

# The Protection of Individual Members of Unions

## La protection des droits individuels des membres d'un syndicat

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Article abstract

The author discusses the analysis and recommendations found in the Woods\* Report on the position of the individual member of the union. He views the investigation into the rights of individuals in two parts: (1) the extent to which unions are granted exclusive control over employment conditions and (2) the extent to which the services provided by such unions are vital to Us members. Solutions to the problems inherent in individual member versus union conflicts cannot be found in appeals to abstract 'demo-cracy', internal reform or changes in the common law, but through legislation.

# The Protection of Individual Members of Unions

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The singling out of the rights of individuals in unions for discussion tends to create the impression that unions have been blameworthy in their actions in this field. I believe further comments are warranted.

Specifically, it cannot be overstated that in my research I unearthed substantial evidence that unions have acted arbitrarily with regard to their members in any but a few isolated cases. This does not, of course, mean that the problem was not worthy of study. Quite the contrary. The present position of unions under modern collective bargaining legislation requires that all possible steps be taken to insure that the position of members of unions meet standards generally acceptable in today's community.

Before examining what the Task Force, in fact, has recommended and my views thereon, I would like to make certain preliminary com-

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ments. First, I would like to say that the two central features of any investigation of the rights of individual employees affected by a collective bargaining regime are the extent to which unions, as certified bargaining agents, have been granted exclusive control over employment conditions in the bargaining unit and the extent to which the services provided by such unions are vital to its members. The first of these points is illustrated by the fact that the union is the sole party able to negotiate a labour agreement: there is no room left for private negotiation between employer and employee. As has been stated: "... (A) stockholder of a corporation, if dissatisfied with its management, can sell his stock and invest elsewhere; a member of a union can resign — and starve". The latter point has two aspects: first, the kinds and extent of activities of unions have undergone substantial changes in recent years — "fringe" economic benefits are burgeoning and political involvement has increased; and, second, the significance of these benefits to members and non-members of unions has heightened as job mobility has lessened in the face of automation and the economic costs of hiring older employees. Thus, it can readily be seen that not only the mere fact of membership, but also the extent to which an individual member can participate in and control union activities, is of far greater import by reason of the evolution of the role of unions in society.

Given these points, the resolution of their inherent difficulties by the Task Force was a prodigious task. It was made even more difficult, however, by the proliferation of union security legislation which, in some cases, has made employment dependent upon union membership and by a continuation of the judicial policy of non-intervention in matters of union membership. Obviously, certain inequities have been created by this situation and these have come under attack from various quarters.

As noted, basic to the work of the Task Force has been the fact that these changes have resulted in criticism of union security being continually placed before the layman and persons actively engaged in labour work. These critics demand abolition or drastic modification of the present situation, because they claim that it gives union leaders too much power and thus saps the vitality of the labour movement; that workers are left at the mercy of capricious union rules, and that, generally, the individual is not given his "fair, democratic rights". In rebuttal, proponents of union security stated that union security was an aid to the individual because it increased his influence vis-à-vis his employer and gives him greater job security; and, to the extent that individual workers' freedom is limited,

such limitations were inevitable in a democratic society and the logical concomitant of the right of certified unions to be the exclusive bargaining agent of all workers in the bargaining unit. As an economic argument they also point to the advantage of having stable, industry-wide unions with whom management can negotiate agreements. On a less sophisticated level, it has been stated that all workers should pay for the advantages gained by unions and that opposition to union security was merely a front for anti-union drives. Underlying these arguments, no doubt, is the traditional antipathy of the trade union movement toward any outside intervention in its internal affairs. In short, however, the real point seems to be whether economic convenience or untrammelled individual rights prevail. The dilemma that faced the Task Force, therefore, was one of deciding which of the two propositions above to accept, or alternatively, to balance the need to maintain union unity in respect of its qualities as a bargaining agent with that of retaining freedom of the individual to obtain work.

Upon examination, it seems clear to me that unionists are correct in claiming that some form of union security is an economic necessity ; their arguments do not obtain the same degree of success with respect to the continuation of the slight protection afforded employees in a pre-collective bargaining era when unions were placed in the same category as social clubs and the policy followed by the courts was one of non-intervention in their private affairs. At that time, except for requiring unions to adhere to their constitutions, little or no protection was afforded the individual member. Obviously, such an approach was inadequate to deal with the changing economic realities outlined above. As a rather belated result, legislation was passed which prevented unions from discriminating against a person on the basis of his race, colour, national origin or religion in their membership practice. But this protection was, and is, woefully weak as a remedy for the individual worker who had been discriminated against in less obvious ways than in the mere fact of membership and on the basis of factors other than those dealt with in the legislation. It did not protect what might be called the quality of union membership, the right to take part in union affairs without fear of reprisal, and the right to be fairly represented by the union.

It was and is clear to me as, I believe, it was clear to the Task Force that as long as the economic objectives of union security were maintained, trade unions could claim no inherent sanctity from outside interference in this area. Therefore, circumstances necessitated changes in this area of the law. The problem lay in the formulation of a system of guidelines

or rules which, while protecting the individual, were not detrimental to the effective use of union bargaining power.

The Task Force was also faced with a decision as to the policy which should be followed in deciding upon the nature of such change. Here two major schools of thought exist as to the policy which should underlie approaches to union government: the view that it should be modelled on "democratic" principles to the fullest possible extent; and the position that union government should be tailored to assist the achievement of a central goal of a union — better collective agreements for its members.

The first of these approaches needs little in the way of expansion on the nature of the argument: it generally assumes that the democratic sauce for the Canadian goose is equally satisfactory for the union gander.

Several arguments are made against this type of approach by the functionalist. The first, which would seem to be unanswerable, is that democracy is not an end in itself to be gained by the labour movement, but that better working conditions are. Consequently, it is agreed, stress on means should not be detrimental to the end sought. In other words, the end of trade union activity is to protect and improve the general living standards of its members and not to provide the workers with an exercise in self-government.

The second line of argument stresses the inapplicability of democratic concepts to the trade union movement. Generally, the point is made that democracy has been created to provide government for a society whose aims are diverse and its components disparate; therefore, because the ambit of objectives in unions is narrow and its membership homogeneous, the democratic function does not follow the union form.

In fact, democracy, as an abstract goal, has not flourished in unions, except on rare occasions and at the grass roots level. Nor can it be said to be a necessary concomitant of union organization. Consequently, to swallow this libertarian argument holus bolus is wrong. This is not to say that all the points put forward above are right. Clearly, for example, it does not follow that there are no distinct and strongly-held differences of opinion merely because the ranks of unions come from, on the whole, the same class, and that the decisions they must make all fall within a fairly narrow and related range. Thus, there are areas where democratic principles may provide a basis for union government and, perhaps, the *prima*

*facie* assumption should be that they should apply unless conclusive arguments to the contrary are brought forward ; but still there are areas where an excess of democracy will assist no one — the union as an entity, the employer, the industry, the country as a whole, or, indeed, the workers themselves. In these latter situations, democratic scruples have no place : in a political democracy, not all of its components should be required to mirror this philosophy. It is sufficient to recognize the union's quasi-public nature without making it into a micro-cosmic democracy. Nevertheless, no one can deny that unions should at least be responsible and responsive to the rank and file of its members. Perhaps the Donovan Commission Report, where emphasis is placed on procedural protection rather than on "democratic" reforms, is the approach to take. Certainly, there is room to suspect that this is what the Task Force did.

The method of approach to solve these problems also raises some difficulties. Without delving too deeply into the problem it seems clear that the solutions cannot come either from requests for internal reform or from changes in the common law — independence and history militate against such a possibility. The change, therefore, must be made through legislation, i.e., by requiring trade unions to conform to statutory standards of behavior. Again, the Task Force appears to have accepted this position.

On this point certain observations seem relevant. First, legislation must start with the realization that employers wish to deal only with unions and a remedy which merely permits individual employees to bypass the union and to go to the employer in an illusory protection. Second, legislation based on disclosure is doomed to failure. Historically, required public confessions of personal sin have revealed very few sinners. Finally, any legislation proclaimed must at least meet with a modicum of union favour ; government fiat cannot work in this area without such support.

As a general matter, it would seem that the Labour Task Force concurred in these views. I believe, however, that I would differ in this application from that actually achieved by the Task Force.

An analysis of the position of an individual union member, it seems to me, should be divided into three areas : first, the reason that union membership is significant ; second, how one becomes and remains a member of a union ; and third, what rights attach to such membership. As the Task Force's suggestions in this area are scattered in a rather random

fashion through their report, I will attempt to follow this order in picking out what I consider to be the highlights of it.

Initially, I would therefore like to turn to the question of union security. I do not believe I have to dwell on the more ephemeral aspects of this question. Specifically, it is my contention that one cannot deal satisfactorily with any other aspects of the general problem of the rights of union members until one has determined what the policy should be with regard to union security. In this respect it seems clear that most critics of union activities have rested their case, in part at least, on the possibility that present legislation permits a man's ability to work on a job to be inexorably tied with union membership. Even without facts indicating that such provisions have been unreasonably used, the argument has great currency.

In this area the Labour Task Force has made the following recommendation :

43. We recommend that the compulsory, irrevocable check-off of regular and reasonable dues be available to a certified union as of right upon the negotiation of its initial collective agreement and thereafter, and that this right be extended to a union recognized voluntarily by the employer.

The Task Force would also permit more limited, i.e. stricter, forms of union security, requiring that loss of employment as a result of the triggering of such a clause should not occur until the employee involved has exhausted the appeal procedures involved, as set up by the union, and such further appeals as provided by the Report itself. In the latter situation the person involved would be suspended from the union but would still be compelled to pay dues and assessments until the matter was settled finally.

The apparent basis for this decision lies in the view that the union, as exclusive bargaining authority for the employees, gives them "a claim to general support from employees in the unions' capacity as their collective bargaining agent, whatever other functions it may perform as an instrument of social transformation". In short, the member is to pay "an agency fee" for services rendered by the union as its bargaining agent.

I find that such an approach does not go as far as I would like to see. Specifically, I find it difficult to understand why the check-off envi-

saged should only commence after the negotiation of an initial collective agreement. Surely, if the fee is for services rendered by the union, such services are being rendered before that time. Again, does this not introduce, albeit on a lesser scale, the issue of union security into the bargaining relationship? In this regard, I realize that it is there now, but I find some difficulty in rationalizing companies as the defender of employees' libertarian instincts when a union security clause can be the lever in lowering the wage package.

Again, given the position the Task Force has taken, I can see no necessity for more stringent forms of union security. Once the union is assured that all persons it represents will not be free riders, it seems unwarranted to require that they also be actual members of the union. Only incidentally need I mention that the existence of such a recommendation strengthens the argument that far more intervention is necessary in the internal affairs of the union.

In short, therefore, I feel now, and did in my report to them, that the Task Force should have recommended that upon certification or voluntary recognition by an employer, the union should be entitled as a matter of right to a compulsory irrevocable check-off of regular and reasonable dues from all employees in the bargaining unit affected. However, I would prohibit union security clauses which are more limited.

On my analysis, therefore, the Task Force's recommendations on union security have done little to effect the importance of the right to join and remain a member of a union. Consequently, their recommendations in this latter area are of great significance.

As noted earlier, there is little protection presently afforded members or prospective members of unions by law. Generally, the law has not advanced to the position where membership in a union is considered any differently from that of membership in a private club. Hence, existing rules in this area reflect a reliance upon traditional doctrines of contract which, given the inherent superior position of an organization over an individual in this area, can only act to the detriment of the individual. Although the Task Force realizes that the underlying assumptions of the courts are incorrect, it appears to me to provide too little in the way of change. Specifically, the Task Force almost entirely neglects the control of a union over the qualifications it can impose for membership. Specifically, the Task Force only makes recommendations that "Where access to a particular trade, occupation or industry, is contingent upon the attainment of



certain minimum standards of competency in order to protect the public interest, [they] recommend a standard to be set and administered by a tribunal in which there is a public participation and from whose decision there is a right of appeal". Presumably such appeal is to a Public Review Board or a Labour Relations Board. Again, a similar board would be empowered to determine the reasonableness of dues and allied assessments. Finally, in the case where a member was to have his membership suspended or terminated, a similar board was to have jurisdiction to determine the reasonableness of the substantive rules upon which the union based its termination of membership. In this area the board indicates that such rules "should not be such as to preclude union members from engaging in otherwise lawful conduct unless that conduct seriously undermines the union's position as a bargaining agent."

Quite obviously, such recommendations suffer from at least one serious flaw : they do not in any way touch upon the rules which should govern the initial application for membership by a prospective member. As the only protection now existing appears to be relatively weak, this failure seems especially great. Consequently, in my opinion, the recommendation made by the Labour Task Force to insure that the substantive rules relating to membership be reasonable should be extended to cases where persons are denied membership as well.

Another questionable area of this recommendation relates to the dependence of the Task Force on Public Review Boards. While clearly the board established by the UAW has had a good deal of success in its activities, it is questionable that such groups could adequately deal with all problems that exist. Such boards suffer from the fact that they are a final appellate body and so only come into action when the internal remedies provided by the union constitution have been exhausted. Again, I doubt whether sufficient boards could be found to deal adequate with all problems that would exist. The work of such boards is of an extremely delicate nature and, as anyone in the labour field realizes, manpower of this calibre is rather difficult to come by. I cannot see the Canada Labour Relations Board, the alternate suggestion of the Task Force, being suitable at all.

What does have appeal, however, is a legislative statement of the scope of permissible conduct for unions in this area. Such an approach, it seems to me, would bring the problems home to unions before difficulties arose and thus obviate the necessity in many cases for *ex post facto* adjudication of the correctness of certain rules.

Such a recommendation has been made by the Task Force with regard to the procedures by which such rules are presently dealt. Thus they have recommended "that legislation prescribe basic procedural rights in internal union affairs, including the right to be heard, to be tried by an impartial body, to be represented by counsel, to be protected against double jeopardy, to have access to a speedy trial and appeal, and to receive a reasoned decision." No one could cavil with these recommendations. It is to be hoped that they could be extended further. To me, such a task seems relatively simple and extremely valuable.

The Task Force seems to have been exceptionally successful in its dealings with what might be called the "quality of union membership". In this area, the board made a worthwhile step into the internal affairs of the union when they recommended that :

« [L]egislation guarantee to members the right to run for union office in elections held at regular intervals, to nominate candidates, to vote in union affairs, to attend and participate in union meetings, and to have equal access to union facilities, including the union newspaper, especially during election campaigns. We recommend further that legislation guarantee the right of union members to audit statements of union financial affairs and the possession of the union constitution, and the right of all employees in the bargaining unit to possession of any collective agreement affecting their employment. »

Quite obviously, most of these rights are presently afforded to members of unions. It does, however, provide a clear statement of rights which will be instructive to those persons who have not considered this problem, but are of good will. As well, it has a useful cautionary influence on those who do not. I can see no argument whatsoever against such a position.

In a more substantive way, the report of the Task Force also dealt with the problem of ratification and strike votes as well as political action.

In the case of both ratification and strike votes, the report takes a similar tack. Noting the public interest in both these matters, the Task Force seeks to ensure that a thoroughly representative judgment of the union members involved will be attained. Therefore, they recommend that such votes be taken by secret ballot and that the voters have maximum access to this ballot. To this end they recommend that the vote be taken at the entrance to the work place or places or by mail and that steps be taken to insure the secrecy of the ballot and that the employer's right to put his views to the persons involved be preserved. In the case of strike

votes, the board adds the rider that these be taken only after a time when it is legally possible to strike. In neither case does the Task Force require that such votes be mandatory.

However there are two questions about these recommendations. First, should such votes be mandatory? And second, should non-members of the union who are employed in the bargaining unit be entitled to vote in such elections? The first of these queries is only tentative, -- I am not too sure that in fact there should be any change. The second does, however, appear more arguable. Clearly, under present circumstances these persons are affected by the decision to strike or ratify immediately as union members and, given the implication of the Task Force's other recommendations that they might not in fact be able to be members, it might not seem impractical or unjust to have them vote on such matters. Perhaps the answer to both of these questions is that intervention to such a degree into areas, where hitherto the law has avoided, might be premature.

I would like to touch briefly upon the recommendation of the Task Force regarding the political activities of unions. Briefly, the Task Force adopted the British position in this area with an additional feature. Thus, they recommended that union monies only be used to support a political party when: (1) such decision was made or ratified by a duly constituted representative body of the union; (2) where all such monies were kept and accounted for separately; (3) where dissenting members were permitted to opt out of such contributions; and (4) when members who did not wish to contribute would be able to opt out by notifying the union or by stating their desire to do so in a signed letter to the Canada Labour Relations Board. As a result of the opting out, the Task Force suggests that the funds involved revert to a general operating fund.

I concur with the Task Force's own observation that this is a cumbersome set of procedures. I do not agree, however, that such a system is necessary to protect "union members who may hold divergent views" from the majority. To some extent, all corporate activity — and here I use the term corporate advisedly — entails that the minority of members support causes with which they are not in agreement. Such support, however, is almost always of a very minor nature and does not preclude more active participation in favour of such dissident's chosen position. The balancing of the two interests, it is my submission, does not favour the individual. It rather smacks of a tempest in a teapot.

There are variety of other recommendations contained in the Labour Task Force report which touch on the position of the individual member. However, I cannot go into these in detail, nor dwell on many of the points related to the matters discussed above. These matters form the guts of the report and, my dissenting views notwithstanding, hold together very well.

Having made such a statement and in the face of my earlier criticisms, I believe I should conclude by making some comments on this point. Specifically, although I believe the Task Force could have gone further, I realize that I state this with the bias of an academic. The Task Force was obviously involved in an exercise of the possible — indeed, being academics, they probably bent over backwards to achieve a practical, workable report. This is not to say that the justification for this report is expediency. The points that they recommend are valuable and, facing a relatively new and increasing area of legitimate concern to the public, they have shown restraint in the face of temptation to experiment. I concede that such experimentation is not justified, but, not being in a position where I can be held accountable, I am afraid I have succumbed to temptation quite often in this field. I trust my fall from grace has not clouded my twin observations that this is an admirable report and that concern with this area does not reflect adversely on the splendid work of most unions in this area.

## **LA PROTECTION DES DROITS INDIVIDUELS DES MEMBRES D'UN SYNDICAT**

Sauf dans quelques cas isolés, les syndicats n'agissent pas d'une façon arbitraire à l'égard des droits de leurs membres : la législation qui régit la négociation collective moderne exige des syndicats le respect de certaines règles de comportement vis-à-vis leurs syndiqués.

Deux aspects ressortent d'une enquête sur les droits individuels dans un syndicat :

- i) Les syndicats, en tant qu'agents de négociation accrédités, se sont vu accordé le contrôle exclusif des conditions d'emploi effectant les individus de leur unité de négociation.
- ii) Les services fournis par de tels syndicats sont d'une importance vitale pour leurs membres.

Cette importance relève de l'évolution que connaissent depuis quelques années les syndicats dans leurs activités : leur rôle politique s'est accru. Ils tiennent compte maintenant de la nécessité d'avantages économiques complémentaires au salaire pour leurs membres. La valeur de ces avantages complémentaires pour les membres et non-membres des syndicats s'est accrue à mesure qu'il est devenu plus difficile de changer d'emploi face à l'automatisation, face aux coûts élevés rattachés à l'embauchage d'un travailleur plus âgé.

L'Équipe spécialisée en relations du travail fit des recherches sur les questions de sécurité syndicale esquissée ci-haut. Des injustices ont été créées par ce système, et dénoncées par les parties lésées.

Les critiques de la présente situation en demandèrent l'abolition ou une modification radicale, puisqu'à leur avis les chefs syndicaux détenaient trop de pouvoir et avaient tendance à ne pas respecter les droits de l'individu. On se défendit en soutenant que la sécurité syndicale augmente l'influence possible de l'employé vis-à-vis les patrons et lui donne une meilleure sécurité d'emploi. On démontra aussi les avantages d'avoir des syndicats stables couvrant des industries complètes, avec lesquels les patrons pouvaient négocier des conventions collectives. Le dilemme touchant l'Équipe spécialisée en relations du travail consistait à choisir et approuver l'une de ces deux positions, ou à proposer un compromis : maintenir la sécurité syndicale et défendre en même temps la liberté de l'individu. La législation prohiba toute discrimination de race, de couleur, d'origine ou de religion, mais cette mesure s'avéra inadéquate dans les situations où l'individu se déclarait victime d'une discrimination de nature moins évidente.

Deux écoles de pensée majeures existent concernant la politique d'approche à la formation du gouvernement des syndicats :

- i) Il doit être formé le plus possible d'après des principes « démocratiques » ;
- ii) il doit être raffiné de façon à faciliter la poursuite d'un but central du syndicat — négociation de conventions collectives plus favorables à ses membres.

L'Équipe spécialisée se pencha sur le point de vue « démocratique », et le point de vue « fonctionnel », et semble conclure en insistant plutôt sur une protection par des procédures légales que sur des réformes « démocratiques ». Ces changements doivent être effectués par une législation acceptée par les deux écoles.

Pour notre part, nous croyons que :

- 1) L'Équipe spécialisée néglige presque entièrement la question du contrôle que peut exercer un syndicat sur les qualifications requises pour être un de ses membres.
- 2) Une trop grande dépendance vis-à-vis des comités publics de révision ou du Conseil Canadien des Relations Ouvrières peut se produire pour résoudre les problèmes auxquels la constitution du syndicat ne peut remédier.

Nous sommes d'accord avec la recommandation de l'Équipe spécialisée portant sur une législation qui définirait le champ des conduites permises à un syndicat dans ses affaires internes. Cette recommandation stipule que « la législation doit accorder plus de droits protégés par les règles de procédure aux individus dans les affaires internes des syndicats ».

Sur la question des votes de ratification et de grève, le Rapport vise à assurer l'expression vraiment représentative des membres concernés du syndicat : Il recommande que ces votes soient exprimés par un scrutin secret. Toutefois le vote dans les deux cas doit être facultatif.

L'Équipe spécialisée adopte une position britannique modifiée sur la question des activités politiques des syndicats, avec des procédures de « non-implication » pour les membres dissidents qui ne veulent pas y apporter leur contribution. Nous ne croyons pas que ce système soit nécessaire pour protéger les opinions divergents d'une minorité.

Nous nous devons de conclure que la discussion du rôle du membre du syndicat en tant qu'individu, constitue une partie importante du Rapport de l'Équipe spécialisée en relations du travail.