

WITH **Jan Södergren**, Human Rights Lawyer, Sweden & **John Mortimer**, President, Canadian LabourWatch Association



Jan Södergren is an experienced European lawyer based in Stockholm, Sweden, specializing in labour law and constitutional law including freedom of speech, rights of association and property rights. He also handles civil litigation cases, the majority of which involve the application of European law. Jan represented the unionized employees in the Evaldsson case. A graduate of the University of Stockholm, he is now a well-known speaker and the author of numerous legal articles related to constitutional and human rights cases. His excellent work in many high-profile cases has advanced the rights of employees and citizens throughout the European Union.

John Mortimer is the president of the Canadian LabourWatch Association (a non-profit) whose mission is: advancing employee rights, by enabling employees and union members to get more information about unions and key labour law processes. LabourWatch provides practical tools

for employees opposed to unionization, and balances the wealth of union resources for employees who support unionization. John is a former HRPAAO member, now residing in British Columbia. For 15 years, he held senior HR roles with Colorization, PepsiCo, Wendy's, and Future Shop. John is the leading expert in Canada on the rights and responsibilities of employees and employers regarding unionization.



They were interviewed following a speech to a Frontier luncheon on October 2, 2007.

Frontier Centre: What is wrong with having a portion of union dues go to political causes?

Jan Södergren: This goes against important principles associated with personal autonomy. No one should be forced in a democratic society to support directly or indirectly a political party or political causes that they do not personally agree with or simply do not choose to actively support.

FC: What if it's for a good cause?

JS: That's still your choice to decide what you think is a good cause and even if a person thinks it is, it is another matter to decide to support one good cause versus another. That's the concept of personal autonomy that has evolved in Europe. If you want to support the needs of starving people in Africa you could do that in a number of different ways but you shouldn't be forced to do it a certain way. Unions should not take your money for them to decide who you should support unless you have decided to be an actual member of the union which aligns you with their causes. In Europe no unionized employee can be forced into union "Membership" – as of 2006 in 47 nations it is a choice protected by our view of the human rights of workers.

FC: So in this particular court case, which you argued, there was money flowing from the union to a political party. Can you give us some more details?

JS: It's not a secret that in Sweden there's an unholy marriage between unions and the Social Democratic Party. That's out in the open. What I pleaded was there was a huge surplus generated by the forced union dues of non-Members of a union. By surplus, I mean that the monies raised by the union were greater than the union's costs of serving the "non-Members" needs under their collective agreement. In 2006, the European Court of Human Rights ruled that there is no legitimate form of "non-political membership" when all unionized employees must pay dues. Because "non-Members" don't pay reduced dues and there is no guarantee their dues will not indirectly support political parties and "general union purposes." We said there was a surplus and the union disputed that. We came as close as possible to establishing that there was a surplus but the European Court of Human Rights did not want to take that step in our case because to do so would have implied a huge tax fraud. What the Court said was that the mere suspicion of dues taken from non-members for political purposes or other general union purposes is a

problem. The court said the "non-Members" must have transparency from a union that forces them to pay dues so that these employees can verify how their funds are spent. The union could not provide such transparency to the court, let alone prove that they did so or even could have done so for my clients. So, the Court found a human rights violation of their property rights under the European Convention on Human Rights. Having found a violation here, the court did what most courts do and declined to evaluate if other freedoms such as freedom of non-association, expression and opinion were also violated because the violation was now found and the union had to address it.

John Mortimer: Just to clarify what Jan is saying, a non-member of the union, someone who had not voluntarily become a member of the union, who was paying union dues under this collective agreement, translate from Swedish to monitoring fee or wage inspection fee. The union was being paid to be sure that the employee was being paid in accordance with the collective agreement. The employees are entitled to complete financial transparency that proves that that's all that their union dues are going to. Proof that their union dues are not also going to political purposes and so on. So the union has to say the cost of monitoring your wages, the cost of administering a collective agreement was this and the revenue from you was this and there's no surplus.

FC: So the surplus would have gone to the Social Democratic Party which would then impose its political program on everybody?

JS: Or other general union purposes like supporting social causes or printing posters for union organizing in other parts of Sweden or whatever.

FC: Obviously the Social Democratic Party must be unhappy with losing that automatic funding. How much was the union membership forwarding to the Social Democratic Party?

JS: When I pleaded the case I had a two week old picture of a single donation being made by the Construction Workers' Union of \$1 million Swedish Kronors which is about \$150,000 Canadian. It was perfect timing. Since the ruling earlier this year the union has laid off staff because in bargaining this year, rather than fix their collection and reporting system, they simply stopped collecting any dues from the unionized employees they represent that have not joined their union. They were also

putting their staff into the election campaign which might be worth more than that million.

FC: So John, obviously there's some precedent for this in Canada. Can you mention some? Didn't significant union money go into the Working Families Coalition that was set up for the present Ontario election?

JM: Well obviously the main difference is that both members and non-members have their dues used for political purposes, other social purposes and basically purposes unrelated to their collective bargaining needs in their workplace. Public opinion polling data suggests that 77% of Canadians who are unionized, who are covered by a collective agreement, do not wish to have their dues taken and used for political purposes. This Ontario development is very troubling because it involves millions of dollars from forced dues going into an organization that nudge wink wink was campaigning on issues but clearly there was an understanding in the last Ontario election that the labour code would be changed to strip voting rights from construction workers before a union could be certified and that is exactly what the McGuinty Liberals did.

FC: If we go back to the recent election in Manitoba, the Nurses' Union and certain unions were funding advertising campaigns that generally favoured the status quo or the governing party. That's not that unusual is it?

JM: Well, Manitoba, like the federal sector now, has said that corporations and unions may not give money directly to political parties. That's an amendment that Gary Doer made. That's an amendment that Jean Chrétien made. But most Canadian jurisdictions allow contributions from a union or a corporation as well as from an individual Canadian to a political party. The rules are different for leadership campaigns that they are for campaigns in general elections. So what is starting to happen is you're sharing something with me about Manitoba, which is happening in Ontario with the Working Families Coalition. Or in the British Columbia election where millions of dollars in members' dues were spent advocating on behalf of certain issues but the target was to try to defeat Gordon Campbell.

FC: So you're saying that the unions are funding these front groups or what we might call pro government spending coalitions?

JM: Well for some of them it's quite open; it's quite clear who is funding the Working Families Coalition in Ontario in that election. I can't speak with any expertise to how public what the nurses were doing and whether it was just an ad on behalf of their view of healthcare or advocating for their members' needs in collective bargaining. Maybe there are elements of that that are legitimate. If at the end of the day the ads are serving the purpose of supporting one political party and attacking another then the European model would suggest that only the people that voluntarily became members of the union have their dues go to that. And the others that the union represents don't have money taken from their pockets to be used for those types of purposes. That's the way it should be. That's true freedom of expression. That's true freedom of opinion and conscience. That's what 800 million citizens and their workers in Europe now are entitled to.

FC: Was Gary Doer's decision to ban donations from unions and corporations a good one?

JM: I have to admit that I haven't personally spent a lot of time analyzing and thinking about whether or not corporations and

unions should not be allowed to donate directly. At this time, I have no issue with that especially given the donation disclosure requirements. I don't necessarily have a problem with third party involvement in public policy issues and elections. What I would like to see is that no unionized Canadian is forced to pay union dues that can be used for anything other than the collective bargaining needs of unionized employees, unless they choose to give the money to the union for those specific purposes i.e. you become a member this is what your union dues are used for. Additional dues tied to Membership and clear accounting so that unionized employees and industry observers can verify that dues of "non-Members" and "Members" fund bargaining needs and related overhead while incremental dues of "Members" support non-bargaining activities.

FC: Jan, what possible effects could this European Court decision have on Canada?

JS: I think the Supreme Court of Canada has previously discussed the European cases from 1981 and 1993 and which were based in part on the *United Nations Universal Declaration of Human Rights* article 20, subsection 2 which says that you are entitled not to be forced to join an association. Your court in its 2001 *Advance Cutting and Coring* ruling did the same thing. That is the fundamental principle so to speak that needs to be translated into greater practical reality for unionized Canadians.

JM: The foundation of the European Court's decision was judicial activism to read into the European Convention on Human Rights the freedom from forced association, or what lawyers technically call a negative right of association. The positive right of association means I am free to join any organization I wish to. The negative right of association means I am free from being compelled to be associated with a group I do not wish to be associated with.

FC: So could this decision be cited as a precedent in a Canadian court decision?

JS: Yes.

JM: In fact it has already begun in Canada. In the *Lavigne* decision in 1991, and most importantly in the 2001 *Advance Cutting and Coring* decision. The Canadian Court has done exactly what the European Court has done. They have looked at our *Charter of Rights* and they have said there is no expressly written freedom from forced association in the *Charter*. Then they went to the *United Nations Universal Declaration of Human Rights* article 20, sub 2 that says that people should be free from compelled association. Sub 1 says I am free to associate. So the Court looks at the U.N. document, it looks at the European Court of Human Rights decisions *Young, James and Webster* of 1981 and the 1993 *Sigurjónsson* decisions and it decides, by judicial activism, to interpret the Canadian freedom of association provision as including freedom from forced association.

FC: So is it a matter of time before we see Canada catching up to Europe?

JM: A lawyer's answer: it depends. One of the things that Jan has been teaching us is that the European Court when it goes to its "proportionality test" has decided to uphold the workers rights rather than say the abrogation is justifiable in a democratic society. Our section 1 of the *Charter* is our proportionality test provision - is a violation of a Canadian's rights justifiable in a free and democratic society?

Unfortunately for Canadians our Supreme Court has always answered that question in the affirmative. The court has decided to abrogate the Charter rights that they say Canadians have in favour of the legislation and related collective agreement provisions in question. Whereas what we're seeing in Europe is that the Convention's interpretation by the Human Rights Court is no. They look at the section 1 equivalent and they say no, we will stand up for the personal autonomy and freedom rights of unionized Europeans.

JS: You need the employees to come to the court having been fired or denied employment and that may increase the chance of getting a different result. Do not have employers bring these questions forward or refer test or directed questions cases. In Europe, there are a few cases concerning when the employer turned to the Court and they failed.

FC: John, are you familiar with the group of seven bank tellers who do not want to be in a union?

JM: The Lively Seven, yes. The Lively Seven are objecting to being put in a union without a secret ballot vote, that's their first objection. The second issue that's important in this case is that at this time they are protected from forced "Membership." I don't know the details of the bargaining and how that happened. I don't know whether or not the Steelworkers union asked for a forced membership clause. I don't know if the employer, the TD Canada Trust bank made it clear to not try for forced Membership or simply refused to bargain that kind of clause. What I can tell you from looking at that collective agreement that is publicly on the internet like most agreements, is that there is no forced membership for The Lively Seven or their co-workers at the other branches. So they are members of the bargaining unit, they are covered by a collective agreement, they must pay union dues because the collective agreement does have a forced dues clause, but they are not required to be "Members" of the Steelworkers. The union therefore must convince these hundred employees to become and remain members of the union.

JS: I have a comment concerning the contributions of the Swedish Confederation of Trade Unions, which is the umbrella organization for the blue collar workers. They contributed to the election campaign to the Social Democratic Party in 2006 with in total 40 million Swedish Kronors which is about \$6 million in Canadian dollars and that was in the form of staff during the election campaign and direct contributions.

FC: Unions seem to be declining in North America and Europe. Why do you think that is happening?

JS: I think that personal autonomy is a trend, actually. More individualistic approaches, self-government and I will argue this myself, I think it's a trend which has come with the globalization of the economy, globalization of information with the Internet and other technology. I think all sorts of organizations are facing challenges in getting and keeping "Members".

FC: Do you have some numbers on the decline in union membership from Sweden and Britain?

JS: In 1994, in the under 25 years of age group 77% of these workers joined Swedish unions voluntarily and today it is 52%. The UK has gone from a membership of 13 million employees in 1979 and today it's a little above 6 million. It's a huge Change. We don't know in 1979 who in that 13 million were voluntary "Members" and who were forced "Members". There are more than 6 million unionized Britons of course, there are the formal "Members".

FC: How does that breakdown when comparing public versus private sector?

JM: Great Britain private sector in 2005, 17.1%. Canada, 17.9%. Public sector 2005: Great Britain 58.2% and Canada, 71.3% and those are the statistics Professor Shackleton, Dean of the Westminster Business School compiled with us for the 2006 speaking tour he did with the Canadian LabourWatch Association.

FC: Governments have brought in various worker protection and laws through safety code, human rights legislation, etc. It seems that most of these items are originally services provided by unions. Add in labour mobility and a shortage of skilled workers and it seems like unions might be becoming obsolete. What do you think?

JS: I don't think they are ever going to become obsolete, at least not in Europe, but they are going to have to compete on their own merits. They are getting better and they are so to speak, truly in the market now – as they should be. They have to listen to what potential and actual "Members" want and they have to strive to do that to obtain and keep "Members".

JM: I think regardless of where you go worldwide there's a rising sense of individualism or individuation, pick your term. There's a greater sense of personal autonomy to use the European term. People aren't joining organizations or clubs in the way they were. In the same way that they move from job to job and even career sector of the economy to career sector of the economy in a greater way than they used to, I think they will move through friendships and relationships and what kind of group they want to be with differently than 40 years ago. In Sweden, Jan has drawn to our attention that in 1994, 77% of Swedes under the age of 25 were voluntary members of a union. Today that number has fallen to 52%. Denmark has seen a similar drop. That's a demonstrative of the same issue that unions face in Canada and the United States where young people are not interested in key elements of collectivism. They are just a lot more about what they want for themselves.

FC: It seems Canada lags the curve on labour law developments compared to Europe. For example, didn't the Blair government keep all the sweeping Thatcher labour reforms? Why is Canada such a laggard?

JM: They didn't keep all of Thatcher's reforms. They kept most of them and from a worker choice point of view, from an employee freedom point of view they kept everything. They made some technical changes in the UK. It's called union recognition but you are right Tony Blair has been given the name Son of the Thatcher by people on the left and I think it speaks to what Shackleton said last year which is that amongst British citizens, unionized Brits, union leaders etc - there is no longer a constituency for unions the way they used to be.

FC: Union density is much higher in the public sector in Europe, Canada and the U.S. Why is that?

JS: First of all, I don't think we can just say it's higher in Europe when there are 47 countries in what we're talking about is the Council of Europe because we have not looked at the numbers for each country. Because I think that I would believe absolutely that public sector unionization in Sweden will be higher than in the United Kingdom and higher than in Canada. What's interesting about Sweden today, is that unions are seen differently by Swedes. So Swedes join unions. People who don't work in unionized jobs are members of unions the way

they are members of clubs or members of other organizations like we would be here. Unions in Europe I think serve other purposes to the citizens of those countries more broadly. So when someone decides to join a business association in Canada or a club here they are doing it to get certain benefits. Unions provide benefits outside of the narrow collective bargaining needs of the people they represent in a given workplace.

FC: What is the future of unions?

JS: I don't know if we disagree upon this but I think that at least in Scandinavia that they will always play a role. One is the unholy marriage with the Social Democrats and the Social Democrats will win elections in Sweden for in the future and they will try to find ways to help unions. The Social Democrats are to a large extent moving towards the centre so it's not the voters that are moving it's the Party itself. There's this connection between the blue collar unions and the Social Democrats and the Social Democrats are very strong. But without forced membership and without forced dues for politics from non-Members given the decline in "Membership" the

broad decline appears likely to continue until other as yet unforeseen factors could possibly change that.

FC: So you're saying that they will still be there but they will have to change?

JS: They will have to compete on their own merits.

JM: But with greater accountability. In countries like Denmark and Sweden that have a longer history of forced membership and conditional employment than the U.K. does, it will be interesting to see what the trends are now as we go into the future both as a younger workforce becomes older and as they are no longer able to require "Membership". And if they do not collect dues from non-members, if you go from 77% to 52% that will be a big revenue issue and 52% may not be the floor in Sweden just like it's not the floor in the U.K. So then what will they do in order to demonstrate value and so on?

JS: I'd just like to say that this development in Europe was not due to political leadership. It was due to judicial procedures and that will put a restraint on unions and their activities.