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## **TOO BAD, YOU WERE TOO LATE IN COMING IN!**

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### **Introduction**

Since the 1980s, and even more so since the 1990s, European (Müller-Jentsch, 1988; Hyman, 1992, 1997: 29) and North American researchers (Creese 1996: 454; Crever 1993, 1998; Edwards 1986; Fudge 1996; Gagnon 1998; Kumar et al. 1998; White 1990; Zeynotiglu and Muteshi 2000) have been examining what is frequently referred to as a “crisis” in the union movement, in contrast to what was a fairly firm consensus on the unity and representative power of organized labour up until the late 1970s. Trouble in aggregating and recognizing common interests within both trade union locals and confederations has become fairly evident since this time (see also Clarke Walker, Edelson, Foley, Wall, this volume).

This situation is closely tied to the emergence of new factors contributing to the segmentation of labour, which in turn may have the effect of segmenting the unionized community. Some of the segmentation factors stem from human resource management decisions: promoting worker and workplace flexibility; increasing the number of casual workplace statuses and forms of compensation; the practice of multitasking; disparities among workers in status and compensation levels, etc. Other segmentation factors,

however, originate among the workers themselves or are shared, appropriated and promoted by them.

Under human rights charters and acts<sup>1</sup>, the case law that stems from them, and the more general spreading and promotion of their philosophy, some categories of labour demonstrate specific interests that are distinct from those of the larger group of unionized workers to which they belong, sometimes to the point of contesting what are regarded by others as important gains in union practices, or decisions based upon majority votes. A relevant example is the conflict raised by employees paid under what are known as “orphan” clauses in Quebec, or as two-tiered wage systems in other Canadian contexts.

This paper attempts to show that, where two-tiered wage systems are implemented, new hired workers’ demands and interests are sometimes so distinct from those of the majority of the union local that they affect solidarity and create conflict. First I will present a discussion of two-tiered clauses as a general phenomenon. I will then focus more sharply on a lawsuit that has advanced to the Supreme Court of Canada. It was initiated by a group of union members against their union, the Centrale des syndicats du Québec (CSQ), because they felt they had been adversely affected by a two-tier wage clause that the union had negotiated. The file is now closed (though unsettled).

I will not analyse here the substance of the case, nor the content of the refused out-of-court settlement<sup>2</sup>, but a previous decision of the Supreme Court of Canada, inherent to the case; this decision has acknowledged that a conflict of interest exists between this group of workers and their union, and has denied the union the right to represent these workers as the case advances, as it could be held responsible for the situation and be required to face those workers in court. This case raises serious questions

about who can legitimately speak on behalf of such workers and emphasizes the need for more equitable representation of diverse member groups within unions.

Following the detailed discussion of this particular request from a group of union members and of the decision of the Supreme Court of Canada, I will develop the difference between the concepts of equality and equity, the former being deeply rooted in union traditions, but the latter recently brought into labour relations by the Quebec Human Rights charter<sup>3</sup> and its philosophy. In unionized environments the notion of formal equality, or equality of rights, is widespread if not universal; similar in its application to the same concept in our liberal law and political life, it provides the foundation for democratic citizenship, in which decisions are supposed to be based on the primacy of a majority vote taken in a general meeting; in these, each individual enjoys a vote of equal weight. According to this notion, aiming at equality dictates that all union members should be treated equally. On the other hand, with the notion of equity or equality of results set forth by the human rights laws, legislators recognize that it is sometimes necessary to treat the members of certain groups differently in order to increase their representation in work environments, for instance to temporarily allow for preferential treatment to women (or other groups suffering discrimination) until a situation of equality of results has been established, regardless of the opinion of the majority – because human rights prevail over any other law. These conflicting conceptions of equality create serious difficulties for unions.

The consequences of two-tiered wage systems and their relationship to the concepts of formal equality and equity for unions' inner solidarity conclude the argument developed in this article. As we will see, the application of the equity concept in unions'

practices requires a considerable change in the political decision making process, a change that many union members do not see as fair.

### **Employees Paid Under Two-Tiered Wage Scales (“Orphan” Clauses)**

#### **Matter At Issue**

In response to the pressures of a new economic situation such as the opening of markets and international competition for the private sector, and the pressure for debt reduction and labour cost-cutting targets set by the Quebec provincial government for the public sector, employers are seeking increased flexibility with respect to monetary compensation for their employees. As a consequence, innovations such as merit pay, skill-based pay, broadbanding and even the establishment of two-tiered wage systems based on date-of-hire (so-called orphan clauses) (Collectif 1999), have been introduced.

Orphan clauses originated in the United States and saw their greatest spread during the 1980s. They were generally introduced in an effort to reduce costs while pacifying experienced employees, as saving jobs was sometimes invoked as an outcome of two-tiered wage systems. Two-tiered systems were still prevalent at the end of the 1990s in the Quebec municipal employment sector (e.g. present in 12.6 percent of the collective agreements in 1998) and in the Quebec retail trade sector ( e.g. present in 13.7 percent of collective agreements in that same year) (Coutu 1998). They took on a variety of forms, limited only by the creativeness of the parties to the agreements. Sometimes new hires were subjected to longer probationary periods, or different fringe benefits. Some collective agreements included arrangements that maintained pension levels for older employees (defined benefit plans versus defined contribution plans), but provided no such guarantees for newer employees – just the opposite in fact. Other agreements

reduced the wages of temporary workers or students, or abolished job security for workers to be hired under the new agreement. Some agreements placed new hires in contingent positions while suspending their right to arbitration.

The effects of orphan clauses could be temporary or permanent. For instance, in the education sector they were temporary, since new hires could eventually achieve the same pay ceilings as senior employees; the wage differential ended once the newly hired teacher resumed normal progression in the wage scale. But sometimes the effects were permanent, for instance where whole new structures were created for the new hires, whose pay ceilings were permanently lower than those of senior employees. The characteristic all these two-tiered clauses shared was that they provided new hires with working conditions that were inferior to those negotiated for more senior colleagues in the same jobs, and implemented two different sets of rules governing employees' access to various benefits, plans, programs, etc., based on date-of-hire. In other words, employees hired after day X could get lesser benefits, or wait longer to have access to benefits, or wait longer to reach the same level of benefits, than would employees hired before that day.

The Quebec Act Respecting Labour Standards (title VII.1, section 87.1 and following) now outlaws wage disparities based on date-of-hire<sup>4</sup>, whether temporary or permanent, as long as the matter is dealt with by a standard stipulated in the act, namely: wages, hours of work; statutory general holidays and non-working days with pay; paid annual leaves; rest periods; absences owing to sickness, accident or a criminal offence; family or parental reasons; notice of termination of employment or layoff; and work

**certificate.** The standards pertaining to retirement (Division VI.1) are excluded from the application of section 87.1.

The Quebec Human Rights Commission also concluded that two-tiered wage clauses could have a directly discriminatory effect based on age, but also, in an indirect way, on sex and ethnic origin, because women and immigrants were more often newcomers in the labour market, ironically sometimes benefiting from equity programs. Age, sex and ethnicity are all forbidden factors of discrimination under the Quebec charter:

10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, *sex*, pregnancy, sexual orientation, civil status, *age* except as provided by law, religion, political convictions, language, *ethnic or national origin*, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right. (Quebec charter, R.S.Q., C-12, s. 10, emphasis added)

Furthermore, under the charter, the use of date-of-hire as the basis for differentiating between how different classes of employees are treated cannot be reconciled with what is known as a “rational work requirement,” the defence allowed under the charter to employers who introduce a discriminatory rule:

20. A distinction, exclusion or preference based on the aptitudes or qualifications required for employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory. (Quebec charter, R.S.Q., C-12, s. 20)

It follows, then, that if two-tiered wage systems do have a prejudicial effect on certain legally protected categories of workers, they can be contested because of their systemic discrimination effects; moreover, if applied to wage structure, such clauses directly contravene Article 19 of the charter, whether temporary or permanent:

19. Every employer must, without discrimination, grant equal salary or wages to the members of his personnel who perform equivalent work at the same place. A difference in salary or wages based on experience, seniority, years of service, merit, productivity or overtime is not considered discriminatory *if such criteria are common to all members of the personnel*. Adjustments in compensation and a pay equity plan are deemed not to discriminate on the basis of gender if they are established in accordance with the *Pay Equity Act* (R.S.Q., c. E-12.001). (Quebec charter, R.S.Q., C-12, s. 19, emphasis added)

Lastly, it is important to bear in mind that Article 16 of the charter can also be relevant to this debate:

16. No one may practise discrimination in respect of the hiring, apprenticeship, duration of the *probationary period*, vocational training, promotion, transfer, displacement, laying-off, suspension, dismissal or *conditions of employment* of a person or in the establishment of *categories or classes of employment*.

(Quebec charter, R.S.Q., C-12, s.16, emphasis added)

This clause rules out two-tiered systems that try to extend probationary periods for the newly-hired if, for instance, plaintiffs can establish that the majority of the workers affected by a two-tiered system is part of the same age group (Coutu 1998). Furthermore, a clause that would automatically grant newcomers (hired after day X) a temporary status and workers hired before that day permanent status, would also not be in keeping with Section 16 (Commission des droits de la personne et des droits de la jeunesse du Québec 1998).

Despite the legal amendment of the Act respecting labour standards that has made many two-tiered systems illegal, they remain a significant issue for unions for at least two reasons. First, not all two-tiered systems have disappeared because some of them are not, per se, related to working conditions covered by the law (retirement or employment status, for instance). Second, some of them are not set out in a business policy, a collective agreement or a decree; for example, new rules regarding pension contribution levels can be included in a pension plan but not in the collective agreement; the plan may



well be excluded from the negotiable field. According to Quebec's Human Rights Charter's provisions that make these clauses discriminatory, where there is a clause in the collective agreement pertaining to pension contributions, if the contribution level is the same for all union members (defined contribution plans versus defined benefit plans), the requirements are met despite the fact that benefits will vary, depending on the generation of worker affected.

The second reason two-tiered systems remain relevant is that some of them generated lawsuits that have created strange situations in which groups of unionized workers have been at odds with the rest of the unionized work force and with their union representatives, refusing to be represented by them when contesting the agreement, for obvious reasons. Thus, in the case at study here, the two parties to the contested collective agreements – that is, union and management – become the respondents before the court whereas a group of workers and union members, gathered in a new association, are the plaintiffs. Thus, in these cases, union and management have temporarily joined forces before the courts to deal with these complaints. Court proceedings have resulted in union executive committees as well as management being challenged for failing to comply with the Canadian or the Quebec charter of human rights and freedoms (Coutu 2000). They could also have been challenged for not fulfilling their duty to provide fair representation under Section 47.2 of the Labour Code of Quebec, should the wronged workers have chosen to do so.

In some cases wronged workers — teachers, police officers, firefighters, provincial civil servants — have indeed set up organizations separate from their unions to defend their rights (Brunelle 2002). Initiatives of this kind, which are highly unusual,

raise serious questions for the union movement, since in contrast with status of women committees, racial committees or other equity-based groups that have been able to establish themselves within the union movement, this type of organization is intent upon organizing itself independently, and has no qualms about expressing deep disagreement with the union, or defending its own interests to the exclusion of all others’.

### **Recent Developments**

An initiative to contest the legitimacy of two-tiered wage scales managed to achieve limited, but recognized, success in 2004, when the Supreme Court of Canada acknowledged that these wage scales segmented the unionized work force. The background is as follows.

In 1998, the Association de défense des jeunes enseignants et enseignantes du Québec (ADJEQ, or the Association for the defence of Quebec’s young teachers) challenged some wage clauses in a collective agreement that had been in effect from 1997 to 2000. The parties to the agreement were the Comité patronal de négociation pour les commissions scolaires francophones du Québec, primaire et secondaire, or CPN (management) and the Centrale de l’enseignement du Québec or CEQ (union). The contested clauses held that, for the purposes of promotion in the salary scale, experience gained as a teacher during the academic year 1996-97 would not be taken into account. ADJEQ’s position was that teachers who had reached grades 1 to 15 in the salary scale were the ones affected by these clauses, that most of them were among the youngest in the bargaining unit, and that therefore they were being discriminated against.

All the respondent parties in this case, which consisted of the Attorney-General of Quebec, the employer negotiating committee for the French-language school boards, the CSQ and the Fédération des syndicats de l'enseignement, contested the jurisdictional authority of the Tribunal des droits de la personne du Québec or TDPQ (the Quebec Human Rights Tribunal) to hear the case in May 2000. All these parties were of the view that the case should be addressed through the filing of a grievance under the collective agreement, or the filing of a complaint under Section 47.2 of the Labour Code of Quebec, but in any event, in accordance with the rules of labour law whereby, among other things, the wronged workers would be represented by their union executives. The TDPQ dismissed this motion, so the respondent parties submitted the TDPQ decision to the Quebec Court of Appeal, which ruled in their favour on February 28, 2002. Under the ruling, the complaint was to be handled through the grievance procedure, but only the employer would be held responsible for the situation and required to face the plaintiffs, even though the union had also negotiated the agreement being challenged.

The TDPQ subsequently appealed this decision to the Supreme Court<sup>5</sup>, which rendered its decision on June 11, 2004<sup>6</sup>. The Supreme Court upheld the jurisdictional authority of the TDPQ to hear the case, acknowledging that if grievance arbitration was the ADJEQ's sole avenue of appeal, which was the main item in contention, then the young teachers' interests would not be properly represented. Judges, in doing so<sup>7</sup>, insisted on quoting a well-known earlier ruling:

In an arbitration under a collective agreement, only the employer and union have party status. The unionized employee's interests are advanced by and

through the union, which necessarily decides how the allegations should be represented or defended. Applying Weber so as to assign exclusive jurisdiction to labour arbitrators could therefore render chimerical the rights of individual unionized employees.<sup>8</sup> (Abella J.A. in *Ford Motor Co. of Canada Ltd. v. Ontario (Human Rights Commission)* [2001] 209 D.L.R. (4th) 465 (Ont. C.A.) (leave to appeal refused, [2002] 3 S.C.R. x), at paras. 61-62.).

The Supreme Court's ruling is highly significant in that it acknowledges that 13,400 "young teachers," organized into an association other than their union, the ADJEQ, have interests distinct from those of their union with respect to the working conditions negotiated in a collective agreement, and that these interests are based on age. As a result, those teachers affected by the two-tiered wage scales could then legitimately take their case to the TDPQ as a distinct party, and they did, instead of being compelled to use the grievance procedure, as the Court of Appeal ordered them to do in 2002. This ruling could well have had a significant impact on young firefighters, such as those in Sherbrooke who filed a complaint with the HRC on August 29, 2003, and on young police officers who are the victims of similar discriminatory clauses (Brunelle 2002), who finally went for out-of-court negotiated agreements with the municipal government or hearings before the Quebec's Commission of Labour Standards.

The Supreme Court decision acknowledges implicitly that the executive committees of local unions may be placed in the difficult situation of representing the interests of employees who claim to be the victims of discrimination as a result of clauses the unions themselves have negotiated or applied, while at the same time representing what they

consider to be the collective interest of all the members of the certification unit, as expressed at a general meeting. The teachers' case has not yet been heard per se before the TDPQ, but a joint request by union and management to ratify an out-of-court settlement has been denied. This settlement was first offered to ADJEQ on June 18, 2007. The Association has recommended its members not agree to it. Both parties to the collective agreement – union and management – then asked the TDPQ to ratify the settlement to put an end to the case, which the TDPQ refused to do on September 13, 2007. Union and management, on the one hand, and ADJEQ, on the other, carried on negotiating the proposal to try to come to an agreement, but failed. The proposal was withdrawn on February 18, 2008; on the same day, both the TDPQ and ADJEQ withdrew from the case. For the wronged workers, the set of options now comes down to individually asking the TDPQ to be heard...<sup>9</sup> At the end of the day, the political split between union and management on the one hand, and ADJEQ on the other, remains.

As these discriminatory two-tiered clauses have now been ruled out, a legitimate question is whether it is still relevant to discuss them. I believe the answer is yes, because two conflicting conceptions of equality are at stake. One focuses on formal equality, or equality of rights, which dictates that all union members should be treated equally. The other focuses on equity, or equality of results, which is rooted in human rights, that in turn prevail over all other rights, laws, politics or agreements, regardless of the union members' majority opinion. These conceptions of equality and their outcomes will be discussed below.

### **Two Conflicting Concepts of Equality**

The logic of local union operation has been founded on the legal concept of formal equality between members, according to which each individual enjoys a vote of equal weight in any decision process. In practice, in a working context, such formal equality comes down to an equality of treatment, which is obtained by a neutrality of decisions and practices, that is, by treating everyone scrupulously in the same way, applying the same criteria, even if outcomes differ. The democratic nature of unions' decisions is based, in this context, on respect for the wishes of the majority, deemed to be the aggregate of the wishes of individuals who are equal in rights.

This concept of equality is consistent with the traditional concept of citizenship, as described by Marshall (1964: 92). "Citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed." Citizens thus defined form the basis of political democracy as we have known it since the eighteenth century. Moreover, this view of equality is in keeping with the republican ideal that provides the basis for formal, though abstract, equality between citizens within predominantly deliberative democratic institutions (Duchastel 2003: 73).

In a unionized setting, two-tiered wage systems and the struggles around them bring to the fore a deep tension between two dimensions of the formal equality of all union members. On the one hand, decisions are supposed to be based on the primacy of a majority vote taken in a general meeting; in these voting processes, a minority group may see its claims systematically dismissed. On the other hand, unions are also supposed to treat all members the same or, if differentiating, apply the same rules to everyone in

doing so, including while bargaining collective agreements. This makes the systematic dismissal of minority group claims problematic.

In addition, the concept of formal equality does not satisfy the equity requirements set out in the Quebec and Canadian charters and human rights laws as they relate to targeted or designated groups. Legislators, as we have formerly said, recognize that it is sometimes necessary to treat the members of certain groups differently, for instance to temporarily give preferential treatment, until a situation of equality of results (for instance, in representation) has been established. Preferential treatment in a unionized environment may extend, for example, to temporarily suspending seniority as the basis upon which to award promotions, training opportunities and the like, if it is shown that seniority-based decisions produce systemic discriminatory effects (Killenbeck 1999; Koggel 1994; Legault 2005; Lepofsky 1995; MacLeod 1994).

In the case of the teachers, I mentioned that the shared will of the union executive and management was that the dispute should be handled in accordance with the rules of labour law. One of these rules, the majority rule, allows for many union decisions that can be damaging to some particular members' interests, as long as the vote is handled in accordance with the rules in a democratic, general meeting, and these decisions respect the laws. Traditionally, labour courts have granted union executives a great freedom of manoeuvre in negotiating matters, since collective agreements are said to be "the parties' law" (Legault et al. 2007; Legault 2005). But since the existence of the charter of rights, under the equity principle, union executives are also required to avoid discrimination and, if needed, treat individuals from different groups differently in order to give them

equal chances of arriving at the finish line. It may entail invalidating a majority vote for certain decisions, if those decisions are declared discriminatory.

This latter focus, e.g. on results, runs counter to the union egalitarian tradition; in that tradition, it is not that individual disagreements/differences are ignored, but that the approach provided for by virtue of the duty of fair representation (in the Quebec Labour Code, s. 47.2) is supposed to take care of them. This approach may be sufficient for a group that perceives itself as being homogeneous. But when the group splinters because of profoundly different collective interests, a gap opens up between a system of union democracy dominated by the rule of formal equality, and the responsibility for accommodating groups or minorities, which is essential to the achievement of real equality, the equality of results (a very interesting reading in this regard is Brunelle 2001).

When the victims of two-tiered wage scales say that they, as a group, are suffering the effects of systemic discrimination as a result of an action ratified by the majority of their peers, they form a group having distinct interests within their union. They base their stance on the Quebec charter and demand equity, e.g. equality of results. As Brunelle (2002) puts it, the principle, well established by the charters, whereby an individual (or a group, I would add) is entitled to be treated according to his or her own characteristics if they differ from those of the group of which he or she is a part, may not be reconcilable, under all circumstances, with the postulate that a union must take the collective interest of the entire bargaining unit into account when exercising its discretionary powers, and that it is bound by the decision of the majority as expressed at a general meeting.



The new demands coming from “minority groups” in unions call into question the concept of union democracy and, in doing so, the whole concept of republican democracy that is based on the expressed will of a majority of equal individuals in a general meeting. These demands deeply upset an important political premise within unions, e.g. that all union members are equal, each has equal weight in collective decision-making, and the voice of the majority rules. Such a rationale cannot continue to prevail, since the Quebec charter, implemented in 1975, states that:

17. No one may practise discrimination in respect of the admission, enjoyment of benefits, suspension or expulsion of a person to, of or from an association of employers or employees or any professional corporation or association of persons carrying on the same occupation. (Quebec charter, R.S.Q., C-12, s. 17)

It may seem paradoxical to speak of union activists subscribing to the notion of formal equality, since union ideology in general is not terribly compatible with the presumed equality of all political subjects in a republican democracy, in terms of both rights and obligations. Too aware of the real inequalities in so-called democratic societies, very few union activists actually believe in equality with regard to society in general. But that does not prevent them from quite consistently postulating formal equality within their ranks for the purposes of internal governance, premised on a similarity of class interests among their members.

Social segmentation challenges this basic premise of formal equality and makes the balancing of the legitimate interests of definable groups within a union bargaining unit in

the negotiation process more difficult. Submerging individual group interests into the collective interests of the larger group, a process which used to be allowed “a wide range of reasonableness” (Liggett 1987: 237), is no longer as simple as taking a vote in a general meeting, not even after a long democratic debate. Now the Quebec human rights court offers a different forum for certain labour disputes that, moreover, is governed by a very different set of rules. This is a very challenging forum for unions’ representatives, as dissatisfied members can put in their claims to this competing authority. Moreover, the existence of this new forum echoes another wider social debate concerning citizenship, arising from Canada’s and Quebec’s charters of Rights: what does respect for differences really mean in our institutions?

What seems to be emerging is a demand for a new kind of citizenship, one that has a social dimension. Wall and Edelson (this volume) are right in pointing that workers from equity groups seek support from grassroots organizations representing their own people, even when they are members of a union, and sometimes do so to defend themselves when they feel their union does not do it adequately, including in supporting a claim in front of the human rights commission. This new type of citizenship claim raises serious problems for unions, in part because it promotes the rights of minorities in a milieu where democracy is a question of majority rule, and also because it is based on an equity argument promoted in the Quebec and Canadian charters that breaks with the tradition of formal equality that characterizes the traditional logic of organized labour. We now turn to a discussion of this new citizenship claim.

### **A Citizenship Claim with A Social Dimension**

As Robert Castel (1995) has pointed out, the typical Fordist wage system kept the various labour groups in uniform subordination, but at the same time allowed solidarities among workers to be built and strengthened. That does not mean that unity could be taken for granted, nor that it did not require any effort, but the primary objective of the trade union movement, historically, has been to fight against competition between individual workers in order to build a common front for dealing with employers (Offe and Wiesenthal 1980). Unions have therefore historically had a tendency to try as hard as they can to play down socioprofessional differences, and to deny the importance of generational, sexual and ethnocultural gaps (Gagnon, 1998; Lévesque et al. 1998).

Recently, however, new union members' practices have brought organized labour into competition with new social movements, which seem better suited to supporting the claims of special interest groups such as women, young people (Force jeunesse and Le pont entre les générations, for instance, are groups which are known for their opposition to two-tiered wage scales) and people from ethnic communities, to name a few (Offe and Weisenthal 1980; Zoll 1998). This competition brings about a segmentation of social relations and fosters the development of centrifugal forces within unions that make it more difficult for them to maintain unity — even though this unity is crucial (Hyman 1992; Segrestin 1981).

This development challenges union executive committees: it divides the wage-earning group, adds new intra-union conflict, reduces some workers' support of both the local union and the general unionization principle (Castel 1995; Hyman 1992) and raises

human rights concerns. This situation is really challenging unions' practices, as Edelson points out (this volume), in bringing in new options, new forums to support some workers' claims. Also contributing to this challenge is that newly hired workers may share interests with women in traditionally male job categories, immigrants, persons with disabilities, the gay community, etc., in that they all may feel that they have been denied representation in traditional political decision making processes that are based on majority vote. They also have in common the fact that they are currently demanding (and I am exaggerating only slightly here) a new type of "union citizenship" for marginal workers such as women (in what are non-traditionally female job categories), young people, victims of two-tiered wage scales, immigrants, persons with disabilities, and so forth (Commission des droits de la personne et des droits de la jeunesse du Québec, 1990, 1998; Coutu 2000; Legault 2005; Lepage 1989; Liggett 1987; Bich 1999; Collectif 1999).

Hitherto, the tendency has been to recognize "industrial citizenship" only of aggregates that exist in law, that is, unions and management (Arthurs 1967; Marshall 1964; taken up more recently by Birnbaum 1996; and by Bulmer and Rees 1996; Béland and Hansen 1998). But as a result of the new demands mentioned above, organized labour, the strength of which has traditionally been based on the solidarity of the group, is seeing its legitimacy challenged by these new categories of workers and is faced with demands for profound change (Dufour and Hege 1994a, b; Hege and Dufour 1998; Kochan et al. 1986; Laplante 2000; Rosanvallon 1988; Zoll 1998). Union decision making is therefore being pulled in two contradictory directions: to disregard intra-union differences at the price of an internal weakening of the organization, or to acknowledge

such differences at the price of a weakening of the organization in its dealings with the employer (Regini 1992).

People whose condition is protected from discrimination in compliance with Section 10 of the Quebec charter, now can – and do – aggregate in organized groups. These people have come to exist socially but are theoretically not yet social or industrial citizens, because they have no existence as groups in law. Ironically, as these people do not yet exist as collective actors in the legal corpus, they can only draw on their rights as individuals under the law. This is largely because the Quebec charter, unlike the Quebec Pay Equity Act for instance, does not set out universal, precise obligations for employers and social institutions to implement equality in all their decisions and practices, but simply allows individuals and groups to file complaints. In other words, the Quebec charter is a less “proactive” law in the working environment than is the *Employment Equity Act* (LC, 1995, c. 44). Although the labour relations laws do acknowledge explicit collective rights, they only do so for certified unions.

Yet legislators have inevitably recognized that groups can hold collective interests, if only by virtue of the systemic discrimination they are acknowledged to have suffered, or might suffer, as a group. Even when not targeted by equity programs, those who have the characteristics set out in Section 10 of the Quebec charter — particularly young people, to go back to the example of two-tiered wage scales — are recognized as having collective interests on the sole basis that age is one of the prohibited grounds for discrimination. An association such as ADJEQ that was founded to fight against two-tiered wage scales and brought its case before the Human Rights Commissions is evidence of this.

Despite the fact that, in theory, no groups other than unions exist to represent workers as “industrial citizens,” the Supreme Court’s recent ruling in *Morin* (see endnote 6) nonetheless constitutes a step in this direction by recognizing that workers have rights distinct from those of their unions. In fact, are these groups of unionized workers not saying that, from at least one standpoint — that is, the representation of their material interests (of significant importance in collective bargaining), membership in their union does not guarantee them a form of “industrial citizenship” that they are recognized as having under the charter? The strained relationships between competing interest groups within unions that arise from this situation are discussed below.

### **Strained Relationship Between Interest Groups Within Unions**

By proposing that strained relationships arise from the opposition between the principles of equality and equity, I am not suggesting that that opposition constitutes the essence of these conflicts. A supplementary, materialist reading is also necessary. By making the equality of results the objective of legislation (quasi-constitutional as for the Quebec charter and the *Canadian Human Rights Act* (R.S., 1985, c. H-6) and by giving legal recognition to positive discrimination measures to benefit target groups, legislators have upset the social order for awarding “places,” in which I include jobs, thereby impinging on the interests of the majority by forcing members to share a territory according to a new set of rules. As a result, outcomes of equity policies are assessed, not in terms of their impact on the minority groups for whom they were originally intended, but in terms of their harmful effects on the majority group, thus distorting the objective of

such policies and leading to accusations of “reverse discrimination” (Pietrantonio 2002: 70).

Admittedly, the two-tiered wage example discussed here took place in a general context of cost cutting and negotiation of concessions by unions, which constituted the backdrop of workers’ positions. Nonetheless, deciding where concessions are to be made will necessarily involve tackling the question of equality. In the case of the teachers, referred to earlier, if the TDPQ rules that discrimination is indeed being exercised jointly by the two parties to the collective agreement, the majority union decision in support of the signing of the agreement can only point to a deep split within the union membership, with new hires on one side and senior colleagues and their union representatives on the other. Indeed, according to Liggett (1987: 239), with such a decision, these representatives will be held responsible for discrimination against their own members:

Discrimination charges can [...] arise when a union’s activities, intended to protect the interests of one group in a bargaining unit, adversely affect the interests of other groups, e.g. employees who recently became members of the bargaining unit. (Liggett, 1987: 237) Using date of hire in the two-tiered contract separates employees into classes. Historically, competitive seniority has ranked employees on an individual basis; but the two-tiered system divides workers into classes, raising the issue of the duty of fair representation. It is unlikely that the seniority principle can be stretched that far... Where the burden of proof falls on the labour organization, the two-tiered concept based

on date of hire cannot be used as a defence under the general standard of relevant differences.

It will be difficult not to notice the cohesion of material interests in each of the groups on either side of the fault line, majority versus minority. Regardless of whatever legal arguments were raised by the TDPQ and of the fact that the labor conflict is still unresolved, there is an intra-union political conflict that will have to be addressed too. Indeed, union officials' "trade-off of the new hires to preserve things for our existing people" (Liggett 1987: 236) will no longer be acknowledged as legitimate. It is sad, though, that the actions of union executives have brought them to this, given that two-tiered clauses, whether wage clauses or other, already disturb internal solidarity and reduce cohesion in unions' bargaining units (Cappelli and Sherer 1990; Lepage 1989; Levine 1989).

## CONCLUSION

It will be increasingly difficult to preserve the uniformity of the unionized work force that attempts to justify the legitimacy of majority rule, since the Quebec and Canadian charters now recognize that minority groups have potential interests distinct from those of the group of workers to which they belong, and have held that, where those interests are not served, minority groups can appeal to the appropriate bodies, e.g. file complaints with the relevant Human Rights Commissions. Minority groups' demands existed before; specific women's demands for maternity leaves, or shorter working day, for instance, are well-known phenomena. But unions used to manage those demands



internally, within the framework of the deliberative process ruling the general meetings. In a context wherein the majority's vote prevailed, minority interests were likely to be set aside, if not forgotten. Compromises and sacrifices required from the minorities were traditionally said to be made in the name of the collective interest. For we must not delude ourselves: intra-union divisions are not new, and maintaining unity has always presented a challenge for unions.

Feminist research has already condemned a "consensus" within unions that in actual fact was nothing more than an expression of the interests of white male workers (Briskin and McDermott 1993; Cockburn 1995; Creese 1999). The principle of formal equality and the primacy of the majority vote that is a corollary of it, were once sufficient to settle divisive intra-union disputes. But with the advent of the human rights charters (see endnote 1) and the remedies that stem from them, the primacy of the majority vote is no longer sufficient to bring an end to the debate, as another parallel legal arena has been created. Its creation marks the end of a certain degree of union independence in the arbitration of internal conflicts of interest, one which goes hand in hand with the end of a certain degree of independence in collective labour relations. We are only now, with the existence of this parallel arena, beginning to gauge just how often there may be a failure to reconcile these interests locally. There is not necessarily any reason to be unduly surprised about this, as it is a huge task.

Only the future will tell whether unions are able to develop the necessary modes of arbitration between these divergent intra-union interests that would make such extra-union remedies superfluous. Unionism and the principle of equity are not contradictory terms. Unions do not contest the essence of the equity principle, and many have explored

some very fertile avenues for union action to promote equity within unions. Collective agreements can protect or ensure a certain form of equity, prohibit discrimination and harassment and provide for redress; they can provide for maternity and adoption leave and a variety of measures for reconciling private and professional life (Briskin 1999; Briskin and Bernardo 2005). So, hopefully, union representatives will work to close the “gap between what is said and what is actually done about racism and other inequities in the labour movement” (see Clarke Walker, this volume) instead of widening it.

Union representatives can make all the difference when any of the problems I have mentioned so far arise. When it comes to negotiating two-tiered wage scales, many unions have refused these proposals, restricting themselves to other initiatives whose adverse effects were better distributed throughout the union membership. For instance, since these conflicts took place in the public sector where reducing the public budget deficit was often at stake, the alternative was all too often to accept limited wage raises that were distributed more evenly, such as: decreases in hourly wages or wage increases in percentage terms across the board, covering all members of the bargaining unit; reductions in employers’ costs for insurance or social plans; reduction of overtime rates of compensation; and so forth. In a way, the elimination of orphan clauses narrows the range of alternatives available to parties seeking to solve a problem, possibly causing working conditions to deteriorate for the majority, as compared to what could be gained for the senior employees under orphan clauses. When such clauses were prohibited, some even contended that discrimination against one group was replaced with precariousness for everyone, as employers used to lay down a simple alternative between two-tiered wage clauses on the one hand, and layoffs and outsourcing on the other. This is a poor

understanding of the rules of equity, surely at least in part due to inadequate member training and communication about equity, as Foley (this volume) emphasizes.

In the past, unions stressed all too often that they were forced by circumstances to negotiate two-tiered wage clauses since they were required to protect the rights of the majority of their members. But when local union representatives adhere strictly to the principle of formal equality between workers (tightly linked to the majority rule), it leads them too often to deny the sociohistoric gains that have led to the recognition of the effects of systemic discrimination, to differential treatment and to the resulting approach toward equity that is supported by the Quebec and Canadian charters. As Wall (this volume) points out, this is a real challenge of our times for unions.

#### ENDNOTES:

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- <sup>1</sup> *Charter of Human Rights and Freedoms* of Quebec (R.S.Q., 1977, c. C-12), *Canadian Charter of Rights and Freedoms* (Part I of the Constitution Act, 1982, enacted as Schedule B of the Canada Act, 1982 [U.K.], 1982, c. 11), *Canadian Human Rights Act* (R.S.C., 1985, c. H.-6), *Act to secure the handicapped in the exercise of their rights* (R.S.Q., 1977, c. E-20.1), *Employment Equity Act* (S.C., 1995, c. 44), *General Regulation respecting the conditions of contracts of government departments and public bodies*, O.C. 1166-93, 1993, 125 G.O. 2, 6191, *Regulation respecting Affirmative Action Programs*, O.C. 1172-86, 118 G.O. 2, 3416. Henceforth we shall consider the expression “human rights charters” to include legislation that plays the same role.
- <sup>2</sup> Readers interested in the content of this out-of-court settlement can have more details at this electronic address : <http://www.adjeq.qc.ca/sgc>.

- <sup>3</sup> *Charter of Human Rights and Freedoms* of Quebec (R.S.Q., 1977, c. C-12). It should be borne in mind that the *Canadian Human Rights Act* (R.S.C., 1985, c. H.-6) affects employers under federal jurisdiction in the same manner as does the Quebec legislation.
- <sup>4</sup> The banning was included in an amendment of the *Act respecting labour standards*, Quebec's employment standards legislation, in 1999, Differences in treatment (s. 87.1 to 87.3).
- <sup>5</sup> The facts are well summarized in the brief (File No. 29188), submitted by the Commission des droits de la personne et des droits de la jeunesse du Quebec to the Supreme Court of Canada, to request permission to appeal the earlier decision of the Court of Appeal, <http://www.cdpdj.qc.ca/fr/dossiers/dossier-enseignant.htm>.
- <sup>6</sup> Morin ruling, Quebec's employment standards legislation *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185, 2004 SCC 39, File No. 29188, rendered June 11, 2004.
- <sup>7</sup> *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, [2004] 2 S.C.R. 185, para. 28.
- <sup>8</sup> Available on line on the ADJEQ website: <http://www.adjeq.qc.ca>.
- <sup>9</sup> See <http://www.adjeq.qc.ca> for more details.

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#### **ACRONYM LIST :**

ADJEQ	Association de defense des jeunes enseignants et enseignantes du Quebec, or Association for the defence of Quebec's young teachers
CEQ	Centrale de l'enseignement du Quebec, now CSQ (union)
CSQ	Centrale des syndicats du Quebec, former CEQ (union)
CPN	Comite patronal de negociation pour les commissions scolaires francophones du Quebec, primaire et secondaire (management)
TDPQ	Tribunal des droits de la personne du Quebec, or Quebec Human Rights Tribunal