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Restoring Balance? Bill 32, the *Charter*, and Fair Democratic Process

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Bill Commented On: Bill 32, *Restoring Balance in Alberta's Workplaces Act, 2020*, 2nd Sess, 30th Leg, Alberta, 2020

On July 7, the United Conservative Party (UCP) government introduced Bill 32, styled the *Restoring Balance in Alberta's Workplaces Act, 2020*. Bill 32 makes a number of changes to Alberta's labour relations statutes that are of questionable constitutionality. The focus of this post is only on the constitutional dimensions of Bill 32's impact on the capacity of unions to participate in political activities. Bill 32 is interesting from the perspective of democracy jurisprudence because it appears to be a paradigmatic example of the use of legislative power to silence or impair the efficacy of political opponents. A constitutional challenge to Bill 32, which seems inevitable based on early statements by Alberta unions, promises to provide a forum for the consideration of whether political animus is relevant to constitutional analysis. This post does not express a view on the constitutionality of Bill 32; rather, it explores how courts should approach constitutional analysis of legislation that has an obvious negative effect on political opponents of the government.

Bill 32

Bill 32 represents the fulfillment of a UCP campaign promise (at 22) to give union members a choice as to whether their union dues are used for political purposes. Bill 32 amends the *Labour Relations Code*, RSA 2000 c L-1 and several other labour statutes to provide that unions must now disclose the percentage of union dues that "relates to political activities and other causes" including:

> (i) general social causes or issues,
>
> (ii) charities or non-governmental organizations,
>
> (iii) organizations or groups affiliated with or supportive of a political party, and
>
> (iv) any activities prescribed by the regulations….

Bill 32 further provides that in order for a union to use a member's dues for political activities and other causes, the union member must first opt-in to paying the percentage of dues relating to political activities and other causes, referred to by the Bill as making an election. The categories of expenditures that must be disclosed to members, and regarding which members are required to make their election, are stated in vague terms, and left open-ended given the ability of the government to expand the categories using regulations.

The ostensible purpose of the opt-in provision is to provide union members with agency to withhold funds from the union when such funds are used for political purposes with which the union members disagree. The opt-in provision promotes the freedom of expression and association of individual union members by allowing them to distance themselves from union political activities. The significance of the expression and association enhancements should be kept in perspective. Union members have always had the right to use the democratic processes of their organizations to influence the political activities and spending practices of those organizations.

Partisan political purposes may be inferred from the absence of any parallel legislative measures limiting the spending of corporate funds for political purposes, suggesting that the government is content for the expression and association interests of shareholders, which parallel union member interests, to be protected by the mechanism of corporate democracy. Why, unions might ask, are they not entitled to the same treatment as corporations? A partisan purpose may also be inferred from the choice of an opt-in regime over an opt-out regime. Arguably, the freedom of expression and association of union members would be equally protected by an opt-out provision that would have less impact on unions. The difference between opt-in and opt-out regimes are a subject of study in behavioural economics. Richard Thaler and Cass Sunstein, proponents of the Nudge theory (see here), suggest that governments should use opt-out regimes instead of opt-in regimes to increase participation in socially-desirable activities such as organ donation (see here). This is because opt-out regimes result in higher participation rates than opt-in regimes. The UCP, by creating an opt-in regime, has chosen a default setting that is likely to result in less money being available to unions for political activities.

However, these inferences are not required because the government has made no attempt to hide the partisan political purpose and effect of this election provision. Bill 32 is designed to limit the capacity of both NDP allies and UCP critics to publicize political messages that the UCP government does not like. Premier Jason Kenney retweeted the following tweet by the UCP explaining why the provisions of Bill 32 permit union members to prevent their dues from being used for political expenditures:

The UCP tweet, and others like it, make it clear that Bill 32 targets unions because of their historical support for the NDP and their opposition to UCP policy positions.

The UCP government has also signalled that it may increase or do away with the limits on third party election expenses (i.e. expenses of unions, corporations, and individuals), which would allow unfettered advertising by private interests during the election period (see here). Bill 29 significantly loosens restrictions on political contributions and third party spending activities in local elections and may foreshadow similar changes to the rules for election finance at the Provincial level. If that comes to pass, the combined effect of undermining the capacity of unions to make political expenditures and removing the limits that constrain both union and corporate spending will tilt the electoral playing field in favour of the UCP and its monied allies.

Union Dues and Political Activities in Comparative Perspective

Perspective can be gained by looking at political finance rules in a comparative context. The most instructive examples because of history and proximity are the United States and the United Kingdom. The current approach in Canada stands in contrast to that of the US. Canadian jurisdictions have traditionally not restricted the use of union or corporate funds for political purposes other than by imposing general spending limits that apply to unions, corporations, and individuals alike. The US, partly as a result of court decisions, employs a system whereby

political expenditures are essentially unlimited and, at the same time, union members are allowed to opt out of having their dues used for political purposes with no similar rights being provided to shareholders that make political expenditures. The UK, over the last several decades, has moved to a system that has some measure of parallel treatment of unions and corporations with both being subject to limits on the use of funds for political purposes.

The Supreme Court of Canada in *Lavigne v Ontario Public Service Employees Union*, 1991 CanLII 68 (SCC), [1991] 2 SCR 211, considered whether legislation that allowed the use of union dues for political activities with which a member disagreed was an infringement of the *Charter*. The union member contended that *Charter* section 2(d), which protects freedom of association, gave him a right not to be associated with the union's political activities and that use of his union dues for these purposes violated this right. The decision is fractured with four sets of reasons all coming to the same result. Three of the seven judges concluded that *Charter* section 2(d) does not protect a right not to associate, while four concluded that section 2(d) does protect a right not to associate. However, of the four affirming judges, Justice Beverly McLachlin disagreed that the right was infringed by the use of union dues for political purposes with which a member disagreed. The other three judges who found that the right not to associate was infringed concluded that the infringement was justified under section 1. All seven of the judges agreed in the result that rules permitting the use of union dues for political activities with which a member disagrees are constitutional.

Justice Gérard La Forest, writing for himself and Justices John Sopinka and Charles Gonthier, considered the impact of moving from the status quo to an opt-out regime. He observed that:

> the number of causes [that a union] will be able to support will be severely reduced, if individual contributors are free to "opt out" in order to avoid funding causes they find distasteful. The ability of unions to favourably affect the political, social and economic environment in which collective bargaining and dispute resolution take place will be correspondingly reduced. Just as importantly, these developments will have serious consequences for the state objective of encouraging healthy democratic decision-making and debate within unions. Under an opting-out regime, the criterion under which expenditure decisions will be made may well become the acceptability of proposed expenditure to those likely to exercise the right to opt out, rather than a genuine attempt to identify and pursue what is in the best interests of those represented by the union. (at 338)

Justice Bertha Wilson, who wrote for herself and Justice Claire L'Heureux-Dubé and with whom Justice Peter Cory agreed in separate reasons, made similar observations (at 286-292). Justice McLachlin observed that "[a] strong argument can be made that to achieve their legitimate ends and maintain the proper balance between labour and management, unions must to some extent engage in political activities" (at 349-350). *Lavigne* endorsed the status quo in Canada, whereby until Bill 32 was proposed, the provinces and federal government generally did not provide for any limits on the use of union funds for political purposes.

In contrast, the US Supreme Court in *Abood v Detroit Bd. of Educ.*, 431 US 209 (1977) decided that the use of a public service union member's dues to fund expenditures on political activities with which the member disagreed contravened the First Amendment of the US Constitution. The

Court likened the use of union dues for political activities that a member disagreed with to forced expression or forced association. The Court held that a union could make political expenditures but that "such expenditures [must] be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment" (at 236).

The US Supreme Court's decision in *Citizens United v Federal Election Commission,* 558 US (2010) opened the door to significantly increased corporate spending in elections. Justice Anthony Kennedy suggested that the removal of limits on corporate expenditures was not as troublesome as critics thought because shareholders, through the mechanism of corporate democracy, could exercise control over political expenditures (at 46). Reformers proposed legislation to require shareholder approval prior to a corporation being able to spend money on political advertising, but these efforts have not borne fruit and it has even been suggested that such restrictions might be unconstitutional (see here). The US political finance system after *Abood* and *Citizens United* gives wealthy individuals and corporations an advantage over unions in the competition to influence political debate.

The UK political finance regime restricts both unions' and corporations' use of funds for political purposes. The UK rules provide that for union political funds established before March 1, 2018, union members are automatically enrolled but are permitted to give notice to opt-out (see here). For union political funds established after March 1, 2018, union members must affirmatively opt-in to participate. The UK's change from an opt-out regime to an opt-in regime for union political funds was assailed as a partisan attack. Corporations are required under the UK *Companies Act,* 2006 c 46 to disclose and obtain prior approval from shareholders for all political expenditures over £5,000 (see here). The UK approach, though not treating unions and corporations the same, provides some measure of parity in recognizing the agency of both union members and shareholders.

Egalitarian Model

Unions, corporations, and individuals who make independent expenditures in election campaigns (typically advertising on issues in support of a candidate or party) are termed "third parties" (see here). Going back to the time they were first proposed by the Barbeau Commission in 1966, the assumption behind third party spending limits was that wealthy individuals and corporations were the most likely to incur third party expenditures. Since 1974, third party activities have been intermittently regulated through spending limits and, more recently, mandatory reporting and disclosure. Limits on third party expenditures were repeatedly challenged in the Alberta courts until the Supreme Court of Canada ruled third party expenditure limits constitutional in 2004 in *Harper v Canada (Attorney General),* 2004 SCC 33 (CanLII).

Harper characterized Parliament's approach to election regulation and the Supreme Court of Canada's elections jurisprudence as being egalitarian in nature and purpose. The "egalitarian model" (see here) is "premised on the notion that individuals should have an equal opportunity to participate in the electoral process. Under this model, wealth is the main obstacle to equal participation" (at para 62). The egalitarian model seeks to prevent private wealth from dominating electoral discourse and to create a "level playing field" between electoral participants (at para 62). Uncontrolled third party expenditures pose a significant risk to the level playing

field for electoral competition that is created by political party and candidate expenditure limits. Accordingly, proportional regulation of third party expenditures is constitutional.

An argument can be made that unions, being democratic organizations comprised of individuals, do not pose the same threat to egalitarian election regulation and electoral fairness as wealthy individuals and corporations. Indeed, third party election expenditure regulations were motivated by fears of private wealth-distorting election discourse, and not from the threat of unions. Despite this, election finance regimes in Canada have not traditionally made a distinction between corporations and unions. The fact that corporations and unions are rivals that often take opposite sides of the same issues and the idea that fairness should govern electoral competition both weigh in favour of equal treatment of unions and corporations.

Structural Approaches to *Charter* Democracy Cases

Bill 32 limits the section 2(b) *Charter* right of unions to freedom of expression by reducing their capacity to make political expenditures. The UCP government will no doubt contend that the limit on the freedom of expression of unions is justified by the autonomy given to workers to make a determination whether they will fund union political activities. Doesn't that autonomy also further the purposes of the *Charter* rights of freedom of expression and association? The Legislature, it will be argued, is entitled to deference in determining how to balance rights. Absent the naked partisan purposes of Bill 32, this might be an appropriate approach. But what is a court to do when a law restricting political activity is aimed at the government's political opponents?

Legislators have an inherent conflict of interest in enacting laws that govern the political process. A party that controls the legislature is subject to the temptation to institute electoral laws that favour its re-election. To deal with this problem, US constitutional theorist John Hart Ely proposed, in his seminal work, *Democracy and Distrust*, what he called a representation-reinforcing approach to constitutional review (see here). Ely likened the role of courts reviewing laws governing the democratic process to an anti-trust regulator or a referee in sports. The anti-trust regulator – in Canada, the Competition Tribunal – is concerned with preventing monopolistic behaviour and promoting efficient markets, and a referee in sports is concerned with "one team gaining unfair advantage" (at 103). Ely would have courts intervene to prevent the distortion of political competition. His theory of constitutional review is sometimes called a "process theory." Patrick Monahan has suggested that there is a place for Ely's process theory in *Charter* jurisprudence (see here).

Following Ely, Samuel Issacharoff and Richard H Pildes in "Politics as Markets" likened legislators to corporate managers who adopt measures that prevent their removal – poison pills, for example. They contend that courts in democratic process cases should act as courts do in corporate law, to invalidate measures that foster management entrenchment. Legislative conflict of interest is sometimes taken into account in US cases by applying strict scrutiny, the most stringent standard of review, in democratic process cases. The approach to law and democracy problems that has grown from the insights of Ely and later Issacharoff, Pildes, and Karlan (see here) and others is often called a structural approach. The structural approach holds that constitutional rights must be understood less in terms of their individual dimensions and instead contextually in terms of the larger democratic process in which they are situated. In other words,

constitutional rights are tools available to courts to ensure the proper functioning of the democratic process. While process theory and structural approaches are sometimes portrayed as being agnostic to normative considerations, a more realistic view is that process theory and structural approaches assume the basic norms of liberal democracy as a baseline.

Yasmin Dawood has articulated a new conceptual framework for Canadian law and democracy cases that she calls "structural rights" (see here). Structural rights are "individual rights that take into account the broader institutional framework within which rights are defined, held, and exercised" (at 503). Dawood posits that the Supreme Court of Canada should "recognize the right to a fair and legitimate democratic process as a purpose of the right to vote" (at 525). The right to a fair and legitimate democratic process is mainly concerned with checking "illegitimate exercise of power that benefits the partisan interests of public officials at the expense of the public interest" (at 526). Dawood's approach works well in the context of section 3 of the *Charter*, which protects democratic rights, where there is analytical work to be done in the definition of the right. It is less clear how Dawood's approach works in the context of section 2(b) of the *Charter*, where all of the analytical heavy lifting is done in the context of section 1 (i.e. in examining the justifiability of government limits on freedom of expression). Dawood's discussion of *Harper* and campaign finance restrictions suggests that she envisions courts scrutinizing self-serving partisan behaviour in the context of section 2(b) of the *Charter*, so it must be imagined that this analysis would take place under the rubric of section 1. In his paper, "Breakdown in the Democratic Process and the Law of Canadian Democracy", Michael Pal suggests that structural considerations come into play in the section 1 evaluation of whether the legislative objective is pressing and substantial (at 346).

My own attempt to reconcile the Supreme Court of Canada's normative view of regulation of the democratic process, the egalitarian model, and a more structural approach to constitutional analysis all within the framework of existing *Charter* doctrine is found in "Freedom of Expression and the Law of the Democratic Process." I argue that the approach to analyzing whether limits on *Charter* rights are justified that emerged from *R v Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103, allows a court to take into account normative considerations in the first part of the section 1 analysis, evaluating whether the legislative objective is pressing and substantial, and structural considerations in the second part of the analysis where proportionality is evaluated. A strict approach to proportionality allows courts to effectively police self-serving behaviour. I called this approach "process theory lite" to give a playful acknowledgement of my intellectual debt to Ely and others.

My process theory lite approach has been criticized by Pal (at 346) and others (see here) as being too deferential. These critics would prefer to see a more distrustful approach taken to the evaluation of legislative objectives in the first part of the *Oakes* test rather than leaving the protection of structural interests to the proportionality stage of the analysis. My response to these critics is that legislation rarely fails at the first stage of the *Oakes* test because legislatures are almost always able to advance a plausible objective for their legislation. Even if a legislature is able to point to a legitimate objective, the work done in the first stage of the *Oakes* test is not lost because it may identify structural concerns – for example, potential self-dealing and adverse effects on political competition – that can then inform the rigour with which the elements of the proportionality stage of the *Oakes* test are applied. A strict approach to the minimal impairment and rational connection stages may weed out abusive legislative provisions, but it is the final

aspect of the proportionality enquiry, called by some the "heart" of the analysis, that is ideally suited to taking structural considerations into account (see here at paras 78-79). At this stage, as the Court explained in another law and democracy case, *Thomson Newspapers Co v Canada (Attorney General)*,1998 CanLII 829 (SCC), [1998] 1 SCR 877, a court must take into account "practical and contextual factors" and weigh "whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*" (at para 125).

Conclusion

Pal raised the question of what he calls "difficult cases." Difficult cases, according to Pal, are ones where a restriction is self-dealing and has a partisan effect but, absent those factors, would be unobjectionable from a constitutional perspective. This is especially the case if there are also defensible principled reasons that can be marshalled in favour of the restriction. Pal contends that where a "problem [that reduces political competition] emanates from the incentives facing legislators, it is unlikely to be fixed in the legislature itself, and should, therefore, be remedied by courts" (at 345).

A constitutional challenge to Bill 32 would be a difficult case. A law requiring union members to opt-in to having their dues used for political purposes, when viewed apart from its context, is not inherently objectionable and can be defended under section 1 of the *Charter* as promoting the legitimate purpose of enhancing union members' freedom of expression and association. Bill 32 only appears to be constitutionally objectionable when viewed from a structural or contextual perspective considering both its partisan purposes and its adverse effect on political competition.

A constitutional challenge to Bill 32 will provide an opportunity for a court to explain how structural considerations may be weighed in *Charter* analysis. A court evaluating Bill 32 from a structural perspective will have to ask whether the government's ostensible purpose of promoting worker autonomy could have been achieved through a measure such as an opt-out regime that would have a less drastic impact on union capacity to participate in political debate. A court will also have to ask whether the enhancement of the expressive and associational interests of union members outweighs the toll that the measure exacts on political competition. The government's conflict of interest in enacting Bill 32 requires that the deference accorded to legislatures in balancing *Charter* values in the proportionality stage of the *Oakes* test be cast aside and the restrictions be assessed with a critical eye.

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