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J. Maurice Cantin, Q.C.

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Résumé de l'article

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The Labour Relations and the *Canadian Charter*; the aftermath of the first decisions

J. MAURICE CANTIN, Q.C. *
Vice-Chairman,
Public Service Staff Relations Board, Ottawa

RÉSUMÉ

La Charte *est entrée en vigueur à un moment où vraiment personne ne la souhaitait. Dans cet article, l'auteur examine les origines de la* Charte *et son impact sur les premières décisions rendues par nos tribunaux en matière de relations de travail. Il examine plus particulièrement quelques décisions de la Cour suprême. Il émet l'opinion que la* Charte *ne peut que nuire au droit du travail, particulièrement en ce qui concerne le droit de grève et le piquetage. Il conclut que la* Charte *n'est pas le remède approprié pour améliorer le climat qui existe en relations de travail.*

ABSTRACT

The Charter *was introduced at a time when there was no real demand for its existence. In this article, the author reviews the origin of the* Charter *and examines the impact on labour law of the initial decisions rendered by our Courts. He examines more particularly some of the first* Charter *decisions emanating from the Supreme Court of Canada. He writes that the* Charter *may have a damaging effect on labour law especially in relation to the right to strike and to picket. He concludes that the* Charter *is ill-suited for use in the labour relations domain.*

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INTRODUCTION

Prior to 1982, Constitutional law in Canada referred mainly to the division of powers provisions enumerated under the former *British North America Act of 1867*. It is, in fact, from this *Act* that the provinces generally derive their powers to regulate labour relations within provincial boundaries. [1] This general rule is subject to the power of the federal government to regulate the labour sector of industries that fall within federal jurisdiction. [2]

The year 1982 marked the beginning of a revolutionary change in Canadian law with the repatriation of the Canadian constitution. The *British North America Act* was renamed the *Constitution Act of 1867* and was removed from Imperial British authority and brought under Canadian control subject to strict procedures of amendment. [3] This document was accompanied by the *Constitution Act of 1982*, the first 34 sections of which form the topical *Canadian Charter of Rights and Freedoms*. [4] Despite the fact that the *Charter* has only been in existence for 6 years, *Charter* arguments have appeared in virtually every facet of the law. The effect of the *Charter*'s introduction into Canadian jurisprudence is apparent when it is considered that the Supreme Court of Canada now spends more than half of its time deliberating on *Charter*-related issues.

One interesting note concerning the *Charter*'s inception is that it was introduced at a time when there was no real demand for its existence. This was compounded by a general lack of interest on the part of the organized labour movement to have their interests reflected following a proposal to constitutionally entrench civil liberties. [5] This

1. *Constitution Act, 1867*, 30 & 31 Victoria, 1867, c. 3 (U.K.), s. 92 (13). The leading case that relates to labour relations comes under the heading "Property and Civil Rights" is *Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 396.

2. *Constitution Act, 1867*, *Id.*, s. 91. See *Re Industrial Relations and Disputes Investigation Act (Can.)*, [1955] S.C.R. 529.

3. This event was brought about by the passing of the *Canada Act 1982*, (1982) c. 11 (U.K.).

4. *Canada Act 1982*, *Id.*, Schedule B, Part I. *The Constitution Act, 1982* came into force by proclamation issued by the Queen at a signing ceremony in Ottawa, April 17, 1982.

5. Paul J.J. CAVALLUZZO, "Freedom of Association : Its Effect upon Collective Bargaining & Trade Unions", (1987) prepared for Queen's University Law School

meant that the *Charter* was sculpted without much attention having been paid to the potential constitutionalization of labour rights. Yet following the enactment of the *Charter*, the labour sector became the source of a flood of *Charter* challenges aimed at removing legislative restrictions on union and labour activities. As Paul Cavalluzzo points out, these uncoordinated *Charter* attacks were made without any concern about the effects that a successful decision in an individual case might have on the labour movement in the long run. [6] The result is an apparent attempt on labour's part to cloak themselves with *Charter* protection although their inclusion in the scheme was not seriously explored at the drafting stage. It would appear that Canadian courts have accordingly been quite reluctant to rush too quickly into *Charter* issues that might have the effect of constitutionally crystallizing collective bargaining-related rights.

Two additional factors have contributed to the judicial caution exercised in this area. The first is a desire not to disturb the balance of powers between management and employee organizations attempted by collective bargaining legislation. A second factor is the concern that, given the creativity often employed in *Charter* arguments, too broad a *Charter* interpretation may provide an unforeseen weapon in future cases leading to undesired or inconsistent decisions both inside and outside the labour arena. This conservative attitude is exemplified in recent cases heard before the Supreme Court of Canada.

I. THE DOLPHIN DELIVERY DECISION

The first of the cases was the 1986 decision of *Dolphin Delivery*. [7] Workers were engaged in secondary picketing against a third party which had no connection with the principal party in the labour dispute. *Dolphin Delivery* applied for and was granted an injunction based on the common law torts of civil conspiracy and interference with contractual relations. On appeal, the union argued that the common law rules violated their freedoms of expression and association. A majority of the British Columbia Court of Appeal concluded that the *Charter* did not apply to secondary picketing. [8] A final appeal was made to the

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lecture : September 24 & 25, 1987, p. 1. Also see, Harry W. ARTHURS, " 'Right to Golf' : Reflections on the Future of Workers, Unions and the Rest of Us Under the Charter", (1987) address to the conference on *Labour Law Under the Charter*, September 24, 1987, p. 18.

6. P.J.J. CAVALLUZZO, *Id.*, pp. 1-2.

7. *Dolphin Delivery Ltd.* v. *R.W.D.S.U., Local 580*, [1986] 5 S.C.R. 573; 33 D.L.R. (4th) 174; 71 N.R. 83; [1986] 1 W.W.R. 577; 25 C.R.R. 321; 87 C.L.L.C. 14, 002.

8. (1984) 52 B.C.L.R. 1; 10 D.L.R. (4th) 198; [1984] 3 W.W.R. 481; 84 C.L.L.C. 14, 036 (C.A.).

Supreme Court of Canada solely on the basis of a violation of the freedom of expression. Despite the fact that the court concluded that the *Charter* dit not apply to the common law in the absence of government action, the majority of the Court went on to consider the *Charter* issue. Mr. Justice McIntyre writing for the majority, found that peaceful picketing was in fact a form of expression drawing *Charter* protection but that, under the circumstances of the case, the injunction was a "reasonable limit" under section 1.

I should pause briefly to mention section 1 of the *Charter*. Section 1 is the "saving provision" which reads,

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

There are many cases that attempt to interpret the wording of section 1 but one case, considered to be the authority for section 1 analysis, is the *Oakes* decision.[9] For the most part, *Oakes* lays down a detailed and somewhat mechanical approach to a section 1 analysis, but the relevant findings of the decision are that,

1) the person seeking to uphold the infringing legislation bears the burden of proof under section 1;
2) the objective for overriding the guaranteed right must be of sufficient importance;
3) there must be a "proportionality" between the effect of the limiting measures and the objective; and
4) these limiting measures should impair as little as possible that right or freedom.[10]

Bearing this in mind I shall return to the *Dolphin Delivery* decision.

The first aspect of this decision — that is the conclusion that the *Charter* does not apply to the common law in the absence of government action — may have a damaging effect on labour law. The courts have long been viewed as being unduly restrictive against the labour cause and incapable of dealing equitably with the delicate issues surrounding labour relations.[11] As a result, they still maintain a set of common laws that reflect their pro-commercial attitude in labour relations. Although these rules are as authoritative as legislation itself, the decision essentially puts them beyond the scope of *Charter* review. The effect is that any labour rights that attract *Charter* protection will be unable to draw on their constitutional coat in the face of restrictive common law

9. *R.* v. *Oakes*, [1986] 1 S.C.R. 103; 26 D.L.R. (4th) 200; 19 C.R.R. 308; 65 N.R. 87.

10. *Id.*, see generally pp. 224-8 (D.L.R.).

11. Brian ETHERINGTON, case comment on *Retail, Wholesale and Dept. Store Union, Local 580* v. *Dolphin Delivery Ltd.*, (1987) 66 *Can. Bar Rev.* 818, p. 836.

rules. This question over the scope of the *Charter*'s application has been critically debated in academic circles. Despite the uncertainty surrounding the exact meaning of this decision, its effect on labour relations should be minimal. For the most part adjudicative control over labour relations has been legislatively withdrawn from the courts and passed on, along with regulatory powers, to labour tribunals. Therefore, there is less of an opportunity for courts to apply those common law rules that restrict labour activity. But as *Dolphin Delivery* clearly indicates, such occasions may arise.

The second issue dealt with in the *Dolphin Delivery* decision is difficult to characterize either as a victory or loss for the labour movement. Although it is certainly valuable to have a decision that finds that freedom of expression includes picketing, thereby rejecting the argument that "expression" does not include "economic" expression, the court was also receptive to the notion that the injunction was a reasonable limit under section 1 in the circumstances of the case. However, as professor Etherington points out, there is some weakness to the court's analysis under section 1. [12] The first is that the court had considered a serious *Charter* issue, one which could certainly have an impact in future cases, based on an appeal from an *interim* injunction, the factual basis of which was not fully established at trial. [13] This was contrary to a policy adopted by the Supreme Court of Canada to hear only important *Charter* issues that are based on a clear, factual foundation. A second weakness is that the court removed the onus of proof implicitly borne by those seeking to uphold the law under section 1, in this case the employer. [14] Etherington also points out that the court failed to ensure that the section 1 analysis complied with the authoritative decision of *Oakes* which finds that the impairment must be "as little as possible" to comply with section 1. [15]

The case of course leaves open the question of whether legislative restrictions on *primary* picketing represent a reasonable limit under section 1. It could be argued that, although picketing falls within the wording of section 2(b), properly drafted legislation that restricts primary picketing can easily pass section 1 scrutiny. Adding to this the fact that the reasoning of the court on the *Charter*-related issue was in fact an *obiter dictum*, the decision still leaves a grave question mark as to its ultimate effect on labour relations law. However, the emergence of an important message is certain : there is an apparent conservatism on the part of the courts to loosely apply concepts of fundamental rights and freedoms in the labour relations setting.

12. *Id.*, pp. 827-831.
13. *Id.*, p. 821.
14. *Id.*, p. 828.
15. *Id.*, p. 829.

II. THE TRILOGY

Three further decisions of the Supreme Court of Canada have had a pronounced effect on labour relations in Canada. [16] All three cases involved legislation that in some form or another curtailed collective bargaining rights in general and, specifically, the rights to strike. This trilogy basically came to the conclusion that the right to strike and bargain collectively are not constitutionally protected under the freedom of association in the *Charter*. The majority of the court in all these decisions stressed that the freedom of association does protect the right to *establish* and *belong* to an association. Freedom of association also protects the right to exercice collectively any of the individual rights enshrined within the *Charter*. However, the majority found that the *Charter* does not necessarily protect the purposes for which the association exist, such as the right to strike in the case of unions. The court pointed out that the rights to strike and bargain collectively were created by statute and are thus subject to appropriate statutory restrictions. Finally, LeDain, J., writing for the majority, acknowledged that a specialized expertise is necessary in order to carry out the balancing of interests required in labour relations, a scheme in which the *Charter* does not appropriately fit.

McIntyre, J., who had previously written the majority decision for *Dolphin Delivery*, came to the same general conclusion as the majority in the right to strike cases arguing that "association" is an *individual* freedom although it protects group interests. He suggested that the basis for the freedom of association is the need for collective activity in order to attain and enforce individual rights. Since there is no individual right to strike under the *Charter*, the mere collection of interests does not create such a right. McIntyre, J., also endorsed the fact that modern collective bargaining is an especially complex area of law. He felt that the judiciary was ill-equipped to provide the expertise necessary to regulate labour relations and that the courts should avoid assuming such responsibilities.

Chief Justice Dickson basically disagreed with the majority by finding that collective bargaining and the right to strike could be accorded constitutional protection under the freedom of association, but found that in two of the three decisions, the restrictions of the right to strike were reasonable limits under section 1. Madame Justice Wilson

16. *Reference re Public Service Employee Relations Act (Alta.), Labour Relations Act (Alta.) & Police Officers Collective Bargaining Act (Alta.)*, [1987] 1 S.C.R. 313; 38 D.L.R. (4th) 161; 74 N.R. 99; 87 C.L.L.C. 14,021; *Public Service Alliance of Canada* v. *The Queen in right of Canada*, [1987] 1 S.C.R. 424; 38 D.L.R. (4th) 249; 75 N.R. 161; 87 C.L.L.C. 14,022; *Government of Saskatchewan* v. *R.W.D.S.U., Locals 544, 496, 635, 955*, [1987] 1 S.C.R. 460; 38 D.L.R. (4th) 277; 74 N.R. 321; 87 C.L.L.C. 14, 023.

agreed with the Chief Justice that there was a right to strike but found that in none of the three cases could the restrictions be justified under section 1.

Clearly these decisions represent a set-back for the labour movement. Not only did the Supreme Court affirm the position that the *Charter* is ill-suited for use in the labour relations domain, but it endorsed the argument that extensive *Charter* litigation will have the effect of drawing labour disputes from the *fora* best-suited to cope with these problems. The real effect of the decisions is to maintain the *status quo* in labour relations dispute settlement, a result that commentators such as Professor Harry Arthurs [17] and Paul Cavalluzzo [18] suggest is actually more favourable to the overall labour relations scheme.

III. THE LAVIGNE DECISION

Aside from the general right to strike and right to picket decisions, a host of other *Charter* challenges have been put forward, mostly from the labour side of the table. The Ontario decision of *Lavigne* [19], presently being considered before the Ontario Court of Appeal, concluded at trial that the security clause in a collective agreement between employee and the representative union violated a non-member's freedom of association. The case itself, although not of real authoritative weight, does reveal a number of interesting examples of *Charter*-related issues that have arisen in the labour setting. One such issue, which I shall allude to later, is whether the *Charter* can be applied so as to nullify the term of a collective agreement, especially where it is established that the government is a party to the contract as employer.

Disregarding for the moment the problem of the reviewability of a collective agreement term under the provisions of the *Charter*, the success of a claim that a security clause violates the freedom of association stipulated in section 2(d) of the *Charter* depends largely on whether this freedom includes the protection of an individual from being compelled to associate with an organization contrary to his wishes. In other words : does the freedom of association include the right *not* to associate, and does the security clause violate such a freedom?

Lavigne, obligated as a non-union employee to pay dues to the representative bargaining agent under a Rand formula clause, admitted that the collection of dues may have been a reasonable limit under section 1 if the dues were employed solely for the purposes of furthering

17. H.W. ARTHUR, *op. cit.*, *supra*, note 5, p. 25.

18. See generally CAVALLUZZO, *loc. cit.*, *supra*, note 5, and specifically, p. 66.

19. *Lavigne* v. *O.P.S.E.U.* (1986) 55 O.R., (2d) 449; 29 D.L.R. (4th) 321; 86 C.L.L.C. 14, 039 (H.C.J.).

the bargaining unit's cause. His objection, however, was over the union's use of a part of the dues as contributions to a political party as well as to several controversial social organizations, arguing that this activity removed the clause from the "reasonable limit" protections of section 1. For the most part Mr. Justice White accepted Lavigne's arguments in his decision.

The preliminary and somewhat broader issue to be resolved, not explicitely dealt with in the reasoning of *Lavigne*, is whether the freedom of association includes its complementary partner, the so-called right *not* to associate. Logic suggests that the freedom of association includes the right to choose both with whom we wish to and with whom we wish *not* to associate. However, as there is no authoritative jurisprudence supporting the implicit finding in *Lavigne* of a right not to associate, this broader interpretation of section 2(d) remains an uncertainty.

Assuming that the *Charter* does provide protection for the right not to associate, it is of course also unclear as to whether security clauses and their compulsory dues requirements actually violate such a freedom. Paul Cavalluzzo argues that since the *Charter* does not protect the right to be represented by an exclusive bargaining agent — the effect of the findings in the right-to-strike trilogy — it follows that the right *not* to be similarly represented should escape *Charter* protection as well. [20] Although this is a logically persuasive statement, the conclusion may not accurately reflect the emphasis of the right-to-strike decisions. The main thrust of the trilogy decisions was that, although the right to join, form or belong to a union is protected under the *Charter*, the purposes for which the association exists and the means of carrying out those ends are not necessarily constitutionally preserved. In the *Lavigne* situation, the focus of the question at issue is on the association itself, allegedly created as a result of the compelled payment of dues. Whether it is a desirable result to find that security clauses do violate the freedom of association is, of course, debatable at this stage, but for the sake of consistency, it would appear that Paul Cavalluzzo's argument does contain an element of equity to it. If the policy of the Supreme Court of Canada is to avoid drawing *Charter* battles into the area of law governing industrial relations, it would appear that the *Lavigne* decision is wandering in the wrong direction.

Even if security clauses are found to be in violation of the freedom of association, there is a strong argument that section 1 could play a large role by preserving the Rand formula and similar clauses as a "reasonable limit" to the restriction on the freedom of association. Given the fact that such a clause is based on the democratic principle of "majority rules", it would not be too difficult to persuade a court that a

20. P.J.J. CAVALLUZZO, *loc. cit.*, *supra*, note 5, p. 63.

carefully worded agency shop term meets the standards of section 1, the clause being "demonstrably justified in a free and *democratic* society". Adding to this the Supreme Court's express reluctance to apply the *Charter* to labour-related issues, it seems unlikely that the security clause challenge will see much success in higher court decisions of the future.

The second major issue raised by the *Lavigne* decision explores one aspect of the scope of the *Charter*'s application, in particular with respect to its application to freely negotiated terms of a collective agreement. Although the breath of such a topic makes it impossible to explore in such a limited amount of time, I will briefly address a few aspects of this issue.

The *Charter* is normally employed to challenge statutory and, less frequently, common law restrictions of rights and freedoms. Although it is quite certain in Canadian law that the *Charter* was not intended to control the infringing activity of purely private individuals,[21] this being the appropriate topic of provincial human rights legislation, the *Charter*'s inapplicability is not quite so certain where there is some element of government involvement. In *Lavigne*, the allegedly infringing dues check-off clause was not only included in a collective agreement pursuant to provincial legislation that expressly sanctioned such a term, but it was found that the college, as employer, was in fact acting as agent for the provincial government. If the legislation required the inclusion of the clause, the legislation and the term would undoubtedly be subject to *Charter* scrutiny. But since the term is included pursuant to legislation that simply authorizes such activity, the *Charter*'s application is not as certain. Many constitutional theories reign under this area of the law. One, for example, suggests that the *Charter* only applies to acts of government that impose constitutional restrictions on individuals. The permissive language of the legislation would thus escape *Charter* scrutiny even though the legislation may expressly encourage activity that potentially violates *Charter* freedoms. Even if the legislation is struck down as being in violation of the freedom of association, the term still exists as the result of a freely negotiated collective agreement.

A further wrinkle is added when the government is found to be a party to that contract. If it is agreed that the *Charter* applies to government activity, does this not deny the government the option of agreeing to a term that is in violation of *Charter* rights? Again, some constitutional theorists argue that the *Charter* only applies to the government as legislator and not as a subject of the law. The arguments for and against the *Charter*'s application to collective agreements are many and

21. *Bhindi* v. *B.C. Projectionists, Loc. 348, Int. Alliance of Picture Machine Operators of U.S. & Can.*, (1985) 4 B.C.L.R. (2d) 145; 29 D.L.R. (4th) 47; [1986] 5 W.W.R. 303 (C.A.).

varied, and there is yet no authoritative Canadian decision to provide any guidance on this issue. One alleviating note is that the *Charter* may only apply to a collective agreement where the government is the employer, suggesting that the problem may only be relevant to the smaller public sector work force.

If *Lavigne* is successful, the thought of opening the individual terms of a collective agreement to *Charter* scrutiny will have some broad and potentially unforeseen effects on standard terms that may have been previously quite acceptable in practice. This result again stresses the inappropriateness of the *Charter*'s application to labour relations. One issue that has recently arisen in Canada and which provides a perfect example of the *Charter*'s potential disruptive effect is whether the standard compulsory retirement clause constitutes discrimination on the grounds of age under the section 15 equality provisions.[22] In fact, to provide a further example, I recently disposed of a challenge in which a public servant, who was the father of a newly-born, claimed that the collective concluded between the reprensentative bargaining agent and the government violated the equality provisions of the *Charter* on the grounds of sex as it failed to provide maternity leave for fathers.[23] The possibilities for absurdity are endless.

IV. WHAT IS A COURT OF COMPETENT JURISDICTION?

Finally I would like to mention one further *Charter* issue that is currently gaining interest in decisions and that may be of particular significance to the labour field because of the heavy reliance legislation places on administrative bodies to cope with labour-related issues. The difficulty lies in the wording of section 24(1) of the *Charter* which reads,

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considerers appropriate and just in the circumstances.

The uncertainty is over the words "court of competent jurisdiction" and whether this reference includes administrative tribunals such as labour relations boards and arbitrators. Although the precise wording of section 24(1) appears to exclude tribunals with its explicit reference to

22. See, for example, *Connell* v. *University of British Columbia*; *Harrison* v. *University of British Colombia*, (1988) 21 B.C.L.R. (2d) 145; [1988] 2 W.W.R. 708 (C.A.); *Stoffman* v. *Vancouver General Hospital*, (1988) 21 B.C.L.R. (2d) 165; [1988] 2 W.W.R. 688 (C.A.); and *Mckinney et al.* v. *Board of Governors of the University of Guelph*, Ont. C.A., December 10, 1987 (unreported); *Douglas/Kwantlen Faculty Association* v. *Douglas College*, [1988] 2 W.W.R. 718 (B.C.C.A.).

23. *Andrew Douglas* v. *Treasury Board (Revenue Canada)*, P.S.S.R.B., nº 166-2-16351, May 7, 1987 (unreported).

courts, the confusion is augmented in that the French version of section 24(1), which is equally authoritative for interpretation, employs the word *tribunal* which has a broader meaning than the word *cour*, the French equivalent of the english word "court". [24] Some judicial direction is necessary as the relatively few lower court decisions in this area are not consistent in their response to the issue. Meanwhile many administrative boards continue to hear and determine *Charter* issues, with relatively few declining jurisdiction to entertain such questions.

Arbitrators pose a more difficult problem. Unlike labour boards which are established by direct government action, most arbitrators are appointed pursuant to terms of a collective agreement. Their remedial and interpretative authority is derived from the contractual relations. As such, it is difficult to categorize an arbitral panel as a "court" within the meaning of section 24(1). However, one saving factor is that most labour relations legislation requires that collective agreements contain provisions for the disposition of grievances arising under the agreement, in addition to providing default terms in the absence of such stipulated procedures. This requirement appears to be adequate to render these arbitrators as "tribunals" for the purposes of administrative law. [25] Arguably then arbitrators qualify as a tribunal for the purposes of the *Charter* should it be determined that administrative tribunals do have the power to grant *Charter*-related remedies under section 24(1).

In addition, professor Evans presents a quite convincing argument that section 24(1) is not the only section of the *Charter* that grants remedial powers for the purposes of determining *Charter* issues. [26] Section 52(1) reads that the constitution is the "supreme law of Canada" and that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect". He argues that this section, of itself, creates a remedy which any tribunal is entitled to use for the purposes of disposing of the proceedings before them. In fact, this argument may be expanded to suggest that any person acting under administrative authority has the power to ignore legislation that appears to be in violation of *Charter* rights or freedoms. [27] These decisions are invariably subject to some form of administrative or judicial review providing a reasonable check on a potentially broad power.

However, there are still many practical problems that may develop as a result of tribunal consideration of *Charter* issues. There is

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24. J.M. EVANS, "Administrative Tribunals and Charter Challenges", (1988) 2 *C.J.A.L.P.* 14, p. 24.

25. Garry J. SMITH, *Law Society of Upper Canada Bar Admission Course Materials 1983-4 : Charter of Rights and Aministrative Law*, Toronto, Carswell, 1983, p. 52.

26. *Supra*, note 23, pp. 6–8.

27. See EVANS comments, generally, *loc. cit.*, *supra*, note 24, p. 37.

the argument that some tribunals lack the legal expertise to deal with complicated *Charter* questions. [28] Many boards are represented by non-legal members or do not encourage legal representation before its hearings. *Charter* issues also tend to complicate proceedings. [29] This, in turn, prolongs procedures that were intended to lessen the cost of and to simplify dispute resolution. Considering that a board is often called upon to interpret its own enacting legislation, a task that is often best carried out by the board itself in light of its special expertise, an anomalous result may occur if the board is asked to consider the constitutional validity of its own legislation. If the board finds that its own constituting legislation is invalid under a *Charter* challenge, it consequently has no authority to render such a decision. The simple solution would likely be that this type of question is best placed before a court in the first instance. [30]

However, if the ability to render answers to *Charter* questions was removed from the authority of tribunals, this would have the effect of inviting courts to consider questions initially intended to be considered by administrative boards. And yet procedure may require that a hearing be commenced, absent the *Charter* issue, before the courts may be called upon to judicially review the decision on *Charter* grounds. The court involvement will inevitably increase the expense of proceedings, ultimately defeating the purpose of using the lower cost administrative system for dispute settlement. [31] This problem is greatly magnified in the case of labour relations in that the court is already generally considered to be an ill-equipped forum for the purposes of dealing with the delicate issues inherent to the collective bargaining regime. Yet the increase in *Charter* arguments by labour groups has already had the effect of forcing labour disputes back into the courts.

CONCLUSION

In general, academic comment on the application of the *Charter* to labour law ranges from a conservative and unambitious attitude, espoused by commentators such as Harry Arthurs and Paul Cavalluzzo, to the bold and progressive concepts advocated by writers such as David Beatty. [32] High court rulings appear to favour the unobtrusive approach of reading the *Charter* quite narrowly in order to favour a

28. Donald D. CARTER, "Canadian Labour Relations Under the Charter : Exploring the Implications", (1988) 43 *Rel. Ind.* 305, p. 317.

29. *Supra*, note 23, pp. 3-4.

30. *Id.*, pp. 6-7.

31. *Id.*, pp. 3-4.

32. See, for example, David BETTY, *Putting the Charter to Work : Designing a Constitutional Labour Code*, Kingston, McGill — Queen's Univ. Press., 1987.

policy of leaving the labour boards and not the courts with the task of reviewing the intricacies of the collective bargaining regimes. The decisions are an implicit acknowledgement that the *Charter* is an inappropriate weapon for use by any party in a scheme that attempts to delicately balance opposing interests. Even where *Charter* arguments in labour disputes have been successful, there is a good chance that labour relations will continue to exist more or less as it has with minimal consequences as a result of the *Charter*. Any damage that the *Charter* inflicts on labour relations legislation will most likely be repaired with adequate wording that satisfies constitutional scrutiny. However, it must be remembered that the *Charter* is still in its infancy and that the full extent of its effect on Canadian jurisprudence has yet to be experienced. This is true for labour law as it is for all areas of Canadian law.