21972

Court File No. A128/89

IN THE SUPREME COURT OF CANADA
(APPEAL FROM THE COURT OF APPEAL
OF THE PROVINCE OF ONTARIO)

BETWEEN:

FRANCIS EDMUND MERVYN LAVIGNE

Appellant
(Applicant)

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

Respondent
(Respondent)

- and -

ONTARIO COUNCIL OF REGENTS FOR COLLEGES
OF APPLIED ARTS AND TECHNOLOGY

Respondent
(Respondent)

- and -

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

Respondents
(Respondent-interveners)

FACTUM OF THE ONTARIO FEDERATION OF LABOUR AND THE CANADIAN LABOUR CONGRESS

SACK GOLDBLATT MITCHELL
Barristers & Solicitors
Suite 1130
20 Dundas Street West
Toronto, Ontario
M5G 2G8

Jeffrey Sack, Q.C.
Steven Barrett
Ethan Poskanzer

(416) 977-6070

Solicitors for the Respondents
Canadian Labour Congress et al

SOLOWAY, WRIGHT, HOUSTON,
GREENBERG, O'GRADY, MORIN
Barristers & Solicitors
99 Metcalfe Street
Ottawa, Ontario
K1P 6L7

Robert E. Houston

(613) 782-3222

Ottawa Agent for the Respondents

TO: **REGISTRAR OF THIS COURT**

AND TO: **BORDEN & ELLIOT**
Barristers & Solicitors
40 King Street West
Toronto, Ontario, M5H 3Y2

Solicitors for the Appellant
Dennis O'Connor, Q.C.
Christopher D. Bredt
Ronald Foerster
(416) 367-6000

SCOTT & AYLEN
Barristers & Solicitors
60 Queen Street
Ottawa, Ontario, K1P 5Y7

Ottawa Agents for
the Appellant

AND TO: **GOWLING, STRATHY & HENDERSON**
Barristers & Solicictors
Suite 200. 2 First Canadian Place
Toronto, Ontario, M5X 1A4

Solicitors for the Respondent,
Ontario Public Service
Employees Union

Stephen T. Goudge, Q.C.
Ian McGilp
(416) 862-8484

GOWLING, STRATHY & HENDERSON
Barristers & Solicitors
160 Elgin Street, Suite 2400
Ottawa, Ontariio, K1N 8S3

Ottawa Agent for the Respondent
Ontario Public Service Employees

AND TO: **HICKS, MORLEY, HAMILTON STEWART, STORIE**
30th Floor, Box 371
Toronto-Dominion Bank Tower
Toronto-Dominion Centre
Toronto, Ontario, M5K 1L8

Solicitors for the Respondent,
Ontario Council of Regents for
Colleges of Applied Arts and
Technology

Brenda J. Bowlby
Stephen Shamie
(416) 362-1011

BURKE-ROBERTSON
Barristers & Solicitors
70 Gloucester Street
Ottawa, Ontario
K2P 0A2

Ottawa Agents for the Respondent,
Ontario Counsel of Regents for
Colleges of Applied Arts and
Technology

AND TO: **NELSON, McNAMEE**
Barristers & Solicitors
238 Jane Street
Toronto, Ontario, M6S 3Z1

Solicitors for the Respondent
National Union of Provincial
Government Employees

J. Cameron Nelson
Allan Manson
(416) 762-7477

AND TO: **ATTORNEY-GENERAL OF ONTARIO**
Constitutional Law & Policy Division
7th Floor, 720 Bay Streeet
Toronto, Ontario, M5G 2K1

Robert E. Charney
(416) 326-4452

SOLOWAY, WRIGHT
Barristers & Solicitors
99 Metcalf Street
Ottawa, Ontario, K1P 6L2

Ottawa Agent for the Attorney General of Ontario

AND TO: **ATTORNEY-GENERAL OF BRITISH COLUMBIA**

BURKE-ROBERTSON
Barristers & Solicitors
70 Gloucester Street
Ottawa, Ontario, K2P 0A2

Ottawa Agents for the Attorney General of British Columbia

AND TO: **PROCUREUR GÉNÉRAL DE LA PROVINCE DE QUÉBEC**

NOEL, DÉCARY, AUBRY & ASSOCIÉS
111 Champlain Street
Hull, Quebec
J8X 3R1

Agents for the Procureur général de la province de Québec

AND TO: **ATTORNEY-GENERAL OF CANADA**
Department of Justice
Ottawa, Ontario
L1A 0H8

John C. Tai, Q.C.
Deputy Attorney General
of Canada

AND TO: **CONFÉDÉRATION DES SYNDICATS NATIONAUX**

NOEL DÉCARY, AUBRY & ASSOCIÉS
111 Champlain Street
Hull, Quebec, J8Z 3R1

Agents for the Confederation des syndicats nationaux

AND TO: **LERNER & ASSOCIATES**
Barristers & Solicitors
Scotia Plaza - 19th Floor
40 King Street West
Box 210
Toronto, Ontario
M5H 3Y2

Earl Cherniak
(416) 867-3076

Solicitors for Canadian Civil Liberties Association

TABLE OF CONTENTS

PART I - THE FACTS

1. The Ontario Federation of Labour (OFL) and the Canadian Labour Congress (CLC) rely upon the facts as summarized in the reasons for judgment below, and in the factums of the respondents OPSEU and NUPGE.

PART II - POINTS IN ISSUE

2. The points in issue are set out in the Constitutional Questions stated by the Chief Justice, reproduced in paragraph 5 of Lavigne's factum.

PART III - THE LAW

A. SUBSTANCE OF LAVIGNE'S APPLICATION

1. The Charter is concerned with the relationship between government and individuals and does not restrict action undertaken by private parties. As a result, it is respectfully submitted that the Court of Appeal was correct in dismissing Lavigne's application on the grounds that it is directed against the constitutional validity of trade union expenditures, and not merely the requirement to pay the equivalent of dues to OPSEU. While Lavigne seeks to found governmental action upon the payment of dues as a result of the Colleges Collective Bargaining Act (the C.C.B.A.) or the conduct of the Council of Regents (the Council), any finding of constitutional invalidity depends upon the expenditure decisions of trade unions, which even the appellant concedes constitutes private action beyond the reach of the Charter.

2. The extent to which Lavigne's challenge is beyond the reach of the Charter is evident not only from the grounds for relief and the relief sought in the Notice of Application, but also from an analysis of the nature of the governmental action which is effectively being challenged. In this regard, the OFL and CLC submit as follows:

(a) Even at the level of infringement, the Notice of Application does not allege that the mere payment of dues violates s.2 of the Charter. Rather, by its express terms, the grounds of the application are that the C.C.B.A. or the conduct of the Council of Regents violates s.2(b) and s.2(d) of the Charter, but only where dues are used by the union for specified purposes. Moreover, as the Court of Appeal stated: "the declarations are concerned solely with the expenditure of the funds received by OPSEU pursuant to the mandatory check off clause" (Case on Appeal, p. 2141);

(b) Further, contrary to Lavigne's submission in paragraph 12 of his factum, the Court of Appeal did not "simply [fail] to consider the government compulsion to pay dues". Rather, the Court of Appeal recognized that Lavigne was, in substance, complaining that the government had failed to restrict the use to which Rand formula dues can be put. Indeed, in paragraph 10 of his factum, the appellant characterizes the government action under challenge as "permit[ting] the dues to be used for any of the purposes set out in Appendix "A" to the amended application", and also states that he seeks only to have declared unconstitutional

"those aspects of the governmental action", i.e., permitting the use of dues for certain purposes, "that cannot pass muster under s.1". As a result, on his own terms, the conduct which Lavigne alleges is unjustified under s.1, and thereby constitutionally invalid, is not government action at all, but rather the action of a trade union in deciding to expend funds for certain purposes.

(c) Contrary to the submissions set out in paragraphs 13 and 14 of Lavigne's factum, the Court of Appeal's ruling that Lavigne's application is beyond the reach of the Charter is not based upon "semantic distinctions" with respect to the declaration sought. As is clear from the possible alternate formulations of the notice of application set out in Lavigne's factum, no matter how the application is framed, the appellant must rely upon the failure of the Council or the statute to restrict the uses to which dues can be put, a matter beyond the reach of the Charter. Merely because the government has required the payment of money to a non-governmental organization, without direction as to its use, does not justify Charter scrutiny of subsequent activities of that organization. As the Court of Appeal stated (Case on Appeal, p. 2142):

> **"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. The failure of the Council to regulate the use of those dues by OPSEU does not, in our judgment, constitute action by a government body."**
>
> **Re Blainey and Ontario Hockey Association (1986), 26 D.L.R (4th) 728 (C.A.),** at pp. 737-38

(d) The appellant Lavigne seeks to distinguish the decision in Baldwin, by arguing that it was "based on an application framed differently than the instant application". However, as is evident from the declaratory relief sought in Baldwin (Case on Appeal, p. 2136) the declaratory relief was framed in virtually identical terms to that sought in the instant application. While the appellant seeks to frame his argument differently, by asserting that the requirement to pay dues infringes s.2 of the Charter, it is submitted that whatever governmental action exists in respect of the payment of dues is, as in Baldwin, at an end prior to the expenditure of any funds by the union. Thus no matter how the notice of application is framed, the constitutional validity of the statutory or collective agreement provisions depends solely upon the actions of a private party beyond the reach of the Charter.

B. APPLICATION OF THE CHARTER

3. In the alternative, even if the substance of the application is directed to the requirement that the appellant pay sums equivalent to union dues to the respondent OPSEU, it is submitted that neither the inclusion of Article 12.01 in the collective agreement entered into between the Council and OPSEU, nor the provisions of the CCBA, taken alone or together, are sufficient to give rise to the application of the Charter.

(I) Article 12.01 of the Collective Agreement

4. It is respectfully submitted that, assuming the respondent Council is a governmental actor or is controlled by the government, the Charter does not apply to those of its actions which are essentially

of a private, commercial, contractual or non-public nature. Indeed, in other contexts, courts have recognized a distinction between actions which are truly governmental or public in nature, and actions which are purely private, commercial or contractual in nature, and have restricted governmental action to circumstances where the governmental authority owes a public duty to the applicant as a member of the public. Given that the purpose of the Charter is to restrain governmental action, it is submitted that a similar approach should be followed with respect to the application of the Charter.

McKinney v. University of Guelph (1988), 46 D.L.R. (4th) 193 (Ont. C.A.)

Re Ontario English Catholic Teachers' Association et al. and Essex County Roman Catholic School Board (1987), 36 D.L.R. (4th) 115 (Ont. Div. Ct.)

Tomen et al v. Federation of Women Teachers' Associations of Ontario et al. (1989), 70 O.R. (2d) 48 (C.A.)

Berardinelli v. Ontario Housing Corp. (1978), 90 D.L.R. (3d) 481 (S.C.C.)

R. v. East Berkshire Health Authority, ex parte Walsh, [1984] 3 All E.R. 425 (Eng. C.A.), per May L. J. at 435-36, and per Purchas L. J. at 442.

Bradford Corporation v. Myers, [1916] 1 A.C. 242 (H.L.)

Re Ainsworth Electric Co. Ltd. and Board of Governors of Exhibition Place et al (1987), 58 O.R. (2d) 432 (Div. Ct.)

Bartello v. Canada Post Corp. (1987), 62 O.R. (2d) 652 (H.C.), at 664-66

Schnurr v. Royal Ottawa Hospital (1986), 56 O.R. (2d) 589 (C.A.)

Swinton, "Application of the Canadian Charter of Rights and Freedoms", in Tarnopolsky and Beaudoin, The Canadian Charter of Rights and Freedoms (1st ed.), at pp. 58-59

Arlington Crane Service v. Minister of Labour et al (1988), 56 D.L.R. (4th) 209, at pp. 242 and 258

5. In this regard, it is submitted that the negotiation of a collective agreement is not part of the process of governing. Rather, in negotiating a collective agreement with OPSEU, the Council is acting as any employer which collectively bargains with its employees. As a result, the terms and conditions of the collective agreement, including the Rand formula, do not result from government action to which the Charter applies.

6. In any event, even if entering into a collective agreement by the Council could in some circumstances constitute government action, it is necessary to distinguish between the government directly conditioning employment on a deprivation or waiver of Charter rights, and the mere acquiescence by government to a contractual provision at the instance of and for the benefit of a private contracting party, such as the trade union. Thus, unlike the universities in McKinney which insisted upon the imposition of mandatory retirement, the Council, far from compelling the trade union to agree to the Rand formula, is merely acquiescing in its inclusion in the collective agreement at the behest of the union. It is submitted that this does not constitute sufficient government action to invoke

the Charter, particularly where there is no evidence whatsoever that the Council has ever sought or required the Rand formula.

7. Further, contrary to the appellant's submission in paragraphs 23 and 24 of his factum, this case does not raise a concern that government is seeking to avoid its obligations under the Charter by doing indirectly by contract that which it would otherwise seek to do directly. Indeed, the repeal of the earlier regulation requiring the payment of dues can only be viewed as indicating the government's intention to leave the terms and conditions of the collective agreement as a matter to be decided voluntarily by the parties to the agreement, and not as a matter of legislative or government compulsion. In these circumstances, it is submitted that a distinction should be made between government exercising its coercive powers while acting in a public capacity to unilaterally enact legislation or regulations, and government voluntarily negotiating, at arms length, a contract or collective agreement in the same manner as any private individual.

8. Lavigne relies, in paragraphs 39 and 40 of his factum, upon certain U.S. cases and an article by Professor Summers, for the proposition that setting the terms and conditions of public employment is inherently governmental in nature. In Canada, however, both legislatures and the courts have rejected the U.S. approach, and have taken the view that public sector employees should be treated no differently than private sector employees in this respect. As Justice Wilson stated in the PSAC case: "The government as employer has no greater power vis-a-vis its employees than a private sector employer."

PSAC v. Canada, [1987] 1 S.C.R. 424 at 456

Reference re Public Service Employees Relations Act, [1987] 1 S.C.R. 313, at pp. 378-380

(ii) The Colleges Collective Bargaining Act

9. The appellant Lavigne also relies upon ss.51, 52 and 53 of the CCBA to support his submission that the Charter applies to the requirement that he pay sums equivalent to union dues to the respondent OPSEU. However, the CCBA does not require that the collective agreement between the union and the employer contain the Rand formula, and is entirely neutral in this respect; a collective agreement which did not contain the Rand formula would be just as enforceable and legally valid as one which did.

Bhindi v. B.C. Projectionists, Local 348 (1988), 29 D.L.R. (4th) 47 (B.C.C.A.), at p. 56:

> **"In my opinion the government's enactment of the Labour Code with the provision allowing the closed-shop does not transform the closed-shop provision into governmental action. The collective agreement before us was not mandated by the Legislature. It was entered into by two parties to a contract. Its contents do not reflect government policy. The Labour Code establishes the procedure whereby private parties may conclude an enforceable collective agreement but clearly it does not require the parties either to reach such an agreement or to include in it a closed-shop provision.**

> **The Union and the employer are performing no public role in ordering their affairs through their private contract (the collective agreement). The Labour Code neither mandates nor encourages the parties to include a closed-shop provision. The provision is merely recognized by the Labour Code as one of the possible varieties of contractual terms resulting from collective bargaining in the field of industrial relations."**

Arlington Crane Service v. Minister of Labour et al., supra, at pp. 63-66

10. Furthermore, it is submitted that neither s.51 of the CCBA, in giving binding effect to a collective agreement, nor s.52 of the CCBA, in recognizing an exclusive bargaining agent, convert the voluntary negotiation of terms and conditions of employment, including the Rand formula, into governmental actions subject to Charter scrutiny. Sections 51 and 52 of the CCBA are part and parcel of a legislative scheme which provides a framework to regulate collective bargaining between employers and trade unions, as democratically selected representatives of employees. The participation of trade unions in the procedures established under collective bargaining legislation, such as the CCBA or the Ontario Labour Relations Act, does not make the terms and conditions of freely concluded collective agreements amenable to Charter review, convert a trade union into a governmental actor, or convert the activities or expenditures of trade unions into governmental activities. Otherwise any private transaction, which was recognized, sanctioned, licensed, or made enforceable by virtue of legislation would be amenable to review under the Charter. The law gives binding effect and imposes preconditions to the validity of a host of private transactions or agreements in such fields of law as real estate, securities, corporate, landlord and tenant, trust, wills and estates. While legislative and common law rules condition and structure the nature of all private arrangements, the essentially private nature of the parties, and of the contractual provisions and legal relations between them, remains unimpaired.

R.W.D.S.U. v. Dolphin Delivery, [1986] 2 S.C.R. 573

Wellington, "The Constitution, the Labour Union and Governmental Action" (1961) 70 Yale Law Journal 345.

Swinton, "Application of the Canadian Charter of Rights and Freedoms", supra, at p.47

11. Contrary to the appellant's submission in paragraph 43 of his factum respecting the Bartello decision, the Charter applied in Bartello because the equivalent of s.51 of the CCBA under the Canada Labour Code was itself alleged to be in breach of s.15(1) of the Charter, not because of its permissive provision. Similarly, the provisions in the McKinney and Blainey cases were subjected to Charter scrutiny not because they failed to prevent allegedly private acts of discrimination, but because it was alleged that such provisions directly infringed s.15(1) of the Charter by denying the protection of human rights legislation specifically on the basis of age and sex.

12. Contrary to the appellant's submission in paragraph 45 of his factum, most U.S. courts have held that permissive legislative provisions respecting union security arrangements are not sufficient to subject

such provisions to constitutional scrutiny. Moreover, in the Beck decision, the U.S. Supreme Court did not deal with the constitutional issue at all. Finally, the U.S. Supreme Court has held that provisions contained in collective agreements are not subject to constitutional scrutiny merely on account of the statutory framework governing collective bargaining, including exclusivity of bargaining authority, or the binding effect of collective agreements.

United Steelworkers of America, A.F.L.-C.I.O.-C.L.C. v. Weber (1979), 443 U.S. 193 at p. 222

Abood v. Detroit Board of Education (1977), 431 U.S. 209, per Brennan J. at p. 226 n. 223, and per Powell J. at 256, esp. n.7

Machinists v. Street (1961), 367 U.S. 740 (U.S.S.C.), per Frankfurter J. at p. 807

Kolinske v. Lubbers (1983), 712 F. (2d) 471 (U.S. Ct. of Appeal)

Pasillas v. Agricultural Labour Relations Board, (1984), 202 Cal. Rptr. 739 (Cal. App. 1 Dist.)

Reid v. McDonnel Douglas Corporation (1971), 443 F. (2d) 408 (U.S. Ct. of Appeal)

Otten v. Baltimore (1953), 205 F. (2d) 58

Gabalaon v. United Farm Workers Organizing Committee et al (1974), 111 Cal. App. (3d) 757

Price v. U.A.W. (1986), 795 F. (2d) 1128

C. NO INFRINGEMENT OF THE CHARTER

(i) Freedom of Association

(a) The Purpose and Nature of Freedom of Association

13. In defining the meaning of freedom of association, it is necessary to have regard to the underlying interests protected and served by s.2(d) of the Charter. In so doing, while it is important to give a generous rather than a legalistic interpretation of the right in question, it is equally important not to overshoot the actual purpose of the right of freedom, and to place it in its proper linguistic, philosophical and historical context, including its relationship to other guaranteed rights and freedoms, and to Canada's international human rights obligations.

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

14. In Reference Re Public Service Employee Relations Act (the Alberta Reference case), the Supreme Court of Canada articulated the underlying purposes served, and interests protected, by freedom of association. While the members of the Court reached different conclusions as to whether the activities of an association, including the right to strike, are included or protected by s.2(d), all agreed that freedom of association is intended to allow individuals to engage in activities together, and pursue commonly held goals which cannot be achieved in isolation. Thus, as the Court of Appeal recognized in setting out the relevant passages from the Alberta Reference case (Case on Appeal, pp. 2146-50), the Supreme Court of Canada has held that while freedom of association is a right which inheres in

the individual, it cannot be exercised alone but only jointly by a plurality of individuals carrying out associational activities in common cause for a common purpose. This understanding of freedom of association has been consistently recognized by other Canadian courts.

> **Alberta Reference, supra, per Le Dain, J., at pp. 390-91; per McIntyre, J., at p. 393, 395, 397, 406 and 408; per Dickson, C.J.C., at p. 334 and pp. 365-66**
>
> **C.A.S. of Metro Toronto v. S.(T.), (1989), 69 O.R. (2d) 189 at pp. 203-204**
>
> **Re Retail Wholesale and Department Store Union, et al. and Government of Saskatchewan et al (1985), 19 D.L.R. (4th) 609 (Sask. C.A.)**
>
> **Re Service Employees International Union, Local 204 and Broadway Manor Nursing Home et al. (1983), 44 O.R. (2d) 392; aff'd on other grounds (1984) 48 O.R. (2d) 225 (Ont. C.A.)**
>
> **Dolphin Delivery v. Retail Union et al. (1984), 10 D.L.R. (4th) 198 (B.C.C.A.) at p. 211**
>
> **Public Service Alliance of Canada v. The Queen in Right of Canada (1984), 11 D.L.R. (4th) 337 (Fed. C.A.)**
>
> **Canadian Imperial Bank of Commerce v. Rifou (1986), 13 C.C.E.L. 293 (Fed. C.A.)**
>
> **Reference Re Public Service Employees Relations Act (1985), 16 D.L.R. (4th) 359 (Alta. C.A.) per Belzil, J.A., at p. 388**
>
> **Re Rio Hotel Ltd., and Liquor License Board et al. (1986), 29 D.L.R. (4th) 662 (N.B.C.A.)**
>
> **Re Prime et al. and Manitoba Labour Board et al (1983), 3 D.L.R. (4th) 74 (Man. Q.B.)**
>
> **Re Pruden Building Ltd. and Construction Workers' Union (1984), 13 D.L.R. (4th) 584 (Alta. Q.B.)**
>
> **Union of Bank Employees, Local 2104 and Canadian Imperial Bank of Commerce, [1986] 86 CLLC 14,192 (CLRB)**

(b) No Negative Freedom of Non-Association

15. It is submitted that, having regard to the purpose and ambit of freedom of association as identified by the Supreme Court of Canada in the Alberta Reference case, there is no basis for reading into the guarantee of freedom of association a negative freedom not to associate. The purpose of freedom of association is to foster and protect the ability of an individual to join together with other individuals, free of governmental or legislative interference, in order to engage in activities which promote a purpose common to those individuals; guaranteeing a negative freedom not to associate would not serve to protect the individual from forced isolation against the state, but rather would only serve to guarantee a right to isolation itself.

16. Contrary to Lavigne's submissions, it is inconsistent with the purposive approach to interpreting rights and freedoms guaranteed by the Charter if the courts were automatically to imply the negative of the right or freedom in question. For example, this Court held in R. v. Turpin that the right in s.11(f) of the Charter to the benefit of trial by jury does not carry with it the negative right not to be tried by

jury. While the respondent Lavigne may be entitled to waive his constitutional freedom of association, this does not carry with it the right to insist upon the opposite negative freedom of non-association.

R. v. Turpin et al., [1989] 1 S.C.R. pp. 1320-24; aff'g (1987), 22 O.A.C. 261 (Ont. C.A.) at pp. 264-65

17. It is submitted that any attempt to incorporate into the guarantee of freedom of association a negative freedom not to associate is not only inconsistent with the approach adopted by the Supreme Court of Canada in the Alberta Reference case, but also with the meaning of freedom of association as it developed at common law, which specifically recognizes the legitimacy of union security arrangements. As Justice McIntyre observed in the Alberta Reference case:

> **"As to the pre-existing law in Canada, it is sufficient to say that freedom of association is not a new right or freedom. It existed in Canada long before the Charter was adopted and was recognized as a basic right. It consisted in the liberty of two or more persons to associate together provided that they did not infringe a specific rule of common law or statute by having either an unlawful object or by pursuing their object by unlawful means. . . . It may be observed as well that freedom of association was recognized and applied in relation to trade unions. The law of Canada and of each Province has long recognized that trade unions could, and did, exist as lawful associations with rights and obligations fixed by law and that individuals had the right to belong to, and participate in, the activities of trade unions". (p. 403) [Emphasis added]**

Crofter-Harris Tweed Co. v. Veitch, [1942] 1 All E.R. 142 (H.L.)

Newell v. Booker and Bruce, [1950] 2 D.L.R. 289 (S.C.C.)

C.P.R. v. Zambri (1962), 34 D.L.R. (2d) 654 (S.C.C.); (1962) 31 D.L.R. (2d) 209 (Ont. H.C.)

Allen v. Flood, [1885-9] All E.R. Rep. 52 (H.L.)

White v. Riley, [1920] All E.R. Rep. 37 (C.A.)

Reynolds v. Shipping Federation Ltd., [1923] All E.R. Rep. 383 (Ch.D)

18. Further, it is submitted that the view of freedom of association contended for above is consistent with international treaties to which Canada is signatory, which do not incorporate into freedom of association a so-called negative freedom not to associate, but rather enshrine the freedom of individuals to combine together and engage in concerted activities. In this regard, it is to be noted that, in the trade union context, any negative freedom on non-association was deliberately omitted precisely to safeguard union security provisions, which are regarded as entirely compatible with the guarantee of freedom of association.

International Covenant on Civil and Political Rights, Article 22 (acceded to by Canada May 19, 1987)

International Covenant on Economic, Social and Cultural Rights, Article 8 (acceded to by Canada, 1976)

International Labour Organization Convention No. 87 (ratified by the government of Canada, 1972)

Final Act on the Conference of Security and Co-operation in Europe (agreed to by Canada, 1983)

Jenks, The International Protection of Trade Union Freedom, p. 30 and pp. 334-36

19. Accordingly, freedom of association itself should not be and does not need to be transformed into an anti-associational concept which would grant independent constitutional protection solely to the interest of individuals in an isolated existence. Any values or interests of the individual in being left alone already receive independent protection through the other guaranteed rights and freedoms specified in the Charter, which safeguard individual conscience, religious beliefs, bodily integrity and so forth. While freedom of association is clearly anchored in the individual, it should be recognized that it can only be exercised jointly and collectively. As Mr. Justice McIntyre recognized in the Alberta Reference case, freedom of association simply "cannot be exercised alone".

20. To the extent Lavigne relies in paragraph 50 of his factum upon the decision of the Supreme Court of Canada in R. v. Big M Drug Mart for the proposition that freedom of association includes the negative freedom on non-association, it is submitted that the analysis undertaken in Big M Drug Mart related to the purpose, scope and content of the freedom under consideration in that case. Thus, in the specific context of freedom of religion, the Court concluded that freedom from compulsory religious observance was protected activity under s.2(a), and that the Lord's Day Act was unconstitutional because it imposed values rooted in a particular religion for religious purposes. However, as submitted above, having regard to the underlying purpose of s.2(d) and the interests it protects, there is no basis for implying into freedom of association a negative freedom of non-association.

21. Lavigne refers, in paragraph 50 of his factum, to Professors Emerson and Beatty in support of his contention that a negative freedom not to associate should be incorporated into s.2(d) of the Charter. In this respect, it should be noted that in the article by Emerson upon which Lavigne relies, Emerson concludes (at p. 17) that "in the context of forced association, the concept of 'the right of association' as an independent constitutional right has not been used, and cannot be used, to solve the hard problems". In addition, in Professor Emerson's view, any negative freedom of non-association is limited to situations where an individual is forced into membership in an organization or is forced to participate in the organization's activity, and only where this has an impact on other independently guaranteed constitutional activity, such as freedom of religion or freedom of expression (p. 15). Moreover, to the extent that Professor Beatty's conclusion purports to rest upon "unavoidable logic", it is simply not a principle of logical deduction that the guarantee of "A" implies a guarantee of "not A", its opposite. Further, it is to be noted that, according to Professor Beatty, the "unavoidable logic" of his conclusion leads to the entire dismantling of the Canadian labour relations system, including certification on a majoritarian basis, exclusive bargaining agency, and each and every form of union security.

22. Lavigne relies upon the Young, James and Webster decision in paragraph 51 of his factum in support of his interpretation of s.2(d) of the Charter. In this regard, the interveners' submissions are as follows:

(a) it is submitted that, in the Canadian context, given the underlying purpose of freedom of association articulated by the Supreme Court of Canada, the dissenting opinion in the Young, James and Webster case, which held that a negative freedom not to associate should not be incorporated into the guarantee of freedom of association, is to be preferred to that of the majority.

(b) the Court specifically stated (at p. 53) that it did "not consider it necessary to answer this question [whether freedom of association in Article 11 includes a negative right not to associate] on this occasion";

(c) the issue before the Court was whether the closed shop was consistent with freedom of association, and Lavigne is not subject to a closed shop provision;

(d) Lavigne was hired subsequent to the existence of the Rand formula in this case, while in Young, James and Webster, the court's finding that freedom of association had been violated was based upon the threat of dismissal against the complainants as a result of a closed shop arrangement which had been entered into subsequent to their employment.

(c) No Infringement of Freedom of Association

23. Lavigne does not submit that his freedom to join together with other individuals is in any way infringed by the requirement to pay the equivalent of dues to OPSEU. Rather, Lavigne relies entirely upon the submission that his negative freedom of non-association is infringed. For the reasons set out above, it is the position of the OFL and CLC that a negative freedom of non-association is not protected under s.2(d) of the Charter, and accordingly there can be no infringement of s.2(d) in the instant case.

Terminaux Portuaires v. Martime Employers Assoc. O.C. (1988), 89 N.R. 278, at pp. 296-97:

". . . I doubt that it can then be said that freedom of association involves 'that of non-association', which the argument clearly presupposes".

24. In the alternative, with respect to any negative freedom of non-association, it is submitted that the simple requirement of monetary payment to an organization in exchange for services rendered does not interfere with an individual's negative freedom of non-association. Freedom of association entails the joining together with others to engage in collective activities in order to pursue common goals. As a result, any negative freedom of non-association would of necessity involve a requirement that individuals join an organization, be forced to participate in its activities, or be subject to its authority. Mere payment to an organization, without any further obligation, or identification with that organization or its activities, is an inevitable feature of living in organized society, and as such, can hardly constitute a breach of the Charter. As the Court of Appeal found (Case on Appeal, pp. 2156-57):

The compelled payment does not curtail or interfere with any aspect of Lavigne's freedom of non-association or the interests protected thereby. His right not to associate remains unimpaired. He is not forced to join the union; he is not forced to participate in its activities; and he is not forced to join with others to achieve its aims. The compelled payment does

> not identify him personally with any of the political, social or ideological objectives which OPSEU may support financially or otherwise; nor does it impose any obligation on him to adapt or conform to the views advocated by the union. . . . A right to refrain from association does not, in our opinion necessarily include a right not to be required to support an organization financially. In the labour relations context in which this case arises, to determine whether this Charter right has been breached, the consequences of the financial relationship created by the agency shop provision must be examined. Does it threaten or impair any consitutionally protected associational interest of non-members?
>
> On the evidence in this case, the mandatory payment did not operate so as to diminish the non-member's ability, as an individual, to join with others in the pursuit of collective activities and common goals. Furthermore, neither the payment, nor the use to which any part of it might be put by the union or any labour body with which it is affiliated, operates so as to compel the non-member to join or associate with any political party or to join or associate with causes other than those of his choice or to be identified with any of the aims and objectives of the union. In the absence of dangers of this nature, we see no threat to any constitutional interests protected by s.2(d)".

Etherington, "Freedom of Association and Compulsory Union Dues: Towards a Purposive Conception of a Freedom to not Associate", in (1987), 19 Ottawa Law Review 1 at p. 43-45.

Merry v. Her Majesty the Queen in Right of the Province of Manitoba and the Manitoba Medical Association, unreported, Manitoba Court of Appeal, Dec, 21, 1989:

> "Even conceding for the sake of argument that freedom of association carries with it a concomitant freedom of non-association, we are unable to see how the impugned statute offends the Charter. Although Dr. Merry is forced to pay money to the Manitoba Medical Association (MMA), he is not obliged to be a member of it or to be associated with it in any way other than the payment of money. In our opinion, the provinces's power to divert money from a citizen to a particular association or group does not offend the citizen's right to freedom of association".

25. The sole basis for the appellant's claim in these proceedings is that a governmental measure which diverts money from an individual to a particular organization or group is tantamount to compelled association within the meaning of s.2(d). It is submitted, however, that whether an individual voluntarily pays an organization for services rendered (money to a law firm or tuition to a university) or is required to pay for services rendered (taxes to the government or premiums for mandatory automobile insurance), that payment does not create an association, and that individual does not thereby engage in protected associational activity. All that is involved is an economic exchange, which does not require or entail personal involvement in the collective pursuit of common goals. In this connection, it would be inconsistent with the intent and structure of the Charter to regard freedom of association as protecting the right of an individual to choose whether or not to contract with an individual or organization on whatever terms he or she pleases. The Charter does not include a guarantee of economic or commercial liberty, or freedom to contract, and indeed, such protection was specifically excluded by the drafters of the Charter.

Irwin Toy Ltd. v. Attorney General of Quebec, [1989] 1 S.C.R. 927, at pp. 1003-1004

Alberta Reference, supra, per McIntyre J., at p. 413

Omni Health Care Ltd. v. C.U.P.E., Local 1909, unreported, Ontario Div. Ct., January 29, 1987 at p. 3:

> **"Not every relationship is an 'association', for example, solicitor-client, doctor-patient, teacher-pupil, relationships could hardly be referred to as 'associations'. . . . An 'association' implies a common purpose. One party to labour management negotiations seeks as high wages as possible the other as low as possible. They are adversaries. It is difficult to say that adversaries have a common purpose."**

Canadian Imperial Bank of Commerce v. Rifou, supra

Re Malartic Highgrade Gold Mines (Canada) Ltd. and Ontario Securities Commission (1986), 27 D.L.R. (4th) 112 (Ont. Div. Ct.)

Aluminium Company of Canada Limited and The Queen et al. (1986), 55 O.R. (2d) 522 (Div. Ct.)

Manicom et al. v. County of Oxford et al. (1985), 21 D.L.R. (4th) 611 (Ont. Div. Ct.) at pp. 618-19

Smith, Kline, & French Laboratories Limited et al. v. Attorney-General of Canada (1987), 24 D.L.R. (4th) 321 (F.C.T.D.); aff'd (1986), 34 D.L.R. (4th) 584 (F.C.A.)

R. v. Videoflicks et al. (1984), 48 O.R. (2d) 395 (C.A.) at 432-33; aff'd on s.7 grounds in Edwards Books and Art Ltd. v. The Queen, [1986] 2 S.C.R. 713

R. v. Quesnel (1985), 53 O.R. (2d) 338 (C.A.) at p. 346

Re Gershman Produce Company Limited v. Motor Transport Board (1985), 22 D.L.R. (4th) 520 (Man. C.A.) at p. 528

26. Furthermore, even if the negative freedom of non-association were protected by s.2(d) of the Charter, the extent of such protection must be construed with reference to the "nature, history, traditions, and social philosophy of our society." The Rand formula provision has long been recognized as a fundamental component of collective bargaining in Canada, and as an important right of trade unions. It is submitted that an interpretation of freedom of association which recognizes the importance of the Rand formula to our history, traditions and social philosophy is to be preferred to one which would hold the Rand formula to be prima facie unconstitutional. As the Court of Appeal noted, the drafters of the Charter could not have intended "to render these historical collective bargaining practices and procedures and trade union activities in violation of the Charter."

Decision of the Ontario Court of Appeal, Case on Appeal, pp. 2151-52 and p. 2160

Alberta Reference, supra, per McIntyre J., at p. 393 and pp. 403-4

Syndicat Catholique (1959), 18 D.L.R. (2d) 346 (S.C.C.)

Ford Motor Company of Canada v. UAW-CIO, (Rand Decision), Case on Appeal, vol. 6, pp. 1044 ff.

27. In the Alberta Reference case, this Court declined to interpret s.2(d) as including the right to strike, on the basis that the courts should be reluctant to adopt an interpretation of freedom of association which would undermine the ability of the Legislature to balance the competing interests inherent in the regulation of labour relations and collective bargaining. Similarly, it is submitted that the

Rand formula should not be regarded as constituting a prima facie infringement of s.2(d) of the Charter, given the extent to which it has become an integral element in the balance of power in the field of labour relations. This approach is consistent with the decisions of other courts which, recognizing the delicate balance of competing interests in labour relations matters, have dismissed challenges to other elements of the collective bargaining system based on the Charter.

> **Alberta Reference, supra, per McIntyre J., at pp. 403-4 and 414-20 and per Le Dain, J. at pp. 391-92**
>
> **Arlington Crane Services Ltd., supra**
>
> **Metropolitan Stores Ltd. v. M.F.C.W., Local 832, [1988] 5 W.W.R. 544 (Man. Q.B.); upheld on appeal, Manitoba Court of Appeal, Nov. 3, 1989**

28. Finally, it is submitted that where an infringement of a constitutionally protected interest is alleged, a trivial or insubstantial burden does not warrant constitutional protection. The evidence establishes that there is no impairment of the appellant's ability to engage in associational activities with others, and that any effect on Lavigne is purely financial and does not implicate any other interests which are even arguably comprehended by s.2(d). It is submitted that the Court of Appeal correctly held that any interest Lavigne may have in "being left alone" or in being "unemcumbered by any monetary obligation" was trivial or insubstantial, and that any interference with that interest is not sufficient to give rise to an infringement of s.2(d) of the Charter.

> **Edwards Books and Art Ltd. v. The Queen, supra, at p. 759**
>
> **R. v. Jones, [1986] 2 S.C.R. 284, per Wilson J.:**
>
> > **"To state that any legislation which has an effect on religion, no matter how minimal, violates the religious guarantee 'would radically restrict the operating latitude of the legislature".**

29. In paragraphs 53 and 57, the appellant Lavigne relies upon the decision of Martland, J., in the Oil Chemical Atomic Workers case. However, Justice Martland's comments were not concerned with whether the Rand formula infringes a constitutionally protected freedom of association, but rather the extent to which certification procedures alter the status of trade unions as purely voluntary associations. Moreover, the constitutional issue involved whether, under s.92(13) of the then B.N.A. Act, legislation preventing unions from contributing any portion of their dues to political parties fell within provincial or federal jurisdiction. Finally, it is submitted that, in the context of interpreting constitutionally guaranteed rights or freedoms, the decision of Mr. Justice Judson, which in fact recognizes the right of unions to make contributions to political parties out of their own funds, is to be preferred.

30. In paragraph 58 of his factum, Lavigne relies on U.S. decisions for the proposition that "compelled financial support" alone violates freedom of association. In this regard, it is to be noted that the passages cited by Lavigne in both Street and Abood make clear that, at least in the U.S., the alleged

violation of freedom of association results from the decisions of unions to expend their funds on particular political or ideological causes. However, these are the very activities or decisions to which Lavigne concedes the Charter does not apply. It is submitted that Lavigne's reliance on these cases confirms the submissions set out in paragraphs 1-2 above that the substance of his application relates to the expenditure decisions of trade unions. In addition, since the analysis of the U.S. Supreme Court in this area relates not so much to freedom of association, which receives no independent protection under the U.S. Bill of Rights, but rather to the First Amendment protection of freedom of speech, the U.S. cases are discussed below under the topic of freedom of expression.

(II) Freedom Of Expression

31. Throughout his submissions relating to freedom of expression, Lavigne consistently asserts that the s.2(b) of the Charter is infringed as a result of the union expending funds for certain "political or ideological causes", or for so-called non-collective bargaining activities. For example, in his summary of argument set out in paragraph 63, Lavigne argues that the alleged infringement of freedom of expression results from his being compelled to "provide positive affirmation - in the form of a financial contribution - the union's non-collective bargaining activities". However, given that the trade union determines which activities it will expend union dues on, the alleged infringement of s.2(b) upon which Lavignes relies clearly results from the decision of a private body to which the Charter does not apply, and should be dismissed on this basis alone. In this regard, Lavigne's own submissions concerning the alleged infringement of s.2(b) again reveal the extent to which the substance of his application is directed at private actors beyond the reach of the Charter.

32. In any event, it is submitted that the payment of the equivalent of dues by Lavigne to OPSEU does not constitutes an infringement of s.2(b). As this Court held in the Irwin Toy case, in deciding whether an alleged violation of the guarantee of freedom of expression exists, it is first necessary to "determine whether the plaintiff's activity falls within the sphere of conduct protected by the guarantee", that is, whether such activity conveys or attempts to convey a meaning. It is respectfully submitted, for the reasons set out below, that the payment of sums equivalent to dues to OPSEU does not constitute expressive activity on the part of Lavigne.

Irwin Toy, supra

33. It is submitted that the payment of money, in and of itself, does not amount to expressive activity so as to be protected by s.2(b). Such contention is founded upon the untenable assumption that an individual expresses his opinions, beliefs or thoughts each time he parts with his money. However, when individuals buy goods and services, or pay bills or taxes, they are not viewed as expressing approval or disapproval of the organizations to which such payments are made or of any subsequent

expenditures by such organizations. Similarly, by the payment of the equivalent of dues under the Rand formula, Lavigne is not expressing nor is he seen as expressing any particular ideas, opinions, beliefs or thoughts concerning his approval or disapproval of unions, or otherwise. In short, Lavigne can in no way be seen to have personally engaged in any form of expression simply by paying the equivalent of dues to the union.

Cox, Law and The National Labour Policy, 1960, p. 109:

> **"The forced payment of dues does not curtail freedom of speech or association. It impairs no political rights. Since the only compulsion is to pay the regular dues - not an earmarked political assessment - the member does not even suffer the affront of being forced to pay money for an identifiable cause which he is unwilling to support."**

Lathrop v. Donohue (1961), 367 U.S. 820, per Harlan J., concurring at p. 858:

> **"What seems to me obvious is the large difference in degree between, on the one hand, being compelled to raise one's hand and recite a belief as one's own, and, on the other, being compelled to contribute dues to a bar association fund which is to be used in part to promote the expression of views in the name of the organization (not in the name of the dues payor), which views when adopted may turn out to be contrary to the views of the dues payor. I think this is a situation where the difference in degree is so great as to amount in a difference in substance."**

MacKay v. The Government of Manitoba, [1989] 2 S.C.R. 357

34. Further, it is submitted that the simple payment by the appellant Lavigne of amounts equivalent to union dues is not tantamount to the expression by Lavigne of support for the trade union, or for a particular political or social cause. Even where the trade union makes payments in support of so-called non-collective bargaining matters, such expenditures do not involve Lavigne himself personally contributing to or being identified with particular political or social causes. Once dues are remitted to the trade union, they are expended as a result of the trade union's decision democratically arrived at, and on behalf of the trade union, rather than on behalf of any particular individual. The dues remitted to the trade union are for the trade union to expend, whether or not their payment has been required; individuals do not voluntarily pay taxes to the government, but once such taxes are paid, it can hardly be denied that the money is the government's to use as it determines. As a result, the only entity which contributes to or could be identified with the seven causes to which Lavigne specifically objects is the trade union itself. This lack of identity between Lavigne and any message being conveyed is even more apparent in the case of expenditures by the central labour bodies.

Decision of Mr. Justice White, Case on Appeal, Vol. 10, pp. 2009-2012

Hills v. Attorney General of Canada, [1988] 1 S.C.R. 513 at pp. 550-59

DeMille v. American Federation of Radio Artists (1947), 187 P. (2d) 769 (Sup. Ct. Cal.) at p. 776

Lathrop v. Donahue, supra, at pp. 856-60

Machinists v. Street, supra, per Frankfurter, J. at p. 808

International Brotherhood v. Therien (1961), 22 D.L.R. (2d) 1 (S.C.C.), at p. 11

35. In MacKay v. The Government of Manitoba, this Court held that enforced financial support by a taxpayer of a political party whose views were fundamentally opposed to those of the taxpayer did not constitute an infringement of freedom of expression, since neither the taxpayer nor anyone else was prohibited from holding or expressing any position or their belief in any position. Similarly, it is submitted that the requirement that Lavigne pay dues does not involve any restriction on his ability to hold and express his own thoughts, beliefs, and opinions; to communicate his opposition to any positions supported by the union; to identify with or be identified with causes he chooses; and finally, to express his approval or disapproval for the trade union itself. As a result, neither the purpose nor effect of the Rand formula is to interfere with the underlying values or interests protected by s.2(b) of the Charter, including the pursuit of truth, participation in the community or individual self-fulfillment.

MacKay v. The Government of Manitoba, supra, at p. 366

36. In paragraphs 68 to 70 of his factum, Lavigne relies on certain decisions of the U.S. Supreme Court. In this regard, the OFL and CLC rely upon the following submissions:

(a) While Lavigne relies on the Barnette and Maynard decisions, the U.S. Supreme Court itself distinguished these cases in the subsequent case of Pruneyard Shopping Center v. Robins (1980), 447 U.S. 74. In Pruneyard, the U.S. Supreme Court held that there was no deprivation of a shopping centre owner's right of free speech when the shopping centre owner was compelled by state law to provide access to his property as a forum for the speech of others. In reaching its decision, the Court distinguished its earlier decision in Wooley v. Maynard on the following basis, per Renqhuist J. at p. 85:

> **"Appellants finally contended that a private property owner has a First Amendment right not to be forced by the State to use his property as a forum for the speech of others. They state that in Wooley vs. Maynard 432 U.S. 795 (1977), this Court concluded that a State may not constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the expressed purpose that it be observed and read by the public. This rationale applies here, they argue, because the message of Wooley is that the State may not force an individual to display any message at all.**
>
> **Wooley, however, was a case in which the government itself prescribed the message, required it to be displayed openly on appellant'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 thought the Court found that the display of the motto served no important State interest. Most important . . . the views expressed by members of the public in passing out pamphlets to seeking signatures for petition . . . will not likely be identified with those of the owner. Second, no specific message is dictated by the State to be displayed on appellant's property. There consequently is no danger of governmental discrimination for or against a particular message. Finally, as far as it appears here, appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand."**

The Court also distinguisned the Barnette Case, which involved a State education department making it compulsory for children in public schools to salute the flag and pledge allegiance, on the following grounds, at p. 87:

> **"[Barnette] involved a compelled recitation of a message containing an affirmation of belief. This Court held such compulsion unconstitutional because it 'required the individual to communicate by word and sign his acceptance' of government dictated political ideas, and whether or not he subscribed to them. Appellants are not similarly compelled to confirm their belief in any governmentally prescribed position or view, and they are free to publicly disassociate themselves from the views of the speakers or handbillers."**

As a result, contrary to Lavigne's submissions, the U.S. Supreme Court has considered the factors of public identification with a state-prescribed message, and the capacity to disavow any connection with that message, as critical to a determination of whether an individual is being required to engage in expressive activity. Pruneyard stands for the principle that public identification and disavowal are relevant where, as in the instant case, an individual is not personally compelled to convey or communicate a message prescribed by government, but rather is merely required to financially support a third party which engages in expressive conduct.

(b) Moreover, it is submitted that the holding of the U.S. Supreme Court in Abood is inconsistent with its subsequent decision in Pruneyard; indeed, had a similar analysis been applied in Abood, no constitutional violation would have been found. In this regard, the same distinguishing factors which led the U.S. Supreme Court to find no infringement of free speech in the Pruneyard case can be applied to the facts of the instant application. As in Pruneyard, Lavigne's views are not identified with those of the trade union, no specific message is dictated by government; Lavigne is free to disavow any possible connection with respect to support for the union or its activities; Lavigne is in no way being compelled to affirm his belief in any governmentally prescribed view; and finally, the payment of union dues does not amount to the recitation of a message containing an affirmation of belief.

Lathrop v. Donohue, supra, per Harlan J., at p. 858

Erzinger et al. v. Regents of the University of California (1983), 187 Cal. Rep. 164 at p. 167

Arlington et al. v. Taylor et al. (1974), 380 F.Supp. 1348

U.S. v. Lee (1982), 455 U.S. 252 at pp. 259-60

Etherington, "Freedom of Association and Compulsory Union Dues", supra at pp. 40-41

37. In paragraphs 71 to 73 of his factum, the appellant attempts to distinguish the MacKay decision of the Manitoba Court of Appeal (subsequently affirmed by this Court), on the basis that government expenditures are different than those made by a private association such as a union, and that the expenditures in the MacKay case are "content neutral". In this regard, the OFL and CLC submit as follows:

(a) to the extent Lavigne claims that the payment of union dues, and not their subsequent expenditure, violates s.2(b), the MacKay case cannot be meaningfully distinguished, since both cases involve a government requirement to pay money to private organizations (a trade union or a political party), to which the individual may object. Moreover, by relying upon a supposed distinction between expenditures by government, and expenditures by private

associations, it is again evident that Lavigne seeks to challenge the expenditure decisions of a private association, and not the prior requirement to pay money to that association;

(b) While the appellant attempts to distinguish McKay on the basis that the expenditures at issue were "content neutral", such expenditures were made to political parties specifically to enable the expression of political views, with which some individuals will inevitably disagree, and the fact that those political parties may have different political views does not mean that the expenditures were "content neutral". Similarly, in the instant case, it cannot be said that the government subsidizes a particular viewpoint, since trade union activities and expenditure decisions are not in any way dictated by government, but rather are determined by unions on a democratic basis. In this regard, there is no evidence to suggest that this democratic process of decision making within unions does not promote wider discussion and participation in the electoral process. Trade union expenditures often serve to counteract viewpoints advocated by employers, thereby fostering and encouraging a wider range of positions. Finally, contrary to Lavigne's assertion in paragraph 72 of his factum, the record does not support the proposition that the views of trade unions are monolithic.

Morton Affidavit, Case on Appeal, vol. 8, p. 1472

D. SECTION 1 OF THE CHARTER

(i) General Principles

38. It is respectfully submitted that a limitation on Charter rights and freedoms is demonstrably justified where (i) the objectives served by the challenged measure relate to sufficiently important concerns and (ii) the means chosen to attain those objectives are proportionate to them.

R. v. Oakes, [1986] 1 S.C.R. 103

Edwards Books and Art Ltd. v. The Queen, supra

Irwin Toy Ltd. v. A.G. Quebec, supra

Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038

United States of America v. Cotroni, [1989] 1 S.C.R. 1469

39. It is respectfully submitted that, where the Legislature is required to strike a balance between competing groups, particularly so as to protect vulnerable or less powerful groups, the courts will be reluctant to substitute judicial opinion for legislative choices as to the particular balance struck or line drawn. In this regard, in determining whether a particular measure is justified under s.1, the courts must be concerned to avoid constitutionalizing inequalities of power in the workplace and between societal actors in general. Thus, as in Edwards and Slaight Communications, the courts should be vigilant to ensure that the Charter not be used to undermine legislative measures which are intended to redress the inequality of bargaining power between employees and their employers.

Irwin Toy Ltd. v. A.G. Quebec, supra, at pp. 988-994

Edwards Books and Art Ltd. v. The Queen, supra, at pp. 772, 779, and 781-82

Slaight Communications Inc. v. Davidson, supra

40. It is submitted that the field of labour relations and collective bargaining in particular involves a delicate balancing of competing political and economic interests among employers, trade unions, and employees represented by trade unions. As a result, the courts must be particularly sensitive to the danger of substituting their judgment for that of the Legislature as to the appropriate balance to be struck in this area. As Mr. Justice Le Dain pointed out in the Alberta Reference case, the use of s.1 of the Charter to review legislation in the labour relations field demonstrates "the extent to which the court becomes involved in a review of legislative policy for which it really is not fitted."

Alberta Reference, supra

(II) The Objectives of the Rand Formula

41. It is respectfully submitted that the Rand formula serves the objective of (i) strengthening trade unions so that they can protect and advance the interests and welfare of all employees they have been democratically selected to represent against the countervailing power of employers; and (ii) eliminating the incentive for certain employees to become "free riders" by receiving the benefit of union activities without paying the same costs as other employees.

42. It is submitted that the pressing and substantial nature of the concerns which underlie the objectives served by the Rand formula have been generally recognized, and indeed, are self-evident.

Syndicat Catholique, supra, at p. 350:

> **"The object of the clause is well known and obvious. It is to throw upon all employees, whether members of the union or not, equal responsibility for the financial upkeep of the union on the theory that the gains achieved by the union on behalf of all employees must, at least to the extent of financial support, be paid for by all. For the union, the advantages and convenience of a compulsory check-off are equally obvious.**

Ford Motor Company of Canada v. UAW-CIO (Rand Formula Decision), Case on Appeal, Vol.6, p. 1[illegible].

> **"In most of the Provinces and by Dominion War Legislation, the social desirability of the organization of workers and of collective bargaining where employee seek them has been written into law as . . . the corollary from it is that labour unions should become strong in order to carry on the functions for which they are intended.**

Edwards Books and Art Ltd., supra, at p. 770

Jones v. The Queen, supra

Slaight Communications, supra

43. The importance of the Rand formula to the Canadian collective bargaining system, and to the ability of trade unions to fully and effectively advance the interests of the workers they represent, flows directly from the fact that trade unions are the exclusive bargaining agents for all of the employees they represent, and are required to fairly represent all employees. Having regard to this fundamental structure of collective bargaining in Canada, the purpose of the Rand formula is to ensure that the

costs of obtaining the collective or public good which results from union action on behalf of all employees is adequately met and fairly distributed. As Professor Weiler has observed with respect to the rationale for the Rand formula or agency shop:

> **"What is the cumulative result of those doctrines of a union's exclusive bargaining authority over a unit of employees, and its duty of fair representation to all employees in the unit whether union members or not? The trade union faces the dilemma of trying to achieve a public good on a voluntary basis. . . . For a combination of economic and legal reasons, that collective good cannot be confined to those who paid the cost of producing it. . . .**
>
> **The remedy for that disparity in the distribution of benefits and costs seems clear enough: the agency shop. All employees in the unit must pay the regular union dues, whether they belong to the union or not."**
>
> **Weiler, Reconcilable Differences, pp. 144-45**

44. It is submitted that the appellant Lavigne incorrectly characterizes the purpose or objectives of the Rand formula as limited to the immediate concerns of collective bargaining, and as restricted to providing unions with sufficient resources to spend on collective bargaining narrowly defined. There is no basis in the record for attributing this narrow purpose to the government, particularly since, where it intended to restrict the use of dues collected through an agency shop provision, legislatures have specifically enacted provisions specifically limiting the use of union dues. Indeed, under the C.C.B.A. at issue in these proceedings, restrictions limiting the scope of trade union expenditures previously in effect were repealed (Regulation 403/69). As a result, it is submitted that no inference can be drawn that the government's objective is to limit the ability of employees represented by a trade union to determine on a democratic basis the most appropriate and effective activities on which to expend union revenues collected through the agency shop. Rather, the evidence demonstrates that the objective of the Rand formula provision is not limited to the immediate concern of collective bargaining, narrowly defined, but rather to the prevention of "free riders" with respect to all activities of the trade union which have been determined to be appropriate by the majority of employees.

> **Machinists v. Street, supra, at p. 801:**
>
> > **"The aim [of the legislation] . . . was to eliminate 'free-riders' in the industry - to make possible 'the sharing of the burden of maintenance by all of the beneficiaries of union activity' to suggest that this language covertly meant to encompass any less than the maintenance of those activities normally engaged in by unions is to withdraw life from law and to say that Congress dealt with artificialities and not with the railway unions as they were and as they functioned."**
>
> **Rand Formula Decision, Case on Appeal, Vol. 6, p.1049:**
>
> > **"It may be argued that it is unjust to compel non-members of a union to contribute to funds over the expenditure of which they have no direct voice; and even that it is dangerous to place such money power in the control of an unregulated union. But the dues are only those which the members are satisfied to pay for substantially the same benefits, and as any employee can join the union and still retain his independence in employment, I see no serious objection in the circumstance. The arguement is really one for a weak union."**

Bercuson Cross-Examination, Case on Appeal, Vol. 9, pp. 1808-1812 (U.A.W. used union dues to support CCF at time of Rand decision, and Rand did not limit such use)

(iii) The Proportionality Requirement

(a) Rational Connection Between Objective and Rand Formula

45. It is respectfully submitted that the requirement that an individual pay dues to a trade union, and that the expense and costs of trade union representation be borne equally by employees the trade union is obligated to represent, is rationally related to the objective of providing trade unions with sufficient resources to represent employees and preventing "free riders."

(b) No Reasonable Alternative Scheme

46. It is respectfully submitted that, if the appellant is correct in maintaining that a Charter infringement occurs when he is required to pay dues, without regard to what the dues are used for, it is entirely inappropriate and irrelevant to inquire under s.1 into the use of trade union dues. Otherwise, the constitutional validity of the requirement to pay dues would be entirely dependent upon the expenditure decisions of a private party to which the Charter does not apply. In this regard, it is submitted that Lavigne has conceded, at least for the purposes of this application, that the Rand formula is justified, since the only basis upon wnich he submits that it cannot be justified depends upon trade union decisions to make expenditures on so-called non-collective bargaining matters, which expenditure decisions are beyond the reach of the Charter.

47. In the alternative, to the extent that the expenditure decisions of trade unions are relevant under s.1 of the Charter, it is submitted that the process of collective bargaining is but one of the means employed by unions to advance the objective of adequately protecting the interest and welfare of employees. Only through engaging in a wide range of activities, including both bargaining directly with employers as well as social and political action, can trade unions effectively protect and advance the interests and welfare of the employees they represent. Indeed, it is submitted that both the history of the trade union movement, and economic, social and political reality, dictate that trade unions be involved in and concerned with all facets of economic, social and political life, if success at the bargaining table is to be achieved and preserved. As a result, once it is accepted, as Lavigne concedes, that it is reasonable and justified to require all employees who share the benefit of trade union activity through collective bargaining to equally shoulder the burden, it is no less justified to require that all employees share equally in the costs involved in those expenditures determined by the majority to be important in achieving the goals of collective bargaining and furthering the welfare and interests of employees represented by the trade union. It is simply not possible to restrict the "free rider" rationale to the payment of dues for collective bargaining activities narrowly defined. The benefits

which trade unions bring to workers they represent are as much a product of their political and social activities as the activities engaged in at the bargaining table or in administering the collective agreement.

48. The evidence before this Court unequivocally demonstrates that, in order to accomplish these goals, it is necessary for trade unions to resort to a wide range of activities, aside and apart from negotiating directly with individual employers. In this regard:

(1) Professor Abella has noted that such activity is necessary because (a) many improvements to the social and economic well-being of workers can only be obtained through legislative action and reform; (b) social and economic policies adopted by governments impact both directly and indirectly upon the economic and social well-being of workers; and (c) trade union activities outside the arena of direct negotiations with individual employers have proved necessary to counteract the ability of employers to effectively lobby and advocate their interest in various political forums.

(2) Professor Morton has noted that restrictions on the ability of trade unions to engage in and expend money on social and political activities would seriously undermine the ability of workers to promote and advance their interests and to speak with a collective voice.

(3) The President of NUPGE, John Fryer, has deposed to the fact that the need of trade unions to engage in both collective bargaining and social and political action is especially pronounced in the public sector.

(4) The then President of the OFL, Clifford Pilkey, has observed that social and political activities, programs and expenditures are as important and in some cases, more effective than, negotiations with individual employers in advancing the social and economic well-being of the workers represented, and that trade union involvement in the full range of social and economic matters is required to promote a political and economic atmosphere which will recognize, protect and advance the rights of trade unions and the workers they represent.

(5) Finally, the then President of the CLC, Dennis McDermott, testified that there is and always will be an unavoidable link between union activity and political action.

Abella Affidavit, Case on Appeal, vol. 7, pp. 1418-20

Morton Affidavit, Case on Appeal, vol. 8, pp. 1473-74

Fryer Affidavit, Case on Appeal, vol. 7, pp. 1286 and 1290

Pilkey Affidavit, Case on Appeal, vol. 7, pp. 1197 and 1200

McDermott Affidavit, Case on Appeal, vol. 5, p. 965

49. It is submitted that the history of the trade union movement in Canada, as deposed to in the various affidavits filed by the respondents to the instant application, clearly demonstrates the importance and necessity of engaging in political and social action in order to advance the interests of employees, accomplish the goals of collective bargaining, and strengthen trade unions in the collective bargaining process. The observations of Mr. Justice Frankfurter in Machinists v. Street, supra, are even more apposite in the Canadian context:

> **"The statutory provision cannot be meaningfully construed except against the background and presupposition of what is loosely called political activity of American trade unions in general and railroad unions in particular - activity indissolubly relating to the immediate economic and**

social concerns that are the raison d'être of unions. It would be pedantic heavily to document this familiar truth of industrial history and commonplace of trade union life. To write the history of the Brotherhoods, the United Mine Workers, the Steel Workers, the Amalgamated Clothing Workers, the International Ladies Garment Workers, the United Auto Workers, and leave out their so called political activities and expenditure for them, would be sheer mutilation. . .

This aspect - call it the political side - is as organic, as inured a part of the philosophy and practice of railway unions as their immediate bread-and-butter concerns. Viewed in this light, there is a total absence in the text, the context, the history and the purpose of the legislation under review of any indication that Congress, in authorizing union-shop agreement, attributed to unions and restricted them to an artificial, non-prevalent scope of activities in the expenditure of their funds. . . . The aim of the 1951 Legislation, clearly stated in the congressional Reports, was to eliminate 'free riders' in the industry - to make possible 'the sharing of the burden of maintenance by all the beneficiaries of union activity'. To suggest that this language covertly meant to encompass any less than the maintenance of those activities normally engaged in by unions is to withdraw life from law and to say that Congress dealt with artificialities and not with the railway unions as they were and as they functioned. . . .

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.

Machinists v. Street, supra, at pp. 800-801 and p. 182

50. The integral relationship between social and political action, and the collective bargaining process, has been recognized by a wide variety of courts and observers:

Collymore and Another v. Attorney General of Trinidad and Tobago, [1969] 2 All E.R. 1207 (P.C.) at p. 1211:

> **"It is, of course, true that the main purpose of most trade unions of employees is the improvement of wages and conditions. But these are not the only purposes which trade unionists as such pursue. They have in addition in many cases objects which are social, benevolent, charitable and political. The last named may be at times of paramount importance since the effort of trade unions have more than once succeeded in securing alterations in the law to their advantage." [Emphasis added].**

Williams v. Hursey, [1959] 33 A.L.J.R. 269 (Aust. H.C.), at pp. 276-77

Machinists v. Street, supra, per Frankfurter J. at pp. 814-815:

> **"When one runs down the detailed list of national and international problems on which the A.F.L.-C.I.O. speaks, it seems rather naive for a court to conclude - as did the trial court - that the union expenditures were 'not reasonably necessary to collective bargaining or to maintaining the existence in position of said union defendants as effective bargaining agents'. 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. And this Court accepts briefs as amici from the A.F.L.-C.I.O. on issues that cannot be called industrial, in any circumscribed sense. 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. It disrespects the wise, hardheaded men who are the authors of our Constitution and our Bill of Rights to conclude that their scheme of government requires what the facts of life reject".**

Etherington, "Freedom of Association and Compulsory Union Dues", supra, at pp. 34-37:

"The attempt to distinguish the economic and political concerns rests on the misguided premise that unions can represent the economic interests of workers effectively without engaging in political activity. If this was ever more than a myth, it is certainly not the case in a post laissez-faire society, it is necessary for unions to engage in political activity to ensure that governmental regulation takes a form that is favourable, or at least not adverse, to the economic interests of its constituents. If they do not, they may find that their bargaining position vis-a-vis employers has been substantially weakened or undermined by government legislation or policy. . . .

Indeed, it can be asserted that unions have no choice but to engage in political activities. They know that the interests of employers will be well represented in the political arena through lobbying activities, through the support of sympathetic politicians or, in the case of public sector unions, by the fact that the employer is the government. Thus they know that they may face a Legislature that is critical of union activities and unsympathetic to workers' interests if they fail to engage in political activity. . . .

A more realistic view of the relationship between union political activities and the economic concerns of workers would recognize that political activities as reasonable, and in many cases a necessary, means of attaining the union's legitimate purpose of advancing or protecting the socio-economic interests of workers and is therefore 'wholly germane to a union's work in the realm of collective bargaining'. Contrary to the restrictive notion of the free-rider rationale employed in the American decisions and in Lavigne, one who benefits from pro-labour measures achieved by political expenditures without contributing is as much a free-rider as one who benefits from measures attained through bargaining with the employer."

Cox, Law and The National Labour Policy, supra, at p. 107

"It is difficult, if not impossible, to separate the economic and political functions of labor unions. Right-to-work laws affect union organization and collective bargaining. Legislation subjecting unions to the antitrust laws or confining their scope to the employees of a single company would greatly weaken their bargaining power, if it did not destroy them altogether. Although it seems unlikely that the LMRDA will seriously impair the strength of labour organizations, many union leaders hold an opposite view which time may prove correct. Political action in these spheres of union interest is hardly more than incidental to the unions' economic activities. A similar link exists even when a union takes political action upon a broader front. The basic philosophy of a President and his party affects appointments to agencies like the National Labour Relations Board, which in turn exert tremendous influence upon the course of labor relations. Even the tariff impinges on labor negotiations. The bargaining power of the Hatters Union, for example, is affected by the competition of low-cost foreign goods."

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

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

Note, (1958) 42 Minnesota Law Review, 1179 at pp. 1183-1184:

> **"This argument, however, begs the question since it assumes that funds expended for political, ideological, charitable and other purposes are not related to collective bargaining. Arguments can be made that virtually every union expenditure short of malfeasance furthers the bargaining function. For example, some common union expenditures which are not directly associated with bargaining are: support of political parties and candidates, maintaining lobbying activities and programs to defeat anti-union legislation, providing insurance and welfare programs, and contributing to charitable and religious foundations. All of these expenditures further collective bargaining through supporting political candidates and legislation favoring increased union bargaining power; providing advantages for union members which will promote interest and enthusiasm in union affairs; and enhancing the prestige of the union in the eyes of the public which will make strikes and consumer boycotts more effective."**

Rauh, "Legality of Union Political Expenditures" (1961) 34 Southern California Law Review 152

Woll, "Unions in Politics, A Study in Law and The Workers' Needs" (1961) 34 Southern California Law Review 130

Wellington, "The Constitution, The Labour Union and Governmental Action", supra, at pp. 364-365

Bercuson Cross-Examination, Case on Appeal, vol. 9, pp. 1831-37; and Exhibit 1 to Bercuson Cross-Examination, "The Road To Nowhere: The CLC-NDP Alliance", Case on Appeal, vol. 10, pp. 1865-67

51. Further, a scheme which restricted trade unions to soliciting additional dues from the employees they represent for any activities apart from those directly or immediately related to collective bargaining is not a reasonable alternative scheme, having regard to the "free rider" objective set out above. The very essence of the free rider rationale is that since trade union activities involve the attempt to obtain a public or collective good, there will always be an incentive for individual employees, if contributions are strictly voluntary, to have others in the bargaining unit shoulder the burden. Restricting a trade union to receipt of voluntary contributions automatically creates a "free ride situation" by preventing the trade union from spreading the cost of all activities it is required to undertake among the employees who benefit from such activities. As Professor Weiler noted in Reconcilable Differences, at p. 144:

> **"It seems intuitively fair that everyone should pay his proper share. Yet there is an obvious temptation not to make a voluntary contribution. An individual who looks at it solely from his own perspective can reason that he will get the benefit anyway. He will save on his personal costs, and the fact that he does not pay his dues will not lose him the benefit, because this makes only an insignificant dent in the unions' coffers to which everyone else is contributing. Needless to say that last element in the calculations of the rationally self-interested individual only adds to the unfairness. To the extent that some do not pay, contributions of the others must increase at least marginally to take up the slack. In the final analysis, someone does have to pay for the 'free rider'".**

Rauh, "Legality of Union Political Expenditures", supra, at p. 152:

> **"The difficulty in raising these 'voluntary dollars' should not surprise anyone. Union members generally believe that they have already contributed for all union activities by the payment of their union dues, intended not only for collective bargaining but also for legislation, political and other community activity. Union members do not expect that**

> **they will have to pay twice to protect their interests and are not anxious to contribute a second time".**

Cox, Law and the National Labour Policy, supra, at p. 107:

> **"In theory, we could have the best of both worlds by forbidding collective bargaining representatives to engage in political activities and then permitting the organization of parallel political groups like PAC and COPE. In practice, the separation would be so unreal as to heap contempt upon the law. When a UAW vice-president delivers in Georgia during an election year an eloquent speech upon the need for stronger labour unions, he will inevitably be engaged both in spreading union organization and in calling for political action against sponsors of restrictive labour laws. Enforced separation would also weaken both the economic activities and the political influence of the labour movement. There are too few leaders, and too little money, for parallel organizations."**

52. It is submitted that, in light of the foregoing, any attempt to distinguish among trade union expenditures on the basis of their relative degree of importance to attaining the objectives of the Rand formula is both artificial and impractical. Moreover, the scheme proposed by the appellant Lavigne, which would require the courts to adjudicate upon and weigh the wisdom or effectiveness of a particular trade union expenditure in terms of whether it is sufficiently related to the immediate concern of collective bargaining, does not constitute a viable alternative approach to the determination on a democratic basis, by a majority of employees represented by trade unions, as to which expenditures are in their best interests. As the Ontario Court of Appeal stated (Case on Appeal, pp. 2160-61):

> **"Judicial values ought not to be imposed in determining whether or how far a union expenditure is germane to collective bargaining or a reasonable means of achieving collective bargaining objectives. These are properly matters for the union in the conduct of its own internal affairs. If restrictions are to be imposed, they should be imposed by the Legislature which bears the responsibility of striking the delicate and changing balance, in the light of prevailing circumstances, between employers and trade unions and between trade unions and their members and non-members. The Court should not be called upon to monitor and examine every jot and tittle of union expenditure objected to by a non-member, as the judgment in appeal would dictate".**

[illegible]erington, "Freedom of Association and Compulsory Union Dues", supra, at p. 36:

> **"[The U.S. Supreme Court] has embarked on a process of judicial review of individual union activities, a process in which judges, guided by their own social and political values, 'may be tempted to substitute their own judgment for that of the union, or question its wisdom on a case-by-case basis'. The Court has invited itself to define the scope of collective bargaining purposes and activities which are appropriate for a union to pursue in the interests of workers. It is the Court, and not the legislature or the majority of workers in a bargaining unit, who will define what is in the socio-economic interests of employees. This is an approach which could 'translate into constitutional law the same sorts of arbitrary distinctions between legal and illegal union objectives that were inserted into the common law of labour by the judges in the conspiracy and injunction cases'. The limited experience we have had with United States Supreme Court determination of the validity of specific expenditures from compelled dues suggests that this criticism has merit. The distinction made by the Court in Ellis between organizing expenses and union social activities would appear to be arbitrary at best . . . Other Canadian courts should consider carefully the prospect of ongoing supervision of union objectives and activities before embracing the Lavigne adoption of**

the American approach to reconcile the competing interests of the majority and dissenters".

53. Furthermore, having regard to the objective of strengthening trade unions against the countervailing power of employers, it is submitted that to impose restrictions on the political use of trade union funds derived through the Rand formula, without at the same time imposing restrictions on the political use of corporate funds derived through shareholder investment, is not a reasonable alternative, and would seriously undermine the goal of social equality and equal participation which the Charter is intended to protect. In this regard, Professor Laurence Tribe, in his book Constitutional Choices, has partly attributed the decline in the rate of union representation in the United States to the narrow view which U.S. Courts have taken of the role of trade unions, to the failure of U.S. Courts to recognize the necessity of trade union involvement in social and political activities, and to the unequal treatment which has been afforded trade union political expenditures in comparison with corporate expenditures as a result of the U.S. Supreme Court decision in Abood, and subsequent cases. As Professor Tribes states at pp. 202-203:

> **"In theory, of course, employers and employees are supposed to get evenhanded treatment in the legal administrative framework within which labour disputes - including those involving free speech - are handled. In reality, however, workers have found themselves at a substantial disadvantage. When unions speak out on political matters, for example, they must (upon request) refund to dissenting members the pro-rated cost of such activity. [citing Abood]. Corporations do not have this problem; corporations may speak out on political subjects in spite of shareholder dissent. Corporations also speak with a far louder voice, heavily out spending labour on the dissemination of their views. Indeed, the proof of this imbalance of power can be seen in the results: 'the failure of labor to pass any legislation affecting the basic structure of private sector bargaining since 1935', and a decline in the rate of union representation of American workers from 35 percent in the 1940s to barely 20 per cent in 1980.**
>
> **The Court's apparent unwillingness to give unions the full measure of First Amendment protection cannot be justified by the argument that unions pursue narrowly economic goals. . . . [T]o the extent that unions have forsaken broader issues, their current orientation has been shaped to a large degree by the Supreme Court itself - for example, in the Courts highly restrictive subject-of-bargaining doctrine."**
>
> **The opportunity to speak, whether through words or conduct, provides workers with one of their only effective counters to the dominant position held by employers".**

54. Finally, the courts should be particularly hesitant to hold that the collective bargaining structure established by the Legislature is not a reasonable limit under s.1 of the Charter, and to substitute an alternative scheme which would require ongoing judicial supervision of labour relations, given that the Rand formula forms an integral and fundamental component of the present balance, and constitutes an historical compromise among competing forces in the field of labour relations.

Alberta Reference, supra

(c) Importance of Objectives Outweighs Infringement Alleged

55. With respect to the third branch of the proportionality requirement, it is submitted that the importance of the objective advanced by the requirement that all employees contribute dues or the equivalent of dues to a trade union which represents them outweighs any adverse effects of the Rand formula on the respondent Lavigne, having regard to the nature and extent of the infringement in question, and the extent to which the Rand formula furthers principles integral to a free and democratic society, including social equality and the participation of groups in the democratic process of this country.

56. The decisions made by a trade union on a democratic majoritarian basis to engage in various activities is consistent with and strengthens the operation of a free and democratic society. Indeed, the process whereby trade unions come to represent employees is itself a manifestation of democratic decision-making, in that the majority of employees are free both to select a trade union to represent them, and to terminate the rights of the trade union to such representation. Further, the entire process of collective bargaining and trade union representation is one which gives employees the opportunity to participate in a meaningful way in the making of decisions which affect their interests. In this regard, importation of the Abood rule into Canada would undercut democratic processes within unions by encouraging resort to the courts instead of democratic participation in union policy-making.

Weiler, Reconcilable Differences, pp. 32-33
Alberta Reference, supra, at p. 369

57. Further, it is submitted that, given the compelling reasons supporting the right of trade unions to determine their activities and expenditures on a democratic basis, and to rely on the payment of dues from all employees they represent, if there is any infringement of Lavigne's rights, such infringement is insignificant when compared with the societal interests advanced, and should be viewed as a reasonable limit consistent with the maintenance of a free and democratic society within the meaning of s.1 of the Charter. In any organization based on democratic principles, the decision of the majority prevails, so long as no individual has been prevented from expressing his views, and other constitutional and legal rights have been respected. The principles of free expression in a democratic society protect the right of all individuals to seek adoption of their point of view through the democratic decision-making process, but do not deny the right of the group as a whole to implement its decision and act collectively. Utimately, every dissenter must endeavour to become a majority, or dissent and democracy lose their meaning.

R. v. Oakes, supra
Machinists v. Street, supra, at pp. 808 and 818 per Frankfurter J.:

> "The plaintiffs have not been deprived of the right to participate in determining union policies or to assert their respective weight in defining the purposes for which union

> **dues may be expended. Responsive to the actualities of our industrial society, in which unions as such play the role that they do, the law regards the union as a self-contained, legal personality exercising rights and subject to responsibilities wholly distinct from its individual members . . . It is a commonplace of all organization that a minority of a legally recognized group may at times see an organization's funds used for promotion of ideas opposed to the minority. The analogies are numerous. On the largest scale, the Federal Government expends revenue collected from individual taxpayers to propagandize ideas which many taxpayers oppose. . . .**
>
> **In conclusion, we are asked by union members who oppose these expenditures to protect their right to free speech - although they are as free to speak as ever - against governmental action which has permitted a union elected by democratic process to bargain for a union shop and to expend the funds thereby collected for purposes which are controlled by internal union choice. To do so would be to mutilate a scheme designed by congress for the purpose of equitably sharing the costs of securing the benefits of union exertions; it would greatly embarrass if not frustrate conventional labour activities which have become institutionalized through time. To do so is to give constitutional sanction to doctrinaire views and to grant a minuscule claim constitutional recognition."**

Lathrop v. Donohue, supra, Harlan J. at p. 857:

> **"Beyond all this, the argument under discussion is contradicted in the everyday operation of our society. Of course it is disagreeable to see a group, to which one has been required to contribute, decide to spend its money for purposes the contributor opposes. But the Constitution does not protect against the mere play of personal emotions. We recognized in Hanson that an employee can be required to contribute to the propagation of personally repugnant views on working conditions or retirement benefits that are expressed on union picket signs or on union handbills. A federal taxpayer obtains no refund if he is offended by what he has put out by the United States Information Agency. Such examples could be multiplied."**

Autenrieth v. Cullen (1969), 418 F.2d 586; cert. denied, (1970), 397 U.S. 1036

App. No. 10295/82 v. United Kingdom (Freedom of Conscience: Peace Campaigners, Tax Protesters) (1984), 6 E.H.R.R. 558

58. In paragraphs 101-104 of his factum, Lavigne submits that the extent of the constitutional infringement in the instant case is significant, notwithstanding that it concerns solely the payment of money and notwithstanding the minimal amount of money at issue. However, Lavigne's reliance upon the Hudson case once again illustrates the extent to which it is the expenditure decisions of trade unions which form the substance of his application, since in that case, the constitutional interest at stake is that of not having one's funds used for trade union "political or ideological" expenditures, which expenditures are in Canada beyond the reach of the Charter. Moreover, Lavigne's argument that there may be other individuals in similar circumstances is irrelevant in assessing the limited extent of the constitutional interest at issue. This Court's has held in the Edwards case that the Charter does not require the elimination of every miniscule state- imposed cost or burden on s.2 freedoms.

(iv) Reply to the Arguments of the Appellant

(a) Canadian Materials

59. Lavigne relies in paragraph 77 upon the decision of the Ontario Labour Relations Board in the Adams Mine Cliffs of Canada case. In fact, however, the Ontario Labour Relations Board specifically recognized that unions cannot adequately represent employees in the bargaining unit without engaging in a wide variety of activities, including expenditures of the type challenged in these proceedings. As the Board noted in paragraph 25 of its decision:

> **"Realistically, certain trade union objectives cannot be achieved through negotiations, such as public education, social insurance of various kinds, adequate housing and effective economic management of the economy. Other objectives can be achieved much faster through legislation such as minimum wages, maximum hours, health and safety standards, minimum union security provisions, and labour law reform generally. Indeed, the passage of the Labour Relations Act itself is, in part, a product of broader trade union activity. The Canadian Labour Congress, to which many of Canada's trade unions are affiliated, has always had as one of its purposes, the focusing of organized labour's broader objectives. It is therefore clear that trade union activity includes more than just face to face collective bargaining negotiations in the pursuit of employee interests".**

60. Contrary to the submissions of Lavigne in paragraph 89 of his factum that the 1946 decision of Mr. Justice Rand limited the "free rider" rationale to collective bargaining activities of trade unions, narrowly defined, Mr. Justice Rand imposed only the following specific restrictions on the Rand formula:

> **"My award is a check-off compulsory upon all employees who come within the unit to which the agreement applies. It shall continue during the period of the contract. The amount to be deducted shall be such sum as may from time to time be assessed by the union on its members according to its constitution, for general union purposes; it shall not extend to 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. The deduction shall be made only in the conditions and circumstances laid down by the constitution and by-laws of the Union, but it shall not include any entrance fee. [Emphasis added.]**

However, Mr. Justice Rand did recognize that the argument against the agency shop is "really one for a weak union". In his view, it was "irrelevant to try to measure benefits in a particular case; the protection of organized labour is premised on a necessary security to the body of employees". Thus, since agency shop "dues are only those which members are satisfied to pay for substantially the same benefits", Mr. Justice Rand did not place any restrictions whatsoever on the expenditure of union funds derived through the agency shop.

> **Rand Formula Decision, Case on Appeal, vol. 6, pp. 1049-50**
>
> **Bercuson Cross-Examination, Case on Appeal, vol. 9, pp. 1808-1812 (U.A.W. used union dues to support CCF at time of Rand decision, and Rand did not limit such use)**

61. With respect to Lavigne's reliance in paragraphs 81 to 84 of his factum on certain legislative provisions in support of his assertion that the Ra[illegible]ormula cannot be justified under s.1, the respondents OFL and CLC submit as follows:

(a) the fact that in the past, provinces have limited the use of dues for electoral purposes, but have subsequently revoked any such limitations, and that no Canadian jurisdiction presently restricts the use of dues for so-called non-collective bargaining purposes, indicates a general legislative consensus that such restrictions are not appropriate nor practical. No legislative precedent exists in Canada for prohibiting trade union expenditures in respect of all so-called non-collective bargaining matters;

(b) with respect to the public service labour relations legislation relied upon by Lavigne, which prevents trade unions from making contributions to political parties, the rationale advanced by government for such provisions is to protect the non-partisan nature of the public service, and is neither directed nor intended to safeguard individual objecting employees. For example, the Public Service Staff Relations Act specifically prohibits any electoral political expenditures by trade unions whatsoever, whether obtained under a Rand formula or individual solicitations. Moreover, community college employees are specifically excluded from any such restrictions because of the recognition that concerns related specifically to public service employees do not apply to them.

(c) with respect to Lavigne's reliance upon the provisions of the CCBA and the Labour Relations Act, which permit employees to opt out of paying union dues for religious reasons, such provisions do not support Lavigne's claim for a blanket exemption for all non-members from paying dues at their option, but rather recognize the right of a trade union to collect dues from all employees it represents, save in limited and exceptional circumstances which do not apply in the circumstances of this case. Further, no financial rebate as claimed by Lavigne in this case is provided for to objecting employees, rather the equivalent of dues must be contributed to a designated charity.

Etherington, supra, pp. 38-39

62. With respect to Lavigne's reference to the Little Report in paragraph 85 of his factum, it is submitted that Judge Little's recommendation was concerned with ensuring that dues remitted to the union not be used for purposes which solely benefit members of the trade union, and which exclude non-members from receipt of such benefits. Thus, for example, Judge Little's recommendation would prohibit unions from using ordinary dues to construct and maintain recreational facilities available only to members of the union. However, his recommendation would not affect the ability of unions to expend dues on a wide variety of activities intended to benefit all employees in the bargaining unit, both members and non-members alike. In any event, the regulation which purportedly gave effect to Judge Little's recommendation has now been repealed.

63. With respect to the Woods Report, and the CLC response, relied upon by Lavigne in paragraphs 86-87 of his factum, the submissions of the OFL and CLC are as follows:

(a) the Woods Report recommendation was restricted to partisan electoral expenditures. Moreover, the Report concluded that it would be sufficient to ensure that the dues of objecting employees be expended for matters other than partisan electoral activities, and that

it was unnecessary to return any portion of the dues to objecting employees. In this respect, the Report specifically stated that "there is no case for placing any more stringent constraints upon unions in this area unless other institutions are brought under similar controls";

(b) the CLC response referred to the practice of opting out in the context of trade union affiliation with political parties, and in particular with the New Democratic Party, and did not relate in any way to expenditures out of general revenues made to political parties, which are at issue in the instant case. Indeed, the paragraph of the CLC's response directly following that relied upon by Lavigne makes it clear that it was the CLC's position that there should be no special restriction on the ability of trade unions to support political parties from general trade union dues or revenues, particularly since no such restriction existed respecting the ability of corporate employers to provide financial support to political parties utilizing shareholder funds. Moreover, in 1970, the CLC confirmed its position that it is eminently proper for trade unions to financially support political parties, and renewed its opposition to any attempts to restrict the ability of trade unions to make electoral contributions from ordinary dues collected from its members where the majority so decide, absent similar regulation of corporate employers.

McDermott Cross-Examination, Appeal Book, vol. 3, Exhibit 1, pp. 510-11

Undertakings on McDermott Cross-Examination, Appeal Book, vol. 6, pp. 1146-52

64. Lavigne argues in paragraphs 90 and 93 of his factum that the practice of paying affiliation fees to the New Democratic Party supports his position that trade unions should be constitutionally prohibited from using the dues of non-members for so-called non-collective bargaining purposes. In this respect, the OFL and the CLC rely upon the following submissions:

(a) with respect to the comments of Eamon Park referred to by Lavigne in paragraph 90 of his factum, it is submitted that, as Professor Morton testified, Park's comments were specifically concerned with how individual members of a local union would affiliate with the New Democratic Party under its proposed constitution, and were entirely unrelated to contributions by both local unions and central labour bodies to political parties out of general trade union funds, which contributions are at issued in these proceedings. Indeed, given the existence of such general contributions out of ordinary union dues at the time of Park's statement, it is logical to conclude that his comments related solely to what would become an additional method of financing for and membership in the NDP, namely, affiliation payments;

(b) with respect to affiliation fees referred to by Lavigne in paragraph 93 of his factum, it is submitted that affiliation payments to the New Democratic Party differ in kind from ad hoc general contributions out of general trade union revenues. Affiliation by a local union with the NDP, which is specifically provided for under the party constitution, provides a mechanism whereby individual union members are allowed and encouraged to directly participate in the structure and functioning of the NDP;

(c) moreover, even where individuals are afforded the opportunity not to have their dues used as an affiliation payment to the New Democratic Party, such employees are not entitled to a reduction or return of dues;

(d) in any event, the practice of the trade unions and the New Democratic Party with respect to affiliation relates only to expenditures in the area of partisan electoral activity, and not to all the expenditures or activities which Lavigne challenges in these proceedings.

McDermott Affidavit, Case on Appeal, vol. 6, Exhibit E

Undertakings on McDermot Cross-Examination, Case on Appeal, vol. 6, p. 1159 and pp. 1176-90

Morton Cross-Examination, Case on Appeal, vol. 5. pp. 1499-1503. 1519-21, 1526-29, 1532-39

65. Lavigne refers, in paragraph 92 of his factum, to the existence of voluntary political action funds and union constitutions which permit members to opt out of political or ideological contributions. In fact, however, of seventy-nine unions affiliated with the CLC, only three have a specific opting-out provision for employees represented by a trade union, and these provisions are contained in international union constitutions, drafted with reference to U.S. legal requirements. Moreover, the voluntary political action funds referred to by Lavigne provide for collection of assessments from employees which are specifically earmarked in advance for specific purposes, and allow unions to raise additional funds in excess of those collected through ordinary dues. Further, unions have historically raised supplementary funds for specific political causes in addition to, rather than as a substitute for, the use of general union dues as determined on a democratic basis.

Undertakings on McDermott Cross-Examination, Case on Appeal, vol. 4, p. 1158
Morton Cross-Examination, Case on Appeal, vol. 5, pp. 1507 and 1511

(b) **Foreign Jurisdictions**

66. Lavigne relies upon legislation in other countries in support of his argument that there is a reasonable alternative scheme to the Rand formula. However, it is the position of the OFL and the CLC that the labour relations system of such countries do not establish that a reasonable alternative to the Rand formula exists in the Canadian context. Generally in Western European countries, including those upon which Lavigne relies, the system of labour relations is fundamentally different from that prevailing in Canada. In these countries, there it not - as there has been in Canada since the 1940's - a collective bargaining system involving a legal requirement upon employers to recognize and bargain in good faith with trade unions, exclusive representation rights based upon majority support, labour board regulation of unfair labour practices, and legal enforceability of collective agreements. Moreover, in most Western European countries collective bargaining is conducted on an industry wide, regional or national basis, and not, as in Canada, on a plant by plant basis. Indeed, in some Western European countries, worker representation at the plant level is not conducted by the trade unions at all but by work councils. Finally, such jurisdictions have constitutional systems which are different from our own (for example, extending specific constitutional protection to the right to strike), which constitutions have shaped their respective labour relations systems.

Fairweather, "Western European Labour Movements and Collective Bargaining - An Institutional Framework" in Kamin (ed.) Western European Labour and the American Corporation, at pp. 69-92

Summers, "Labour Relations and the Role of Law in Western Europe", in Kamin, supra, at pp. 145-167

Delisle v. Attorney General of Canada, unreported Nov. 29, 1989, Quebec Superior Court, at pp. 76 ff.

Cross-Examination of Professor D. Morton, p. 32-35, Case on Appeal, vol. 8, pp. 1514-17

67. Lavigne submits, in paragraph 105 of his factum, that the labour relations systems of various other countries are relevant, not because the features of those systems are analogous to the Canadian labour relations system, but rather to demonstrate that all "respect the principle of voluntary association to some extent, while at the same time sustaining effective trade unions". However, it is precisely because of the different features, structure and history of the Canadian labour relations system, for example, the different way in which the principle of voluntary association is reflected in Canada in the concept of exclusive bargaining agency based on majority representation, that comparisons with other labour relations systems are unreliable. Reference to labour relations systems without the Rand formula are irrelevant when such labour relations systems do not include the concept of exclusivity upon which the Rand formula is in large part based. Abstract comparisons without empirical foundation, without sensitivity to different political, social and economic structures, and without regard to different features of the particular labour relations system in question, are of little help in determining the existence of a reasonable alternative under s.1 of the Charter.

Decision of Mr. Justice White, Case on Appeal, vol. 11, pp. 2059-61

68. As Professor Otto Kahn-Freund observed in his article "On the Uses and Misuses of Comparative Law" (1974) 37 Modern Law Review 1, there is a great danger in applying the comparative method to the field of collective bargaining law and practice, especially in respect of union security arrangements, and in attempting to transplant a particular component or element of a foreign labour relations system, given that collective bargaining institutions and rules are closely linked with the structure and organization of political and social power in their particular society:

> **"The law of labour relations comprises a number of separable elements: it is concerned with individual relations between employers and workers - wages and hours of work, safety and health, holidays and pensions. It is however also concerned with collective relations between unions and other groups of workers and management with the way the labour market is organized through understandings between them, the way rules are established through their agreements, and the way conflicts between them are fought and settled. In my opinion the first element - individual labour law - lends itself to transplantation very much more easily than the second element - that is collective labour law. Standards or protection in rules on substantive terms of employment can be imitated - rules on collective bargaining, on the closed shop, on trade unions, on strikes, cannot."**
>
> **Kassalow, "Will West European Unions Embrace the Union Shop?" (1977) Monthly Labour Review 35**
>
> **Schregle, "Comparative Industrial Relations: Pitfalls and Potential" (1981) 120 International Labour Review 15**
>
> **McWhinney, "The Canadian Charter of Rights and Freedoms: The Lesson of Comparative Jurisprudence" (1983) 61 C.B.R. 55, at p. 64**

Bok, "The Distinctive Character of American Labour Law" (1971) 84 Harvard Law Review 1394

Blanpain, "Comparativisim in Labour Law and Industrial Relations" in Blanpain, Comparative Labour Law and Industrial Relations, at pp. 29 ff.

Mitchnick, Union Security and The Charter, pp. 7-10

69. In paragraph 96 of his factum, Lavigne relies upon the U. K. Trade Union Act to support his submission that a reasonable alternative scheme to the Rand formula could be utilized in Canada. However, under the legislation in the United Kingdom, individuals are permitted to opt out only with respect to electoral-related activities, and not general political and social action. Trade unions are, in fact, entitled tc use their general funds, apart from electoral expenses, in accordance with their constitution, and an exemption from paying dues where such dues are used for "non-collective bargaining purposes" is unknown in the United Kingdom.

70. In paragraph 97 of his factum, Lavigne relies upon the labour relations systems in two states of Australia, Queensland and New South Wales. However, in New South Wales and Queensland, any restriction on union expenditures is only effective, as in the United Kingdom, in permitting individuals to opt-out with respect to partisan electoral activities, and not in respect of general political and social expenditures. Further, there do not appear to be any such restrictions on the use of union funds in the other four Australian states, nor in the federal jurisdiction. The only limitation on union security in the federal Conciliation and Arbitration Act, which governs the majority of collective bargaining relationships in Australia, is the provision allowing exemption from union membership on the basis of "conscientious belief", in which case, equivalent amounts are not returned to the objecting employee, but must be paid by that employee to the consolidated Revenue Fund. Moreover, under the federal Act, it is open to unions and employers to negotiate all forms of union security provisions, including those requiring union membership. As to New Zealand, as Mitchnick notes at p. 94, an individual's right to opt-out is limited to trade union expenditures made out of a political levy but not out of general funds

Australian Conciliation and Arbitration Act, s.47 (Commonwealth Acts 1956, No. 44)

Williams v. Hursey, supra

Mitchnick, supra, p. 94

71. Finally, with respect to Switzerland to which Lavigne refers in paragraph 98 of his factum, it should be noted, as the Berenstein article upon which Lavigne relies makes clear at p. 113, that the Swiss system does not involve "voluntary contributions"; rather, Swiss courts have upheld a compulsory levy paid not only for "the cost of collective bargaining", as Lavigne suggests, but rather for the benefit secured because "the contracting workers' organization wielded substantial economic power which in turn owed its existence to the contributions and union activities of its members and organs".

72. With respect to the U.S. while the Canadian collective bargaining system is in some respects similar to that of the U.S., the U.S. experience does not support Lavigne's contention that the limitations imposed there on trade union expenditures provide a reasonable alternative to the present arrangements governing the Rand formula in Canada. Of critical importance is the wider role of trade unions in Canada, and the broader scope of their activities, which in turn has been determined by a different political culture, legal structure and social values than exist in the U.S. Indeed, at a time when observers such as Professor Weiler are proposing that U.S. collective bargaining law look to Canada in order to strengthen trade union representation, it can hardly be regarded as consistent with the objective of strengthening trade unions and eliminating free riders to import the Abood rule into Canada: see also paragraph 53 above. Moreover, the result of the decision of the U.S. Supreme Court in Abood, and subsequent cases, has been to inject the judiciary into the evaluation and supervision of trade union activities, and to create unintelligible and unworkable distinctions between "collective bargaining" and "non-collective bargaining" expenditures. For example, the U.S. Supreme Court held in Ellis that, while conventions and social activities are permissible because they are "collective bargaining related", expenditures related to organizing non-unionized employees, litigation to protect the rights of employees during bankruptcy proceedings, and portions of union publications insufficiently related to collective bargaining, are impermissible.

Ellis et al. v. Brotherhood of Railway, Airline and Steamship Clerks et al. (1984), 104 S. Ct. 1883

Morton Affidavit, Case on Appeal, vol. 8, pp. 1468 and 1470-73

Abella Affidavit, Case on Appeal, vol. 7, pp. 1418-20

Lipset, "North American Labour Movements: A Comparative Perspective", in Lipset (ed.), Unions in Transition, at pp. 421-452

Huxley, Kettler, and Struthers, "Is Canada's Experience 'Especially Instructive'?", in Lipset (ed.), Unions in Transition, at pp. 113-132

Weiler, "Promises To Keep: Securing Workers' Rights To Self Organization Under the N.L.R.A." (1983) 96 Harv. L.R. 1769

Meltz, "Labor Movements in Canada and the United States", in Kochan, Challenges and Choices Facing American Labor, pp. 315-337

E. Remedy

(i) No Remedy Against Private Bodies

73. It is submitted that, as a review of the declaratory relief sought in the notice of application makes clear, the remedy requested by Lavigne is specifically directed to the use of dues by private parties to whom the Charter does not apply. Thus, the relief sought by the applicant is simply unavailable, since neither s.24(1) of the Charter, nor s.52(1) of the Constitution Act, vest a court with jurisdiction to impose

a remedy against a party or person not bound by the Charter. Moreover, as is also apparent from the order of Mr. Justice White at trial, the fact that the appellant requests a remedy relating to the use of union dues, and not to the actual payment of dues, illustrates the extent to which the substance of his application, and any alleged constitutional violation, depends upon the particular expenditure decisions made by trade union and central labour bodies, that is, actions of private bodies to which the Charter does not apply.

(II) Rewriting the Challenged Provisions

74. In any event, it is submitted that there are a number of remedial measures which the parties or the Legislature might devise should a constitutional infringement be found which cannot be justified under s.1. Such measures might include the following:

(a) paying that portion of union dues to which a non-member objects to a charitable organization, as is the situation under s.47 of the Labour Relations Act;

(b) paying that portion of union dues to which a non-member objects to the Consolidated Revenue Funds, as is the situation in Australia in the case of conscientious objection;

(c) segregating that portion of dues to which a non-member objects in a trade union general funds, and ensuring that such funds are not utilized for so-called non-collective bargaining matters.

(d) returning a portion of union dues to objecting non-members, as is the situation in the U.S..

It is submitted that the parties or the Legislature should be afforded the opportunity to devise a scheme which remedies any constitutional invalidity, and suits the parties' particular needs or circumstances. As this Court cautioned in the Edwards Books case, this should not be foreclosed in advance by the court passing on the constitutional validity of schemes not directly before it.

Edwards Books, supra, at p. 783

(III) Opt-In Remedy Inappropriate

75. In any event, it is respectfully submitted that there is no basis or necessity for the imposition of an opt-in remedy. A remedy should only be available to those individuals who have demonstrated actual interference with their Charter rights. If there is no objection to payment or expenditure, there is no possible constitutional interest which could be implicated. However, the opt-in relief requested by Lavigne presumes a constitutional violation without the necessity of a particular individual establishing or asserting that he falls within the class of non-member employees who object to paying union dues.

76. Further, contrary to the submissions of Lavigne in paragraph 114 of his factum, there is no evidence whatsoever before this Court, and no basis for assuming that all, most, some or indeed any

non-member of the union other than Lavigne objects to paying the equivalent of dues to the trade union. In this regard, it is submitted that there is no basis for equating the decision not to join a trade union with an unwillingness either to pay dues to the trade union or to consent to the use of such dues for various purposes. The applicant has brought an application solely on his own behalf, yet seeks a remedy which would apply to all non-members in the bargaining unit; it would be inappropriate to extend relief to individuals who have not even identified themselves as objecting to the payment of dues to the trade union.

Decision of Mr. Justice White, Case on Appeal, p. 2050
Machinists v. Street, supra, p. 774

77. Moreover, it is respectfully submitted that it would be totally inconsistent with our legal system and legal tradition to accept that a requirement that an individual assert his rights in order to obtain a remedy constitutes a violation of the Charter. Indeed, in R. v. Jones, where a parent submitted that his religious freedom was infringed by a provision requiring that he seek exemption from the general obligation that his children attend public school, this Court specifically held that the requirement to seek exemption was in no way unconstitutional.

R. v. Jones, supra

78. The opt-in remedy requested by Lavigne not only is unnecessary to ensure that the constitutional rights of objecting employees are protected, but also would substantially interfere with the right and ability of trade unions to engage in activities conceded by Lavigne, and found at trial, to be both legitimate and appropriate. Trade unions would be required to establish cumbersome, disruptive and unnecessary parallel mechanisms in order to raise and expend funds deemed necessary on a democratic majoritarian basis. Thus, it is submitted that, given that an opt-in remedy exceeds what is necessary to remedy the constitutional violation, this court should prefer a remedy which would not unduly hinder the ability of trade unions to carry out their legitimate and appropriate activities.

Rauh, "Legality of Union Political Expenditures", supra, at p. 153
Cox, Law and The National Policy, at p. 107

79. An opt-in remedy would be entirely inconsistent with the general approach which legislatures across Canada have taken with respect to those employees who object, for specified reasons, to paying dues to a trade union. Virtually all Canadian labour relations legislation which establishes a mechanism through which individual employees can be exempted from either paying dues to or being members of a trade union also provides that an employee must specifically object before he is entitled to relief. Thus, for example, s.47 of the Ontario Labour Relations Act provides that an employee must object to belonging to or paying dues to a trade union because of religious conviction or belief before being

entitled to the relief provided for under the Act. It is to be noted that the mechanism established under labour relations legislation to deal with objecting employees has been referred to with approval by the Ontario Court of Appeal in the Videoflicks decision.

Decision of Mr. Justice White, Case on Appeal, pp. 2056-57
Ontario Labour Relations Act, R.S.O. 1980, c.228 as amended, s.47
Labour Code, R.S.B.C. 1978, c.212 as amended, s.11
Labour Relations Act, S.M. 1972, c.75 as amended, s.68(3) and 68.1
Trade Union Act, R.S.S., c. T-17, as amended, s.5(L)
Canada Labour Code, R.S., c.L-1, s.70
R. v. Videoflicks (1985), 48 O.R. (2d) 395 (Ont. C.A.)

80. The Woods Report, referred to in paragraph 86 of Lavigne's factum, recommended that an "opt-out" mechanism be utilized to deal with individual objections to political party contributions, and also recommended that the union "be obliged to revert these [objecting] members' share of the union's political contributions to its general operating fund". In this respect, it is to be noted that the Woods Report did not require that the portion of the union's political party contributions to which individual employees might object be returned directly to the objecting employees, but rather, recognized that the interests of objecting employees would be adequately protected by ensuring that no portion of their union dues was used for contributions to political parties.

Woods Report, paras. 513-18, Case on Appeal, vol 3, pp. 524-26

81. Even in the United States and Great Britain - the only countries whose labour relations systems are somewhat analogous to Canada's - various forms of "opt-out" mechanisms have been accepted and utilized, either through judicial decisions or legislation. In this regard, notwithstanding the report of the Thatcher government referred to by Lavigne in paragraph 122 of his factum, the Trade Union Act continues provide relief only to those employees who actually object to electoral political contributions ...e by trade unions. With respect to the Western European labour system to which Lavigne refers in paragraph 123 of his factum, the respondents rely on paragraphs 66 to 72.

82. With respect to the U.S, Lavigne concedes that, as Mr. Justice White found below, the U.S. Supreme Court "has consistently recognized the reasonableness of the requirement of the dissident employee's obligation to make known his dissent, so as to invoke protection of his First Amendment rights by the court". Lavigne submits, however, that an opt-in scheme is preferred to an opt-out mechanism because the latter requires the judiciary to be involved in policing "opt-out" schemes. Nonetheless, it should be immediately apparent that, whatever the remedy, machinery would have to be established to resolve any disputes which may arise between objecting employees, unions and

employers, including such matters as the scope of impermissible trade union expenditures, who is to make that decision, whether that decision maker is impartial, the provision of adequate information, and if necessary the segregation of disputed amounts. That this is no less the case in the context of an opt-in mechanism is confirmed by the decision of the U.S. Supreme Court in Hudson v. Chicago Teachers Union, in which all of these issues arose in the context of a statutory opt-in mechanism.

Etherington, supra, at pp. 31-33

83. While Lavigne suggests that an "opt-in" remedy is preferable, since it would protect objecting non-members from "undue persuasion" or "coercion", it is submitted that, in the instant case, there is no evidentiary support for basing a remedy on sheer speculation concerning the alleged lack of good faith of union officials, given the well-established principle that courts will not grant declaratory relief unless the applicant has established that the occurrence of future harm is probable.

Operation Dismantle v. The Queen, [1985] 1 S.C.R. 441

F. COSTS

84. The OFL and the CLC adopt the submissions of OPSEU and NUPGE relating to costs, and rely upon their submissions previously set out in the factum filed on the motion for leave to appeal.

PART IV - ORDER REQUESTED

85. It is respectfully requested that the appeal be dismissed with costs.

ALL OF WH . - IS RESPECTFULLY SUBMITTED.

Jeffrey Sack

Ethan Poskanzer

Steven M. Barrett

of Counsel for the OFL and CLC

PART V

TABLE OF AUTHORITIES

ARTICLES AND TEXTS

STATUTES AND TREATIES