Court File No. 21378

SUPREME COURT OF CANADA

(APPEAL FROM THE COURT OF APPEAL OF THE PROVINCE OF ONTARIO)

B E T W E E N:

FRANCIS EDMUND MERVYN LAVIGNE

Appellant
(Applicant)

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION, ONTARIO COUNCIL OF REGENTS FOR COLLEGES OF APPLIED ARTS AND TECHNOLOGY

Respondents
(Respondents)

- and -

CANADIAN LABOUR CONGRESS, ONTARIO FEDERATION OF LABOUR, and NATIONAL UNION OF PROVINCIAL GOVERNMENT EMPLOYEES

Respondents
(Interveners)

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PART I - THE FACTS

1. This is an appeal by the appellant Francis Edmund Mervyn Lavigne from the decision of the Ontario Court of Appeal dated January 30, 1989. The appeal arises from an application by Lavigne in which he challenges, pursuant to the Charter of Rights and Freedoms ("the Charter"), sections 51, 52 and 53 of the Colleges Collective Bargaining Act ("CCBA") and the entering into of a collective agreement by the respondent the Ontario Council of Regents for Colleges of Applied Arts and Technology ("Council of Regents"). Lavigne submits that the combined effect of sections 51, 52 and 53 of the CCBA and the collective agreement is to force him into association with the Ontario Public Service Employees Union ("OPSEU") by making OPSEU his exclusive bargaining agent, binding him to the collective agreement, and compelling him to support and maintain OPSEU financially. It is alleged that this is in violation of sections 2(b) and 2(d) of the Charter. Lavigne further submits that the compulsory payment of union dues cannot be justified pursuant to section 1 of the Charter to the extent that such dues are used to provide financial contributions to political parties, disarmament campaigns, pro-abortion campaigns, campaigns opposing the expenditure of municipal funds for a domed stadium in Toronto, Arthur Scargill and the United Kingdom Coal Miners, the Palestine Liberation Organization, and Nicaragua.

2. The specific facts relied upon by the appellant are summarized in the reasons for judgement of White J. However, it is important to recognize at the outset that Lavigne is not a member of OPSEU, and accordingly, this case concerns only the rights of non-members. This case does not affect in any way the right of the union as a voluntary association to support any political or ideological cause it chooses.

3. The application was heard in two stages: arguments with respect to breach of the Charter were heard first, and following judgment on that issue, further argument with respect to the issue of remedy was heard. In his judgment on the issue of Charter breach, Mr. Justice White concluded as follows:

(i) the action of the Council of Regents, a Crown agent, in agreeing to the inclusion of a dues check-off clause in the collective agreement it entered with OPSEU, in combination with sections 51, 52 and 53 of the CCBA, have the effect of compelling Lavigne to support OPSEU financially and, such compulsion is government action within the meaning of section 32 of the Charter;

(ii) the compelled payment of dues to OPSEU infringes Lavigne's right to freedom of association pursuant to section 2(d) of the Charter; and

(iii) such compelled payment of dues is not saved by section 1 of the Charter in so far as the government has failed to restrict the use of non-members' dues to matters that are directly related to collective bargaining or to the administration of the collective agreement.

In his subsequent reasons for judgment Mr. Justice White examined the issue of the appropriate remedy required by the Charter and made a detailed order setting out a scheme for remedial relief.

4. An appeal by the respondents and the interveners, together with a cross-appeal by the applicant, was heard by the Court of Appeal in June, 1988. On January 30, 1989 the Court of Appeal released reasons in which it concluded that:

(i) Lavigne's application was concerned "solely" with the expenditure of funds by OPSEU and, as OPSEU is a private actor, there was no governmental action present such as to invoke Charter scrutiny; and

(ii) even assuming the presence of government action, the compelled payment of dues to OPSEU did not infringe Lavigne's freedom of association or his freedom of expression.

Thus the Court of Appeal set aside the order of Mr. Justice White, allowed the appeal of the respondents and interveners with costs to the respondent OPSEU and to the interveners, and dismissed Lavigne's cross-appeal.

5. The Chief Justice has stated the following constitutional questions for consideration by this Court:

(i) Did the Ontario Court of Appeal correctly hold that the Canadian Charter of Rights and Freedoms does not apply in the circumstances of this case, on the basis that the substance of the application concerns the expenditure of funds by the respondent Ontario Public Service Employees Union (OPSEU), and not the requirement that the appellant pay sums equivalent to union dues to OPSEU?

(ii) If the answer to question 1 is in the negative, does the Canadian Charter of Rights and Freedoms apply to the requirement that the appellant pay sums equivalent to

union dues to the respondent OPSEU, as provided for in article 12.01 of the collective agreement between the respondent Ontario Council of Regents and the respondent OPSEU pursuant to ss. 51, 52 and 53 of the Colleges Collective Bargaining Act, R.S.O. 1980, c. 74?

(iii) If the answer to question 2 is in the affirmative, does the requirement that the appellant pay sums equivalent to union dues to the respondent OPSEU infringe or deny the rights and freedoms guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms?

(iv) If the answer to question 2 is in the affirmative, does the requirement that the appellant pay sums equivalent to union dues to the respondent OPSEU infringe or deny the rights and freedoms guaranteed by s.2(d) of the Canadian Charter of Rights and Freedoms?

(v) If the answer to either of questions 3 or 4 is affirmative, is the requirement that the appellant pay sums equivalent to union dues to the respondent OPSEU justified in whole or in part by s.1 of the Canadian Charter of Rights and Freedoms and therefore is not inconsistent with the Constitution Act, 1982?

PART II - POINTS IN ISSUE

6. The points in issue and the position of the appellant are as follows:

(A) Substance of the Application

The substance of this application is a challenge to the governmental compulsion to pay union dues.

(B) Government Action

The Charter applies to sections 51, 52 and 53 of the CCBA and any collective agreement that is enabled thereby which is entered into by the Council of Regents, a Crown agent.

(C) Breach of the Charter

The combined effect of sections 51, 52 and 53 of the CCBA and the collective agreement entered into by the Council of Regents is to force Lavigne into association with OPSEU, by making OPSEU his exclusive bargaining agent, binding him to the collective agreement and compelling him to support and maintain OPSEU financially. This violates Lavigne's rights of freedom of association and freedom of expression pursuant to sections 2(d) and 2(b) of the Charter.

(D) Section 1 of the Charter

The government compulsion to financially support OPSEU is, to the extent that the government has failed to restrict the use of Lavigne's dues to matters related to collective bargaining, neither a reasonable limit, nor demonstrably justifiable in a free and democratic society.

(E) Remedy

The burden on the individual employee's Charter right should be limited to the extent necessary to satisfy the government's objective - collective bargaining - and should go no further. Only a voluntary contribution remedy (opt-in) can satisfy this "least restrictive means" test. Further, the onus is on the government to show through a high degree of probability that the challenged expenditures are necessary to accomplish its objective.

(F) Costs

The normal principles with respect to costs apply, and accordingly Lavigne is entitled to costs, both in this Court and below. In any event, the interveners are not entitled to recover costs and the award below was unfairly punitive.

PART III - ARGUMENT

(A) SUBSTANCE OF THE APPLICATION

(1) Summary of Argument

7. It is submitted that the substance of this application is a challenge to the governmental compulsion to pay union dues. Lavigne recognizes and concedes that private spending decisions of a union are not subject to Charter challenge. However, if the government chooses to violate Lavigne's rights to freedom of association and expression by compelling him to financially support the union, it must, in accordance with s. 1 of the Charter, do so in the "least restrictive" manner. In this case, the least restrictive means is for the government to compel financial support only to the extent necessary to satisfy its purpose - collective bargaining. This will clearly affect the ability of

the private actor - OPSEU - to spend the money that the government has compelled Lavigne to pay. The fact that private action is affected does not exempt from Charter scrutiny the governmental compulsion to pay union dues. Put another way, the private actor OPSEU would not be in a position to act at all with Lavigne's money unless the government had compelled the payment in the first place.

(ii) **The Government Action challenged in this Application**

8. It is important to understand at the outset how the appellant has framed his argument. The Charter contemplates that judicial review of government action should proceed in two stages. In the first stage, the court must decide whether the government action challenged has the effect of limiting one of the guaranteed rights (i.e. a prima facie breach). If a prima facie breach of the Charter is established, the second stage requires the court to decide whether the requirements of s.1 of the Charter can be satisfied. Only after both of these steps have been completed is the government action determined to be unconstitutional.

9. The amended application, in accordance with this well established two stage analysis, specifically challenges the combined effect of two aspects of government action as constituting violations of rights guaranteed by the Charter (i.e. prima facie breaches):

(i) the Council of Regents entering into a collective agreement which provides for the compulsory payment of dues to OPSEU; and

(ii) sections 51, 52 and 53 of the CCBA which create an exclusive bargaining agent, bind Lavigne to the collective agreement and expressly permit the compulsory payment of dues to OPSEU.

10. Lavigne submits that the compelled payment of dues in itself, and without regard to either the government's objective or the use for which the dues are employed, constitutes a prima facie breach of his right to freedom of association and expression. Recognizing that these prima facie breaches of the Charter may be justified under s.1 of the Charter, the application narrows the constitutional challenge to the extent that such government action permits the dues to be used for any of the purposes set out in Appendix "A" to the amended application. In short, it is only those aspects of the government action that cannot pass muster under s.1 that Lavigne seeks to have declared unconstitutional. This was recognized by White J. in his reasons for judgment:

> "The applicant in the case before me alleges that the compelled payment of dues even for collective bargaining purposes abridges his fundamental freedoms contained in paragraphs 2(b) and (d) of the Charter. The question of how the dues are spent by the Union is only relevant to the analysis required by s.1 of the Charter. The applicant argues that governmentally compelled payment of dues is justified in a free and democratic society if the dues are used to finance collective bargaining and settlement of disputes by grievance procedure, but it is not if the dues are used to support social, ideological and political causes."
>
> Case on Appeal, Vol. X, p. 1970 - 1971.

11. The Court of Appeal held that the application was concerned solely with the expenditure of funds by OPSEU, a private body that is not subject to the Charter. In reaching that conclusion, the Court of Appeal relied on the fact that the declarations requested limited the extent of the claimed unconstitutionality to the use of dues for non-collective bargaining purposes. The Court of Appeal concludes as follows:

> "Lavigne did not seek a declaration that ss.51, 52 and 53 of the Colleges Collective Bargaining Act were unconstitutional. Nor did Lavigne seek a declaration that the entering into of a collective agreement with the compulsory dues check off was, in itself, unconstitutional. Rather all the declarations claimed in the notice of application, which related to this issue, were limited to a claim that the expenditure of funds for the purpose set out in Appendix "A" to the amended notice of application was unconstitutional."
>
> Case on Appeal, Vol. XI, p. 2141.

12. As the passage above makes clear, the Court of Appeal simply failed to consider the government compulsion to pay dues. Simply stated, the union would not be in a position to have the use of Lavigne's funds at all unless the government had compelled payment in the first place. It is submitted that by focusing on the union's spending decisions and failing to consider the government compulsion to pay dues, the Court of Appeal has fundamentally misconstrued the application.

13. Consider, for example, if Lavigne had claimed only a declaration that "the entering into of a collective agreement by the Council of Regents, which collective agreement provides for the compulsory payment of dues to OPSEU, is in violation of the Constitution Act, 1982", and had simply deleted the balance of the declaration which reads: "to the extent that such an agreement

permits the dues that are compulsorily required to be paid to the Union to be used for any of the purposes set out in Appendix "A" to the amended application". In that situation, the Court of Appeal would have had to examine the government action of entering into a collective agreement which provided for the compulsory payment of union dues, and in the event that this was found to violate the Charter's guarantees of freedom of association and expression, would then have had to determine, pursuant to s.1 of the Charter, the extent to which such compulsory payment of dues could be justified. In examining the extent to which such compulsory payment of dues could be justified, the Court, of necessity, would have had to examine the government's purpose for compelling the payment of dues, and w. ether the violation of the Charter had been done in a manner that accomplished the government's objective - collective bargaining - in the least restrictive manner. In short, the Court of Appeal's analysis would have had to follow the same path as that of White J.

14. Similarly, Lavigne could have broken the declarations requested into compone.. parts, separating out the issues of government action, Charter breach and s. 1 of the Charter, as has been done in the Notice of Constitutional Question. Again, the Court of Appeal's analysis would have had to follow the same path as that of White J. Lavigne has consistently taken the position that it is the compulsory payment of dues that violates s. 2(b) and s. 2(d), and that the failure to limit the expenditure of dues by government is only relevant to s. 1. In these circumstances it is submitted that the important Charter issues raised by this case should not turn on the types of semantic distinctions with respect to the declarations requested that were drawn by the Court of Appeal.

15. Finally, we note that the decisions of the British Columbia courts in the Bhindi and Baldwin cases are distinguishable from this case. In Bhindi, the British Columbia Court of Appeal held that the Charter did not apply to a private collective agreement. However, Chief Justice Nemetz makes clear in his reasons for judgment on behalf of a majority of the Court, that the appellants in that case did not seek to challenge any provision of the Labour Code of British Columbia. Accordingly, Bhindi is distinguishable from this application for two fundamental reasons: first, the contract here is not a private contract because it was entered into by the Council of Regents, an agent of the government of Ontario; second, this application challenges specific provisions of the CCBA. Similarly, the decision of Mr. Justice Mackoff in the Baldwin case is based on an application framed differently than the instant application. Mackoff J. comments as follows:

From the foregoing it is seen that the petitioner does not seek a declaration that s. 14 of the Act, which mandates both payment of dues to the Union and the deduction of dues from wages by the government, is unconstitutional. He raises no objection to the fact that he is compelled by the Act to pay union dues.

Re Baldwin & B.C. Government Employees Union (1986), 28 D.L.R. (4th) 301, 303 (B.C.S.C.).

Bhindi v. B.C. Projectionist, Local 348 (1986), 29 D.L.R. (4th) 47, 55 (B.C.C.A.); aff. (1985), 20 D.L.R. (4th) 386 (B.C.S.C.).

16. In summary, the Court of Appeal erred in holding that the challenge was to the spending by the private organization, rather than to the government compulsion to pay. The decision of the Court of Appeal leads inevitably to the conclusion that government may compel payment of money to any private organization without any restriction on the use of such compelled payments, and the act of the government compelling payment is not subject to Charter scrutiny. It is submitted that the protections afforded by the Charter cannot be so easily avoided.

(B) GOVERNMENT ACTION

(i) Summary of Argument

17. In his reasons for judgment Mr. Justice White held as follows:

(i) The Council of Regents is a Crown agent representing the Minister of Colleges and Universities in the centralized bargaining structure; and

(ii) Governmental action includes the entering into of a contract by a Crown agency pursuant to powers granted by sections 51, 52, and 53 of the CCBA.

The applicant submits that Mr. Justice White correctly decided the issue of government action.

18. It is submitted that the relationship between the parties is governed by and subject to the terms of the Charter. The Charter is applicable in the circumstances of the present case because:

(i) The Council of Regents is an agent of the Government of Ontario, exercising powers delegated to it by the Government.

(ii) The Minister exercises substantial control over all activities of the Council of Regents.

(iii) Public employment, including the setting of the terms and conditions of such employment, is a governmental function.

(iv) Sections 51, 52 and 53 of the CCBA bind Lavigne to the collective agreement, mandate the union as his representative and permit mandatory dues check-off.

Before developing these submissions more fully, it will be helpful to review the history of community college collective bargaining in Ontario.

(ii) History of Community College Collective Bargaining

19. Following arbitration, the first collective agreement for academic employees of the colleges was signed on September 6, 1972. This agreement recognized OPSEU as the exclusive bargaining agent for all academic employees of the colleges. The collective agreement contained a dues check-off formula essentially the same as that provided for in O. Reg. 403/69, and expressly provided that the dues check-off formula was to be in accordance with and subject to the conditions set out in the Ontario Regulations. The check-off formula in O. Reg. 403/69 consisted of maintenance of dues check-off for employees who had already authorized it, check-off for current employees when and if they authorized it in future, and mandatory dues check-off for all new employees. However, the regulation provided an important limitation on the uses for which such mandatory dues could be employed:

> . . . the deductions referred to in this section shall be remitted to the Civil Service Association of Ontario and shall be used only for purposes directly applicable to the representation of Crown employees and shall not be used for activities on, by, or on behalf of any political party. (emphasis added)

O. Reg. 403/69, s. 1.

Affidavit of James Clancy, Case on Appeal, Vol. V, p. 776.

Exhibit "2" on cross-examination of James Clancy, Case on Appeal, Vol. V, p. 881 - 884.

20. The collective bargaining framework was altered in July, 1975, when the Legislature passed the Colleges Collective Bargaining Act, 1975. Following the passage of this Act, a new collective agreement was signed on September 17, 1975 for the academic employees of the colleges. This collective agreement again contained a dues check-off provision which was expressly subject to the provisions of the Ontario Regulations. Successive collective agreements maintained this dues check-off provision, until 1981 when the current provision, which does not limit the use of compulsory dues to purposes directly applicable to the representation of Crown employees, was introduced. It should be noted that O. Reg. 403/69, which limited the purposes to which the union was entitled to apply check-off dues, was repealed in 1977 by O. Reg. 870/77.

Colleges Collective Bargaining Act, 1975, S.O. 1975, c. 74.

O. Reg. 870/77, s.15.

Affidavit of James Clancy, Case on Appeal, Vol. V, p. 776.

21. A more detailed description of the history of collective bargaining in the Ontario Community College system may be found in the Reasons for Judgment of Mr. Justice White and of the Ontario Court of Appeal.

(iii) The Act of the Council of Regents in Entering into a Contract which Compels Lavigne to Pay Dues to the Union is Government Action and Subject to the Charter.

(a) General Principles

22. This Court has held that the Charter applies to the legislative, executive and administrative branches of government. Further, the term "government of each province" in section 32 of the Charter is not to be narrowly construed. To permit Parliament, the legislatures or the executive arms of government to avoid the Charter by delegating their functions to, or dictating the conduct of, subsidiary bodies, which are immune from Charter scrutiny, would run counter to that purpose. The state acting through a subsidiary agent should be equally subject to the Charter as the state acting directly.

Harrison v. The University of British Columbia, [1988] 2 W.W.R. 688 (B.C.C.A.).

Operation Dismantle Inc. et al. v. The Queen, [1985] 1 S.C.R. 441, 459.

Retail, Wholesale & Department Store Union, Local 580 et al. v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573.

23. It is important to note that governments often have a choice of acting through a variety of different instruments. In this regard, the issue of the compelled payment of dues is instructive, as the Government of Ontario has mandated the compelled payment of dues by contract, by regulation, and by statute. This case is an example of the Government mandating the compelled payment of dues by way of contract. However, from 1969, until the repeal of O. Reg. 403/69 in 1977, the Government mandated the compelled payment of dues by way of regulation. Further, the Government has mandated the compelled payment of dues in the private sector in Ontario by way of section 43 of the Labour Relations Act. To distinguish between government action by way of regulation and legislation on the one hand, and government action by way of contract on the other hand leads to inconsistent results. For example, all employees in the private sector subject to the Labour Relations Act would be entitled to challenge the compelled payment of dues, whereas public employees would be precluded from such a challenge, despite their public employment, because the government had chosen to compel by way of contract, rather than by way of regulation as previously.

Labour Relations Act, R.S.O. 1980 c. 228, s.43.

24. The danger of permitting government to circumvent the Charter by doing indirectly by way of contract or otherwise, what they are not permitted to do directly by way of legislation or regulation, has been noted by G.V. LaForest (now LaForest J.):

> The sentiment of Lord Atkin in speaking of a constitutional prohibition addressed solely at the legislative branch is relevant here: "The constitution", he stated, "is not to be mocked by substituting executive for legislative interference with freedom". The constitutional limits of legislative and governmental power can no more be evaded by authorizing someone else to do the constitutionally forbidden act or by leaving the doing of what is forbidden to someone's discretion. (emphasis added)

LaForest, "The Canadian Charter of Rights and Freedoms: An Overview" (1983), 61 C.B.R. 19, 27.

25. In determining whether the action of a subsidiary body constitutes government action for the purpose of the Charter, recent case law has focused on two factors:

(i) Government control; and
(ii) Governmental function.

We review below the control exercised by the government over the Council of Regents, as well as the nature of the governmental functions it performs.

(b) **Government Control**

26. In Harrison v. The University of British Columbia, the British Columbia Court of Appeal held that where the impugned act is the act of a body other than Parliament, the legislatures or their executives, it will be subject to the Charter to the extent that it bears a direct and definable connection to an Act of Parliament, the legislatures or their executives, thereby establishing an exercise of government power. The Court further held that this connection is established if it is found that the government exercises sufficient control of the subsidiary agent such that the acts in question should be regarded as acts of the government.

Harrison v. University of British Columbia, supra, 693.

Stoffman et. al. v. Vancouver General Hospital et. al. (1988), 21 B.C.L.R. (2d) 165 (B.C.C.A.).

Douglas/Kwantlen Faculty Association v. Douglas College (1988), 21 B.C.L.R. (2d) 175 (B.C.C.A).

27. In Harrison and in the decision of the Ontario Court of Appeal in McKinney v. University of Guelph et. al., it was found that the universities in question functioned independently of government, and accordingly the Charter did not apply. However, Harrison and McKinney are clearly distinguishable from this case: the Council of Regents is not independent of government, it is a Crown agent, all of whose members are appointed by the Minister, and is subject to the extensive control of the Minister. These submissions are developed in more detail below.

Harrison v. University of British Columbia, supra.

McKinney v. University of Guelph et. al. (1987), 63 O.R. (2d) 1 (C.A.).

28. Community Colleges are established and governed by the Minister of Colleges and Universities of the Province of Ontario. The Minister, on behalf of the Government of Ontario, determines the activities engaged in by the Colleges in so far as the statute authorizes him to make regulations governing their administration, including regulations providing for the composition and powers of the Boards of Governors, college curricula, admission requirements, tuition fees and teaching qualifications. A substantial portion of the costs of establishment and the maintenance of the colleges is paid out of monies appropriated therefore by the Legislature of the Province of Ontario and out of monies it receives from the Government of the Dominion of Canada for the purposes of education. As well, the Minister exercises a substantial degree of control over the capital expenditures and financings of community colleges.

Ministry of Colleges and Universities Act, R.S.O. 1980, c. 272, ss. 4, 5.

29. The Council of Regents is a statutory body composed of such members as may be appointed by the Lieutenant Governor in Council. The purpose of the Council of Regents is to "assist" the Minister in the planning, establishment and coordination of programs of instruction and services for the community colleges. In the regulations under the Ministry of Colleges and Universities Act, it is clear that the Boards of Governors of the colleges are subject to the control of the Council of Regents which in turn is subject to the control of the Minister.

Ministry of Colleges and Universities Act, R.S.O. 1980, c. 272, s. 5(2).
R.R.O. 1980, Reg. 640.

30. From the outset the terms and conditions of employment at the various community colleges have not been within the responsibility of the Board of Governors of each college. Instead, they have been established by the Council of Regents and approved by the Minister. Section 6(1) of the Regulation makes this clear:

> A board of governors shall appoint,
>
> (a) a director of the college;
>
> (b) a principal for each division of the college; and
>
> (c) a registrar and a bursar and such other administrative, teaching and non-teaching personnel as are necessary.

> at the salary and wage rates and according to the terms and conditions established by the Council of Regents and approved by the Minister. (emphasis added).

With the advent of collective bargaining, a centralized bargaining structure was created and the Council of Regents assumed the role of conducting labour relations negotiations on behalf of all colleges. However, the terms and conditions of employment remain subject to the approval of the Minister. As found by White J., the Council of Regents represents the Minister in the centralized collective bargaining process.

> Colleges Collective Bargaining Act, R.S.O. 1980, c. 74, s. 2(3).
>
> R.R.O. 1980, Reg. 640, s. 6(1).
>
> Case on Appeal, Vol. X, p. 1947.

31. In both Stoffman and Douglas College, the British Columbia Court of Appeal held that the approval of the impugned regulation or collective agreement by the executive branch of government was sufficient to establish government action.

> Stoffman et al v. Vancouver General Hospital et al, supra.
> Douglas/Kwantlen Faculty Association v. Douglas College, supra.

32. The Ontario Labour Relations Board has held on a number of occasions that the Colleges of Applied Arts and Technology are Crown agencies and therefore, beyond the jurisdiction of the Ontario Labour Relations Act. In a recent decision, the Board again reaffirmed the status of community colleges as Crown agencies:

> It appears to the Board that there have not been any legally significant changes in the legislative framework since the Board's decision in Fanshawe College. There has been a reorganization of ministerial responsibilities and some changes in detail, but the Minister retains a substantial degree of control over the operation of the colleges. The fact that the Minister may permit a degree of local autonomy, and may not be called upon to actively intervene very often, does not diminish his ultimate authority. We are unable to conclude, therefore, that Fanshawe was wrongly decided, or that the current statutory framework is sufficiently different to dictate a different result. The Crown retains a substantial degree of control over all important aspects of the colleges' operations. In our opinion, community colleges were, and remain, Crown agencies, to which the Labour Relations Act has no application . . ..

> . . . On balance, therefore, we are of the view that the Legislature continued to regard the community college staff as a special category of Crown employee, working for a Crown agency and warranting special legislative treatment.
>
> OPSEU v. Sault College of Applied Arts and Technology, [1985] O.L.R.B. Rep. 1293, 1299, 1301.

Summary

33. The Council of Regents is entirely appointed by the Minister, its purpose is to "assist" the Minister, the Minister retains a substantial degree of control over all important aspects of the colleges' operations, and community college teachers remain a special category of Crown employee working for a Crown agency. Moreover, as is apparent from the Act and the regulations, the Council of Regents acts as agent for the Minister in conducting collective bargaining negotiations. Terms and conditions of employment are established by the Council of Regents and approved by the Minister. It is clear that the government exercises sufficient control over the Council of Regents that its acts should be regarded as acts of the government.

(c) Governmental Function

34. It is submitted that the terms and conditions of public employment are clearly governmental functions. It is further submitted, that the clause in the collective agreement that compels Lavigne to pay dues to the Union represents government policy.

35. This Court has held that the public service forms part of the executive branch of government. In accordance with this Court's judgment in Dolphin Delivery, the Charter applies to the executive branch of government. Recent decisions of both the Ontario and British Columbia Courts of Appeal have held that the Charter applies to the terms and conditions of public employment.

> Re OPSEU and A.G. Ontario, [1987] 2 S.C.R. 2.
> Re Fraser and Public Service Staff Relations Board, [1985] 2 S.C.R. 455.
> Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd., supra.
> Roy v. Hackett (1987), 62 O.R. (2d) 565 (C.A.).

Moore v. British Columbia (1988), 50 D.L.R. (4th) 29 (B.C.C.A.).

36. In an influential article entitled "Application of the Canadian Charter of Rights and Freedoms", Professor Swinton proposes a "governmental function" test to decide which activities and which subordinate agencies and private actors should be subject to the Charter. In the article, Professor Swinton concludes that the Charter should apply to government contracts, including those contracts setting the terms and conditions of employment. Her reasoning is persuasive:

> In interpreting the Charter, the concern should be the 'reasonableness' of government limitations on individual freedoms, imposed without individual agreement. These may be imposed by contract or by legislation. The 'reasonableness' of limitations will justifiably take into account market elements and the fact of consent, when contracts are at issue. The fact that contracts are subject to the Charter should not jeopardize every lease granting differential terms to tenants in a government building, or concessions in one collective agreement but not another, for market and bargaining strength may reasonably explain these results. The focus of concern will be such actions as refusal to deal with certain individuals, or unreasonable restraints on freedom of speech or association which an individual has no power to reject in negotiating the contract.(emphasis added)
>
> Swinton, "Application of the Canadian Charter of Rights and Freedoms", in Tarnopolsky and Beaudoin (eds.), The Canadian Charter of Rights and Freedoms: Commentary, (1982), 49, 51.
>
> Hogg, Constitutional Law of Canada, (1985), 671.

37. Further, community colleges are not forays into commercial activity. They are not-for-profit entities, employing Crown employees to provide public education. As found by White J.:

> The administration of a College of Applied Arts and Technology is not a governmental "foray into commercial activity", to borrow the language of Professor Swinton. A community college is a publicly funded and governmentally controlled educational institution. A contract which establishes the terms and conditions of the employment of academic staff relates to the quality of education provided at these institutions. The purpose of these colleges is to educate students: teachers are essential to achieve that purpose ...
>
> Case on Appeal, Vol. X, p. 1961.

38. Government policy is not neutral to collective bargaining and the Rand formula. The clear government policy favouring the mandatory deduction of union dues is demonstrated by the fact

that it has been the subject of government reports at both the federal and provincial levels. In addition, when Bill 89, which amended the Labour Relations Act to include section 43, was introduced in the Ontario Legislature, the Minister of Labour stated:

> . . . the legislation, if enacted, will avert futile contractual disputes, reinforce union democracy and compensate unions fairly for the services they render workers. These are precisely my goals which, if achieved, will certainly justify the characterization of the legislation as a landmark labour bill. (emphasis added)

Debates of the Legislature of Ontario, Thirty-third Legislature, June 10, 1980, 2703.

"Collective Bargaining in the Ontario Government Service: A Report of the Special Advisor His Honour Judge Walter Little" ("The Little Report"), May, 1969.

"Canadian Industrial Relations: The Report of the Task Force on Industrial Relations" ("The Woods Report"), Privy Council Office, December, 1968.

39. It should be noted that the American cases which have considered fact situations similar to this application - public employees teaching at a public educational institution that is publicly funded and publicly regulated - have consistently held that a collective agreement containing an agency shop clause (the American equivalent of the Rand formula) is state action and subject to constitutional review. These cases have all focused on the fact that the agency shop is in itself a breach of the fundamental right not to associate. It is clear that the action of a public employer in entering into a collective agreement constitutes state action for the purposes of American constitutional review.

Abood v. Detroit Board of Education, 431 U.S. 209, 226 (1977).

Chicago Teachers Union Local No. 1 v. Hudson, 106 S.Ct. 1066 (1986); affg. 743 F. 2d 1187 (1984).

School Committee v. Greenfield Educational Association, 431 N.E. 2d 180 (1982).

Robinson v. New Jersey, 741 F. 2d 598 (1984).

40. The particularly governmental nature of public employment was specifically recognized by Justice Powell in his concurring judgment in Abood. He quotes with approval the following extract from an article by Professor Summers:

> The uniqueness of public employment is not in the employees nor in the work performed; the uniqueness is in the special character of the employer.... We have developed a whole structure of constitutional and statutory principles, and a whole culture of political practices and attitudes as to how government is to be conducted.... Collective bargaining by public employers must fit within the governmental structure and must function consistently with our governmental processes; the problems of the public employer accommodating its collective bargaining function to government structures and processes is what makes public sector bargaining unique.
>
> Abood v. Detroit Board of Education, supra, 253n.

Summary

41. This case can be distinguished from McKinney because community college employees are Crown employees, Crown employees form part of the executive branch of government, and the terms and conditions of public employment are clearly governmental functions.

(iv) The Effect of Sections 51, 52 and 53 of the CCBA

42. Section 32 of the Charter expressly states that it applies to the legislature and government of each province in respect of all matters within the authority of the legislature of each province. Sections 51, 52, and 53 of the CCBA are enactments of the Legislature of Ontario, and, when combined with the control exercised by the Government over its agent, the Council of Regents, and the governmental function of public employment, constitute sufficient government action to attract Charter review.

43. Section 51 of the CCBA provides that any collective agreement negotiated by the Council of Regents and the union shall be binding on all employees in the bargaining unit, regardless of whether or not such employees are members of the union. This section is particularly important, because, absent section 51, Lavigne would not be bound by the collective agreement and would not be compelled to financially support the union. In Bartello v. Canada Post Corporation, Mr. Justice Henry considered a similar provision of the Canada Labour Code, and held that it constituted sufficient government action to warrant Charter review. His reasoning is as follows:

> Clearly a statute enacted by the Parliament of Canada is subject to the Charter. These provisions go beyond mere contract law and impose on the parties statutory rules; the implication is important because the agreement may not be acceptable to the individual employee such as the plaintiff. The statute creates a certified bargaining

> agent (the Union), his agent for the purposes of achieving a collective agreement governing the terms and conditions of his employment; he may not personally agree to them. The collective agreement binds him whether he accepts all its provisions or not; It therefore acquires the character of a law which is binding upon him.
>
> Bartello v. Canada Post Corporation (1988), 62 O.R. (2d) 652, 666 (H.C.).
>
> Colleges Collective Bargaining Act, R.S.O. 1980, c. 74, s. 51.

44. Section 52 provides that the employee organization that is a party to the agreement (OPSEU) shall be recognized as the exclusive bargaining agent for the employees to which the agreement applies. Section 53 provides that the parties to an agreement may provide for the deduction of the union dues from the earnings of all employees. These sections, combined with section 51, therefore compel Lavigne to associate with the union as his bargaining agent, and compel him to support the union financially by binding him to an agreement that requires him to pay dues to the union, despite the fact that he is a non-member.

45. American courts have held that legislation which mandates exclusive bargaining and permits union shop agreements is so intertwined with any resulting agreement as to make it subject to constitutional scrutiny:

> Thus it can be said that union security arrangements, like agency shops, carry the practical effect of a statutory mandate: When Congress authorizes an employer and a union to enter into Union Shop Agreements and make such agreements binding and enforceable over the dissent of a minority of employees or union members, it has cast the weight of the federal government behind the agreement just a surely as if it had imposed them by statute.
>
> Havas v. Communications Workers of America, 509 F. Supp. 144, 149 (1981).
>
> Beck v. Communications Workers of America, 800 F.2d 1280 (1985); aff. 108 S.Ct. 2641 (1988).

(v) Conclusion

46. Lavigne submits that the following factors, combined, constitute sufficient government action to ground Charter review:

(i) the Council of Regents is a Crown Agent;

(ii) the Minister exercises substantial control over all activities of the Council of Regents, including collective bargaining;

(iii) college employees are Crown employees and the terms and conditions of public employment constitute an important governmental function;

(iv) but for section 51 of the CCBA, Lavigne would not be bound by the collective agreement to pay dues to the Union; and

(v) section 53 of the CCBA enacts government policy in favour of mandatory payment of dues by specifically permitting such action.

(C) BREACH OF THE CHARTER

47. It is respectfully submitted that the combined effect of sections 51, 52 and 53 of the CCBA and the collective agreement entered into by the Council of Regents infringes Lavigne's right to freedom of association and freedom of expression, because it forces him to support and maintain OPSEU financially.

FREEDOM OF ASSOCIATION

(i) Summary of Argument

48. Mr. Justice White held that Lavigne's freedom of association, as guaranteed by s.2(d) of the Charter, has been infringed. As White, J. stated:

> I agree with the analysis of unions and their character provided by Mr. Justice Martland in Oil, Chemical & Atomic Workers Int'l Union ... A union is not a voluntary association once it is certified as a bargaining agent and it is not merely a "service organization" ... If a governmental agent acts so as to force an individual to financially support a union when he opposes the union, its objects, and its methods, then his freedom of association has been abridged.

The Court of Appeal assumed, without deciding the point, that a right to refrain from association is protected by s.2(d) of the Charter. The Court went on to conclude, however, that the forced

payment of dues to OPSEU does not violate Lavigne's freedom to refrain from association since, as a result of such payment, he is neither forced to join OPSEU, nor to participate in any of its activities. It is submitted that this issue was correctly decided by White J.

Case on Appeal, Vol. X, p. 2006.

49. It is submitted that both the right of an individual to associate as well as the right to refrain from association are protected by s.2(d) of the Charter. These two rights are complimentary components of the broader concept of freedom of association and it would be illogical to give effect to one but ignore the other. It is further submitted that the right to refrain from association necessarily includes the right not to be compelled to support an association financially. Thus, sections 51, 52 and 53 of the CCBA, together with the collective agreement to which Lavigne is legally bound, breach his freedom of association in that they force him to support and maintain OPSEU financially.

(ii) **Freedom of Association Includes the Right to Refrain from Association**

50. This Court has recognized that freedom is characterized by the absence of coercion and constraint. Thus, the freedom of association guaranteed by s. 2(d) of the Charter is a freedom to associate as one pleases. As such, it necessarily includes the right not to associate, or to be free from forced association. To read this right out of s. 2(d) of the Charter, is to ignore the word "freedom". As labour and constitutional law scholar Professor Beatty states:

> In the first place, to read the Charter as protecting a person's positive freedom to form associations but not the negative freedom to remain apart from an organization to which she or he does not want to belong would be fundamentally at odds with our understanding of the concept of rights. It is now conventional wisdom that all conceptions of freedom, including both the positive and negative, are based on a single concept of triadic relations. Moreover, even for those who cling to the earlier distinction between these two faces of freedom, it was the negative not the positive one which was the primary concern of constitutional guarantees in liberal democratic societies.
>
> Even more fatally, to adopt such an interpretation of freedom of association would be both incoherent and inconsistent with the larger legal environment of which it would be a part. Interpreting s. 2(d) of the Charter in such a way would be incoherent because, in a liberal democratic state, which we profess to be, freedom 'of' association must necessarily imply freedom 'from' compulsory membership as well.

American constitutional law scholar Professor Emerson has stated:

> In a society governed by democratic principles it is the individual who is the ultimate concern of the social order. His interest and his rights are paramount. Association is an extension of individual freedom. It is a method of making more effective, of giving greater depth and scope to, the individual's needs, aspirations and liberties. Hence, as a general principle, the right of individuals to associate or to refrain from association ought to be protected to the same extent, and for the same reasons, as individual liberty is protected.

Beatty, Putting the Charter to Work, (1987), 122, 123.

Emerson, "Freedom of Association and Freedom of Expression" (1964), 74 Yale L. J. 1, 4.

Regina v. Big M Drug Mart Limited, [1985] 1 S.C.R. 295, 336.

51. The freedom to refrain from association has also been consistently recognized as an element of freedom of association in the American, European and international jurisprudence.

Abood v. Detroit Board of Education, supra, 234.

Young, James and Webster, (1980), 3 E.H.R.R. 20.

United Nations Universal Declaration of Human Rights, Article 20.

52. While this Court did not specifically address the right to refrain from association in the Alberta right to strike case, recognition of this right is, it is submitted, implicit in the judgments of the Court. An association, in the words of Mr. Justice McIntyre, "is simply a device adopted by individuals to achieve a fuller realization of individual rights and aspirations". In order to ensure the full realization of individual rights and aspirations, both the right to associate and the right to be free from compelled association must be protected.

> What freedom of association seeks to protect is not associational activities qua particular activities, but the freedom of individuals to interact with, support and be supported by their fellow humans in the varied activities in which they choose to engage. per Dickson, C.J. (emphasis added)

Reference Re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act, [1987] 1 S.C.R. 313, 366, 397 ("Alberta Reference").

(iii) Lavigne's Compelled Association with OPSEU

53. Sections 51, 52 and 53 of the CCBA, and the collective agreement enabled thereby, form part of a statutory scheme designed to force Lavigne into association with the union. These sections compel Lavigne to associate with the union as his bargaining agent, and compel him to support the union financially by binding him to an agreement that requires the payment of dues by member and non-member alike. That such a scheme constitutes "forced association" was recognized by this Court in Oil, Chemical and Atomic Workers International Union v. Imperial Oil (per Martland J.):

> [T]he position of a trade union, which has been certified as a bargaining agent under the Act, is substantially different and every association within the definition of a trade union in the Act is empowered to seek certification. Such a union has, as a result of certification, ceased to be a purely voluntary association of individuals. It has become a legal entity, with the status of a bargaining agent for a group of employees, all of whom are thereby brought into association with it, whether as members, or as persons whom it can bind by collective agreement, even though not members. ...I find it difficult to regard as a free, voluntary association of individuals an entity which, by statute, is clothed with the power to require membership in it, and the consequent payment of dues to it as the price which must be paid by an individual for the right to be employed in a particular employment group.
>
> Oil, Chemical and Atomic Workers International Union v. Imperial Oil, [1963] S.C.R. 584, 593.

54. More recently this Court has held that the freedom to associate includes, "the freedom of individuals to interact with, support and be supported by their fellow humans" (per Dickson, C.J.). It has further been stated:

> [I]t must surely be accepted that the concept of freedom of association includes at least the right to join with others in lawful common pursuits and to establish and maintain organizations and associations. (per McIntyre, J.) (emphasis added);
>
> Freedom of association is particularly important for the exercise of other fundamental freedoms, such as freedom of expression and freedom of conscience and religion. These afford a wide scope for protected activity in association. Moreover, the freedom to work for the establishment of an association, to belong to an association, to maintain it, and to participate in its lawful activity without penalty or reprisal is not to be taken for granted. (per LeDain, J.) (emphasis added)
>
> Alberta Reference, supra, 366, 407, 391.

55. This Court has thus recognized that the positive right to associate includes the right to support and maintain an association. It is submitted that the support and maintenance of an association necessarily includes the right to contribute to it financially. For example, s.2(d) of the Charter would certainly be infringed by legislation which, while allowing individuals to join associations such as trade unions, prohibited them from supporting unions financially. The necessary corollary is that the right to refrain from association includes the right to be free from compelled financial support of an association.

56. It is submitted that the fact that government does not also compel actual membership in OPSEU nor participation in its activities is irrelevant. Compelled financial support is in itself sufficient to result in a breach of s. 2(d). To hold otherwise would result in a glaring constitutional loophole. For example, Parliament would be free to compel all Canadians to contribute to the Progressive Conservative party, as long as it did not compel actual membership in that organization.

57. The fact that compelled financial support results in compelled association has been recognized by this Court in Oil Chemical and Atomic Workers International Union (per Martland J.):

> The Labour Relations Act has materially affected the civil rights of individual employees by conferring upon certified trade unions the power to bind them by agreement and the power to make agreements which compel membership in a union. ...The legislation which is under attack in the present proceedings, in my opinion, does ... ..ng more than to provide that the fee paid as a condition of membership in such an entity by each individual employee cannot be expended for a political object which may not command his support. That individual has been brought into association with a trade union by statutory requirement. The same legislature which requires this can protect his civil rights by providing that he cannot be compelled to assist in the financial promotion of political causes with which he disagrees. (emphasis added)
>
> Oil Chemical and Atomic Workers International Union v. Imperial Oil Ltd., supra, 593.

58. The Supreme Court of the United States has similarly held that compelled financial support violates First Amendment Rights including freedom of association. In Machinists v. Street, a case which also addresses the issue of the compelled payment of dues, Justice Black stated:

> The stark fact is that this act of Congress is being used as a means to exact money from these employees to help get votes to win elections for parties and candidates and to support doctrines that they are against. If this is constitutional the First

> Amendment is not the charter of political and religious liberty its sponsors believed it to be. James Madison, who wrote the amendment, said in arguing for religious liberty that "the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." And Thomas Jefferson said that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical."...[The First]Amendment leaves the Federal Government no power whatever to compel one man to expend his energy, his time or his money to advance the fortunes of candidates he would like to see defeated or to urge ideologies and causes he believes would be hurtful to the country.

In Abood v. Detroit Board of Education Justice Stewart stated:

> Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments...[citations omitted]...The appellants argue that they fall within the protection of these cases because they have been prohibited, not from actively associating, but rather from refusing to associate. They specifically argue that they may constitutionally prevent the Unions spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative. We have concluded that this argument is a meritorious one.
>
> One of the principles underlying this Court's decision in Buckley v. Valeo...[citations omitted]...was that contributing to an organisation for the purpose of spreading a political message is protected by the First Amendment because "making a contribution...enables like minded persons to pool their resources in furtherance of common political goals". The court reasoned that limitations upon the freedom to contribute "implicate fundamental First Amendment interests"
>
> The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement on their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society ones beliefs should be shaped by his mind and his conscience rather than coerced by the State.
>
> International Association of Machinists v. Street, 367 U.S. 740, 790 (1961).
>
> Abood v. Detroit Board of Education, supra, 234.

(iv) Response to Arguments of the Respondents

59. OPSEU has submitted below that Lavigne's relationship with the Union cannot be characterized as forced association because (i) Lavigne is voluntarily a member of the work place; and (ii) the decision to form an association with the Union was made democratically by his co-

workers, Lavigne is not forced to associate with the Union any more than a taxpayer is forced to associate with the government.

60. The first flaw in this submission is that it fails to recognize that the existence of an association between Lavigne and OPSEU is hinged, not on the fact that Lavigne is voluntarily a member of the work place nor on the approval of OPSEU by the majority of Lavigne's co-workers, but on sections 51, 52 and 53 of the CCBA and the collective agreement negotiated by OPSEU and the Council of Regents. OPSEU, like all other private associations, has no inherent authority with respect to non-members. Such authority depends upon legislation. In the absence of sections 51, 52 and 53 of the CCBA and the collective agreement, Lavigne would be free to negotiate his own terms of employment and would not be compelled to support OPSEU financially. Lavigne has, therefore, quite obviously been forced into association with the Union.

61. The second flaw in OPSEU's argument is that it attempts to elevate the status of the Union from that of a private association to that of public government. It is clear that, in order to govern efficiently, the state must be able to compel certain associations. However, as stated in the preceding paragraph, the union only has a right to compel non-members where it has been authorized by government to do so. To the extent that the union, as a private association, is authorized by public government to serve a constitutionally valid purpose (i.e. collective bargaining), it thereby gains the right to compel financial support from non-members. This right is, however, limited to the public purpose authorized by government.

62. As noted above, the courts in the United States have consistently recognized that legislation which compels payments to private associations affects the fundamental First Amendment values of freedom of association and expression. The American Courts have developed a coherent theoretical approach to the issues raised by such compelled payments: compelled payments affect fundamental First Amendment values, but such payments are justifiable so long as they promote the overriding public interest which justified compelled support in the first place. The corollary is that compelled payments for purposes beyond the important public interest which justified the compelled support are unconstitutional. Thus, in regard to labour unions, compelled dues for collective bargaining purposes have been held to be justifiable, but dues for support of ideological causes are unconstitutional. The concurring opinion of Mr. Justice Douglas in Street emphasizes this point:

> The collection of dues for paying the costs of collective bargaining of which each member is a beneficiary is one thing. If, however, dues are used or assessments are made to promote or oppose birth control, to repeal or increase the taxes on cosmetics, to promote or oppose the admission of Red China into the United Nations, and the like, then the group compels an individual to support with his money causes beyond what gave rise to the need for group action....
>
> International Association of Machinists v. Street, supra, 777-8 (1961).
>
> Abood v. Detroit Board of Education, supra.
>
> Arrow v. Dow, 554 F.Supp. 458 (1982).
>
> Falk v. State Bar of Michigan, 342 N.W. 2d 504 (1983).
>
> Ceyssens, "Freedom from Ideological Association" (1988), 13 Queen's L.J. (No. 3) 55.

FREEDOM OF EXPRESSION

(i) Summary of Argument

63. It is respectfully submitted that the courts below erred in concluding that the fact that Lavigne is not publicly identified with the Union's political activities nor prevented from expressing other views, is relevant to the issue of an infringement of his rights under s.2(b). Instead, it is submitted that the fact that Lavigne has been compelled to provide positive affirmation - in the form of a financial contribution - to the Union's non-collective bargaining activities is itself sufficient to establish an infringement of his freedom of expression.

(ii) Freedom of Expression Includes the Right to Remain Silent

64. It is submitted that s.2(b) of the Charter guarantees individuals both the positive right to engage in expressive activities and the negative right to refrain from doing so. The right not to be forced to engage in expressive activity has already been recognized by this Court in Re National Bank of Canada and Retail Clerks' International Union where Mr. Justice Beetz, in a decision concurred in by the majority of the Court, states:

> I cannot be persuaded that the Parliament of Canada intended to confer on the Canada Labour Relations Board the power to impose such extreme measures, even assuming that it could confer such a power bearing in mind the Canadian Charter of Rights and Freedoms, which guarantees freedom of thought, belief, opinion and expression. These

> freedoms guarantee every person the right to express the opinions he may have: a fortiori they must prohibit compelling anyone to utter opinions that are not his own.
>
> Re National Bank of Canada and Retail Clerks' International Union, [1984] 1 S.C.R. 269, 296.
>
> Wooley v. Maynard, 430 U.S. 705, 714 (1977).

(iii) **Financial Contributions Constitute Expressive Activity**

65. Freedom of expression as guaranteed by section 2(b) of the Charter is not limited to the freedom to "speak" or "write" or the freedom to refrain from doing so. The expressive nature of financial support for political or ideological causes has been recognized in both the Canadian and American jurisprudence. The dissemination of political or ideological views depends as much on the expenditure of money as it does on the written or spoken word. As stated by the United States Supreme Court in Buckley v. Valeo, "virtually every means of communicating ideas in today's mass society requires the expenditure of money". That Court further held that:

> Making a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition it enables like-minded persons to pool their resources in furtherance of common political goals.
>
> Buckley v. Valeo, 424 U.S. 1, 19, 22 (1976).
>
> Abood v. Detroit Board of Education, supra.
>
> National Citizens Coalition v. Attorney General for Canada (1984), 11 D.L.R. (4th) 481, (Alta. Q.B.).

66. The importance of expression in regard to political issues has led the United States Supreme Court to apply strict scrutiny to any interference with political or ideological expression. The general rule invoked by the American courts is that the state is strictly prohibited from compelling an individual to subsidize, affirm or support political or philosophical messages to which that individual objects. For example the U.S. Supreme Court has held that each of the following activities were violative of the First Amendment guarantee of freedom of expression: compelled salute of the flag (Board of Education v. Barnette); compelled exhibition of New Hampshires "Live Free or Die" licence plate slogan (Wooley v. Maynard); compelled right of reply regulation for individuals criticized in a newspaper (Miami Herald v. Tornillo); and compelled support of partisan political views (Elrod v. Burns).

Board of Education v. Barnette, 319 U.S. 624 (1943).

Wooley v. Maynard, supra.

Elrod v. Burns, 427 U.S. 347 (1976).

Miami Herald Publishing Company v. Tornillo, 418 U.S. 241 (1974).

67. The present case is, in principle, identical to those set out above. The combined effect of sections 51, 52 and 53 of the CCBA and the collective agreement, is to compel Lavigne to pay dues - a portion of which goes to political and ideological causes supported by the Union. The state is consequently forcing Lavigne to provide affirmative support to the Union's political and ideological causes. A compulsory financial contribution is as significant a form of affirmative support as the verbal or symbolic affirmation in cases such as Barnette and Wooley. The U.S. Supreme Court has concluded that such compulsion offends freedom of expression and, in Abood v. Detroit Board of Education, it prohibited the state from compelling individuals to pay union dues which would provide affirmative financial support for political points of view.

Abood v. Detroit Board of Education, supra.

(iv) Public Identification and Disavowal not Relevant

68. It is submitted that both the Court of Appeal and White J. erred when they concluded that since Lavigne is not publicly identified with OPSEU's political and ideological causes, and because he remains free to disavow or oppose such causes independently, his freedom of expression has not been infringed. In none of the U.S. Supreme Court decisions referred to above were these factors considered to be elements of the breach.

69. It is apparent from the two leading American decisions, Barnette and Maynard, that public identification of individuals with a cause is not a prerequisite to infringement of the First Amendment. In each case, the compelled expression applied to a large group of individuals - all public school students and all New Hampshire drivers, respectively. In these situations it could hardly be suggested that members of the public would identify individuals with the offensive message. Similarly, in the Miami Herald case no reasonable member of the public would assume the newspaper's affiliation with the opinions it was required by law to print. The American

jurisprudence makes clear that although a breach of freedom of expression can be aggravated by the public's identification of the speaker with the compelled message, the constitutional violation does not rest on any requirement of public affiliation.

70. Similarly, it is clear that the fact that Lavigne remains free to express his opposition to the Union's non-collective bargaining purposes is irrelevant to the existence of a breach of his freedom of expression. Since section 2(b) of the Charter guarantees both the right to expression and the right to refrain from expression, the fact that Lavigne's positive right remains intact is no answer to a violation of his freedom to refrain from expression. In the American context, the applicants in both Barnette and Wooley remained free to oppose the flag or "Live Free or Die" slogan. What neither could do, however, was escape the obligation to provide affirmative support for an objectionable ideological position. Similarly, while Lavigne remains free to express his opposition to the Union's non-collective bargaining causes, this cannot remedy the on-going violation caused by the tangible affirmative support he is compelled to provide for the Union's political and ideological purposes.

(v) **Response to Arguments of the Respondents**

71. The Respondents have relied upon the decision of the Manitoba Court of Appeal in MacKay v. Government of Manitoba, which upheld certain sections of the Manitoba Election Finances Act. The impugned provisions of the Act provided for reimbursement, out of the consolidated revenue f[illegible] of a portion of the expenses incurred by certain candidates for membership in the legislative assembly and by registered political parties. It is submitted that MacKay can be distinguished from the facts of this case on the basis of two important principles. First, government and public expenditures are fundamentally different from private associations such as a union and its expenditures. Second, expenditures by trade unions enhance the power of one political or ideological group to further its political goals, while the expenditures in the MacKay case tend to foster the overall exchange of information, ideas and opinions, and in that sense are "content neutral".

Re MacKay et al. and The Government of Manitoba (1985), 24 D.L.R. (4th) 587 (Man. C.A.).

72. The first distinction has already been discussed in connection with freedom of association above. The second fundamental distinction between MacKay and this application, is that the

decision in MacKay is premised upon the fact that the purpose of the impugned provisions was to promote "discussion" and "participation" in the electoral process. Pursuant to this purpose, the financial aid provided was available to all candidates who met the qualifications. The expenditures were thus "content neutral"; they did not favour one political party to the exclusion of all others. However, the facts of this application, make clear that Lavigne's dues are contributed to only one political party and to only one side of any particular issue. Thus, the funds are not used to promote discussion or participation in general, but instead are used to promote specific causes.

73. It should be noted that the distinctions drawn above are fully supported in the American case law. For example, the United States Supreme Court has upheld election expenses legislation on the basis that it furthered a legitimate government purpose of fostering political debate. As well, it has been recognized in the American case law, in the context of compelled payment of tuition fees, that expenditures that are "content neutral", and thus further the significant government interest (education) that justified the payment, must be distinguished from expenditures that are directed to foster one particular political group or ideology and accordingly cannot be constitutionally justified.

Buckley v. Valeo, supra, 668.

Kania v. Fordham, 702 F.2d 475 (1983).

Galda v. Rutgers, 772 F.2d 1060 (1985).

(D) SECTION 1 OF THE CHARTER

(i) Summary of Argument

74. Mr. Justice White held that the compulsion to pay dues cannot be saved by section 1 of the Charter insofar as a non-member of the Union is compelled to support causes which do not directly relate to collective bargaining and the administration of the collective agreement. While he recognized the important state interest promoted by the union's collective bargaining activities, Mr. Justice White concluded that the least restrictive means of achieving this governmental objective has not been employed in the present scheme. He concluded that the goals of collective bargaining could be accomplished without compelling Lavigne to financially support political and ideological causes to which he was opposed. It is submitted that White J. correctly decided the

section 1 issue. Further, there is extensive support for the decision of White J., both in Canada and in other free and democratic societies.

(ii) General Principles

75. The general principles applicable to the interpretation of s.1 of the Charter are now well established. First, the onus is on those seeking to limit a Charter right or freedom to show through a high degree of probability that the limit is reasonable and demonstrably justifiable. Secondly, only government objectives which are pressing and substantial are sufficient, and even then, the means must be proportional in the sense that they must restrict "as little as possible" the right or freedom in question. Finally, a balance of administrative convenience cannot override the rights and freedom enshrined in the Charter.

The Queen v. Oakes, [1986] 1 S.C.R. 103, 136-140.

Re Singh and Minister of Employment and Immigration, [1985] 1 S.C.R. 177, 218.

76. The central purpose of the CCBA, and in particular sections 51, 52 and 53, is to foster collective bargaining. Similarly, the purpose of the Council of Regents entering into a collective agreement which requires compulsory payment of dues, is to assist OPSEU in its role as the collective bargaining agent of the employees in the community college system.

Colleges Collective Bargaining Act, R.S.O. 1980, c. 74.

77. The Ontario Labour Relations Board has recognized that the dominant purpose of collective bargaining legislation is the furtherance of harmonious relationships between employers and employees. The political activities of the union have been held to be too remote to the dominant purpose of collective bargaining legislation to attract the protection of such legislation. In United Steel Workers of America v. Adams Mine, Cliffs of Canada Ltd., Manager, the union sought a declaration that campaigning for a political party on company premises was a lawful activity of the union and as such was protected by the Labour Relations Act. The Board dismissed the complaint commenting as follows:

> ...the dominant purpose of the Labour Relations Act, ..., centers on the furtherance of harmonious relations between employers and employees by encouraging the practices

> and procedure of collective bargaining between employers and trade unions ...' ... The Act deals with a restricted but vital area of trade union interests - the collective bargaining process. It is this dominant purpose of the statute and all related activity necessarily incidental to this purpose which demarcate the Board's jurisdiction...
>
> ...On considering the material as a whole, we have come to the conclusion that in the circumstances of this case the activity is too remotely connected to the dominant purpose of the Labour Relations Act to attract the right asserted by the complainant. In our view, the communications in issue before us are not as connected to the concerns of the bargaining unit employees as employees as they are to their concerns as voters... A trade union should not be able to use its certified bargaining agent status to capture an audience for its political canvassing activities. (emphasis added)
>
> United Steel Workers of America v. Adams Mine, Cliffs of Canada Ltd., Manager, [1982] O.L.R.B. Rep. Dec. 1767, 1781, 1787.

78. It is accepted that a valid government purpose is fostered by the provisions of sections 51, 52 and 53 of the CCBA and the dues check-off provision of the collective agreement, and that collective bargaining is a valid government purpose. However, to the extent that Lavigne's rights of freedom of association and freedom of expression have been infringed by these provisions, section 1 of the Charter requires that such infringement be only to the extent necessary to accomplish the goals of collective bargaining. The goals of collective bargaining can be accomplished without requiring Lavigne to support the causes set out in Appendix A to the amended application, and to that extent, the provisions being challenged do not satisfy the mandate of section 1 of the Charter.

79. It should be emphasized that Lavigne has not challenged the right of OPSEU, or any other trade union, to the extent that they are voluntary associations, to promote or contribute money to any political or other cause. It is only the compelled payment for purposes other than collective bargaining that Lavigne submits is contrary to the Charter. It is submitted that the overwhelming authority, both in Canada and elsewhere, supports Lavigne's argument that compelled payment for political or other causes cannot be justified under section 1 of the Charter.

(iii) Canadian Material

80. Prior to the passage of the Charter, numerous legislative provisions, government reports, as well as the actions of various trade unions and trade union organizations recognized that fundamental problems concerning individual rights and liberties are raised when individual workers

are compelled through collective bargaining legislation to contribute to activities that are unrelated to the dominant role of the trade union as a collective bargaining entity.

Legislative Provisions/Government Reports

81. Several provinces have, in the past, specifically prohibited the use by trade unions of Rand formula dues for political purposes. In upholding such legislation this Court per Martland, J. has commented as follows:

> The legislation, however, does not affect the right of any individual to engage in any form of political activity which he may desire. It does not prevent a trade union from engaging in political activities. It does not prevent it from soliciting funds from its members for political purposes, or limit, in any way, the expenditure of funds so raised. It does prevent the use of funds, which are obtained in particular ways, from being used for political purposes.
>
> The question in issue here is not as to the right to engage in political activity, but as to the existence of an unfettered right to use funds obtained in certain ways for the support of a political party or candidate.

Oil, Chemical and Atomic Workers International Union v. Imperial Oil Limited, supra, 594.

Labour Relations Act Amendment Act, 1961, S.B.C. 1961, c. 31, s. 5.

The Industrial Relations Act, S.P.E.I. 1962, c. 18, s. 48.

82. The federal government and the government of Ontario have recognized that the central purpose of the Rand formula in the public sector is to promote collective bargaining, and accordingly have prohibited the use of Rand formula dues for political purposes. Typical of such provisions is section 40(2) of the Public Service Staff Relations Act:

> The Board shall not certify as bargaining agent for a bargaining unit, any employee organization that
>
> (a) receives from any of its members who are employees,
>
> (b) handles or pays in its own name on behalf of members who are employees, or
>
> (c) requires as a condition of membership therein the payment by any of its members of,

any money for activities carried on by or on behalf of any political party.

Section 1(g) of the Ontario Crown Employees Collective Bargaining Act is similar. However, because Lavigne is subject to the CCBA he is not entitled to the protection of section 1(g). Further, it is noted that O. Reg. 403/69 did provide similar protection to community college teachers (including Lavigne) until it was repealed in 1977.

Public Service Staff Relations Act, R.S.C. 1985, c. P-35, s. 40(2).

Crown Employees Collective Bargaining Act, R.S.O. 1980, c. 108, s. 1(g).

O. Reg. 403/69.

83. Moreover, compelling government employees to support political or ideological causes through compelled union dues runs contrary to the impartiality required of the public service. This Court specifically recognized the fundamental importance of impartiality in the public service in Re Fraser, and in OPSEU v. A.G. Ontario, a challenge to legislation which restricted the ability of public employees to participate in political activities. Further, a Charter challenge to section 1(g) of the Crown Employees Collective Bargaining Act (referred to above) was rejected on the basis of the need for an impartial public service. Mr. Justice Eberle reasoned as follows:

> "... I again also assume without deciding, that s.2(b) is infringed by the provisions impugned in the statute and I move to s.1 of the Charter. In my view these sections are clearly saved by it. I refer again to what I have already said in these reasons about the detriment to the integrity of the public service which would in my view inevitably flow from the partisan politicization of the public service. In my view where one is considering an organization which is in a position to speak for its many thousands of members, the detriment is greater and all the more immediate to the public perception of the integrity of the public service... It is important here to recognize that the employees in the union's bargaining unit are required to contribute to it whether or not they are members, and whether or not they support its political views. In this sense the union is not entirely a voluntary organization and in this sense some at least of the money that it receives is money received from persons who do not support its partisan views or activities. Nevertheless, by its statutory position as bargaining agent the union is able to obtain money from such persons. In considering whether or not the union should be free to make political contributions, this is an aspect that ought not to be forgotten."

OPSEU v. A.G. Ontario (1988), 65 O.R. (2d) 689, 710 (H.C.).

OPSEU v. A.G. Ontario, [1987] 2 S.C.R. 2.

Re Fraser and Public Service Staff Relations Board, supra, 455, 470.

84. The Legislature of Ontario has recognized in the CCBA and the Labour Relations Act that, where an individual employee objects to being required to support a union financially because of his religious convictions or beliefs, he should not be compelled to do so. Further, the Legislature has recognized in the CCBA that no individual employee should be compelled to join a union. These provisions illustrate that the Legislature, even prior to the Charter, recognized that fundamental rights and freedoms are gravely affected by legislation compelling union membership or deduction of dues.

Colleges Collective Bargaining Act, R.S.O. 1980, c. 74 s. 53(2), (3).

Labour Relations Act, R.S.O. 1980, c. 228, s. 47(1).

85. In 1969, His Honour Judge Little delivered a report on "Collective Bargaining in the Ontario Government Service". In this report, Judge Little recommended that dues check-off be established, but also specifically recognized that "the revenue flowing from the provisions for deduction of dues should not be used for purposes other than those directly applicable to all members of the respective bargaining units."

Little Report, supra, 31.

86. In the Report of the Federal Task Force on Labour Relations it was recommended that a union should automatically be entitled to an agency shop or a universal compulsory check-off of dues (i.e. the Rand formula). The Task Force noted, however, that individual union members who objected to political activities should be protected. It therefore recommended that before any monies are donated to political parties, the decision to do so should be made, or at least ratified, by a duly constituted representative body of the union. Further, it was recommended that all such monies be separately kept and accounted for and that dissenting members be permitted to opt out of such contributions. The Report also recommended that, in order to protect the anonymity of dissenting members and to avoid the possibility of retaliation, the Canadian Labour Relations Board be used as an intermediary. The Task Force was of the view that such procedures were necessary to protect the legitimate interests of unions and their individual members.

Woods Report, supra, 513-518.

87. Mr. Ed Finn of the Canadian Brotherhood of Railway, Transport and General Workers prepared a report for the CLC entitled "A Summary and Analysis of the Report of the Task Force on Labour Relations (The Woods Report)". Commenting on the proposed right of individuals to object to political expenditures, he stated: "... an objective examination shows that .... they would only make compulsory those elementary rights and practices which all but a few unions provide voluntarily." It should be noted that the CLC in its official response to the Woods Report, made the following comments:

> We are in full agreement with the Task Force as to the legitimacy of union involvement in political action. We share the position of the Task Force that union members should not be compelled to contribute to a political party which they do not support and the Task Force points out that many unions make provision for opting out from the political contribution. We have endorsed the principle of opting out.
>
> "Canadian Industrial Relations: Statement by the Canadian Labour Congress on the Report of the Task Force on Labour Relations", submitted to Hon. Bryce Mackasey, P.C., M.P., Minister of Labour, June 25, 1969, p. 32.
>
> Undertakings on cross-examination of Ronald Lang, Case on Appeal, Vol. IV, p. 723.

Material Relevant to the Canadian Labour Movement

88. From their earliest beginnings, until the late 1940's and early 1950's, Canadian trade unions were voluntary organizations: there was no legal compulsion for workers to either financially support or join trade unions upon commencing employment. The voluntary nature of trade unions was substantially reduced in early 1944, when the government issued Order in Council P.C. 1003, under the authority granted to it by the War Measures Act. This Order in Council introduced the American Wagner Act concept into Canada by establishing a National Labour Relations Board and giving the Board power to certify a trade union if the Board was satisfied that the union represented a majority of the workers in a particular bargaining unit. Once certified, the union became the exclusive representative of all employees in the bargaining unit. If a collective agreement was concluded, it was legally binding on all employees regardless of whether or not they were members of the union.

Affidavit of David J. Bercuson, Case on Appeal, Vol. IX, p. 1777-1780.

Hills v. A.G. Canada, [1988] 1 S.C.R. 513, 539-540.

89. The voluntary nature of the trade unions was further reduced by the decision of Mr. Justice Rand in the Ford strike, and the almost universal adoption of the Rand formula after 1946. The Rand formula compelled workers to pay dues to the union which represented them, but not to join it. Although the Rand formula and compulsory bargaining legislation ended the voluntary association status of trade unions, this was clearly done for a very specific purpose: to establish unions as economic organizations. In his decision, Rand J. commented as follows:

> I consider it entirely equitable that all employees should be required to shoulder their portion of the burden of expense for administering the law of their employment, the union contract; that they must take the burden along with the benefit.

This passage makes it clear that Rand J. was of the view that financial contributions were required so that non-members of the union would not be "free-riding" on the efforts of others. Therefore, to the extent that they benefitted from the collective bargaining activities of the union, they were required to pay their portion of the expenses. Rand, J. makes no mention of expenditures unrelated to the costs of "administering the law of their employment, the union contract".

Affidavit of David J. Bercuson, Case on Appeal, Vol. IX, p. 1780.

Exhibit "F" Affidavit of Dennis McDermott, Case on Appeal, Vol. VI, p. 1049.

90. At the convention of the Canadian Labour Congress held in 1958, the Congress endorsed a resolution from its Committee on Political Education in support of the establishment of a new labour or social democratic party. This was a clear departure from the past policy of the CLC. Even though there was some opposition to it, it was adopted, but not before the Chairman of the Committee on Political Education, Eamon Park of the United Steel Workers of America, endorsed the right of individual union members to refuse to allow their dues to be handed over to a political organization they did not support. He stated:

> ...individual members of individual unions must not be required - as they are not required in Great Britain and in other parts of the world - to have part of their dues set aside for a political movement to which they themselves as individuals cannot adhere.

Affidavit of David J. Bercuson, Case on Appeal, Vol. IX, p. 1784.

91. Park's views clearly reflected a way of thinking within the trade union movement that was strong at the time and which has remained strong ever since. When the Political Education Committee of the CLC conducted a survey of union locals in 1962 to find out how many of them had been affiliated with the NDP, they found that while 98 had voted for affiliation, 145 had voted against it. The comments of the locals rejecting affiliation included citations of constitutional prohibitions of political activity and declarations that affiliation would constitute an offence against the individual liberty of the membership.

Affidavit of David J. Bercuson, Case on Appeal, Vol. IX, p. 1784.

Extract from Gad Horowitz, Canadian Labour in Politics (1968), Exhibit "2" on cross-examination of Dennis McDermott, Case on Appeal, Vol. III, p. 474-475.

92. Some Canadian unions either maintain voluntary political action funds, or have articles in their constitutions which provide for voluntary political contributions. Such unions include the Amalgamated Transit Union, the Newspaper Guild and the Machinists. As well, a number of major unions operating in Canada today have clauses in their constitutions allowing individual union members to opt out of contributions to political or ideological causes not related to collective bargaining. These include the Amalgamated Clothing and Textile Workers Union, the Brotherhood of Railway, Airline and Steamship Clerks, the United Steel Workers of America and the United Automobile Workers of America. The provision in the constitution of the United Steel Workers of America is typical:

> ...the International Executive Board shall establish a procedure under which any individual, who is required to pay dues and who objects to partisan political or ideological expenditures not related to collective bargaining, shall have the right upon perfecting a notice of objection to obtain a rebate of a portion of such individual's dues obligation based upon the proportion that the approximate amount of political and ideological expenditures not related to collective bargaining bears to the total annual expenditures.

Exhibit "7" on cross-examination of Dennis McDermott, Case on Appeal, Vol. III, p. 483.

Transcript of cross-examination of Desmond Morton, Case on Appeal, Vol. VIII, p. 1507.

Undertakings on cross-examination of Dennis McDermott, Case on Appeal, Vol. VI, p. 1142.

93. Further, financial contributions are paid to the New Democratic Party in the form of affiliation fees by local unions which have chosen to affiliate directly with the Party. In such cases the civil liberties of the individual employee are usually protected, and only such members of the local union as choose voluntarily to be associated with the affiliation are expected to pay affiliation fees. This right is made clear by articles in the constitutions of both the Federal and the Ontario New Democratic Party which provide that at any time members of unions affiliated to the NDP may notify the union that they do not wish payments to be made to the NDP on their behalf, and that the union is required thereafter to cease making such payments.

Affidavit of Dennis McDermott, Case on Appeal, Vol. V, p. 968 - 969.

Transcript of cross-examination of Dennis McDermott, Case on Appeal, Vol. VI, p. 1115-1123.

Undertakings on cross-examination of Dennis McDermott, Case on Appeal, Vol. VI, p. 1142.

94. In his affidavit sworn June 27, 1985 Dennis McDermott, the then President of the CLC, deposed that the principles of legislation and related collective agreements and practices being challenged by Lavigne, were widely accepted throughout Canadian society as appropriate. It is submitted that the principle that an individual should be compelled to contribute to political or other expenditures through his union dues is neither widely supported nor widely accepted throughout Canadian society. Every available survey, including the CLC's own 1962 survey, indicates that a majority of Canadians, indeed a majority of union members, is opposed to such principle. Moreover, a 1985 Gallup Poll indicates that 87% of Canadians, including 84% of union households, believe that a union should not be allowed to use union dues to support a political party which a worker may not personally support.

Affidavit of Dennis McDermott, Case on Appeal, Vol. III, p. 403.

Affidavit of Clara M. Hatton, Case on Appeal, Vol. IX, p. 1658 - 1687.

(iv) Foreign Material

(a) American Law

95. In the United States, the compulsory payment of union dues that are used for political and other purposes unrelated to collective bargaining has been held by the Supreme Court to be a violation of the fundamental rights of freedom of expression and freedom of association. In Abood v. Detroit Board of Education, the Supreme Court of the United States was faced with an agency shop agreement (the American equivalent of the Rand formula) between a teacher's union and the Detroit Board of Education (a public employer). A number of individual teachers challenged the requirement that they pay agency shop fees on the basis that such fees were being used to support political activities which they opposed and which were unrelated to collective bargaining. The Court concluded as follows:

> We do not hold that a union cannot constitutionally spend funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative. Rather, the Constitution requires only that such expenditures 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.

This decision has been confirmed and developed by the U.S. Supreme Court in subsequent cases.

Abood v. Detroit Board of Education, supra, 235.

Ellis v. Brotherhood of Railway Clerks, 104 S. Ct. 1883, 1892 (1984).

Chicago Teachers Union v. Hudson, supra.

(b) English Law

96. In the United Kingdom, the right of individual union members not to have a portion of their union dues used to support political activities has been protected since the Trade Union Act of 1913. That Act and subsequent amendments have been based upon two main principles: first, that trade unions should, if they so choose, be able to pursue their members' interests through political organization and be able to give financial support to such organizations; second, that no trade

union member should be obliged to support financially any political organization to which he is opposed. The most recent piece of legislation is the Trade Union Act, 1984. This Act adopts a broader definition of "political objects" and makes clear that individual union members cannot be compelled to have a portion of their union dues used in support of such objects if they object to them.

Trade Union Act, 1913 2 & 3 Geo. 5, c. 30.

Trade Disputes and Trade Unions Act, 1927, 17 & 18 Geo. 5, c. 22.

Trade Disputes and Trade Unions Act, 1946, 9 & 10 Geo. 6, c. 52.

Trade Union Act, 1984, c. 49, s. 17.

Democracy and Trade Unions (Green Paper, 1983) Cmnd. 8778, pp 21-36.

(c) Australian and New Zealand Law

97. In Australia, under legislation in Queensland and New South Wales, political levies are legal, but the individual worker cannot be compelled to contribute to such levies if he is opposed to them. In the other Australian states, such levies are not permitted. In New Zealand the individual worker is entitled to opt out of political levies.

Walker, Australian Industrial Relations Systems, (1970), 37-43.

Industrial Conciliation and Arbitration Act, 1961-1983 (Queensland), s. 57 A.

Industrial Arbitration Act, 1940 (New South Wales) s. 107.

Mitchnick, Union Security and the Charter (1987), 93.

(d) Western Europe

98. In Western Europe, the Constitutions of France, Ireland, Italy, and West Germany all guarantee the right of freedom of association. In all of these countries, this right has been interpreted so as to protect the right of the individual worker not to associate. Accordingly, in all of these countries, an individual worker cannot be compelled to either join or to contribute financially to any union. In Switzerland, non-members of a union pay "contributions of solidarity"

to defray the costs of collective bargaining. However, the contributions of solidarity are lower than regular union dues since non-members pay only their proportionate cost of collective bargaining.

International Encyclopedia for Labour Law and Industrial Relations extracts for France (1982) pp. 122-125, Great Britain (1980) pp. 153-161, Ireland (1983) pp. 138-141, Italy (1981) pp. 106-109.

Mitchnick, supra, 57-62, 68-69.

Dudra, "Approaches to Union Security in Switzerland, Canada, and Columbia" (1963), Monthly Labour Review, Feb., 136, 137.

Berenstein, "Union Security and the Scope of Collective Agreements in Switzerland", (1965), 85 International Labour Review No. 2, 101.

(e) Summary

99. It is striking that, in all of the countries reviewed above in which the right of "freedom of association" is constitutionally entrenched, this freedom has been interpreted as preventing the compelled contributions of individual workers to trade unions beyond the cost of collective bargaining. In some countries, workers cannot be compelled to make financial contributions at all. Even in countries such as Britain, Australia and New Zealand, in which the right of freedom of association is not constitutionally protected, the legislatures have, in a number of instances, recognized the serious infringement of individual liberties that results from such compulsion, and have therefore passed laws giving individual workers the right not to be compelled to contribute to such political causes. In view of this overwhelming evidence, it is submitted that the provisions at issue in the present case are neither reasonable limits nor can they be demonstrably justified in a free and democratic society.

(v) Response to Arguments of the Respondents

Fundamentally Undemocratic

100. OPSEU has argued that it would be "fundamentally undemocratic" to permit an individual employee to "financially disassociate" from the majority. OPSEU asserts that because the union has been elected by the majority of employees in the bargaining unit, dissenting employees must be

bound by the union in the same way that citizens who have cast a losing vote are bound by the decision of the majority in a political constituency. It is submitted that the respondents have fundamentally misconstrued the difference between unions and governments. Unions and governments both must act within the scope of the objects for which their legal status is recognized. The difference, however, lies in the fact that unions have a significantly narrower mandate than governments. The union has no authority to bind individuals or to "further" individual workers' interests beyond what is necessary to accomplish the goals of collective bargaining, except when acting as a voluntary association.

Beatty, supra, 147.

The De Minimis Argument

101. The respondents submitted below that the adverse impact on Lavigne in this case is minimal because only a small amount of money is at issue. This argument ignores the fact that while each individual's contribution may be small, the actual impugned payments are in themselves quite large. If the respondents' argument was taken to its logical conclusion, then the constitutional rights of hundreds of thousands of individuals who are required to pay union dues could all be violated with impunity, so long as the actual amount required to be paid by each employee was small, even if the total of the actual unconstitutional expenditures by the unions (as evidenced by the expenditures in this case) might amount to hundreds of thousands of dollars.

102. It should be noted that in the context of the religious exemption, the labour relation boards and the courts have not hesitated to recognize objections based upon "minuscule" expenditures.

OPSEU v. Forer (1985), 52 O.R. (2d) 705 (C.A.).
Gever et al v. OPSEU et al, [1985] O.L.R.B. Rep. 1057.

103. Further, it is important to recognize that the amount of money at stake for each individual does not diminish the quality of the non-member's interest in not being compelled to subsidize the propagation of political or ideological views that she opposes. The U.S. Supreme Court confirmed this principle in Hudson. In its discussion of the proper procedure by which non-members' dues may be exacted, the Court commented as follows:

'[T]he Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining.' Abood, 131 U.S. at 244 (concurring opinion). The amount at stake for each individual dissenter does not diminish this concern. For, whatever the amount, the quality of a respondents' interest in not being compelled to subsidize the propagation of political or ideological views that they oppose is clear. In Abood, we emphasized this point by quoting the comments of Thomas Jefferson and James Madison about the tyrannical character of forcing an individual to contribute even "three pence" for the "propagation of opinions which he disbelieves". A forced exaction followed by a rebate equal to the amount improperly expended is thus not a permissible response to the nonunion employees' objections. (emphasis added)

Chicago Teachers Union v. Hudson, supra, 1075.

104. Finally, Lavigne has challenged only seven particular expenditures. There has not been a detailed review of the expenditures of OPSEU to determine the actual percentage of dues that are expended for non-collective bargaining matters. It is possible that the actual expenditures for non-collective bargaining matters is actually quite significant. In the Beck case, a detailed review of the union's expenditures revealed that approximately 80% of the union dues were used for non-collective bargaining matters. It is submitted that the important principles at issue in this case ought not to be decided on the factual basis of whether this particular union spends a lot or a little on the impugned matters.

Beck v. Communications Workers of America, supra.

Use of Foreign Material

105. The interveners, OFL and CLC, contended below that meaningful comparisons cannot be made between Canada's and other industrialized nations' systems of labour relations because industrial relations systems are "system-specific." It is obvious that Canada's industrial relations system is not identical to that of any other nation and, of course, caution must be exercised in applying laws of foreign countries to domestic concerns. However, Lavigne adduces the evidence of foreign laws, not for the purpose of making fine comparisons, but rather for the purpose of illustrating that other industrialized nations, with various structures of labour relations systems, all respect the principle of voluntary association to some extent, while at the same time sustaining effective trade unions. Such an observation is relevant to the Canadian context. As Professor Beatty observes:

> ... the labour codes in all societies which, like Canada, are conventionally regarded as being more or less free and democratic, can be seen to be structured along similar principles. Standards fixing minimum terms and conditions of employment - wages, hours, security, opportunity, and so on - are common to all legal regimes in North America, western Europe, the Commonwealth, and Japan. So are processes and institutions of collective labour relations....
>
> These .... examples illustrate how many of the most important parts of our labour code are able to spread easily across the boundaries of all free and democratic countries.
>
> Beatty, supra, 157-158.

106. Moreover, any comparison with the American system of labour relations is most forceful because the labour relations system as a whole in the United States is most similar to that in place in Canada. Specifically, and to provide only a few examples, the American system embraces the principle of exclusive representation rights based upon majority support, collective bargaining is conducted on a decentralized basis, and the system, as in Canada, is often described as "adversarial" or "conflictual" in nature.

Mitchnick, supra, 95-121.

Hills v. A.G. Canada, supra.

(E) REMEDY

(i) Summary of Argument

107. In his reasons for judgment of July 7, 1987 White J. held as follows:

(i) the voluntary contribution ("opt-in") remedy proposed by Lavigne was rejected, and a forced objection ("opt-out") remedy was found to satisfy the requirements of section 1 of the Charter;

(ii) the matters referred to in Appendix "A" to the amended application were reviewed, and two expenditures were held to satisfy the test of being reasonably related to collective bargaining and the administration of the collective agreement; and

(iii) an administrative scheme involving access to accounting records, an internal procedure before an impartial decision maker to challenge the propriety of union expenditures, and interest-bearing escrow accounts was ordered.

108. It is submitted that White J. erred in deciding that a forced objection remedy constitutes the "least restrictive" remedy. The government's objective of furthering the collective bargaining process can be achieved without forcing non-members of the union to bear the burden of dissent. In fact, former Regulation 403/69 accomplished exactly that result. Further, it is submitted that White J. erred in finding that some of the expenditures in Appendix "A" to the amended application were related to collective bargaining. In particular, the onus is on the union to show by a "high degree of probability" that the expenditures are justified.

(ii) General Principles

109. In fashioning an appropriate declaratory remedy it must be kept in mind that compelled financial support of the union is in itself, regardless of the union's use of the dues, a prima facie breach of Lavigne's freedom of association. Accordingly, any remedy must satisfy the demanding scrutiny required by section 1 of the Charter. The general principles established by this Court as guides for the interpretation of section 1 have been reviewed above.

(iii) Application of the General Principles: Voluntary Contribution vs. Forced Objection

110. Applying the general principles reviewed above to the facts of this case, it becomes clear that the burden on the individual employee's Charter rights should be limited to the extent necessary to satisfy what the Court has found to be the legitimate government purpose - collective bargaining - and should go no further. It is thus essential that any remedy ensure that non-members of the Union pay only their share of collective bargaining expenditures, and that there be no expenditure of non-members union dues for purposes other than collective bargaining, unless, and until, the non-member has voluntarily indicated he is willing to contribute to such activities. In short, the principle to be established is that a non-member of the Union should be permitted to voluntarily contribute (opt-in) to non-collective bargaining activities, he should not be forced to object (opt-out) to such activities. The principle of voluntary contribution is the only remedy which satisfies the Oakes requirement of a carefully designed limit which impairs as little as possible the right in question.

111. It should be immediately apparent that both the "voluntary contribution" remedy proposed by Lavigne, and the "forced objection" remedy proposed by OPSEU and the interveners, CLC, OFL and NUPGE, enable the compelling government interest of collective bargaining to be satisfied. Thus, the issue before the Court is whether a "voluntary contribution" remedy or a "forced objection" remedy is the least restrictive of Lavigne's rights. In this regard, it should be noted that absent government compulsion, non-members would not be required to pay any money at all to the union. OPSEU and the interveners suggest that the "least restrictive" remedy is one wherein the government compels payment of funds beyond their legitimate purposes, and then forces individual employees to object to the payment of the additional funds that have been compelled. It seems clear that a remedy that from the outset permits the government to compel payments only for collective bargaining is the "least restrictive" remedy.

112. In practical terms, the appropriate remedy is simple and is easily implemented. The clause in the collective agreement providing for compulsory dues check-off could expressly restrict the use of such dues to collective bargaining and the administration of the collective agreement. In essence, this is simply a return to the situation that existed when Regulation 403/69 was in force. The union could then establish a voluntary political action fund to finance its non-collective bargaining activities. In fact, both the OFL and the CLC have already established such funds. It is submitted that such a remedy ensures that contributions to non-collective bargaining activities are in no way coerced by the government, yet permits the union to engage freely in such activities through voluntary contributions.

113. A remedy that does not permit any expenditures for purposes other than collective bargaining, except from voluntary funds, ensures that no constitutional violation can take place, even for a minimal time, as the individual in all cases can voluntarily choose to support political or ideological activities, but in no case is compelled to do so. Because it is unconstitutional for the government to authorize the union to exact any fee unrelated to collective bargaining, consent to the violation of a right protected by the Charter should not be presumed.

114. To assume that an individual consents to a violation of a right protected by the Charter is particularly offensive in a situation where that individual is a non-member of the union. In such cases, the individual, knowing that he will be required to pay union dues in any event, has nonetheless chosen not to join the union. Implicit in such a decision is a rejection of association with the union. Individuals who have indicated their rejection of the union in such unambiguous

terms should not have their Charter protected rights burdened even further by a remedy that forces an additional objection to be made.

115. It is submitted that individual employees would be impermissibly burdened in the exercise of their Charter protected rights of freedom of expression and freedom of association if they were to be placed under an affirmative obligation to object to the use of their money for non-collective bargaining matters. Individual employees should not be required to bear the burden of dissent. Such a burden, in itself, would constitute an unjustifiable infringement of an individual's freedom to maintain his beliefs without being compelled to disclose them publicly. The coercive nature of requiring individuals to seek exemption from unconstitutional activity was recognized by the Ontario Court of Appeal in Zylberberg.

Zylberberg v. Sudbury Board of Education (1988), 65 O.R. (2d) 641, 654 (C.A.).

NAACP v. Alabama, 357 U.S. 449, 462 (1958).

Lamont v. Postmaster General, 381 U.S. 301, 307 (1955).

Abood v. Detroit Board of Education, supra.

116. The imposition of a burden of dissent forces individual employees to seek out information about the union's activities and about their constitutional rights, which may not be readily accessible to them and leaves open the possibility of undue persuasion:

> The Abood Court implied that a voluntary union plan which allowed the dissenting employee to declare his opposition to the use of his contribution for other than collective bargaining activities would solve the problem of recurring litigation. The voluntary nature of this suggestion implies that a union need not adopt such a plan. Moreover, the plan as described, leaves the burden on the individual to declare his opposition in order to protect his first amendment rights. By placing the burden on the employee to protest, the Court ignored the infringement upon the individual's privacy which is central to the right of freedom of association. By making it incumbent upon the employee to lodge a protest, the possibility that an employee will be dissuaded "from exercising the right to withhold support" is significantly increased, since disclosure in front of union officials may subject the employee to "economic reprisal, ... threat of physical coercion, and other manifestations of public hostility." Given these considerations the voluntary union plan probably is not the least restrictive means to attain the desired results under any agency shop.
>
> Gale, "Abood v. Detroit Board of Education: Association as a First Amendment Right - The

Protection of the Non-member Employee in the Context of Public Sector Unionism", 3 Utah L. Rev. 487, 496 (1977).

Perry v. Local Lodge 2569, 708 F. 2d 1258, 1262 (1983).

NAACP v. Alabama, 357 U.S. 449, 462 (1958).

Wright, "Clipping the Political Wings of Labour Unions: An Examination of Existing Law and Proposals for Change", 5 Harv. J. Law and Pub. Pol. 1, 31 (1982).

Democracy in Trade Unions (U.K. Green Paper, 1983) Cmnd., 8778, pp. 92, 98.

117. In summary, a forced objection remedy simply cannot satisfy the "least restrictive means" test demanded by section 1 of the Charter. Forced objection infringes the employee's right to remain silent and forces him to bear a burden of dissent. In contrast, a voluntary contribution remedy accomplishes the government's objective of forwarding collective bargaining, without putting any additional burdens on the individual employee.

(iv) Evidence Supporting Voluntary Contribution as the Appropriate Remedy

118. It is submitted that numerous legislative provisions and government reports, as well as the actions of various trade unions and trade union organizations have recognized the principle of "voluntary contribution" as the appropriate method of protecting the rights of the individual employee.

(a) Canadian Material

119. Prior to 1977, the Government of Ontario had ensured that OPSEU was limited in its expenditure of compulsory union dues to collective bargaining matters. O. Reg. 403/69, section 1(6) provides as follows:

> Subject to subsection 4, the deductions referred to in this section shall be remitted to the Civil Service Association of Ontario and shall be used only for purposes directly applicable to the representation of Crown employees and shall not be used for activities carried on by or on behalf of any political party. (emphasis added)

This provision, which applied to community college teachers in Ontario until its repeal in 1977, applied the principle of voluntary contribution: the union was not precluded from engaging in non-

collective bargaining activities so long as the funds so expended were contributed voluntarily. It is important to note that there is no evidence to indicate that the regime provided for by O. Reg. 403/69 created any burdens for either OPSEU or the Council of Regents.

See supra, paragraphs 19, 85.

120. Several provinces have, in the past, specifically prohibited the use by trade unions of Rand formula dues for political purposes. These provisions did not preclude political activity by the trade-unions, they remained free to pursue such activity through voluntary contributions. With respect to public sector unions, both the federal government and the government of Ontario have recognized that the central purpose of the Rand formula in the public sector is to promote collective bargaining, and accordingly have prohibited the use of Rand formula dues for political purposes. Finally, both the CLC and the OFL have established voluntary political action funds. This material, which provides strong support for the viability of voluntary contribution as the appropriate remedy, has been reviewed in more detail in paragraphs 81-92, above.

(b) Foreign Material

121. In the United States the prevailing case law holds that a remedy which requires "forced objection" is adequate. However, the forced objection approach has inevitably engaged the judiciary in policing rebate schemes, interest paying escrow accounts, the provision of adequate information, impartial decision makers and the like. The result of these requirements is that a number of public sector employers are now requiring an advance reduction of non-members dues or a "fair share" requirement. Such fair share schemes put in place a de facto voluntary contribution regime for non-memoers of the Union.

Railway Clerks v. Allen, 83 S. Ct. 1158 (1963).

Chicago Teachers' Union v. Hudson, supra.

Gilpin v. AFSCME, 643 F. Supp. 733 (1986).

Minnesota Public Employee Labour Relations Act, Minn. Statutes Am. (West Supp. 1982), 179.65(2).

122. In England, although in past, the principle of voluntary contribution was required, current legislation forces members of a trade union to object in order to avoid the use of union dues for political purposes. However, a recent government report has recognized the difficulties created by a forced objection approach:

> The evidence set out in the above paragraphs suggests strongly that the system of contracting-out as it now operates is not fully in accord with one of the basic principles of the 1913 Act, that is that no trade union member should be obliged to support financially any political organization if he does not wish to do so (see paragraph 73 above). Indeed it can be argued that, even if the system of contracting-out were working properly, such a requirement is objectionable in principle as well as in practice. It is objectionable in principle that anyone should have to indicate his dissent from the political alignment of his union to avoid contributing to political activities or to a political party to which he is opposed. And it is objectionable in practice that anyone should have to reveal his dissent to those from whom, given the realities of the shop-floor and trade union power, he may have good reason to keep his political sympathies private. Finally it is wrong in principle that a decision to contribute to a political fund should result from inertia or apathy rather than from a deliberate and positive choice.

The report went on to recommend that the system of forced objection be replaced by one of voluntary contribution so as to be consistent with the principle that "those who wish to make a political contribution should be required to make a positive decision to do so".

Democracy in Trade Unions (Green Paper, 1983) Cmnd. 8778, pp. 92, 98.

123. Other countries have also adopted the principle of voluntary contribution. For example, in France, Ireland, Italy and West Germany, an individual employee cannot be compelled to either join or to contribute financially to any union. In Switzerland, where a system similar to the Rand formula has been adopted, "contributions of solidarity" required to be paid to the union by non-members have been limited to the non-members proportionate share of the cost of collective bargaining. All non-members are entitled to pay reduced union dues. Again, the principle of voluntary contribution is adopted. Finally, the Australian State of Queensland has established the principle of voluntary contribution by statute. This material is reviewed in more detail in paragraphs 97-99 above.

Summary

124. The Charter requires that the government establish a justification for abridging individual rights and demonstrate that the means it has chosen to accomplish its objective are reasonable. In this case, there is no justification for placing an obligation of dissent on individuals who are not even members of the organization which is exacting their funds. Moreover, it is unreasonable to impose such an obligation on them, because a system allowing voluntary contributions is the only one that can satisfy the "least restrictive means" requirement of the Charter. The remedy sought by the appellant is simple - a return to the situation that prevailed when O. Reg. 403/69 was in force. There is no evidence that O. Reg. 403/69 was a burden to OPSEU or the Council of Regents.

(v) **Scope of the Declaration**

125. In his reasons for judgment White J. held that the central question in determining the scope of the declaration is "whether the challenged expenditures are necessarily and reasonably incurred for collective bargaining and collective agreement administration purposes or for some other purpose". Applying this test, White J. held that contributions to Arthur Scargill and the striking U.K. coal miners and to a tour of Nicaraguan Health Care Workers were reasonably and necessarily related to collective bargaining. Mr. Justice White also held that a declaration ought not to issue with respect to support for the Palestine Liberation Organization (the "PLO"). Lavigne submits that White J. erred in not extending the declaration to all seven impugned expenditures.

Case on Appeal, Vol. XI, p. 2069.

126. It is submitted that the onus of proof is on those who seek to uphold a violation of the Charter to show through a "high degree of probability" that the violation is justified. Thus, in this case, the onus is on OPSEU and the interveners to show on a high degree of probability that the impugned expenditures are necessary to accomplish the government's objective of "collective bargaining and the settlement of disputes arising out of the collective agreement."

Contributions to Arthur Scargill and the Striking U.K. coal miners

127. White J. held that this item of expense, while 'marginal", was not so remote as to be proscribed. It is submitted that it has not been shown on the basis of a high degree of probability

that contributions to the U.K. coal miners are necessary to accomplish the government's objective of collective bargaining and the settlement of disputes arising out of the collective agreement. Quite simply, marginal expenditures of this sort, while quite legitimate if paid out of voluntary funds, should not be paid out of compelled dues.

Contributions towards a tour by members of a Nicaraguan Health Care Workers Union

128. White J. accepted the submission of counsel for OPSEU that this expenditure represented an educational exchange between union officials, and accordingly, was not proscribed. However, it is submitted that there is no evidence in the record to support OPSEU's submissions. The only evidence in the record with respect to this matter is that it was a tour of Canada by two members of FETSALUD, a Nicaraguan health care workers union. There is no evidence that the tour constituted an educational exchange and not a series of speeches seeking support for Nicaraguan political causes. Again, the onus is on OPSEU to show on the basis of a high degree of probability that contributions to Nicaragua of this sort are necessary to accomplish the government's objective of collective bargaining.

Cross-examination of James Clancy, Case on Appeal, Vol. II, p. 219-221.

Undertakings on cross-examination of James Clancy, Case on Appeal, Vol II, p. 358.

Contributions to the P.L.O.

129. White J. held that as there was no evidence of a union expense being made to support the PLO, the declaration ought not extend to contributions to the PLO. It is submitted that contributions to the PLO clearly fall outside the range of permitted expenditure. Further, while no contributions have been made to the PLO, the OFL did pass a resolution urging support for that organization. Accordingly, Lavigne submits that the concern about contributions to the PLO is not a hypothetical case but a real possibility. Lavigne should not be required to wait until any such expenditures are made before seeking relief. In this regard, we note that the Ontario Court of Appeal in Re OPSEU and Forer, upheld a decision of the Ontario Labour Relations Board which permitted Mr. Forer to invoke the religious exemption to the payment of his dues to OPSEU as a result of his objection to the same OFL resolution in issue in this case.

Case on Appeal, Vol. XI, p. 2070.

Re OPSEU and Forer, supra.

(vi) **Response to Arguments of the Respondents**

Objection is not necessary to establish a Breach of the Charter

130. It is submitted that the right to freedom of association guaranteed by s.2(d) is violated by the government compelled payment of dues, regardless of whether the individual compelled to pay dues objects or not. If, for example, the legislature were to pass a statute which compelled everyone to attend an Anglican church on Sundays, that statute would violate the rights of all individuals, including those of the Anglican faith who might not personally object to attending church. Similarly, if the government by statute compelled everyone to contribute $10 per month to a political party, it could hardly be argued that the compelled association was only unconstitutional as against those who objected and litigated the issue. To suggest otherwise would mean that the rights guaranteed by the Constitution would appear or disappear depending on each individual's state of mind. As this Court has made clear, it is the nature of the law, not the status of the individual that is relevant:

> A law which itself infringes religious freedom is, by that reason alone, inconsistent with s. 2(a) of the Charter and it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation. It is the nature of the law, not the status of the accused, that is in issue. As Mr. Justice Laycraft observed in the Alberta Court of Appeal (at pp. 320-1 C.C.C., p. 131 D.L.R., p. 636 (W.W.R.):
>
> > The task of the Court is to see whether all or part of the Lord's Day Act is inconsistent with Freedom of conscience and religion and therefore of no force or effect. It does not affect that task that a person charged has no religion or even that he has no feelings of conscience.

Mr. Justice Cartwright, dissenting in Robertson and Rosetanni v. The Queen, [1964] 1 C.C.C. 1, 41 D.L.R. (2d) 485, [1963] S.C.R. 651, though not in conflict with the majority of the Court on this point, stated at p. 4 C.C.C. pp. 488-9 D.L.R., p. 661 S.C.R.:

> "It was argued that, in any event, in the case at bar the appeal must fail because there is no evidence that the appellants do not hold the religious belief that they are under no obligation to observe Sunday. In my view such evidence would be irrelevant. The task of the Court is to

> determine whether s. 4 of the Act infringes freedom of religion. This does not depend on the religious persuasion, if any, of the individual prosecuted but on the nature of the law. To give an extreme example, a law providing that every person in Canada should, on pain of fine or imprisonment, attend divine service in an Anglican church on at least one Sunday in every month would, in my opinion, infringe the religious freedom of every Anglican as well as that of every other citizen."

Regina v. Big M. Drug Mart Ltd. supra, 314, 315.

131. It is therefore submitted that, while the fact that an individual may not personally object to a Charter breach may affect his willingness to seek enforcement, it does not alter the nature of the breach itself. In any event, non-members of the union have made their objection to the union clear by not joining. Individuals who have indicated their rejection of the union in such unambiguous terms should not have their rights eroded by bearing a further burden of dissent.

Expenditures by the Central Labour Organizations

132. The interveners OFL, NUPGE and CLC argued below that Lavigne is not entitled to declaratory relief which reaches the challenged expenditures made by the intervener central labour bodies. It is submitted that the following facts are relevant to a consideration of this issue:

(i) A portion of the union dues that Lavigne is compelled to pay to OPSEU is paid by OPSEU on a per capita basis to OFL, NUPGE, and CLC.

(ii) The Constitutions of OFL, NUPGE, and CLC require only that affiliated organizations pay a per capita fee on behalf of members. The President of NUPGE has stated that it is the affiliated organization that determines how many members on whose behalf a per capita fee will be paid. The President of the CLC has stated that the CLC constitution refers to members of the affiliated union and not to members of the collective bargaining unit. Thus OPSEU could, in accordance with the constitutions of the central labour bodies, pay affiliation fees on behalf of members and not on behalf of non-members like Lavigne.

Affidavit of John Fryer, Exhibit "A", Case on Appeal, Vol. VII, p. 1291-1306.

Transcript of cross-examination of John Fryer, Case on Appeal, Vol. VII, p. 1357-1358.

Affidavit of Clifford G. Pilkey, Exhibit "A", Case on Appeal, Vol. VII, p. 1202-1211.

Affidavit of Dennis McDermott Exhibit "A", Case on Appeal, Vol. VI, p. 986-1011.

Transcript of cross-examination of Dennis McDermott, Case on Appeal, Vol. VI, p. 1133.

(iii) Both the CLC and the OFL have already established a number of voluntary funds for non-collective bargaining activities such as political action. Neither the administration nor the budgeting of these funds has proven to be difficult.

(iv) Clifford Pilkey, President of OFL, has acknowledged that OPSEU is prohibited by statute from making contributions to political parties, and that this is one of the services that OFL performs for them using fees paid to it by affiliated unions, including OPSEU. In addition, two representatives of OPSEU, Sean O'Flynn and Susan Vallance actually sit on the Board of Directors of OFL.

Transcript of cross-examination of Clifford Pilkey, Case on Appeal, Vol. VII, p. 1250-1251.

Transcript of cross-examination of James Clancy, Case on Appeal, Vol. V, p. 844.

133. The onus is on the respondents and interveners to show that the payments to the central labour organizations, like all other expenditures of OPSEU, are necessary to accomplish the government's objective of "collective bargaining and the settlement of disputes arising out of the collective agreement." It is submitted that, given the obvious connections between OPSEU and the central labour bodies, OPSEU should not be permitted to do indirectly what it cannot do directly.

134. In the United States, money paid to central labour bodies is subject to the same test as any other expenditures made by the union. The U.S. Supreme Court in Hudson case has commented as follows:

> The union need not provide non-members with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor. With respect to an item such as the union's payment of $2,167,000.00 to its affiliated state and national labour organizations, see n. 4, supra, for instance, either a showing that none of it was used to subsidize activities for which non-members may not be charged, or an explanation of the share that was so used was surely required.

Chicago Teachers Union v. Hudson, supra, 1076 n.

(F) COSTS

(i) Summary of Argument

135. Should Lavigne succeed on this appeal, it is submitted that an award of costs to Lavigne in the circumstances of this case would not offend the principle that costs are to be an indemnity. In any event, it is submitted that the Court of Appeal erred in awarding costs to the interveners. In view of the fact that Lavigne brought a serious Charter challenge and was, indeed, successful in the first instance, the cost award is not only unfair, but is punitive.

(ii) Costs are to be an Indemnity

136. Lavigne seeks his costs of these proceedings as compensation for expenses incurred in conducting the litigation. This Court has held that despite assistance from a third party, a litigant seeking costs is entitled to an award of costs as long as there remains a possibility that the litigant will be ultimately responsible for the costs in the event of an unfavourable decision. In Armand v. Carr the Court commented as follows:

> Naturally, as a matter of business, the solicitors would, we have no doubt, apply in the first instance to the Insurance Company, as being the persons ultimately liable to pay the costs as between all parties - that is to say, the persons who would have to indemnify the defendant against the costs. But that does not exclude the liability of the insured, and it seems to us not in the least to affect the position that the client may be liable although there may be a third person to indemnify the client. (emphasis added)

Armand v. Carr, [1927] S.C.R. 348, 351.

Clarke v. Attorney General for Ontario et al., [1967] 2 O.R. 366, 369.

Adams v. The London Motor Builders, [1921] 1 K.B. 495, 501 (C.A.).

137. In this case, should the National Citizens Coalition ("NCC") choose not to continue its assistance of Lavigne or should it be unable to continue to do so, Lavigne would himself be ultimately responsible for all the costs incurred on his behalf and any award of costs that may be

assessed against him. Accordingly, Lavigne is entitled to his costs in accordance with the principle established by the Supreme Court of Canada in the Armand case.

(iii) Costs award against Lavigne

138. It is submitted that in awarding costs to OPSEU and the interveners, the Court of Appeal seemed to rely on the fact that Lavigne's application was substantially funded by the NCC. Lavigne is a private citizen who would simply have been unable to finance a constitutional challenge of this magnitude without outside support. OPSEU and the interveners, on the other hand, are large organizations with substantial resources far in excess of those of an ordinary citizen. It is submitted that the fact that an individual's Charter challenge is funded by an interest group is irrelevant to the issue of whether that individual should be responsible for costs. To penalize this method of financing an application needlessly stifles Charter litigation.

139. It is submitted that the Court's award of costs to the interveners, NUPGE, CLC and OFL, is not only unfair, but is punitive and should not be allowed to stand as a precedent in constitutional litigation. The appellant is not aware of any previous decision in which an individual has raised an important Charter issue, yet was ordered to pay the costs of interveners. The approach of this Court in allowing intervention in constitutional cases has been to require interveners to bear their own costs, regardless of the outcome. The interveners have substantial resources, chose to intervene in this litigation on their own initiative, and lengthened the proceedings by vigorously opposing the application at all stages. The result of the Court of Appeal's order is that each additional intervener doubles or triples the cost consequences to the appellant, while the interveners' proportionate exposure for payment of the appellant's costs is reduced to one-half, one-third, etc.

140. The cost award is made even more unfair by the fact that the legal fees of OPSEU and the interveners were at least partially funded through dues collected from Lavigne as well as other non-members who would have benefitted from the declaration sought. In essence, therefore, the Court of Appeal has required Lavigne to pay for a portion of his opponent's litigation costs twice.

PART IV - ORDER REQUESTED

141. It is respectfully submitted that Lavigne is entitled to the following relief:

(i) The declarations requested in paragraph 1(b), (c), (d) and (e) of the amended application;

(ii) Costs here and below;

(iii) Such further and other relief as this Honourable Court may deem just and equitable.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dennis O'Connor, Q.C.

Christopher D. Bredt

Ronald Foerster

of counsel for the Appellant, Francis Edmund Mervyn Lavigne.

PART V - AUTHORITIES

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