Court File No. 21378

**IN THE 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
(Intervenors)

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# FACTUM OF THE NATIONAL UNION OF PROVINCIAL GOVERNMENT EMPLOYEES

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## PART 1 - THE FACTS

### (a) Nature of Appellant's Case

1. The Appellant is a member of the bargaining unit of community college teachers represented by the Respondent Ontario Public Services Employees Union (hereinafter referred to as "OPSEU") although he has chosen not to become a member of OPSEU. This case arose because of two grievances that the Appellant felt that he had against the Respondent OPSEU. The first, relating to the strike of 1984, has been abandoned. The remaining grievance relates entirely to various expenditures made by the Respondent OPSEU and the Respondents Canadian Labour Congress (hereinafter referred to as the "CLC"), Ontario Federation of Labour, (hereinafter referred to as the "OFL") and the National Union Of Provincial Government Employees (hereinafter referred to as "NUPGE"), with whom OPSEU is affiliated. The Appellant objects to these expenditures and seeks to invoke the Canadian Charter of Rights and Freedoms as the instrument for challenging them.

2. The first of the series of constitutional questions set for this case indicates the pivotal significance to be attached to the proper characterization of the case. The Ontario Court of Appeal held that the case is about how a union spends its own monies, lawfully earned and collected. The Appellant submits that the case is about the "compulsory payment of dues". The Appellant has accepted the constitutional validity of Sections 51, 52 and 53 of the Colleges Collective Bargaining Act R.S.O. 1980 c.74 (hereinafter referred to as the CCBA) and of the Collective Agreement between OPSEU and the Council of Regents except to the extent that monies paid to OPSEU were subsequently used for the purposes set out in Appendix 'A' to his Amended Application.

(b) **Facts of the Case**

3. As supplemented below, NUPGE accepts the facts of the case and the history of collective bargaining in community colleges in Ontario as set out by the Ontario Court of Appeal.

> Reasons for Judgment of the Court of Appeal for the Province of Ontario, Case on Appeal, Vol. XI, at 2119-2130.

4. The Respondent OPSEU is a component of the Respondent NUPGE which was formed in 1976 to represent and promote the interests of provincial government employee organizations. NUPGE components make per capita payments based on the number of employees they represent and, in return, the components have access to the research, policy development, education and public relations resources of NUPGE. Decisions on the expenditure of NUPGE funds are made by its National Executive Board which is elected for two year terms at regular conventions. Members of OPSEU are members of NUPGE but employees represented by OPSEU who have chosen not to be members of OPSEU do not become members of NUPGE. At each NUPGE convention, OPSEU delegates represent a minority of delegates and, therefore, do not control any decisions either in respect of resolutions, the expenditure of funds or the election of members of the National Executive Board.

> Affidavit of John Fryer, Case on Appeal, Vol. VII, at 1283-1289

5. Article 12.01 of the operative collective agreement between OPSEU and the Council of Regents is the focus of this appeal. It was inserted in 1981 into the Collective Agreement in response to a demand made by OPSEU during collective bargaining. It reads as follows:

> "12.01 - There shall be an automatic deduction of an amount equivalent to the regular monthly membership dues from the salaries of all employees in the bargaining unit covered hereby."

> Affidavit of F.E.M. Lavigne, Case on Appeal, Vol. 1, at 36-37.

6. The Constitution of OPSEU entitles all members of the bargaining unit, including the Appellant Lavigne, to attend all general meetings and to speak at all

general meetings whether they are members or not. Non-members are afforded a vote on whether or not a collective agreement is to be ratified but cannot vote on any other union issues, including expenditures.

Cross-Examination of James Clancy, Case on Appeal, Vol.II at pp.203-204.

## PART II - POINTS IN ISSUE

7. The Respondent NUPGE intends to argue that:

(1) the Appellant's claim does not raise an issue of governmental action within the meaning of s.32 of the Canadian Charter of Rights and Freedoms but relates entirely to decisions made by the Respondents OPSEU, CLC, OFL and NUPGE, who are private actors and whose democratic internal decision-making processes cannot be constrained or controlled by invocation of the Canadian Charter of Rights and Freedoms;

(2) Article 12.01 of the collective agreement between OPSEU and the Council of Regents uses the employer as the conduit for fees payable by members of the bargaining unit to OPSEU for services rendered to them by OPSEU and does not infringe Appellant's freedom of expression as guaranteed by s.2(b) of the Canadian Charter of Rights and Freedoms;

(3) Article 12.01 of the collective agreement between OPSEU and the Council of Regents uses the employer as the conduit for fees payable by members of the bargaining unit to OPSEU for services rendered to them by OPSEU and does not infringe the Appellant's freedom of association as guaranteed by s.2(d) of the Canadian Charter of Rights and Freedoms;

(4) If this Honourable Court finds any prima facia infringement of a constitutionally protected interest, Article 12.01 is reasonable and justifiable within the meaning of s.1 of the Canadian Charter of Rights and Freedoms; and

(5) The Respondent NUPGE, although granted leave to intervene as an added party, ought to have been included as a necessary party in the original application and hence should be entitled to its costs throughout if successful in this appeal.

## PART III - THE ARGUMENT

### A. GOVERNMENT ACTION

8. Summary of Argument: The Respondent NUPGE submits, in the first instance, that the Appellant's claim is not about governmental action but rather is a grievance against a private actor, the Respondent OPSEU. The Respondent NUPGE submits that the Appellant cannot find governmental action to trigger his claim simply by pointing to an antecedent statutory framework unrelated to the focus of the claim. Secondly, the Respondent NUPGE submits that, while a contract with a governmental agency may give rise to a Charter claim, the Appellant cannot succeed on this basis since Article 12.01 of the Collective Agreement was inserted in the agreement at the request of the Appellant OPSEU during negotiations and was not imposed as a manifestation of governmental policy. Moreover, the Appellant's claim arises from conduct independent of Article 12.01.

#### (a) Private Action and the Nature of the Appellant's Claim

9. On the issue of governmental action, the Ontario Court of Appeal adopted the reasoning of Mackoff, J., dealing with a similar claim in Re Baldwin and B.C. Government Employees Union. As in Lavigne, the petitioner in Baldwin sought a declaration that the statutory framework infringed fundamental rights of expression and association "insofar as it permits" the union to make expenditures which ne characterized as not "directly related to collective bargaining". The claim raised the issue of support for "various political, social and economic causes." Unlike the case of Lavigne, the statutory framework itself in Baldwin provided specifically for both the payment of dues and the deduction and remittance to the union in respect of all members of the bargaining unit. Still, Mackoff, J., concluded:

> "There is no link between the governmental compulsion of payment of dues and the union's use of those moneys. Once the government has collected the dues and turned them over to the union, the governmental involvement is at an end. To hold that the term "governmental action" is applicable to activities that are faciliated or arise out of government intervention would make s.32(1) meaningless since both the federal and provincial governments

> regularly redistribute and reallocate income among the population. Governments provide grants to private organizations and to corporations whose activities and expenditures they do not control or influence. In my view, the mere making of those funds available, without direction of any kind as to use, is not the sort of act involving governmental action to which s.32 of the Charter is applicable."
>
> Reasons for Judgment of the Court of Appeal for the Province of Ontario, Case on Appeal, Vol. XI, 2112, at 2139
>
> Re Baldwin and B.C. Government Employee's Union (1986), 28 D.L.R. (4th) 301 (B.C.S.C.), at 308-309

10. In the instant case, the deduction and remittance occurred as the result of the negotiation of Article 12.01 which inserted into the contractual relations between OPSEU and the Council of Regents the "Rand Formula" and established an "agency shop". In both the courts below, the Appellant Lavigne expressly disavowed any challenge to the legitimacy of the Rand Formula.

> Reasons for Judgment of White, J., Case on Appeal, Vol.X, at 1937-38.
>
> Reasons for Judgment of Court of Appeal for the Province of Ontario, Case on Appeal, Vol. XI, at 2141.

11. In a search for some governmental action that will transform his claim into a Charter claim, the Appellant, in paragraphs 6(a) and 7-16 of his factum, has recast the substance of the application as "a challenge to the governmental compulsion to pay union dues". By crafting his claim to encompass the interaction of the statutory framework and the role of the Council of Regents as the sources of governmental action, the Appellant distracts attention from the real and only source of his complaint: how a union spends the funds which it lawfully receives as payment for services which it renders to all members of the bargaining unit it represents.

12. The Canadian Charter of Rights and Freedoms was entrenched in the Constitution Act, 1982 to restrain government and protect people from unjustifiable governmental intrusions into the spheres of their lives which are insulated by the recognition of fundamental freedoms and guaranteed rights. Without a "direct" and "precisely-defined connection" between governmental action and a claimant's grievance, the Charter does not reach into private relationships.

As Campbell, J., has observed: "The Canadian Charter of Rights and Freedoms applies to government action. It represents a curb on the power of government, not a fetter on the rights of organizations or individuals independent of government which do not exercise the functions of government."

> Hunter et al v. Southam Inc. [1984] 2 S.C.R. 145, at 156
>
> Retail, Wholesale, and Department Store Union, Local 580 et al v. Dolphin Delivery Ltd. [1986] 2 S.C.R. 573, at 598-599, and 601.
>
> Trieger v. Canadian Broadcasting Corporation (1988), 66 O.R. (2d) 273 (Ont.H.C.) per Campbell, J. at 278
>
> Re Blainey and Ontario Hockey Association, (1986), 54 O.R. (2nd) 513 (Ont. C.A.) at 520-522.
>
> Harrison and Connell v. University of British Columbia, [1988] 2 W.W.R. 688 (B.C.C.A.) at 692-693 (currently on reserve in the Supreme Court of Canada).

13. The trigger for Charter intervention must be found in an act by government or a governmental agent which itself constitutes or results in an infringement of a fundamental right or guaranteed freedom. Simply locating some antecedent governmental action by way of legislation or an exercise of delegated authority cannot engage the application of the Charter in the future in respect of all consequential events. A claim for Charter protection must be premised on specific intrusive governmental action and not on the independent acts of private parties. The nature of the claim must be a grievance about governmental actions either as the source or the instrument of the infringement alleged.

> Retail, Wholesale & Department Store Union, Local 580 et al v. Dolphin Delivery Ltd., supra, at 598-599.

14. The concept of governmental action, as used in S.32 of the Charter, requires a legislative, executive or administrative act that is part of the function of governing. It contemplates control, regulation or the imposition of a mandated policy through the acts of government or a governmental agent. When a claim is premised on the acts of an agent other than Parliament, a legislature or the

executive, the impugned act must equally represent control, regulation or imposition of policy by government.

Harrison and Connell v. University of British Columbia, supra, at 693-697.

15. The Respondents OPSEU, NUPGE, OFL and CLC are private organizations which are not transformed into agents of government simply because they operate within a regulated framework, nor are their independent actions imbued with the quality of governmental action. Emanations of statutory schemes, such as incorporated companies, are not the source of governmental action simply because they are regulated by statutory authority. Conversely, municipal corporations are bound by the Charter not because they are creatures of the legislature but because of the function they were created to perform. The issue of governmental action requires a functional inquiry into the actor's nexus with government.

Re McKinney and Board of Governors of the University of Guelph et al (1987), 63 O.R. (2d) 1 (Ont. C.A.) at 23-24 (currently on reserve in the Supreme Court of Canada).

(b) **Contracts and Governmental Action**

16. The Respondent NUPGE concedes that the Council of Regents qualifies as a governmental actor which has been given authority to negotiate collective agreements in respect of community colleges. Moreover, NUPGE agrees that a government, through the exercise of its contracting powers, cannot do indirectly what the Constitution Act, 1982 would prohibit it doing directly. In the context of a Charter claim relating to a contract with a governmental agency, the Respondent NUPGE submits that the requirement of governmental action includes both that the claim arises from a contractual provision and that the inclusion of that provision was an act of government. The first aspect involves examining the nature of the claim and whether it is generated by the contractual provision itself or by some action of the non-governmental contracting party. The second aspect distinguishes between a provision which is the product of negotiation between the parties and a provision which represents the imposition of a clearly manifest governmental policy.

Harrison and Connell v. University of British Columbia, supra, at 696-697.

17. In this case, the Appellant's claim fails the test of governmental action in respect of a contract on both grounds. First, the Appellant's claim has been generated by the conduct of the non-governmental contracting party acting independently of government and its policies. Article 12.01 was included in the collective agreement in 1981 as a result of a demand by the Respondent OPSEU in the course of arms-length negotiations with the Council of Regents. From that time, the employer has made deductions in respect of all members of the bargaining unit and forwarded those monies to OPSEU. The Appellant's claim relates to decisions made by OPSEU independent of the Council of Regents, independent of the collective agreement and after Article 12.01 had already operated. The claim, therefore, does not implicate any governmental action.

18. Furthermore, Article 12.01 was not imposed on OPSEU as a result of clearly manifest governmental policy but rather was requested by OPSEU. The existence of a permissive legislative provision, s.53(1) of the CCBA, simply acknowledges the legality of an agency shop clause if negotiated by the parties and cannot be characterized as the imposition of a clearly manifest governmental policy.

## B. THE APPELLANT'S CHARTER CLAIMS

### (a) Interpreting the Charter

19. Summary of Argument: The Respondent NUPGE submits that the proper interpretation of sections 2(b) and 2(d) of the Charter within their historical, social and linguistic context compels the conclusion that the mere payment of money for services rendered is not a constitutionally protected sphere of activity.

20. Through the use of the phrase "compulsory payment", the Appellant Lavigne attempts to colour the use by the parties of the Rand Formula in a coercive and offensive light. This effort ignores the fundamental fact that all law regulates, structures or prohibits; all law authorizes, entitles or disentitles. Law is an instrument of action and the legal regime aids in shaping the institutions and the fabric of the community by requiring people to act or not act. The fundamental freedoms contained in the Canadian Charter of Rights and Freedoms define spheres

of human activity into which, without substantial justification, the legal regime cannot intrude.

21. The enactment of the Canadian Charter of Rights and Freedoms represented a stage of constitutional development within the Canadian legal regime. Dickson, C.J.C. has commented on the role of the Charter in responding to the legal regime:

> "In interpreting and applying the Charter I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons. When the interests of more than seven vulnerable employees in securing a Sunday holiday are weighed against the interests of their employer in transacting business on a Sunday, I cannot fault the legislature for determining that the protection of the employees ought to prevail."

Within a democratically organized social community, the achievement and protection of rights produces concomitant obligations and responsibilities owed to other members of the community.

> R. v. Edwards Books and Art Ltd. [1986] 2 S.C.R. 713, at 779.

22. The guarantees of freedom of expression and association must be understood purposively, in light of the interests they were meant to protect. Although their interpretation should be generous rather than legalistic, "it is important not to overshoot the actual purpose of the right and freedom in question, but to recall that the Charter was not enacted in a vacuum, and must . . . be placed in its proper linguistic, philosophical and historical context."

> R. v. Big M. Drug Mart Ltd. [1985] 1 S.C.R. 295, per Dickson, C.J.C. at 344.

23. The Appellant's claim, premised on the mere payment of money for services rendered, must be understood in context before determining whether the activity is constitutionally protected. The statutory framework of the CCBA, including sections 51, 52 and 53 raised by the Appellant Lavigne, represents the common structure for labour relations legislation in Canada. The Appellant is incorrect in his assertion in paragraphs 12, 43, 44 and 46 of his Factum that, but for the CCBA, he would not be required to make payments to OPSEU. Labour relations legislation

did not create unions or collective bargaining but, since 1944 in Canada, it has regulated them. Without the regulation of labour relations by statute, issues of representation, membership and dues would be decided at the bargaining table or on the picket line.

24. The common premises of Canadian labour relations legislation are certification of a union when a majority of employees choose to be represented by that union, exclusive bargaining authority, binding agreements and the union's duty of fair representation in respect of all members of the bargaining unit. Clearly, such schemes contemplate majoritarian decision-making and, thereby, envisage the existence of dissent even in respect of the threshold question of collective representation by a union as compared to individual employment relations. Regardless of disparate views between groups of workers within a bargaining unit, the essence of labour law in Canada recognizes the need to empower workers collectively as participants in their relationship with their employer. The Rand formula and the agency shop are common vehicles for maintaining union security and obtaining payment for services rendered.

> P. Weiler, Reconcilable Differences (Carswell Co., 1980) at 124-125 and 143-145

25. With respect to labour laws in general, Dickson, C.J.C. recently adopted the following observation:

> "The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequity of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call protective legislation - legislation on the employment of women, children and young persons, on safety in mines, factories, and offices, on payment of wages in cash, on guarantee payments, on race or sex discrimination, on unfair dismissal, and indeed most labour legislation altogether - must be seen in this context. It is an attempt to infuse law into a relation of command and subordination."
>
> Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, at 1051-52. Quoting from Davies and Freedland, Kahn-Freund's Labour and the Law, 3rd Edition, at 18

26. Before addressing the Appellant's claims that the collective bargaining structure regulated by the CCBA has infringed his constitutionally protected rights

of expression and association, it is important to consider how the legal regime protects Mr. Lavigne's ability to express himself, to hold opinions and to join with others to pursue lawful objectives:

(i) The Appellant Lavigne shares with all other Canadians the freedom of expression and belief on all matters whether they be political, social, economic, cultural, intellectual or legal. Neither the Council of Regents, nor OPSEU, nor the Respondents NUPGE, OFL, or CLC have impinged on his free ability to think, to write or to speak. Moreover, none of these parties has compelled him to express, espouse, accept or endorse any view, belief or opinion.

Affidavit of F.E.M. Lavigne, Case on Appeal, Vol. 1, at 35-42

(ii) The Appellant shares with all other Canadians the freedom of association, the constitutionally protected right to join his will and his voice with others, as evidenced by his association with the National Citizens Coalition. This is his choice. He is not associated, publicly or privately, with the views, opinions or beliefs of the other parties to this action. Again, that is his choice.

Affidavit of F.E.M. Lavigne, Case on Appeal, Vol. 1, at 35-42

Wright Affidavit, Case on Appeal, Vol. X, at 1873-1880

(iii) Pursuant to the provisions of the CCBA, the Appellant is guaranteed:

- the right to be represented by a bargaining agent only if that agent has the support of a majority of his co-workers;
- the right to seek decertification of that bargaining agent if it no longer has the support of a majority of his co-workers;
- the right to be represented fairly by the bargaining agent without discrimination, whether or not he is a member of OPSEU;
- the right to join OPSEU if he chooses and thereby to invoke all participation rights of membership within a democratically constituted association;
- the right to be free from any coercion or compulsion in respect of the exercise of any rights under the CCBA including the right to refrain from union membership;
- the right to vote along with all co-workers in respect of ratification of a collective agreement or resort to strike action, whether or not he is a member of OPSEU.

CCBA, sections 59(1) (d) and (e), 65, 68, 71, 75(3) and 76.

(iv) In furtherance of its duty of fair representation, the Constitution of OPSEU, entitles the Appellant:

- to attend all general meetings, whether he is a member or not;
- to speak at all meetings whether he is a member or not.

Cross-Examination of James Clancy, Case on Appeal, Vol. II, at 203

**(b) Freedom of Expression**

27. Summary of Argument: The Respondent NUPGE submits that the mere payment of money for services rendered is not an expressive activity encompassed by s.2(b) of the Charter. Section 2(b) protects an individual's ability to express and hold views, thoughts and feelings, by ensuring that the individual will not be silenced, and will not be compelled to express opinions against his or her will. The latter aspect includes the protection against public identification with a view or belief which the individual does not choose and does not share.

28. In Canada, the fundamental freedom of expression, guaranteed by s.2(b) of the Canadian Charter of Rights and Freedoms, exists to promote the widest possible exchange of views on issues of political, social, cultural and economic significance and to ensure that individuals can hold and express their views without interference from government. As Canadian constitutional jurisprudence evolves, a number of theoretical bases may develop for defining the sphere of expressive activity which is insulated from unjustifiable governmental interference depending on the matrix of factors presented by a particular claim. This Honourable Court has already accepted theories of expression based on political participation and the promotion of self development or self-actualization.

Ford v. Attorney General of Quebec, [1988] 2 S.C.R. 712, at 764-767

Irwin Toy Ltd. v. Attorney General of Quebec, [1989] 1 S.C.R. 927, at 968-69 and 976-77.

Dolphin Delivery, supra, at 583-86.

29. Basic to any expression claim, however, is the existence of expressive activity and an alleged interference with it. This is not restricted to speech, but

neither does it extend to encompass all human activity. As this Honourable Court held in Irwin Toy, "activity is expressive if it attempts to convey meaning". Thus, the Appellant must show that the payment to OPSEU for services rendered to him was done to convey a meaning. While some payments may be expressive because they convey the meaning of political or cultural support, it is submitted that the payment for services rendered conveys no such meaning. It is a commercial transaction plain and simple and is not accompanied by any public perception of support for, or identification with, the views or beliefs of OPSEU or any of its members.

Irwin Toy, supra, at 969.

30. Both the Courts below rejected the Appellant's claim that the deduction and remittance of monies to OPSEU infringed his expression rights as guaranteed by s.2(b) of the Canadian Charter of Rights and Freedoms. The Court of Appeal concluded:

> "The payment does not limit his ability to express his thoughts, beliefs and opinions or otherwise diminish his expressive capacity. The fact that the payment may be used in part to promote aims or objectives contrary to his own does not identify him with those aims or objectives or preclude him from expressing his own views publicly and privately. OPSEU's expression of its views is not made in his name and he is not bound by it; he remains free to speak in opposition to OPSEU or any causes supported by it. We cannot accept, as Lavigne urges, that his financial contribution can be seen as a positive affirmation of the union's non-collective bargaining activities, publicly identifying him with those activities."
>
> Reasons for Judgment of the Court of Appeal for the Province of Ontario. Case on Appeal, Vol. XI, 2112, at 2163

31. As found by White, J., and the Ontario Court of Appeal, the Appellant does not allege that he has been compelled to express any view or that he has been the subject of any interference in expressing his views. His claim is based simply on the payment of money to OPSEU which ultimately finds itself in the hands of those with whom he disagrees. Furthermore, there is no suggestion in the record that any payment by the Appellant has diminished his ability to speak and believe as he chooses.

32. Recently, in MacKay et al and Government of Manitoba, this Court rejected the claim that an election subsidy paid out of government funds infringed the expression rights of a taxpayer who did not agree with the views of the recipient. The unanimous decision in MacKay on this point applies directly to the Appellant's claim. The mere payment of money for services rendered does not implicate expression rights simply because it may ultimately be used to support a cause with which the payer disagrees. The Appellant, in paragraph 71 of his factum, attempts to distinguish MacKay on two grounds: (1) public expenditures are different from private expenditures; and (2) the purpose of the Manitoba Election Finances Act is to promote the overall exchange of views and, hence, is "content neutral". Both these arguments miss the essential point that in MacKay, like Lavigne, words were not put in anyone's mouth, no one was silenced and no one was identified with the views of subsequent recipients. The original payor remained free to express agreement or disagreement without interference. Accordingly, no expression right was implicated. Moreover, the Appellant can hardly distinguish between public and private expenditures when the Appellant argues that his claim herein flows from governmental action. As well, if "content neutrality" is a factor, when Article 12.01 operates to deduct monies and remit them to OPSEU, it is equally content neutral in that there is no direction and no decision how, or to whom, any residue will be expended.

> MacKay et al and Government of Manitoba, [1989] 2 S.C.R. 357, at 366-367.

33. It is submitted that the Appellant is wrong when, in paragraphs 68 to 70 of his Factum, he asserts that the absence of public identification with the choices and views of the Respondents OPSEU, NUPGE, CLC and OFL is irrelevant. The Appellant relies on the American cases of Board of Education v. Barnette and Wooley v. Maynard and suggests that members of the public would "hardly" identify the plaintiffs in those cases with the expressions involved. It is clear in Barnette that the U.S. Supreme Court considered the compulsory flag salute and pledge of allegiance in the classroom to be a "compulsion of students to declare a belief" and an "affirmation of a belief". Thus, the issue of public identification was implicit and its premise was integral to the Court's conclusion. In Maynard, the split between the majority and dissent related to the factual consideration of whether

the vehicle owner was truly asserting a message or affirming a belief by displaying the impugned license plate. The majority considered that the plaintiff was essentially "a mobile billboard" for the ideology which he found unacceptable while the dissent found no assertion by the plaintiff that the message was true. The dissent added that the plaintiff was free to display disagreement. Hence, it is clear that both opinions considered that some form of public identification or affiliation was essential to the claim of constitutional infringement. More pointedly, in the subsequent case of Pruneyard Shopping Centre, the U.S. Supreme Court rejected a First Amendment claim and distinguished Wooley v. Maynard on the basis, inter alia, that the views of the pamphlet distributors would "not likely be identified" with those of the shopping centre owner and the owner was free to disavow and disagree with the message in the pamphlets. The Court also distinguished other cases relied on by the Appellant herein (Barnette and Miami Herald Publishing) because both those cases involved "compelled recitation of a message containing an affirmation of belief".

> West Virginia State Board of Education v. Barnette (1943), 319 U.S. 624, at 631 and 633.
>
> Wooley v. Maynard (1977), 430 U.S. 705, at 715 and 721-711.
>
> Pruneyard Shopping Center et al v. Robins (1980), 447 U.S. 74, at 85-88.

34. Recently, this Honourable Court denied leave to appeal from a decision of the Federal Court of Appeal rejecting a taxpayer's claim that the payment of income tax and its subsequent use for military expenditures infringed her freedom of conscience or religion as protected by s.2(a) of the Charter. Marceau, J.A. held that the payment of taxes "in no way identifies her with any of the functions of the Government of Canada."

> Prior v. The Queen (1989), 101 N.R. 401 (F.C.A.), at 404 (leave to appeal to the Supreme Court of Canada denied, February 22, 1990).

**(c) Freedom of Association**

35. Summary of Argument: It is the position of the Respondent NUPGE that payments by the Appellant to OPSEU do not infringe his freedom of association as

guaranteed by s.2(d) of the Canadian Charter of Rights and Freedoms. First, it is submitted that the freedom protected by s.2(d) is the positive freedom of purposeful association and the Appellant remains free to choose with whom he wishes to join his voice and energy to pursue common objectives. Section 2(d) must be interpreted within the evolving Canadian context which precludes encompassing co-incidental associations within its ambit. Moreover, any enforced associations which would be offensive in constitutional terms are protected by sections 2(a), 2(b) and 7 of the Charter. Alternatively, the Respondent NUPGE submits that if s.2(d) includes a "negative right", its scope ought to be defined commensurately with the spheres of impact encompassed by the other fundamental freedoms. Consequently, the mere payment of money for services rendered without any identification with the beliefs of the recipient, would not infringe any negative s.2(d) right.

36. Freedom of association as guaranteed by s.2(d) empowers individuals to join together to pursue common objectives. The essence of the association protected by s.2(d) lies in purposeful joining together. In the trilogy of "right to strike" cases decided by this Court in 1987, a number of comments and observations were made about the purposes and intrinsic qualities of freedom of association. In Re Public Service Employee Relations Act, Dickson, C.J.C. interpreted the guarantee of freedom of association as recognizing "the profoundly social nature of human endeavours" and the need "to protect the individual from state-enforced isolation in the pursuit of his or her ends." Thus, in the view of the Chief Justice, freedom of association protects "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."

> Reference Re Public Service Employee Relations Act, [1987] 1 S.C.R. 313, at 365-366.

37. McIntyre, J., in the same case, concluded that the purpose of freedom of association is "to guarantee that activities and goals may be pursued in common". He recognized that s.2(d) guaranteed the "collective exercise of constitutional rights" and the pursuit jointly with others of "whatever action an individual can lawfully pursue as an individual". The judgment of LeDain, J. accepted the "wide

range of associations or organizations of a political, religious, social or economic nature" which would be protected by s.2(d) and described the constitutional protection of an individual's activity with others in terms of the ability "to work for the establishment of an association, to belong to an association, to maintain it, and to participate in its lawful activity". In all judgments, the language used by the judges connotes active and purposeful association.

> Reference Re Public Service Employee Relations Act, supra, per McIntyre, J. at 406-407, per LeDain, J. at 391.

38. Thus, the thrust of this Honourable Court's interpretation of s.2(d) has been to recognize the profound importance of purposeful association both in its value to the collective interests of the community and in its value to the individual who chooses to join with others. Section 2(d) is a mechanism of enhancement, enrichment and empowerment by ensuring that individuals cannot be forced into lives of isolation. Recognizing that the Charter was not enacted in a vacuum, restricting the scope of s.2(d) to its role in respect of purposeful association would exclude from its ambit any "negative right" that would apply to the myriad of coincidental associations which arise in our complex contemporary society. Individual choices do not become association within the meaning of s.2(d) simply because they coincide with others in terms of being within the same context or at the same place. Regularly, people are required to be in the same room as others, the same line, the same public transit vehicle or the same class. While, superficially, these examples may be considered association they are not the kind of purposeful association protected by s.2(d) of the Charter. Consequently, the individual cannot complain that he objects to the views of others on the bus or in the line because he or she is required coincidentally to associate with them. Like the Appellant Lavigne, such association is coincidental and does not identify the individual with the conscience, beliefs or opinions of others who are in the same place.

39. It is the position of the Respondent NUPGE that any legitimate individual concerns about potentially coercive association are specifically addressed as matters of individual liberty by other provisions in the Charter, particularly sections 2(a), 2(b) and 7. Certainly, it is offensive to coerce an individual to

express opinions she does not hold, or to be perceived as expressing them by reason of enforced membership in a group. It may be offensive to force someone to join an organization which has objectives with which she disagrees on political, religious, or ethical grounds. An individual is protected against these forms of enforced identification with the views of others through s.2(a) and 2(b) of the Charter.

> Reference Re Public Service Employees Relations Act, supra, per LeDain, J. at 239 and per McIntyre, J. at 227

40. Furthermore, the right to security of the person protected by s.7 of the Charter includes issues which interfere with the person's physical, psychological or emotional well-being, sense of dignity and self-respect or sense of autonomy. Thus, an individual can seek protection against the incidents of an enforced association through the vehicle of s.7.

> R. v. Morgenthaler, [1988] 1 S.C.R. 30, per Wilson, J., at 173-174

41. If section 2(d) is held to encompass a right to refrain from association, this aspect of the freedom must respond to the same constitutional values which provide the premises for the entrenchment of freedom of association in the Charter. Accordingly, any prima facie violation of a negative freedom of non-association, must arise from coercion that impinges on an otherwise protected interest such as expression, belief, religion or security of the person.

> B. Etherington, Freedom of Association and Compulsory Union Dues: Towards a Purposive Conception of Freedom of Association (1987), 19 Ottawa L. Rev. 1, at 42-46
>
> Reference Re Public Service Employees Relations Act, supra, at 227 and 239

42. The Appellant's claim herein is that the payment of monies to OPSEU for services rendered to and accepted by him infringes his freedom of association by associating him with OPSEU. On this issue, the Ontario Court of Appeal found:

> "Viewing freedom of association in terms of a positive right, we think it clear that there can be no infringement of that right in the circumstances posed by the question, and we do not understand White J. to have concluded otherwise. The positive freedom of association safeguards the right of

> individuals to associate with each other for the purpose of protecting common interests and pursuing common goals. The agency shop or Rand formula provision does not limit or interfere with that right. It imposes no restriction on an employee's ability in voluntary association with others to achieve a common purpose or advance a common cause; the employee remains patently free to oppose the union and the causes which it may support, to seek to have the union's bargaining rights terminated, and to join with others for such purposes."

It refrained from ruling on whether s.2(d) includes a negative freedom, that is, a freedom not to associate. However, the Court found that even if there were a negative freedom, Lavigne's right not to associate "remains unimpaired".

> Reasons for Judgment of the Court of Appeal for the Province of Ontario. Case on Appeal, Vol.XI, 2112, at 2151 and 2156

43. Recently, the Manitoba Queen's Bench agreed with the reasoning of the Court of Appeal in Lavigne in the context of a doctor who argued that the Manitoba Medical Association Fees Act infringed his freedom of association by requiring him to pay "dues" to the Manitoba Medical Association. The Association was "constituted to represent and speak for the majority of medical practitioners" in Manitoba and the Applicant claimed that the Association took a position on abortion with which he disagreed. Ferg J. concluded that the Association's use of monies paid by the Applicant did not "have the effect of forcing an association politically or otherwise" and that the doctor, like the Appellant herein, "remains free to pursue his personal goals whether political, ideological, socio-economic or otherwise".

> Merry v. Manitoba and Manitoba Medical Association (1989) 58 Man.R. (2d) 221 (Man.Q.B.), at 230-231.

44. If the combination of one's funds with others as a result of a levy for services can constitute a prima facie violation of freedom of association, then equally impugned are:

a) federal, provincial or municipal tax levies;
b) payments to state-regulated public utilities and communications monopolies;
c) payments to state-administered or state-regulated health care plans;
d) contributions to state-administered pension funds;

e) payments to state-regulated automobile insurance companies, and
f) in the context of public sector employees like Applicant Lavigne, all compulsory deductions and contributions from salary he would otherwise receive from employment. These include deductions and contributions for his Superannuation Fund, Long Term Disability Benefits, Life Insurance, Dental Plan and Health Plans.

It is the position of the Respondent NUPGE that no available interpretive source - historical, linguistic, contextual or philosophical - supports extending the ambit of s.2(d) to achieve this degree of disruption to the day-to-day interactions necessary to the life of an advanced, organized community. If so, all such fund recipients would be required to submit their expenditures to the demanding scrutiny and justification of section 1 of the Charter.

45. The Appellant relies in paragraph 57 of his Factum on the 1963 decision of this Court in the Oil, Chemical and Atomic Workers case to support the position that payments result in association. The quotation used by the Appellant about association must be read in the context of that case. The case involved a claim by a union, twenty years before the entrenchment of the Charter, that its freedoms were infringed by legislation that prohibited expenditures of its monies for political purposes without the members' approval. The decision upheld the legislature's authority over the issue of expenditures. In the case herein, the Ontario legislature has exercised its authority and has chosen not to restrict the union's use of its monies in the manner sought by the Appellant.

Oil, Chemical and Atomic Workers International Union v. Imperial Oil Ltd., [1963] S.C.R. 589

46. Individuals in an organized community are assured that they will not suffer interference with the exercise of their fundamental freedoms unjustifiably but they are not guaranteed the facilitation of absolute and unburdened opportunities. If s.2(d) encompasses the right to refrain from association, the requirement of payment for services lawfully rendered must be characterized as a trival burden which does not warrant constitutional protection when the payor is not identified

with the beliefs of the recipient and has unimpaired opportunities to express disagreement or join with others who disagree.

R. v. Jones, [1986] 2 S.C.R. 284, per Wilson, J., at 313-14

R. v. Edwards Books and Art Ltd., supra, per Dickson, C.J.C., at 759

(d) **American Jurisprudence**

47. On both the Freedom of Expression and Freedom of Association issues, the Appellant relies principally on American First Amendment jurisprudence. As Lamer, J. has said: "We would ... do our own Constitution a disservice to simply allow the American debate to define the issues for us, all the while ignoring the truly fundamental structural differences between the two constitutions." Methodologically, the following structural distinctions are significant:

1. The American constitution contains no explicit protection for freedom of association but, rather, it is an emanation of "freedom of speech" in respect of which there is the absolute stricture that "Congress shall make no law...";
2. The definition of constitutionally protected interests occurs in the United States through balancing state interests and the interests of the individual claimant;
3. The American Constitution contains no provision like s.32 of the Charter but, instead, an ambiguous and unpredictable "state action" doctrine has evolved which Professor Tribe describes as "chaos"; and
4. The absence of a justifactory vehicle akin to s.1 of the Charter.

Reference Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, per Lamer, J., at 498

L. Tribe, American Constitutional Law, 2nd Ed. (Foundation Press, 1988) at 1690-91

Reference Re Public Service Employee Relations Act, supra, per Dickson, C.J.C., at 344-345

48. Differences in constitutional history are also significant. There is ample evidence to suggest that during the era of the Burger Court, the United States Supreme Court made explicit choices in favour of individual autonomy over collective societal interests. Professor Fiss has commented on the "divergence

between autonomy and rich public debate" and argued that the First Amendment decisions of the 1970's represented a tradition locked into the image of the street corner speaker and the intruding police officer. Professor Cantor has concluded "that Abood and cases akin to it are essentially askew" because the U.S. Supreme Court "failed to focus sufficiently on the precise first amendment interests at stake and their application in diverse contexts." It is respectfully submitted that the preferences reflected by these judicial choices are not necessarily appropriate for the Canadian constitutional, political and social experience.

O. Fiss, Free Speech and Social Structure (1986).
71 Iowa L. Rev. 1405, at 1407-1410 and 1422-1425

Cantor, Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association (1983), 36 Rutgers L. Rev. 3, at 6-7, 24-25 and 51-52

B. Etherington, Freedom of Association and Compulsory Union Dues, supra, at 37

49. Equally important to an understanding of the American cases is the conception of labour relations, unions and union security exemplified by the decisions relied upon by the Appellant. It is submitted that this conception is inconsistent with Canadian labour relations history. Prior to Abood, the case of International Association of Machinists v. Street offered two juxtaposed views of labour relations: one which focussed narrowly on the union role in the negotiation of contracts and the view of Frankfurter, J. which placed union activity in its historical, social, political and legislative setting. The majority decision in Street, applied in Abood, represents a choice in favour of restricting the appropriate role for unions to their immediate bargaining context.

Abood et al v. Detroit Board of Education, (1977), 431 U.S. 209, at 219-223

International Association of Machinists v. Street (1961), 367 U.S. 740, per Brennan, J. at 762-769 and per Frankfurter, J. at 800-809

50. The dissenting view of Mr. Justice Frankfurter in Street recognizes the economic and societal role of unions beyond contract negotiation and administration. This multi-dimensional conception, rejected by the majority in that case, accords with Canadian labour relations history. As Dickson, C.J.C. has observed:

"The capacity to bargain collectively has long been recognized as one of the integral and primary functions of associations of working people. While trade unions also fulfil other important social, political and charitable functions, collective bargaining remains vital to the capacity of individual employees to participate in ensuring fair wages, health and safety protections, and equitable and humane working conditions."

Reference Re Public Service Employees Relations Act, supra, at 368

Affidavit of I. Abella, Case on Appeal, Vol. VII, at 1418-21

Cross-examination of I. Abella, Case on Appeal, Vol. VIII, at 1447 and 1455

Affidavit of Desmond Morton, Case on Appeal, Vol. VIII, at 1467-74

51. Moreover, in the United States, the issue of freedom of association, dues and political expenditures has moved into the arenas of state bar societies, university student councils and university newspapers. The litigation flows entirely from the acceptance of the proposition that the payment of a fee for a service entitles the payor to demand that the money not end up in the hands of someone espousing a view with which the payor disagrees.

Tribe, American Constitutional Law, 2nd Ed. (Foundation Press, 1988) at 806

## C. SECTION 1

52. Summary of Argument: It is the Respondent NUPGE's position that, if Article 12.01 of the collective agreement herein infringes any of the Appellant's fundamental freedoms, it is a reasonable and justifiable limit within the meaning of s.1 of the Charter. Article 12.01 represents the adoption of the agency shop for relations between the council of Agents and the Respondent OPSEU and the agency shop is an integral element of contemporary labour relations in Canada. The purpose of the legislative framework and the agreement regulated by it, including Article 12.01, is to promote harmonious labour relations by empowering workers to bargain and act collectively. This encompasses the need to ensure the security of unions so that they can be effective participants on behalf of the workers they represent. This purpose is pressing and substantial. Secondly, Article 12.01 is a proportionate means of achieving the goals of effective collective representation because it is a reasonable vehicle. It is rationally connected to that goal, impairs the Appellant's freedoms as little as is reasonably possible in the context and does

not produce an infringement which is disproportionate to the benefits derived from the scheme. Moreover, it is not the role of s.1 to be the instrument for engrafting new exceptions onto pre-existing legislative schemes.

53. This Honourable Court has developed a two-stage test for determining whether a limitation is a reasonable one under s.1 of the Charter. The first aspect inquires into the legislative objective of the limitation to determine whether it represents a "pressing and substantial concern." The second aspect examines the "means chosen to attain those objectives" to determine whether they are "proportional or appropriate to the ends." Normally, the proportionality analysis involves the elements of rational connection, minimum impairment and absence of disproportionate impact on the individual. This Honourable Court has recognized that proportionality as a concomitant of reasonableness ought not be measured by "rigid and inflexible standards."

R. v. Oakes, [1986] 1 S.C.R. 103 at 138-39

R. v. Edwards Books & Art. Ltd. [1986] 2 S.C.R. 713, at 768-769

(a) Purpose

54. The focus of this appeal is Article 12.01 of the collective agreement. Accordingly, the first part of the s.1 inquiry involves this article's specific purpose and whether it operates in furtherance of a "pressing and substantial" similar concern. The latter aspect flows from the general purpose of the CCBA framework.

55. Article 12.01, commonly known as the Rand Formula, establishes an agency shop. The vision of the agency shop, as articulated by Mr. Justice Rand, provides a clear example of the concern to move from an era where economic power without regulation was the sole determinant of collective bargaining into a statutory regime where legislated provisions, specialized tribunals and fair adjudication protected the interests of the participants:

> "That we cannot draw back and try to reverse the whole progress of the last 100 years in labour-employer relations, that we must go through to a higher

> evolution of them must, I think, be accepted as axiomatic. On that assumption there are two fundamental views to be taken on the mode of bringing that progress about; either to leave it as the issue of economic war in all its ferocity and waste or as the gradual rationalization of an area where interests are both common and conflicting. That we must have some sort of law or convention regarding these relations is inescapable: whenever human beings are drawn together socially or economically, a rule of that nature by whatever name we call it becomes imperative, and the stronger the conflict of interest the more insistent the demand for settled understandings. But we preserve the conquests of these understandings as we do of human rights generally, and they are taken on by new groups as of course. Is there any doubt at this time in serious minds of the right of labour to organize? In fact, our law now declares that right. The question is whether the remaining controversies are to be settled in the mode of war or reason. Considering the immense stage in which these relations now appear, it would be a sad commentary on what we call Christian civilization if every foot of that field would have to show the waste of conquest by economic struggle. There is still and may always be a residue of this area which it will be beyond the powers of man to conquer by the force of his intellectual or spiritual facilities and a similar residue may remain in economic relations. But the measure of our civilization will be the degree to which that residue is diminished in scope."
>
> Rand Award, Case on Appeal, Vol. VI, 1044, at 1045-46

56. The agency shop provision has been characterized as an element of union security. It serves a dual function. The "check off" provides a vehicle whereby all members of the bargaining unit pay for the services of their representative plus union members are protected from potential employer retaliation since they are not individually identifiable. As characterized by Mr. Justice Rand, the issues of union security are fundamental to guaranteeing workers the right to effective representation of their choice without having to constantly win an "economic war" to achieve it. This was fundamental to the protection of weak unions from interference and corrosion and is a necessary element of a rational labour relations policy. Moreover, the internal operations of a union and the necessary balancing of both individual and collective interests are the appropriate subjects of legislative action to ensure that individuals are not victims of the "economic wars" between management and labour. Legislation such as the CCBA has responded to those concerns by establishing a framework of reciprocal rights and obligations.

Rand Award, Case on Appeal, Vol. VI, 1044, at 1048-49

57. The importance of the agency shop provision must be assessed in terms of the purposes of the legislative framework in general. The Appellant is wrong in arguing that collective bargaining is the sole purpose of the legislative framework herein. This narrow characterization ignores the historical reality of collective representation in Canada. The history of the labour movement attests to the importance of political activity along with collective bargaining in effectively representing the economic interests of working people.

Roberts Affidavit, Case on Appeal, Vol. V, at 904-942

Abella Affidavit, Case on Appeal, Vol. VII at 1417-1422

Morton Affidavit, Case on Appeal, Vol. VIII, at 1467-74

See Machinists v. Street, supra, per Frankfurter J., at 800-801, 812:

"The statutory provision cannot be meaningfully construed except against the background and presupposition of what is loosely called political activity of American trade unions in general and railroad unions in particular - activity indissoluably relating to the immediate economic and social concerns that are the raison d'etre of unions. It would be pedantic heavily to document this familiar truth of industrial history and commonplace of trade union life. To write the history of the Brotherhoods, the United Mine Workers, the Steel Workers, the Amalgamated Clothing Workers, the International Ladies Garment Workers, the United Auto Workers, and leave out their so called political activities and expenditures for them, would be sheer mutilation . . .

This aspect - call it the political side - is as organic, as inured a part of the philosophy and practice of railway unions as their immediate bread and butter concerns."

. . . .

"For us to hold that these defendant unions may not expend their monies for political and legislative purposes would be completely to ignore the long history of union conduct and its pervasive acceptance in our political life."

See Archibald Cox, Law and The National Labour Policy, (Greenwood Press, 1960), at p.107:

"It is difficult, if not impossible, to separate the economic and political functions of labour unions. Right-to-work laws affect union organization and collective bargaining. Legislation subjecting unions to the antitrust laws or confining their scope to the employees of a single company would greatly weaken their bargaining power, if it did not destroy them altogther. . . . Political action in these spheres of union interest is hardly more than

incidental to the unions' economic activities. A similar link exists even when a union takes political action upon a broader front. The basic philosophy of a President and his party affects appointments to agencies like the National Labor Relations Board, which in turn exert tremendous influence upon the course of labor relations. Even the tariff impinges on labor negotiations. The bargaining power of the Hatters Union, for example, is affected by the competition of low-cost foreign goods."

See Benjamin Aaron, "Certain Aspects of the Union's Duty of Fair Representation" (1961) 22 Ohio State L. J. 37, at p.62:

"In the second place, it will be difficult, if not impossible, to prove that the expenditures of union funds in Street were not 'solely for the benefit' of the organization and their members. By enacting the L.M.R.D.A. Congress demonstrated beyond dispute that the most vital interests of unions and their members are not limited to the context of collective bargaining, but extend into the political arena. The welfare of organized labour is affected not only by so called 'labour legislation', but also by executive, legislative, and judicial decisions with respect to monetary and fiscal policy, defence, education, health and many other issues. Finally, policies are made by men, and it is sheer sophistry to argue that although a union may legitimately support certain legislative objectives, it may not spend its funds to secure the election of candidates whom it hopes or has reason to believe will work to achieve labour's goals."

58. Moreoever, collective bargaining itself is more than an economic mechanism but is a "political institution". It serves to re-align the power relationship between employers and employees and establishes a rule-making process for the employment context. The framework of the CCBA was enacted not simply to regulate bargaining over immediate economic factors but to protect the legitimate expectations of the employer, the employees and the public.

A. Flanders, Collective Bargaining: A Theoretical Analysis (1968) 6 Br.J. of Ind. Rel. 1, at 8-13.

P. Davies and M . Freedland, Kahn-Freund's Labour and the Law, 3rd Edition, (Stevens & Sons, 1983), at 65-70.

59. Particularly with respect to public sector employees, the union's role in representing the interests of bargaining unit members has an essentially political character which requires it to participate in the larger political context. In the public sector, the government has available to it the tools of legislation and general economic policy which can affect not only terms and conditions of employment but also the expansion or contraction of job opportunities, job security and the general welfare of workers and their families.

60. Many advances of both economic and social concern to working people can only be achieved through legislative reform. Some of the most important advances in the condition of the lives of Canadians have come through legislative reform promoted by the labour movement. Government pensions, unemployment insurance, medicare, and the minimum wage are among the benefits now enjoyed by all Canadians, which could not have been achieved at the bargaining table but which were achieved in large part through the work of unions in the political arena. Furthermore, labour legislation itself has a direct impact on workers' economic interests.

Roberts Affidavit, Case on Appeal, Vol. V, at 904-942

Abella Affidavit, Case on Appeal, Vol. VII, at 1417-22

Morton Affidavit, Case on Appeal, Vol. VIII, at 1467-74

61. In addition, unions must be able to participate in the political process because employers actively represent their economic interests at the legislature as well as the bargaining table. Curtailing the political voice of unions while leaving intact the employer lobby would widen the gap in bargaining power between employers and labour and thereby destabilize labour relations in the province.

Tribe, Constitutional Choices (Harvard University Press, 1985) at 202

62. It is further submitted that in order effectively to represent the common interests of working people in the political arena, it is necessary for unions to work together through the central labour organizations to coordinate their efforts. The Respondents OFL, NUPGE, and CLC provide such necessary research, organizing, and lobbying services. The fees paid for these services are part of the essential cost of union representation. Given that the Appellant benefits from OPSEU's participation in these organizations, he is not entitled to avoid his obligation to pay his share of the cost.

Fryer Affidavit, Case on Appeal, Vol. VII, at 1282-90

**(b) Proportionality:**

63. It is respectfully submitted that Article 12.01 is rationally connected to the purpose of collective representation. It ensures that all who benefit from the fruits of that activity will pay for it and it also provides protection to union members from potential retaliation. The security of the union is a necessary concomitant of its effective participation on behalf of the workers it represents.

64. In respect of "minimal impairment", it is important to note that this Honourable Court has not taken the position that the assertion of any alternative measure which arguably produces less impairment thereby renders the provision in question unjustifiable. In cases involving the competing interests of various segments of the community, this Court has employed a "reasonableness" test which recognizes the complex legislative task of accommodating disparate interests. In multi-dimensional cases, the issue becomes whether the limitation impairs the individuals rights "as little as reasonably possible". That is, is there a "reasonable alternative" in light of the context and the objectives?

> R. v. Edwards Books Ltd., supra, per Dickson, C.J.C. at 772-73; per La Forest, J., at 794-95

65. The CCBA, like other labour relations statutes in Canada, protects those whose religion prohibits them from joining or supporting a union. While the CCBA does not offer a similar protection to people like the Appellant who object to certain union expenditures but are content to benefit from union representation, any impairment of the Appellant's freedoms by Article 12.01 is reasonably "minimal" in light of the importance of collective representation and the amorphous nature of potential objections. Article 12.01 and the CCBA Framework in general is tailored to achieve its objectives with only minimal intrusion into protected spheres of activity. Unlike religious views which can be ascertained, the scope of objections which could be self-characterized as offensive are limitless. In the case herein, the Appellant simply asserts that he is "opposed" to having monies

spent in the ways set out in Appendix A to his Amended Application and offers no basis for his objection.

Slaight Communications Inc. v. Davidson, supra, per Dickson, C.J.C., at 1053-57

Affidavit of F.E.M. Lavigne, Case on Appeal, Vol. I, at 37-42

66. It is further submitted that any impairment of the Appellant's freedoms by reason of payments to OPSEU is not disproportionate in light of the objectives of Article 12.01 and the general legislative framework. First, as set out in paragraph 26 above, the Appellant has unimpeded opportunities to speak and disseminate his views, and to join with others to pursue common objectives of a political or social nature. Secondly, the actual extent of impugned expenditures which may be attributable or traced to the Appellant is an extremely small part of the monies he pays to OPSEU for services rendered to him. In 1985, only $1.36 out of $338.00 paid by the Appellant to OPSEU are attributable to the expenditures made by OPSEU, NUPGE, CLC and OFL which he challenges.

Economic Analysis of Lavigne's Dues, Case on Appeal, Vol. X, at 1868-72

67. More importantly, however, is the impact of the remedy he seeks on the legitimate activities of unions in respect of the power relations between employers and employees. It has been noted in the United States by Professor Tribe that the direct result of the Abood line of cases and the imbalance of political power which they have created has been the diminution of labour's legislative input and the dramatic reduction in union representation of workers. The efficacy of public sector unions has also been "greatly weakened".

L. Tribe, Constitutional Choices (Harvard University Press, 1985) at 202.

J. Henkel and N. Wood, Restrictions on the uses of Union Dues: A Threat to Public Sector Unions? (1986), J. of Coll. Neg. 41, at 48-50.

(c) **The Proper Role of s.1:**

68. It is further submitted that the Appellant's claim misconceives the methodological role of s.1 in constitutional litigation. The Appellant has

constructed his claim so as to invoke s.1 to engraft a new restriction on union spending onto the structure of the CCBA. The Appellant accepts the validity of the statutory structure as it exists but argues that this Court ought to use s.1 to add a new element to insulate the personal sensibilities of the Appellant from choices made by the Respondent OPSEU after Article 12.01 has operated.

69. This misconception of the judicial function in terms of Canadian constitutional methodology is exemplified by the role which American courts have been required to play since the adoption of the Abood ruling. Courts have become the gatekeepers of union expenditures. They have been required to assess the propriety of monies spent in respect of organizing efforts, advocacy in respect of legislation that affects terms of employment like pensions and minimum salaries, advocacy in respect of legislation that affects the employment context generally, and advocacy in respect of public issues which have special or general impact on members of the bargaining unit. It is respectfully submitted that these forms of restrictions and the kinds of distinctions required to make them may be appropriate exercises for legislatures, but they are not appropriate for the judiciary.

M. Malin, The Evolving Law of Agency Shop in the Public Sector (1989), 50 Ohio St. L.J. 855, at 870-880.

Reference Re Public Service Employee Relations Act, supra, per Le Dain, J. at 391-92.

R. v. Edwards Books Ltd., supra, per La Forest, J., at 801

**(d) Foreign Jurisdictions**

70. The internal elements of a labour relations structure as legislated within a particular jurisdiction reflect historical, social and economic choices within that jurisdiction so that, for comparative purposes, individual systemic elements are not directly translatable to another jurisdiction.

Otto Kahn-Freund, Uses and Abuses of Comparative Law (1973), 37 Modern L. Rev. 1, at 20-27.

M. Mitchnick, Union Security and the Charter (Butterworths, 1987) at 7-9

71. It is submitted that the Applicant's reference to the labour relations schemes in other jurisdictions is of very limited value. The issue of union security is only one part of a labour relations model which must attempt to balance the competing interests of employers, employees and the public. The manifestation of union security within any jurisdiction cannot be assessed in isolation but must be related to the elements of union recognition, certification and de-certification, the binding nature of agreements on non-members and whether representation is exclusive to one union or multi-lateral. Moreover, of fundamental importance is the historical role of trade unions within the political and social structure of the jurisdiction in question. The European models, in particular, have developed on completely different historical and structural lines.

Cross-examination of Desmond Morton, Case on Appeal, Vol. VIII, at 1514-17

Mitchnick, Union Security and the Charter, supra, at 43-45, 49-51, 57-59, 65-69

## D. REMEDY

72. The Respondent NUPGE adopts the argument presented by the Respondents OFL and CLC in respect of the remedial issues herein.

73. It is the position of the Respondent NUPGE that, should this Honourable Court find an infringement of the Appellant's fundamental freedoms which cannot be justified by s.1, the appropriate remedy is a declaration as to the Appellant's rights combined with an order that the parties to the collective agreement re-negotiate an addition to Article 12.01 which conforms with the aforesaid declaration. The decision as to the appropriate method for manifesting the Court's declaration ought to be left to the parties who best appreciate the respective interests and capabilities of the participants.

## E. COSTS

74. Summary of Argument: If this appeal is dismissed, the Respondents NUPGE, OFL and CLC should be entitled to their costs throughout this litigation since they ought to have been included as necessary parties in the original application.

75. The CLC, OFL and NUPGE have been referred to throughout this case as Intervenors. They were named in the original application as the sources of most of the impugned expenditures but were not joined by the Appellant as Respondents to that application. The CLC, OFL and NUPGE moved for orders joining them as necessary parties or granting them leave to intervene as added parties. With the consent of the Appellant and pursuant to Rule 13.01 of the Ontario Rules of Practice, the three groups were granted leave to intervene as added parties.

Motions to Intervene, and Orders Granting Leave to Intervene, Case on Appeal, Vol.1, at 9-21.

76. The Declarations granted at trial by White, J., while subsequently set aside by the Ontario Court of Appeal, imposed obligations on NUPGE, OFL and CLC in respect of their internal expenditures.

Judgment of White, J., para 1(5), Case on Appeal, Vol. X, at 1906.

77. It is submitted that the Respondents NUPGE, OFL and CLC ought to have been joined by the Appellant in the original application herein because of the direct manner in which the Appellant impugnes their actions and because the relief he has been seeking affects their interests. Rule 13.01 of the Ontario Rules of Practice is a form of intervention distinct from the traditional "amicus curiae" intervention now provided by Rule 13.02. The "intervenor" under Rule 13.01 is called an "added party" and has full rights of participation. The basis for an application under Rule 13.01 requires a direct and substantial connection with the claim. Accordingly, the Respondents NUPGE, CLC and OFL, as added and necessary parties, are entitled to costs throughout if successful on this appeal.

Rules of Civil Procedure, O. Reg. 560/84, Rules 13.01 and 13.02

78. If this Honourable Court finds that the Appellant is entitled to any relief, it is submitted that any award of costs in his favour must be crafted in order to ensure that the Appellant is indemnified only for costs actually incurred. It is a

fundamental principle that, in judicial proceedings, a successful party is only entitled to costs as indemnification or compensation for costs actually incurred by that party.

Bell Canada v. Consumers Association of Canada et al (1986), 26 DLR (4th) 573 (S.C.C.) per Le Dain, J., at 582, and 586-587

79. Costs are not intended to provide a windfall profit for the party awarded them. In this case, the Appellant's litigation has been funded by the National Citizens Coalition (N.C.C.) which conducted a public fund raising campaign for that purpose. Therefore, it is submitted that costs ought not to be available to a party who has been indemnified by a third party organization which itself has incurred no expenses because of its successful campaign to raise funds.

Affidavit of David Wright, Case on Appeal, Vol. X, at 1873-1880, and the Exhibits thereto at 1881-1896

Reasons for Judgment of White, J., Case on Appeal, Vol. XI, at 2098-99

80. If the scope and expenses of Charter litigation necessitates a re-thinking of the traditional view of costs as a partial indemnity for the expenses incurred by a successful litigant, then the judiciary must control the process of reimbursement to ensure that litigation does not become the source of profit in the hands of a third party. The same rationale as has applied to the development of the law of champerty should be adopted to ensure that a legitimate need for financial assistance cannot be transformed into a source of profit for a third party. It is contrary to public policy to permit or encourage profit-making on litigation: "Anglo-Canadian jurisprudence has never countenanced trafficking in litigation."

Frederickson v. I.C.B.C., [1986] 4 W.W.R. 504 (B.C.C.A.) at 511

Trendtex Trading Corp. v. Credit Swisse, [1980] 3 All E.R. 721 (C.A.) per Denning M.R. at 741-744; per Oliver L.J. at 748-749

81. It is respectfully submitted that any order for costs in favour of the Appellant should be limited to any deficiency between funds raised through N.C.C.'s public appeal and the costs of the litigation incurred by the Appellant.

## PART IV - ORDER REQUESTED

82. It is respectfully submitted that the appeal herein be dismissed with costs to the Respondents OPSEU, NUPGE, OFL and CLC throughout.

All of which is respectfully submitted.

J. Cameron Nelson

Allan Manson

of Counsel for the
Respondent NUPGE

## PART V - AUTHORITIES

**(a) Cases Referred To:**

(c) **Statutes and Regulations:**

1. Canadian Charter of Rights and Freedoms, ss.1, 2(b), 2(d), 7, being Part 1 of the Constitution Act, 1982, enacted as Schedule B, Canada Act, 1982 c.11 (U.K.).

2. Colleges Collective Bargaining Act, R.S.O. 1980, c. 74, s. 51, 52, 53, 59, 65, 68, 71, 75 and 76.

3. Election Finances Act, S.M. 1982-83-84, c. 45, (C.C.S.M., c. E32).

4. Rules of Civil Procedure, O. Reg. 560/84