Centre for Constitutional Studies

CONSTITUTIONAL FORUM CONSTITUTIONNEL

Volume 3, Number 2 Edmonton, Alberta Winter 1991

In This Issue

Centre d'études constitutionnelles

CONSTITUTIONAL FORUM
CONSTITUTIONNEL

Editor:
David Schneiderman

Design and Layout:
Christine Urquhart

Constitutional Forum Constitutionnel is the newsletter of the Centre for Constitutional Studies / Centre d'études constitutionnelles published with the financial support of the Alberta Law Foundation.

The opinions expressed herein are those of the individual contributors only. Contributions and replies are invited in either official language. Notes and articles should be limited to 1,500 words in length. The Editor and Management Board reserve the right to edit any submissions. Inquiries and contributions should be directed to the Editor, David Schneiderman, 459 Law Centre, University of Alberta, Edmonton, Alberta, T6G 2H5 or by telephone at (403) 492-5681 or Fax (403) 492-4924.

Constitutional FORUM Constitutionnel is indexed in: Index to Canadian Legal Periodical Literature.

Alberta Law Foundation

R. v. Seaboyer: PORNOGRAPHIC IMAGINATION AND THE SPRINGS OF RELEVANCE

Annalise Acorn

Section 276 of the *Criminal Code* of Canada provided that, in a trial for sexual assault, the accused could not (other than in limited circumstances) adduce evidence of the sexual conduct of the complainant with persons other than the accused. The section was introduced[1] as an attempt to eradicate the effects of the assumption explicitly accepted by the common law that a woman who had sexual relations outside of marriage was likely to consent to any sexual activity and was also likely to lie under oath.[2]

In *R.* v. *Seaboyer*; *R.* v. *Gayme*, the Supreme Court of Canada struck down this section deciding that it violated two fundamental rights of accused persons protected by the *Canadian Charter of Rights and Freedoms*. These were the right under section 11(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an impartial tribunal; and the right under section 7 to life, liberty and security of the person and the right not to be deprived thereof other than in accordance with the principles of fundamental justice.

Interestingly, the two women on the court were pitted against one another in their judgements. Justice McLachlin wrote for a majority of seven members of the court and Justice L'Heureux-Dubé wrote a strong dissent concurred in by Justice Gonthier. Essentially, the view of the majority was that the legislation went too far in excluding evidence of the sexual history of the complainant. Justice McLachlin was quick to applaud the goals of the legislation. She conceded the weightiness of the objectives of encouraging the reporting of sexual assault, protecting the complainant from embarrassing and traumatic intrusion into her privacy, and eliminating the practice of inviting the inference from the complainant's sexual experience that she fabricated the incident or brought it on herself.

Notwithstanding her endorsement of these objectives, Justice McLachlin felt that evidence of the sexual conduct of the complainant could be relevant in ways that did not engage these discredited myths about female sexuality and that to preclude the introduction of that evidence in all cases potentially could unfairly restrict the accused in the conduct of his defence. To borrow the language of the law of similar fact evidence, she thought that not all use of evidence of the complainant's sexual conduct necessarily involved the use of "forbidden reasoning"— that is: female with extra-marital sexual experience = slut = liar/indiscriminate consenter.[3]

1. It was the second legislative effort to change the common law in this area. A similar section (s.142 of the *Criminal Code* enacted by *Criminal Law Amendment Act*, 1975 S.C. 1974-75-76 c. 93, s.8) had been nullified by judicial interpretation. See *R. v. Seaboyer and Gayme* (1991), 128 N.R. 81 at 186ff.

2. See *R. v. Seaboyer and Gayme, ibid.* at 110ff. Now, s. 277 of the *Criminal Code* provides that evidence of past sexual conduct may not be called simply to attack the complainant's credibility. This section was upheld by the Supreme Court in this case since it was found that evidence of sexual conduct could not, on its own, be relevant to credibility. However, since such evidence is invariably introduced to undermine the complainant's testimony the implied link between sexuality and mendacity is not eliminated where the evidence is called on a particular issue such as consent.

3. See *R. v. Wald* [1989] 3 W.W.R. 324 at 357 "... they will say that her reputation is that she is easy and the word that they would use to describe it in everyday language, to put it bluntly is slut. And one or more of them will say that she also has a reputation for having been easy in terms of consenting to sex with more than one man at the same time...".

She thought that the evidence could be relevant in a number of ways that did not spring from these myths. First of all, she thought that it could be relevant in that it could support the accused's statement that he had an honest but mistaken belief that the complainant had consented to the conduct complained of. As a result of the decision in *Pappajohn* v. *The Queen*[4], and its subsequent codification in section 265 of the *Criminal Code*[5] an accused person is entitled to an acquittal if he honestly believed that the complainant was consenting to the sexual conduct. That belief does not have to be reasonable. However, there must be an "air of reality" to the accused's story that he honestly believed there was consent before the judge is required to tell the jury that, if they believe the accused, he is entitled to an acquittal. The accused's belief that the complainant consented may be based on his beliefs about her past sexual conduct. That is to say, the accused may have thought that the complainant was easy and, therefore, that she would consent. The defence of honest (though not necessarily reasonable) belief excuses coercive sexual conduct where the accused sincerely believes that a woman's past sexual conduct is a decisive piece of information in determining whether she is consenting. Justice McLachlin's view was that, since the defence is available to the accused in law, it is contrary to the principles of fundamental justice to hamper the accused in his proof of that defence by depriving him of the opportunity to give his story an "air of reality" by calling evidence of the sexual conduct of the complainant that formed the factual basis of his honest belief that she would and did consent.

The evidence is not relevant to the issue of the complainant's credibility or her consent. The nature of the defence substantially eliminates both of those issues by focusing the inquiry on the state of the accused's mind. Thus, the evidence of the sexual conduct of the complainant was held to be potentially relevant to the issue of the accused's belief that the complainant consented.[6]

Another situation in which Justice McLachlin thought that the evidence could be relevant other than by way of discredited myth was to show that the complainant had a motive for fabricating the charge of rape. The example she used in support of this argument was a case of a child who complained that her father had sexually assaulted her. The father's defence was that he had discovered an incestuous relationship between the child and her brother. The child in anger and spite at her father's having reprimanded her for this conduct supposedly fabricated the allegation of sexual assault against the father. Justice McLachlin was of the view that here, evidence of past sexual conduct of the complainant does not derive its relevance solely from sexist myth and, therefore, that it is contrary to the principles of fundamental justice and a fair trial to preclude the accused from bringing to light the complainant's treachery. The evidence goes to the issue of motive to fabricate and does not simply use evidence of sexual experience to invite the inference of consent or fabrication. It is not because she had a sexual relationship with her brother that she is supposed to have lied, rather it is because she was caught by her father doing something "very naughty" that she is supposed to have had a motive to do him in.

Justice McLachlin focused on identifying situations in which evidence of sexual conduct with third parties could be relevant in a way that did not directly require the trier of fact to accept the background assumption that women who have sexual identities lie and consent to anything and anybody. By adopting this focus, she was able to interpret the provision as an attempt by the state to gain an unjustifiable advantage against the accused in the trial by tying his hands in the presentation of his defence and denying him the opportunity to prove the true facts of his case.

Justice L'Heureux-Dubé, writing for the dissent, took a completely different approach. In the first part of her judgment she gave extensive documentation of the ways in which widespread acceptance of myths about female sexuality and sexual assault distort the process of reporting, prosecuting and trying sexual offenses.[7] She saw the assumption (which also exists as an emotion), that female integrity is undermined and negated by female sexuality, as "baggage that belongs to us *all*".[8]

---

4. [1980] 2 S.C.R. 120

5. It has also been argued that the third exception to the exclusionary rule in 276(1)(c) is a further codification of the defence. See T. Brettel Dawson, "Sexual Assault Law and Past Sexual Conduct of the Primary Witness: The Construction of Relevance" (1988) 2 C.J.W.L. 310 at 320.

6. For discussion of the defence of mistaken belief in consent see: Lucinda Vandervort, "Mistake of Law and Sexual Assault: Consent and *Mens Rea*" (1987) 2 C.J.W.L. 233; Toni Pickard, "Harsh Words on *Pappajohn*" (1980) 30 U.of T.L.J. 415.

7. For a comprehensive Canadian source on these issues see Lorenne M. Clark and Debra J. Lewis *Rape: The Price of Coercive Sexuality* (Toronto: The Women's Press, 1977).

8. *Supra*, note 1 at 170.

Justice McLachlin, by contrast, seemed to be of the view that the modern sensibility is all but cleansed of these discriminatory stereotypes, referring to them always as "discredited" myths. This difference in perception of the pervasiveness and depth of the problem helps to explain the different conclusions of the two women. Justice L'Heureux-Dubé, however, sets out a significant amount of evidence supporting the conclusion that these myths are alive and well and are controlling factors in sexual assault cases.

Justice L'Heureux-Dubé was of the view that the exclusion of the evidence cannot be a violation of the accused's rights since the evidence cannot be relevant other than through a process of reasoning which invokes sexist myths about women and rape[9]. The right to a fair trial conducted in accordance with the principles of fundamental justice does not include a right to introduce irrelevant evidence of a kind that has been proven to be a preemptively potent force in contorting and controlling the fact-finding process. It does not include the right to manipulate the emotive response to the case by harnessing misogynist prejudices. Here, L'Heureux-Dubé expands the understanding of the stereotypes that underwrite the relevance of the evidence, extending it beyond the slut = liar/ consenter equation. She notes that rape myths have more varied and subtle forms and include, among them, the idea that women — particularly promiscuous women[10] — tend to fantasize about having been raped, that prostitutes concoct rape charges to extort further fees from their clients, that if a woman really does not want sex that she can avoid it — i.e. "you can't thread a moving needle" or "a woman with her dress up runs faster than a man with his pants down" — and that if they are caught in the act, sexually active women and children will use the cry of rape to maintain a facade of chastity.

Justice L'Heureux-Dubé's essential point is that there is no case in which evidence of sexual conduct does not derive its relevance through some aspect of this misogynist social construction of the "truth" about sexual assault. In the context of the defence of mistaken belief in consent, she argues that in order for evidence of sexual conduct to be relevant it must be accepted that the sexual conduct of the complainant gives an air of reality to the accused's assertion of belief in consent. This conclusion can only be arrived at through the acceptance of rape myths about sexual experience and consent.[11]

Similarly, regarding Justice McLachlin's example of the incestuous child, Justice L'Heureux-Dubé would argue that the relevance of the evidence springs from an archetype of our pornographic imagination[12] of the sensually voracious, treacherous, malicious, sexual female child.[13] Further, as long as we allow the overwhelming power of this pornographic imagination free reign in the trial of sexual assault cases those trials will not be "fair" in any full sense of the word.

What we see in the disagreement between the majority and the minority is the collision of two very different approaches to constitutional litigation and the meaning of fundamental justice. Justice McLachlin views the process of constitutional adjudication in a criminal context as one designed to protect the individual in his contest with the state. The familiar theory behind this view is that the constitution exists to keep the state in check lest it grow into a dictatorship. The acquittal of some guilty individuals is seen as a small price to pay for the preservation of a state that respects the requirement of full proof of any allegations made against its citizens. Justice McLachlin views the notion of the principles of fundamental justice as intimately connected to the internal morality of the criminal law focused on the restriction of the great coercive machine of the state. This is why she is able to describe this legislation as "draconian"[14] and it is why she is able to quote with approval a passage describing the complainant as "merely a witness, entitled to no constitutional protection".[15]

Justice L'Heureux-Dubé takes a view of fairness and fundamental justice that goes beyond the conception of constitutional legal rights as protections of any advantages that an accused may be given in a trial. She recognizes that constitutional litigation engages questions about the collective situation of women as a group in the

9. I use the word rape instead of sexual assault to avoid the inference of gender neutrality that the new *Criminal Code* provisions suggest.

10. However, the old common law requirement of corroboration in all sexual assault cases accepted the idea that women generally were inclined to fabricate rape charges. Celibate women were not exempt, in law or common wisdom, from this suspect category. See E.M. Forester, *A Passage to India* (London: E. Arnold, 1924).

11. The next step in the line of reasoning which Justice L'Heureux-Dubé begins here is that the defense of honest but mistaken belief defines sexual assault in a way that trivializes women's refusal of consent. This misogynist definition of the crime itself must be eradicated.

12. See Elizabeth Sheehy, "Canadian Judges and the Law of Rape: Should the Charter Insulate Bias?" (1989) 21 *Ottawa L. Rev.* 151 at 166. Sheehy borrows the phrase from Susan Griffin, as do I. See *Pornography and Silence: Culture's Revolt Against Nature* (New York: Harper and Row, 1981.)

13. See *R. v. Lessen*, [1990] B.C.J. No. 833 (B.C.C.A.) referring to the trial judge who described a three year old child as "sexually aggressive".

14. *Supra*, note 1 at 123.

15. *Ibid.* at 113 quoting J. A. Tanford and A.J. Bocchino, "Rape Victim Shield Laws and the Sixth Amendment" (1980) 128 U. Pa. L. Rev. 544 at 588.

society.[16] She understands the notion of fairness of the trial and the principles of fundamental justice also in terms of the distortion of the outcome of the trial and the effect that an accumulation of such distortions have on the position of women in the society. This is why she is able to view the accused's entitlement to trade on rape myths to build a defence as unfair. She understands the notion of prejudice to the trial not just in terms of prejudice to the accused but also in terms of prejudice to the complainant and prejudice to women's position as full participants in the society. This perspective is not one that has been given much voice in the legal tradition and it smacks of the uninitiated. The difficulty of using the existing body of rhetoric surrounding the exclusion of prejudicial evidence is apparent since that rhetoric has been spoken from the perspective of the accused. In a system that has deeply internalized the understanding of fairness as erring on the side of the accused, it is difficult to shift that focus to fairness as guarding against the distortion of sexist stereotypes.

The essence of the challenge to the legislation is summed up by David Paciocco in his argument that the legislation unfairly limits the inferences that a jury can draw by imposing a feminist world view in the rules of admissibility[17]. This view entails the belief that other rules of evidence do not impose any world view at all. This is not true. All of the exclusionary rules of evidence impose a particular world view and impose certain generalizations about what people do and do not do in deciding that some evidence is unreliable and inadmissible. For example, the rule excluding similar fact evidence and evidence of the criminal record of the accused imposes a particular view about human nature — that is, that people are capable of radical choice and transcendence of seemingly immutable aspects of their character.[18] Even where evidence of discreditable conduct is relevant, in that it would strongly suggest an inference of guilt, we exclude the evidence because we have accepted a world view which deems the inference to be unwarranted. So, in Justice McLachlin's example of the incestuous child and her father, we would exclude evidence of the father's prior conviction for rape even though it might be directly relevant in the sense that it would significantly strengthen the inference of guilt. The reason that we exclude it is that we simply don't accept the assumption that its relevance springs from: that people who act in a certain way in the past continue to act that way in the future. Similarly, with respect to the exclusion of evidence of sexual conduct, the justification for the exclusion is that we should not accept the sexist assumptions from which their relevance springs. The process of excluding evidence and limiting inference on the basis of the adoption of a particular world view is not new. What was new in this legislation was the adoption of a world view that took the sexual reality of women's lives seriously.

ANNALISE ACORN, Faculty of Law, University of Alberta. I would like to thank Charalee Graydon for her very helpful comments.

---

16. Sharene Razack, *Canadian Feminism and the Law* (Toronto: Second Story Press, 1991) at 71.

17. "The Charter and the Rape Shield Provisions of the *Criminal Code*: More About Relevance and the Constitutional Exemptions Doctrine."(1989) 21 Ottawa L. Rev. 119 at 130.

18. I discuss this point in much more detail in "Similar Fact Evidence and the Principles of Inductive Reasoning: Makin Sense" (1991) 11 O.J.L.S. 63 at 68.

SURPRISING AND DISTURBING? THE SASKATCHEWAN BOUNDARIES DECISION

Kent Roach

The Supreme Court's decision to uphold Saskatchewan's electoral boundaries was for the nation's editorial writers "surprising and disturbing".[1] In this short comment, I will argue that the decision is not surprising in light of recent developments in the Supreme Court's approach to *Charter* adjudication. Moreover, I will suggest that the Court's unwillingness to enforce strict equal population standards for electoral districts is not overly disturbing.

The majority decision of Justice McLachlin to uphold the boundaries that gave rural residents more ridings than required on the basis of population alone reflects a tendency for the Court in the past few years both to interpret some *Charter* rights more narrowly and to defer to the legislature's balancing of competing policy interests. In interpreting the right to vote in section 3 of the *Charter* only to protect relative parity of voting power, Justice McLachlin relied on a decision that excluded the right of unions to strike from the right to freedom of association on the basis of the Court's perception of the historical understanding of that right.[2] As the Court has sought to impose definitional limits on at least some *Charter* rights, the question of the intent of the framers of the *Charter* has, in some contexts, become as important as the interpretative edict of giving constitutional rights a broad and generous interpretation.[3] Thus, both Justice McLachlin's majority judgment and the concurring opinion of Justice Sopinka stressed the fact that there was no evidence, either in the wording of section 3 or in the relevant debates surrounding its enactment, that it was intended to alter the modified form of representation of population that Canadians had before the enactment of the *Charter*.[4]

Although the majority judgment never reaches the question of whether Saskatchewan could justify its boundaries under section 1, it is clear that Justice McLachlin was influenced by the increased deference the Court has demonstrated in its scrutiny of government's justifications for infringing *Charter* rights. Invoking the Court's approach to section 1 in *Irwin Toy*[5], the Attorney General of Saskatchewan successfully argued that the allocation of electoral boundaries "concerns questions about the entitlements of one group of electors *vis-à-vis* those of other electors" and as such did not involve either "a confrontation between the state and individuals" or a situation "where there are demonstrably right or wrong answers".[6] Justice McLachlin appeared to accept this logic and fused section 1 and section 3 considerations in reasoning that: "[t]his Court has repeatedly affirmed that the courts must be cautious in interfering unduly in decisions that involve the balancing of conflicting policy considerations."[7] Thus, her judgment stands as an example of both the recent tendency to place definitional limits on *Charter* rights and to defer to the state's balancing of interests under section 1.

If the majority's judgment is representative of a new more deferential approach to the *Charter*, the dissenting judgment is also typical of an older tradition of *Charter* activism. Justice Cory's dissent does not spend much time interpreting the right to vote or attempting to define and place limits on the equality of voting power that is protected by that right. Instead, the judgment moves quickly to the question of justification and, in particular, to the question of whether the impugned provision infringes equality of voting power as little as possible. Justice Cory points to the fact that both the predecessor and successor of the impugned legislation allowed the boundary commission greater scope to pursue the goal of equality of voting power. Nullification of legislation under the *Charter* follows from the Court's ability to envision the government pursuing its objectives in a less intrusive manner. Thus, for Justice Cory, "a comparison of the 1981 map to that of 1989 convinces me that there has been such an infringement."[8]

In short, the editorial writers who were surprised with the Supreme Court's decision to uphold Saskatchewan's boundaries had not been closely watching the evolution of *Charter* adjudication. Still, the question remains whether the decision is disturbing.

One development which, in my view, places the Court's new approach to *Charter* adjudication in its best light was

---

1. *Reference re Electoral Boundaries Commission Act, ss.14, 20 (Sask)* (1991), 81 D.L.R. (4th) 16 (S.C.C.); "What Your Vote's Worth" *The Globe and Mail* (7 June 1991) A14. See also "Power Politics Still in Force" Saskatoon *Star Phoenix* (8 June 1991) C-9; "A Sparkling Dissent" *The Toronto Star* (12 June 1991) A24.
2. *Reference Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 at 403-404.
3. In other contexts, particularly in relation to criminal law, this has not been the case. See *Reference Re B.C. Motor Vehicles Act*, [1985] 2 S.C.R. 486.
4. *Supra*, note 1 at 20-21, 36-37.
5. [1989] 1 S.C.R. 927.
6. Factum of the Appellant Attorney General of Saskatchewan, para. 138, p.56 (Supreme Court of Canada file 22345).
7. *Supra*, note 1 at 39 (S.C.C.)
8. *Ibid.* at 26.

their decision in *Andrews*[9] not to interpret the equality rights in section 15 of the *Charter* as a general guarantee of equal treatment in law for all individuals. The Court in *Andrews* rejected the view, popular among the Courts of Appeal until that time, that equality rights were designed to ensure that similarly situated entities were treated the same. Rather, the Court held that equality rights were designed to protect enumerated and analogous groups from suffering further discrimination and disadvantage. Thus, the Court placed definitional limits on the broad equality rights but retained their anti-majoritarian commitment to protect disadvantaged groups from laws and programs that in their purpose or effect discriminate against those groups.

It is strange that section 15 did not play more of an explicit role in the Saskatchewan case. The reference to the Court of Appeal simply asked whether the boundaries were consistent with the *Charter*. The parties limited their submission to the right to vote and freedom of expression but their time would have been well spent researching the section 15 jurisprudence. It appears that those who forget the struggle over the interpretation of equality rights are bound to repeat it. The decisions of the Court of Appeal and the Supreme Court played out at an unconscious level the previous struggle that ended with *Andrews*. The Court of Appeal stressed the value of the formal equality of each individual stating that "no person's portion of sovereign power exceeds that of another."[10] Equality is achieved through the equal treatment of individuals; there is no room for group rights except as an anonymous aggregation of individuals and their rights.[11] In contrast, Justice McLachlin's judgment shares much of the same group and sociological approach to equality that characterised *Andrews*. Thus, she mentions the legitimacy of respecting cultural and group identity in the districting process and concludes:

> Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic.[12]

This approach means that an individual's right to vote is not violated by simply demonstrating unequal treatment in the districting process. As in *Andrews*, it is recognized that sometimes genuine equality will require differential treatment.

Section 15 also helps to explain a curious consensus between the Court of Appeal and the Supreme Court that most of the editorial writers neglected to mention. Despite the support it gave to the one person-one vote principle, the Court of Appeal held that the two largest deviations from equal population standards in the electoral map were, in fact, justified because, in these northern areas, the realities of geography and sparse population justified robust departures from equal population standards. This consensus about the need for special treatment of the north reflects Canadian electoral traditions and is in accord with the *Andrews* philosophy because those who live in the north are vulnerable to systemic disadvantaging in the political process.

What bothered the editorial writers was a perception that the law was passed in an attempt to capitalize on the strength of the governing Conservative party in rural areas. Justice McLachlin addressed these allegations and concluded that the addition of seats in Regina, Saskatoon and Prince Albert in the 1989 electoral map "belies the suggestion that the 1989 Act was an unjustified attempt to adjust boundaries to benefit the governing party."[13] She admits that the map overrepresents rural as opposed to urban ridings on the basis of population but suggests that this is justified in part by servicing considerations including "difficulty in transport and communications".[14] In making these conclusions, Justice McLachlin ignored evidence submitted to the Court of Conservative electoral dominance in the 1986 election in rural ridings and their relative weakness in urban areas. She also accepts without question some contested and empirically verifiable assumptions about the difficulty for members to service rural as opposed to urban ridings.[15] In seeking to minimize the shortcomings of the Saskatchewan legislation, Justice McLachlin engaged in some questionable political science.

Justice Cory's dissent accepted the need for some differential treatment of rural as opposed to urban ridings but made no reference to allegations of partisan distribution. He did suggest that the 1989 legislation's "mandatory rural-urban allocation may have prevented the Commission from taking sufficient account of the diminishing rural population and the corresponding urban

---

9. [1989] 1 S.C.R. 143.
10. *Ref. re Electoral Boundaries Commission Act (sask.) ss. 14, 20* (1991), 78 D.L.R. (4th) 449 at 460 (Sask. C.A.).
11. As the Court stated: "And what applies at the level of the individual applies at the level of the group. If one constituency of voters, 5,000 in number let us say, is entitled by law to elect one representative, while another, numbering 10,000, is entitled to no more, then obviously it cannot be said each is being accorded their democratic rights. The rights of the latter are debased." *Ibid.* at 461. Even the Court of Appeal's decision to hold that 2 northern ridings were justified under s.1 of the *Charter* is not connected to a notion of the need for effective representation of distinct groups. *Ibid.* at 481.
12. *Supra*, note 1 at 36.
13. *Ibid.* at 42.
14. *Ibid.* at 44.
15. Increasingly heterogenous urban ridings may very well present their own servicing problems.

growth of the province"[16], adding specifically that, on the basis of its population, Saskatoon would be entitled to another member. In the end, however, Justice Cory's decision to invalidate the boundaries revolved around the fact that the 1981 map provided proof positive that boundaries could be drawn in a better fashion. This conclusion is, in my respectful view, questionable political science and constitutional law because it begs the normative question.

The problem with Justice Cory's reasoning is he does not explain why the 1981 map should set the constitutional standard. As Robert G. Dixon argued: "[t]he key concept to grasp is that there are no neutral lines for legislative districts ... every line drawn aligns partisans and interest blocs in a particular way different from the alignment that would result from putting the line in some other place."[17] Given that there are no neutral boundaries, it is not clear why, as a matter of constitutional law or political theory, the 1981 map should be preferred to the 1989 map. Both respect relative equality of voting power; there is little explanation of why a 15% tolerance from equal population standards respected in 1981 is better than the 25% tolerance respected in 1989. The 1981 map would give the growing cities slightly more representation, but why is this good? All other things being equal, similar treatment has a value in a democracy, but as was recognised in *Andrews*, in some contexts, it may be antithetical to equality. Justice Cory criticizes the Saskatchewan legislation for "shackling" the boundary commission but, given the assumption that there are no neutral boundaries, it would have been more appropriate to praise the legislature for its candour. If urban residents don't like the policy behind the distribution, they know who to vote for in the next election.

And this is the core of the issue. In general, a decision to overrepresent rural voters as opposed to urban voters would not raise concerns about domination of politics by rural interests. Urban residents are generally more numerous in number than those in rural and remote areas and, in the absence of empirical evidence to the contrary, it seems reasonable to assume that urban residents enjoy easier access to the machinery of politics: their member, government offices, and the media.[18]

What makes Saskatchewan a somewhat difficult case, however, is that urban residents in that province have historically been a minority and, even on the basis of the data before the Supreme Court, they continue to be a minority with 47.6% of the population and, under the challenged boundaries, 43.9% of the seats. Moreover, rural residents have not traditionally been a minority and they now form a bare majority of the population and have 53% of the seats. This alone would not be disturbing; on the admittedly crude basis of numbers, urban residents have only a slightly better claim to being a vulnerable minority than men. However, the rural/urban polarization of support for the Progressive Conservatives and NDP in the 1986 election raises the spectre of people in the cities being rendered a permanent minority in the legislature and, hence, vulnerable to systemic political and legal discrimination. Fortunately, however, the increasing growth of Saskatchewan's urban centres as well as the changeable political allegiances of rural residents mitigates the possibility of a rural stranglehold on power. It is difficult to believe that urban residents, as well represented as they are, are vulnerable to systemic political and social prejudice.[19] Given the reality of urban voting power, there is reason to believe that policies such as moving government offices out of urban areas will be balanced by policies such as the government's role in enticing Crown Life to Regina.

The Saskatchewan legislation may not be admirable or public-spirited but judicial intervention was not required to protect a vulnerable minority. The Court's anti-majoritarian role will require invalidation of voting restrictions on groups such as prisoners and the homeless, invalidation of districting decisions that dilute the voting strength of geographically concentrated minorities, and deference to legislative and administrative attempts to maximize the voting strength of minorities. It is, however, neither surprising or disturbing that the Court has not reached out to augment the political power of urban residents.

KENT ROACH, Faculty of Law, University of Toronto.

16. *Supra*, note 1 at 25-26.
17. R.G. Dixon "Fair Criteria and Procedures for Establishing Legislative Districts" in Grofman, Lijphart, McKay and Scarrow *Representation and Redistricting Issues* (Lexington: D.C. Heath, 1985) at 7-8.
18. Roach "Reapportionment in British Columbia" (1990) 24 U.B.C. Law. Rev. 79 at 92-3.
19. To be sure, there are disadvantaged people living in the cities but the disadvantages they suffer from electoral boundaries are at most indirect. There is little reason to think that adding a few members would result in better representation of disadvantaged groups in the cities.

LAVIGNE v. OPSEU: STUMBLING TOWARDS A FREEDOM *FROM* ASSOCIATION

Brian Etherington

INTRODUCTION

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

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

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

THE FACTS

Lavigne was a member of the academic staff bargaining unit at one of twenty community colleges established in Ontario under the *Ministry of Colleges and University Act*[6] but had never been a member of the bargaining agent, the Ontario Public Service Employees Union (OPSEU). Nevertheless, he was required to pay the equivalent of regular union dues to OPSEU under an agency shop clause[7] in the collective agreement between OPSEU and the employer Council of Regents.[8] The relevant legislation was *permissive* in nature, leaving it open to the parties to negotiate over the inclusion of an agency shop clause in their collective agreement.[9]

The main thrust of the applicant's *Charter* challenge was the claim that the compelled payment of union dues

1. *Lavigne v. OPSEU* (1991), 81 D.L.R. (4th) 545 (S.C.C.).
2. *Ref. re Alberta Public Service Employee Relations Act*, [1987] 1 S.C.R. 313; *Public Service Alliance of Canada v. A.G. of Canada*, [1987] 1 S.C.R. 424; and *Gov't of Saskatchewan v. RWDSU, Local 544*, [1987] 1 S.C.R. 460.
3. *B.C. Gov't Employees Union v. A.G. of B.C.*, [1988] 2 S.C.R. 214.
4. *Dolphin Delivery v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573.
5. *P.I.P.S. v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367.
6. R.S.O. 1980, c. 272.
7. Agency shop"(often referred to as Rand formula) clauses require all members of the bargaining unit, including non-union members, to pay to the union an amount equal to regular union membership dues. Deductions are usually required to be made by the employer at source, as they were in this case. Agency shop clauses must be distinguished from other forms of union security, such as "union shop" clauses and "closed shop" clauses. A union shop clause requires all employees in the bargaining unit to become and remain members in good standing of the bargaining agent union within a short period of becoming an employee in the bargaining unit. A closed shop provision requires the employer to hire only members of the bargaining agent union for employment within the bargaining unit.
8. The Ontario Council of Regents for Colleges of Applied Arts and Technology had been designated as the exclusive bargaining agent for college employers in a centralized province-wide scheme of collective bargaining established for all Ontario colleges in the *Colleges Collective Bargaining Act*, R.S.O. 1980, c. 74, s. 2(3). The Council was established under s. 5(2) of the *Ministries of Colleges and Universities Act*, R.S.O. 1980, c. 272.
9. See sections 51, 52 and 53(1) of the *Colleges Collective Bargaining Act*, R.S.O. 1980, c. 74.

to OPSEU under the agency shop clause violated his *Charter* freedoms of association and expression, in so far as the compelled dues were used by the union for non-collective bargaining purposes. The expenditures objected to by the applicant as "non-collective bargaining" in nature can be summarized briefly under the following headings:

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

The applicant took the position that compelled payment of dues itself, to be used for any purpose, constituted a *prima facie* violation of section 2(d) and section 2(b)[10] of the *Charter*. He conceded, however, that at the level of analysis under section 1 of the *Charter,* compelled payment of dues under an agency shop clause was a reasonable limit on his *Charter* freedoms in so far as the dues were used for collective bargaining activity. But, Lavigne argued that compelled payment of dues used for non-collective bargaining purposes could not be justified as a reasonable limit under section 1. Lavigne was successful in the Ontario High Court[11] but had his claim dismissed by the Ontario Court of Appeal.[12]

THE APPLICATION OF THE CHARTER

A strong majority of the Court (five of seven judges) supported the reasons of La Forest J. on the application of the *Charter*.[13] His finding in favour of *Charter* applicability continued the focus on requirements, established in several prior decisions of the Court,[14] of "governmental conduct" by a "governmental actor".[15] Of great significance for future cases is the finding that the existence of permissive legislation allowing the parties to agree to such union security clauses is not, by itself, sufficient to implicate the legislature as the government actor and require the *Charter*'s application.[16] Rather, the application of the *Charter* hinges on the finding that the employer was a Crown agency.[17] There was sufficient governmental conduct in the employer's acquiescence to the agency shop clause, which obligated the Council to deduct dues and remit them to the union, to attract the *Charter*'s application.

La Forest J. also rejected arguments that the governmental actors should not be subject to the *Charter*

---

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

11. *Lavigne v. OPSEU* (1986), 55 O.R. (2d) 449 (Ont. H.C.). Mr. Justice White held that the *Charter* applied due to the presence of a governmental actor (the Council of Regents) and governmental action in the form of entering into the collective agreement. He also found that freedom of association under the *Charter* included a freedom from compelled association which was violated whenever the individual was forced to combine with others to achieve a common end. Thus compelled contribution of financial resources through compulsory agency dues could only be upheld if found to be a reasonable limit under section 1. White J. held that compelled contribution of dues could be justified to the extent they were used for collective bargaining purposes, but could not be justified under section 1 if used for other purposes. In separate reasons reported at 60 O.R. (2d) 486, White J. held that most of the impugned expenditures were not permissible, except for the contributions to other unions. He issued a five page declaratory order requiring the union to establish a complex "opt-out" mechanism with a procedure for objections to union expenditures designed to ensure procedural fairness for dissident employees.

For an extensive commentary on the decision, see Etherington, "Freedom of Association and Compulsory Union Dues: Towards a Purposive Conception of a Freedom to Not Associate" (1987) 19 Ottawa L. Rev. 1.

12. (1989), 67 O.R. (2d) 536. The Court of Appeal held that Lavigne's challenge was a challenge against the union's use of the compelled dues, which was a private activity by a private actor and hence beyond the reach of the *Charter*. The Court went on to indicate that if the *Charter* did apply there was no infringement of Lavigne's freedom of association. Although it refused to rule on whether the freedom did include a negative aspect, if held that, if the *Charter* did protect a negative freedom from association, the right to refrain from association does not necessarily include the right not to be required to support an organization financially. It also indicated that any restriction on how a union spent its dues was more appropriately a legislative matter than a matter for the judiciary.

13. The concurring reasons of Wilson J. on the *Charter* application issues, in which she argued for adoption of a comprehensive three-part test for determining *Charter* applicability to "non-governmental" bodies, were supported by L'Heureux-Dubé J.

14. See *RWDSU, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *McKinney v. University of Guelph*, [1970] 3 S.C.R. 229; and *Douglas/Kwantlen Fac. Assoc. v. Douglas College*, [1990] 3 S.C.R. 570.

15. *Lavigne, supra* note 1 at 618-622, per La Forest J.

16. *Lavigne, supra* note 1 at 618, per La Forest J.

17. The Court relied solely on the element of government control over the Council in determining that it "fell within the apparatus of government". *Ibid.* at 619.

when engaged in activities that are primarily of a private, commercial, contractual or non-public nature. It was important that the *Charter* be applicable to government actors when engaged in commercial or non-governmental activity to prevent governments from circumventing *Charter* obligations by undertaking such activities. As well, to enable the *Charter* to play a positive role in the creation of society-wide respect for the principles it embodied, it was necessary that government provide a model of how Canadians should treat each other when it undertook activities in the private sector.[18]

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

A FREEDOM TO NOT ASSOCIATE

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

La Forest J., citing protection of the individual's interest in self-actualization and fulfilment as the essence of both positive and negative aspects of freedom of association, held that a purposive conception of the freedom must include "freedom from forced association".[19] However, a *Charter* freedom *from* association had to recognize that everyday forms of compelled association were a "necessary and inevitable part of membership in a democratic community, the existence of which the *Charter* clearly assumes." The compulsory payment of taxes to support government policies to which the individual is opposed is but the most obvious example. Some degree of compelled association, beyond paying taxes, would be constitutionally acceptable where the association is created by the workings of society in pursuit of the common interest.[20]

La Forest J. found that compelled payment of dues, even in small amounts, affected the autonomy of the individual and amounted to compelled association. Because the freedom to associate consisted of the right to organize, belong to, maintain, and participate in the activities of an association,[21] the denial of any one of those rights denies the freedom and being forced to do any one of those activities interferes with the freedom to not associate. But, given the need for compelled combining of efforts to further the collective social welfare in modern society, some limitations on the freedom not to associate had to be recognized.

In his search for limits, La Forest J. rejected suggestions that a purposive conception of the freedom should only find interference with that freedom where the compelled combining of efforts threatened one of the constitutional interests which the freedom was designed to protect.[22] In his opinion, this more restrictive approach towards a freedom to not associate should be broadened

---

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

Court watchers have to be struck by the contrast between this reasoning for applying the *Charter* to government agencies when they engage in commercial or "private" activity and the Court's rejection of similar arguments for the application of the *Charter* to the *courts* themselves as government actors when enforcing common law doctrines in litigation between private parties in *RWDSU v. Dolphin Delivery (supra* note 4). One can draw the inference that it is more important for little-known government agencies such as the Council of Regents to provide a model of respect for *Charter* values than it is for our courts to do so in the development and application of common law.

19. *Lavigne, supra*, note 1 at 624, per La Forest J. La Forest J. relied on *R v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295: "Freedom in a broad sense embraces both the absence from coercion and constraint, and the right to manifest beliefs and practices." (at 336-337).

20. *Lavigne, supra*, note 1 at 626, per La Forest J..

21. This definition of the scope of the positive aspects of the freedom is allegedly drawn from *Ref. re Alberta Public Service Employee Relations Act*, [1987] 1 S.C.R. 313. One might question the validity of this definition in light of the decision in the *PIPS v. NWT (Commissioner)* decision, *supra*, note 5, which implies that there is no protection for the right of individuals to participate in the activities of the association unless they are otherwise protected activity under another *Charter* right.

22. La Forest J. here referred to the arguments found in Etherington, *supra*, note 11 at 43-44, that a purposive interpretation of the freedom from association would impugn compelled association only where it threatened one of the four primary political process and liberty interests which the freedom was designed to protect. I maintained that a forced contribution did not threaten the constitutional interests at stake unless it:

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

to allow the Court to interfere with a government decision to compel association on two other grounds which are not related to the political process or individual liberty interests at stake. First, the Court should be able to review the wisdom of the legislature's determination that a compelled combining of efforts was required to further the collective social welfare. If the Court approves of the legislature's social policy choice, it can still find the individual's freedom from association infringed either because one of the liberty interests to be protected by the freedom is threatened, or (and this is a very big "or") because the association is acting outside of the "furtherance of the cause which justified its creation."[23]

This latter broad ground for intervention relieves the dissident individual from having to demonstrate a link between the compelled association and the liberty interests at stake under a purposive conception of the freedom to not associate. It is not necessary to show that the form of association involved entails the government establishment of a particular political party or ideology, impairment of a payor's freedom to associate or express herself as she pleases, the imposition of ideological conformity, or the identification of the objecting individual with particular political causes or ideology. Instead, La Forest J. adopted the American standard for freedom from association, developed in a number of cases concerning compulsory union dues.[24] La Forest J. summarized this standard as follows:

> In my view, it is more consistent with the generous approach to be applied to the interpretation of rights under the *Charter* to hold that the freedom of association of an individual member of a bargaining unit will be violated when he or she is compelled to contribute to causes, ideological *or otherwise*, that are beyond the *immediate concerns* of the bargaining unit.... When that association extends into areas outside the realm of common interest that justified its creation, it interferes with the individual's right to refrain from association. (emphasis added)[25]

La Forest J. acknowledged difficulty in drawing the line between "activities that are related to the workplace and those that are not" and admitted that where one draws the line "will depend on one's political and philosophical predilections, as well as one's understanding of how society works."[26] He suggested in his reasons, however, that he has a rather narrow view of the immediate concerns of the bargaining unit, equating them with addressing "the matters, the terms and conditions of employment for members of his bargaining unit" and "representing Lavigne and his fellow workers in collective bargaining, grievance arbitration, and the like."[27] And, he held that the impugned expenditures relating to the disarmament movement and opposition to the Skydome did violate Lavigne's freedom to not associate because they were not sufficiently related to the concerns of the bargaining unit or to the union's functions as exclusive bargaining agent.[28]

Nevertheless, La Forest J. upheld agency shop provisions which compel employees to pay dues to unions knowing the dues may be used for other than collective bargaining purposes as reasonable limits under section 1 of the *Charter*. The problems of indeterminacy of the standard of 'causes beyond the immediate concerns of collective bargaining' and its invalidity in terms of the role which unions must play in modern society to further workers' interests were not effective to convince La Forest J. to adopt a more restrictive conception of freedom to not associate, but these concerns were recognized in his section 1 analysis.[29] He attempted to avoid the spectre of judicial entanglement, in the form of ongoing judicial review of particular union expenditures, by giving an apparently broad section 1 approval for agency shop provisions which leave the union free to determine union expenditures, even if they include expenditures for items which violate the objecting payor's freedom to refrain from association.

McLachlin J. agreed that freedom of association must contain a negative aspect, a freedom to refrain from

---

23. *Lavigne, supra*, note 1 at 632, per La Forest J.
24. See discussion of American case law in Etherington, *supra*, note 11 at 22 to 34. The leading decisions are *Abood v. Detroit Bd. of Education*, 431 U.S. 209 (1977); and *Ellis v. Brotherhood of Rlwy. Workers*, 104 S. Ct. 1883 (1984).
25. *Lavigne, supra*, note 1 at 634-35, per La Forest J..
26. *Ibid.* at 639.
27. *Ibid.* at 632-33.
28. *Ibid.* at 635.
29. *Ibid.* at 635-39. In terms of important governmental objectives, he cited the importance of ensuring that unions have the resources and mandate necessary to allow them to play a role in shaping the political, economic and social context within which collective bargaining will take place. The second important objective was to contribute to democracy in the workplace. These objectives would be seriously undermined if the government or courts were to decide which expenditures could be said to be in the interest of the union's members. Agency shop measures which required contributions without guarantees as to how they would be used were rationally connected to these objectives. They also impaired the individual's freedom to not associate as little as possible when compared with the alternatives. An opting-out process for dissident employees could seriously undermine the union's financial strength and their ability to favourably affect the political, social and economic environment in which collective bargaining takes place. As well, the paternalism and indeterminacy of legislative and judicial attempts to draw the line between appropriate and inappropriate expenses would undermine the status of unions as self-governing and democratic institutions. Indeed, La Forest J. concluded that it would be "highly unfortunate if courts involved themselves in drawing such lines on a case-by-case basis" (at 639).

association. Nevertheless, she adopted a more restrictive and more purposive approach to the freedom to not associate. The constitutional interest to be protected is freedom from enforced association with ideas and values to which the individual does not voluntarily subscribe. She referred to it as "the interest in freedom from coerced ideological conformity."[30] Given this purpose for the freedom, when concerned with compulsory payments to an association such as a union, section 2(d) interests will not be infringed unless the payments are such that they may reasonably be regarded as associating the individual with ideas and values to which the individual does not voluntarily subscribe.[31]

The payment of compulsory union dues under the Rand formula simply did not meet this standard of enforced ideological conformity. The whole purpose of the agency shop clause is to permit a person who does not wish to associate herself with the union to avoid doing so by declining to become a member and thereby dissociating herself with the activities of the union. The compelled payment by its very nature avoids the connotation of personal support for the purposes for which it is used, just as the obligation of a taxpayer to pay taxes is no indication of support for particular policies.

McLachlin J.'s insistence that compelled association be shown to threaten one of the constitutional interests at stake for a violation of section 2(d) to be found is motivated by both practicality and policy.[32] Interpreting section 2(d) to cover compelled financial contributions *per se* or those used for purposes beyond the immediate concerns of the association would recognize the *prima facie* validity of a plethora of claims and put the courts to assessing the justifiability of countless government actions or government supported actions, either by trying to distinguish between "immediate concerns" and more attenuated goals under section 2(d) or under section 1 of the *Charter*. This, despite the fact there may be no threat to the constitutional interests at stake by means of the compelled payment. And, the American standard for freedom from association, adopted by La Forest J. in his reasons, has been controversial and difficult to apply in the United States.[33]

Wilson J. held, however, that the freedom of association does not include protection for freedom to refrain from association. In reasons supported by Cory and L'Heureux-Dubé, she concluded that the Court's prior rulings under section 2(d) restricted the purpose of the freedom to protection for the collective pursuit by individuals of common goals. To protect the freedom to not associate would overshoot the actual purpose of the freedom and set the scene for judicial contests between the positive associational rights of union members and the negative associational rights of non-members. To restrict the freedom to its positive aspects best suited the Court's serious and non-trivial approach to *Charter* guarantees.[34] And, it would avoid the dangers which protection for a freedom from association presented in terms of ongoing judicial review of numerous other forms of compelled association contributions necessary in modern society, not the least of which is government taxation.[35] Wilson J. also expressed great concern with evidence of judicial entanglement resulting from the recognition of compelled contributions as constitutionally impermissible in the United States.[36]

Madame Justice Wilson's final reason for not recognizing a freedom to not associate is that it is not necessary. The other *Charter* rights and freedoms should be sufficient to protect the real constitutional interests at stake in claims for a right to refrain from association. She felt that sections 2(b) and 7 were likely candidates for protection in appropriate cases.[37]

CONCLUSION

Perhaps the most startling feature of La Forest J.'s reasons (supported by Sopinka and Gonthier JJ.) for rejecting a narrower, more purposive conception of the freedom *from* association were his arguments that we should adopt a more generous and expansive interpretation of the freedom because our *Charter* contains a separate explicit right of freedom of

30. *Lavigne, supra*, note 1 at 643, per McLachlin J.

31. *Ibid.* at 643-44.

32. McLachlin J.'s analysis is the closest to the purposive conception of a freedom to not associate which I have advocated previously. See Etherington, *supra*, note 11.

33. *Lavigne, supra*, note 1 at 648, per McLachlin J. For fuller commentary on the difficulties with the American standard, see Etherington, *supra*, note 11 at 34-42.

34. See *Andrews v. Law Society of B.C.*, [1989] 1 S.C.R. 143.

35. *Lavigne, supra*, note 1 at 580-81, per Wilson J.

36. *Ibid.* at 581. She referred to it as having "given rise to an endless train of disputes in the United States."

37. She also argued that even if section 2(d) did include a freedom to not associate it would not be infringed in the *Lavigne* case because the negative aspect of the freedom could not be broader in scope than the positive right to associate previously defined by the Supreme Court. Both the *Alberta Reference* and *P.I.P.S v. N.W.T. (Commissioner)* cases made it clear that section 2(d) did not protect the objects of the association or activities necessary to the pursuit of those objects. Here, Lavigne's complaint was essentially that he could not be compelled to contribute to associational objects of which he disapproved. Wilson J. concluded that if the objects of an association cannot be invoked to advance claims of unions then they cannot be invoked to undermine them. To do otherwise would be to engage in "one-sided justice". *Ibid.* at 583.

association and the presence of section 1 allows us to give generous scope to the right itself and tailor it to given contexts under section 1.[38] This may appear to be a sudden and unseemly conversion to many readers familiar with the Court's decision in the freedom *to* associate cases in the labour setting. Most notably, in the leading decision[39] in the *Labour Trilogy*, the four judges who comprised the majority which rejected protection for the right to strike alluded, in two judgements,[40] to the need for the Court to exercise restraint in giving content to the freedom of association. Both judgments pointed to the danger of constitutionalizing aspects of labour relations which would require the courts to become involved in questioning the decisions of legislatures on labour relations matters, which by their very nature involve a complex and delicate balancing of competing interests. Le Dain J. noted that the Court had recently affirmed the need for restraint in the judicial review of administrative action in the labour area in light of the limits of court expertise in such matters.[41] McIntyre J. pointed out that experience had shown that courts were ill-suited to resolving questions concerning labour relations policy, and the Court should be hesitant to interpret the freedom of association in an expansive fashion to include the right to strike because it could throw them back into the field of labour relations.[42] Finally, in the more recent decision of *P.I.P.S. v. N.W.T. (Commissioner)*[43] the majority, in judgments by Sopinka J. (supported by La Forest and L'Heureux-Dubé JJ) and Dickson C.J., continued the restrictive approach to the interpretation of section 2(d) by holding that it did not protect any aspects of collective bargaining.[44]

La Forest J.'s comments in *Lavigne* would appear to demonstrate that the Court's approach toward the interpretation of section 2(d) in a labour relations context, whether it should be generous and expansive or restrictive and cautious, depends heavily on the nature of the claims being asserted and the values of the individual judges concerning the protection of collective rights and individual rights and freedoms. This seems particularly apparent given that La Forest J. had supported Le Dain J. in the *Labour Trilogy* cases and Sopinka J. had taken a restrictive approach to the interpretation of the freedom in its positive aspects in the *P.I.P.S.* decision. And, two of the strongest proponents of broader protection for collective activities in pursuit of common goals, Wilson J. supporting the right to strike and bargain collectively in the *Trilogy* and Cory J. supporting protection for collective bargaining in *P.I.P.S. v. N.W.T.*, refused to interpret the freedom of association generously in its negative aspect in *Lavigne*. Thus, the decision is important as a window on the values, assumptions and ideology of members of the Court on individual and collective rights in the collective bargaining context and, perhaps, in other contexts where modern Canadian governments compel association to further the collective social welfare.

BRIAN ETHERINGTON, Faculty of Law, University of Windsor.

38. *Ibid.* at 634. This, of course, is given as the reason why our freedom to not associate should be at least as broad as that adopted in the U.S. courts where the Bill of Rights makes no explicit reference to freedom of association, but the right is implied from the freedom of expression in the first amendment, and there is no counterpart to section 1.
39. *Re Alberta Reference, supra*, note 2.
40. Le Dain J. wrote for Beetz and La Forest JJ. McIntyre J. wrote a concurring opinion.
41. *Re Alberta Reference, supra*, note 2 at 391.
42. *Ibid.* at 415-17.
43. *Supra*, note 5.
44. In fact, of the four judges who made up the majority in *P.I.P.S v. N.W.T.*, only two, Sopinka and L'Heureux-Dubé JJ. seemed to find that freedom of association in its positive aspect protected associational activities which were lawful if performed by an individual. La Forest J. expressly distanced himself from this conclusion, implying that it only protected associational activities which were otherwise constitutionally protected activities under other sections of the *Charter*.

A CAP ON CAP

Stan Rutwind

The tension between maintaining Parliamentary sovereignty in the face of cooperative federalism was manifested in the recent case of the *Reference Re Canada Assistance Plan (B.C.).*[1] It can be argued that the Supreme Court of Canada, in taking a classical approach to sovereignty, did not effectively deal with the reality of cooperative federalism.

The *Canada Assistance Plan* (the "Plan") is one of a number of shared-cost programs in existence between Canada and the provinces. First enacted in 1966, this program provides for 50:50 cost-sharing with respect to social assistance and welfare. The magnitude of this program can be determined from an examination of expenditures under the Plan. Payments by the Federal Government to the provinces climbed from $151 million in 1967-68 to approximately $5.5 billion in 1989-90. A feature of this Plan is that it authorized the Government of Canada to enter into agreements with the provinces.[2] The Plan was open-ended in that the Government of Canada would pay approximately half of a province's expenditures with respect to social assistance and welfare regardless of its size.[3] In addition, the Plan stipulated that agreements would remain in force so long as a provincial enabling law remained in force.[4] The agreements could be terminated by consent on one year's notice from either party[5] and could be amended by mutual consent.[6]

The Government of Canada entered into an Agreement with British Columbia on March 23, 1967. The Agreement provided that it was to remain in force as long as the provincial enabling law was in operation.[7] Further, the Agreement provided that it could be amended or terminated at any time by mutual consent of the Minister and the province.[8] It could also be terminated by either party on one year's notice.[9] The Agreement between Canada and Alberta was the same, *mutatis mutandis*, as that between Canada and British Columbia.

In his Budget Speech of February 20, 1990, The Honourable Michael H. Wilson, Minister of Finance, Canada, advised that his government would be introducing an expenditure control plan. In the Budget,[10] the Minister provided details of his plan:

> For the next two years, growth in CAP transfers will be limited to 5 percent a year in fiscally stronger provinces; Ontario, British Columbia and Alberta. Other provinces — those receiving federal equalization payments — will be exempt from this ceiling on growth. They will continue to have open-ended access to federal dollars to meet any growth in expenditures eligible for cost sharing under CAP.[11]

The proposed changes to the Budget were embodied in Bill C-69, *An Act to amend certain statutes to enable restraint of government expenditures*, which was introduced in Parliament on March 15, 1990. It received Royal Assent on February 1, 1991.[12]

Events moved along quickly as, on February 27, 1990, the Government of British Columbia referred the following questions to the British Columbia Court of Appeal under the *Constitutional Questions Act*, R.S.B.C. 1979, c.63:

1. Has the Government of Canada any statutory, prerogative or contractual authority to limit its obligation under the Canada Assistance Plan [sic], R.S.C. 1970, c.C-1 and its Agreement with the Government of British Columbia dated March 23, 1967, to contribute 50 percent of the cost to British Columbia of assistance and welfare services?

2. Do the terms of the Agreement dated March 23, 1967 between the Governments of Canada and British Columbia, the subsequent conduct of the Government of Canada pursuant to the Agreement and the provisions of the Canada Assistance Plan Act [sic], R.S.C. 1970, c.C-1, give rise to a legitimate expectation that the Government of Canada would introduce no bill into Parliament to limit its obligation under the Agreement or the Act without the consent of British Columbia?

Ultimately Ontario, all the western provinces, as well as the Native Council of Canada and the United Native Nations of British Columbia intervened in the cause.

---

1. *Reference Re Canada Assistance Plan*, [1991] 6 W.W.R. 1 (S.C.C.).
2. R.S.C., 1985, c.C-1, s.4
3. Ibid. s.5.
4. Ibid. s.8(1).
5. Ibid. s.8(2).
6. Ibid. s.8(2).
7. Agreement of March 23, 1967, s.6(2).
8. Ibid. s.6(3)(9).
9. Ibid., s.6(3)(6).
10. The Budget, February 20, 1990, at 11-12.
11. Ibid. at 76.
12. *Government Expenditures Restraint Act*, S.C. 1991, c.9.

At the British Columbia Court of Appeal,[13] Canada did not seriously contend that the federal government could limit its obligations under the Plan and the Agreement except by legislation. Virtually all the argument of British Columbia, supported by Alberta, centered on the application of the doctrine of legitimate expectations. British Columbia argued that it had a legitimate expectation that the Government of Canada would not introduce a bill into Parliament altering the terms of the Plan or the Agreement without the consent of British Columbia. This position was based on the Plan, the nature of the Agreement, and the course of dealings over the time between the parties to the Agreement.

It was argued that Parliamentary sovereignty had been preserved as the attack was directed against the Government of Canada in introducing the bill into Parliament, and not against Parliament itself. Indeed, it was admitted that Parliament could pass the law if it wanted. It was to be seen whether the bill would become law in the face of a judicial finding that British Columbia had a legitimate expectation that no such law would be introduced. Further, the importance of cooperative federalism to the fabric of the nation was urged. It was argued that shared-cost agreements have added stability and certainty to the provision of provincial social services. Intergovernmental agreements facilitated the daily business of intergovernmental operations. Governments, it was submitted, enter into these agreements to know their boundaries of action, to know what is expected of them and the government they are contracting with. They add permanence, stability and predictability. It was argued that, if this law could be introduced into Parliament by the Government of Canada, the basis for cooperative federalism would collapse.

On June 15, 1990 the British Columbia Court of Appeal held, in a 4:1 decision, in favour of British Columbia and the Intervenors in holding that the answers to the questions posed were (1) No and (2) Yes. Toy J.A. (concurred in by Hinkson and Legg J.J.A.) accepted British Columbia's submission that it had such a legitimate expectation. Further, Toy J.A. held that Parliamentary sovereignty was ensured as only the conduct of the Government of Canada was impugned rather than Parliament itself. Lambert J.A., concurring in the result, decided the case on interpretation issues. Southin J.A. dissented.

[13] (1990), 71 D.L.R. (4th) 99, 45 Admin. L.R. 34, 46 B.C.L.R. (2d) 273 (B.C.C.A.).

The Supreme Court of Canada in an unanimous decision rendered on August 15, 1991, written by Sopinka J., reversed the decision of the British Columbia Court of Appeal. The Court held that Question 1 as set out in the Order in Council was of no assistance in resolving the dispute. In their view, the first question asked the Court to determine whether the Agreement obliged the Government of Canada to pay to British Columbia the contributions that were authorized when the agreement was signed or whether the obligation was to pay those contributions as authorized from time to time. Sopinka J. advised that if the former interpretation was correct, the Government of Canada acted contrary to the agreement in introducing Bill C-69 whereas, if the latter was correct, the action was in accordance with the Agreement. The Court held that if it was the intention to freeze the payment formula it would have been set out in the Agreement. Yet, the payment formula did not appear in the Agreement but only in the Act, where it was subject to amendment. Thus, the Court held that the Government of Canada, in tabling Bill C-69 in the House of Commons, acted in accordance with the Agreement and that the answer to question 1 was "Yes". The Court viewed Question 2 as dealing only with the legal doctrine of legitimate expectations. The Court repeated its position regarding the doctrine as stated in *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, a decision released on December 20, 1990, eight days after that Court heard argument in the *Reference Re Canada Assistance Plan*, which held:

> The principle developed in these cases is simply an extension of the rules of natural justice and procedural fairness. It affords a party affected by the decision of a public official an opportunity to make representations in circumstances in which there otherwise would be no such opportunity. The court supplies the omission where, based on the conduct of the public official, a party has been led to believe that his or her rights would not be affected without consultation. [at 1204].

The Court decided that Question 2 as posed by British Columbia claimed that the consent of British Columbia had to be obtained. It held, however, that the doctrine of legitimate expectations would require consultation, not consent. Further, Sopinka J. wrote that the rules governing procedural fairness do not apply to a body exercising purely legislative functions. The Court held that the "formulation and introduction of a bill are part of the legislative process with which the Courts will not meddle."[14]

[14] *Supra*, note 1 at 25.

(Continued on page 46)

THE MARKET AND THE CONSTITUTION

David Schneiderman

Writing in 1947, Bora Laskin, former Chief Justice of Canada, wrote that the Canadian constitution did not "enshrine any particular economic theory". That observation may have been of dubious accuracy then:[1] it certainly would no longer be true if the recent constitutional proposals tabled by the federal government regarding the Canadian common market become entrenched in the constitution. While the proposed guarantee to entrench a *Charter* right to property has attracted much attention, the common market clause has attracted less, and generally favorable, press. Yet the common market proposal may be able to do much of the work of a right to property clause and much more — it could have wide-ranging impact on the constitutional limits to which Canadians may govern themselves.

The common market clause would guarantee the free movement of persons, goods, services, and capital across provincial and territorial boundaries. Any laws or practices, whether federal or provincial, which act as a restriction or barrier on that mobility would be of no force or effect. The common market principle would not be absolute. Exceptions would be federal laws regarding equalization or regional development, provincial laws which promote regional development within the province but do not treat other regions in the province any more favourably than other provinces, and those federal or provincial laws which are declared to be in the "national interest" by Parliament together with the approval of the governments of at least seven of ten provinces representing more than fifty percent of the Canadian population. Dissenting provinces may not otherwise opt out of the operation of the common market.

A companion proposal would grant the federal government a broad power to legislate "in relation to any matter that it declares to be for the efficient functioning of the economic union". Such laws will also require the approval of the governments of at least seven provinces with more than fifty percent of the population, likely acting through the new Council of the Federation. Dissenting provinces may opt out of the operation of the federal law for a non-renewable three year period. Neither the declaration of laws in the "national interest" nor the passage of laws "for the efficient functioning of the economic union" may be easily accomplished: the consent of more than a majority of provinces representing a majority of the Canadian population must be obtained — similar conditions must be met to amend most parts of the constitution.

The common market proposal is offered as a means to correct, and make more efficient, the operation of the free market system. It is argued that, in the era of globalization, Canadian business must be prepared to compete nationally in order to meet the demands of international competition. By targeting government practices which artificially prop up certain enterprises, economies of scale will result which, in turn, will permit the Canadian economy to compete more effectively in the international marketplace. Practices[2] such as provincial government procurement policies which favour in-province goods, services, and labour have been targeted by the drafters of the proposals. Preferential beer and wine pricing by provincial liquor boards have been identified as culprits to the inter-provincial mobility of alcoholic goods. Marketing boards which set quotas or prices on the production of agricultural goods, and provide farmers with a set price and the right to supply a specific share of the market, also are likely caught by the proposed amendment.

These consequences alone are quite significant. But the language of the common market proposals is not limited to such matters and potentially could have much wider implications for the provincial and federal regulation of the marketplace. Economists have identified a number of "distortions"[3] of the marketplace which act as barriers to the free flow of capital and labour, goods and services. Those distortions include provincial government pools of capital, such as the Alberta Heritage Trust Fund and Québec's Caisse de Dêpots et Placement, which have made available to local enterprises favourable fin-

---

1. The *Constitution Act, 1867*, together with judicial interpretation, guaranteed a customs union together with an "imperfect" common market for goods, capital and enterprise. See T. J. Courchene, "Analytical Perspectives on the Canadian Economic Union" in M.J. Trebilcock, J.R.S. Prichard, T.J. Courchene and J. Whalley, *Federalism and the Canadian Economic Union* (Toronto: University of Toronto Press for the Ontario Economic Council, 1983) at 65. To this may be added federal-provincial and inter-provincial agreements and the *Canadian Charter of Rights and Freedoms* which reinforce aspects of the economic union. See T.J. Courchene, *In Praise of Renewed Federalism* (Toronto: C.D. Howe Institute, 1991) at 12-13.

2. These are identified in the federal document, *Canadian Federalism and the Economic Union: Partnership for Prosperity* (Ottawa: Supply and Services, 1991) at 19 and 43-45.

3. According to Whalley, economists use the term "distortion" as a popular synonym for "barrier." But most use the term distortion"to describe a policy that is discriminatory, in the sense that it treats participants in transactions differently." See John Whalley, "Induced Distortions of Interprovincial Activity" in M.J. Trebilcock *et al.*, *supra*, note 1 at 162-63.

ancing at below-market rates.[4] Some provinces impose restrictions on investment by insurance companies, such as restricting investment in real estate, in part, to property within the province.[5] The proposed common market generally would not permit such preferential investment at the local level. Natural resource policies in some provinces are designed to ensure that processing of the resource occurs within the province,[6] or set up regulatory regimes to ensure that the resource needs of the province are met before export is allowed.[7] Provinces which choose to limit resource processing and exports, likely will be offending the principle of the economic union.

A wide variety of less obvious barriers to trade may also be caught.[8] Corporate tax rates may vary from province to province, as do labour standards,[9] and that variety can distort the free flow of capital. Provinces which choose to impose greater corporate tax rates,[10] or labour standards such as pay equity, which may increase the costs of doing business in the province and thereby distort the allocation of commercial resources, could be seen as barriers or restrictions to the free movement of capital in the common market. Packaging standards may vary, and rogue provinces which require differing and more onerous standards, such as the requirement of french language packaging in Québec, may have set up a restriction on the free movement of goods that could be challenged in the courts.[11] Environmental standards also may act as a barrier or restriction.[12] The province of Alberta has, in practice, refused admission into the province of hazardous wastes from Ontario or Québec which may have been destined for disposal at the Swan Hills waste facility plant. This practice, which restricts the free passage of hazardous goods into the province of Alberta, may not survive the constitutionalizing of the common market.[13]

■■

It may seem curious that the federal government has proposed constitutional amendments to guarantee the common market when there are a number of other large, and more pressing, matters on the constitutional agenda, such as accommodating Québec's distinctiveness, aboriginal self-government, and Senate reform. And, as the 1980 federal Liberal government discussion paper on "Securing the Canadian Economic Union" acknowledged, despite some barriers to inter-provincial trade, Canada has attained a "highly integrated economic union nonetheless."[14] The proposal is even more curious when we are advised, according to most economic forecasts, that the cost of these barriers and restrictions to the Canadian public are quite modest (under 1 percent) when compared to Canada's gross domestic product.[15] But the proposal has a distinguished pedigree, which can be traced back to section 121 of the *Constitution Act, 1867* which guarantees that "All articles of the Growth, Produce, or Manufacture of any one of the Provinces shall from and after the Union, be admitted free into each of the other provinces". The section rarely has been the subject of litigation and, as a consequence, judicial treatment. The section has been limited to catching only those fiscal measures which act as barriers between provinces rather than to any measures which regulate the marketplace within the provinces.[16] It was because of the limited effect given to section 121 that, in 1978, the Canadian Bar Association recommended constitutional amendments to this section to guarantee the free mobility of goods, services, labour and capital, which would enable any affected individual or corporation to attack in court any barriers to that movement.[17] This same proposal was made in the 1979 Pepin-Robarts' Report,[18] the 1980 Liberal party of Québec "Beige Paper,"[19] and the 1980 federal Liberal document

---

4. See M.J. Trebilcock, J. Whalley. C. Rogerson, and I. Ness, "Provincially Induced Barriers to Trade in Canada" in M.J. Trebilcock *et al.*, *supra*, note 1 at 294-295 and 302-304.
5. See the *Alberta Insurance Act*, R.S.A. 1980, c.I-5, s.94(3) and Trebilcock *et al.*, *ibid.* at 299.
6. As in the province of Saskatchewan. See Trebilcock *et al.*, *ibid.* at 261.
7. See the Alberta *Gas Resources Preservation Act*, R.S.A. 1980, c.G-3.1, ss.8-9.
8. A "barrier to the economic union includes any initiative that alters the wage/rental rate or the leisure/labour choice or the tax price of public goods on a geographical basis." See T.J. Courchene, *In Praise of Renewed Federalism*, *supra*, note 1 at 14.
9. Although a 1979 federal study concluded that there is "little evidence to suggest that their impact is a *major barrier* to labour mobility." Discussed in Trebilcock *et al.*, *supra*, note 4 at 286.
10. See Trebilcock *et al.*, *ibid.* at 314.
11. Trebilcock *et al.*, *ibid.* at 285-286.
12. According to the federal government document on the economic union, impediments to mobility include unintentional policies such as "non-harmonized regulation of environmental standards." See *Canadian Federalism and the Economic Union*, *supra*, note 2 at 17.
13. I am grateful to Professor Elaine Hughes for this example.
14. See "Powers Over the Economy: Securing the Canadian Economic Union in the Constitution" in A. Bayefsky, *The Constitution Act 1982 & Amendments: A Documentary History* (Toronto: McGraw-Hill Ryerson, 1989) at 607.
15. See *Canadian Federalism and the Economic Union*, *supra*, note 2 at 19.
16. See *Gold Seal Ltd.* v. *A.G. Alberta* (1921) 62 S,C,R. 424 and *R. v. Nat Bell Liquors Ltd.*, [1922] 2 A.C. 128. Broader interpretations can be found in *Murphy v. C.P.R.*, [1958] S.C.R. 626, *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198 per Laskin CJ, and *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591.
17. Canadian Bar Association Committee on the Constitution, *Towards a New Canada* (Montreal: The Canadian Bar Foundation, 1978) at 85ff.
18. The Task Force on Canadian Unity, *A Future Together* (Ottawa: Supply and Services, 1979) at 67-70.
19. The Constitutional Committee of the Quebec Liberal Party, *A New Canadian Federation* (Montreal: Quebec Liberal Party, 1980) at 105.

"Powers over the Economy: Securing the Canadian Economic Union in the Constitu-tion" tabled by then Minister of Justice Jean Chretien.[20] The MacDonald Commission on Economic Union, the intellectual springboard for the Canada-U.S. free trade agreement, also recommended the removal of inter-provincial trade barriers, both by strengthening section 121 and by instituting a code of economic conduct to cover those practices which an amended section 121 might not reach.[21]

The call for an unimpeded common market was renewed, more significantly, in the Liberal Party of Québec's "Allaire Report".[22] The Report declared the economy of Canadian federalism a failure and called for the radical decentralization of federal power together with a common market with the rest of Canada. In briefs and testimony before the Bélanger-Campeau Commission on the Political and Constitutional Future of Québec, the Québec business community, speaking through the Chambre de commerce du Québec, called for the rejection of any restrictions on the "free movement of individuals, goods and capital" throughout Canada.[23] There were no calls for a new corresponding economic power for the federal government.

There also has been some political movement in this direction in recent years. Both the western and maritime Premiers have agreed in principle to abandon preferential procurement policies which discriminate against out-of-province businesses within their respective regions. In August, all of the provincial premiers agreed to end preferential procurement policies for goods in excess of $25,000. [24] Together with the apparently anomalous situation of a free trade agreement in place with the United States, and no equivalent agreement amongst all of the provinces, and international pressures at global trade talks to remove certain barriers to trade, the time may have appeared opportune to constitutionalize the market model.[25]

Yet, throughout this debate, not enough attention has been given to the Australian experience of almost 90 years with a similar common market clause.[26] The Australian constitution guarantees in section 92 that "customs, trade, commerce, and intercourse among the states ... shall be absolutely free". The clause, according to law Professor Peter Hanks, has "posed a serious obstacle to any government which undertook to regulate commercial activity in Australia".[27] Courts have been faced with the perplexing task of reconciling this free market clause with public demands for state intervention and regulation.[28] The Australian Advisory Committee on Trade and National Economic Management, in its report to the Constitutional Commission, described the impact of section 92 jurisprudence in this way:[29]

> interstate trade is almost entirely free from taxation, banks and airlines cannot be nationalised, interstate transport cannot be made subject to discretionary licensing, and most marketing schemes must exempt interstate traders. It is doubtful that this interpretation of s.92 was intended: the section was to provide a guarantee of free trade, not of free enterprise.

This cautionary tale about constitutionalizing free market enterprise is particularly resonant in the Canadian context because of the change in language proposed by the federal government: from the constitutional directive that goods "be admitted free" into each of the provinces (directed at customs duties) to the declaration that "Canada is an economic union within which persons, goods, services and capital may move freely without barriers or restrictions based on provincial or territorial boundaries" (directed at unrestricted movement).[30] This change of language would be an important signal to the courts, moving us clearly in the direction of the Australian experience.

The constitutionalizing of the common market also has important implications for the role of the judiciary in constitutional litigation; courts will be called upon to test the economic impact of regulatory measures to determine whether they act as "barriers or restrictions" or are saved by the equally vague "equalization" or "regional

---

20. *Supra*, note 14. A useful history of this proposal is found in Annex B to 616-619.

21. See Royal Commission on the Economic Union and Development Prospects for Canada, *Report*, Vol. 3 (Ottawa: Supply and Services, 1985) at 136-140. Calls for an economic union were also made in the Report of the Group of 22, *Some Practical Suggestions for Canada* (Montreal: le Groupe Columbia, June 1991) at 20; Canadian Manufacturers Association, "'Canada 1993': A Plan for the Creation of a Single Market in Canada" (April 1991); and Canada West Foundation, "Time for Action: Reducing Interprovincial Barriers to Trade" (May 1989).

22. Report of the Constitutional Committee of the Quebec Liberal Party, *A Quebec Free to Choose* (January 28, 1991) at 36.

23. Richard Fidler, trans. & ed., *Canada, Adieu? Quebec Debates Its Future* (Vancouver & Halifax: Oolichan Books & Institute for Research on Public Policy, 1991) at 84.

24. See *Canadian Federalism and Economic Union*, *supra*, note 2 at 21.

25. These, and other reasons, are discussed in K. Norrie, R. Simeon, and M. Krasnick, *Federalism and the Economic Union in Canada* (Toronto: University of Toronto Press, 1986) at 249-251.

26. Some discussion can be found in J.A. Hayes, *Economic Mobility in Canada: A Comparative Study* (Ottawa: Supply and Services, 1982) and A.E. Safarian, *Canadian Federalism and Economic Integration* (Ottawa: Information Canada, 1974).

27. Peter Hanks, *Australian Constitutional Law: Materials and Commentary*, 4th ed. (Sydney: Butterworths, 1990) at 689.

28. See *Uebergang v. Australian Wheat Board* (1980), 145 C.L.R. 226 at 300.

29. (Australian Government Publishing Service, 1987) at 206.

development" exemptions. The 1978 Canadian Bar Association report was sanguine about this prospect: "the courts would find sufficient leeway, as they have done under section 121, to allow for departures from the principle of free movement when need be..."[31] Again, The Australian experience is instructive. The High Court of Australia wrote in 1988 that:[32]

> judicial exegesis of the section [92] has yielded neither clarity of meaning nor certainty of operation. Over the years the court has moved uneasily between one interpretation and another in its endeavours to solve the problems thrown up by the necessity to apply the very general language of the section to a wide variety of legislative and factual situations. Indeed, these shifts have been such as to make it difficult to speak of the section as having achieved a settled or accepted interpretation at any time since federation.

As it would seem that, *prima facie*, any regulatory measure is intended to "distort" the operation of the free market, most measures would be *prima facie* challengeable under the proposed section 121.[33] While the courts are unlikely to strike down every such measure, there will be a great deal of uncertainty in regard to many measures and some that we value likely will not survive. More importantly, this has significant implications for democratic politics; legislators may be less likely to intervene in the marketplace and, when they do, they may choose to "harmonize downwards"[34] so as to level the playing field. Rather than risk litigation, and under pressure to retain their competitive advantage vis à vis other provinces,[35] governments would be inclined to favour the free market, rather than "distort" it. As Peter Leslie describes it, this version of economic liberalism calls for "shrinking of the role of government altogether. It is a response to the voices calling for minimal interference in the allocation of resources through market forces."[36] This may be seen as a valuable outcome for some: for others, it valorizes capitalism over democratic self-rule. The sovereignty of the people acting through their democratically elected representatives will be severely diminished.[37] The saving of laws by declaring them to be in the national interest and the new proposed federal power to make laws for the efficient functioning of the economic union, requiring the stringent amending formula standard of 7 and 50, are strait-jacketing substitutes for the free operation of the democratic process.[38]

■■■

The common market proposals sustain the perception that this round of constitutional negotiations is one for all of Canada, not just for Québec. The federal strategy appears to have been to load up the constitutional plate with a variety of wide-ranging proposals, each of which could have substantial implications for the future of the country, united or not. With only five months before the Parliamentary committee is mandated to report back to Parliament, the Canadian public legitimately is entitled to ask who wins and who loses according to the economic proposals. At the very least, with the removal of agricultural marketing boards and subsidies on the prairies, it "is most likely that western Canada would lose a large number of farm communities and farm operations...One would expect much bigger farm operations and fewer farm/rural towns."[39] If there are significant losses, we might wish to buffer that economic loss, as the de Grandpré commission which looked into the effects of Canada-U.S. free trade ultimately recommended in regard to the FTA.[40] Even then, the federal government failed to act. Indeed, Canadians would be justified in asking, given their far-reaching implications, why the common market proposals are part of a package with a very tight time frame which restricts opportunity for in-depth consideration.

To whatever extent barriers to interprovincial trade deserve to be addressed, that should be attempted at the

---

30. A.E. Safarian, *supra*, note 26 at 20.
31. See *Towards a New Canada*, *supra*, note 17 at 88.
32. See *Cole v. Whitfield* (1988), 78 ALR 42 at 48.
33. See T. Lee and M.J. Trebilcock, "Economic Mobility and Constitutional Reform" (1987) 37 U.T.L.J. 268 at 312.
34. See Ontario, *A Canadian Social Charter: Making Our Shared Values Stronger* (Toronto: Ministry of Intergovernmental Affairs, 1991) at 8.
35. According to Peter Leslie, "the presence of the US on our doorstep requires adaptive behaviour by Canada; efforts to buck continental trends will be damaging and counter-productive" in *The European Community: A Political Model for Canada?* (Ottawa: Supply and Services, 1991) at 31.
36. *Ibid.* at 33.
37. See *Citizen's Forum on Canada's Future, Report to the People and Government of Canada* (Ottawa: Supply and Services, 1991) at 132, where the "Spicer Commission" found Canadians look to their governments to play a role in redressing market imperfections and supplementing market initiatives.
38. The same problems do not arise when the federal government invokes its s.91(2) power over "trade and commerce". But there is no discussion in the federal proposals about how this power may be exercised in conjunction with the new s.91A power. Might the federal government be legally, if not morally, obliged to obtain the consent of a majority of provinces before it exercises the general trade and commerce power it previously could exercise unilaterally?
39. W. H. Furtan, "Agriculture in a Restructured Canada" (Western Centre for Economic Research: The Economics of Constitutional Change Series, Art.#3, June 1991) at 7.
40. See Report of the Advisory Council on Adjustment, *Choosing to Win* (Ottawa: Supply and Services, 1989).

inter-governmental, and not the constitutional, level.[41] Parliamentary and legislative committees should be commissioned to look into a code of conduct designed to address the specific barriers which act as socially indefensible impediments to trade. Redress for unjustifiable barriers should be had before bodies other than courts.

Although part of the "national unity" package, the constitutionalizing of the free market model marks another turn toward the kind of class conflict that characterized the free trade debate. The Business Council on National Issues, the Fraser and C.D. Howe Institutes, and the Canadian Manufacturing Association will be pitted against the labour movement, and those who are unable to participate freely in the market such as women and the poor.

The proposals may have another interesting effect. Much of the support for sovereignty within Québec has been led by the new economic elites, who gained financially by the upsurge in Québec economic activity in the 1970s and 1980s.[42] Coupled with the green light from Wall Street that Québec could go it alone economically, they, rather than the poets, musicians, and academics, have calmly been leading public opinion in Québec in the march towards sovereignty. The common market proposals are both a lure and a challenge to those elites. Either they will choose the federalist option, with its promise of economic prosperity in a common market, or they will choose to maintain "Québec Inc.", where the national assembly maintains its close ties to economic development in the province, unhampered by constitutional prohibitions against provincial intrusion into the marketplace. If they choose the former, the federal strategy may have succeeded in dismembering the sovereignist alliance. If they choose the latter, the bargaining power of Québec's nationalist movement will have been weakened.[43] Canadians outside of Québec may then be led, perhaps dangerously, to the brink where rhetoric and reality may not be readily distinguishable.

DAVID SCHNEIDERMAN, Executive Director, Centre for Constitutional Studies, University of Alberta.

---

41. The Manitoba Constitutional Task Force recently recommended that political action be taken to remove inter-provincial economic barriers. See *Report of the Manitoba Constitutional Task Force* (October 28, 1991) at 52-54.

42. See Charles Macli, "Duelling in the Dark" *Report on Business Magazine* (April 1991) 29.

43. Quebec's ability to negotiate a new free trade agreement with the United States may also be impaired. See T.J. Courchene, *In Praise of Renewed Federalism*, *supra*, note 1 at 30-31.

(Continued from page 40)

Sopinka J. rejected the contention that there was no impediment to prevent Parliament from legislating but that the government was constrained by the doctrine from introducing the Bill before Parliament. Relying on W. Bagehot, *The English Constitution* (2nd ed. 1872) the Court held that a restraint on the executive in the introduction of a bill was a fetter on the sovereignty of Parliament.

The Court did not deal with an argument put forth by Ontario, supported by Alberta and Saskatchewan, that there was, with respect to federal-provincial cost-sharing agreements, a convention that neither Parliament nor the legislatures could use their legislative authority to alter their obligations unilaterally. Sopinka J. wrote that, since Question 2 did not relate to conventions, the issue would not be addressed.

The Supreme Court of Canada briefly dealt with a "manner and form" argument put forward by the Native Council of Canada and the United Native Nations of British Columbia. The Court held that there was no indication of an intention on the part of Parliament to have bound itself by the Plan and, further, that manner and form restrictions could only relate to non-substantive matters in statutes of a constitutional nature. The Court also briefly disposed of an argument by Manitoba that Parliament lacked legislative jurisdiction to make changes to the Plan.

In sum, the result in this case is the product of a conservative tradition with respect to Parliamentary sovereignty. It could be argued that Bagehot, relied upon by the Court, is of little relevance as he wrote about a 19th century unitary state without a history of cooperative federalism.

The Court has, however, left open a door. Although it held that the "formulation and introduction of a bill" would not be meddled with, it left aside:

> ... the issue of review under the *Canadian Charter of Rights and Freedoms* where a guaranteed right may be affected.[15]

Further, the issue regarding the existence of conventions in the realm of shared-cost agreements between Canada and the provinces is still unresolved.

STAN RUTWIND, Barrister and Solicitor, Constitutional & Energy Law, Alberta Attorney-General and Counsel for the Alberta Attorney General in *Reference Re Canada Assistance Plan (B.C.)*.

---

15. *Ibid.*