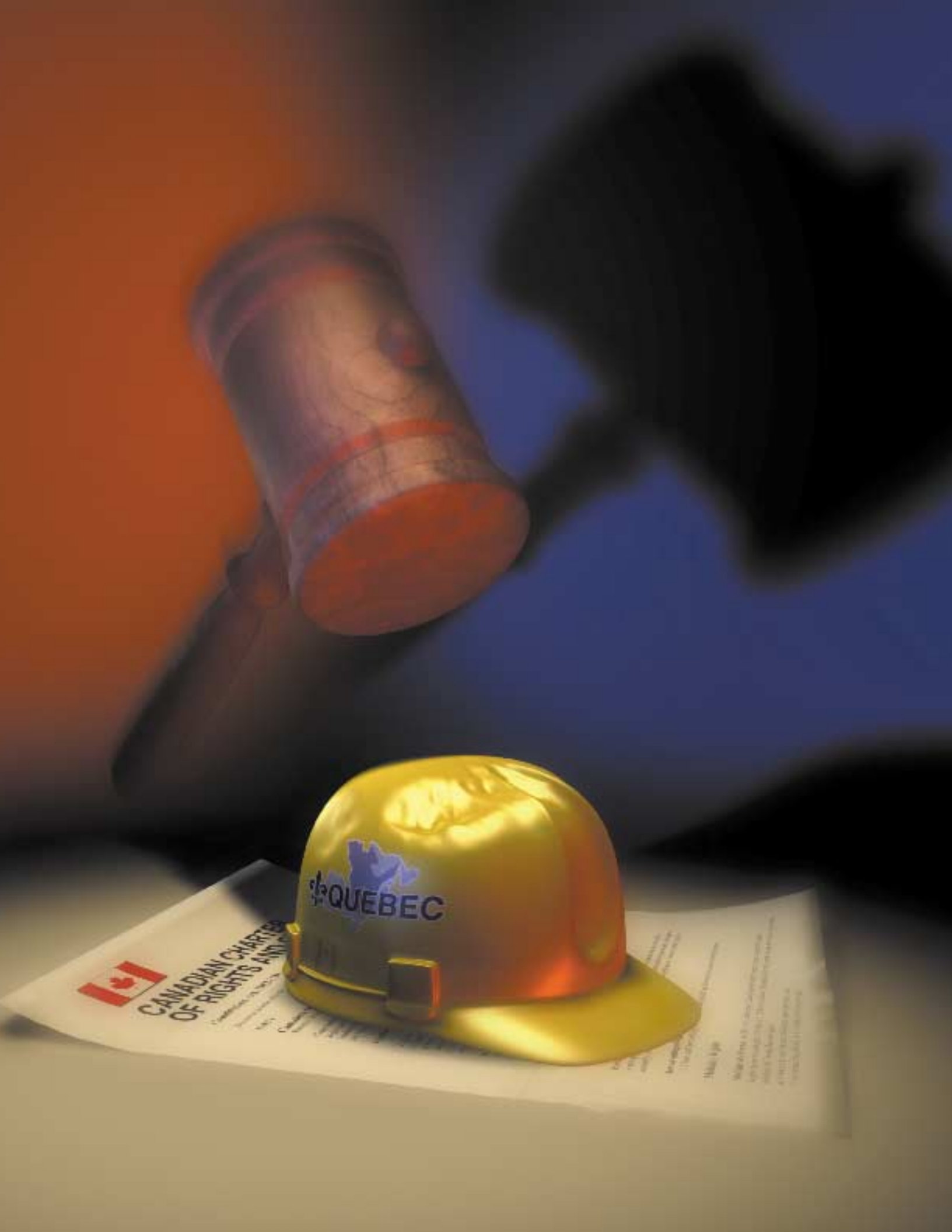

QUEBEC
CANADIAN CHARTER
OF RIGHTS AND

HAMMERING AWAY AT INJUSTICE

The Supreme Court rules on Freedom of Association

For over 30 years, a series of severely restrictive laws and regulations in Quebec have disenfranchised thousands of workers who didn't believe they should be required to join a union in order to work in the construction industry. In March 2000, this issue was taken to the Supreme Court of Canada by Gatineau contractor, Jocelyn Dumais, and the Association pour le Droit Au Travail (ADAT).

After an extraordinary 18 months, the Court rendered its decision in October 2001. The decision contained two results. Sadly, in the context of Quebec, a five to four majority upheld the travesty of justice Quebec's laws perpetrate against open shop construction contractors and tradespeople. However, eight of the nine court justices also held that Canada's Charter of Rights and Freedoms protects individuals from being forced by governments to join unions — at least outside Quebec's construction industry.

At this point, perhaps only two definitive conclusions can be drawn from the decision. The first is that until there is a fundamental change in Quebec's labour legislation, its construction industry will continue to operate as a closed and isolated enclave within North America. The second conclusion, which is more open to debate, is that the door has been opened to legally challenge government laws and policies that force individuals into association with trade unions.

Though it may take many years and legal cases to fully assess the impact of the ruling, it will undoubtedly be heralded as a landmark decision in Canadian labour law history. It is thus important to understand why the Court arrived at the conclusions it did concerning Quebec's construction industry employment rules and the decision's implications for the rest of Canada.

How Quebec's "Soviet-Style" Registration System Evolved

To understand the Advance Cutting and Coring Ltd. et al. v. Her Majesty the Queen and the Procureur Général Du Quebec (R. v. Advance Cutting and Coring) case, one must first explore how Quebec's "Soviet-style" regime of registration and enforced unionization came to exist.

To begin, Canada's Constitution Act, for the most part, gives provinces jurisdiction to regulate licensing and employment of construction workers. While each jurisdiction has its own regime, the unique peculiarities of Quebec's system stem from what National Post columnist Diane Francis has called an "unholy alliance" between the Quebec government and that province's construction unions.

According to Gatineau contractor and ADAT leader Jocelyn Dumais, this alliance was formed following the 1964-67 "war" between U.S.-based international building trades unions and Quebec-based unions. Quebec's last Union Nationale government reacted to this violence by passing Bill 290: the Construction Industrial Relations Act, in December 1968. The law outlawed non-union construction and made union membership mandatory. This effectively made the province's construction industry a closed shop.

The expected industrial peace and stability evaporated when the enormous James Bay hydroelectric development was built in the early '70s. Vandalism and rampant violence between union factions resulted in millions of dollars in damages. Consequently, the Liberal government formed the Cliché Commission, to conduct a comprehensive review of construction industry labour relations. The Commission recommended giving the provincial government, as opposed to unions, total control over the supply and dispatch of construction workers to construction employers.

The National Assembly agreed and in 1976, passed legislation establishing the Commission de la Construction du Quebec (CCQ) which provided the necessary framework to implement and enforce regulations governing construction industry employment. This complex series of rules and regulations formed the basis for the current Labour Relations, Vocational Training and Manpower Management in the Construction Industry Act.

In a study of labour laws published in 1998 by the Work Research Foundation of Mississauga, Ontario, Jennifer Wunsch comments, "Sorting through the Act to determine who can work where and when and under what circumstances is no simple task." Notwithstanding the confusion arising from the Act, it is clear the regulations link the issue of government controlled permit cards to construction union membership. Specifically, Section 7.02 of the decree states, "Every employee must join a union or syndicate affiliated to the representative association he has chosen."

That these cards are rigidly controlled by the CCQ and difficult to come by is evident by the numbers issued. Only about 98,000 cards are issued for a province of over seven million people. Moreover, a separate authorization is required for each of the province's 13 sectors. Considering that Quebec's population is more than double Alberta's where upwards of 140,000 people work in construction, it seems obvious that Quebec's system is designed to artificially limit the supply of construction workers to keep pay rates excessively high. This is evident in the rate schedules that range from $32.35 for labourers to $39.41 for electricians.

> "The objection to union membership can be anchored in profound moral, religious or political convictions and it is implicit in Canadian law that such convictions are to be respected."

Inherent in this regulatory structure are economic incentives for both consumers and suppliers of construction services to flirt with the rules. Indeed, an enormous underground "black market" has emerged as a direct result of the rules and regulations. This underground economy is so large that Laval lawyer and labour relations expert Roger Bedard estimated it constituted 80 per cent of the residential construction market in 1987. According to Jocelyn Dumais, similarly high levels were evident in commercial and institutional construction markets.

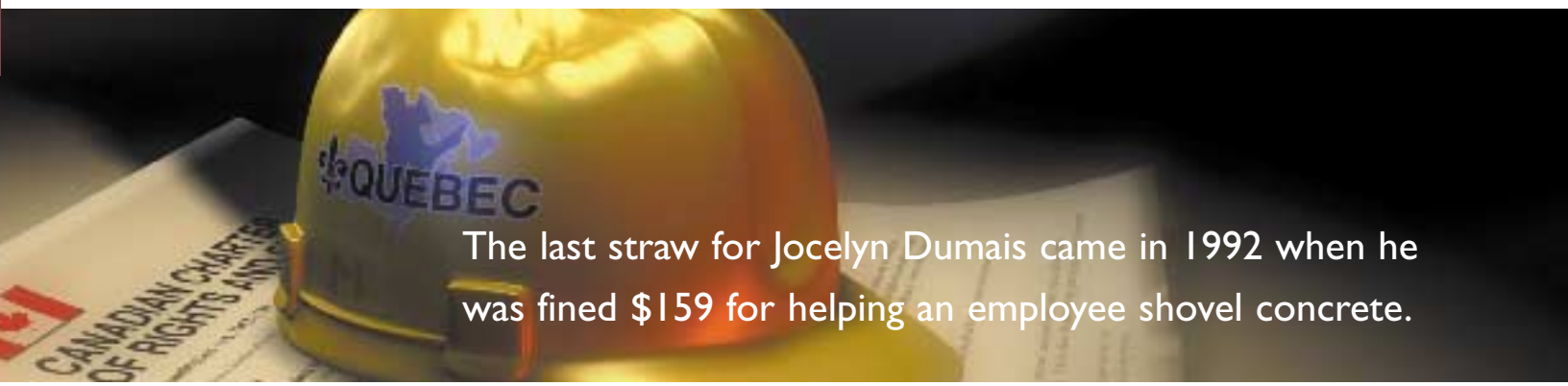
Your Money or Your Microwave!

Notwithstanding the prevalence of this underground economy, any employee caught working without a card is subject to fines and penalties. Employing a worker without a card is also an offence. Morality issues aside, the economic reality is that when restrictive regulatory regimes serve to unduly exclude people from participating in potentially lucrative markets, some of the excluded people will be tempted to ignore the rules. Most economists will agree this is a fundamentally basic human response, with potential penalties and fines considered a risk worth taking and simply a cost of doing business.

Those acting on this view in Quebec, however, have faced a formidable regulatory adversary. The CCQ has an annual budget of $36 million and 450 staff, including upwards of 150 inspectors who roam the province checking compliance. These inspectors enforce the rules governing construction employment with a zealous vigour comparable only to the enforcement of the province's strict French language laws.

Consequently, dozens of workers have spent time in jail for the "crime" of working in Quebec's construction industry. Almost $25 million in fines and penalties were issued between 1978 and 1996.

Though his company paid $43,000 in fines and penalties between 1989 and 1993, the last straw for Jocelyn Dumais came in 1992 when he was fined $159 for helping an employee shovel concrete. A government official threatened to seize his home television and microwave unless he paid the fine. Shortly thereafter, he and a group of similar-minded contractors and employees formed ADAT in the hope of changing Quebec's draconian regime. The R. v. Advance Cutting and Coring et al. case was formally initiated in 1993. In 1999, the Supreme Court of Canada agreed to hear the case appealing 1998 decisions of Quebec's Superior Court and Court of Appeal.



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Constitutional Questions to be Resolved

The Supreme Court appeal focussed on establishing that Quebec's registration and licensing scheme constituted a compulsory obligation to join a construction union. The appellants contended that this, in combination with the consequences arising from enforcement of the law and regulations, violated rights guaranteed under both the Canadian and Quebec Charters of Rights and Freedoms.

Specifically, Section 2 d) of Canada's Charter of Rights and Freedoms guarantees "freedom of association" for Canadians. In context of labour law, this is accepted to mean that the rights of individuals to freely join together to form a union for the purposes of bargaining collectively with employers are constitutionally protected.

However, because the Charter contains no specifically expressed provision, the appellants sought to convince the Court that this same Section 2 d) provision protects an implicit corollary freedom against being legally forced to join a union — sometimes referred to as "freedom of disassociation." In affirming this individual right, the Court would then have to find that Quebec's card system and the related consequences for individuals caught working without the prescribed cards, violated this implicit Charter right. Finally, even if the appellant's successfully convinced the Court to agree on this, a further majority needed convincing that this violation went beyond what could be "demonstrably justified in a free and democratic society", as Section 1 of the Charter requires.

The Delicate Balance Between Collective and Individual Rights

As industrial history records demonstrate, working conditions were quite appalling prior to the formation of labour unions. Consequently, the concept of individuals coming together to improve economic and working conditions by bargaining collectively through unions was embraced by western industrial democracies as being in the public interest. To support this interest, governments developed laws and policies to promote and protect unions.

However, expanding collective rights in general, and more particularly the rights of unions, inevitably comes at the expense of individual rights. Obviously the two cannot expand at the same time. Diverging opinions over the nature of these rights and the basis on which the two interests are reconciled lies at the heart of legal discussions on the concept of "association."

In Canada, the legal foundation for the current rules governing relationships between individuals and unions was laid in a 1946 Supreme Court decision written by Justice Ivan Rand. Known as the "Rand Formula," the decision permitted employees to opt out of union membership so long as their dues continued to be paid to the representative union. The ruling established that all employees benefiting from collective bargaining, regardless of union membership, should financially contribute toward the costs associated with collective bargaining. This decision contributed immensely to the fortunes, influence and strengthening of organized labour through the 1950s, '60s and '70s.

However, to gain more influence, unions became increasingly involved in activities unrelated to collective bargaining. The extent and legitimacy of these activities were considered by the Supreme Court in the landmark Lavigne v. Ontario Public Service Employees Union (OPSEU) case of 1991.

Lavigne argued that the "Rand Formula" compelled him to contribute to groups and causes whose objectives he disagreed with. He felt that being forced to pay dues violated his freedom to disassociate with them.

The majority decision of Canada's Supreme Court ruled against Lavigne because he was not compelled to join OPSEU. A significant court minority, however, did agree there was an implicit right to freedom of disassociation within the Charter. Writing for the dissenting minority

on this point, Justice Gérard LaForest noted, "The essence of the Section 2(d) guarantee is protection of the individual's interest. The protection of this and the community interest in sustaining democracy requires that that freedom from compelled association be recognised under Section 2 (d)." This minority decision served as an important foundation from which the freedom to associate/disassociate issue could be explored further in R. v. Advanced Cutting and Coring et al.

How the Court Ruled

When the Court heard the legal arguments in March 2000, many speculated that a decision would be handed down within six to nine months. The fact that it took the Court over 18 months to render its somewhat fractious decision indicates the difficulties it had addressing the conflicting array of issues.

While eight of the nine judges affirmed that the right to disassociate is protected by the Charter, five ruled the violation in Quebec was tolerable and reasonable due to the construction industry's troubled labour relations history. Four dissenters said Quebec's law exceeded reasonable limits. This divided and qualified decision to allow the legislation to override fundamental freedoms in Quebec received mixed reaction.

Naturally, ADAT's Dumais was disappointed in the ruling as it related to Quebec's construction industry, though not its it broader implications for individuals outside Quebec. "For the first time the Supreme Court recognized the right to belong or not to belong to a union. We may have lost our battle to free the Quebec construction industry from union dictatorships but we have won the war against forced unionization in Canada. To this, we say "mission accomplit."

It was precisely this type of impact a Supreme Court ruling might have on laws outside of Quebec that prompted seven provincial construction associations under the banner of the Canadian Coalition of Open Shop Contracting Associations (CCOSCA) to present "intervener" arguments to the Court. Speaking on behalf of the Coalition in Alberta, Stephen Kushner, president of Merit Contractors Association stated, "This is a victory for the rights of workers to decide for themselves whether to join a union and a message to governments that they cannot interfere with that right. It is a strong confirmation of the right of workers to gain employment in an industry without being forced by government to join a union. The ruling places important curbs on governments when they try to unilaterally foist unions on employees through heavy handed decrees."

Organized labour also heralded the decision, but from a different perspective. First, the fact that Quebec's law was upheld was seen as a victory. Second, it was believed the ruling would have limited effect outside Quebec. According to Harold Caley, the lawyer representing the Canadian Office of the AFL/CIO's Construction Trades Department, "I think that given the uniqueness of the Quebec construction industry, it would be hard to take this decision and transplant it elsewhere in the country."

Given these two decidedly different interpretations of the same result, it is apparent that some elements of the ruling require further analysis.

Piercing the Union Veil Part One: Other Agendas

All but one Supreme Court justice found that the freedom to disassociate from unions was protected under the Charter. In so doing, the Court formally recognized that unions are political as well as social and economic institutions. As such, there is an ideological attachment to being associated with them.

Regardless of the issues, the views of labour leaders are a constant in Canada's political landscape. Even when their views aren't sought or their relative membership numbers are small, it is rare for "labour movement" leaders not to weigh in on "behalf of its members" when public policy issues are being discussed. In fact, many of these leaders frequently claim to represent not just the views of their members but all union and non-union working people alike!

This was an important consideration for Justice Michel Bastarache who contended that a government system compelling employees to join unions amounted to forcing ideological conformity. His decision reads, "Ideological constraint exists in particular where membership numbers are used to promote ideological agendas and this is so even where there is no evidence that the union is coercing its members to believe in what it promotes." He went on to say that he endorsed the appellants contention that "the objection to union membership can be anchored in profound moral, religious or political convictions and it is implicit in Canadian law that such convictions are to be respected."

Judicial notice of this point prompted Peter Gall, Vancouver lawyer for the firm Heenan Blaikie, who presented CCOSCA's arguments to the Court to conclude, "mandatory union membership involves 'coerced ideological conformity' with the political and economic goals of unions."

Piercing the Union Veil Part Two: Protecting the Public Interest

While a majority of Court justices achieved consensus on the right of disassociation, the issue of whether Quebec's regime was reasonably justified under the circumstances proved to be more divisive.

In R. v. Advanced Cutting and Coring et al., four Court justices saw through the contrived nature of Quebec's regulatory structure. In particular, Justice Bastarache wrote, "While it is in the public interest to have structured collective bargaining and to provide for competency requirements, and these are no doubt pressing and sub-

stantial objectives, they are not the true objectives of the impugned provisions. The legislation brings into play restrictions on the admission to the industry, cancellation of the ability to have a non-unionized business, restrictions on bargaining rights, imposition on regional quotas and impingement on regional mobility. It has not been demonstrated that there is a logical relationship between the legislation's stated objectives and these restrictions. Any justification based on competency is untenable."

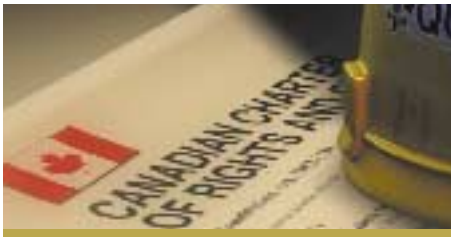
The remaining majority of justices, however, reached an opposing conclusion that must be analyzed from two different perspectives.

Judicial Restraint and "That Context Thing"

Because some of its Charter of Rights decisions have overturned laws democratically developed through the political system, the Supreme Court has recently received criticism for being "too activist". As appointed rather than elected officials, Supreme Court justices are increasingly sensitive to criticism that their rulings intrude too far into political matters.

This sensitivity is apparent in Justice Louis LeBel's analysis. He wrote, "The management of labour relations requires a delicate exercise in reconciling conflicting values and interests. The relevant political, social and economic considerations lie largely out beyond the area of expertise of courts. ...The jurisprudence acknowledges that legislative policy-making in the domain of labour relations is better left to the political process, as a general rule." As evidence, he noted, "The legislature viewed this form of security as a better instrument to maintain and develop democracy than the Rand formula under which workers pay for services and have no say on the most important issues concerning the association and its members."

It is in comparing the Court's contrasting views on the causes and effects of labour legislation that creates uncertainty about the extent to which courts in future will be prepared to limit government policies that force individuals into unions. Though it opened the door to restrict forced unionization schemes, the width of that opening can only be speculated on at this time. Specifically, under what circumstances are courts prepared to intervene to protect individuals from having their right



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to disassociate from unions infringed upon? Moreover, how important will the ongoing threat of union violence be in these considerations?

In commenting on the R. v. Advance Cutting and Coring case the *National Post*'s, Luiza Chwialkowska wrote, "The three native Quebecers [on the Supreme Court] also reasoned that the violent history required that the 'delicate exercise' of labour relations best be left to Quebec's National Assembly." That violent behaviour and moreover the threat of potential violence, lies simmering near the surface of the minds of some labour leaders was immediately apparent in their reaction to the ruling. For example, Quebec labour leader Marc Laviolette told the *Ottawa Business Journal*: "We need to maintain social peace in the sector. Knowing the history of the industry, I would not want to see what happens on a job site where there is one set of standards for a unionized worker and another for those not unionized."

The threatening, smug nature of this "leader's" comment is typical of organized labour's sometimes open and defiant contempt for the rule of law. Yet somehow, both legislators and the legal system have acquiesced to related acts of violence as being somehow morally acceptable when unions protect their "turf". This demonstrates the extent to which violence is institutionalized in Canadian labour law. It seems apparent that the real reason union-related violence has been so prevalent, and the reason potential union violence continues to be a potent consideration, is that the authorities responsible for protecting the public interest effectively allowed and condoned these illegal activities in the first place. Why is it that normal standards of conduct and respect for private property seem to have less meaning when applied to unions and striking workers than to the general citizenry?

Throughout the development of labour relations laws, government policies have tended to support and protect unions for genuine social and economic reasons. It would be naïve, however, to exclude the fact that many legislators also hoped to be rewarded for doing so by gaining organized labour's political support. Indeed, it would be a rare politician that would fail to rationalize a pro-union policy on the basis that it was tied to preserving "harmony" or promoting "stability." There is,

nonetheless, a fine line between creating a framework for effective collective bargaining and appeasing violence, or threats of violence, designed to intimidate opposition. Surely our courts, with their system of tenure, are better positioned to ensure the rule of law prevails than legislators whose tenure is limited by the vagaries of public opinion.

In allowing Quebec's legislation to override the right of individuals to disassociate with unions, the Court left the impression that it was giving de-facto sanction to the existence of institutional violence. Thus, the rationale for allowing Quebec's legislation to supersede a right deemed fundamental under the Charter merits further scrutiny.

The implication that the Supreme Court sanctioned the trade off of individually protected rights to appease organized labour's propensity for violence necessitates a broader examination of whether construction union related violence is unique to Quebec.

Institutionalized Construction Union Violence

An examination of construction industry violence shows that it is a deliberate and consciously used tool to intimidate any and all potential threats. In his seminal works on the development of open shop construction in the U.S., Dr. Herbert Northrup of the Industrial Research Unit of the Wharton School at the University of Pennsylvania extensively documents the use of violence by construction unions in the U.S. During the past decade, various examples of violent and intimidating behaviour demonstrate the lengths some Canadian construction unions will go to protect their turf.

In various parts of Canada, general contractors, whether unionized are not, are permitted to sub-contract with companies that provide specialized construction services such as electrical, plumbing and mechanical work. In 1994, the Nova Scotia government proposed legislation intended to reverse a court decision prohibiting unionized general contractors from subcontracting to non-unionized companies providing such specialized services. In response, unionized construction workers stormed the legislature and descended from the gallery into the debating chamber. Is such conduct considered to be a legitimate form of protest or exercise of free speech?

All but one Supreme Court justice found that the freedom to disassociate from unions was protected under the Charter. In so doing, the Court formally recognized that unions are political as well as social and economic institutions. As such, there is an ideological attachment to being associated with them.

Would legislation or schemes that force individuals into construction unions featuring such by-laws in other provinces pass the standard of minimal impairment outlined by the Court in Justice LeBel's decision?

In 1994, people watched in shock as violence erupted at Macmillan Bloedel's paper mill in Port Alberni, B.C. In what was termed "one of the most bitter labour disputes in BC history," U.S.-affiliated building trades union members wreaked havoc because a construction project was awarded to a firm affiliated with the independent Canadian Industrial Iron and Steel Workers' Union. That B.C.'s NDP government of the day tacitly supported this behaviour was evident when the minister responsible for B.C.'s Ferry Corporation (former union organizer and now disgraced premier, Glen Clarke) banned the construction company's vehicles from using the public ferry system for fear of public safety.

Numerous cases were launched as a result of the unions' actions. One case involving two company superintendents and the B.C. and Yukon Territory Building and Construction Trades Council resulted in $170,000 damages, including $100,000 in punitive damages being awarded against the unions. In the decision, Justice Cohen noted, "the plaintiffs were threatened, intimidated and constantly harassed by the building trade union's members while these representatives who clearly had knowledge of their members' activities took no active steps to stop their members' conduct."

Perhaps the most bizarre incident occurred on Nova Scotia's Cape Breton Island. In 1997, an estimated 1,000 unionized construction workers descended on a building under construction to protest that part of the project was being done by a non-union contractor. Where was the pepper spray when the mob burned the virtually completed building to the ground and held both police and firefighters at bay?

As these examples illustrate, a propensity for violence and the on-going threat of violence is an institutionally accepted characteristic of construction industry unions that is not unique to Quebec. Quebec's uniqueness is only a matter of degree. It is thus unnecessary to keep a box score as to whether unions in one jurisdiction have a higher propensity for violence than unions in another jurisdiction. Rather, the main issue of concern from legal and political perspectives centres on the manner and form by which governments elect to deal with this issue.

Features of Quebec's System That Make it Truly Unique

Any further legal examination of Quebec's legislation governing construction industry employment will have to await substantial change in government policy. Hence, assessing the potential impact of the Court's decision on government policies outside Quebec is limited to the rationale the Court's majority used in determining that the Quebec government's regime could override a right protected under the Charter.

As previously established, violence, the potential for violence and the objective of obtaining "harmony" and "stability" are offered by governments as rationales for the legislation, policies and schemes that prevent non-union or independently-unionized construction companies from working on construction projects. Clearly the Court was concerned with past violence and the potential for violence in Quebec's construction industry when it allowed Quebec's regime to override a right deemed protected under the Charter. However, it seems apparent that the Court chose to permit this exception because the unique features in Quebec's system set it apart from the systems legislators outside Quebec devised. These systems share more common features than they do with Quebec's system. And, the feature that makes Quebec's system particularly unique is that the provincial government has total control over the hiring of tradespersons.

For example, there was virtual unanimity on the issue concerning the rights of individuals to disassociate with unions. The Court, however, split on the degree Quebec's legislation resulted in individuals being subjected to "ideological coercion". While dissenting judges took a broad view that forced membership in itself constituted ideological coercion, the majority concluded that Quebec's hiring system required a more rigorous analysis of the subtleties behind Quebec's compulsory membership scheme. In particular, Justice LeBel analyzed the degree of forced union membership in Quebec and concluded, "Mere membership in a union does not violate freedom of association because it does not impose an ideology. The appellants have not made out a case that the challenged legislation establishes any form of ideological conformity. As it stands, the law does not impose on construction workers much more than the bare obligation to belong to a union." But how would the Court react to a regime that compelled union membership if the consequence of this membership was that an individual would be forced to sign a "Salting Clearance Agreement"?

In the 1990's many Canadian construction unions adapted the Construction Organising Membership Education Training (COMET) program from their U.S. counterparts. The International Brotherhood of Electrical Workers' (IBEW) "Salting Clearance Agreement" binds individual members to "promptly and diligently carry out the organising assignments and leave the employer or job immediately upon notification of the business manager or its agents." Some individuals find these activities distasteful and freely choose not to participate in them or be subjected to consequential union disciplinary measures. Surely being forced to join this union would mean there is an element of compelled ideological attachment to this union's philosophy!

Justice LeBel also noted how the legislation curbed union powers. His decision

states, "At the same time, the Act provides protection against past, present and potential abuses of union power. Unions are deprived of any direct control over employment in the industry. They may not set up or operate an office or union hall." But what of the hiring hall provisions that are so basic to construction industry collective bargaining agreements and systems in the rest of Canada?

A by-law for an Alberta carpenters union local states, "Members working on non-union job sites must inform the union where and who the member is working for and must be available to assist in any organising effort undertaken by the local. Any member who fails to inform the local that they are working non-union shall be removed from the dispatch board until they produce a separation certificate." Similar by-laws have resulted in members being legally fined by their unions because they failed to follow such directives. Would legislation or schemes that force individuals into construction unions featuring such by-laws in other provinces pass the standard of minimal impairment outlined by the Court in Justice Lebel's decision?

Beyond Quebec

In looking at Justice Lebel's reasons, it is apparent that Quebec's construction industry is unique when compared to other Canadian provinces. And no matter how morally repugnant one might view his decision, it is further apparent that his ruling establishes the fundamental principles for determining the degree of applicability R v. Advanced Cutting and Coring will have on compelled union membership in other provinces.

In particular, the framework he sets out suggests that the only way governments can force individuals into associating with unions is when the loss of individually protected rights is significantly less than the gain being transferred to the union. While Quebec's construction employment legislation takes away the right of individual employees to disassociate with unions, the compulsory aspect of the membership requirement was deemed less odious because, at the same time, unions lost control over hiring. They did not gain, at least in non-monetary terms, from the loss of individual rights. Rather, for good reason in its view, the Court determined that both the losses to individuals and unions were effectively balanced when they were transferred to the Quebec government. Applying this thesis to other provincial contexts suggests that the compelled union association schemes that exist elsewhere in Canada have a far greater likelihood of being declared illegal than the various union leaders would likely admit.

Former Supreme Court law clerk Andrea Zwack, now with the Heenan Blaikie firm in Vancouver, assisted in developing CCOSCA's Supreme Court presentation. In analyzing the various elements of the Court's decision, she stated, "The decision has implications for any situation in which governments require union membership in order to do certain work, or favour certain unions over others or over non-union companies and their access to certain work." In particular, she noted that the judges focussed on the aspect that, "There was no way for workers to choose not to join a union, even if a majority wanted to be non-union, and still work in the industry. Thus, if a government deprives employees in any particular industry or workplace of that effective right to choose whether or not to be a member of a union or a particular union,

based on majority wishes, whether directly, or through limiting access to work opportunities, then this decision provides a strong basis for challenge of such actions."

As her colleague Peter Gall, noted, "All levels of government in Canada will have to be mindful of the decision in setting policies including those relating to the expenditure of public monies."

The Framework for Future Challenges

The member associations making up CCOSCA contend that construction industry employees and unions have a legitimate right to operate outside the traditional building trades craft union "closed shop" system of construction. Outside Quebec, organizations such as the Merit Contractors Association in Alberta and the Independent Contractors and Businesses Association in British Columbia have expanded and matured because there is legitimate competition in these provinces, unlike the monopolistic conditions in Quebec. This has resulted in competitive wages and comprehensive benefit and training programs being made available to employers and employees operating in open shop environments. This makes it unnecessary to legislate employees to join a particular union in order to be employed. Moreover, it is no longer justifiable to limit participation on construction projects to contractors who have collective bargaining relationships with particular unions. In fact, it can now be argued that any system of mandatory union membership imposed by governments as a condition of employment or continued employment infringes on freedom of disassociation rights that are legally protected in the Charter.

The Supreme Court's acceptance of the principle that in order for freedom of association to be fully realized there must be the freedom to choose no union representation, opens the door to challenge some of the schemes developed by unions and either implicitly or expressly endorsed by various governments.

Both publicly and privately funded purchasers of construction have a history of entering into agreements which stipulate that all contractors must either be affiliated or adhere to collective bargaining provisions set out by U.S. - based international building trades craft unions. This serves to eliminate contractors and employees who have no affiliation with the building trades unions even though public monies may be involved.

The Bi-provincial Upgrader at Lloydminster, Saskatchewan, the Vancouver Island Highway in B.C. and the Crown Construction Tendering Agreement in Saskatchewan are examples of projects that include strict union hiring provisions which give building trade unions preference over non-unionized or alternative labour unions.

In 1994, the B.C. government established a shell corporation called Highway Constructors Limited (HCL) which entered into a project agreement with the building trades unions to build a highway that spanned Vancouver island. This model followed previous models used by B.C. Hydro to build dams and the Sky Train expansion project in Vancouver. The fact that these government entities did all the hiring, then compelled the individuals to join the various unions certainly suggests that similar schemes are unlikely to withstand judicial scrutiny given the Supreme Court's ruling on R. v. Advanced Cutting and Coring.

Conclusion

While the R v. Advance Cutting and Coring ruling did not achieve the sought-after results for Quebec's construction industry, the case will limit governmental arrangements that force employees into joining a construction union. And though it's unfortunate that the full Court did not use this opportunity to further develop these limits, its conclusions extensively address whether the historical rationale for granting special protections to construction unions at the expense of individual rights are necessary and justified in a free and democratic society. Further, the Court's ruling made great strides in achieving Dumais' dream — a democratic employment structure where employees are free to choose whether or not they wish to be affiliated with a union. And though it is sad that his efforts did not result in the victory, clearly ADAT's efforts have resulted in an effective shot across the bow of Canada's trade union movement. And for this we say, "merci".

Bill Stewart