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Court File No: 21378

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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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SIGNIFICATION

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PART I - THE FACTS

1. Lavigne appeals a decision of the Ontario Court of Appeal dated January 30, 1989, in which that Court unanimously dismissed his application for a declaration that his freedom of association and expression are infringed to the extent that he is required to pay union dues which are used for purposes objected to by Lavigne.

2. The Respondent, the Ontario Public Service Employees Union (OPSEU), is an independent Canadian union representing approximately 87,000 workers in Ontario, including some 12,000 academic and support staff at Colleges of Applied Arts and Technology. Lavigne is a member of the academic staff at the Haileybury School of Mines, and a member of the academic staff bargaining unit. He is not a member of OPSEU.

Affidavit of James Clancy, Case on Appeal, Volume V, p.773, paragraph 2

3. OPSEU's constitution and structure are highly democratic. Its policies are determined democratically. Its policy makers are democratically elected and accountable. OPSEU respects the rights of individuals, minorities and dissidents, both within the union and among those who have chosen not to join the union. Non-members can attend union meetings and speak from a local level up to the executive board level. Non-members can also vote on the ratification of collective agreements.

Affidavit of James Clancy, Case on Appeal, Volume V, pp.776-779, paragraphs 9-11, 21-22

Cross-examination of James Clancy, Case on Appeal, Volume II, p.203

Undertakings on the cross-examination of James Clancy, Case on Appeal, Volume V, p.888

4. OPSEU has a proud record of activity in social, economic and political fields designed to "advance the common interest, economic, social and political, of...all public employees...(and to improve) the well being of workers generally in Canada". This record is fully consistent with the history of the Canadian labour movement.

Affidavit of James Clancy, Case on Appeal, Volume V, p.782, paragraph 32

Affidavit of Wayne Roberts, Case on Appeal, Volume V, pp.904-942

5. Prior to the Second World War collective bargaining in Canada was governed by common law. Employers were under no obligation to bargain with employees. Unions were free to negotiate "closed shop" contracts requiring union membership as a condition of employment if they had sufficient bargaining power. Employees who were unwilling to join the union or were expelled from the union faced the prospect of dismissal.

Cross-examination of Desmond Morton, Case on Appeal, Volume VIII, pp.1493-1494

Affidavit of David Bercuson, Case on Appeal, Volume IX, p.1777, paragraph 3

6. In the 1920's employers waged an "Open Shop Drive", the purpose of which was to eliminate closed shops. Prior to this campaign, union membership in the country had reached approximately 17% of the work force, but:

> As a result of the campaign the union membership in the country fell drastically to the point where, by 1929, 1930, the labour movement was back to where it had been in 1913. There isn't any question that the Open Shop Drive that was launched by the organized employers was at least in part responsible for the roll-back in union membership.

Cross-examination of David Bercuson, Case on Appeal, Volume IX, pp.1798-1799, paragraph 19

7. Union security was essential to the survival of unions. The only unions that survived for any length of time were those that obtained "a closed shop arrangement or very close to a closed shop arrangement":

> The general rule is unions seeking security of membership either through a closed shop or some other kind of restrictive arrangement, if they don't their lifespan tends to be short, which is the nature of the market.

Cross-examination of Desmond Morton, Case on Appeal, Volume VIII, pp.1487-1495, paragraph 39

Cross-examination of David Bercuson, Case on Appeal, Volume IX, pp.1798-1800

8. The first comprehensive labour relations legislation, PC 1003, was proclaimed by the federal cabinet in 1944. The basic principles of that system remain in place today. A union that can demonstrate majority support in an appropriate "bargaining unit" of employees is entitled to be certified as the exclusive bargaining agent for all those employees. The employer has a duty to bargain with the

union in good faith. All employees are bound by the contract negotiated by the union and the employer. The union is prohibited from going on strike during the life of a collective agreement.

Adams, Canadian Labour Law, pp.12-17

Carrothers, Collective Bargaining Law in Canada (2nd Edition) pp.81-87

Affidavit of David Bercuson, Case on Appeal, Volume IX, pp.1777-1779, paragraphs 3-7

9. While PC 1003 represented a major gain for employees, neither it nor subsequent legislation dealt with union security. In 1944 and 1945, union security became the central issue in labour disputes. From 1944 to December 1945, 125 of 132 labour disputes investigated by federal conciliation officers related to union security. Union security strikes caused more lost working days during this period than the combined total of all other strikes.

Affidavit of Wayne Roberts, Case on Appeal, Volume V, p.924, paragraph 41

H.A. Logan, State Intervention and Assistance in Collective Bargaining: The Canadian Experience 1943-1954 pp.83-5

10. The single most important strike over union security was the 1945 UAW-Ford strike in Windsor. After a long and bitter struggle both sides agreed to binding arbitration by Mr. Justice Rand of the Supreme Court of Canada.

Affidavit of Wayne Roberts, Case on Appeal, Volume V, pp.924-925, paragraphs 42-44

11. Rand J. refused the union's request for a closed shop. Recognizing the need for union security, however, he invented and awarded a compromise device whereby all employees in the bargaining unit would pay dues to the union, but would not be required to become members of the union. Mr. Justice Rand's award was based on the following factors:

(1) Unions and collective bargaining are socially desirable. The history of the past century demonstrates that "the power of organized labour, the necessary co-partner of capital, must be available to redress the balance of what is called social justice...". Unions have an "essential" role in a private enterprise economy.

(2) To carry out these functions, it is necessary that unions be strong. Some form of union security clause is necessary to maintain the strength and integrity of a union.

(3) The choice is between awarding some sort of union security on a reasoned, rational basis, or leaving it to economic warfare, "in all its ferocity and waste".

(4) Imposing a form of security requiring membership in the union would unreasonably infringe the rights of individual workers and expose them to the risk of "arbitrary action".

(5) It is equitable that all employees pay dues; otherwise non-members share the fruits of unionist work without sharing the burden. "...I doubt if any circumstance provokes more resentment in a plant than this sharing of the fruits of unionist work and courage by the non-member".

Rand award, Case on Appeal, Volume VI, pp.1044-1051

12. At the time of the Rand award Canadian unions were active in politics. This included electoral politics as well as a variety of social issues such as international peace, the availability of birth control, unemployment insurance, medicare, pension plans and minimum wages. Despite this background, and despite the fact that the UAW actively supported the CCF, Rand J. did not prohibit the use of non-member dues for political purposes. The funds were to be used for "general union purposes" as permitted by the union's constitution. The limit was that non-members did not have to pay any portion of dues which provided benefits to union members only, such as a union insurance scheme.

Cross-examination of David Bercuson, Case on Appeal, Volume IX, pp.1810-1811

Affidavit of Wayne Roberts, Case on Appeal, Volume V, pp.904-942

Affidavit of Desmond Morton, Case on Appeal, Volume VIII, pp.1468-1474

Affidavit of Irving Abella, Case on Appeal, Volume VII, pp.1417-1421

13. The "Rand formula" quickly gained acceptance and was rapidly incorporated into a large number of collective agreements, to the point where it became almost "universal" in Canada. Union security quickly faded as a major issue. Security strikes all but disappeared.

Cross-examination of David Bercuson, Case on Appeal, Volume IX, pp.1806-1808

H.A. Logan, State Intervention, supra, pp.83-5

14. The Colleges Collective Bargaining Act (CCBA) was enacted in 1975. With certain exceptions, it establishes a proto-type collective bargaining regime, which applies only to Colleges of Applied Arts and Technology. Section 53(3) of the Act prohibits closed shop agreements. Section 53(1) provides that the parties "may provide for the payment by the employees of dues or contributions to the

employee organization". The collective agreement between OPSEU and the Colleges contains a dues check-off provision modelled on the Rand award (Article 12.01).

S.O. 1975, c.74

R.S.O. 1980, c.74

Reasons for Judgment of White J. dated July 4, 1986, Case on Appeal, Volume X, p.1915

PARTS II & III - ISSUES AND LAW

THE FIRST ISSUE : FREEDOM OF ASSOCIATION

The First Submission: Neither the CCBA nor the collective agreement force Lavigne to be associated with OPSEU contrary to s.2(d) of the Charter.

15. This Respondent assumes that s.2(d) of the Charter protects both freedom to form or join an association, and freedom from being forced to join one. The clearest example of a breach of the negative aspect of s.2(d), it is submitted, is where an individual is forced to be a member of an association that represents interests and viewpoints of a group to which the individual does not belong.

16. Lavigne submits that ss.51, 52 and 53 of CCBA and the collective agreement enabled thereby force Lavigne into association with OPSEU, by compelling him to associate with the union as his bargaining agent, and by compelling him to support the union financially. Lavigne relies on a passage from Oil, Chemical & Atomic Workers v. Imperial Oil, in which this Court held that British Columbia could, as a matter of property and civil rights in the province, enact legislation prohibiting unions from contributing to political parties. In that context Mr. Justice Martland said:

> ...a union has, as the 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 with association with it, whether as members, or as persons whom it can bind by a collective agreement, even though not members.
>
> Oil Chemical and Atomic Workers International Union v. Imperial Oil Limited, [1963] SCR 584, 593
>
> Reasons for Judgment of White, J. dated July 4, 1986, Case on Appeal, Volume X, pp.1936-1937
>
> Appellant's Factum, paragraph 53

17. OPSEU acknowledges that a union is not a "purely" voluntary organization. An employee who opposes unionization but is outvoted by the majority is represented by the union notwithstanding the opposition. On the other hand, unions are not "purely" involuntary organizations either, for two reasons. First, employees who support the union and choose to become members do so voluntarily. Second, and more importantly, the legislation ensures that the decision to unionize is a democratic decision in which every employee has the right to participate, including those who oppose unions. Accordingly, a decision to be represented by a union is the free and voluntary decision of all employees in the bargaining unit, whether they voted for or against the union. The only "involuntary" aspect of Lavigne's relationship with OPSEU, it is submitted, is that he does not agree with the decision of the majority to unionize.

18. OPSEU submits that in a democracy individuals are not "forced" by decisions of the majority if they are free to participate in the decision-making process. Enfranchised individuals voluntarily associate with the outcome of a democratic process, knowing that the decision may go for or against them. Democratic decision-making is a form of self determination, it is submitted, not an instance of coercion or forced association with the decision of the majority.

19. The fact that Lavigne is not a member of OPSEU does not take this case out of the democratic group category, it is submitted, because Lavigne is a member of the bargaining unit, and that is the group which has a legal right to participate in the process of determining whether or not to be represented by a union. A group of employees in a particular workplace is a "purely" voluntary group, it is submitted, in the same way and to the same extent as any democratic constituency, federal, provincial or municipal. Individuals are not forced to live or work in particular places in Canada. Accordingly, employees who oppose unions are not forced to associate with a successful union, because like members of any democratic constituency they voluntarily associate with the enfranchised group, aware that a vote may go against them. Further, a bargaining unit is free to vote to decertify a union. Opponents have an ongoing opportunity to alter the majority decision. Voluntary participants in a democratic process are not forced to associate with the result, it is submitted, only because it goes the wrong way.

CCBA, ss.65, 66, 71

20. This Court has indicated that the "purpose" of entrenching the Charter was to ensure that "Canada is a free and democratic society", and has stated that in interpreting the Charter "The Court must be guided by the values and principles essential to a free and democratic society". The concept of freedom from association advanced by Lavigne in this case is fundamentally anti-democratic, it is submitted, because it would apply the Charter to give losers in a democratic process freedom from the decision of the majority. Lavigne says that when the majority of a voluntary group votes to be represented

by a particular agent for particular purposes the minority that opposed the decision is unconstitutionally "forced" to associate with the agent selected. OPSEU submits that Lavigne gives freedom from association such a wide meaning that it would undermine the basic principle of democratic organization: majority rule. Freedom from forced association does not, it is submitted, include freedom from the will of the majority of a democratic community.

R. v. Oakes, [1986] 1 SCR 103, 136

21. Accordingly, OPSEU submits that ss.51, 52 and 53 of the CCBA do not force employees to associate with a union, because the decision to be represented by a union is entirely the result of a democratic vote. Democratic decision-making is the antithesis of force or coercion, it is submitted, not an instance of it. OPSEU submits that the CCBA does not "force" Lavigne to associate with a union in any sense that the constitution of a democratic society can be designed to protect against.

22. OPSEU further submits that Lavigne's obligation to pay the equivalent of union dues does not force him into association with the union, for the reason given by the Court of Appeal:

> [Lavigne's] payment to the union under the agency shop agreement cannot be construed as placing his stamp of approval on anything done by the union or on any cause to which it might contribute.
>
> Reasons for Judgment of the Ontario Court of Appeal, Case on Appeal, Volume XI, p.2158

23. It is submitted that the obligation to pay union dues under the terms of the collective agreement does not unconstitutionally force Lavigne into association with OPSEU, because s.2(d) protects against forced association with groups representing interests or objectives an individual does not share, not against association with objectives common to a group to which the individual voluntarily belongs. Section 2(d) guarantees freedom from association with foreign associational objectives, not common associational objectives, it is submitted, because where the individual is voluntarily a member of a group, association with the group's common objectives is voluntary, not forced.

24. That is the situation here. Lavigne is voluntarily a member of the academic staff at Haileybury college. OPSEU has a statutory duty to represent all members of the bargaining unit in good faith, without discrimination between members and non-members. Lavigne is not forced to associate with objectives other than his own, it is submitted, because the objectives the union pursues are as much

Lavigne's as any other member of the bargaining unit.

CCBA, s.76

25. OPSEU submits that an obligation to financially support a particular organization can infringe s.2(d) of the Charter only if the payment creates an association between the payor and the recipient that does not otherwise exist on a voluntary basis. Where, as here, an individual is voluntarily a member of a group with certain common interests and objectives, an obligation to pay for services rendered in pursuit of those objectives does not convert the voluntary association into a forced one. Section 2(d) may protect against forced financial support of foreign associational objectives, it is submitted, but it does not give individual members of voluntary groups freedom to avoid paying a fair share of the cost of pursuing the group's common objectives. Lavigne's obligation to share the cost of college employees pursuing their common objectives through a union is not forced association, it is submitted, because Lavigne's association with the group represented by the union is voluntary, and is neither forced nor created by the obligation to pay dues.

26. Accordingly, it is submitted that neither the legislation nor the collective agreement nor both together force Lavigne to be associated with the union. If the association between Lavigne and OPSEU is less than "purely" voluntary, it is no more "forced" than the association between any elected agent and the minority of the constituency who oppose the agent's election. Lavigne's theory of association should be rejected, it is submitted, because it is fundamentally inconsistent with democratic values the Charter is designed to protect. Freedom from association does not include freedom from decisions taken by the majority of a voluntary group. It does not include freedom to avoid the result of a democratic vote. It does not include freedom from paying a share of the cost of a voluntary group pursuing common objectives, only because one disagrees with objectives chosen by the majority. Lavigne seeks to apply the negative aspect of s.2(d) broadly, to give the individual freedom from the actions of the majority even where an issue is decided democratically and even where the majority acts only in the group's common interests. The theory of free association advanced by Lavigne should be rejected, OPSEU submits, because it does not recognize that even in a democracy with an entrenched Charter of Rights, individual liberty only has such scope as is consistent with the democratic freedom of the whole group.

The Second Submission: Lavigne's freedom under the negative aspect of s.2(d) must be balanced against any impairment of the majority's freedom under the positive aspect of s.2(d). In the circumstances, the infringement of Lavigne's negative freedom is the minimum consistent with employees' positive freedom to associate.

27. In the alternative, if s.2(d) does have the reach contended for by Lavigne, it is submitted that individual freedom under the negative aspect of s.2(d) must be balanced against employees' associational freedoms under the positive aspect of s.2(d). It is further submitted that this balancing should occur separately from and prior to balancing the importance of governmental objectives under s.1 of the Charter. The s.1 process is distinct from the process of weighing individual against majority rights under s.2(d), it is submitted, because the right to form a union is itself constitutionally protected, and does not have to be demonstrated to be an important governmental objective for s.1 purposes. Where a majority of employees exercise their freedom to join a union, that freedom is entitled to be weighed against any freedom an individual may have to avoid it, and quite apart from s.1, it is submitted, because freedom of association is a constitutionally protected freedom.

28. In Re Public Service Employee Relations Act this Court indicated that freedom of association includes more than the right to form or join an association, and also protects the freedom to engage in certain collective activities. The plurality, speaking through Le Dain J., indicate that s.2(d) "afford(s) a wide scope for protected activity in association", because it protects the right to collectively exercise other constitutional freedoms such as freedom of expression, and also 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 reprisals" (emphasis added).

Reference Re Public Service Employee Relations Act, Labour Relations Act and Police Officers Collective Bargaining Act, [1987] 1 SCR 313, per Le Dain J., p.391; per Dickson CJC., pp.366, 362-71, 345-358; per McIntyre J., pp.407-408, 395-409

29. It is submitted that two group rights recognized in Re Public Service Employee Relations Act are relevant here:

(a) The association's freedom of expression, which is protected collective activity because it is independently recognized as a fundamental freedom in the Charter;

(b) Freedom to "maintain" an association free of legal restraints that make the right to associate ineffective, which is protected associational activity because the right to "maintain" the association is a fundamental incident of the right to form it.

30. The right to "maintain" an association has a special history and significance in the labour relations context. Prior to 1944, when unions first received a statutory right to represent all employees in a workplace where they have majority support, employees' ability to bargain collectively depended on

whether they had the economic power to negotiate a closed shop agreement. Unions which could not negotiate closed shop arrangements tended not to survive.

Cross-Examination of Desmond Morton, Case on Appeal, Volume VIII, pp.1487-1495

Cross-Examination of David Bercuson, Case on Appeal, Volume IX, pp.1798-1800

31. Early experience under the first collective bargaining legislation (PC 1003), especially the Ford strike leading to the Rand award in 1946, showed that in practice "union security" in the workplace and collective bargaining are in jeopardy, even where the union has exclusive representation rights, if the union must represent all members of the bargaining unit but receive dues only from consenting individuals. Immediate and wide acceptance of the Rand formula virtually eliminated union security strikes in Canada, which had been the main cause of lost working days during 1944 and 1945. OPSEU submits that this history, especially the role of the Rand award, indicates that some form of union security - closed shop or agency shop - is essential to employees' freedom to form and maintain a union. As indicated, the CCBA prohibits closed shop provisions, but permits the parties to negotiate a Rand formula (agency shop) clause.

Affidavit of Wayne Roberts, Case on Appeal, Volume V, p.924, paragraph 41

H.A. Logan, State Intervention, supra, pp.83-85

32. Union security provisions lie at the core of an employee's right to associate, it is submitted, because where individual employees are free to obtain the benefits of collective action while avoiding both the responsibilities of membership and the burden of paying dues, the freedom of the majority to organize is in jeopardy. Each employee who opts not to pay dues weakens a union. In a workplace where the number of dissenters is significant the union is too weak to be effective and disappears.

33. Lavigne seeks to opt out of union dues to the extent that the union uses funds for political or ideological purposes to which he objects. Recognition of this freedom would create an even stronger disincentive to union membership than the economic disincentive, it is submitted, because ideological and political principles are more important to many individuals than the amount of money involved.

34. It is submitted that the freedom sought by Lavigne is fundamentally inconsistent with the constitutional right to "maintain" employee organizations in the workplace, because a constitutional right [illegible] of union dues amounts to a constitutional prohibition against any form of union security. If

Rand formula clauses are unconstitutional, presumably closed shop provisions must also fail. This Court has already recognized that freedom of association under s.2(d) is intended, in part, to guarantee employee's freedom to form and maintain employee associations. The freedom asserted by Lavigne fundamentally undermines that right, and should not, it is submitted, be recognized for that reason.

35. It is further submitted that the freedom sought by Lavigne is inconsistent with the union's freedom of expression. Freedom to opt out of disagreeable union initiatives weakens the voice of the union, it is submitted, both its authority because of a diminished constituency, and its reach because of diminished resources. In bargaining units where dissent is strong the union becomes a weak and ineffective advocate, or no advocate at all. Worse, the freedom asserted by Lavigne effectively eradicates unions from the "political" arena, it is submitted, because the more political a matter may be the greater the likelihood of significant dissent, and the greater the likelihood that unions will find silence preferable to a controversy that brings the political and financial benefits of non-membership into focus. This Court has recognized that unions enjoy freedom of expression. OPSEU submits that the individual freedom asserted by Lavigne has both the purpose and effect of significantly impairing the union's freedom to advocate the causes of its constituency, and ought not be recognized for that reason.

36. For reasons already given, it is submitted that s.2(d) of the Charter requires a balancing of group and individual rights, if indeed it protects both freedom of association and freedom from association. It is further submitted that the agency shop device originally introduced by Mr. Justice Rand creates an appropriate balance in the present context, because it accommodates both the collective choice and the individual right to disassociate.

37. The individual freedom asserted by Lavigne, on the other hand, is fundamentally inconsistent with employees' freedom to form and maintain an employee association. Indeed, the freedom sought fundamentally undermines the essence of trade unions as they have existed in Canada since 1946, because on Lavigne's theory s.2(d) constitutionally outlaws the concept of an employee association that speaks with the authority and resources of all employees so long as it continues to enjoy the support of the majority. In effect, Lavigne seeks to give dissenting employees the best of both worlds: the benefit of collective action where the union pursues agreeable objects, the benefit of individual choice when it does not. The two worlds, however, cannot co-exist. Either employees have a right to speak with a single voice and obtain whatever benefits collective action might bring, or dissenters have a right to opt out, in which case there is no collective voice. Lavigne's theory of free association is wrong, it is submitted, because it applies a section of the Charter primarily designed to protect group rights in a way that totally subordinates group rights to the rights of the individual.

THE SECOND ISSUE: FREEDOM OF EXPRESSION

The First Submission: The payment of dues does not infringe the right to remain silent because inthe circumstances the payment is not expressive activity.

38. Lavigne submits that the obligation to pay union dues infringes his freedom to remain silent under s.2(b) of the Charter, because he is compelled to provide positive affirmation - in the form of a financial contribution - to the union's non-collective bargaining activities, specifically the causes listed in Appendix "A" to the Amended Application. Both Courts below held that there was no infringement of s.2(b), because Lavigne would not be associated or identified with the ideological causes supported by the union. The Court of Appeal said:

> 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 Ontario Court of Appeal, Case on Appeal, Volume XI, p.2163
>
> Appellant's Factum, paragraph 63

39. Lavigne submits that the absence of public identification with OPSEU's causes and his freedom to disavow them are not "relevant" to the forced speech issue, and cites American cases which he says do not treat these factors as elements of the breach alleged. OPSEU submits that Lavigne's reliance on the U.S. cases he cites is misplaced for three reasons.

(i) They were all decided prior to Pruneyard Shopping Center v. Robins, which expressly holds that public identification is a central issue in forced speech cases.

(ii) The earlier cases show, at most, that the USSC did not address the public identification issue where the legislation was bad for another reason: it was content based, since government had dictated the message to be affirmed or displayed.

(iii) Cases subsequent to Pruneyard indicate that the USSC does not agree with Lavigne's assertion here that members of the public would not have identified individuals with the offensive messages at issue in the earlier cases.

> Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980)
>
> Appellant's Factum, paragraphs. 66,68,69

40. In Pruneyard v. Robins the Supreme Court upheld a state constitutional provision requiring shopping centre owners to allow individuals to exercise free speech rights on shopping centre property. The Court rejected the property owner's forced speech argument for three reasons:

> Most important, the shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. Second, no specific message is dictated by the State to be displayed on appellants' property. There consequently is no danger of governmental discrimination for or against a particular message. Finally, as far as appears here, appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand.

Pruneyard Shopping Center v. Robins, supra, p.87

41. Pruneyard leaves no doubt that public identification is an issue in forced speech cases. Indeed, the Court said it was the "most important" consideration. The earlier cases on which Lavigne relies strike down legislation that failed the second test enumerated in Pruneyard: it was content-based. Board of Education v. Barnette, for example, held compelled salute of the flag unconstitutional, because government may not "prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion, or force citizens to confess by word or act their faith therein". Wooley v. Maynard held compelled display of the state motto "Live Free or Die" on motor vehicle license plates unconstitutional, because it required citizens to use their property as a "mobile billboard" for the state's ideological message. Miami Herald v. Tornillo involved "right of reply" legislation requiring newspapers who attacked a political candidate's character or record to publish the candidate's reply. In a subsequent case, Pacific Gas v. Public Utilities Commission, the Supreme Court explained that the Miami Herald legislation was content based in two ways: (1) access to the newspaper "was triggered by a particular category of newspaper speech", namely attacking a political candidate, and (2) access was "awarded only to those who disagreed with the newspaper's views".

> West Virginia State Board of Education v. Barnette 319 US 624, 642 (1943)
>
> Wooley v. Maynard 430 US 705, 715 (1977)
>
> Miami Herald Publishing Company v. Tornillo 418 US 241 (1974)
>
> Pacific Gas and Electric Company v. Public Utilities Commission of California 106 S.Ct. 903, 910 (1986)

42. It is submitted that these cases show only that in the U.S. content bias is a sufficient condition for finding legislation unconstitutional, absent a "compelling" state interest. Pruneyard shows

that where the legislation is content-neutral, however, it must also satisfy one or both of two other conditions: (1) the individual will not be publicly identified with the objectionable message and (2) the individual is free to disavow the message. Accordingly, the U.S. authorities Lavigne relies upon do not demonstrate that public identification is not an element of a forced speech claim. They demonstrate that the Supreme Court did not consider it necessary to address that issue where the legislation was content-based, at least prior to Pruneyard. Pruneyard demonstrates that public identification is an element of the breach, it is submitted, because the absence of public identification was one of three reasons why the forced speech claim was rejected.

43. Lavigne says that in the cases he cites "it could hardly be suggested that members of the public would identify individuals with the offensive message". In Pruneyard, however, the Supreme Court distinguishes Wooley (license plates), apparently as failing all three Pruneyard conditions:

> Wooley, however, was a case in which the government itself prescribed the message, required it to be displayed openly on appellee's personal property that was used "as part of his daily life," and refused to permit him to take any measures to cover up the motto even though the Court found that the display of the motto served no important state interest.
>
> Pruneyard Shopping Center v. Robins, supra, p.87
>
> Appellant's Factum, paragraph 69

44. Subsequent to Pruneyard, in Pacific Gas v. PUC, the Supreme Court considered a right of reply issue similar to Miami Herald, though in a different context, and expressed concern that members of the public would identify the forced message with the speaker. Pacific Gas was required to give a ratepayer's association reply space in its "newsletter", which it distributed in customer billing envelopes. The Court indicates that when the association (TURN) advocates viewpoints contrary to the company's interest, the company "may be forced either to appear to agree with TURN's views or to respond".

> Pacific Gas and Electric Company v. Public Utilities Commission of California, supra, pp.905, 910-11, 914

45. It is submitted that the above comments indicate that on the facts in at least two of the pre-Pruneyard cases. Wooley and Miami Herald, public identification was a significant possibility. Contrary to Lavigne, OPSEU submits that the public would likely identify the forced message with the speaker, at least in Wooley and Barnette, because persons observing patriotic behaviour such as saluting the flag or displaying a "state motto" generally assume the sincerity of the act, even where everyone does

it. It is therefore submitted that the cases cited by Lavigne are not examples of legislation being struck down even where public identification was not a concern.

46. The reason that public identification and disavowal are important in forced speech cases, it is submitted, is that without these elements a contribution of funds or other property is not a mode of expression eligible for protection under s.2(b). In A.G. Quebec v. Irwin Toy, this Court held that "Activity is expressive if it attempts to convey a meaning", and that if "activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee".

A.G. Quebec v. Irwin Toy Company, [1989] 1 SCR 927, 968-969

47. OPSEU submits that an expenditure of funds is not per se expressive activity, but may become such in two circumstances. First, where a person voluntarily contributes funds to a speaker for the purpose of disseminating particular viewpoints the contribution conveys a meaning and is expressive activity for the reason given by the U.S. Supreme Court in Buckley v. Valeo: the contribution is a symbolic expression of support for the speaker and the viewpoints expressed. A voluntary contribution to a political party, for example, is expressive conduct, while payment for goods or services received is not, it is submitted, because the first expenditure is intended to convey a message of partisan support, whereas the second is not designed to convey any meaning.

Buckley v. Valeo 424 US 1, 21 (1976)

A.G. Quebec v. Irwin Toy Company, supra, p.969

48. An involuntary expenditure may also be expressive conduct and eligible for protection under the negative aspect of s.2(b), it is submitted, but only if the payor is publicly identified with the viewpoints expressed, because in those circumstances the payment in fact conveys the message that the individual supports the viewpoints expressed, notwithstanding that the payment is not intended to convey support, or any meaning. An expenditure of funds is expressive conduct pursuant to Irwin Toy only if it "conveys or attempts to convey a meaning". It is submitted that voluntary expenditures to facilitate speech are constitutionally protected because they are an "attempt to convey" meaning, and that involuntary expenditures are protected if the payor is identified with the viewpoints expressed, because in that circumstance the expenditure actually "conveys" a meaning, though it is not an attempt to do so. An involuntary expenditure, however, is not expressive activity where public identification is lacking, it is submitted, because the expenditure neither attempts to convey nor actually conveys any meaning.

49. It is further submitted that in the circumstances of this case there is no reasonable possibility that the public will perceive Lavigne as affirming or symbolically supporting the union's viewpoints by paying union dues. On the facts, this case is not comparable to the U.S. "billboard" cases (license plate, newspaper, customer billing envelope), where government forced a challenger to display a disagreeable message on highly visible personal property used as part of "daily life". Nor is it as close to the "billboard" situation as Pruneyard, where the USSC found that the shopping centre owner would not be associated with the speaker's viewpoints even though the assistance to the speaker was highly visible. The reason given was that the property in Pruneyard was not "personal" as in Wooley and Miami Herald, it was "open to the public to come and go as they please".

Pruneyard Shopping Center v. Robins, supra, p.87

50. On the other hand, the subsidy in this case is comparable to the tax subsidies sustained by the U.S. Supreme Court in Buckley v. Valeo (public subsidies for political parties), and Regan v. TWR (tax benefits for veterans' organizations), because Lavigne's financial contribution is neither publicly visible nor identifiable with him personally. As in those cases, the contributions here are pooled with the funds of many individuals and have no personal aspect comparable to license plates or outgoing mail, or a newspaper, or even real estate. The fact that Lavigne pays dues to OPSEU is not obvious, nor before this case visible to the public. Even the small class of persons who may know that Lavigne pays dues would not believe that he supports every viewpoint expressed by the union, or that he supports every financial expenditure made by the union. It is commonly known that unions represent many different individuals with different views on different subjects, and that not every employee in a unionized workplace agrees with everything a union says and does. The fact that an individual pays union dues does not alter that perception.

51. It is further submitted that an obligation to pay union dues is not content-based in any [illegible]se recognized in U.S. jurisprudence, or otherwise. Government does not prescribe the message, as in Wooley (state motto) and Barnette (salute the flag). Government does not select a speaker because of the content of viewpoints expressed, as in Miami Herald (political candidates attacked by a newspaper) and Pacific Gas (ratepayer association's right to advocate viewpoints adverse to the company's position).

52. Nor is the payment of union dues content-based because a portion of the dues notionally supports speakers or organizations advocating particular viewpoints on particular issues, it is submitted, because there is no government involvement of any kind in union decisions to expend funds for particular purposes, or to take a side on particular issues. If Lavigne were publicly identified with the union's viewpoints or with organizations receiving union funds, his payment of dues might convey a "meaning"

with a particular "content". That fact, however, would only mean that the payment was expressive conduct, not that it is content-based. An obligation to expend funds is "tied to content", it is submitted, only when government in some way defines or selects the content of the expression to be favoured by a subsidy.

53. The payment of dues to OPSEU is content neutral, it is submitted, for the same reason the U.S. Supreme Court found tax subsidies for political lobbying by veteran's organizations content-neutral in Regan v. TWR, notwithstanding that other organizations were ineligible for the subsidy if they engaged in "substantial lobbying". The Court held the subsidy content neutral because the veterans organizations were entitled to receive the subsidy "regardless of the content of any speech they may use".

> Regan v. TWR, 103 S.Ct. 1977, 2002 (1983)

54. Accordingly, it is submitted that Lavigne's obligation to pay union dues does not infringe the right to remain silent for two reasons: (1) an involuntary expenditure of funds is not expressive conduct entitled to protection under the negative aspect of s.2(b) unless the payor is publicly identified with the speaker's views, because absent public identification the expenditure neither attempts to convey a meaning nor actually conveys any meaning; and (2) the obligation to pay dues is in no sense tied to the content of the union's viewpoints, and applies whatever views the union might choose to express.

THE THIRD ISSUE: APPLICATION OF THE CHARTER

55. In Retail, Wholesale and Department Store Union v. Dolphin Delivery this Court held that the Charter applies to the legislative, executive and administrative branches of government, and not to private action, except where there is a "direct and precisely defined connection" with government action.

> Retail, Wholesale and Department Store Union v. Dolphin Delivery [1986] 2 SCR 573, 598, 601

The First Submission: The Charter does not apply to the union's conduct in spending dues for purposes Lavigne finds objectionable.

56. The Notice of Application commencing this litigation alleges that ss.51, 52 and 53 of the CCBA and the collective agreement are unconstitutional "to the extent that...(they) permit the dues that are compulsorily required to be paid to OPSEU to be used for any of the purposes set out in Appendix "A" to the Amended Application". Accordingly, as Lavigne characterizes his own case there is no

infringement of the Charter unless the union spends dues for Appendix "A" purposes. Objectionable use of Lavigne's dues is an element of the Charter breach he alleges.

> Amended Notice of Application, Case on Appeal, Volume I, p.4
>
> Reasons for Judgment of the Ontario Court of Appeal, Case on Appeal, Volume IX, pp.2141-2142

57. Lavigne acknowledges that the union is a private organization not subject to the Charter. To establish that government has infringed his Charter rights, it is therefore necessary for Lavigne to demonstrate a "direct and precisely defined connection" between the Council of Regents or some other governmental actor and the use which the union makes of the dues. Lavigne, however, neither alleges nor demonstrates any government involvement in any union spending decisions. Indeed, since government is the employer, government involvement in the administration of the union's affairs would impair the union's "fitness to represent the interests of employees" and disqualify it from maintaining bargaining rights under the CCBA.

> CCBA, s.69

58. It is submitted that Lavigne's application must fail because there is no connection, direct or indirect, between the Council of Regents or any other government actor and the conduct alleged to be unconstitutional, the union spending Lavigne's dues for Appendix "A" purposes. It is further submitted that the Court of Appeal correctly decided this issue when it said:

> The mere making of the funds available to the union by the Council without direction of any kind as to use does not convert the union's expenditures into governmental action. ...
>
> The essence of Lavigne's complaint is that the Council of Regents has failed to restrict the uses to which the union dues can be put. Section 2 of the Charter does not give rise to affirmative obligations on the part of government or a government body to take positive steps to prevent private parties from violating constitutional rights. The Charter does not apply to private activity merely because government has failed to prohibit that activity. The use of dues by the union is a private matter.
>
> Reasons for Judgment of the Ontario Court of Appeal, Case on Appeal, Volume XI, p.2142

The Second Submission: The Charter does not apply to government in its capacity as employer.

59. It is submitted that the Charter does not apply to the Council of Regents in its capacity as employer, or to its action in entering the collective agreement, because employment matters are not

a government function and the Charter applies to government only when it exercises governmental functions.

McKinney v. University of Guelph et al. (1987), 63 OR (2d) 1, 24 (CA)

The Third Submission: Neither the CCBA nor the Council of Regents compels Lavigne to pay dues, the union does.

60. In the alternative, if the Charter does apply to the conduct of government qua employer, and if as Lavigne now asserts the compelled payment of dues infringes the Charter no matter how the dues are spent, the Respondent submits that government has not infringed Lavigne's Charter rights in any event, because neither the legislation nor the Council of Regents compels Lavigne to pay union dues. Any compulsion that might exist, it is submitted, is the result of the union's conduct, and not of any action of government. Lavigne's contention that government compels him to pay is based on two aspects of government action: the Council of Regents entering the collective agreement, and ss.51, 52, and 53 of the CCBA.

Entering the Collective Agreement

61. OPSEU acknowledges that the Council of Regents is a government agent subject to the Charter, and that a governmental actor therefore entered the collective agreement at issue. OPSEU further acknowledges that Lavigne is compelled to pay dues, in the sense that the collective agreement imposes a legal obligation to pay as long as he remains a college employee. It is submitted, however, that it is not the act of the Council of Regents entering the collective agreement that compels Lavigne to pay dues. Rather, the union entering the collective agreement obliges Lavigne to pay, because the union's signature binds him to its terms, not the Council of Regents' signature. The union is the agent of all employees in the bargaining unit, including non-members, and signs the collective agreement on behalf of non-members. It is the union that forces the obligation to pay on Lavigne, it is submitted, not the Council of Regents, because it is the union that contracts the legal obligation to pay on his behalf.

62. The Record makes it clear, if it is not obvious, that the union and not the Council of Regents sought to have the agency shop provision included in the collective agreement. Since the Council of Regents' signature is pre-requisite to the collective agreement being enforceable, however, the issue that arises is whether the Council of Regents' acceding to the union's demand for the agency shop provision constitutes such a "direct and precisely defined connection" between government and the

conduct alleged to be unconstitutional that the union's contracting an obligation to pay dues bears the imprimatur of government, and should be regarded as government action for constitutional purposes.

Affidavit of James Clancy, Case on Appeal, Volume I, p.164, paragraph 9

63. In the United States, the Supreme Court has consistently held that "mere acquiescence" by government to private conduct is not a sufficient basis for making private conduct subject to the Bill of Rights. The Court will apply constitutional restraints only when government has placed its "weight" behind private conduct by taking some "initiative" or "affirmative action" to compel or encourage the "specific conduct" of which the Plaintiff complains. Where the governmental role is limited to a determination that a private party is "authorized to employ such a practice", the private party merely exercises a "choice allowed by state law" and constitutional restraints do not apply.

Jackson v. Metropolitan Edison, 419 US, 345, 356-7, 354 (1974)

Public Utilities Commission v. Pollak, 343 US 451, at 461-2 (1952)

Reitman v. Mulkey, 387 US 369, 376, 378 (1967)

Flagg Brothers v. Brooks, 436 US 149, 164-5 (1978)

Blum v. Yaretsky, 457 US 991, 1004 (1982)

Rendell-Baker v. Kohn, 457 US 830, 841 (1982)

Carlin Communications v. Southern Bell Telephone, 802 F.(2d) 1352, 1358 (11th Cir.) (C.A.)

64. In Jackson v. Metropolitan Edison, for example, the Court found that the constitution did not apply where state regulatory authorities had approved a private utility company's operating procedures without requiring that the company give customers an opportunity to be heard before discontinuing service. The Court held that government "approval" of this sort is not a sufficient basis for applying the constitution, because the "initiative" behind the practice came from the private actor and "not from the state". In PUC v. Pollak, on the other hand, the Court did apply constitutional restraints where regulatory authorities had investigated a private company's practice of broadcasting music on public transportation and approved the practice as conducive to the public interest. Jackson is different than Pollak, the Court says, because in Jackson "there was no such [government] imprimatur placed on the practice of Metropolitan about which petitioner complains".

Jackson v. Metropolitan Edison, supra, pp.354, 356-7

65. Similarly, in Reitman v. Mulkey the Supreme Court held government responsible for private racial discrimination where California had amended its constitution to prohibit the Legislature and state agencies from limiting the right of property owners to discriminate on the basis of race. The Court took account of the "historical context" and found that "the state had taken affirmative action" to encourage discrimination. In Flagg Brothers v. Brooks, on the other hand, the Court declined to apply the constitution to legislation providing a procedure under which a warehouseman had converted a lien on bailed goods into good title, because "This Court...has never held that a State's mere acquiescence in private action converts that action into that of the State".

Reitman v. Mulkey, supra, pp.375, 379, 373

Flagg Brothers v. Brooks, supra, pp.164-5

66. The Respondent submits that the principle underlying the American cases is the same principle stated by the Court of Appeal in this case: the Charter does not give rise to positive obligations on the part of government or a government body to take steps to prevent private parties from violating constitutional rights. It is further submitted that the distinction between government "acquiescence" to private conduct and a positive government "initiative" to encourage such conduct is appropriate in determining whether there is a sufficiently "direct and precisely defined connection" between government and private conduct that the Charter ought to apply. The distinction is particularly appropriate, it is submitted, where, as here, application of the Charter is asserted on the basis of a contractual relationship between a government agent and a private party. Government should be constitutionally responsible for the conduct of private parties who contract with government, it is submitted, only if the governmental actor takes some affirmative initiative to encourage the specific conduct alleged to infringe the Charter. Where a government agent takes the initiative to include a contractual term requiring a private contractor to discriminate in hiring, for example, government has put its "weight" behind the practice and should be responsible for it. On the other hand, where government involvement is limited to entering an agreement that permits contractors to hire their own staff, there is no positive government initiative to which constitutional restraints might be applied, and a finding of governmental action is inappropriate.

67. OPSEU submits that the Council of Regents acceding to the union's demand for an agency shop provision is not a sufficient basis for applying constitutional restraints to the union's conduct in negotiating an agency shop provision, or to the provision itself, because the initiative behind the provision came from the union and not from the governmental actor. The Council of Regents acquiesces to the union's exercising a choice allowed by law, but it neither compels non-members to pay union dues

of Regents "permits" OPSEU to oblige Lavigne to pay dues, even where the initiative is entirely private, would be to apply the Charter to most private activity, it is submitted, because most private activity is governed by some legislation or administrative authority that could require the private actor to observe constitutional restraints. Lavigne's argument that the Charter applies on the basis that the Council of Regents entered the collective agreement should fail, it is submitted, because it rests on the premise that the Charter imposes an affirmative obligation on government to prevent private parties from infringing constitutional rights.

Sections 51, 52 & 53 OF CCBA

68. Section 52 of CCBA provides that every collective agreement negotiated under the Act is deemed to contain a provision recognizing the union as the "exclusive bargaining agent" of all employees in the bargaining unit. Section 51 provides that the collective agreement binds the employer, the union, and all employees in the bargaining unit. Section 53 provides that the collective agreement "may provide for the payment" of union dues by employees, but shall not contain a provision requiring membership in a union as a condition of employment.

69. Lavigne submits that "but for" s.51 he could not be compelled to pay union dues, and that ss.51, 52 and 53 combined compel him to associate with the union as his bargaining agent, and compel him to support the union financially. The Respondent denies that the legislation compels Lavigne to associate with the union or pay dues for the following reasons.

Appellant's Factum, paragraphs 43, 44, 46

70. First, ss.51 and 52 do not force a union on college employees. On the contrary, the legislation permits employees to decide themselves by majority vote whether they want a union, and after that whether they wish to continue to be represented by a union. Section 52 makes a decision of the majority to unionize binding on all. In these circumstances it is submitted that it is the majority of employees who compel the minority to associate with the union, or not to associate with the union, as the case may be. Section 52, alone or together with s.51, compels nothing but majority rule.

CCBA, ss.65, 68, 71, 72

71. Second, it is not true that "but for" ss.51 and 53 Lavigne would not be obliged to pay union dues. At common law if a union had sufficient bargaining power to negotiate an agency shop [illegible] were "compelled" to pay to the

extent that they had to choose between paying dues and leaving their employment. Under the CCBA non-union employees are in exactly the same position. A union can negotiate an agency shop clause only if it has sufficient bargaining power. If it gets one, non-members must choose between paying dues and seeking employment in a non-union shop. Accordingly, non-members are neither more nor less compelled to pay dues under the legislation than without it.

72. OPSEU therefore submits that if Lavigne is "compelled" to be associated with a union as bargaining agent or to support the union financially, he is compelled by the majority of college employees acting through their union, not by ss.51, 52 or 53 of the CCBA. Section 51 ensures that the rights and obligations the union negotiates for members also apply to employees who choose not to belong to the union. But neither s.51 nor s.52 compels employees to be represented by a union, and neither s.51 nor s.53 compels non-members to pay dues. The decision of private individuals to unionize and the union's successful negotiation of the agency shop provision compel Lavigne to be associated with the union and to pay dues. The legislation does not.

73. OPSEU further submits that even if Lavigne could not be compelled to pay dues "but for" s.51, the legislation would not for that reason be subject to the Charter, because legislation conferring rights and obligations on private parties inter se is not susceptible to Charter scrutiny on the ground that those rights and obligations did not apply at common law. If the CCBA provided that non-members must pay union dues the Charter would apply, it is submitted, because in that circumstance the Legislature compels the payments. Where legislation gives one private party rights against another, however, even rights that did not exist at common law, the Charter does not apply, it is submitted, because the Charter does not oblige the Legislature to require that private parties comply with constitutional restraints and dealings inter se.

74. The Charter application argument advanced by Lavigne ought to be rejected, it is submitted, because it would mean that all legislation regulating the rights of private parties such as the Sales of Goods Act, the Residential Tenancies Act, etc., would be subject to the Charter to the extent that it authorizes of fails to prohibit private parties from engaging in conduct that offend the Charter. OPSEU submits that this principle should be rejected because it would have the effect of applying the Charter to private actors in most circumstances. That Lavigne's position has this consequence can be seen from the Order granted by the Trial Judge, which imposes duties on the union to establish accounting and arbitration procedures to ensure that Lavigne's Charter rights are not infringed.

75. Accordingly, it is submitted that neither the legislation permitting the union to negotiate an agency shop provision, nor the Council of Regents acceding to the union's demand for that provision,

nor both together, attract Charter scrutiny in the circumstances of this case, because neither the legislation nor the Council of Regents compel Lavigne to pay dues, and because neither the Legislature nor the Council of Regents has an obligation to ensure that private parties comply with the Charter in dealings between themselves and other private parties.

THE FOURTH ISSUE: SECTION 1 OF THE CHARTER

76. Lavigne concedes that the infringement of his rights and freedoms under s.2(b) and (d) of the Charter is "reasonable" for s.1 purposes, to the extent that his dues are used for purposes of negotiating or administering a collective agreement. Lavigne contends, however, that when a portion of his dues are used for non-collective bargaining purposes, specifically for the purposes set out in Appendix "A" to the Amended Application, the infringement of his rights and freedoms is not reasonable or saved by s.1. Accordingly, the s.1 issue in this case is whether the use of non-members' dues for purposes other than negotiating and administering a collective agreement is reasonable in a free and democratic society.

77. Normally, a party invoking s.1 must demonstrate the importance of some objective sought to be achieved by a government rule or act that infringes the challenger's rights. In present circumstances, however, the Respondent must justify the failure of government to act: specifically, the failure of government to limit the purposes for which unions may spend non-member's dues.

78. Although the legislation does not restrict the causes a union may pursue with Rand formula dues on the basis of content, as urged by Lavigne, it does provide another form of control: it ensures that unions are subject to democratic control, including protection against discrimination and bad faith by the majority. The preference for democratic control over content regulation goes back to the Rand award, which set two important limits on the use of non-member dues. Such dues were to be used "for general union purposes", but this would not extend to:

> ...[1] a special assessment or to an increment in an assessment which relates to special union benefits such as for instance union insurance, in which the non-member employee as such would not participate or the benefit of which he would not enjoy. [2] The deduction shall be made only in the conditions and circumstances laid down by the constitution and by-laws of the Union.
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> Rand award, Case on Appeal, Volume VI, p.1050

79. Both these limits are incorporated into and enhanced by the CCBA. The rule that non-members' dues should not be used to obtain benefits which non-members cannot share is expanded in s.76, which imposes a duty to represent all employees in good faith, without discrimination between members and non-members. The requirement that non-member dues be expended only on objectives allowed by a union's constitution and by-laws ensures that there is democratic control over the expenditure of non-member dues, because the constitution and by-laws are the means by which the bargaining unit authorizes and restricts union expenditures. Under the CCBA ongoing democratic control over the union is provided by s.71(2), which permits the bargaining unit to vote to decertify a union prior to the expiry of every collective agreement. Accordingly, while government has not imposed content restrictions on what unions may do with non-member's dues, it has imposed other controls. Like Mr. Justice Rand, the Legislature has protected the individual through democratic control: the union must maintain the support of the majority, and the majority cannot act in bad faith or discriminate against non-members.

80. The general reason government does not restrict union expenditures on the basis of content, it is submitted, is that employees are as entitled as anyone to pursue their interests as they perceive them, not as government perceives them. Before and after the Charter, governments have been reluctant to impose any form of content restriction on expressive activity. Specifically, and pursuant to the first branch of the Oakes test, it is submitted that there are four reasons why government imposes democratic rather than content control on the use of Rand formula dues.

81. The most important reason, it is submitted, is that permitting individual employees to financially opt out of majority initiatives on the basis of ideological content is fundamentally undemocratic, and therefore inconsistent with the thrust of collective bargaining legislation, which is to bring democratic decision making to the workplace. Every employee in the bargaining unit should be bound by majority decisions, including spending decisions, it is submitted, because every employee is a member of the constituency that is enfranchised to participate in the decision making process. Democracy protects the right to dissent, but not to financially opt-out of disagreeable majority initiatives, because individual control of the purse makes action by the whole group impossible. The most important public interest at stake under s.1 in this case, it is submitted, is the public interest in maintaining democracy in the workplace, with both the freedoms and obligations that democracy entails.

82. The second reason unions should not be subject to content restrictions on the use of non-member dues, it is submitted, is that non-members benefit from union initiatives outside the bargaining context to the same extent as members do. Union efforts to reform legislation or government policy affecting employees, or to lobby public opinion to employee viewpoints, work to the benefit of all

employees equally, not union members only. The policy reason for requiring non-members to pay union dues articulated by Mr. Justice Rand in 1946, and by both Courts below, is to prevent "free-riders": to ensure that all employees share the burden as well as the benefit of collective action. OPSEU submits that this rationale applies to union initiatives outside the context of collective bargaining with precisely the same force that it has in that context. The second reason government does not restrict the use of non-member dues, it is submitted, is that it would be inequitable to do so.

Rand award, Case on Appeal, Volume XI, pp.1048

83. The third reason is that giving non-members a right to opt-out of disagreeable union initiatives would create a disincentive to union membership, thereby undermining union security and collective bargaining, especially in weaker bargaining units. It is submitted that the public has a vital interest in promoting labour peace through collective bargaining between parties with comparable bargaining power. Recognizing the freedom Lavigne seeks would impair that interest by making unions vulnerable in the same way they were vulnerable before the agency shop provision was introduced by Mr. Justice Rand. In the circumstances, it is not possible to factually demonstrate the extent of the effect on collective bargaining, except by reference to the pre-1946 era. It is submitted, however, that two things are probable: (1) the effect would be felt most by employees who had the least bargaining power, because union security is weakest where the union cannot obtain significant gains at the bargaining table; and (2) if the economic disincentive to union membership is less where only some dues may be avoided, the opportunity to express political or ideological opposition to particular union initiatives by opting out is itself a powerful disincentive, to many employees more powerful than the amount of dues at issue. The third reason unions are not subject to content restriction on the use of non-members' dues, it is submitted, is that unified and effective unions balance the employer's bargaining power and contribute to labour peace, whereas the weakening of unions leads to labour strife and economic inequality.

84. The fourth reason government does not regulate the use of non-members' dues on the basis of content, it is submitted is that such restrictions would deter unions from publicly addressing, or even internally debating, controversial public issues. If individuals who disagree with the majority on controversial subjects are free to opt-out of the majority decision by revoking their membership and claiming a proportionate rebate of dues, the "safe course" for unions would be to avoid controversial subjects altogether, especially where deeply held political or moral views may be involved. OPSEU previously submitted that this affects the union's freedom of expression under s.2(d) of the Charter. It is further submitted, in the context of s.1, that a deterrent to controversial political speech by unions also impairs a weighty public interest: the public interest in unfettered advocacy of diverse and antagonistic social and political change desired by the people. Unions have been

vigourous and sometimes antagonistic advocates for social change in Canada, because employees have demanded that they play this role. If dissident individuals in a bargaining unit can hereafter deter unions from political controversy, a voice for social change will have been muted.

85. In R. v. Oakes this Court made it clear that only some kinds of public objectives are important enough to warrant overriding constitutionally guaranteed rights. Oakes indicates that the words "free and democratic society" in s.1 provide "the final standard of justification for limits on rights and freedoms": that "The Court must be guided by the values and principles essential to a free and democratic society"; that objectives which are "trivial or discordant" with a free and democratic society "do not gain s.1 protection".

R. v. Oakes, supra, pp.136, 138

86. It is submitted that the four public objectives outlined above are exactly the type of values s.1 is designed to protect. Oakes indicates that the purpose of s.1 is to ensure that the rights and freedoms guaranteed by the Charter will not be given such wide effect that they operate counterproductively, that they impair rather than enhance the values and processes of a free and democratic society. This is the perfect case for finding an overriding public interest, it is submitted, because the interest at stake is the basic principle of democratic organization: majority rule. If freedom from association or forced expression does have the scope contended for in this case, that individual liberty ought to be overridden in the circumstances, it is submitted, because it is discordant with the right of a democratic constituency to determine by majority vote who its representative will be, and what collective objectives will be pursued in whatever forum or context the majority deems appropriate. The freedom Lavigne seeks should be overridden, it is submitted, because it is inequitable, conducive to labour strife and a deterrent to controversial expression by the union, but most of all because it undermines democratic freedom in the workplace. Democratic decision making cannot co-exist with individual freedom to financially disassociate from the majority.

87. Pursuant to the second branch of the Oakes test, it is submitted that the decision to impose democratic control rather than content control on union activities satisfies all three components of the proportionality test, because providing democratic process is the least intrusive and only means of accomplishing the public objectives outlined above. Freedom to opt-out of disagreeable union initiatives is not a less intrusive means of avoiding "free-riders" on benefits a union might obtain outside the bargaining context. Lavigne seeks to avoid paying for such benefits. Freedom to opt-out of majority initiatives is not a less intrusive means of advancing labour peace through equal bargaining power. Based on Canadian experience prior to 1946, freedom to avoid union dues significantly weakens unions

and leads to union security strikes. Most important, freedom to opt-out is not a less intrusive form of workplace democracy. It is a means of avoiding the obligations that necessarily accompany the right to participate in a democratic process. The first reason the means chosen satisfy the proportionality test, it is submitted, is that democratic control, together with protection against discrimination, is the only way of bringing true democracy to the workplace.

88. Oakes also states that "the nature of the proportionality test will vary depending on the circumstances". One circumstance that requires a variation in the application of the least restrictive means test, it is submitted, is where a challenger's constitutional rights must be balanced against another party's constitutional rights, as well as against governmental objectives. In that situation the inquiry should be whether the means chosen interfere "as little as possible" with both parties' constitutional freedoms, not the challenger's only. Challengers' rights are entitled to no greater constitutional weight, it is submitted, because they initiate the litigation.

R. v. Oakes, supra, p.139

89. The second reason democratic controls are more responsive to s.1 requirements than content controls, it is submitted, is that restricting the use of non-member dues to certain subject matters would seriously infringe other employees' rights and freedoms under the Charter, specifically freedom to express employee viewpoints through an association, and also freedom to form and "maintain" an employee association, and to pursue lawful objects through the association. The Rand award was specifically and carefully designed to balance individual and group rights in this context. It is submitted that Canadian history before and after 1946 indicates that when the balance is further tipped to the individual's side, the associational rights of the majority are in jeopardy. It is submitted that the legislative decision to impose democratic but not content control on the use of non-members' dues is a time-proven attempt to balance the rights of all parties, including the public, and that the existing scheme ought to be preferred to the content regulation proposed by Lavigne, because it represents the least restriction on the rights and freedoms of all concerned.

90. Oakes indicates that even if government objectives cannot be accomplished in a less intrusive way, the impugned governmental action may falter on the third branch of the proportionality test, if the "deleterious effects" on the individual are so serious that "the measure will not be justified by the purposes it is intended to serve". OPSEU submits that the adverse impact on Lavigne in this case is minimal. Only a very small amount of money is at issue. Lavigne is not required to be a member of OPSEU. The public will not associate Lavigne with OPSEU's viewpoints or expenditures. Lavigne is free to join or support any union or other association he chooses, and to advocate any viewpoint he chooses.

The only affront he suffers, it is submitted, is that the majority of his peers undertake initiatives to which he is ideologically opposed. OPSEU submits that the public interest in having democratic and vigorous unions that speak for all employees on social and political issues, as well as collective bargaining issues, outweighs and justifies the minimal harm to Lavigne in this case.

R. v. Oakes, supra, pp.139-140

91. In Irwin Toy, this Court stated that where the Legislature attempts to strike a balance between the claims of competing groups it must often "strike a balance without the benefit of absolute certainty concerning how that balance is best struck", and that in those circumstances Oakes requires only that government "make a reasonable assessment as to where the line is most properly drawn". In cases that do not involve "mediating between different groups", however, "government is best characterized as the singular antagonist of the individual whose right has been infringed", and a greater "degree of certainty" is required in demonstrating that the Oakes tests are met.

A.G. Quebec v. Irwin Toy et al., supra, 993-4

92. OPSEU submits that the legislation at issue here is a paradigm of government attempting to balance the rights of competing groups, and that it is not possible either for the Legislature or a reviewing Court to determine with precision or certainty exactly where a line should be drawn to achieve the most appropriate and least intrusive balance. Further, in Re Public Service Employee Relations Act this Court recognized that collective bargaining legislation involves "a balancing of competing interests", and that it is therefore inappropriate for the Court to substitute its judgment for that of the Legislature in that context. OPSEU submits that these two cases demonstrate that government should not be held to a high degree of certainty in balancing the rights of the unions, employers, and individual employees, and that a "reasonable assessment" as to the least intrusive means is all that can be expected. For the reasons above, OPSEU submits that government meets that standard in this case.

Re Public Service Employees Relations Act, supra, 391-2

Appendix "A" to the Amended Application

93. Lavigne says that the expenditures listed in Appendix "A" are unreasonable for s.1 purposes because they are outside the scope of collective bargaining. OPSEU submits that each of the Appendix "A" expenditures is saved by s.1 for the following reasons.

(1) All of the expenditures are authorized by the union's constitution. They are therefore within the scope of the objective of bringing democratic process to the workplace, it is submitted, because they represent the democratic will of the majority of employees.

(2) Whatever benefits flow from Appendix "A" expenditures accrue to non-members to the same extent as members. The free-rider rationale applies.

(3) The range of expenditures objected to by Lavigne demonstrates the potential scope of the disincentive to union membership if the freedom Lavigne seeks is recognized. The public interest in union security and labour peace through equality of bargaining power applies.

(4) The expenditures objected to demonstrate the potential scope of the deterrent to unions expressing viewpoints on controversial subjects, if individuals who disagree can protest by paying proportionately lower dues. The public interest in unfettered advocacy for social change applies.

(5) The expenditures objected to all relate to economic and employment interests, directly or indirectly. In a democracy economic and political concerns are not separate, in theory or practice.

94. OPSEU's constitution provides that "The aims and purposes of the union shall be:"

(a) to regulate labour relations between the members and their employers and managers, said labour relations to include the scope of negotiation, collective bargaining, and the enforcement of collective agreements and health and safety standards;

(b) to organize, sign to membership, and represent employees in Ontario;

(c) to advance the common interests, economic, social and political, of the members and of all public employees, whenever possible, by all appropriate means;

(d) to bring about improvements in the wages and working conditions of the membership, including the right of equal pay for work of equal value;

(e) to defend the right to strike;

(f) to promote full employment and equitable distribution of wealth within Canadian society;

(g) to co-operate with labour unions and other organizations with similar objectives in strengthening the Canadian labour union movement as a means towards advancing interests and improving the well being of workers generally in Canada;

(h) to promote justice, equality, and efficiency in services to the public;

(i) to strengthen, by precept and example, democratic principles and practices both in the Canadian labour union movement and in all manner of institutions, organizations and government in Canada.

Reasons for Judgment of White J., dated July 4, 1986, Case on Appeal, Volume X, pp.1917-1918

95. Item 5 on Appendix "A" is "contributions to Arthur Scargill and the striking United Kingdom coal miners". Lavigne cites an OPSEU donation to the National Union of Mineworkers, and an OFL donation to the British Trades Union Congress for the assistance of striking miners. The rationale behind these donations is explained in the Affidavit of Irving Abella, Professor of history at York University:

> Canadian unions have historically offered support to trade unions throughout the world. In part, this results from the fact that European, and especially British unions, helped both to subsidize and to organize the earliest trade unions in Canada. As well, Canadian trade unions have contributed to fellow trade unionists caught in an extremity whether as a result of a strike, mine disaster or earthquake, wherever those workers are. Canadian union funds have flowed, amongst other places, to Britain, Israel, Brazil, Japan, Greece, Italy and the United States. Similarly, Canadian workers have received support from trade unions in other parts of the world. For example, union workers demonstrated in Bombay on behalf of General Motors strikers in Oshawa and St. Catharines. International union solidarity has played an important part in building and maintaining the strength of worker's organizations in Canada and in achieving their social and economic aspirations.

Affidavit of Irving Abella, Case on Appeal, Volume VII, p.1421, paragraph 8

Cross-examination of James Clancy, Case on Appeal, Volume II, pp.214-215

Affidavit of Clifford Pilkey, Case on Appeal, Volume VII, p.1199, paragraph 17

96. OPSEU submits that contributions to workers "caught in an extremity" are reasonable for s.1 purposes, because the fruits of the longstanding tradition of union solidarity in time of need flow to all employees. Such contributions also relate directly to collective bargaining. The success or failure of strikes in other countries, especially when government is the employer, have a direct impact on public opinion and government policy relating to wage demands and strikes in this jurisdiction.

Cross-examination of James Clancy, Case of Appeal, Volume II, pp.214-215

97. Item 4 on Appendix "A" is "contributions to a campaign opposing the expenditure of municipal funds for a dome stadium in Toronto". In 1985 OPSEU and five other groups sponsored a conference entitled "Linking Towards Action on Poverty and Unemployment in Toronto". One of the resolutions at that conference raised the issue of public funding of the dome stadium as a symbol of misguided provincial priorities in cutting back on funding for public housing and social assistance. The

only financial payment by OPSEU in connection with this conference was the purchase of lunch for 120 people at a price of $360.00.

Undertakin s on cross-examination of James Clancy, Case on Appeal, Volume II, p.356

Affidavit of James Clancy, Case on Appeal, Volume V, p.784, paragraph 33(d)

Cross-examination of James Clancy, Case on Appeal, Volume V, p.841

Reasons for Judgment of White J., dated July 4, 1986, Case on Appeal, Volume X, p.1921

98. Attendance at conferences of this sort is related to the process of negotiating and administering working agreements, it is submitted, because part of the purpose of such conferences is educational. Union officials representing employees who deliver social services can better represent employee interests when better informed about problems and alternatives facing the recipients of such services.

99. Sponsoring a conference relating to poverty and unemployment is authorized by several of the union's aims and purposes, especially paragraph (f), "to promote full employment and equitable distribution of wealth". Accordingly, the majority of employees have expressly contemplated union involvement in this type of activity. This expenditure illustrates the public interest in a democratic workplace, it is submitted, because it is a clear example of the democratic will of the majority being exercised for the benefit of the whole community of workers.

100. Item 2 on Appendix "A" is "contributions to disarmament groups". It is submitted that contributions to organizations advocating disarmament and reallocation of defence spending are similar to expenditures advocating government funding for social assistance rather than a dome stadium. Both are related to increasing public sector employment. Whatever influence such expenditures might have accrues to the benefit of public sector workers generally, not to union members as opposed to non-members.

101. Item 3 on Appendix "A" is "contributions to campaigns in favour of free choice with respect to abortion". In this context Lavigne relies on expenditures by one or more of the central labour organizations. OPSEU made no expenditure for this purpose.

Reasons for Judgment of White J., dated July 4, 1986, Case on Appeal, Volume X, pp.1922-1923

Affidavit of James Clancy, Case on Appeal, Volume V, p.784, paragraph 33(c)

102. Expenditures related to the availability of abortion illustrate how unions sometimes seek to improve working conditions through legislative reform rather than collective bargaining. Abortion is an employment issue in a work force that is nearly half female, because the availability of abortion relates directly to the ability of women to enter and remain in the work force. Abortion issues also demonstrate how an individual's right to make a political statement by obtaining a rebate of dues operates as a disincentive to union membership to many individuals, and also a strong deterrent to union advocacy on controversial subjects.

103. With respect to Item 7 on Appendix "A", "contributions to Nicaragua", Lavigne relies on two expenditures: (1) an OPSEU contribution of $2,000.00 towards a tour of Canada by two members of FETSALUD, a Nicaragua Health Care Workers Union; and (2) NUPGE donations of $1,000.00 and $100.00 to Oxfam and to a Nicaragua health care workers' organization to send medical aid and food supplies to Nicaragua.

> Reasons for Judgment of White J., dated July 4, 1986, Case on Appeal, Volume X, pp.1922-1925
>
> Cross-examination of John Fryer, Case on Appeal, Volume VIII, pp.1381-1382
>
> Undertakings on cross-examination of John Fryer, Case on Appeal, Volume VIII, p.1388

104. It is submitted that the OPSEU expenditure serves exclusively educational purposes and is within the ambit of duties undertaken on behalf of all employees. Contact between OPSEU shop stewards and union officials from other jurisdictions results in an exchange of information and ideas about the administration of government services and labour relations, and so assists OPSEU officials in the better administration of domestic collective agreements. The NUPGE contributions are humanitarian in nature and promote international solidarity between workers' organizations in time of need. Among working people, as elsewhere, benevolence begets benevolence.

105. With respect to Item 1 on Appendix "A", "contributions to political parties", Lavigne complains of two types of expenditures: (1) contributions by central labour organizations to a political party; and (2) funds expended by OPSEU to purchase tickets to dinners held by a political party.

> Reasons for Judgment of White J., dated July 4, 1986, Case on Appeal, Volume X, pp.1919-1920, 1926, 1929-1930

106. As the Canadian political system has evolved one political party has traditionally represented employee causes in the political arena, and has been instrumental in bringing about

legislative reform that benefits employees, including the first collective bargaining regime in 1944 (PC 1003). It is submitted that contributions to political parties also relate directly to immediate collective bargaining strategies where government is the employer, because the government of the day is the alter ego of a political party, and will make public sector wages and working conditions a partisan political issue inside and outside election campaigns. Public sector collective bargaining is inherently political for both sides.

> Affidavit of Irving Abella, Case on Appeal, Volume VII, pp.1418-1420, paragraph 5
>
> Affidavit of Desmond Morton, Case on Appeal, Volume VIII, pp.1471-1472, paragraph 14
>
> Affidavit of Clifford Pilkey, Case on Appeal, Volume VII, p.1200, paragraph 20
>
> Affidavit of James Clancy, dated October 8, 1985, Case on Appeal, Volume V, p.780, paragraph 25
>
> Affidavit of Dennis McDermott, Case on Appeal, Volume V, pp.965-967, paragraph 39-42
>
> Cross-examination of Dennis McDermott, Case on Appeal, Volume III, pp.420-421, 477, 499
>
> Desmond Morton, Working People: An Illustrated History of the Canadian Labour Movement, pp.183-4

107. Item 6 on Appendix "A" is "contributions to the PLO". The Trial Judge found as a fact that neither OPSEU nor any of the central labour organizations made any expenditure to support the PLO. Lavigne now concedes that this is so.

> Reasons for Judgment of White J., dated July 4, 1986, Case on Appeal, Volume X, p.1923
>
> Reasons for Judgment of White J., dated July 7, 1987, Case on Appeal, Volume XI, p.2070
>
> Appellant's Factum, paragraph 129

108. It is submitted that when the particular expenditures objected to by Lavigne are considered in light of the aims and purposes sought to be advanced thereby, the arbitrary nature and impracticality of the content restriction proposed by Lavigne, and the effect on the union's freedom of expression, become apparent. In this context, OPSEU relies on the dissenting judgment of Frankfurter J. in Machinists v. Street:

> 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. American labor's initial role in shaping legislation dates back 130 years. ...

Yet the Georgia trial court has found that these funds were not reasonably related to the unions' role as collective bargaining agents. One could scarcely call this a finding of fact by which this Court is bound, or even one of law. It is a baseless dogmatic assertion that flies in the face of fact. ... The passage of the Adamson Act in 1916, establishing the eight hour day for the railroad industry, affords positive proof that labor may achieve its desired result through legislation after bargaining techniques fail. ... If higher wages and shorter hours are prime ends of a union in bargaining collectively, these goals may often be more effectively achieved by lobbying in the support of sympathetic candidates. ...

The notion that economic and political concerns are separable is pre-Victorian. Presidents of the United States and Committees of Congress invite views of labor on matters not immediately concerned with wages, hours, and conditions of employment. ... It is not true in life that political protection is irrelevant to, and insulated from, economic interests. It is not true for industry or finance. Neither is it true for labour.

International Association of Machinists v. Street, 367 US 740, 812-5 (1960)

Foreign Jurisdictions

109. Lavigne refers to various foreign jurisdictions which he says prevent "compelled contributions of individual workers to trade unions beyond the cost of collective bargaining". OPSEU submits that the jurisdictions he refers to do not support his position for the following reasons.

(1) The United Kingdom, Australia and Ireland prohibit unions from using dues to make contributions to political parties, but do not otherwise restrict the use of dues for political purposes. Accordingly, in these jurisdictions only one item on Appendix "A" would have to be financed by voluntary contributions.

Trade Union Act, 1913 (U.K.) 293 Geo. V, c.30 s.3

Trade Union Act, 1984 (U.K.) c.49, s.17

Walker, Australian Industrial Relations Systems (1970),pp.40-2

Ford and Plowman, Australian Unions (1983), pp.74-6

Industrial Arbitration Act, George VI, No. 2, 1940, s.107 (New South Wales)

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

International Encyclopedia for Labour Law in Industrial Relations, (ELL) p.112, paragraph 268; p.114, paragraph 273 (Australia)

Mitchnick, Union Security and the Charter, (1987), pp.84-5 (U.K.), pp.44-5 (Ireland)

(2) It is true that in France, Italy and West Germany workers cannot be compelled to financially contribute to unions. The law of these jurisdictions does not, however, support the proposition asserted by Lavigne, because none of these jurisdictions distinguish political and collective bargaining dues. All compelled dues are prohibited, because these countries do not operate on a system of exclusive representation, as in Ontario. Workers may belong to and be represented by any union. Collective bargaining is conducted by committees of the various unions with members in the workplace.

ELL, supra, p.154, paragraph 313 (France)

Hanson et al., The Closed Shop, pp.209-210, 221-2 (West Germany)

Mitchnick, Union Security and the Charter, supra, pp.44-5 (Ireland), pp.71-2 (Italy)

Labour Relations Law in France and the United States, Michigan Institute Labour Studies, pp.17-23

(3) Switzerland permits a form of agency shop. Swiss courts have upheld "loyalty to the contract" clauses requiring "solidarity payments" by non-members of the union. Solidarity payments are lower than union dues, but this does not, as asserted by Lavigne, reflect a distinction between collective bargaining and political items. Swiss courts require lower solidarity payments to take account of the fact that the "outsider" employee may wish to join and pay dues to another union.

ELL, supra, paras 488-489

Berenstein, Union Security and the Scope of Collective Agreements in Switzerland (1965), 85 International Labour Review, No. 2, pp.109-14

Dudra, Approaches to Union Security in Switzerland, Canada and Columbia (1963), Monthly Labour Review, February, p.137

110. Accordingly, other than the U.S., none of the jurisdictions cited by Lavigne permit non-members to pay reduced dues proportionate to union expenditures for non-collective bargaining purposes. It is further submitted that in many foreign jurisdictions non-members are subject to greater "compulsion" by unions than employees governed by the CCBA. Closed shop provisions are legal in Sweden, Norway, Ireland, the Netherlands, and some Australian states. Despite the legal regime in

France, closed shops exist in fact. Further, in New Zealand "union shop" provisions are legal, which require employees to join the union once they are hired.

Walker, supra, at p.38 (Aust.)

Ford and Plowman, supra, at p.74 (Aust.)

Mitchnick, supra, at pp.48-49 (Ireland), 84-85 (Aust.), pp.35-37 (Sweden), pp.91-92 (N.Z.)

ELL, supra, at p.150 paragraphs 469-470 (Sweden)

ELL, supra, pp.64-65 paragraphs 224 and 227-28 (Netherlands)

Trade Union Situations, Geneva, ILO, (1984) pp.20-21 (Norway)

ELL, supra, p.154, paragraph 313 (France)

ELL, supra, p.64, paragraph 224 (Ireland)

THE FIFTH ISSUE: REMEDY.

Opt-In or Opt-Out

111. Lavigne asserts that under the least restrictive means test non-members should be required to pay full dues only if they expressly agree to contribute to non-bargaining expenditures (opt-in). OPSEU submits that non-members should be excused from paying full dues only if they expressly object to non-bargaining expenditures (opt-out), for all three reasons accepted by the Trial Judge:

(1) An objection to union expenditures is an element of the breach alleged, forced association and expression, because employees who support union expenditures whether they agree with them or not are not forced to contribute financially. They do so voluntarily.

(2) The least restrictive means test requires the least interference with all parties' constitutional freedoms. Opt-out perfectly protects the Applicant's freedom, while intruding as little as possible on the unions'. Opt-in unnecessarily intrudes on the union's freedom while affording Lavigne no greater protection.

(3) Opt-out is consistent with remedies previously adopted in Canada and other democratic countries to deal with objections to paying union dues.

Reasons for Judgment of White J., dated July 7, 1987, Case on Appeal, Volume XI,

112. In the U.S., the Supreme Court approved an opt-out system because "...the majority also has an interest in stating its views without being silenced by dissenters". It is submitted that the opt-out system developed in American jurisprudence perfectly protects dissenters' constitutional rights, because it ensures that the dissenters' funds are not used for non-bargaining purposes in any circumstances. The American system has three components: (1) the union identifies and reports its collective expenditures, i.e. funds spent for "the benefit of non-members as well as members", and indicates what proportion of total expenditures this constitutes; (2) the dues checkoff for dissenters is reduced by that proportion; and (3) challenges alleging that particular union expenditures are political are determined by an impartial decision maker.

International Association of Machinists v. Street, supra, pp.773-4

Chicago Teachers Union v. Hudson, 54 LW 4231, 4235-6 (1986); 106 S.Ct. 1066 (1986)

Brotherhood of Railway and Steamship Clerks v. Allen, 373 US 113, 121-2 (1963)

Abood v. Detroit Board of Education, 431 US 209, 239-240, n.40 (1977)

113. Lavigne submits that "opt-in" is preferable to "opt-out" because the latter requires judicial policing of rebate schemes. OPSEU submits that if judicial policing is necessary at all, it is equally necessary under either system. Both schemes require impartial decision makers, ultimately the courts, because non-members have a legal right to challenge the proportion of dues they are required to pay.

114. Lavigne submits that an employee who chooses not to be a member of the union implicitly objects to non-bargaining expenditures, and that an additional objection should be unnecessary. OPSEU submits that employees decline union membership for any number of reasons: they may object to collective bargaining per se, to the certification of a particular union, to individual union executives, or to a union's bargaining strategy. Non-membership does not indicate political dissent generally, even if it does for this challenger.

115. Lavigne further submits that the "opt-out" system infringes his freedom of expression and association because it compels him to publicly disclose his opinions and beliefs. OPSEU submits that non-members who object to all non-bargaining expenditures disclose nothing about their personal ideological beliefs, and if they do, they do so to the same extent under either system.

116. Lavigne submits that an "opt-out" system is impermissible, because it exposes objecting non-members to the coercive authority of union officials. OPSEU submits (1) that there is no basis in the Record or in fact for this allegation; (2) that any such conduct by union officials would be unlawful under

the CCBA, which provides an effective remedy, and (3) that if there is any such risk, it is not greater under an "opt-out" system than under an "opt-in" system.

CCBA, ss.75(3), 76, 77

117. For all of the above reasons, it is submitted that "opt-out" is the "just and appropriate" remedy under s.24 of the Charter in the circumstances of this case.

Scope of the Order Sought

118. OPSEU submits that the appropriate remedy is a declaration of rights against the Council of Regents, not a declaration against the union, or a declaration that Article 12.01 of the collective agreement is unconstitutional, in whole or in part.

119. It is submitted that no order lies against the union or any of the central labour organizations, because where government infringes an individual's constitutional rights the appropriate remedy is an order against the infringing government agent, not against private parties exercising lawful rights. In the Court of Appeal Lavigne conceded that no order lies against OPSEU. Accordingly, it is submitted that any order that might issue should be directed to the Council of Regents, not to OPSEU.

Reasons for Judgment of the Ontario Court of Appeal, Case on Appeal, Volume XI, p.2161

120. It is further submitted that any order should provide for a rebate of dues from the union, or a reduction in the amount of dues checked-off by the employer, because it is contrary to good labour relations policy to require unions to indicate to the employer who is a member of the union and who is not.

CCBA, s.77(b)

Labour Relations Act, R.S.O. 1980, c.228, s.111

Sack and Mitchell, Ontario Labour Relations Board Law and Practice, p.179

121. OPSEU submits that this Court should not declare Article 12.01 of the collective agreement unconstitutional, because Lavigne does not challenge the operation of that provision for employees who pay dues voluntarily, which includes the majority of employees who voluntarily join the union, and also non-members who do not object to unions advancing employee causes beyond the bargaining table.

Since there is no evidence that any employee other than Lavigne objects to the Appendix "A" expenditures, and since the amount of Lavigne's dues spent on Appendix "A" purposes is very small, it is submitted that the appropriate remedy is an order prohibiting the Council of Regents from entering a collective agreement which does not require the union to provide a proportional rebate of dues to employees who object to Appendix "A" expenditures.

122. For these reasons it is submitted that Lavigne is not entitled to the relief sought in paragraphs (b), (c), and (d) of the Amended Application, and that to take account of the submissions above the declaration sought in paragraph (e) should read as follows:

> A declaration that any collective agreement entered by the Council of Regents that provides a dues check-off for non-members must also provide that where a non-member signifies in writing to the union that he or she objects to spending funds for purposes listed in Appendix "A", the union is required to determine the amount it spent in the last year for purposes other than those in Appendix "A", and must rebate to non-members that percentage of dues that the union's expenditures Appendix "A" purposes represents of its total expenditures for that year.

THE SIXTH ISSUE: COSTS.

123. It is submitted that Lavigne is not entitled to costs in this case, even if he is successful, because his costs are paid by a group known as the National Citizen's Coalition (NCC). The Trial Judge found "that the NCC is a specific interest group which...conducted a vigorous public campaign in the newspapers to obtain financial support to assist the Applicant in this Application", and that the NCC was assisted by the Applicant's wife who wrote letters to NCC members "asking for financial support". At trial, the parties agreed on certain facts relating to costs, including:

(1) Substantially all of the costs of the Applicant in bringing this Application have, to date, been paid for by the NCC.

(2) There is no arrangement between Borden & Elliot and the Applicant that limits the liability of the Applicant in any way for the costs of this Application.

(3) Any proceeds of the costs award to the Applicant would be paid over by the Applicant to the NCC.

(4) The arrangement between the Applicant and the NCC is such that any costs ordered against the Applicant would be discharged by the NCC as far as the NCC is able.

Reasons for Judgment of White J., dated July 7, 1987, Case on Appeal, Volume XI, pp.2098-2099

Reasons for Judgment of the Ontario Court of Appeal, Case on Appeal, Volume XI, p.2177

Affidavit of David Wright, Case on Appeal, Volume X, pp.1873-1877

124. In Bell Canada v. Consumers Association, this Court upheld a CRTC decision awarding costs to intervenors at a Bell Canada rate hearing notwithstanding that the intervenors received government funding, because none of the government funds were "specifically ear-marked" for the Bell hearing. The CRTC would have denied costs in a "specific funding" situation to avoid "double recovery".

Bell Canada v. Consumers Association of Canada et al., (1986) 26 DLR (4th) 573, 580, 582, 586-7 (SCC)

Ryan v. McGregor (1926), 58 OLR 213 (CA)

Harold v. Smith,(1860) 5 H&N 381, 385

Gundry v. Sainsbury, [1910] 1 KB 645 (CA)

Orkin, The Law of Costs, pp.14-5

125. The Bell case reiterates the principle that the purpose of a costs award is to indemnify for out of pocket expenses only, and that a "strict view of whether expense has been actually incurred" will be taken. Applying this principle, it is submitted that Lavigne is entitled only to costs for which he has not been reimbursed, and that funds raised by Lavigne or others for the specific purpose of financing this litigation should be deducted from costs assessed. Otherwise, there is a "windfall" or "double recovery" for someone.

Bell Canada v. Consumers Association, supra, p.587

126. In McLean v. Arkansas Board of Education the majority of the U.S. Court of Appeal (8th Cir.) awarded costs to the American Civil Liberties Union (ACLU) even where it had raised funds for the specific litigation, because "awards ultimately benefiting legal services organizations...help to ensure the continued existence of such organizations and their ability to represent other indigent parties who cannot afford private legal representation". The dissenting judgment would have denied costs in specific funding cases, because they "produce windfalls to attorneys".

McLean v. Arkansas Board of Education, 723 F.(2d) 45, 48, 50 (1983)

127. The Trial Judge in this case adopted the majority holding in McLean v. Arkansas, and denied OPSEU's motion to discover whether the NCC had raised sufficient or surplus funds to pay for this litigation, and what the NCC would do with any surplus or costs award it received. It is submitted that the holding in the McLean case does not apply here for two reasons:

(1) Unlike the ACLU in McLean, the NCC is not a "legal services organization" which exists to fund litigation for "indigent parties who cannot afford private legal representation". There is no evidence or admission that the NCC would use any "windfall profits" generated by this case to fund future Charter litigation.

Affidavit of David Wright, Case on Appeal, Volume X, pp.1877-1880

(2) The Respondent seeks to reduce Lavigne's entitlement to costs only to the extent that funds are actually received from the public for the specific purpose of funding this litigation. The NCC will not be out of pocket from funding Lavigne's case. It will be prevented from gaining a profit.

128. In the event that Lavigne is entitled to costs, costs should be awarded against the party which infringed his constitutional rights, it is submitted, which is the government of Ontario, not the union.

PART IV - RELIEF REQUESTED

129. The Respondent requests that the appeal be dismissed, with costs here and below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

S T Goudge Q.C.
STEPHEN T. GOUDGE, Q.C.

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STATUTORY REFERENCES