UNION DEMOCRACY AND THE LAW IN CANADA

Michael Lynk
Faculty of Law, University of Western Ontario, London, Ontario, Canada

The modern direction of Canadian labour and employment law has been significantly influenced by legal developments in the United States and Great Britain. Our heavily regulated system of industrial relations is directly borrowed from the American *Wagner Act*. Canadian law on wrongful dismissal has been largely imported from the English common law. Yet, unlike these two source countries, Canada has taken a distinct path respecting the legal regulation of union democracy and internal trade union affairs. While both the U.S. Congress and the British Parliament have enacted stringent legislation governing union elections and union officers' duties, the Canadian approach has been largely one of statutory abstinence. Comparatively speaking, Canadian unions enjoy greater institutional freedom of association than their American and British siblings, although they also suffer, like their counterparts, from a largely conservative judiciary that has commonly misunderstood the particular culture and social role of trade unions.

Four reasons in particular explain this particular Canadian approach towards the law governing union democracy. First, Canadian unions have historically encouraged a culture of democratic practices, and they have been able to give voice to both the employment and the social aspirations of their membership. The 1996 federal Task Force reviewing the Canada Labour Code stated that:

> "Canadian trade unions exhibit a high level of internal democracy and genuinely represent the interests and wishes of their membership."

Second, unions in Canada have generally avoided both the stain of corruption that has tainted parts of the American labour movement, and the specter of unbridled militancy that had characterized a number of British unions. While incidences of corrupt unionism have occasionally appeared in Canada, unions that encouraged or tolerated patterns of corruption or violence in Canada were generally outside the mainstream labour congresses, or were expelled once the mainstream leadership was satisfied that the patterns were endemic.

Third, there has never been a sustained political or popular demand in Canada for a significant legislative intrusion into internal

union affairs. The cry for "union democracy" from conservative political parties has never acquired the influence it has in the United States and Britain. As well, Canadian employers, unlike their American counterparts, have generally accepted the fundamental premises of collective bargaining, and have not built up a significant antiunion consulting industry or sought as a common strategy to undermine the legitimacy of unions.

And fourth, the traditional British common law concept of unions as voluntary organizations, and therefore entitled to self-government, has long influenced Canadian legislators and courts. The English and Canadian courts viewed the membership relationships of these organizations as purely personal and contractual, and they therefore would not review an internal decision of a union except on narrow procedural grounds.

THE LEGAL REGULATION OF UNION DEMOCRACY IN CANADA

The legislative intervention into internal trade union affairs by the federal government and the ten provinces has been quite modest. While the certification process requires applicant unions to have a constitution and a set of elected officers, Canadian labour legislation is silent on the democratic quality by which union officers are elected. In turn, labour boards have read this statutory abstinence to mean that their jurisdiction to oversee the democratic life of unions is restricted. The prevailing view is expressed in a 1993 Ontario Labour Relations Board ruling *RWDSU and New Dominion Stores* involving a complex trusteeship application:

> "The *[Ontario] Labour Relations Act* is primarily concerned about institutional collective bargaining relationships, the trade union in its role as statutory bargaining agent. The statute does not purport to regulate internal union affairs, nor does it prescribe any general code of *democratic practice*. Indeed, the statute is exceedingly (and we think, intentionally) sparse in respect of such matters, leaving them to be determined, for the most part, in accordance with the union's constitution" [italics in original].

Consequently, the appropriate forum for litigating issues of union democracy in Canada is divided between labour relations boards and the courts. The division of jurisdiction is the residual consequence of the legislative reluctance to intervene through labour relations boards in internal union affairs. This has left the courts to fill the judicial vacuum. If specifically addressed in legislation, then the particular labour relations board has the jurisdiction to rule on the matter. If the legislation is silent, then the common law (or, in Québec,

the civil law) courts assume the jurisdiction, which has given them the predominant role in supervising union constitutions.

The primary legal tool for the courts to intervene has been a reliance on the contract theory of union constitutions. This theory holds that every member, by joining the union, enters into a contractual relationship through the constitution with every other member. This allows a dissident member to sue the leadership on breach of contract grounds if he or she can establish a violation of a constitutional provision. In turn, this has permitted the courts to act as an appellate body, interpreting the contracts and providing relief to union members for any violation of the constitution and bylaws.

The irony of this significant residual role of the courts in union democracy issues should not be lost. The Canadian labour movement fought hard during the 1930s and 1940s for legislation that would remove the courts, whom they saw as strongly hostile to unions and imbued with a stiffly contractual approach to decision-making, from any involvement in the legal regulation of industrial relations. Yet, the labour movement, by also opposing any statutory regulation of their internal affairs, has unwittingly sustained a limited but potentially potent involvement for the courts. Indeed, aside from judicial review of labour board decisions and the occasional monitoring of picket line activity in some jurisdictions, the supervision of internal union affairs is the Canadian judiciary's only remaining area of original jurisdiction over Canadian industrial relations.

UNION DEMOCRACY: ELECTIONS AND OFFICERS

The statutory regulation of union elections and union officers is almost entirely absent in Canadian labour statutes. Québec legislation regulates only one discrete procedural aspect of the electoral process: it requires that elections for union office be conducted by secret ballot. Manitoba and New Brunswick forbid a union, or someone acting on behalf of a union, to interfere through intimidation or coercion with the right of a union member to become, or remain, a union officer. Saskatchewan requires that a union give members reasonable notice of all meetings that they are entitled to attend. In Ontario, the then-governing New Democratic Party in 1993 restricted the ability of the parent leadership of construction unions to remove from office, alter the duties of, or impose a penalty on, an elected or appointed officer without just cause. Otherwise, the rules governing such matters as the rules for elections and candidate conduct, length of office, the fiduciary responsibilities of officers, and removal from office are governed almost entirely by union constitutions, and supervised

primarily by the courts as a contractual matter.

The conduct of union elections

The Canadian common law has stated that the results of an election will be upheld if it has been conducted in substantial compliance with the union's constitution and by-laws. A mere irregularity in campaign or voting procedures that has not materially affected the election results will usually not be sufficient to nullify a union election. However, while the Canadian courts have expressed this as a principle, they have not been shy about defining a broad range of procedural breaches of an internal election as a significant irregularity requiring a new election. The courts have intervened to quash union elections where voting secrecy was inadequate, ballots were distributed to ineligible members, ballots were tampered with, eligible members were not given ballots, a voting deadline extension was not communicated to some of the union electorate, and ballots were numbered and printed in a manner which could reveal the identity and voting choice of the union members.

Union officers

The duties and liabilities of union officers in Canadian law are found primarily in the governing union constitution, and are enforced by the courts within the context of contract law. The common law dominates the regulation of this area of trade union activities, although again there is scant caselaw to draw on. Legislation in Canada has regulated the duties of officers in only one area: the liability of union leaders for participation in an unlawful strike or for violating other provisions of the governing labour statute.

The common law in Canada has commented on two areas of responsibility resting with union officers: the scope of presidential authority in relation to the union executive and the nature of the fiduciary duty of honesty owed by an officer to her or his national union. Both common law duties speak to the subordination of individual or local officers to collective authority in the decision making and the management of union assets.

The courts have drawn from prevailing principles of company law to prefer the primacy of collective decision-making over the authority of an individual executive officer. In *FASWOC v. Schuster*, a 1987 British Columbia case, a union president and the national executive fell into a paralyzing dispute over the president's authority to dismiss staff unilaterally and to initiate legal action in the name of the union. The British Columbia Supreme Court, comparing similar circumstances between company officers and corporate boards, read the union constitution to say that the

president's authority was subordinate to the executive.

The courts have also held that local union officers have a fiduciary duty towards the parent union to act honestly when dealing with union assets. In *CUPE v. Deveau*, a 1977 case from Nova Scotia, the union constitution stated that the assets of a local, on dissolution, all reverted to the parent. Before the members of a local seceded to join another union, the local executive arranged to distribute almost all the funds of the local to the membership in the guise of a cost-of-living allowance. The Nova Scotia Court of Appeal found that the local executive violated its fiduciary duty it owed to the parent union, and ordered the officers personally liable for the improperly dispersed funds.

Three provinces, British Columbia, Alberta, and Saskatchewan, have recently amended their labour legislation to provide that deposed or disciplined officers and members are entitled to natural justice (procedural fairness) throughout the internal proceedings against them. In these provinces, labour relations boards now have jurisdiction over some officer removal issues, and they have the authority to look beyond union constitutions to the common law principles of natural justice. In recent rulings applying this new power, labour boards in these provinces have struck down decisions to remove officers where the union disciplinary body did not provide proper notice of the allegations or the hearing, or where internal tribunal bias was found.

Union officers in Ontario's construction sector, where unions are predominantly led by international (i.e. American) unions, have been particularly vulnerable to their parent union's penchant for imposing trusteeships over Canadian locals. The *Ontario Labour Relations Act* was recently amended to forbid a parent union from ousting an officer from her or his position unless the Ontario Labour Relations Board was satisfied that just cause was established. Yet, even here, the Board has resisted a broad reading of the provision, stating in one recent officer removal case that the purpose of the amendments was to protect local union autonomy and was not meant to address the rights of individual union officers.

THE UNION AND INDIVIDUAL MEMBERS: DISCIPLINE AND REPRESENTATION

The majoritarian principle of representation, that if a majority of employees in a bargaining unit vote in favour of a particular union as their bargaining representative, the union becomes the exclusive representative for all employees in the bargaining unit, is a centrepiece of the *Wagner Act* legislation in the United States and Canada. To temper the extensive authority over the membership that the principle gives to unions, Canadian

legislatures have enacted provisions to regulate both the limits of internal union discipline and the quality of collective agreement representation. In both areas, the degree of legislative intervention has been restrained, and jurisdiction has been split between labour relations boards and the courts.

Union Discipline

Legislatures in Canada have enacted two primary methods for regulating union authority to discipline members. The first has been to blunt the impact of an expulsion or suspension decision without limiting the union's right to make that decision. Essentially, this is done by giving the union the power to discipline, but restricting it from compelling the employer to dismiss an employee on the sole basis that she or he has been expelled or suspended from union membership. These provisions act as a legal counter-balance to the legislative right of unions to negotiate union security clauses in collective agreements that require all employees in the bargaining unit to pay union dues or even, in some workplaces, to hold union membership as a condition of employment.

Legislative limitations on dismissing an employee from employment as a result of an expulsion or suspension from union membership generally fall into three overlapping categories: (i) dismissal from employment is only permitted if the member has failed to pay periodic union dues; (ii) dismissal is prohibited for various stated reasons, such as the discriminatory application of membership rules, membership in another union, or engaging in activity against the incumbent trade union; and (iii) dismissal is prohibited unless the reasons for expulsion are specifically permitted by statute.

These provisions limit the reasons for which union discipline can result in the loss of employment. They do not otherwise restrict the right of unions to discipline members for breaches of listed constitutional provisions.

The second legislative method of protecting union members has been to regulate the union disciplinary process itself. One way has been to ensure minimum procedural standards in internal disciplinary hearings. Several jurisdictions, Alberta, New Brunswick, Nova Scotia, Saskatchewan and the federal sector, ensure that union members receive a disciplinary hearing that meets the requirements of fairness. These requirements usually include: the right to know the charges; the right to reasonable notice of the hearing dates; the charges must be specified in the constitution; the trial must be in substantial compliance with the constitutional requirements; the right to a hearing, including the ability to call evidence and make submissions; the presiding panel members must act

and decide in good faith; the verdict must be based only on the actual evidence adduced; and, in serious cases, the right to be represented by counsel.

Legislatures have also intervened to regulate the degree of punishment which unions can impose on their members. This has been achieved by prohibiting unions from acting in an unreasonable, unfair, or discriminatory manner. Generally, if a union can satisfy a labour relations board that the discipline serves a labour relations purpose, that it has not been applied selectively, and that the punishment is proportionate to the offence, then the union's decision to discipline a member will not be struck down.

The majority of union discipline cases that have reached labour boards in Canada have involved issues of either crossing picket lines or allegations of dual membership and related conduct detrimental to the union. Labour boards have clearly recognized that individual members have the right to be free of spurious punishment or retaliation, but they have balanced this imperative with the recognition that unions must have the authority to act against strike breakers if they are to be able to maintain an effective bargaining force. The 1980 decision of the Saskatchewan Labour Relations Board in *IWA and Moose Jaw Sash and Door Co.*, where several union members had refused to honour a legal picket line is illustrative. The Board ruled that the internal punishment (expulsion from the union) of the members for strike-breaking lay within the authority of the union:

> "Any crossing of a picket line by a member of the union defies the will of the majority of the members of the bargaining unit and constitutes strike breaking, which in any form, certainly threatens the effectiveness of the strike, and, in many cases, the very life and existence of the union local. It is difficult to imagine any other act by a member which a union would consider to be more treasonous conduct to it."

However, the ability by a union to punish for strike-breaking is not open-ended. If the strike or picket lines are unlawful, any member who refuses to comply with it would be protected from internal discipline. As well, the internal discipline must be consistently applied, and based upon clear rules or policy in the constitution or by-laws.

Duty of Fair Representation

Canadian labour law has established a duty of fair representation that prohibits trade unions from acting in a manner that is arbitrary, discriminatory, or in bad faith towards any employee (and not just union members) whom it represents. The imposition of the duty is a statutory *quid pro quo* for the union's

exclusive bargaining rights. It exists in every Canadian jurisdiction through explicit statutory provision or through a common law obligation enforceable by the courts. The Supreme Court of Canada has stated that the duty requires the representation to be "fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee."

In law, unions must represent employees fairly during the administration of a collective agreement, and several jurisdictions have extended the duty to the union's conduct during collective bargaining. In representing an employee, unions must turn their mind to the merits of the issue, they must not act negligently during their investigation, and their decisions must not be tainted by malice or ill-will. Should a labour board find a union in breach of the duty, remedies include sending a grievance to arbitration, ordering the union to pay for independent counsel to represent the grievor at arbitration, waiving any time limits objections to arbitration that the employer might have, and requiring the union to compensate the grievor for a portion of her or his losses should the grievance subsequently be successful at arbitration.

Since the duty was introduced in Canada in 1970, caselaw has shown a considerable degree of sensitivity towards the various interests that unions must weigh, including the availability of resources, the competing demands by different groups of employees, and the fact that most local union leaders are volunteers. While labour boards receive a relatively high volume of fair representation complaints, only a small portion, less than 2 per cent , are successful against unions. This is likely the result of two factors: the modest standard of representation that the law has imposed, and the generally satisfactory quality of the work that unions perform on behalf of the employees they represent.

UNION GOVERNMENT: TRUSTEESHIPS, CONSTITUTIONS AND STRUCTURE

Aside from a few legislative requirements to file constitutions and make financial information available to members, the administrative apparatus of unions is almost entirely left to the internal constitution, with the courts providing the final supervision. Even with trusteeships, with all its potential for misuse to squelch dissent and local democracy, there has been little statutory intervention.

Trusteeships

The imposition of a trusteeship is a significant intrusion by a parent union into the democratic life of a local. It usually involves the removal from office of the locally elected

officers, the surrender of control over its finances and administration, and the suspension of membership meetings and committees. Union trusteeships have been imposed only rarely in Canada, and generally only for a short duration. Primarily because the weapon of trusteeship has not often been used in an oppressive or authoritarian manner, Canadian labour law has left the regulation of union trusteeships largely up to the labour movement.

Only two provinces, Ontario and British Columbia, have legislation regarding trusteeships, and even they focus largely on procedural issues. Both provinces require that a parent union imposing trusteeship file a statement with the labour relations board within sixty days setting out the terms by which the trusteeship is to be exercised. However, the parent union is obliged only to seek consent from the labour board should the trusteeship extend beyond a year. The only other limitation that either province places over the exercise of a trusteeship authority is the recent requirement in Ontario that a parent union in the construction industry cannot place a local into trusteeship without just cause. Where its jurisdiction has been invoked, the Ontario Board has generally consented to a continuation of a trusteeship where a legitimate labour relations purpose can be established. It has refused to extend a trusteeship where it was not satisfied that the original purpose of the trusteeship was still being served and where the parent could provide no assurances that local elections would be held in the near future as required by the international constitution.

Parent-Local Relationships

With one exception, Canadian labour law has left the regulation of parent-local relations (aside from trusteeships) entirely in the hands of union constitutions and ultimately the courts. In Ontario, recent amendments restricted the authority of parent construction unions, largely headquartered in the United States, from intervening in the affairs of their Ontario locals without just cause. These provisions have increased the role and authority of the construction locals within the union in the areas of bargaining rights, work and geographic jurisdiction, and the administration of benefit plans. In cases where the legislation conflicts with the parent union's constitution, the statute prevails.

Canadian courts have invariably upheld the predominant constitutional authority of the parents during intra-union disputes - defecting locals, conflicts over bargaining authority, or ownership of property. The courts apply contract analysis to interpret the union's governing documents. While this judicial line has been criticized by labour law academics as a frustration of democratic

principles, it is a faithful application by the courts of the explicit location of constitutional authority. Accordingly, decisions have stated that defecting locals are not allowed to hinder the efforts of the parent to recover assets constitutionally belonging to the central authority. In effect, this prohibits dissidents attempting to lead a local's membership out of a union from using the assets and resources of the local to finance the defection, and bans the insurgent local leadership from using the name, trade marks, or insignias of the parent union in the new organization.

Mergers and Amalgamations

Mergers have been a growing trend in the Canadian labour movement in the 1990s. These consolidations have been in response both to the increasing concentration among Canadian corporations and to member demand for more efficient delivery of bargaining and administrative services.

Canadian labour law regulates two different types of union succession. Most commonly, unions are required to seek successorship certifications from labour relations boards when ownership of the workplace changes hands or a corporate merger or restructuring has occurred. This is often quite straightforward but a corporate ownership change, merger, or restructuring can result in the intermingling of workforces and unions. A representation election is conducted by the appropriate labour board to determine a new bargaining agent. The effect of a declaration by a labour board that a union has acquired successorship rights is two-fold: it grants the successor union all of the statutory bargaining rights and duties of its predecessor, and it requires the employers of the affected union membership to recognize the change in bargaining agent status in all respects.

Second, when unions themselves decide for efficiency or institutional reasons to merge or amalgamate with another union, they are required to follow the merger provisions in their respective constitutions. Canadian labour relations boards have approved union mergers and amalgamations where they are satisfied that the vote was held with sufficient notice, it was organized by a duly elected executive, it was available to all members, with relevant information made available to all, and a bona fide opportunity was provided to the membership to express their views and democratically demonstrate their wishes. Underlying this liberal attitude has been the recognition by labour boards of the importance of respecting the autonomy and internal traditions of union governance.

UNIONS AND POLITICS: THE USE OF UNION DUES FOR POLITICAL EXPRESSION

The idea that trade unions should act as the political voice of labour, rather than merely as the collective bargaining representative of workers, has become accepted in Canadian politics and law, although not without controversy. The principal trade union congresses and their affiliates in English Canada and Québec have long been closely affiliated with social democratic parties. They have acted as pressure groups in support of a wide variety of public policy goals, and they have more than occasionally participated in political (and invariably illegal) strikes protesting particular government policies.

While there are a number of significant aspects concerning the relationship between trade unions, politics, and the law in Canada, a burning issue respecting union democracy has been the use of membership dues for social purposes beyond the confines of collective bargaining and internal union administration. This issue raises controversies that are at the heart of the law and union democracy debate: What is the nature of freedom of association? What is the appropriate role of the law in regulating internal trade union affairs? What is the social role of unions, and how is that balanced with the right of individual union members to abstain from involvement in selected union causes?

These matters came to a head in *Lavigne v. O.P.S.E.U.*, where the Supreme Court of Canada in 1991 upheld the right of unions to spend their funds on non-collective bargaining objectives, despite a claim by a dissident member that he objected to such expenditures. The ruling gave considerably greater freedom to Canadian unions to decide on dues expenditures than their American and British counterparts, where courts and statutes have placed stringent limitations on union political and social spending. It also displayed the greater liberalism of the Supreme Court of Canada towards union democracy issues, in contrast to the more jaundiced and inarticulate approach of many lower Canadian courts. *Lavigne* now stands as the most significant decision in Canadian law on internal democracy and on union rights and responsibilities.

Mervyn Lavigne, an instructor at an Ontario community college, had not joined the teachers' union at the college, but was nonetheless required under the Rand formula to pay the equivalent of union dues. In 1984, Mr. Lavigne initiated a challenge under the *Charter of Rights and Freedoms* arguing that the provisions of the labour legislation which permitted the expenditure of union dues contributed by non members for purposes unrelated to collective bargaining contravened

his *Charter* guarantees to freedom of association and expression. While acknowledging that union dues collected under the Rand Formula and spent on collective bargaining were justified, Mr. Lavigne objected to financial contributions made by the union to the New Democratic Party, to a disarmament campaign, to pro-choice abortion groups, to striking British miners, and to medical aid programs in Nicaragua. He sought a declaration that would allow him to withhold that portion of his dues which were spent on non-collective bargaining causes that he did not agree with. Mr. Lavigne was successful before the Ontario Supreme Court, but lost at the Ontario Court of Appeal, and then appealed to the Supreme Court of Canada.

The Supreme Court of Canada was unanimous in dismissing Mr. Lavigne's application. The heart of the Supreme Court's decision was expressed in the judgement of Justice Gerald La Forest. He noted that the purpose of the Rand Formula was to ensure that unions have sufficient resources to participate in shaping the political, economic, and social context of labour relations, and to contribute to democracy in the workplace. Before reviewing the importance of the Formula to the democratic development of unions, La Forest set the dues deduction system within a wider social context:

> "The first [objective] is to ensure that unions have both the resources and the mandate necessary to enable them to play a role in shaping the political, economic and social context within which particular collective agreements and labour relations disputes will be negotiated or resolved. The balance of power between management and labour at any given time or in any particular industry or workplace is a product of many factors. It is also a product of the state of government legislation and policy, most obviously in the area of labour relations itself, but also in regard to social and economic policy generally."

The Justice then spoke to the importance of legislative restraint as a social tool in fostering union autonomy and democratic self-government. Particularly significant was his recognition of the independence of unions as social actors:

> "The integrity and status of unions as democracies would be jeopardized if the government's policy was, in effect, that unions can spend their funds as they choose according to majority vote provided the majority chooses to make expenditures the government thinks are in the interest of the union's membership. It is, therefore, for the union itself to decide, by

> majority vote, which causes or organizations it will support in the interests of favourably influencing the political, social and economic environment in which particular instances of collective bargaining and labour-management dispute resolution will take place. The old slogan that self-government entails the right to be wrong may be a good way of summing up the government's objective of fostering genuine and meaningful democracy in the workplace."

Finally, Justice La Forest connected the relationship between the present system of mandatory union dues payments and its encouragement of union democracy by promoting solidarity:

> "Compelling contributions by all represented by the union, all who benefit from the union's attempt to push the general political, social and economic environment in a direction favourable to unions and their members, provides the union with the stable financial base needed to underwrite political, economic and social activism. The fact that no restriction is put on the manner in which money is expended leaves the decision as to what is and what is not in the interests of the union and its members in the hands of the union membership. It, therefore, clearly has the effect of promoting democratic unionism, I would add that the ability to opt out would undermine the spirit of solidarity which is so important to the emotional and symbolic underpinnings of unionism."

Lavigne is emblematic in several significant ways of the approach by Canadian labour law towards unions and their internal governance. First, the principles of majoritarianism and exclusive representation have been found to be consistent with the constitutional guarantees of freedom of association and expression. Second, the compulsory payment of union dues, and the expenditure of those dues funds on social and political causes outside of the realm of collective bargaining, have also been found to be compliant with the Charter. Third, the modest degree of legislative intervention into the internal affairs of unions in Canada has been reinforced by the Supreme Court on the specific grounds of promoting democracy and autonomy. And fourth, the protection of the rights of individual employees and members within unions, in itself an important value, is to be balanced against the necessary requirements for solidarity and collective action that provide unions with the primary source of their strength.

Underlying the decision in *Lavigne* is the implicit endorsement by the Supreme Court of the logic of unions: their ability to transform an

individual employee's illusory liberty to bargain on an equal footing with her or his employer into a meaningful collective liberty for all members of the unit.

CONCLUSION

Unions combine two fundamental and contradictory impulses that on occasion rub up against each other. On the one hand, unions are autonomous societies that combine service and civic responsibilities, characterized by a tradition of open democratic debate and dissent by the membership in conventions and committee meetings. Indeed, without internal democracy, unions would only add to the degree of workplace hierarchy and obedience that they are ostensibly there to alleviate. On the other hand, they are also economic organizations that, to win better working and social conditions for their members, must depend on discipline, solidarity, and institutional loyalty. Unions must have power, internally and externally, to exercise their role in the workplace and in society. Otherwise, the employment bargain would be wholly one-sided.

There is little debate among observers of contemporary industrial relations that unions can only fulfil their social and economic mission if they are democratic institutions. The focus among labour lawyers and legislators, however, has been on the degree of intervention that the law should make into the internal affairs of trade unions. Some prominent Canadian labour lawyers and academics have argued that a more elaborate code of democratic conduct must be legislated in order to ensure that the right to dissent, the right to be heard, and the right to participate are properly protected. This argument for a union members' bill of rights in Canada is based not so much on any historic or contemporary pattern of entrenched abusive behaviour, as it is on the growing political and economic role of trade unions in modern society and the consequent public responsibilities that come with that role. Implicit in this view is the acceptance that the law can play a substantial role in ensuring membership control and participation by regulating the democratic behaviour of trade unions.

Others have maintained that the present level of legal supervision is sufficient to ensure that unions are fair and responsive to their members, although many of the powers presently possessed by the courts should be removed and placed with labour relations boards. This view is premised on the belief that unions, as essentially private organizations, should be permitted the greatest degree of autonomy possible that is consistent with ensuring that their membership is entitled to fairness in matters concerning both collective agreements and internal affairs.

Beyond providing the basic requirements for internal fairness, it argues that the sinews for union democracy must come from the creativity and maturity provided by the experience of dynamic industrial relations.

The approach in Canada has been to accept the latter argument. Unions have been permitted a significant degree of autonomy, tempered only by the requirements, sometimes expressed by legislation, but largely by the courts and the common law, that they respect their constitutional procedures, that their members have the right to be heard in internal proceedings, and that their rules be free of unfairness and discrimination. For reasons that may or may not be peculiar to Canada, this path has assisted in shaping a trade union movement that it would be fair to characterize as being democratic in its character, civic in its vision, responsive to its membership, and increasingly more representative of Canada's social diversity in its leadership.

Any serious political judgement in the future as to whether the degree of statutory intervention should be increased ought to be determined with the following three tests in mind: (i) the efficacy of the current level of judicial and labour board supervision; (ii) the continuing ability of trade unions to provide democratic self-regulation; and (iii) the level of legislative regulation on the internal affairs of other socially influential non-governmental organizations, such as corporations, political parties, and religious institutions. The most serious obstacle to greater democracy within Canadian trade unions appears to lie not in the pattern of their behaviour, nor in any particular restrictions in their constitutions, but in the generally low participation of the membership in the political life of unions, except in times of conflict or crisis. In the world of representative institutions, this is a common enough problem. The question becomes whether the law can realistically do more than assure that the pre-requisites of fairness are provided, leaving the quality of democracy to emerge through the life experiences of the organization itself.

Note:
A longer version of this paper appeared in: (2000), 21 *Journal of Labor Research*, 37-63.