necessary insofar as decisions made in the political arena have an impact on the economic well-being of the union and its membership (Cavalluzzo 1988).

Perhaps the most important element of this decision, though, was the manner in which the court chose to execute the remedy. Would employees in a unionized workplace have to opt-in to the union or would they be allowed to opt-out should they object to certain union activities? Given that legislation and judicial precedent in this country contemplates that employees can be exempted from union membership should they object to such, the court held that employees would be given the right to opt-out of the non-collective bargaining portions of their dues. Ironically, though, it is to American case law that White J., again writing for the court, refers to in justifying this element of the decision (*Lavigne* v. *O.P.S.E.U.* (1987), 87 C.L.L.C. 14,039).

To no one's surprise the union filed on appeal from these decisions. In January 1989 the Ontario Court of Appeal rendered its decision on the appeal, overturning White J.'s judgement (*Lavigne* v. *O.P.S.E.U.* (1989), 89 C.L.L.C. 14,011). In essence the Court of Appeal decision parallels that given in the *Baldwin* case. Even though the employer might be a public body, the inclusion of a union security provision in its collective agreement did not 'convert' the union's expenditure of funds into governmental action. The court concluded that the manner in which the union spent those funds it collects was a private matter beyond the scope of the Charter and subject only to the union's own constitution and by-laws. The court did not feel compelled to decide whether the right to non-association existed but did say that, even if it did, Lavigne's rights were not infringed. The court held that the financial contribution Lavigne made to causes he opposed was too small to constitute an abridgement of his freedom and that such contributions did not personally identify Lavigne with those causes or prevent him from taking action in opposition to those causes that the union supported either financially or through political means (*Lavigne* v. *O.P.S.E.U.* (1989), 89 C.L.L.C. 14,039).

Needless to say, Lavigne has appealed this decision and the case was argued before the Supreme Court of Canada in the summer of 1990. Until there is a final determination from the Supreme Court the future of the Rand formula and the traditional ties of trade unions to political and social causes in Canada remains uncertain. In a sense what is at stake is the core not only of Canada's collective bargaining regime but also of the social unionism that helped create it. In terms of the impact of American judicial doctrines on Charter jurisprudence relating to collective bargaining, the *Lavigne* case will be the ultimate determinant of the future of the Canadian labour regime.

Should Lavigne win his appeal it is a distinct possibility that the Canadian labour movement will find itself hamstrung in terms of its political and

social activism much in the same way as the American unions currently are. Should the union ultimately with then important segments of the labour regime would be declared beyond the Charter's scope and would act as a counterweight to the liberal individualist ideology that suffuses the Charter's guarantees.

CONCLUSIONS

From what can be seen of the cases discussed above, no clear pattern emerges concerning the impact of American jurisprudence on those Charter cases relating to labour law. What is very noticeable is the tendency of the Canadian judiciary to consult American case law, even if it is ultimately rejected as a deciding factor in the particular decision to be rendered.

Thus, in terms of the citation of American precedents it can be asserted that Charter jurisprudence is being "made in Canada", though always with an eye to the experience of the United States and, to a much lesser degree, other western nations. Indeed, even in those cases in which American jurisprudence was seen to be particularly relevant, it was never to the exclusion of an assessment of the Canadian experience or without a recognition that the values, institutions and constitutional arrangements of the two nations are different.

With reference to the methodological dilemma of determining "what is an influence", certain points should be made about the overall impact that the Charter is having, not only on labour-capital-state relations, but on Canadian society in general. The Charter, like the U.S. Bill of Rights, is reshaping the fundamental values that Canadians hold. As the labour trilogy demonstrated quite clearly, it is very difficult to defend the solidaristic and collectivist principles of trade unionism when faced with the existence of constitutionally entrenched individual rights. Thus, even if union security provisions are upheld as being beyond the Charter's scope, it is still possible that traditional union rights will be seen to of a second-class nature insofar as they are political/legal rights without constitutional bases. This is the dilemma faced in the *Lavigne* case as unions who once sought to have their rights brought under the Charter's protection are now seeking a means to escape the Charter's reach.

In this sense, the impact of American jurisprudence on the Charter may not be at its most profound in terms of references to particular cases, but may rest far more on the ideological predispositions within American society that are reflected and reinforced by documents like the Bill of Rights. While Lipset's arguments about the fundamental differences in

values between Canada and the United States may be over-stated and subject to a great deal of methodological critique, he is certainly correct in the assertion that the Charter will irretrievably alter Canadians' conceptions of themselves and their society. Indeed, it may be the case that if anything he understates the impact the Charter may have in order to preserve that part of his argument that relies on there still being fundamental differences between the two countries.

Yet, however profoundly the Canadian labour regime comes to resemble the American regime in this era of the Charter, one must be cautious of linking that development to the judiciary's aping of either American case law or ideological outlooks. The philosophical principles embedded in the Bill of Rights are every bit as apparent in the Charter and one need not look to the American experience necessarily to justify the trumping of individual over collective or community rights. Indeed, as Robert Sedler has argued previously, the labour trilogy managed to promulgate a notion of freedom of association essentially similar to that found in the U.S. without the unquestioned acceptance of the American position.

We are still left with the question of convergence between the two labour regimes and, regardless of the reasons on which it is decided, *Lavigne* will still be the major determinant in this question. If the Ontario Court of Appeal's decision is itself overturned, it could well begin an era of labour regime convergence (to the clear detriment of Canadian unions) even if no mention is made of American judicial precedents. Of the cases decided to date, however, all that can be asserted is that a clear pattern of judicial reasoning has not emerged, making it risky to predict the degree of convergence between Canadian and American labour regimes that the future holds. Nevertheless, it is clear that the Charter still holds the potential to reshape the Canadian labour regime in a form more closely resembling its American counterpart.

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La négociation collective et la Charte canadienne des droits et libertés L'influence américaine

Cet article cherche à évaluer l'effet de la jurisprudence américaine sur les décisions récentes rendues en vertu de la *Charte canadienne des droits et libertés* eu égard aux lois canadiennes sur la négociation collective. À ce sujet, nous nous demandons si la Cour suprême du Canada s'efforce d'établir une jurisprudence «faite au Canada» ou si elle s'inspire profondément de la jurisprudence américaine. La réponse à cette interrogation a des impacts sérieux sur l'avenir du droit du travail au Canada.

Nos conclusions sont nécessairement sujettes à révision vu le nombre limité d'arrêts de la Cour suprême en ce domaine. Même si l'influence américaine semble avoir été présente, il faut noter que la Cour suprême n'a pas entièrement adopté le raisonnement de la jurisprudence américaine. Cette approche s'explique par l'effet combiné des différences institutionnelles et socio-politiques entre les deux pays, différences que la Cour suprême n'a pas manqué de souligner. Nous soutenons cependant que la décision à venir dans l'affaire *Lavigne* c. *O.P.S.E.U.* (N.D.L.R. au moment de mettre sous presse, cette décision a été rendue) est très importante à cet égard. En effet, l'approche adoptée par la Cour suprême dans cette affaire montrera jusqu'à quel point la jurisprudence américaine influencera le statut constitutionnel des lois actuelles visant la négociation collective au Canada.

Dans la première partie de cet article, nous examinons les fondements constitutionnels des deux régimes de droit du travail à la lumière des valeurs fondamentales qui leur sont sous-jacentes. Pour ce faire, nous analysons et critiquons les travaux de S.M. Lipset sur les différences entre la culture politique du Canada et des États-Unis.

Même si nous questionnons la signification des différences identifiées par Lipset, notre propos est plutôt d'explorer comment la *Charte canadienne des droits et libertés* va influencer ces différences à court et à long terme.

Dans la seconde partie de cet article, nous faisons une revue du régime du droit du travail sous la Charte tel qu'articulé par le régime judiciaire canadien et en particulier par la Cour suprême. Notons qu'en y recherchant les influences américaines, nous avons pris soin d'examiner de très près la manière dont les cours canadiennes ont traité les précédents importants dans la jurisprudence américaine. Les résultats mitigés de cette analyse nous amènent à conclure, sous toute réserve, que l'affaire *Lavigne* va probablement indiquer l'étendue de l'influence américaine sur les lois canadiennes visant la négociation collective par l'interprétation et l'application de la Charte.