LabourWatch summary of:

Regina v. Advance Cutting and Coring Ltd.

[2001] 3 S.C.R. 209; [2001] S.C.J. No. 68;
2001 SCC 70; File No.: 26664.

Executive Summary

This case deals with legislation in the Canadian province of Quebec that effectively forces construction workers to become and remain Members in good standing of one of five prescribed unions in order to obtain and keep employment on construction work sites in Quebec.

In summary, the Supreme Court of Canada decided (8-1) that there is a negative right to not associate under the *Canadian Charter of Rights and Freedoms* Section 2d) – the Right to Freedom of Association. The Court also decided (5-4) that the Quebec legislation violated the right to not associate. However, the Court ultimately decided (5-4), under Section 1 of the *Charter*, that the Quebec legislation was a justifiable denial of that right in a free and democratic society given the history of labour relations in Quebec's construction industry. The history the court summarized was that of union violence.

Summary

During the construction of Expo 1967 in Montreal and elsewhere more generally, construction employees and employers in Quebec faced violence and vandalism. Starting at least in the 1960's evidence of significant levels of corruption gained more profile. It included: union actions against their own Members (sale of jobs, blackmailing, usury, physical violence); unions against other unions (physical violence, attempts to control job sites), unions against employers (sale of manpower through the hiring hall, kickbacks, payoffs), employers and government officials (bribes). During 1972, violence in Quebec's construction sector was valued at 300 million dollars.

At the same time, Quebec police, governmental authorities and the courts did not ensure that the rule of law and the Criminal Code were effectively enforced to protect Quebecers.

Prior to 1968 the Quebec construction industry was covered for the most part by 15 separately negotiated labour agreements for various regions. In 1968, in response to this violence and corruption the province abandoned its existing system and adopted Bill 290, a province-wide approach with a single agreement that covered all trades and all construction employers in the province. This legislation was changed numerous times but most importantly in 1975, after serious violence at the James Bay Power project. In 1974, the Quebec Government established a Royal Commission of Inquiry into Union Freedom in the Construction Industry, known as the Cliche Commission.

This Commission was led Quebec Provincial Court Justice Robert Cliche, and included, Brian Mulroney, (then a labour lawyer in Montreal and subsequently Prime Minister of Canada from 1984 - 1992). The Commission recommended changes, some of which were included in Bill R20 which was intended to strengthen the law to deal with the recurring violence, vandalism and corruption that continued to plague the province's construction sector. Some observers say that some changes were also included to make legal challenges to the law more difficult.

The Decision

In *Advance Cutting and Coring*, the appellant employer was charged with hiring employees who did not have the required competency certificates contrary to the *Quebec Act Respecting Labour Relations, Vocational Training and Manpower Management in the Construction Industry* (the "*Construction Act*").

The appellants asserted that workers could not obtain the competency certificates without becoming Members in one of the five unions listed in the *Construction Act*. The appellants claimed this requirement was unconstitutional as it breached employees' freedom of association as guaranteed in section 2(d) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

The *Construction Act* provided a mechanism where each certified construction worker - identified by the Commission de la construction du Quebec (the "Commission") - would select one of five union groups to act as his or her bargaining representative. The union group or association of groups that represented at least 50 percent of certified construction workers would then be granted the power to negotiate collective agreements.

While the Supreme Court of Canada had begun to acknowledge the negative right not to associate in their *Lavigne* decision (1991), it had also accepted a democratic rationale for putting limits on the right of non-association. In *Lavigne*, the Court noted that some forms of compelled association might be compatible with *Charter* values.

In *Advance* the Supreme Court of Canada clearly decided (8-1) that there is a negative right to not associate under the *Canadian Charter of Rights and Freedoms* 2 d) - Right to Freedom of Association. The Court also decided (5-4) that the Quebec legislation violated the right to not associate. However, the Court ultimately decided (5-4), under Section 1 of the *Charter*, that the Quebec legislation was a justifiable denial of that right in a free and democratic society given the violent and corrupt history of labour relations in Quebec's construction industry.

The majority judgment suggested courts should be mindful to avoid second-guessing legislatures on controversial and complex political choices. It noted the Quebec legislation was attempting to address problems that had become a pressing social and economic issue.

The majority judgment found that the method chosen was the fairest and most effective way to determine the representativeness of the unions and to balance employee involvement in the union (as compared to the Rand Formula, whereby an employer deducts a portion of the wages of all employees within a bargaining unit, union Members or not, to go to the union as union dues – also referred to by some as "check off").

LabourWatch Commentary

Surely it is troubling that the highest Court in the land, with this ruling, has enabled the abrogation of the rights of Canadians because the police, the lower courts, crown prosecutors and the government departments responsible for the courts and police were not willing to enforce the law. Instead, construction employees had a *Charter* right that non-construction workers enjoy stripped away through forced union Membership as a condition of employment. The Court chose not to find that the police and judicial system of a whole province should instead have ensured the rights of all employees, employers and the public by striking down the legislation and saying, as in many countries of the world, that mandatory Membership and conditional employment are a violation of human rights.

It should then come as no surprise that again in Quebec in 2013, that the Charbonneau Commission is exposing union corruption in the construction sector. Further, there are continuing rumours that unionized employees, their local union and related employers from one part of the province who seek or take on construction jobs in another part of the province find their truck vandalized, for example. Similar experiences exist for operators from outside the province of Quebec who take on work in the province. It may not be at its historical levels, but it remains a fact of construction life in Quebec.

Indexed as:

R. v. Advance Cutting & Coring Ltd.

Advance Cutting & Coring Ltd., Gilles Thériault, Luc Loyer, Éric Schryer, Jean Grégoire, Daniel Matte, Raymond Matte, Paul Rock, Marc Piché, Denis St-Amour, Ray Matte Couvreur, 161614 Canada Inc., Ateliers de Menuiserie Allaire Inc., Paul Rodrigue, Raymond Plante and Michel Mongeon, appellants;

v.

Her Majesty The Queen, respondent, and

The Attorney General of Quebec, mis en cause, and Commission de la construction du Québec, Centrale des syndicats démocratiques (CSD-Construction), Confédération des syndicats nationaux (CSN-Construction), Conseil provincial du Québec des métiers de la construction (International), Fédération des travailleurs du Québec (FTQ-Construction), Canadian Coalition of Open Shop Contracting Associations and Canadian Office of the Building and Construction Trades Department, AFL-CIO, interveners.

[2001] 3 S.C.R. 209
[2001] S.C.J. No. 68
2001 SCC 70
File No.: 26664.

Supreme Court of Canada

2000: March 20 / 2001: October 19.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC
(291 paras.)

Labour law — Quebec construction industry — Contractors charged with hiring employees who did not have [page210] competency certificates and workers charged with working without competency certificates as required under Quebec construction legislation — Whether requirement that workers become members of one of listed union groups in order to obtain competency certificates unconstitutional — Canadian Charter of Rights and Freedoms, s. 2(d) — Act Respecting Labour Relations, Vocational Training and Manpower Management in the Construction Industry, R.S.Q., c. R-20, ss. 28-40, 85.5, 85.6, 119.1, 120.

Constitutional law — Charter of Rights — Freedom of association — Contractors charged with hiring employees who did not have competency certificates and workers charged with working without competency

certificates as required under Quebec construction legislation — Whether requirement that workers become members of one of listed union groups in order to obtain competency certificates unconstitutional — Whether guarantee of freedom of association includes right not to associate — Canadian Charter of Rights and Freedoms, s. 2(d) — Act Respecting Labour Relations, Vocational Training and Manpower Management in the Construction Industry, R.S.Q., c. R-20, ss. 28-40, 85.5, 85.6, 119.1, 120.

The appellants, who are contractors, real estate promoters and construction workers, were charged with hiring employees who did not have the required competency certificates to work on a construction project or with working in the industry without the proper competency certificates, contrary to s. 119.1 of the Quebec Act Respecting Labour Relations, Vocational Training and Manpower Management in the Construction Industry (the "Construction Act"). The appellants asserted that workers could not obtain the proper competency certificates without becoming members of one of the union groups listed in s. 28 of the Construction Act. They claimed that this obligation was unconstitutional because it breached the right not to associate which, in their opinion, was a component of the guarantee of freedom of association in s. 2(d) of the Canadian Charter of Rights and Freedoms.

At the time, s. 28 of the Construction Act provided that the five union groups listed were the only groups entitled to an assessment of their representativeness. Under s. 30, the Commission de la construction du Québec draws up a list of construction workers qualified to take part in a mandatory vote under s. 32, during which each worker must opt for one of the union groups as his or her [page211] bargaining representative. In order to take part in that vote, a construction worker must hold a journeyman competency certificate, an occupation competency certificate or an apprentice competency certificate. Construction workers must also have worked 300 hours in the industry in the 15 months before the election is held. On the basis of the vote, the Commission determines the representativeness of every association under s. 35. This degree of representativeness determines the extent of the influence of each association in the negotiation process. Only a union or a group of associations with a representativeness of 50 percent or greater of all certified construction workers may negotiate collective agreements. If a union's degree of representativeness does not reach at least 15 percent, it is even deprived of the right to attend collective bargaining sessions.

The trial judge dismissed the constitutional argument and found the appellants guilty as charged. The Superior Court affirmed that judgment. The Court of Appeal dismissed the appellants' motion for leave to appeal to that court.

Held (McLachlin C.J. and Major, Bastarache and Binnie JJ. dissenting): The appeal should be dismissed. The impugned legislation is constitutional.

Per Gonthier, Arbour and LeBel JJ.: The appellants have standing to raise the constitutional questions stated. As appears from the legislation challenged, the conditions governing the issuance of competency certificates and union membership are closely linked. A successful challenge to the provisions governing the compulsory choice of a collective bargaining agent might give rise to some defence to the specific charges laid in this case. Moreover, at the present stage of the proceedings, the interest of justice favours a careful consideration of the substantive issues brought before this Court.

Although the right of association represents a social phenomenon involving the linking together of a number of persons, it belongs first to the individual. It fosters one's self-fulfilment by allowing one to develop one's qualities as a social being. The act of engaging in legal activities, in conjunction with others, receives constitutional protection. The focus of the analysis remains on the individual, not on the group.

While the majority of the Court acknowledged in Lavigne that there was a negative right not to associate, it also accepted a democratic rationale for putting internal limits on it. An approach that fails to read in some inner limits and restrictions on a right not to associate would [page212] deny the individual the benefits arising from an association. The acknowledgement of a negative right not to associate would not justify a finding of an

infringement of the guarantee whenever a form of compelled association arises. Some forms of compelled association in the workplace might be compatible with Charter values and the guarantee of freedom of association. An inquiry must take place into the nature of the commitment to an association. In the case of a legislated form of union security, the nature of the legislative scheme must also be closely scrutinized.

The appellants have not made out a case that the challenged legislation establishes a form of ideological conformity that would trigger the application of s. 2(d) of the Charter. As it stands, the law does not impose on construction workers much more than the bare obligation to belong to a union. Their obligation boils down to the obligation to designate a collective bargaining representative, to belong to it for a given period of time, and to pay union dues. At the same time, the Act provides protection against past, present and potential abuses of union power. Unions are deprived of any direct control over employment in the industry. They may not set up or operate an office or union hall. No discrimination is allowed against the members of different unions. Provided they hold the required competency certificates, all workers are entitled to work in the construction industry without regard to their particular union affiliation. Section 96 grants members clear rights of information and participation in union life. The law allows any construction worker to change his or her union affiliation, at the appropriate time.

There is simply no evidence to support judicial notice of Quebec unions ideologically coercing their members. Such an inference presumes that unions hold a single ideology and impose it on their rank and file, including the complainants in this case. Such an inference would amount to little more than an unsubstantiated stereotype. The appellants presented no evidence that the legislation imposes a form of ideological conformity or threatens a liberty interest protected by the Charter, which is necessary for it to infringe the right not to associate under s. 2(d). The evidence does not even indicate whether unions are engaged in causes and activities that the appellants disapprove of. This is not a subject where judicial knowledge could and should replace proper evidentiary records unless the fact of joining a union were, of itself, evidence of a particular ideological bent. The well-known fact of trade union participation in public life in Canada does not demonstrate that every union [page213] worker joining a union under a union security arrangement should be considered prima facie a victim of a breach of the Charter.

The question at stake in this appeal should be left to the political process. Such a solution retains a balance in the application of the Charter, and leaves the legal management of labour relations to Parliament and legislatures as well as to the parties to labour agreements. The management of labour relations requires a delicate exercise in reconciling conflicting values and interests. The relevant political, social and economic considerations lie largely beyond the area of expertise of courts. This limited and prudent approach to court interventions in the field of labour relations reflects a proper understanding of the functions of courts and legislatures. In the application of the Charter, it also avoids characterizing any kind of governmental action in support of human rights as a prima facie infringement of the Charter that would have to be justified under s. 1.

Even if the legislation had infringed the s. 2(d) right not to associate, it would still be justified under s. 1 of the Charter. Legislatures are entitled to a substantial, though not absolute, degree of latitude and deference to settle social and economic policy issues. Courts should be mindful to avoid second-guessing legislatures on controversial and complex political choices. The jurisprudence acknowledges that legislative policy-making in the domain of labour relations is better left to the political process, as a general rule. The limits at issue here are prescribed by law. The law also addresses a pressing and substantial purpose. The history of the legislation demonstrates that the Quebec National Assembly tried to address problems that had become a pressing social and economic issue, which led to a process of trial and error that lasted for several years, and is still going on.

Moreover, a rational connection existed between the means chosen by the legislature and their goal. The voting procedure constituted the fairest and most effective way to determine the representativeness of unions. The obligation to join them demonstrated the will to involve workers in the management of their association, to foster and increase their participation in union life and in union decisions, after a period when democratic values had often been flouted by local unions. The legislature viewed this form of security as a

better instrument to [page214] maintain and develop democracy than the Rand formula, under which workers pay for services and have no say on the most important issues concerning the association and its members. As it still does, the construction industry played a major role in the economy and development of the province. Its labour relations were constantly in turmoil for several years. Union democracy was in peril. It had become difficult to set up a workable system of collective bargaining. A resolution of these difficulties involved both the establishment of the representative status of labour unions and the safeguarding of union democracy. The National Assembly sought, in this way, to address the objective of establishing peace and economic efficiency in the industry. Given the nature of these difficulties, the provisions involving the selection of a bargaining representative, the obligation to choose among a limited number of union groups and compulsory financial support were related to this objective. They attempted to create a workable mechanism to establish the representativeness of unions while safeguarding union pluralism. There is no evidence that any active employee association in the industry was left out of the process. On the contrary, the legislature usually tried to take into account the numerous changes in the organization of the labour groups. In this manner, these measures directly aim to further important social and economic purposes.

Viewed in the context of the particular historical experience of Quebec's labour relations, the legislation also meets the minimal impairment test. This limited form of compelled association respects fundamental democratic values. It requires only a limited commitment from construction employees. They must choose a collective bargaining agent. The legislation gives them a choice among five union groups. It appears that no new group has been left out of the process. The law also calls upon construction employers to support the chosen approach. Nothing more is imposed by the law. Finally, the advantages of the legislation clearly outweigh their limited impact upon the asserted negative right not to associate. The Construction Act imposes strict obligations on unions in respect of internal democracy. Any form of employment discrimination is also forbidden. The whole process of hiring has been entirely removed from union control by legislation. Through a difficult process of legislative experimentation, the legislation has reestablished a degree of peace and union democracy in the Quebec construction industry. The Court is called upon to consider the validity of a complex legislative scheme, born out of a history of attempts, failures and disappointments. At the time the present litigation started, this legislation presented the result of about 30 years of legislative work [page215] to create a proper system of collective bargaining in the industry. A considerable degree of deference is due to the legislature and the difficulties inherent in the art of government in such a traditionally fractious environment. Court intervention might affect sensitive aspects of a carefully balanced scheme and is not warranted in the circumstances of this case.

Per L'Heureux-Dubé J.: LeBel J.'s extensive review of the troubled history of labour relations in the Quebec construction industry and of the legislative history of the Construction Act was agreed with, as was his conclusion that the Act is constitutional. For the reasons given by Wilson J. in Lavigne, however, s. 2(d) of the Charter includes only the positive freedom to associate. The alleged protected "right not to associate" is nowhere articulated in the Charter, and is antithetical to the purpose and scope of the protected right of association. The negative right does not sit well with the structure of the Charter. Moreover, it would trivialize the Charter since the recognition of such a right would have serious consequences, which would oblige the courts to adopt severe limitations to differentiate between genuine and constitutionally insignificant violations of s. 2(d). While no one should be forced to associate, s. 2(d) of the Charter does not offer such constitutional protection. Rather, and particularly on the narrowly circumscribed definition of that right and numerous built-in exceptions adopted by LeBel J., the constitutional guarantee of freedom of expression under s. 2(b) will come into play if and when one is forced to associate, as well as possibly s. 7 of the Charter.

Negative rights are viewed as individual rights embodying individual goals: an individual is given the constitutional right not to belong to an association. If the fundamental purpose of freedom of association is to permit the collective pursuit of common goals, then the very concept of a "negative freedom of association" becomes suspect. The collective pursuit of "common goals" in such a context leads to an abstraction which is difficult to justify.

The course of judicial restraint suggests that no new constitutional doctrine should be developed if existing doctrine could resolve the issue. Constitutional remedies are powerful tools which ought to be used with prudence. When required, however, they should be applied with vigour and in a purposive manner. An additional reason for caution is based on the fact that the impetus for efforts to establish the negative right to association has historically originated with those opposed to the establishment [page216] or maintenance of labour associations. The creation and application of new judicial tools, featuring a questionable mark of origin, will inevitably generate new jurisprudence to which there are certain risks attached. Such a development may not be viewed as prudent, especially in light of the fact that there is no need to take such a risk because proven alternatives are available.

Per Iacobucci J.: The freedom of association guaranteed by s. 2(d) of the Charter encompasses a negative right to be free from compelled association, which is infringed by the legislation at issue here. An analysis that construes the negative freedom within s. 2(d) more broadly than the "ideological conformity" test should be adopted. Where the state obliges an association of individuals whose affiliation is already compelled by the facts of life (such as in the workplace), and the association serves the common good or furthers the collective social welfare, s. 2(d) will not be violated unless the forced association imposes a danger to a specific liberty interest. The state-imposed association established by the Construction Act does not promote the common good or further the collective social welfare within the context of s. 2(d) of the Charter. The legislation fails to provide any justification for the compelled union association that it envisages for Quebec's construction industry. Membership in union groups is not contingent upon any competency requirements and there is thus no public assurance that workers within these groups will have the necessary skills and abilities to carry out their trade. Furthermore, the provisions of this legislation impair the appellants' liberty interests. The present appeal involves construction workers in Quebec who have no choice but to unionize in order to carry out their work. Their liberty is further restricted by the fact that they must become members of one of five union groups that have been specifically accepted by the state. However, the legislation is justified under s. 1 of the Charter. The Construction Act was adopted within a unique and complex historical context, and served to promote distinct social and economic objectives that were, and remain, pressing and substantial. Further, for the reasons given by LeBel J., the legislation is rationally connected to these objectives, it minimally impairs the freedoms guaranteed under s. 2(d), and its benefits outweigh its deleterious effects.

Per McLachlin C.J. and Major, Bastarache and Binnie JJ. (dissenting): Section 2(d) of the Charter implies a negative right not to associate. The test for an infringement of this right, however, is not whether there is evidence of ideological coercion or conformity imposed by the forced association. For ideological conformity to [page217] exist, it is not necessary that there be evidence of an imposition of union values or opinions on the member, evidence of a limitation of the member's free expression, or evidence that the union participates in causes and activities of which the member disapproves. The interpretation of ideological conformity must be broader and take place in context. In this case, this context would take into account the true nature of unions as participatory bodies holding political and economic roles in society which, in turn, translates into the existence of ideological positions. To mandate that an individual adhere to such a union is ideological conformity.

The challenged statutory provisions infringe the negative right which forms part of s. 2(d). Under the Construction Act, membership in one of the unions is obligatory. Furthermore, membership has meaning. Membership is about sharing values, joining to pursue goals in common, expressing views reflecting the position of a particular group in society. It is because of the collective force produced by membership that unions can be a potent force in public debate, that they can influence Parliament and the legislatures in their functions, that they can bargain effectively. This force must be constituted democratically to conform to s. 2(d).

It is not necessary to have more independent evidence of the ideological views of the specific unions involved in this case. It is in fact sufficient that adherence is required to a scheme advocating state-imposed compulsory membership which affects freedom of conscience and expression, as well as liberty and mobility interests, for it to have a negative impact on the right to work, because such adherence itself is a form of ideological coercion. Ideological constraint exists in particular where membership numbers are used to promote

ideological agendas and this is so even where there is no evidence that the union is coercing its members to believe in what it promotes.

In this case, workers objected to being forced to join a union and objected generally to the compulsory unionization scheme, which is ideological in nature. This is a case where the freedom not to associate is markedly infringed. It is a clear situation of government coercion, the result of which mandates that workers in the construction industry in Quebec group together in a few unions which are specified and approved by government. The fact that there are five unions from which workers can choose in no way negates this infringement for it remains government-mandated group affiliation. Self-realization of the worker is violated in many ways. He or she must [page218] unionize. Within the prescribed regime, democracy is further restricted by limited choice. There is no guarantee that a majority of voters will exercise their right. A default provision can determine the outcome of elections. Those voting for minority associations may be left out of future negotiations. When freedom not to associate is considered in light of other Charter values, including liberty, freedom of conscience and expression, mobility and the right to work, it must be concluded that governmental mandatory union association infringes this important Charter right. Ideological conformity is engaged in particular because the members of the associations necessarily participate in and indirectly support a system of forced association and state control over work opportunity. This is a situation whereby the democratic rights of workers are taken away. Being forced to accept and participate in a system that severely limits the democratic principle in the area of labour relations is a form of coercion that cannot be segregated totally from ideological conformity.

There is also a breach of the positive right to associate. There are severe restrictions on the right of a person to join one of the five chosen unions in order to work in the construction industry in Quebec. Even if the conditions imposed by s. 30 of the Construction Act were permissible limitations on freedom of association, the regional quotas would still need to be justified under s. 1. They unduly infringe the ability of workers to join a union, which is a prerequisite for working in the construction industry in Quebec. As such, they are an infringement of the s. 2(d) freedom of association.

The infringement of s. 2(d) is not justifiable. In determining whether this infringement can be justified by s. 1, this Court must again take into consideration Charter values including liberty, freedom of expression, the right to work and mobility rights. While it is in the public interest to have structured collective bargaining and to provide for competency requirements, and these are no doubt pressing and substantial objectives, they are not the true objectives of the impugned provisions. The legislation brings into play restrictions on the admission to the industry, cancellation of the ability to have a non-unionized business, restrictions on bargaining rights, imposition of regional quotas and impingement of regional mobility. It has not been demonstrated that there is a logical relationship between the legislation's stated objectives [page219] and these restrictions. Any justification based on competency is untenable. The actual requirements of s. 30 and the regional quotas have little if anything to do with the professional competence of workers in the construction industry. Being a resident of Quebec in the previous year, having worked a set number of hours in that year, and being less than 50 years old, do not verify competence. The same may be said for the regional quotas and control over regional mobility within the province. There is accordingly no rational connection between the objective and the measures taken. Moreover, the requirements of the minimal impairment branch of the proportionality test have not been met. If the purpose of the legislation is viewed as ensuring the competency of construction workers, neither the limitation of the "freedom to associate" nor the limitation of the "freedom from association" is minimally impairing. Section 30 and the regional quotas have little or nothing at all to do with competence and therefore cannot be viewed as minimal impairments of s. 2(d).

Cases Cited

By LeBel J.

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By L'Heureux-Dubé J.

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By Iacobucci J.

Considered: Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211.

By Bastarache J. (dissenting)

Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211; Ford Motor Co. of Canada v. U.A.W.-I.C.O. (1946), 46 C.L.L.C. para. 18,001; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; R. v. Oakes, [1986] 1 S.C.R. 103; Canadian Egg Marketing Agency v. Richardson, [1998] 3 S.C.R. 157; Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817; Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326; R. v. O'Connor, [1995] 4 S.C.R. 411; Mills v. The Queen, [1986] 1 S.C.R. 863; Mooring v. Canada (National Parole Board), [1996] 1 S.C.R. 75; R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2; R. v. Keegstra, [1990] 3 S.C.R. 697; B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315; Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313.

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Act to amend the Act Respecting Labour Relations, Vocational Training and Manpower Management in the Construction Industry and other legislative provisions, S.Q. 1993, c. 61, s. 15(3).
Act to amend the Act Respecting Labour Relations, Vocational Training and Manpower Management in the Construction Industry and other legislative provisions, S.Q. 1994, c. 8.
African Charter on Human and Peoples' Rights, art. 10(2).
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APPEAL from a judgment of the Quebec Court of Appeal, [1998] Q.J. No. 4173 (QL), dismissing an application for leave to appeal a judgment of the Superior Court, [1998] R.J.Q. 911 (sub nom. Thériault v. R.), affirming Judge Bonin's dismissal of the appellants' constitutional challenge and convicting them of offences under the Act Respecting Labour Relations, Vocational Training and Manpower Management in the Construction Industry. Appeal dismissed, McLachlin C.J. and Major, Bastarache and Binnie JJ. dissenting.

Julius H. Grey, Elizabeth Goodwin and Vincent Basile, for the appellants.
Jean-François Jobin and Benoit Belleau, for the mis en cause.
Jean Ménard, for the intervener Commission de la construction du Québec.
Robert Toupin and Edward Kravitz, for the interveners Centrale des syndicats démocratiques (CSD-Construction), Confédération des syndicats nationaux (CSN-Construction) and Conseil provincial du Québec des métiers de la construction (International).

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Robert Laurin and France Colette, for the intervener Fédération des travailleurs du Québec (FTQ-Construction).
Peter A. Gall, Andrea L. Zwack and Corrado De Stefano, for the intervener Canadian Coalition of Open Shop Contracting Associations.
Harold F. Caley, for the intervener Canadian Office of the Building and Construction Trades Department, AFL-CIO.
[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

The reasons of McLachlin C.J. and Major, Bastarache and Binnie JJ. were delivered by

¶ 1 **BASTARACHE J.** (dissenting):— I have had the opportunity of reading the reasons of my colleagues. I respectfully disagree with L'Heureux-Dubé J. on the existence of the right to be free from compelled association. Although I appreciate the value of the long historical development discussed by LeBel J. and agree with him on the existence of the negative right just mentioned, I cannot agree with him on a number of fundamental issues. First, I have a different view of the content of freedom from association, in other words, the scope of the negative right. Second, I do not agree with the restrictive approach to the s. 1 analysis adopted by LeBel J. in this case. In addition, I believe this Court must consider the restrictions on the right to associate, the positive right, that are imposed in particular by s. 30 of the Act Respecting Labour Relations, Vocational Training and Manpower Management in the Construction Industry, R.S.Q., c. R-20, and the regional regulatory quotas. The appellants directly challenged s. 30 of the Act as infringing s. 2(d) of the Canadian Charter of Rights and Freedoms; as noted by the appellants in their oral arguments, it is therefore necessary to consider all s. 2(d) issues that are raised. Based on my view of the scope of the negative right and the analysis of the infringement of the positive right, I would allow the appeal.

[page227]

Section 2(d): The Scope of the Negative Right

¶ 2 LeBel J. concludes that s. 2(d) of the Charter implies a negative right not to associate; he states that the test for an infringement of this right is whether there is evidence of ideological coercion or conformity imposed by the forced association. Having found that no such ideological conformity exists in the present case, he finds no infringement of this right. With respect, I disagree both with the test used and his ultimate finding in the present case.

¶ 3 The test relied upon by LeBel J. is based primarily upon the decision of McLachlin J. (as she then was) in Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211. According to LeBel J., for ideological conformity to exist, there must be evidence of an imposition of union values or opinions on the member, evidence of a limitation of the member's free expression, or evidence that the union participates in causes and activities of which the member disapproves (para. 232). In other words, LeBel J.'s interpretation of ideological conformity is a narrow one where, in order to exist, there must be some impact on the member's moral convictions. This test, as formulated by LeBel J., is, in my opinion, too narrow and results in a negative right that is too constrained. I do not agree that McLachlin J.'s opinion in Lavigne need be interpreted so restrictively. In my view, the interpretation of ideological conformity must be broader and take place in context. In this case, this context would take into account the true nature of unions as participatory bodies holding political and economic roles in society which, in turn, translates into the existence of ideological positions. To mandate that an individual adhere to such a union is ideological conformity.

¶ 4 It is evident that even prior to the coming into force of the Charter, ideological conformity was a major concern of the courts when considering forced association. In fact, this is shown by the Rand formula, which has been so important in [page228] the historical development of the union movement. According to Rand J., the democratic principle is an underlying value of prime importance in this analysis and any form of coercion affecting it must be taken very seriously. As noted by M. MacNeil, M. Lynk and P. Engelmann in Trade Union Law in Canada (loose-leaf ed.), at p. 2-13:

> Rand attempted to balance the interest of individuals in not being forced to associate with an organization against their will with the interest of the majority in preventing a minority from acquiring the fruits of collective bargaining without having to pay for it. [Emphasis added.]

¶ 5 At issue in the labour dispute arbitrated by Rand J. in 1946 was whether a union shop clause could be inserted into a collective agreement. He created an alternative to the union shop clause which became widely accepted and known as the 'Rand formula'. As noted above, in Ford Motor Co. of Canada v. U.A.W.-I.C.O. (1946), 46 C.L.L.C. para. 18,001, Rand J. was concerned with individual workers' rights and the democratic principles underlying union membership. He stated at p. 159:

> As I conceive it, from the social and economic structure in which we live I must select considerations which have attained acceptance in the public opinion of this country and which as principles are relevant to controversies of the nature of that before me;

At pp. 160 and 161, he noted that:

> [O]rganized labour itself develops and depends upon power, which in turn must be met in balancing controls in relation to the individual members or workers over whom it may be exercised, as well as to industry and public.
>
> ...
>
> The organization of labour must in a civilized manner be elaborated and strengthened for its essential function in an economy of private enterprise. For this there must be enlightened leadership at the top and democratic control at the bottom. ... Hitherto the tendency has been

> to treat labour as making demands quite [page229] unwarranted on any basis of democratic freedom in relation to property and business and the ordinary mode of settling labour disputes, a piecemeal concession in appeasement. I cannot see much effort to place conciliation on principle and although at once I disclaim any hope of doing more than to suggest principle through a slightly altered approach, I must at least make that attempt. [Emphasis added.]

He continued, at p. 163, discussing the balancing of union security with that of individual choice. He remarked:

> What is asked for is a union shop with a check-off. A union shop permits the employer to engage employees at large, but requires that within a stated time after engagement they join the union or be dismissed if they do not. This is to be distinguished from what is known as a "closed shop" in which only a member of the union can be originally employed, which in turn means that the union becomes the source from which labour is obtained.
>
> ... Where there is a closed or union shop, the check-off becomes less significant because of the fact that expulsion from the union requires dismissal from employment.
>
> In addition to the foregoing of which there may be many modifications, there is what is known as "maintenance of membership" which is a requirement that an employee member of a union maintain that membership as a condition to his continuing employment for a stated time, generally the life of an agreement. ...
>
> Basing my judgment on principles which I think the large majority of Canadians accept, I am unable in the circumstances to award a union shop. It would subject the Company's interest in individual employees and their tenure of service to strife within the union and between them and the union which, with extraordinary consequences, ... and it would deny the individual Canadian the right to seek work and to work independently of personal association with any organized group. It would also expose him even in a generally disciplined organization to the danger of arbitrary action of individuals and place his economic life at the mercy of the threat as well as the action of power in an uncontrolled and here an unmatured group. [Emphasis added.]

Finally, at p. 165, he concluded that the mechanism chosen "preserves the basic liberties of [the] [page230] Company and employee" (emphasis added) aforementioned.

¶ 6 The Rand formula was discussed by this Court in Lavigne, supra. Wilson J. noted the reason for the success of this type of clause in Canada and distinguished it from situations where union membership was mandatory. She stated, at p. 272:

> Its success in Canada has stemmed from the fact that in enhancing union security it does not work to suppress expression but to foster it.
>
> Why is this so? Viewed closely, it is evident that there is nothing about the agency shop which purports to align those subject to its operation with the union or any of its activities. Indeed, the Rand formula specifically provides for dissent by stipulating that no member of the bargaining unit is required to join and thereby become a member of the union. Free expression was thus enhanced by giving unionists and non-unionists alike a voice in the administration of the employment relationship. [Emphasis added.]

Finding that the Rand formula infringes s. 2(d) of the Charter but is justified by s. 1, La Forest J. also noted, at p. 341, that the Rand formula does not mandate union membership. Further, McLachlin J. remarked, at p. 347:

> The whole purpose of the formula is to permit a person who does not wish to associate himself or herself with the union to desist from doing so. The individual does this by

declining to become a member of the union. The individual thereby dissociates himself or herself from the activities of the union.

¶ 7 The infringement in the present case is much more important than that created by the Rand formula and requires justification that is therefore more extensive. It was decided in Lavigne that ideological conformity is at the core of freedom from association; it is not necessary to decide here whether it is the only factor to be considered in all cases, as will be shown later in these reasons.

¶ 8 In order to understand the entire scope of the negative right, one must consider the impact of other Charter values on its infringement, as required under the rules of Charter interpretation described in R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, where Dickson J. (as he then was) stated, at p. 344:

[page231]

> The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in Southam [Hunter v. Southam Inc., [1984] 2 S.C.R. 145] emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this Court's decision in Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts. [First emphasis in original; second emphasis added.]

Dickson C.J. referred to this decision in R. v. Oakes, [1986] 1 S.C.R. 103, where he remarked, at p. 119:

> To identify the underlying purpose of the Charter right in question, therefore, it is important to begin by understanding the cardinal values it embodies.

¶ 9 Both of these cases provide inspiration for defining the limits of the s. 2(d) negative right under the Charter. The whole context of the right must be considered. This was already a consideration of Rand J. in Ford Motor, supra, at p. 159, wherein he speaks of the social and economic structure in which we live and which gives rise to principles of law. This context includes, as I have said, a consideration of Charter values that come into play in the particular situation at issue. In this case, the fundamental values that must be protected in the workplace include freedom of conscience, mobility, liberty, freedom of expression and the right to work. The necessity of considering the totality of the rights and values that are interrelated when [page232] dealing with forced association in the workplace, in my opinion, points to the need to take a broad view of the Charter right not to associate.

¶ 10 This approach is supported by consideration of this freedom in light of international conventions and the jurisprudence of this Court.

¶ 11 The United Nations Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), states:

Article 20

...

2. No one may be compelled to belong to an association.

In addition, the United Nations International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, provides that:

Article 8. 1. The States Parties to the present Covenant undertake to ensure:

(a) the right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others; [Emphasis added.]

¶ 12 This Court has regularly made reference to and relied upon the aforementioned international documents in interpreting fundamental freedoms in the Charter. As stated in Canadian Egg Marketing Agency v. Richardson, [1998] 3 S.C.R. 157, at para. 57, "the development of international human rights [is] an important influence leading to an entrenched guarantee of rights and freedoms in this country". In that case, the Court cited with approval an article written by former Chief Justice Dickson where he stated:

[page233]

The Charter reflects an agreement by the federal and provincial governments to limit their legislative sovereignty so as not to infringe on certain rights and freedoms.

("The Canadian Charter of Rights and Freedoms: Context and Evolution", in G.-A. Beaudoin and E. Mendes, eds., The Canadian Charter of Rights and Freedoms (3rd ed. 1996), 1, at p. 1-15)

Further, this Court stated in Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, at para. 70:

The important role of international human rights law as an aid in interpreting domestic law has also been emphasized in other common law countries ... . It is also a critical influence on the interpretation of the scope of the rights included in the Charter: Slaight Communications [Inc. v. Davidson, [1989] 1 S.C.R. 1038]; R. v. Keegstra, [1990] 3 S.C.R. 697.

The same sentiment has been expressed (and these international agreements have been used as interpretative tools) in numerous cases decided by this Court, including Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326, at p. 1377; R. v. O'Connor, [1995] 4 S.C.R. 411, at p. 484 (the right to privacy as found in s. 8); Mills v. The Queen, [1986] 1 S.C.R. 863, at pp. 881-82; Mooring v. Canada (National Parole Board), [1996] 1 S.C.R. 75, at para. 51 (the right to a remedy as found in s. 24(1)); R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 178 (the protection of children as it impacts s. 2(b)); and R. v. Keegstra, [1990] 3 S.C.R. 697, at pp. 749-55 (the scope of s. 2(b)).

¶ 13 It is interesting to note that the African Charter on Human and Peoples' Rights, which was referred to in B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315, at para. 38 (the scope of the right to liberty in s. 7), provides, at art. 10:

2. Subject to the obligation of solidarity provided for in Article 29 no one may be compelled to join an association. [Emphasis added.]

¶ 14 In Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313 ("Alberta Reference"), and Lavigne, supra, this Court used these [page234] international agreements as interpretative tools in an analysis of s. 2(d) of the Charter. In Alberta Reference, Dickson C.J. (dissenting) noted, at p. 350, that the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, were adopted in an effort to make more specific the broad principles included in the Universal Declaration of Human Rights. I would like to note, however, that the specificity of the international covenants did not replace the broad principles enunciated in the Universal Declaration. These covenants clarify art. 20(1) of the Universal Declaration (the positive right), but do not minimize the negative right. Actually, the continuing importance of the negative right is seen in art. 8(1)(a) of the International Covenant on Economic, Social and Cultural Rights, wherein the joining of a union is referred to as the "right" of the worker to join a union of his or her "choice".

¶ 15 The importance of these documents in relation to s. 2(d) was discussed by La Forest J. in Lavigne, where he prescribed a broad and liberal interpretation of s. 2(d) in light of other Charter values. He stated, at pp. 318-20:

> Forced association will stifle the individual's potential for self-fulfillment and realization as surely as voluntary association will develop it. Moreover, society cannot expect meaningful contribution from groups or organizations that are not truly representative of their memberships' convictions and free choice. Instead, it can expect that such groups and organizations will, overall, have a negative effect on the development of the larger community. ... Recognition of the freedom of the individual to refrain from association is a necessary counterpart of meaningful association in keeping with democratic ideals.
>
> Furthermore, this is in keeping with our conception of freedom as guaranteed by the Charter... .
>
> It is clear that a conception of freedom of association that did not include freedom from forced association would not truly be "freedom" within the meaning of the Charter.
>
> [page235]
>
> This brings into focus the critical point that freedom from forced association and freedom to associate should not be viewed in opposition, one "negative" and the other "positive". These are not distinct rights, but two sides of a bilateral freedom which has as its unifying purpose the advancement of individual aspirations. The bilateral nature of the associational right is explicitly recognized in Art. 20 of the United Nations Universal Declaration of Human Rights, 1948, ...
>
> This construction of the associational right in two reflective strands serves to recognize the often overlooked potential for coercion in association. Governmental tyranny can manifest itself not only in constraints on association, but in forced association. There is no logical inconsistency in recognizing this reality. Nor do I accept the proposition that including the right to be free from compelled association within the reach of s. 2(d) will weaken or "trivialize" the cherished right to be free to form associations. It will do nothing but strengthen it. Moreover, the purposive approach to Charter interpretation demands such a result.
>
> Finally, that some aspects of the freedom may be protected by ss. 7, 2(a) or 2(b) of the Charter, to cite the most obvious possibilities, should not dissuade us from giving full meaning to s. 2(d). All of the liberties guaranteed by the Charter are particular aspects of the broader freedom we enjoy in Canada. As the Court noted in R. v. Lyons, [1987] 2 S.C.R.

309, at p. 326:

> Before entering into a detailed discussion of the issues, it may be useful to note that this case exemplifies the rather obvious point that the rights and freedoms protected by the Charter are not insular and discrete (see, e.g., my comments in this regard in R. v. Rahey, [1987] 1 S.C.R. 588). Rather, the Charter protects a complex of interacting values, each more or less fundamental to the free and democratic society that is Canada (R. v. Oakes, ...), and the particularization of rights and freedoms contained in the Charter thus represents a somewhat artificial, if necessary and intrinsically worthwhile attempt to structure and focus the judicial exposition of such rights and freedoms. The necessity of structuring the discussion should not, however, lead us to overlook the importance of appreciating the manner in which the amplification of the content of each enunciated right and freedom imbues and informs our understanding of the value structure sought to be protected by the Charter as a whole and, in particular, of the content [page236] of the other specific rights and freedoms it embodies.

> Accordingly, a person is not deprived of protection under a provision of the Charter merely because protection may also be derived under another. The rights overlap in defining Canadian society, and I see no reason for depriving a litigant of success because he has chosen one provision that legitimately appears to cover the matter of which he or she complains, rather than another. That would often be the effect if the individual rights and freedoms were construed as discrete rather than overlapping.

¶ 16 He went on to discuss the scope of this Charter right. In doing so, he noted that s. 2(d) has limitations and that it was not meant to protect the people of Canada from the association with others that is "a necessary and inevitable part of membership in a democratic community" (p. 320). He mentioned governmental policies requiring the payment of taxes and the association with others that is compelled by the organization of our society, such as membership in a family. I am not persuaded that these are examples of true associations as envisaged within the meaning of s. 2(d) or that they constitute true exceptions to the freedom from association. In this, I think we have to be guided by the purpose of the section. On this point, it is worth quoting La Forest J., at pp. 322-23, where he stated:

> At the core of the guarantee of freedom of association is the individual's freedom to choose the path to self-actualization. This is an aspect of the autonomy of the individual. It is of little solace to a person who is compelled to associate with others against his or her own will that no one will attribute the views of the group to that person. ... Consequently, the test should not be whether the payments "may reasonably be seen" as association, or must "indicate to any reasonable person" that the individual has associated himself with an ideological cause. An external manifestation of some link between the individual and the association is not a prerequisite to the invocation of the right; it is enough that the individual's freedom is impaired. [Emphasis added.]

I think this has to be read with the words of Dickson C.J. in Oakes, supra, at p. 136:

[page237]

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions

which enhance the participation of individuals and groups in society. [Emphasis added.]

¶ 17 The recognition of the union movement as a fundamental institution is implicit here precisely because it is a participant in the political and social debate at the core of Canadian democracy. To suggest that the unions in the present case are not associated with any ideological cause is to ignore the history of the union movement itself. Although it has been accepted that freedom of association protects an activity by an association that is permitted by an individual, this does not mean that there is no distinctive function for an association, or that associational analogues to individual rights need be ignored. The collective character of the right to associate is undeniable because collective activity is not equivalent to the addition of individual activities. It is important, however, that belonging to important social institutions be free; this is how democracy will be enhanced.

¶ 18 Discussing limitations on the freedom from association, La Forest J. noted that some of the liberty interests at issue in the context of the right to be free from association were discussed by Professor B. Etherington in his article "Freedom of Association and Compulsory Union Dues: Towards a Purposive Conception of a Freedom to not Associate" (1987), 19 Ottawa L. Rev. 1, and include (at pp. 43-44):

1. governmental establishment of, or support for, particular political parties or causes;
2. impairment of the individual's freedom to join or associate with causes of his choice;

[page238]

3. the imposition of ideological conformity; and
4. personal identification of an objector with political or ideological causes which the service association supports.

La Forest J. noted that this view is consistent with the reasons of Dickson J. in Big M Drug Mart, supra.

¶ 19 I agree with La Forest and McLachlin JJ. that there is a negative aspect to the s. 2(d) right. However, I do not think it is useful to distinguish between the factors proposed by Professor Etherington or to formulate a definitive opinion with regard to the various factors that could, in any given situation, provide a framework for the conclusion that freedom from association has been breached. With regard to the content of the right, it is sufficient to refer to ideological conformity in this case because that factor has already been recognized, because it is at play and because its scope is such that it encompasses all aspects of the case on its facts. I am left here with a number of options. For instance, I could accept that there is an internal qualification of the negative aspect of s. 2(d) and that it is triggered by the infringement of a liberty interest, other Charter values and/or the imposition of ideological conformity; or I could accept that there is a negative aspect to s. 2(d) and that a s. 1 justification is immediately required upon a finding that there has been state-imposed association. First, a distinction may be made between the exceptions to s. 2(d) protection, as discussed by La Forest J. and noted at para. 16 of these reasons, and true associations which are protected by s. 2(d). Although not necessary to determine in this case, as these exceptions are not brought into play by the factual situation in issue, it may be said that these "necessary" associations do not truly fall within the purpose of s. 2(d) protection since they do not involve persons coming together in the pursuit of a common goal or purpose as this is generally understood. Association in a labour organization would not in any case be part of the "necessary" associations category. Further, any element of necessity which [page239] would impact protections provided by s. 2(d) would, in my opinion, fall within a s. 1 justification of a s. 2(d) infringement rather than at the initial Charter breach analysis. Second, it should be added that even if forced associations in and of themselves should not be considered ab initio contrary to universal values or principles, once coercion is applied by government to association in circumstances where ideological conformity is imposed, I believe s. 2(d) is infringed and the government must justify this forced association pursuant to s. 1.

¶ 20 I would add here that I disagree with the statement of LeBel J. at para. 199 of his reasons that La Forest J. was of the opinion that the obligation to join a union whose purposes were limited to collective bargaining would not even engage s. 2(d). This inference, in my view, is not consistent with the fact that La Forest J.'s discussions of constitutional issues in Lavigne had nothing to do with mandatory membership (see p. 325). Furthermore, this is not relevant here, as will be demonstrated later, because the association in question goes beyond the purpose of collective bargaining.

Section 2(d): Was the Negative Right Infringed?

¶ 21 D. Wright notes in his article "Unions and Political Action: Labour Law, Union Purposes and Democracy" (1998), 24 Queen's L.J. 1, at p. 7:

> Though labour has supported a variety of political parties over the years, trade union support for organized political parties has been a prominent part of labour's activities throughout most of this century.

¶ 22 He states that labour has played an important part in the development of the New Democratic Party and Parti québécois and that the purpose of trade unions transcends that of collective bargaining on behalf of members and includes, as a fundamental purpose, the political representation of members. Rand J. noted that union representation is about power, as seen earlier. LeBel J. explains that the [page240] history of labour relations in Quebec is rife with violence and dissonance. Eventually, a system of representative unions was recognized by legislation. In 1974, after violence broke out at the James Bay Project site, the government set up the Cliche Commission. The representative union system was modified and a system of regional quotas was created. In discussing the political activity of representative unions in Quebec, G. Murray and P. Verge, La représentation syndicale: Visage juridique actuel et futur (1999), note, at p. 85:

> [TRANSLATION] The 1995 referendum debate on Quebec sovereignty also caused most of the large Quebec union federations to take positions, including the CEQ, the CSN and the FTQ.

They also later state, in discussing general social preoccupations of unions in Quebec, at p. 91:

> [TRANSLATION] The general social issues giving rise to positions by organized labour encompass health and welfare, language and education.

And at pp. 93-94:

> [TRANSLATION] Since 1977, the Conseil de la langue française has been monitoring, for the Minister, the situation of the French language and language developments in general in Quebec. The Conseil is composed of 12 members appointed by the government, including "two persons chosen after consultation with the representative union bodies". [Quotations are from the Charter of the French Language, R.S.Q., c. C-11, ss. 186 and 187.]
> ... Finally, although the Institut canadien d'éducation des adultes is not a governmental organization, the FTQ, the CSN and the CEQ contribute to its work, along with other labour organizations, educational institutions, training and leadership organizations, community groups and cultural community organizations.

At p. 141:

> [TRANSLATION] Labour representation is expected to continue to reach beyond the framework of the company, whether it is dealing with the intermediation of the employee's

> interests as such or, more broadly, the interests of the employee-citizen. The labour [page241] organizations themselves, as we have seen, naturally saw that protecting groups of employees would also lead them into larger arenas, in accordance with their objects and their methods of action. [Emphasis added.]

The authors continue this discussion by dividing the two forms of representation: [TRANSLATION] "employee-employee" and [TRANSLATION] "employee-citizen", the latter of which comprises the social and economic activities of the union. In discussing this, they state, at p. 146:

> [TRANSLATION] But the future of labour representation in relation to these different political, economic and social issues will basically depend on the preferences expressed by employee-citizens themselves. [Emphasis added.]

J. Boivin and J. Guilbault, in Les relations patronales-syndicales au Québec (1982), also write, at pp. 85-86, under the title "Le gouvernement du Parti québécois et l'orientation idéologique des centrales syndicales":

> [TRANSLATION] The arrival of a new party on the provincial political scene -- the Parti québécois founded in 1968 -- would enable the popular discontent with traditional parties to be chanelled and would give a number of union activists the opportunity to become actively involved in political activity. As a result, the Parti québécois benefited from the support of a large number of volunteers experienced in working with groups such as social movements and unions.
>
> ...
>
> Over and above its role as a sovereignist party, which is its main raison d'être, the Parti québécois openly asserted its "bias in favour of workers" without being a true labour party, such as the Labour Party in England or even the NDP in Canada. In addition to being founded on traditional electoral reasons, this aspect of the PQ's political agenda corresponds to the party's sociological reality which, as we have already noted, relies largely on the social movements and the union activists from all the central labour bodies.
>
> The PQ's exercise of power since 1976 has enabled the scope of this "bias in favour of workers" to be confirmed and has resulted in the various labour organizations clarifying their real ideological orientation.
>
> [page242]

Interestingly, at p. 87, the authors commence to discuss the ideological orientation of key unions in Quebec, notably the FTQ, the CSN, the CEQ and the CSD. This is the backdrop upon which the statutory provisions in the Act and its Regulations fall. It is relevant to the consideration of the concept of ideological conformity. The social and economic impact of the union movement is a matter of general knowledge.

¶ 23 The legislation in question here is complex; it creates an entire labour relations scheme which governs, amongst other matters, union membership, employers associations, collective bargaining and the creation of the Commission de la construction du Québec and committees on construction and vocational training.

¶ 24 The mis en cause argues that the action against the appellants was directed solely at their failure to obtain competency certificates. According to the mis en cause, there is a distinction between this requirement and the requirement to become a member of one of the five recognized employee associations. I disagree with this assertion. The scheme of the Act provides that both requirements must be met as conditions precedent to working in the construction industry in Quebec; these conditions are certified together on one document,

referred to as the competency certificate, and the only way to receive such a certificate pursuant to s. 39 of the Act is if both conditions have been met. As stated by Trudel J., [1998] R.J.Q. 911, at p. 923:

> [TRANSLATION] Without an identity card establishing his or her membership in one of these five representative associations, an employee cannot work in Quebec in the construction sector. His or her competency, in other words, since it is acquired largely on the job, is directly related to his or her forced association with one of the five bargaining agents currently recognized by the Act for construction workers.

This is confirmed in ss. 36 and 36.1 of the Act and by s. 23 of the Regulation respecting the election of a representative association by the employees of the construction industry, (1997) 129 O.G. II, 1866. As admitted by the intervener Commission de la construction du Québec, at para. 60 of its factum, this [page243] was also the practice in Quebec prior to the coming into force of this Regulation.

¶ 25 The mis en cause also argues that designating a representative union is not the same as becoming a member of a union. Again, I disagree with this technical distinction. Although these unions are stated to be recognized for representative collective bargaining purposes, they remain "unions", as exemplified by ss. 1(a), 17(9) and 38 of the Act. Further, the Act clearly views those who elect a representative union as "members" of that union, as can be seen in numerous provisions, including s. 30, which makes them "electors" within the association, s. 34, which states that the Commission will forward a list of employees "who have become members of such association", and s. 39, which speaks of his membership in the representative union (see also ss. 31, 32, 41, 96(2), 99, 101, 104, and 119). The only contrary argument that can be found is in s. 102, which states that no association can discriminate against an employee for "abstain[ing] from belonging to any association"; however, both ss. 32 and 94 suggest that the employee must choose one of the five chosen representative unions. This was even acknowledged by counsel for the mis en cause at the oral hearing when he stated: [TRANSLATION] "we are not claiming that there is no associative act here resulting from the choice made by any employee, which is mandatory" (emphasis added). In his factum, he also noted, at paras. 26 and 38, that pursuant to s. 39, all new construction employees must choose a representative association and in the event of failure to do so, the worker cannot be employed. Finally, it is noteworthy that the role of the union is to represent the interests of its "members", as stated in the definition of "association" in s. 1(a). This was also mentioned in the mis en cause's factum where it is stated, at para. 53, that, pursuant to s. 94, the right to belong to a representative union means the right to become a member and participate in its activities.

¶ 26 In the December 16, 1968 debates of the Legislative Assembly surrounding Bill 290 (i.e. the first version [page244] of the present legislation in 1968), wherein the idea of representative association for collective bargaining was introduced, Jean-Paul Lefebvre stated (3rd sess., 28th Leg., vol. 7, No. 105, at p. 4987):

> [TRANSLATION] Will it permit the labour movement -- especially the two central labour bodies -- to represent the workers in accordance with their wishes but in a climate of improved co-operation, while at the same time allowing the normal competition between the different unions to continue? In fact -- and I think we should be happy about this -- we do not have a union monopoly in our province; rather we have a "duopoly" which, when you really think about it, promotes greater freedom for the workers, in my opinion. [Emphasis added.]

In discussing the consequences of having one dominant union and one minority union, it was also said in the debates (at p. 4998) that both will wish to get the confidence of the workers and that:

> [TRANSLATION] The result is that one of the unions will pride itself on providing better service to its members. [Emphasis added.]

At p. 520 of the mis en cause's record, the Cliche Commission report (Rapport de la Commission d'enquête sur l'exercice de la liberté syndicale dans l'industrie de la construction (1975), at p. 8) is quoted:

> [TRANSLATION] Individual Rights of Workers
>
> The Commission is convinced that: --
>
> ...
>
> 2 -- The construction worker must enjoy freedom of choice to belong to one of the two existing associations, that is, to the one that he believes embodies his aspirations as a free man. [Emphasis added.]

The record shows many more references to membership under the Act. For instance, in Historique des relations du travail dans l'industrie de la construction au Québec (1990) by the Commission de la construction du Québec, it was stated (at p. 6):

[page245]

> [TRANSLATION] The legislator ensures, among other things, the workers' freedom of choice regarding union membership and prohibits any discrimination in hiring on the basis of that membership. For that reason, Bill 290 contains the necessary provisions to bring about mandatory unionization and will thereby enable unions to increase their membership rapidly. [Emphasis added.]

At p. 11, it was stated:

> [TRANSLATION] Moreover, mandatory union membership is established since "every employee must, as a condition of the maintenance of his employment, become and remain a member in good standing of one or the other of the union associations" (s. 7.01). [Emphasis added.]

At p. 528 of the mis en cause's record, the Cliche Commission report (at p. 24) is again quoted:

> [TRANSLATION] After this legislation is passed, ... every employee must join the union association of his choice and remain a member thereof. [Emphasis added.]

¶ 27 As stated, I disagree that s. 30 and those that follow it in the Act imply a freedom to join a union or not; rather, membership in one of the unions is obligatory. Furthermore, membership has meaning. Membership is about sharing values, joining to pursue goals in common, expressing views reflecting the position of a particular group in society. It is worth quoting again Boivin and Guilbault, supra, briefly, at pp. 87-89. They write:

> [TRANSLATION] The new ideological orientation of the various union organizations in Quebec can no doubt best be understood through the type of relationships maintained by each central labour body with the government and through the type of criticisms directed to the government.
>
> ...
>
> (a) The FTQ

...

As a result, although this central labour body had partially espoused the ideological language of the CSN [page246] and the CEQ during a certain period of time, the election of the Parti québécois government would establish beyond any doubt that the FTQ was far from having radical goals on a sociopolitical level. The FTQ's current political discourse is found in the same perspective as the social democracy which the PQ leans toward, although there are no formal ties between the two organizations.

(b) The CSN and the CEQ

Although it may not be quite accurate to associate these two central labour bodies on an ideological level, they nonetheless have enough similarities to be the subject of a common analysis.

...

Moreover, although it is fairly easy to understand the type of economic regime that the CSN and the CEQ do not want (capitalism), it is however much more difficult to identify the type of society they do want. In both cases, mention is frequently made of a certain "democratic socialism", but since they still refuse to participate actively in creating a political party, the concrete expression of this socialism has not yet been defined. There is thus a large gap between words and action for these two central labour bodies, as the affiliated labour organizations continue to put into practice (and very effectively in the public sector, where most of their members are recruited) the principles of North American business unionism.

(c) The CSD

Because its existence is based on a systematic opposition to the CSN's ideological radicalism, it is easier to define what the CSD's ideology is not than what it is.

This refusal to blatantly condemn the capitalist system must not however lead us to regard the CSD affiliates as company unions. Although the CSD is not trying to destroy the capitalist system in which it exists, it nevertheless wants to change it profoundly by seeking the collective advancement of workers while remaining completely independent of political parties.

... It endeavours to establish a greater democracy in the workplace. The program put forward by the central labour organization thus deals with, among other things, "changes in business operations through the sociotechnical approach, enriching job duties through new forms of work organization, improving work stations through ergonomics, etc."

[page247]

It is because of the collective force produced by membership that unions can be a potent force in public debate, that they can influence Parliament and the legislatures in their functions, that they can bargain effectively. This force must be constituted democratically to conform to s. 2(d). LeBel J. states at para. 165 that the legislative system in Quebec reflects, on the surface, a "union shop" approach. However, for a "union shop" to exist, there must be a properly constituted union. This Court in Lavigne discussed the role of unions and stressed their democratic nature. In particular, in describing the general structure of labour relations, La Forest J. emphasized (at p. 325) that it involves "democratically run bodies" and "certification of a union when a majority of employees choose to be represented by that union" which contemplates "majoritarian decision-making". In the present case, I fail to see how the precondition to a "union shop" exists; in other words, I fail to see how the

legislative scheme in Quebec falls within the general structure of labour relations as discussed previously by this Court.

¶ 28 This case is one that shows how interrelated Charter rights and values can be. It is not necessary to have more independent evidence of the ideological views of the specific unions involved in this case. This is not novel since such was the case in Lavigne. I disagree with LeBel J.'s views at para. 227 of his reasons and would affirm that it is in fact sufficient that adherence is required to a scheme advocating state-imposed compulsory membership which affects freedom of conscience and expression, as well as liberty and mobility interests, for it to have a negative impact on the right to work, because such adherence itself is a form of ideological coercion. Ideological constraint exists in particular where membership numbers are used to promote ideological agendas and, as noted in Lavigne, at p. 322, this is so even where there is no evidence that the union is coercing its members to believe in what it promotes. After discussing the use of union dues [page248] for actual workplace expenditures, La Forest J. stated, at p. 330:

> When, however, the Union purports to express itself in respect to matters reflecting aspects of Lavigne's identity and membership in the community that go beyond his bargaining unit and its immediate concerns, his claim to the protection of the Charter cannot as easily be dismissed. In regard to these broader matters, his claim is not to absolute isolation but to be free to make his own choices, unfettered by the opinion of those he works with, as to what associations, if any, he will be associated with outside the workplace. [Emphasis added.]

He further stated, at p. 332:

> In my view, it is more consistent with the generous approach to be applied to the interpretation of rights under the Charter to hold that the freedom of association of an individual member of a bargaining unit will be violated when he or she is compelled to contribute to causes, ideological or otherwise, that are beyond the immediate concerns of the bargaining unit. [Emphasis added.]

¶ 29 In the present case, workers objected to being forced to join a union and objected generally to the compulsory unionization scheme, which is, in my view, ideological in nature.

¶ 30 The approach I advocate to the interpretation of the right is consistent in particular with the International Covenant on Economic, Social and Cultural Rights. It provides that:

> Article 6. 1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right. [Emphasis added.]

This provision was noted by this Court in Canadian Egg Marketing Agency, supra, where discussing the importance of s. 6 of the Charter, Iacobucci J. and I stated, at para. 60:

> The freedom guaranteed in s. 6 embodies a concern for the dignity of the individual. Sections 6(2)(b) and 6(3)(a) advance this purpose by guaranteeing a [page249] measure of autonomy in terms of personal mobility, and by forbidding the state from undermining this mobility and autonomy through discriminatory treatment based on place of residence, past or present. The freedom to pursue a livelihood is essential to self-fulfilment as well as survival. Section 6 is meant to give effect to the basic human right, closely related to equality, that individuals should be able to participate in the economy without being subject to legislation which discriminates primarily on the basis of attributes related to mobility in pursuit of their

livelihood. [Emphasis added.]

This sentiment builds upon the reasoning of Dickson C.J. (dissenting) in Alberta Reference, supra, where he stated, at p. 368:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self respect.

¶ 31 This is a case where the freedom not to associate is markedly infringed. I respectfully disagree with LeBel J. when he advocates deference to the choices of government on giving content to the notions of "self-actualization" (para. 210) and "democracy" (paras. 228 and 229). I disagree with his view that the present matter "lie[s] largely beyond the area of expertise of courts" (para. 239). In my opinion, though problems may have been acute in this area, not all options are open to government. This is a clear situation of government coercion, the result of which mandates that workers in the construction industry in Quebec group together in a few unions which are specified and approved by government. The fact that there are five unions from which workers can choose in no way negates this infringement for it remains government-mandated group affiliation. Self-realization of the worker is violated in many ways. He or she must unionize. Within the prescribed regime, democracy is further restricted by limited choice. There is no guarantee that a majority of voters will exercise their right. A default [page250] provision can determine the outcome of elections. Those voting for minority associations may be left out of future negotiations.

¶ 32 The vast majority of Canadians must work for a living and, as such, working is a compelled fact of life; however, in the present situation, the appellants are not arguing that being forced to work with a particular group or to participate in employment-related activities violates s. 2(d). This is not a case where workers dispute the payment of mandated union dues; the restrictions in this case are much more severe than that in Lavigne. The Rand formula mandates payment of union dues for the betterment of all workers; in this case, the workers are being forced to join a union. As argued by the appellants, being forced by the government to join one of five specified unions differs drastically from being forced to pay union dues. The appellants state (factum, at para. 24):

> The objection to union membership can be anchored in profound moral, religious or political convictions and it is implicit in Canadian law that such convictions are to be respected.

I agree with this assertion. Lavigne focussed on the actual activities of the union in question and the purpose for which union dues were used. This situation, on the other hand, even if it is not based on the actual views held by the five unions, comprises a form of ideological conformity.

¶ 33 As I have said, it is not necessary to make a conclusive determination of whether these liberty interests are separate indices of a s. 2(d) infringement or whether they are merely subcategories of ideological conformity since, in this case, ideological conformity, which was explicitly accepted by both La Forest and McLachlin JJ. [page251] in Lavigne, exists. Workers may feel strongly about joining a union for various reasons, but whether they are moral, religious or political, these beliefs and convictions must be pushed aside if one wishes to work in the construction industry in Quebec. They are the only workers affected in this way. When considering freedom not to associate in light of other Charter values, including freedom of conscience and expression, liberty, mobility and the right to work, I cannot help but find that governmental mandatory union association infringes this important Charter right.

¶ 34 As I have said, ideological conformity is engaged in particular because the members of the associations necessarily participate in and indirectly support a system of forced association and state control over work opportunity. This is a situation whereby the democratic rights of workers are taken away. Being forced to accept and participate in a system that severely limits the democratic principle in the area of labour relations is a form of coercion that cannot be segregated totally from ideological conformity. If Parliament provided that a person must belong to a specific political party to work in the public service of Canada, the situation would be analogous. Some would argue that one does not have to believe, simply that one has to belong; as stated at para. 16, I believe there would still be clear ideological conformity.

¶ 35 Since ideological conformity is part of the broader test to which I subscribe, I conclude that the challenged statutory provisions infringe the negative right which forms part of s. 2(d).

¶ 36 I do not believe that this conclusion is inconsistent with previous jurisprudence. For example, the Rand formula differs from the case at bar because it does not negate the democratic principle; in that case, a majority of workers choose accreditation and approve the collective agreement. Workers can [page252] still choose to work in a non-unionized environment. The ultimate forced association is then justified by the majority principle and the underlying need to have a system of protection of workers that is effective. There is also a distinction to be made with the requirements of professional associations such as medical associations and law societies, where the need for protection of the public may require a forced association which is justified under s. 1 of the Charter. In this case, the provisions are not based on the protection of the public by way of assuring the competency of workers. To receive certification, a worker must be a member of one of the five chosen unions; to become a member, he or she must have been a resident of Quebec in the previous year, have worked a set number of hours in that year and must be under 50 years of age. Without having met these requirements, a worker is unable to work in Quebec regardless of his or her actual competence or experience in his or her chosen trade. The conditions related to forced association have nothing to do with the protection of the public. As stated by Judge Bonin of the Court of Québec, [TRANSLATION] "[t]he certificate's main purpose was to maintain hiring priority". As such, a s. 1 justification is required. Before considering s. 1, however, I turn next to the examination of the positive right which is also part of s. 2(d).

Section 2(d) -- The Positive Right

¶ 37 As previously discussed, the appellants argue that s. 30, which establishes the conditions under which a competency card can be obtained, and the regional quota requirements limiting the right to be placed on the union lists are unconstitutional. As such, even if there was no infringement of the right not to associate, there would still be a need to consider whether there is a breach of the positive right to associate. This has not been dealt with by LeBel J., who takes another view of the purpose and effect of s. 30 of the Act.

¶ 38 I have mentioned that, pursuant to s. 30, construction workers can only be placed on the [page253] employer's list and join a union pursuant to s. 32 if they were a resident of Quebec in the previous year, worked 300 hours in that year and were under 50 years of age. The Commission de la construction du Québec forwards a card to the workers on this list (s. 36). No employer may use the services of a person in the construction industry unless that person holds one of these cards (s. 39). Therefore, if the s. 30 requirements are not met, a person may not join one of the five unions and, as a result, cannot work in Quebec. In addition, as acknowledged by the Commission de la construction du Québec, at para. 24 of their intervener's factum, at the material time, there were regional quotas in place which also limited the number of workers in each predetermined region within the province. For persons living in and outside the province of Quebec, their ability to join one of the unions and thereby work in the construction industry is severely restricted by these arbitrary requirements. For example, a person who had lived in Quebec all of his life but was not a resident in the previous year, because he was attending school or working elsewhere in the country, would be excluded. The same may be said for a person who has never left the province but simply did not work in the industry in the previous year or a person who wishes to train and start working in the industry for the first time. In the latter case, even if he held an apprentice competency certificate or an occupation competency

certificate, which has its own barriers as will be discussed, he cannot join the union until he has worked 300 hours or the equivalent thereof while in training. These barriers to association are even more pronounced for those persons who did not reside in the province of Quebec in the previous year.

¶ 39 Section 30 of the Act refers to three types of competency certificates: the journeyman competency certificate, the occupation competency certificate and the apprentice competency certificate. Sections 2 and 2.1 of the Regulation respecting the issuance of competency certificates, (1987) 119 O.G. II, 1471, govern the issuance of an apprentice [page254] competency certificate. Aside from other requirements, at the material time and at present, s. 2.1 provides that a maximum number of these certificates may be granted in any given year. This quota is only expanded in cases where there is an insufficient number of workers in a region; in those cases, certificates may be granted to those who meet the requirements, one of which is being a resident of the region in question (s. 3). As with the apprentice competency certificate, the occupation competency certificates are granted only within the parameters of a quota. One cannot receive an occupation competency certificate without having completed a course approved by the Commission; however, the Commission decides how many positions shall be available in these courses based on the number of workers required per region (ss. 4 and 4.1). As such, both the apprentice competency certificate and the occupation competency certificate can be refused based on regional quotas. For a person entering the industry, it therefore means that his or her ability to get a competency certificate, which is a condition precedent for union membership pursuant to s. 30 of the Act, could be denied merely because a government-designated quota has been reached.

¶ 40 The journeyman competency certificate differs slightly. Pursuant to s. 1 of the Regulation respecting the issuance of competency certificates, a journeyman competency certificate is issued to the holder of a qualification certificate or attestation of experience pursuant to the Regulation respecting the vocational training and qualification of manpower in the construction industry, R.R.Q. 1981, c. F-5, r. 3. This Regulation defines the qualification certificate as "a certificate issued by the Department attesting to the level of qualification acquired by the holder in a trade governed by the Act" and an attestation of experience as "a document issued by exception by the Department proving that the holder has plyed a trade in whole or in part". Section 7 of this Regulation states that a qualification certificate may be granted to anyone who has completed apprenticeship in conformity with this Regulation or anyone who can prove he or she has gained experience by working in the trade equal to the number of periods in Schedule B of the Regulation. Turning first to the completion of apprenticeship, [page255] which would apply to newcomers to these trades, s. 16 of the Regulation discusses the requirements for admission to apprenticeship and states that amongst other requirements, the person must hold a classification certificate under the Regulation respecting the placement of employees in the construction industry, R.R.Q. 1981, c. R-20, r. 10. This latter Regulation provides that a classification certificate is issued to anyone meeting the requirement of having worked in the industry for a certain number of hours in the preceding five calendar years (s. 6). As a result, this certificate may be granted if an experienced person has worked in the industry for a certain number of hours in the past five years; however, this must also be considered in light of s. 30 provisions which continue to mandate that, to join the union and become an employee, a person must have worked at least 300 hours in the industry in the preceding calendar year. For those from outside the province, the possibilities are even bleaker. Section 10 provides that a special classification certificate may be issued to an employee domiciled outside Quebec if he or she previously obtains a guarantee of employment from an employer registered with the Board. Since s. 10 requires that a person outside Quebec obtain employment prior to being granted a certificate of qualification, the requirements of s. 30 must have already been met and a competency card must have been issued to the worker in his or her case; otherwise, the employer would be in violation of s. 39 of the Act.

¶ 41 In fact, a person from outside Quebec cannot get a qualification certificate without employment and, as such, cannot get a journeyman competency certificate without employment; he or she cannot get employment without holding one of the three types of competency cards. Although there are no quota requirements applicable to the journeyman competency certificate, it is unlikely, if ever, that a person from outside Quebec will hold one of these cards and, as such, he or she will be required to hold an apprentice competency certificate, or occupation competency certificate, which will not occur if the [page256] regional quotas are

filled. Therefore, even if workers have met the requirements stated in s. 30, they may not receive a competency card, join the union or be permitted to work.

¶ 42 In summary, there are severe restrictions on the right of a person to join one of the five chosen unions in order to work in the construction industry in Quebec. Even if the conditions imposed by s. 30 of the Act were permissible limitations on freedom of association, the regional quotas would still need to be justified under s. 1. They unduly infringe the ability of workers to join a union, which is a prerequisite for working in the construction industry in Quebec. As such, they are an infringement of the s. 2(d) freedom of association.

Section 1: Is the Infringement of s. 2(d) Justifiable?

¶ 43 In determining whether this infringement can be justified by s. 1, this Court must again take into consideration Charter values including liberty, freedom of expression, the right to work and mobility rights. For the government to justify infringing a Charter right, it must prove on a balance of probabilities that the objective of the impugned legislation is pressing and substantial. It must then show that the infringement is proportionate. In other words, there must be a rational connection between the objective in question and the measures adopted. These measures must not be arbitrary, unfair or based on irrational considerations. The means should impair as little as possible the freedom in question. There must also be proportionality between the objective and the effect of the measures (Oakes, supra).

¶ 44 The mis en cause submits that it is in the public interest to have structured collective bargaining. In discussing the purpose of the legislation, the mis en cause submits that the objective of s. 30 of the Act is to establish the degree of representativeness of the [page257] associations in question for collective bargaining purposes (factum, at para. 72). It notes that these are an integral part of a labour relations regime put in place to ensure industrial peace. Consistent with the above argument, it is clear from the mis en cause's oral submissions that the only purpose of the imposed association is collective bargaining and that this is both a non-protected right and an activity that is in the interest of the workers. In my view, it is not so much the activity undertaken by the association that is relevant in determining whether or not the legislative objective is pressing and substantial; it is the purpose of the Act itself and of the requirement that workers join one of five specified unions in order to participate in the industry in question.

¶ 45 The mis en cause provides this Court with a historical perspective and argues that nothing short of this overall regime works in this industry in Quebec. LeBel J. agrees and acknowledges that s. 30 was merely adopted to determine which unions will enrol the members and will thereby be given representative status. His justification for these findings is based on documents and events that predate the Charter. Proving necessity requires a context based on present realities and circumstances. As such, it would be a rare case, in my view, where what was justified in the past when no Charter values were involved would be determinative. This is consistent with this Court's decision in Big M Drug Mart, supra, where it was stated that it is not sufficient to consider the objective of the legislation prior to the coming into force of the Charter. This Court must consider the objective of the legislation as it stands today. At a minimum, the mis en cause should have given evidence of the actual functioning of the system, the participation of workers in the limited democratic process provided, and the reasons that justify infringement of the democratic right and extreme restriction of the positive right of association.

¶ 46 The mis en cause does not discuss the s. 30 requirements which must be met in order to work in Quebec, or the regional quotas. I accept that it is in the public interest to have structured collective [page258] bargaining and to provide for competency requirements; these are no doubt pressing and substantial objectives. But I have difficulty accepting that these are the true objectives of the impugned provisions. The legislation brings into play restrictions on the admission to the industry, cancellation of the ability to have a non-unionized business, restrictions on bargaining rights, imposition of regional quotas and impingement of regional mobility. The mis en cause has not demonstrated that there is a logical relationship between its stated

objectives and these restrictions. Even if I did accept the stated objectives and found a link to exist, the mis en cause would fail to meet the requirements of the minimal impairment branch of the proportionality tests.

¶ 47 Regarding the relationship between forced association and the objective stated, the mis en cause submits that it is essential to collective bargaining in this area to limit the number of actors in this industry. This is an argument based on the history of labour relations in Quebec. However, as stated above, the mis en cause has failed to show that permitting structured collective bargaining is the true purpose of these provisions as drafted. Further, any justification based on competency is untenable. The actual requirements of s. 30 and the regional quotas have little if anything to do with the professional competence of workers in the construction industry. This was noted by Judge Bonin who stated that "[t]he certificate's main purpose was to maintain hiring priority". Being a resident of Quebec in the previous year, having worked a set number of hours in that year, and being less than 50 years old, do not verify competence. The same may be said for the regional quotas and control over regional mobility within the province. As such, I find there is no rational connection between the objective and the measures taken.

¶ 48 Minimal impairment is also an important consideration in this case. Despite any public interest objective that may be said to exist, this Court must [page259] still consider if the individual worker is minimally affected by the obligation to join one of five specific associations and the additional requirements which must be met in order to join these associations. Trudel J. stated that if there was an infringement of s. 2(d), any restriction is minimal; but she does not explain this finding beyond stating that every employee is free to choose which association he or she must join and affirming that the potential worker may also voice his or her dissent at all union meetings or votes without sanction (pp. 930-31). She does not discuss the fundamental importance of ideological conformity as described in these reasons. She did not discuss the specific provisions in s. 30, nor the Regulations. Her view seems to be that the "competency" requirements per se are not related to freedom of association. I disagree. In this case, they are related to freedom of association because one must meet these requirements to join the union (s. 32). In my view, any justification must deal with the terms of the regime and its effects. The mis en cause must show that the actual scheme is justified as a fair limitation on the Charter right affected.

¶ 49 If one views the purpose of the legislation as ensuring the competency of construction workers, neither the limitation of the "freedom to associate" nor the limitation of the "freedom from association" are minimally impairing. As discussed above, s. 30 and the regional quotas have little or nothing at all to do with competence and, as such, they certainly cannot be viewed as minimal impairments of s. 2(d).

¶ 50 Further, when considering the public interest nature of collective bargaining, I fail to see how s. 30 and the regional quotas minimally impair the positive and negative components of the freedom of association. While recognizing the importance of collective bargaining in the public interest, if this was in fact the objective of these provisions, there is no evidence that it need result in government control over admission to the work force based on the factors discussed above or result in a denial of the [page260] democratic principle. As was shown by the factual situation in Lavigne, there are other choices that a government can make which support collective bargaining. The imposition of a Rand formula, for instance, would allow for collective bargaining to continue without the requirement that workers actually join a union. Furthermore, with respect to a means to protect the negative right, had there been no problem with the positive right in this case, the government could possibly have instituted a clause allowing those who did not wish to join a union to simply abstain while continuing to pay union dues to the representative union in the majority or to a collective 'pot' to be divided equally among all five representative unions.

¶ 51 Given the above conclusions, it is unnecessary to consider the deleterious effects of the measures chosen.

¶ 52 I would allow the appeal with costs, strike down ss. 30 and 32 of the Act and s. 23 of the Regulation respecting the election of a representative association by the employees of the construction industry, and

suspend the declaration of invalidity for 18 months to permit the legislature to consider amendments to its legislation.

The following are the reasons delivered by

¶ 53 L'HEUREUX-DUBÉ J.:-- In this appeal, the appellants challenge the constitutionality of the legislation which governs labour relations in the construction industry in Quebec, the Act Respecting Labour Relations, Vocational Training and Manpower Management in the Construction Industry, R.S.Q., c. R-20 (the "Act"). My colleague LeBel J. reaches the conclusion that the Act is constitutional and hence would dismiss the appeal. I agree with this result but I reach it by a different route.

¶ 54 My colleague LeBel J. makes an extensive review of the troubled history of labour relations in the Quebec construction industry and of the legislative history of the Act to which I subscribe entirely. As I mentioned in Delisle v. Canada [page261] (Deputy Attorney General), [1999] 2 S.C.R. 989, at para. 6:

> The unique context of labour relations must always be considered in constitutional claims in this area, and the right to freedom of association must take into account the nature and importance of labour associations as institutions that work for the betterment of working conditions and the protection of the dignity and collective interests of workers in a fundamental aspect of their lives: employment. The contextual approach to Charter analysis must also take into account the history of the need for government intervention to make effective the rights of workers to associate together. [Emphasis in original.]

¶ 55 The appellants allege that the Act violates s. 2(d) of the Canadian Charter of Rights and Freedoms since the Act forces employees in the construction industry to belong to a union and, in so doing, infringes the "right not to associate" which, in their view, is protected by s. 2(d). In a detailed discussion of Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211, and of the diverse views expressed therein by the seven members of that Court concerning the "right not to associate", my colleague LeBel J. finds that the majority of the Court concluded that s. 2(d) protects the "right not to associate". He adopts a narrow scope for that right, which he deciphers from those various opinions. On this view, the Act would not violate s. 2(d), had the Act been found to coerce Quebec construction industry workers to belong to a representative association, a finding LeBel J. does not make in any event.

¶ 56 LeBel J. argues at para. 189 that in the opinion of a majority of the Court in Lavigne, "a right not to associate existed as a necessary component of the guarantee of freedom of association under s. 2(d) of the Charter". I respectfully disagree. My own analysis of the plural and divergent opinions in Lavigne drives me to a different conclusion, particularly since the point was discussed in answer to an argument advanced by the appellant Lavigne, was only peripheral to the issue in that case and did not dictate the result. The Court split evenly (3-3) for and against the alleged "right not to associate" and [page262] McLachlin J. (now Chief Justice) did not pronounce on this issue, which, as she said, "is not necessary for my purposes to resolve" (p. 343). She went on to discuss that point "[a]ssuming that a right not to associate exists" (p. 346 (emphasis added)). The most that can be said is that a slim majority expressed a preference for a "right not to associate" protected under s. 2(d), assuming that such a right exists, of a very narrow scope described in the words of McLachlin J. as "freedom from coerced ideological conformity" (p. 344). My colleague LeBel J. adopts this narrow scope of the right in the present case.

¶ 57 In these circumstances, I find that Lavigne is neither authoritative nor persuasive on the issue of the protection under s. 2(d) of a "right not to associate" and I feel free to adhere to the views of Wilson J. in Lavigne on this point, reasons with which Cory J. and I concurred. Subsequent decisions of our Court on the scope of s. 2(d) did not revisit the issue of the alleged protected "right not to associate" under s. 2(d): see for example Canadian Egg Marketing Agency v. Richardson, [1998] 3 S.C.R. 157; Delisle, supra.

¶ 58 Wilson J. made an extensive analysis of the alleged protected "right not to associate" in Lavigne. As I did then, I now adopt her reasons, which show that s. 2(d) does not incorporate the "two sides of a bilateral freedom", to use the expression of La Forest J. in Lavigne (p. 319). However prima facie intellectually seductive and "a matter of simple logic" this negative counterpart of s. 2(d)'s right to associate may be, such reasoning was rejected in R. v. Turpin, [1989] 1 S.C.R. 1296: see Lavigne, at pp. 258-59, per Wilson J. The negative right is nowhere articulated in the Charter, as my colleague LeBel J. points out at para. 193 of his reasons. It is antithetical to the purpose and scope of the protected right of association. It does not sit well with the structure of the Charter. It would trivialize the Charter since the [page263] recognition of such a right would have serious consequences, which would oblige the courts to adopt severe limitations to differentiate between genuine and constitutionally insignificant violations of s. 2(d): see Merry v. Manitoba and Manitoba Medical Association (1989), 58 Man. R. (2d) 221 (Q.B.). This is the case in the United States: see N. L. Cantor, "Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association" (1983-1984), 36 Rutgers L. Rev. 3, and there are already proposals in Canada of ways to mitigate these inevitable floodgate problems: see B. Etherington, "Freedom of Association and Compulsory Union Dues: Towards a Purposive Conception of a Freedom to not Associate" (1987), 19 Ottawa L. Rev. 1. My colleague LeBel J.'s discussion in the present case is a good illustration of the difficulties of trying to circumscribe such an alleged right (in particular at paras. 215-32) which Iacobucci J. underlines (para. 284).

¶ 59 Although I agree that no one should be forced to associate, contrary to my colleague LeBel J. I am of the view that s. 2(d) of the Charter does not offer such constitutional protection for the reasons I articulated. Rather, and particularly on the narrowly circumscribed definition of that right and numerous built-in exceptions which my colleague LeBel J. adopts, the constitutional guarantee of freedom of expression under s. 2(b) will come into play if and when one is forced to associate as well as possibly s. 7 of the Charter. There is no need to create a "right not to associate" as a component of s. 2(d) of the Charter with all the consequences which might ensue and a protected right which, in my view, is not contemplated by s. 2(d).

¶ 60 The real concern expressed by McLachlin J. in Lavigne regarding "freedom from coerced ideological conformity" can be addressed without creating a protected "right not to associate", as Wilson J. [page264] pointed out in Lavigne: "To hold that s. 2(d) does not include the right not to associate does not leave those who do not wish to associate without redress for these harms. Sections 2(b) and 7 of the Charter, in particular, would seem to me to be available in appropriate cases" (p. 263).

¶ 61 I am also mindful of Dickson J.'s words in R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at p. 344, referred to by Wilson J. in Lavigne, at p. 259, that extending the protected right to freedom of association to include a freedom not to associate would be "to overshoot the actual purpose of the right or freedom in question". As mentioned by Wilson J., at p. 259:

> Mr. Goudge argued that to include a negative freedom of association within the compass of s. 2(d) would set the scene for contests between the positive associational rights of union members and the negative associational rights of non-members. To construe the section in this way would place the Court in the impossible position of having to choose whose s. 2(d) rights should prevail. I agree with counsel for the respondent that an interpretation leading to such a result should be avoided if at all possible.

The Fundamental Purpose of Freedom of Association

¶ 62 In Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313 (the "Alberta Reference"), McIntyre J., for the majority, stated at p. 408, that the "fundamental purpose of freedom of association ... [is] to permit the collective pursuit of common goals". In Lavigne, supra, Wilson J., at p. 252, reviewed the analysis on freedom of association in the Alberta Reference and concluded that:

> [I]n construing the purpose behind s. 2(d) this Court was unanimous in finding that freedom of association is meant to protect the collective pursuit of common goals. This reading of the purpose behind the guarantee of freedom of association has been confirmed in more recent cases. For instance, s. 2(d) was considered again in the labour relations context in Professional Institute of [page265] the Public Service of Canada v. Northwest Territories (Commissioner), [1990] 2 S.C.R. 367 ("P.I.P.S."). [Emphasis added.]

¶ 63 In Lavigne, La Forest J., at p. 317, introduced the term "individual aspirations" when he noted that "[i]t is important to recognize that while it is true, as Wilson J. states in her reasons, at p. 251, that 'freedom of association is meant to protect the collective pursuit of common goals', such protection is afforded ultimately to further individual aspirations".

¶ 64 I interpret the meaning of "individual aspirations" as being a set which includes a subset under the rubric of "common goals" as well as a subset comprising "individual goals". In the context of freedom of association, I view La Forest J.'s "individual aspirations" as referring primarily to the subset of common goals. The pursuit of individual aspirations comprises both the pursuit of individual goals and the pursuit of common goals. The freedom to associate protects the giving effect to the latter. While it could be the case that in a given case only common goals are involved, the inclusion of individual goals within the term "individual aspirations" does not negate the argument.

¶ 65 I believe that it would not correspond with this Court's jurisprudence to characterize the purpose of s. 2(d) as meaning solely the protection of the common pursuit of individual goals, i.e. with no common goals in the equation.

¶ 66 There is an additional reason why the "common pursuit of individual goals" is not appropriate in the context of freedom of association analysis. In society, there is an element of synergy when individuals interact. The mere addition of individual goals will not suffice. Society is more then the sum of its parts. Put another way, a row of taxis do not a bus make. An arithmetic approach to Charter rights fails to encompass the aspirations imbedded in it.

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¶ 67 In this context, negative rights are viewed as individual rights embodying individual goals: an individual is given the constitutional right not to belong to an association. But, if the "fundamental purpose of freedom of association, ... [is] to permit the collective pursuit of common goals", then the very concept of a "negative freedom of association" becomes suspect. At issue is the definition of "common goals". In such a context, the "collective pursuit of common goals" leads to an abstraction which is difficult to justify.

¶ 68 The references to American jurisprudence, also relied on by the appellant in Lavigne, as well as to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, quoted by my colleagues, are subject to the following caveat expressed by Wilson J. in Lavigne, at pp. 256-58:

> [T]his Court must exercise caution in adopting any decision, however compelling, of a foreign jurisdiction. This Court has consistently stated that even although it may undoubtedly benefit from the experience of American and other courts in adjudicating constitutional issues, it is by no means bound by that experience or the jurisprudence it generated. The uniqueness of the Canadian Charter of Rights and Freedoms flows not only from the distinctive structure of the Charter as compared to the American Bill of Rights but also from the special features of the Canadian cultural, historical, social and political tradition...
>
> These observations are particularly apposite in this appeal since, as regards freedom of association, our Charter stands in marked contrast to the American Bill of Rights. A freedom

> to associate is not explicitly recognized in the Constitution of the United States. Protection of this freedom has been made possible only through its judicial recognition as a derivative of the First Amendment guarantee of freedom of speech... .
>
> Under the Charter, in contrast, there is no necessary connection between association and speech in order to engage s. 2(d). This distinction was noted by Dickson C.J. in the Alberta Reference.

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¶ 69 On this point, as stated by Professor P. W. Hogg in Constitutional Law of Canada (loose-leaf ed.), vol. 2, at p. 56-18.2:

> A case that is properly before a court may be capable of decision on a non-constitutional ground or a constitutional ground or both. The course of judicial restraint is to decide the case on the non-constitutional ground. That way, the dispute between the litigants is resolved, but the impact of a constitutional decision on the powers of the legislative or executive branches of government is avoided.

¶ 70 The course of judicial restraint suggests that no new constitutional doctrine should be developed if existing doctrine could resolve the issue. In this regard, I would make a comment on the case of Sigurjonsson v. Iceland, Eur. Court H.R., judgment of 30 June 1993, Series A No. 264, cited by LeBel J. in his reasons at para. 250, where he stated that in Sigurjonsson, the European Court of Human Rights ("ECHR") "clearly accepted that a right not to associate should be read into the guarantee of art. 11(1)". At p. 17, the majority of the ECHR stated:

> ... Sigurjonsson objected to being a member of the association in question partly because he disagreed with its policy in favour of limiting the number of taxicabs and, thus, access to the occupation; in his opinion the interests of his country were better served by extensive personal freedoms, including freedom of occupation, than State regulation. Therefore, the Court is of the view that Article 11 can, in the circumstances, be considered in the light of Articles 9 and 10, the protection of personal opinion being also one of the purposes of the freedom of association guaranteed by Article 11 (see the above-mentioned Young, James and Webster judgment, pp. 23-24, para. 57). The pressure exerted on the applicant in order to compel him to remain a member of Frami contrary to his wishes was a further aspect going to the very essence of an Article 11 right; there was an interference too in this respect. [Emphasis added.]

¶ 71 It is apparent that the ECHR reached its conclusion by considering Mr. Sigurjonsson's individual goals in the context of art. 11 of the European [page268] Convention. The ECHR also held unanimously that it was "not necessary also to examine the case under Articles 9 or 10" (p. 20).

¶ 72 Similarly, in another case cited by LeBel J. at para. 250, Chassagnou and Others v. France [GD], Nos. 25088/94, 28331/95 and 28443/95, ECHR 1999-III, the ECHR applied a hybrid analysis, a methodology which would not be required in Canada. In that case, all the applicants were owners of small landholdings. By law, the applicants, who are opposed to hunting, had to become members of the approved municipal or intermunicipality hunters' associations set up in their municipalities and to transfer hunting rights over their land to these associations so that all hunters living in the relevant municipality could hunt there. The ECHR stated (at para. 117):

> To compel a person by law to join an association such that it is fundamentally contrary to his own convictions to be a member of it, and to oblige him, on account of his membership of that association, to transfer his rights over the land he owns so that the association in question

> can attain objectives of which he disapproves, goes beyond what is necessary to ensure that a fair balance is struck between conflicting interests and cannot be considered proportionate to the aim pursued.
>
> There has therefore been a violation of Article 11.

¶ 73 My opposition to the enshrinement of the negative right of association in s. 2(d) is not based on a desire to curtail the rights of those who feel aggrieved by the exclusion of the negative right of association. My argument has to do with my belief that we have the constitutional tools to deal with such a grievance.

¶ 74 As discussed above, the analysis followed in Sigurjonsson would be contrary to our jurisprudence for two reasons. First, it grounded its analysis primarily on individual goals, giving far lesser weight to communal goals. Secondly, a solution could have been found under arts. 9 or 10, but the ECHR decided otherwise.

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¶ 75 This judicial parsimony should be ascribed to prudence, not miserliness. Constitutional remedies are powerful tools which ought to be used with prudence. When required, however, they should be applied with vigour and in a purposive manner.

¶ 76 An additional reason for caution is based on the fact that the impetus for efforts to establish the negative right to association has historically originated with those opposed to the establishment or maintenance of labour associations. Such a tainted pedigree raises the question of whether we should constitutionalize an initiative whose purpose was to defeat the right to associate. This concern is reflected in the dissenting opinion of Judge Thor Vilhjálmsson in the Sigurjonsson case, where he comments (at p. 21):

> The present case shows, in my opinion, that the classic freedom of association, which is expressly guaranteed in Article 11 of the Convention, is essentially different from the negative freedom of association. The freedom guaranteed by the Convention was originally one of the foundations of political freedom and activity. Since then, under the protection of this freedom, the trade unions, and their activities aimed at improving the lot of their members, have developed. The Icelandic case before the Court now shows that in certain circumstances it is not clear whether the negative freedom of association is likely to further the interests of those concerned in a way comparable to the clear benefits of the classic freedom. [Emphasis added.]

¶ 77 The creation and application of new judicial tools, featuring a questionable mark of origin, will inevitably generate new jurisprudence to which there are certain risks attached. Such a development may not be viewed as prudent, especially in light of the fact that there is no need to take such a risk because proven alternatives are available.

¶ 78 In any event the European Convention cannot dictate the way the Canadian Charter does protect fundamental rights and as my colleague LeBel J. asserts (at para. 251) "the consideration of European jurisprudence is not determinative". I do not however agree with his assertion that "it confirms an interpretation whereby a limited right to refuse to associate should be read into s. 2(d) of the Charter". In my view such a reading of s. 2(d) of the Charter [page270] is in no way implied in the European jurisprudence, since it is as compatible with my position that, if such a right exists, it is protected by s. 2(b) of the Charter.

¶ 79 Here, there is no negation of the right not to associate but only the way in which the Canadian Charter protects it. For these reasons, more extensively discussed in the reasons of Wilson J. in Lavigne, to which I refer as if herein recited at length, I conclude "that s. 2(d) includes only the positive freedom to associate" in the words of Wilson J. (p. 263). This being said, there is no reason for me to embark on a s. 1 analysis.

¶ 80 In conclusion, I agree with LeBel J. that the constitutional question should be answered in the negative and that the appeal should be dismissed.

¶ 81 I would like, however, to add the following comment about the reality faced by Quebec workers in the construction industry, which underlies the constitutional challenge under s. 2(d) of the Charter in this case.

¶ 82 Under s. 39 of the Act, as it was drafted at the time the appellants were charged with infractions under the Act, no employer could employ a worker in the Quebec construction industry unless such worker had previously obtained from the Commission de la construction du Quebec a card indicating his or her choice of a representative association among the five unions accredited to represent construction workers. Under s. 36, that card was to be issued only to the workers on a list of all employees who had fulfilled the requirements set out in s. 30 of the Act, namely:

> (a) holding a journeyman competency certificate, an occupation competency certificate or an apprentice competency certificate issued by the Commission;
>
> (b) having worked at least three hundred hours during the first twelve of the fifteen complete calendar months preceding the month during which the poll provided for in section 32 is held; and

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> (c) domiciled in Quebec on the last day of the thirteenth month preceding the original expiry date of the decree made by order under section 47.

¶ 83 Only after having fulfilled all these requirements would a construction worker be allowed to choose a representative association, after being placed on the list. However, fulfilling the requirement of 300 working hours would not be possible since an employee was prohibited from working those 300 hours because s. 39 of the Act prohibits an employer from hiring a worker who does not have a card. This is the conundrum which the construction workers in Quebec were facing at the time.

¶ 84 However, the Act appears to have been subsequently modified, in part by the addition of a new s. 36.1 (S.Q. 1996, c. 74, s. 36): "The Commission may, at any time, issue a card under section 36 to a person who wishes to begin working as an employee in the construction industry and who makes known to the Commission, according to the procedure established by regulation of the Commission, his election respecting one of the associations whose name has been published pursuant to section 29" (emphasis added).

¶ 85 This question of statutory interpretation of the Act not being before us, I leave it at that.

¶ 86 I would dismiss the appeal.

The judgment of Gonthier, Arbour and LeBel JJ. was delivered by

LeBEL J.:--

I. Introduction

¶ 87 Labour relations in the Quebec construction industry have gone through a long, complex and difficult history. The present appeal is a new episode of this history. Advance Cutting & Coring Ltd., a construction contractor active in the Ottawa Valley, and the other appellants, who are contractors, real estate promoters or construction workers, [page272] want to write a new chapter, in order, in their view, to protect the freedom of association of workers in the construction industry. In the process, they want to be acquitted of charges that

they hired employees who did not have the required competency certificates to work on a construction project, contrary to the provisions of the Act Respecting Labour Relations, Vocational Training and Manpower Management in the Construction Industry, R.S.Q., c. R-20 (the "Construction Act") or that they worked in the industry without the proper competency certificates. Needless to say, the respondent and the mis en cause and some of the interveners disagree strongly about the contents and direction of this new chapter. They ask that the appeal be dismissed. They even dispute the standing of the appellants to raise the constitutional arguments advanced in this case. For the reasons set out below, even though I accept that the appellants have the standing to raise the constitutional issue, I propose that the appeal be dismissed. In the process of reaching this conclusion, the opportunity has arisen to re-examine this Court's decision in Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211. As a result, I intend to propose a refined view of the right not to associate protected under s. 2(d) of the Canadian Charter of Rights and Freedoms, and to lay out the limits of that right, in relation to the correlative positive freedom to associate also protected by s. 2(d) of the Charter.

II. The Issues and Their Background

¶ 88 A word of caution is required at the outset of these reasons.

¶ 89 This appeal has nothing to do with mobility rights protected under s. 6 of the Charter and the impact they might have on the validity of the legislative provisions challenged by the appellants. The constitutional questions defined by then Chief Justice Lamer were limited to the issue of freedom of association under s. 2(d) of the Charter. The arguments in the courts below were almost exclusively concerned with the guarantee of freedom of association. Moreover, during the hearing, members of the Court put very specific questions to counsel for [page273] the appellants about whether s. 6 of the Charter was engaged. Counsel answered that the only constitutional question at issue here was freedom of association.

¶ 90 Any consideration of the question of mobility rights would also be unfair to the respondent and the mis en cause and the interveners supporting them, because the legal and factual issues have been framed in the courts below and in this Court in relation to the guarantee of freedom of association, its interpretation and the application of the relevant provisions of the Construction Act. No further discussion of s. 6 would thus be justified in this appeal, other than to address issues raised in the accompanying reasons, written by Bastarache J.

¶ 91 The issue of an alleged breach of the guarantee of freedom of association by the provisions of the Construction Act relating to union membership was raised by Advance Cutting & Coring Ltd. and the other appellants in the construction industry as an answer to charges laid under s. 119.1 of the Construction Act. Advance Cutting and the other appellants face various charges of having hired and used workers who did not have the competency certificates required under the Construction Act, contrary to s. 119.1. Some appellants who are construction workers stand charged with having performed construction work within the meaning of the Act without holding the required competency certificates, also under s. 119.1.

¶ 92 The appellants did not dispute the facts. They conceded that they had used unqualified personnel on construction work, which was subject to the Act, or in the case of the workers themselves, that they had not obtained the necessary work permits and vocational certifications, before going to work.

¶ 93 They asserted that workers could not obtain competency certificates without becoming members of one of the union groups listed in s. 28 of the Construction Act. They claimed that this obligation was unconstitutional, because it breaches the right not to associate which, in their opinion, is a component of [page274] the s. 2(d) guarantee of freedom of association in the Charter.

¶ 94 The appellants argued that construction workers should not have to obtain the competency certificates, because their issuance was tied in with compulsory union membership. At trial, on that basis only, they asked that all the charges laid against them be dismissed.

¶ 95 The intervener Commission de la construction du Québec, a public body in charge of the application and enforcement of the Act, and the Attorney General of Quebec, the mis en cause in these proceedings, disputed even the standing of Advance Cutting & Coring Ltd. and of the other appellants to raise the constitutional questions. They submitted that the appellants/accused had been charged with breaches of the rules governing the competency of workers -- charges which are distinct from the Act's provisions about union membership. Their position was that, even if the constitutional questions were to be decided in favour of the appellants/accused, they would still be guilty as charged. Thus, the defence would be totally irrelevant.

¶ 96 The argument put forward by the mis en cause about the lack of standing of the appellants should be dismissed. As appears from the legislation challenged in this appeal, the conditions governing the issuance of competency certificates and union membership are closely linked. A successful challenge to the provisions governing the compulsory choice of a collective bargaining agent might give rise to some defence to the specific charges laid in the present case. Moreover, at the present stage of the proceedings, the interest of justice favours a careful consideration of the substantive issues brought before this Court.

¶ 97 In the alternative, the Commission and the Attorney General argued that there had been no breach of the guarantee of freedom of association. If there had been such a violation, they submitted that it was justified under s. 1 of [page275] the Charter. The matter went to trial on that basis.

III. Relevant Legislation

¶ 98 Canadian Charter of Rights and Freedoms

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 2. Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> (c) freedom of peaceful assembly; and
> (d) freedom of association.

Act Respecting Labour Relations, Vocational Training and Manpower Management in the Construction Industry, R.S.Q., c. R-20

> 1. In this Act, unless the context requires a different meaning, the following words and expressions mean:
>
> (a) "association": a professional union representing construction employees or any unincorporated group of construction employees, a federation or confederation of such unions or groups, a trades council, a provincial trades council or a federation of such councils, having for its object the study, defence and development of the economic, social and educational interests of its members and which has jurisdiction throughout Québec in respect of all construction trades and employments;
>
> (b) "representative association": an association to which the Commission has issued the certificate provided for in section 34;
>
> 28. Only the Centrale des syndicats démocratiques (CSD), the Confédération des

syndicats nationaux (CSN-CONSTRUCTION), the Conseil provincial du Québec des métiers de la construction (INTERNATIONAL), the Fédération des travailleurs du Québec (FTQ-CONSTRUCTION) and the Syndicat de la construction Côte Nord de Sept-Îles Inc. may have their [page276] representativeness ascertained by presenting their application for such purpose to the Commission in the first five days of the twelfth month preceding the original expiry date of the decree made by order under section 47.

30. The Commission must prepare a list of all the employees:

(a) holding a journeyman competency certificate, an occupation competency certificate or an apprentice competency certificate issued by the Commission;

(b) having worked at least three hundred hours during the first twelve of the fifteen complete calendar months preceding the month during which the poll provided for in section 32 is held; and

(c) domiciled in Québec on the last day of the thirteenth month preceding the original expiry date of the decree made by order under section 47.

Subparagraph b of the first paragraph does not apply to employees who, on the last day of the twelfth month preceding the original expiry date of the decree made by order under section 47, are fifty years old or over.

Such list establishes incontestably the names of the only employees who may avail themselves of section 32.

During the twelfth month preceding the original expiry date of the decree made by order under section 47, the Commission shall send to each employee whose name appears on the list established in accordance with this section a card identifying him as an elector for the purposes of section 32 and bearing his name and social insurance number.

Such list is sent to the associations contemplated in section 29 not later than fifteen days before the holding of the poll provided for in section 32.

32. During the eleventh month preceding the original expiry date of the decree made by order under section 47, every employee whose name appears on the list prepared in accordance with section 30 must, in accordance with this section, inform the Commission of his election respecting one of the associations indicated on the list contemplated in section 29.

Such election shall be made by secret ballot held under the supervision of a representative of the Commission, on the dates and in the manner provided for by regulation of the Commission. However, the ballot must be held for a period of not less than five consecutive days.

An employee who is entitled to make known his election, but has not expressed it in accordance with the first [page277] paragraph, is deemed, for the application of sections 33, 35 and 38, to have elected for the association in favour of which he made his election known at the preceding ballot or of which he has become a member in accordance with section 39 since that ballot, provided that the name of that association is published in accordance with section 29.

Any dispute relating to the vote or resulting from the poll shall be settled by the representative of the Commission. His decision is final.

The third paragraph does not apply to the first ballot held after 4 December 1980 under the first paragraph.

33. The Commission shall prepare a list indicating the election made by the employees in

accordance with section 32.

34. The Commission ascertains the degree of representativeness of an association in accordance with the criteria set out in section 35.

It issues to each association whose name has been published in accordance with section 29, a certificate establishing its degree of representativeness and the list of the employees who have become members of such association in accordance with section 32.

The certificate has effect from the first day of the eighth month preceding the original expiry date of the decree made by order under section 47.

35. The representativeness of an association of employees corresponds to the percentage that the number of employees who have elected in accordance with section 32 in favour of that association, is of all the employees who have voted in this matter.

36. The Commission shall send to each employee whose name appears on the list contemplated in section 33 a card indicating, in particular:

(a) his name; (b) his social insurance number; (c) the name of the representative association he has elected for in accordance with section 32.

This card has effect from the first day of the eighth month preceding the original expiry date of the decree made by order under section 47.

38. The fact that an employee has made an election in accordance with section 32 authorizes an employer to deduct in advance from the salary of such employee the union assessment and requires the employer to remit such assessment of the Commission with his monthly report.

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The Commission shall remit the assessments so received to the representative associations accompanied with a nominal roll.

39. No employer may employ an employee unless such employee has previously obtained from the Commission the card contemplated in section 36, after such employee has informed the Commission, in accordance with the procedure established by it, of his membership in a representative association and the Commission has accordingly notified the association concerned.

85.5 To perform personally any construction work, every employer or employee must be the holder of a journeyman competency certificate, an occupation competency certificate or an apprentice competency certificate and apprenticeship booklet or be the grantee of an exemption issued by the Commission and have such certificate or a proof of exemption in his possession.

85.6 To perform personally any work relating to a trade, every employer or employee must be the holder of a journeyman competency certificate or an apprentice competency certificate and apprenticeship booklet or be the grantee of an exemption issued by the Commission in respect of that trade and have such certificate or a proof of exemption in his possession.

94. Every employee has the right to belong to an association of employees of his choice, and to participate in the activities and management thereof, but he shall not belong to more than one association of employees.

119.1 The following persons shall be guilty of an offence and liable to a fine of $400 in the case of an individual and $1 600 in the case of any other person:

(1) every person who personally performs construction work without being the holder of a journeyman competency certificate, an occupation competency certificate or an apprentice competency certificate or the grantee of an exemption issued by the Commission or without having such certificate or a proof of exemption in his possession;

(2) every person who personally performs construction work pertaining to a trade without being the holder of a journeyman competency certificate or an apprentice competency certificate in respect of that trade or the grantee of an exemption issued by the Commission or without having such certificate or a proof of exemption in his possession;

(3) every person who hires the services of or assigns to construction work an employee who is not the holder [page279] of a journeyman competency certificate, an occupation competency certificate or an apprentice competency certificate or the grantee of an exemption issued by the Commission or who does not have such certificate or a proof of exemption in his possession;

(4) every person who hires the services of or assigns to do work pertaining to a trade an employee who is not the holder of a journeyman competency certificate or an apprentice competency certificate in respect of that trade or the grantee of an exemption issued by the Commission or who does not have such certificate or a proof of exemption in his possession;

...

Regulation respecting the registration certificate issued by the Office de la construction du Québec, R.R.Q. 1981, c. R-20, r. 3 (repealed in 1997)

1. Any construction employee shall obtain or have obtained from the Office de la construction du Québec the card mentioned in section 36 of the Act respecting labour relations in the construction industry (R.S.Q., c. R-20) in order to be able to work in this industry.

IV. Judicial History

A. Court of Québec

¶ 99 The charges were laid under the Quebec Code of Penal Procedure, R.S.Q., c. C-25.1. They were heard by Judge Bonin of the Court of Québec, Criminal and Penal Division, in Hull, Quebec. Prior to the hearing, the appellants gave notice to the Attorney General that they intended to challenge the constitutionality of several provisions of the Construction Act.

¶ 100 In a short judgment, Judge Bonin dismissed the constitutional argument and found the accused guilty as charged. In his view, s. 2(d) of the Charter guaranteed neither any specific regime of collective labour relations nor the choice of a particular bargaining agent. The trial judge cited in support of his conclusion the judgment of our Court in Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner), [1990] 2 S.C.R. 367. In the case before him, he held that the accused had not even established [page280] a breach of s. 2(d) of the Charter and concluded:

[TRANSLATION] Quebec has therefore established a regime for bargaining conditions of employment in the construction industry between defined parties. Following the case cited supra, it is my view that this regime complies with the Charter of Rights and Freedoms and therefore does not violate section 2(d) of the Charter.

B. Quebec Superior Court, [1998] R.J.Q. 911

¶ 101 The appellants filed an appeal to the Superior Court. Trudel J. found no breach of the guarantee of freedom of association, but nevertheless decided to consider the issue of justification under s. 1 of the Charter. She wrote detailed reasons where she reviewed the history of the labour relations system in the construction industry of the province of Quebec. She also discussed the interpretation of the impugned provisions of the Act and the application of s. 2(d) of the Charter to this labour relations regime.

¶ 102 While Trudel J. found that the issuance of a competency card was tied in with union membership, she held that compulsory membership did not violate the guarantee of freedom of association. The law left the employees free to choose between five different union groups, which maintained a substantial level of freedom of association. Moreover, Trudel J. found that this obligation was restricted to the limited purpose of choosing a representative association to negotiate and conclude collective bargaining agreements.

¶ 103 Trudel J. addressed the problem of the existence of a right not to associate, although she found that she did not have to decide that question. She expressed the view that the judgment of this Court in Lavigne had not precluded the constitutionality of all forms of forced association and that there is no absolute right not to associate with others. She reasoned that some forms of compulsory union membership designed to maintain an efficient and stable system of collective bargaining would not, per se, amount to an infringement of s. 2(d).

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¶ 104 Then, Trudel J. discussed the application of s. 1 in the event that there had been a breach of the guarantee of freedom of association. She said that she would have found that the law would have been justified under the Oakes test (see R. v. Oakes, [1986] 1 S.C.R. 103). The law addressed pressing and urgent problems linked to the particular nature and problems of the construction industry in Quebec. The means used by the lawmaker appeared reasonable and proportionate to the objective. In her view, courts should apply these criteria with some flexibility and deference to legislative choices in matters where important social and economic questions are at stake. The union membership provision had been designed to determine the representativeness of union groups, for the purpose of province-wide collective bargaining. Moreover, the choice of these five associations listed in s. 28 of the Construction Act was not arbitrary. Those groups were all present and active in the construction industry. Finally, the provisions challenged minimally impaired s. 2(d) and their benefits outweighed any prejudice they might cause. For these reasons, the Superior Court dismissed the appeal and confirmed the judgment of the trial court.

C. Quebec Court of Appeal, [1998] Q.J. No. 4173 (QL)

¶ 105 The appellants sought leave to appeal to the Quebec Court of Appeal on the constitutional questions raised in the Court of Québec and the Superior Court. In a short endorsement, Brossard J.A. dismissed the motion because, in his view, the constitutional question was not really relevant to the disposition of the case. The appellants had been charged with breach of the provisions of the Act relating to the vocational certification of construction workers. They could not be acquitted, even if their constitutional questions were to be decided in their favour. The appellants were then granted leave to appeal to this Court: [1999] 1 S.C.R. v.

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V. Questions at Issue

¶ 106 The Chief Justice defined the constitutional questions as follows:

1. Do ss. 28-40, 85.5, 85.6, 119.1 and 120 of an Act Respecting Labour Relations,

Vocational Training and Manpower Management in the Construction Industry and s. 23 of the Regulation respecting the election of a representative association by the employees of the construction industry restrict the guarantees of freedom of association under s. 2(d) of the Canadian Charter of Rights and Freedoms?

2. If so, is the restriction justified under s. 1 of the Charter?

¶ 107 Within this framework, I must examine two main problems and some related questions. First, I will discuss whether the legislative regime set up by the Construction Act is a breach of freedom of association under s. 2(d). For this purpose, I will have to determine whether a right not to associate must be read into the guarantee of freedom of association and, in the affirmative, what would be the nature and limits of such a right. Second, if I conclude that a right not to associate is implied in s. 2(d) and the union membership provision of the Construction Act infringes it, I will turn to the problem of justification under s. 1.

VI. Positions of the Parties

A. The Appellants' Position

¶ 108 The appellants have advanced a three-pronged argument. First, they argue that the Construction Act imposes an obligation to belong to a union, in order to work in the construction industry. Second, such an obligation infringes the guarantee of freedom of association which includes a right not to associate. And third, the limitation to s. 2(d) cannot be justified under s. 1 of the Charter. The forced association has no rational connection to the stated purpose of the law. It also fails the proportionality test and does not represent a minimal impairment of the constitutional guarantee. In [page283] conclusion, the appellants say the relevant sections of the law should be struck down and they ask for an acquittal.

B. Submission of the Intervener Canadian Coalition of Open Shop Contracting Associations

¶ 109 The Coalition intervened in support of the appellants. In its view, the Quebec legislative scheme amounts to compulsory unionism. It creates a monopoly in favour of the five listed associations, while at the same time excluding other groups inside and outside Quebec. The Coalition argues that such a system breaches the guarantee of freedom of association which includes a right not to associate. The Coalition alleges that it deprives workers of a basic ideological and political choice, when it compels them to become union members. In this respect, it violates their freedom of conscience and expression. The Coalition also suggests that the labour relations system of Quebec might also infringe the mobility rights protected by s. 6 of the Charter.

¶ 110 This intervener also discusses the application of s. 1. It asserts that there is no justification for the challenged regime. The Coalition suggests that Quebec would be better off if it brought its collective bargaining system more in line with those generally applied in the construction industry in other Canadian provinces. It argues there is neither a compelling objective for the impugned law nor a rational link between it and any of its objectives. The harm done by the system far outweighs its advantages. Indeed, this intervener seems of the opinion that few union security clauses could survive any Charter review.

C. The Respondent's Position -- The Attorney General of Quebec

¶ 111 The Attorney General submits that the constitutional question is irrelevant to the charges faced by the appellants even if the Court declares the provisions of the Construction Act to be unconstitutional. Should the provisions dealing with union [page284] membership be struck down, the convictions would still stand. The Attorney General suggests that this Court should simply dismiss the appeal for lack of standing, and refuse to consider the constitutional issues. On the main constitutional issues, the Attorney General argues that the general obligation to obtain certificates of vocational competency does not infringe the guarantee of freedom of association. Such a regulatory measure remains distinct from provisions concerning union membership.

¶ 112 Moreover, the provisions of the Construction Act creating the obligation to choose a representative association, for purposes of collective bargaining, do not violate the guarantee of freedom of association. These rules belong to a sectoral collective bargaining regime which falls outside the scope of the application of s. 2(d), according to the jurisprudence of the Court. The Attorney General also asserts that freedom of association does not include a right not to associate, adding that, even if such a right exists, its scope should not exceed the ambit of the basic right of association, which does not protect the purposes of the association.

¶ 113 According to the Attorney General, the Construction Act incorporates legal rules that answer the need to set up an efficient and stable collective bargaining system in the construction industry. The National Assembly of Quebec attempted to reach a delicate balance between competing interests, in an inherently unstable industry. Its legislative choice must be assessed with deference by the Court, which must leave the legislature some freedom of choice and action in the determination of the most appropriate solutions. As a consequence, while refusing to concede that the law breaches s. 2(d), the Attorney General argues that such a breach would be justified under s. 1 of the Charter. The objective remains of pressing importance. The means chosen respect the test of proportionality. Furthermore, the Act entails only a minimal impairment of fundamental rights and the benefits of the law clearly outbalance any alleged prejudicial effect. In conclusion, the Attorney General asked for the dismissal of the appeal.

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D. Union Interveners

¶ 114 The Commission de la construction du Québec insists on the independence of the provisions of the law and regulations concerning the control of competency and of those relating to the choice of representative union groups. The former provisions do not engage the guarantee of freedom of association. A successful constitutional challenge to the provisions attacked by the appellants would leave the vocational qualification control system intact. As a result, the appeal should be dismissed.

¶ 115 Briefs were filed by some Quebec union groups active in the construction industry. They assert that the provisions of the Construction Act do not breach the guarantee of the freedom of association. Even if there had been such a breach, it would be justified as a reasonable limitation under s. 1. They are also of the view that s. 2(d) does not guarantee a freedom not to associate.

¶ 116 In the opinion of the Canadian Office of the Building and Construction Trades Department, a section of the American Federation of Labour (AFL-CIO), the Quebec regime, while distinct in some respects from that of other provinces, does not breach the guarantee of freedom of association. It does not forbid the formation of other unions. It could be challenged successfully only if it were demonstrated that there exists a constitutional right to non-association. Such a right not to associate would be inherently inconsistent with the practical exercise of the right to association and could deprive it of any real content and effect. If such a right were to be recognized, it should be strictly limited and defined as a right not to be compelled to adhere to some form of ideological conformity. Finally, if there had been a breach of s. 2(d), it would be justified under s. 1. In an analysis under s. 1 in this context, the Court should be sensitive to the difficult choice faced by the lawmakers and adopt an attitude of deference to the options chosen by the legislature. Moreover, the requirement of a minimum impairment should not [page286] mean that legislative solutions must be uniform throughout Canada.

VII. Analysis

A. Historical Background

¶ 117 The problems and, sometimes, the violence of labour relations in the Quebec construction industry have bedevilled successive provincial administrations, since the mid 1960s. These persistent difficulties are closely tied to the specific character of the development and structure of the labour movement in Quebec. This

history has also been influenced by the particular techniques used by the legislature to regulate labour relations, to establish and administer labour standards and to control the vocational competency of the work force. No analysis of the Construction Act, as it stood when the present litigation began in 1992-1993, would be adequate without some examination of this historical background.

¶ 118 For a time, these techniques of labour relations management seemed to work well. As will be seen below, a pattern of conflict between competing unions amidst economic change in the industry led to a re-assessment of the structure and to a new determination in the 1960s and 1970s to restore peace and stability in the industry.

¶ 119 The first attempt at setting up standards of employment in the construction industry in Quebec dates back to 1934, when the provincial legislature adopted a law on the "extension of collective labour agreements" (Collective Labour Agreements Extension Act, S.Q. 1934, c. 56). The Act enabled the provincial government to give legal effect throughout a particular commercial, industrial or service activity to provisions of labour agreements entered into by representative labour and employer groups. The Department of Labour assessed the representativeness of those groups. Upon its recommendation, the government would then adopt an order in council or "décret" giving legal effect to provisions of the labour agreements concerning [page287] mainly wages and some benefits. Those standards would bind not only the parties to the labour agreements, but also all employers and employees covered by the professional and territorial jurisdiction of the decree. The decree would apply throughout the province, in a region or even in a particular area, in a defined industry or activity. (See J.-L. Dubé, Décrets et comités paritaires: L'extension juridique des conventions collectives (1990), at pp. 5 et seq.). In this manner, this law attempted to stop a race to the bottom of labour conditions during the economic pressures of the Great Depression. The law passed after much supportive lobbying by labour groups especially the Catholic unions (CTCC) (Confédération des travailleurs catholiques du Canada) later to become the CSN (Confédération des syndicats nationaux) and with the support of some employer groups and in spite of the bitter opposition of others (see Dubé, supra, at pp. 12-15).

¶ 120 In the construction industry, the provincial government adopted a number of regional decrees to extend and enforce basic labour standards on wages, hours of work, and a few other benefits. However, no provisions concerning union security, like membership or collection of dues, could be included in those decrees. This system of regional construction decrees was renewed and kept in place until the 1960s.

¶ 121 In 1944, the Quebec legislature adopted the Labour Relations Act, R.S.Q. 1941, c. 162A. This law provided for union certification and monopoly union representation within a defined bargaining unit, under the supervision of a labour relations board. With some modifications, it introduced a system of management of labour relations similar to the North American model arising out of the New Deal in the United States. After a number of amendments, it became the Quebec Labour Code in 1964 (S.Q. 1963-64, c. 45 (now R.S.Q., c. C-27)).

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¶ 122 In Quebec, this system of local or defined bargaining units represented by an agent holding exclusive collective bargaining rights did not make any significant inroads into the construction industry. Even if construction workers fell within the scope of the Labour Relations Act and unions could have sought certification or voluntary recognition under the Act, labour relations in the construction industry remained regulated until the 1960s mainly through a number of regional decrees, which concerned the wages, benefits and classification of construction workers.

¶ 123 However, even in the early 1960s, the labour relations of the industry reflected the deep divisions existing within the Quebec labour movement. The most important and distinctive aspect of the Quebec labour relations scene had been the rise of a strong "homegrown" labour movement, strongly influenced at the time by

the Catholic church. Those Catholic unions found themselves competing with other union groups that were already affiliated with international or Canada-wide organizations and which later came under the umbrella of the Quebec Federation of Labour (QFL) and the Canadian Labour Congress.

¶ 124 In the construction industry, international unions were particularly strong in mechanical crafts like electricity or plumbing, but also controlled important trades like iron work and elevator installation. Generally speaking, international unions controlled the construction industry in Montreal, where the Catholic unions remained weak for a long time. On the other hand, the "homegrown" unions were far more active and influential outside the Metropolitan Montreal area. In this manner, the construction industry mirrored the conflicts and divisions within the Quebec labour movement as a whole, according to the evidence given at trial by Réal Mireault, an expert on Quebec labour relations, and for a time the Deputy Minister of Labour of the province.

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¶ 125 Despite those divisions and latent conflicts, until the 1960s, the system of regional decrees and collective bargaining had nevertheless maintained basic labour standards in the construction industry and a degree of industrial peace (see Commission de la construction du Québec, Historique des relations du travail dans l'industrie de la construction au Québec (1990), at p. 3). Indeed, there seem to have been fewer strikes or work stoppages in Quebec than in other provinces during that period. That peaceful, if somewhat hostile, co-existence between the separate strands of the Quebec labour movement broke down after 1965. Changes in the laws governing labour relations and in the economic life of the industry probably account for this breakdown. After the adoption of the Quebec Labour Code, which at the time applied to the construction industry, attempts at union certification for particular projects or employers took place. Such a pattern of local union organization and collective bargaining would have run at cross purposes with the regional system of decrees and informal collective bargaining that had generally prevailed until then. Those attempts at certification on a local basis generally came to nought in the construction industry. The Labour Relations Board managed neither to deal, in a timely manner, with the applications for certification nor to design a proper regulatory framework for such applications. Meanwhile, especially after the 1967 Montreal World's Fair, construction work became scarcer in Montreal. Large industrial and natural resources projects were on the other hand being launched in several regions of the province of Quebec. International unions tried to move into the regions and to take control of these major projects.

¶ 126 More particularly, the international unions in the mechanical trades tried to secure a complete monopoly on all work in large-scale industrial projects throughout the province. On the other hand, the CSN -- Confédération des syndicats nationaux -- the former confederation of Catholic unions -- made new efforts to increase its presence in Montreal and, without much success, to break into the specialized construction trades. Some [page290] union groups sought to gain exclusive bargaining rights for a particular project. Others tried to keep the regional system alive. In 1968, it had become evident that the traditional labour relations system in the industry was no longer working. The system of regional decrees was breaking down, while local certification under the Labour Code had proven practically unworkable.

¶ 127 Conflicts arose within union and employer groups. For example, at least half a dozen provincial, regional or trade groups competed for support among contractors. Violence frequently flared up at construction sites. Work stoppages broke out often and uncontrollably. Abuses like bribery or improper use of union placement systems were rife. Some new framework had to be designed and put in place. The attempts to fix or replace the old collective bargaining regime gave birth to the 1968 Act (Construction Industry Labour Relations Act, S.Q. 1968, c. 45), which set up a specialized labour relations system, limited to the construction industry, where the Labour Code (R.S.Q. 1964, c. 141 (now R.S.Q., c. C-27)) and the Collective Agreement Decrees Act (R.S.Q. 1964, c. 143 (now R.S.Q., c. D-2)) no longer applied (ss. 3 and 59 of the 1968 Act (now R.S.Q., c. R-20, ss. 27 and 124)). (See F. Morin and J.-Y. Brière, Le droit de l'emploi au Québec (1998), at pp. 586-

87.) This reform of the old system, which itself had been unique to Quebec, created a new labour scheme also uniquely tailored to the Quebec construction industry.

¶ 128 The new regime created a negotiation system that included all construction trades and retained regional bargaining, but allowed for province-wide bargaining if the parties agreed (Historique des relations du travail dans l'industrie de la construction au Québec, supra, at pp. 5-6). The law recognized the CSN and the QFL as bargaining agents for their [page291] constituent unions and locals and granted the same status to six different employer groups in respect of their own members. A right of veto was granted to every representative union federation as well as to all employer groups. The collective agreement entered into between unions and employer associations would be extended by a decree, which would legally bind all employers and employees within a region or the province. The enforcement of labour standards was entrusted to joint committees made up of employer and union representatives. For the first time, the Act allowed the introduction into the collective agreement and decrees of provisions relating to union membership and dues.

¶ 129 The law was passed amid high hopes, but disappointment followed. Turmoil did not subside in the construction industry. The new collective bargaining system broke down almost immediately. The same conflicts, strikes and violence continued in spite of several years of large- and small-scale modifications of the law which brought no immediate relief (see Historique des relations du travail dans l'industrie de la construction au Québec, supra, at pp. 9-15; R. Mireault, "Témoignage sur l'évolution du régime des relations du travail dans le secteur de la construction", in R. Blouin, ed., Vingt-cinq ans de pratique en relations industrielles au Québec (1990), 599, at pp. 612-13). After a bitter strike in the Montreal area, the provincial government had to revert to setting employment standards through a regulation adopted under the Minimum Wage Act. (See Mireault, supra, at p. 613.)

¶ 130 During this period, the government abolished the original construction decrees and replaced them by a new provincial decree applicable to all construction trades and to all areas in the province. The administration of the construction decree was handed over to a public body, the Commission de l'industrie de la construction, in 1971. To stop union violence and abuses in the placement or hiring hall schemes managed by unions and to prevent illegal strikes, harsher penalties were added to the law, [page292] without too much success at the time. In spite of those changes, violence still broke out sporadically, as collective bargaining merely led to new conflicts. Specialized trade groups tried to gain or maintain their control of large projects and the QFL attempted to secure a de facto control of the construction industry (see Mireault, supra, at p. 616). Inter-union rivalry continued to plague the industry.

¶ 131 In 1974, after the wrecking of the James Bay project by a number of union officers and members of construction locals affiliated with the QFL, the Quebec government set up a commission of inquiry chaired by the Associate Chief Judge of the Provincial Court, Robert Cliche. This was the "Commission d'enquête sur l'exercice de la liberté syndicale dans l'industrie de la construction" better known as the "Cliche Commission".

¶ 132 The report of the Cliche Commission advocated the imposition of a public trusteeship on a number of union locals for several years. It also recommended a number of changes in the collective bargaining system, as well as extensive reforms in the laws and regulations governing contractors' professional qualification and workers' vocational certification.

¶ 133 The legislative framework that came out of the Cliche report has governed labour relations in the construction industry ever since. Some changes were made later, but are not relevant to the case at bar. The main features of the system remained essentially the same until 1992 when the present litigation started, despite frequent legislative amendments. Indeed, Professors Morin and Brière assert that the National Assembly adopted more than forty laws relating to labour relations in the construction industry within the last thirty years (supra, Annexe 5, at p. 1343).

B. The Labour Relations System After the Cliche Commission

¶ 134 The post Cliche Commission regime remains based on the 1968 Construction Industry Labour Relations Act. It maintains a special system of labour relations restricted to the construction industry, which excludes it from the scope of application of the Labour Code and the Collective Agreement Decrees Act. It provides for provincial collective bargaining between union groups recognized as representative by the law itself and a unified employer association. This Association des entrepreneurs en construction du Québec replaced the several associations that, in the past, had attempted to negotiate for employers. All employees select a union group as their representative. The nature of that choice and of its effects lies at the heart of the present litigation.

¶ 135 Negotiations and agreement between the representative unions and the employer associations led to the adoption of a provincial decree applicable to the whole industry, which is legally binding on all employees and employers within the province. The enforcement of the decree has been entrusted to a public body, the "Office de la construction du Québec", which is now the "Commission de la construction du Québec". A few years later, union employment offices (bureaux de placement) fell under the control of the Commission de la construction and unions are now forbidden to operate them. The regime allows for preferential hiring of construction workers within each region of the province. This regime, which undergoes periodic revisions, aims to achieve a degree of employment stability and to grant a form of seniority rights to those workers who were deemed to be "true construction workers". The legislature has also enacted a general system of professional qualification for all contractors in the construction industry. (See C. Beaudry and C. Roy, "Aperçu du contexte législatif", in Ogilvy Renault, La construction au Québec: perspectives juridiques (1998), 1, at pp. 11-17.)

¶ 136 The intricate laws governing labour relations in the Quebec construction industry and the certification of workers and employers have created a highly regulated environment. The industry is far removed from a system of individual bargaining between employers and employees. Its regime of labour relations is also sharply distinct from the collective bargaining system based on local bargaining units, which is common in the rest of Canada, under the provincial and federal labour laws. The Quebec system has two strikingly different features: (1) the centralized character of the collective bargaining system and (2) the separation of the negotiation of the working conditions from their implementation. While the union groups and employer associations negotiate the collective agreements, and consequently, the standards to be incorporated into the construction decree, the enforcement of these labour standards is not achieved through a grievance procedure controlled by the unions. Instead, enforcement is mainly the responsibility of the Commission de la construction, which is a public body created under the Construction Act. The Commission oversees the implementation of the decree and enforces it, if need be, through civil and penal remedies.

¶ 137 Under the Construction Act, the main functions of the representative union groups and employer associations are restricted to the negotiation of labour conditions. The importance of the union selection rules in the law is thus closely tied to a negotiation process, which depends in turn on the assessment of the representativeness of unions. The impact of a union on the collective bargaining process varies with its degree of representativeness. If it goes over 50 percent, it may control the negotiation and signature of the agreement, and hence, the content of the decree. Smaller groups, which do not manage to form into a larger bargaining unit, may become mere spectators in the process.

C. Interpretation of Provisions Governing Union Allegiance

¶ 138 As indicated above, at the time of the proceedings leading to the present appeal, the law [page295] recognized five union groups as representative parties. Section 28 of the Construction Act provided that they were the only union groups entitled to an assessment of their representativeness.

¶ 139 The Commission draws up a list of construction workers qualified to take part in a mandatory vote under s. 32 of the Act, during which each worker must opt for one of the union groups, as his or her bargaining representative. In order to take part in that vote, a construction worker must hold a journeyman competency certificate, an occupation competency certificate or an apprentice competency certificate. Construction workers must have also worked 300 hours in the industry in the 15 months before the election is held. The list is verified and established by the Commission which, in this manner, determines who is entitled to vote in the union poll.

¶ 140 During the eleventh month before the end of the decree, every eligible construction worker must inform the Commission of his or her "election" respecting one of the representative associations. The ballot is secret. If a worker fails to express a choice, he or she is presumed to have again chosen the association which he or she already belongs to. On the basis of that vote, the Commission determines the representativeness of every association under s. 35. This degree of representativeness determines the extent of the influence of each association in the negotiation process. Only a union or a group of associations with a representativeness of 50 percent or greater of all certified construction workers may negotiate collective agreements. When a union's representativeness falls below 50 percent of the certified construction work force, the union may not negotiate a collective agreement, but may only watch and accept the terms negotiated by the more representative union. If a union's degree of representativeness does not reach at least 15 percent, it is even deprived of the right to attend collective bargaining sessions (s. 42.1).

¶ 141 The respondent and mis en cause argued that in spite of its wording, the Act does not impose an [page296] obligation to join a union. In their view, its provisions are not a form of legislated union shop. They assert the law only imposes an obligation to choose a bargaining agent and to pay for its services under a formula which would amount to a kind of Rand or union agency formula. This interpretation strains the wording of the Act. As it is drafted, the law creates an obligation to join one of five union groups. The election among these groups means that construction workers are deemed to become members of the group they voted for. It should be noted that the Act remains silent about the nature of the legal relationship between craft or local unions that belong to recognized associations and their umbrella organizations. The Act does not state how workers become members of a particular local trade or regional union nor how union dues are apportioned among the affiliates of the five groups. Nevertheless, the law regulates some of the aspects of the internal management of local unions. As was discussed above, unions are forbidden from creating or managing employment referral schemes or hiring halls. The Act also incorporates strong provisions against discrimination to which I will turn in another part of these reasons.

D. The Effect of Section 30 of the Act

¶ 142 Given the discussion of the interpretation of s. 30 in this appeal, some comments seem to be appropriate about the legislative history of this provision, its relationship with union membership and the control of competency. On its face, s. 30 prevents construction workers from joining unions before they are domiciled in Quebec, or have worked 300 hours in the preceding year. It also forbids unions from accepting them as members unless they meet these conditions. At the same time, according to s. 39, no one can work without a card that certifies a person has prior experience in the industry, which in turn requires that the person would have first joined a union. Thus a literal reading of these sections creates a perfect conundrum, dooming the industry to extinction. This, of course, is not the reality. Statistics show that workers continue to enter and leave the [page297] industry. For example, in 1992, when this litigation began, 20,677 workers left the industry and 10,900 entered it. In a better economic year, as in 1987, the proportion of new workers joining the industry reached 27.6 percent. (See, for example, Commission de la construction du Québec, Service recherche et organisation, Analyse de l'industrie de la construction au Québec 1992 (1993), at p. 35.)

¶ 143 Moreover, a literal interpretation of s. 30 would also mean that, at law, workers could join the industry only within the very limited reference period for the assessment of union representativeness, under ss. 30 and 32. Given that decrees usually remain in force for periods of three years, the industry and the unions could accept new workers and members only once every three years. The industry would be legally closed outside this reference period.

¶ 144 It is established law that if a statute is ambiguous or if several interpretations remain possible, it should be given a construction that upholds its validity and which gives it a reasonable meaning and effect. (See R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, per McLachlin C.J.) The provision should be read in conformity with the intention of the legislature: Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at paras. 21-22, per Iacobucci J.

¶ 145 Properly interpreted, in the context of the other provisions of the Act, s. 30 means that a voters list will be drawn up at regular and specific times in order to assess the representativeness of the construction industry unions. It is neither a bar to union membership, nor a breach of the positive right of association. Before, during and after these times, new workers may join the industry and unions must accept them as members, under s. 94 of the Act.

[page298]

> 94. Every employee has the right to belong to an association of employees of his choice, and to participate in the activities and management thereof, but he shall not belong to more than one association of employees.

¶ 146 The period of assessing the unions' representativeness leads to a weeding out of inactive workers. These inactive workers remain eligible to rejoin the industry, if their services are needed, if they have the required degree of competency and if they join a union or have maintained their union membership.

¶ 147 In order to understand the purpose and effect of s. 30, I will return to some aspects of the history of the legislation. When the legislature recognized several construction associations and union groups as employer or employee representatives, it then granted a veto to every party on the negotiation or conclusion of collective agreements. The exercise of this right of the veto led to impasses.

¶ 148 In the end, after the report of the Cliche Commission, the National Assembly compelled the contractors to join one association, then known as the Association des entrepreneurs en construction du Québec. On the union side, several formulas were tried, modified and discarded in order to assess the representativeness of negotiating parties. All these methods shared some common ingredient. (For a review of these formulas, see Rapport du Comité d'étude et de révision de la Loi sur les relations du travail dans l'industrie de la construction (1978), vol. 1, at pp. 5-10.)

¶ 149 The assessment of the representativeness was closely linked to the negotiation process. A reference period was created during which the representativeness could be verified and certified. First, there were attempts to establish it from the membership lists of unions. Unfortunately, at times, a puzzling discrepancy was observed between claimed and actual membership. The tabulation of these would show, at times, more members than workers, and it was found that a number of people maintained dual membership. Other factors were considered, like the amount of union dues collected by each group or the number of hours worked by their [page299] members in the industry. None of these methods proved adequate. The idea, nevertheless, remained that some objective process should allow an independent body to ascertain the representativeness of union groups.

¶ 150 The formula that is now found in s. 30 of the Act finds its source probably in the proposals of the Comité d'étude et de révision de la Loi sur les relations du travail dans l'industrie de la construction ("C.E.R.L.I.C."), a committee set up in 1978, by the Quebec government, to review once more some aspects of the Construction Act and of its application. After considering a number of alternatives, this committee advocated the formula of union election at specified times in order to assess representativeness of the recognized union groups. In its opinion, the law should determine who is entitled to vote and when. The vote must be conducted by an independent body, distinct from unions. The public body known as the "Commission de la construction" would then oversee the vote and certify the representativeness of each union group. (See C.E.R.L.I.C. report, at p. 33.)

¶ 151 Only workers already holding one of the classification certificates then issued and having worked at least 300 hours during the 12 months preceding the vote would be entitled to vote (see report, at p. 34). In its report, the C.E.R.L.I.C. tried to identify who were the real stakeholders in the industry and wanted to restrict the vote to them. From the drafting of s. 30, it is clear that this approach was accepted by the National Assembly.

¶ 152 Section 30 set up a procedure and criteria in order to draw up a list of qualified voters. Such a list did not include every person who happened to have worked an hour or so on a construction job. The law sought to identify those people who had worked long enough to be considered as true construction workers and asked them to take part in a kind of election procedure. An employee who failed to vote [page300] would be deemed to have cast his vote in favour of the union to which he already belonged, and for which he had already voted at the last opportunity, in accordance with s. 39. After the ballot, new lists and new cards certifying, at the same time, the classification or competence and union membership were issued. Although union membership and certification of competence remained a distinct requirement, this solution was recommended again by the C.E.R.L.I.C. in 1978 to reduce the paperwork required in the administration of the Act. Once issued, the card remains valid until the eighth month preceding the expiry date of a decree. In the meantime, s. 32 allows for the issuance of new cards and new union sign-ups. Section 39 requires that a card in the form of s. 30 be issued. Section 32 refers expressly to workers who have chosen a union since the last ballot and thus acknowledges that the affiliation to a union is a continuing process. The worker may then join a union and start working, once his competency is verified. The process provided for in s. 30 is not a bar to participation in the industry. Indeed, the regulation then in force, which was never challenged, clearly allowed the Commission de la construction to issue new cards, on an ongoing basis, during the term of the decree, as it did. (See Regulation respecting the registration certificate issued by the Office de la construction du Québec, s. 3.)

¶ 153 The lists determine who votes. They do not operate as a bar to employment in the industry nor to membership in the unions.

¶ 154 All drafting problems which allegedly existed were addressed and cured by later amendments which added the provision which is now s. 36.1. It provides explicitly for the issuance of cards at any time. Before that, such were the regulations and the practice under them, and the law, when given a proper interpretation. The amendments made the law clearer, but do not mean that cards were issued illegally year after year to the workers who entered the industry, under the legal rules then in force. [page301] There was an obligation to join a union, but no bar to joining them.

¶ 155 There is, clearly, an obligation to join a union group, as well as an obligation on the part of unions to accept workers wishing to affiliate with them. Does this infringe the guarantee of freedom of association under s. 2(d) of the Charter? This question raises the core issue of this appeal. Its consideration will require a survey of the application of the Charter in the field of labour relations, more particularly in the jurisprudence of this Court. Such an analysis will facilitate a proper understanding of the nature and extent of the guarantee of freedom of association.

E. The Charter and Labour Relations

¶ 156 Looking back over nearly 20 years of the application of the Charter, it is clear that this Court has been reluctant to accept that the whole field of labour relations should fall under the constitutional guarantee of s. 2(d). The law of collective bargaining, as it has developed in Canada since the Depression beginning in 1929 and the Second World War, as well as union and employer conflicts like strikes and lockouts, have been left largely to legislative control based on government policy. Laws restricting the choice of a bargaining agent or forbidding strikes and lockouts were deemed not to engage the guarantee of freedom of association as such. The social and economic balance between employers and their collective unionized employees was viewed as a question of policy making and management of sharply conflicting interests. Thus, it was thought more appropriate to leave the resolution of such conflicts and the policy choices they required to the political process.

¶ 157 Bastarache J.'s reasons in Delisle v. Canada (Deputy Attorney General), [1999] 2 S.C.R. 989, at para. 37, accurately summarize this consistent orientation of this Court, since it started to grapple with the problems arising out of the relationship between the guarantee of freedom of association [page302] and the legislative management of labour relations in Canada:

> Since this Court's decision in Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner), supra, it is clear that under the trade union certification system, the government may limit access to mechanisms that facilitate labour relations to one employee organization in particular, and impose certain technical rules on that organization. It goes without saying that it must, however, be a genuine employee association that management does not control. Otherwise, there would be a violation of s. 2(d). This said, I repeat that there is no general obligation for the government to provide a particular legislative framework for its employees to exercise their collective rights. However, they may freely set up an independent employee association which is protected against employer interference in its business by s. 2(d) of the Charter and which may carry on any lawful activity that its members may carry on individually, including representing their interests.

¶ 158 The rationale for that approach may be found in the reasons written by McIntyre J. in one of the first cases which attempted to define the content and meaning of the right of freedom of association after the Charter came into force. In his view, the courts should stay out of the field of labour relations, as they would not be the best arbiter of the conflicting interests at play in this arena of social and economic life. (See Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313, at pp. 412-13.) McIntyre J. did not view freedom of association as incorporating such rights as the right to strike. In that case, the Court reviewed the constitutional validity of an Alberta statute that forbade strikes by certain employees in the public service and imposed a form of compulsory arbitration. Writing for the majority, McIntyre J. held that the Charter would not grant constitutional protection to the right to strike. This holding was bolstered by what McIntyre J. described as considerations of sound management of social policy issues. Constant court interventions might freeze or disrupt a fluid and evolving social environment. It might even impede further legislative development, especially at an early stage of the development of the Charter. (See McIntyre J., at p. 415.) Extending [page303] Charter protection to the collective bargaining process, more particularly in the case of strikes, would make judges arbiters of complex problems about which they had no particular knowledge (at pp. 419-20):

> A further problem will arise from constitutionalizing the right to strike. In every case where a strike occurs and relief is sought in the courts, the question of the application of s. 1 of the Charter may be raised to determine whether some attempt to control the right may be permitted. This has occurred in the case at bar. The section 1 inquiry involves the reconsideration by a court of the balance struck by the Legislature in the development of labour policy. The Court is called upon to determine, as a matter of constitutional law, which government services are essential and whether the alternative of arbitration is adequate compensation for the loss of a right to strike. In the PSAC case, the Court must decide

> whether mere postponement of collective bargaining is a reasonable limit, given the Government's substantial interest in reducing inflation and the growth in government expenses. In the Dairy Workers case, the Court is asked to decide whether the harm caused to dairy farmers through a closure of the dairies is of sufficient importance to justify prohibiting strike action and lockouts. None of these issues is amenable to principled resolution. There are no clearly correct answers to these questions. They are of a nature peculiarly apposite to the functions of the Legislature. However, if the right to strike is found in the Charter, it will be the courts which time and time again will have to resolve these questions, relying only on the evidence and arguments presented by the parties, despite the social implications of each decision. This is a legislative function into which the courts should not intrude. It has been said that the courts, because of the Charter, will have to enter the legislative sphere. Where rights are specifically guaranteed in the Charter, this may on occasion be true. But where no specific right is found in the Charter and the only support for its constitutional guarantee is an implication, the courts should refrain from intrusion into the field of legislation. That is the function of the freely-elected Legislatures and Parliament.

¶ 159 In the end, in 1987, in three different labour law cases, a majority of the Supreme Court refused to read in constitutional protection for aspects of union [page304] activity under s. 2(d) of the Charter. Thus, in Reference re Public Service Employee Relations Act (Alta.), supra, the Court upheld legislation removing the right to strike in the Alberta public service. In PSAC v. Canada, [1987] 1 S.C.R. 424, the Court held that a law which extended the terms and conditions of collective agreements and precluded collective bargaining on some working conditions did not infringe the guarantee of freedom of association. In the third case, RWDSU v. Saskatchewan, [1987] 1 S.C.R. 460, the Court dismissed a constitutional challenge to the validity of a law imposing a temporary ban on strikes and lockouts in the Saskatchewan dairy industry.

¶ 160 Another example of this Court's non-intervention policy is found in Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner), supra. A legislative requirement that an employee association could only represent government employees and engage in collective bargaining if it is incorporated by statute was not found to infringe the Charter, even though the decision to grant the incorporation and, as a corollary, the right to bargain, was left to the discretion of the legislature. Such restrictions on collective bargaining rights did not engage the constitutional guarantee of freedom of association, even though the law granted a monopoly of collective bargaining rights to another union. Again, in 1994, the Court dismissed a union challenge to back-to-work legislation in Canadian harbours, for the reasons given by the majority in the trilogy of 1987 (International Longshoremen's and Warehousemen's Union -- Canada Area Local 500 v. Canada, [1994] 1 S.C.R. 150).

¶ 161 As stated above, in the more recent case of Delisle, this Court remained faithful to its policy choice. Relying on earlier cases on labour law, it upheld the validity of the provisions of federal laws that excluded RCMP members from the application of the Public Service Staff Relations Act, R.S.C. [page305] 1985, c. P-35. In this manner, the Supreme Court left the field of labour relations entirely to the political process, Parliament and provincial legislatures.

¶ 162 At the same time, the jurisprudence of this Court has never held that labour laws are immune to Charter review. It did not find that s. 2(d) or other provisions of the Charter will never require that a law concerning labour relations be declared invalid or subject to some other form of remedy. Nonetheless, this Court has always maintained an attitude of reserve towards constitutional interventions in labour relations. The practical result of this hands-off policy has been to remove, until now, any Charter protection from the bargaining procedures and rights that have largely defined the role of unions for more than half a century in Canada. In respect of those rights, the Charter has remained a neutral force. This approach has attracted expressions of disappointment and criticisms from some quarters (see, for example, M. Mandel, The Charter of Rights and the Legalization of Politics in Canada (1994), at pp. 269 et seq.; A. C. Hutchinson, Waiting for Coraf: A Critique of Law and Rights (1995)).

F. The Charter as a Negative Factor

¶ 163 The case at bar offers the possibility for an evolution in the relationship between the Charter and labour law. As has been seen above, the present case involves an attack on some forms of union security clauses. Under many shapes and forms, such arrangements often provide for an obligation to obtain or maintain union membership in order to retain or obtain employment. They may also address the financing of union activities. They may combine provisions relating to the checking off of union dues with others concerning the maintenance of union membership. A well-known and common form of union security, the Rand formula, which was discussed in the Lavigne case, has even become a standard part of the labour laws of some provinces, for example, under the Quebec Labour Code, R.S.Q., c. C-27, s. 47. Under this [page306] formula, union dues are withheld from the pay of an employee, whether or not he or she belongs to the union. (For an overview of those clauses, see R. P. Gagnon, L. LeBel and P. Verge, Droit du travail (2nd ed. 1991), at pp. 529-30.)

¶ 164 Union security clauses are usually found in collective agreements negotiated under the general labour relations laws like the Quebec Labour Code. These laws authorize the inclusion of security clauses into negotiated labour contracts, but do not usually mandate them. The labour legislation may provide expressly for the application of the Rand formula, or some other clause, as a fallback provision, when a labour agreement remains silent on the matter.

¶ 165 In the present appeal, the provision in dispute amounts to a form of union shop, which requires that all construction workers form a union and remain members of it, mandated by the law itself. It also provides for the check off of union dues and their payment to the representative association. The constitutional challenge by the appellants attempts to use the Charter to limit those union rights. Seen from a union perspective, if this challenge succeeds, the Charter would become a negative force, in the search for a proper balance in the collective bargaining process. As of now, the jurisprudence of this Court does not grant unions protection for traditional collective bargaining rights and procedures under the Charter, when legislatures have refrained from doing so or have restricted them. A finding that the impugned union security arrangement is unconstitutional would undermine a form of legislatively granted protection of union rights. A successful challenge to the form of union security scheme involved in this case might weaken the unions' ability to maintain their membership and preserve their financial base. In the long run, it could affect the balance of power within the economy or the political arena, because of its impact on the ability of unions to use effectively the mechanism of collective agreements and to participate in a meaningful [page307] way in the debates on the direction of Canadian society.

G. Freedom of Association -- Its Sources

¶ 166 These policy considerations do not allow courts to escape the debate on the meaning to be given to the guarantee of freedom of association. The jurisprudence of the Court in the field of labour relations, as well as other judgments rendered in different areas of the law, like election financing or the marketing of agricultural products, has devoted considerable attention to the content of the constitutional guarantee of freedom of association.

¶ 167 One approach to the constitutional protection of civil liberties views the Charter as essentially designed to protect individual rights. The courts, using the power entrusted to them as upholders of the rights of the person, stand as the defenders of individuals in relation to the state. As s. 32 of the Charter circumscribes the application of the Charter to state action, it appears that the Charter seeks to regulate and constrain state action and power in relation to individuals. Indeed, absent state action, the Charter does not apply directly, as the Court held in one of the early cases on the application of the Charter (see RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573).

¶ 168 Nevertheless, the communitarian components of the Canadian Constitution are often overlooked. Section 15 equality rights are concerned not only with the position of individuals, but also with the situation of groups in society. (See Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497, at paras. 42 and 63.) The Constitution protects education rights specific to denominational minorities. (See Reference re Education Act (Que.), [1993] 2 S.C.R. 511, at p. 530 (per Gonthier J.).) Language rights under s. 23 of the Charter benefit both individuals and groups linked together by the use of a language and a will to preserve it and develop its use. (See Arsenault-Cameron v. Prince [page308] Edward Island, [2000] 1 S.C.R. 3, 2000 SCC 1; Mahe v. Alberta, [1990] 1 S.C.R. 342.)

¶ 169 The acknowledgement of the rights of the First Nations under s. 35 of the Constitution Act, 1982 remains one of the clearest expressions of the communitarian strand in the Canadian Constitution. Native rights will inure to the benefit of the members of a particular community. (See, for example, Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010; R. v. Adams, [1996] 3 S.C.R. 101.)

¶ 170 The guarantee of freedom of association stands in a special place within the Canadian Constitution. It concerns not only the relationship between the state and the citizens, but also those relationships that arise from the interaction between the persons themselves. Our Court has defined the right of association primarily as an instrument of self-fulfilment and realization of the individual, but it has never forgotten that the act of association brings together, for some common purpose, a group of human beings, giving birth to a new relationship between themselves. This act of bonding expresses the societal element in the life of mankind. In the Lavigne case, Wilson J. summed up her understanding of the purpose of the constitutional guarantee in this manner: "Thus, in construing the purpose behind s. 2(d) this Court was unanimous in finding that freedom of association is meant to protect the collective pursuit of common goals" (p. 252; see also p. 253). She stated a view of the nature of the right of association which has been shared and upheld by judgments of the Court since it started discussing the application of s. 2(d). These judgments emphasize the fundamental societal value of freedom of association. It allows people to bind together in various ways for the most diverse purposes. In a democratic state, it becomes an essential form of action and expression which informs the entire life of the community (Delisle, supra, at para. 62, per Cory and Iacobucci JJ.):

[page309]

> The human animal is inherently sociable. People bind together in a myriad of ways, whether it be in a family, a nation, a religious organization, a hockey team, a service club, a political party, a ratepayers association, a tenants organization, a partnership, a corporation, or a trade union. By combining together, people seek to improve every aspect of their lives. Through membership in a religious group, for example, they seek to fulfill their spiritual aspirations; through a community organization they seek to provide better facilities for their neighbourhood; through membership in a union they seek to improve their working conditions. The ability to choose their organizations is of critical importance to all people. It is the organizations which an individual chooses to join that to some extent define that individual.

¶ 171 The affirmation by the Canadian Constitution of a right of association confirms the importance ascribed to the societal phenomenon of association within Canadian society. In this respect, the Constitution of Canada differs from the American Constitution. In the absence of any formal affirmation of the right of association, American constitutional law has had to develop the concept of freedom of association under the First Amendment as a derivative of freedom of speech and belief. (See Reference re Public Service Employee Relations Act (Alta.), supra, at p. 345, per Dickson C.J.)

¶ 172 The Canadian Constitution has instead followed the pattern of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221. This international instrument has expressly recognized the existence of the right of association. Its art. 11 states this guarantee as follows:

> (1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. [page310] This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

¶ 173 The Constitution acknowledges a right to association, but all forms of associations do not arise from the pure exercise of human freedom. As La Forest J. pointed out in the Lavigne case, a number of these associations are not entirely voluntary. Some relations are rooted in the nature of things, like the family. Others, like citizenship, arise from the inescapable constraints of social life in modern society. (See La Forest J. in Lavigne, supra, at p. 321.)

¶ 174 In the case at bar, this Court faces a problem of compelled association. The act of forming trade unions, through the implementation of security clauses, may become, at least in respect of some of its members, a form of compulsory association. Moreover, in this appeal, we must assess the constitutional validity of a variety of mandatory unionism. Is that form of compelled association an infringement of the guarantee of freedom of association? I will examine first the jurisprudence of the Court on the nature of this guarantee. This analysis will then focus more closely on the constitutional validity of the particular form of union security at stake in the present case.

H. The Individual Nature of Association

¶ 175 This Court has adopted the view that, although the right of association represents a social phenomenon involving the linking together of a number of persons, it belongs first to the individual. It fosters one's self-fulfilment by allowing one to develop one's qualities as a social being. The act of engaging in legal activities, in conjunction with others, receives constitutional protection. The focus of the analysis remains on the individual, not on the group. In spite of the strong dissent of Dickson C.J. in Reference re Public Service Employee Relations Act (Alta.), the interpretative approach suggested then by McIntyre J. has prevailed.

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¶ 176 In that case, McIntyre J. began his analysis with an inquiry into the purposes or value of freedom of association. In his opinion, freedom of association, viewed as a societal value, recognized that the attainment of individual goals through the exercise of personal rights might often prove impossible without the cooperation of others. Therefore, at its roots, the right of association belongs to the individual as a personal act. It does not become the property of the group formed through its exercise. As a consequence, such a group does not enjoy more extensive constitutional rights and freedoms than its members already hold.

¶ 177 In his reasons, McIntyre J. discussed several possible definitions of freedom of association. He identified half a dozen different approaches to defining this constitutional right. In the first one, freedom of association would be limited to the pure right to associate with others, but would not grant any protection to the objects or actions of the group. A second definition would focus on constitutional rights. It would safeguard

the collective exercise of activities which are constitutionally protected on an individual basis. A third interpretation would guarantee the right to do collectively what an individual may lawfully do alone. Conversely, individuals and organizations would not be constitutionally entitled to engage in activities that would be unlawful on an individual basis. A fourth theory of freedom of association would grant constitutional protection to those collective activities which may be said to be fundamental to the culture and tradition of Canadian society and which, by common assent, deserve protection, like the right to marry, to establish a home and a family, to pursue an education or to gain a livelihood. A fifth and broader interpretation would include all activities which are held essential to the attainment of the lawful goals of an association. The last and most extensive interpretation would grant constitutional protection to all acts done in association, subject only to a limitation justifiable under s. 1 of the Charter (pp. 399-402).

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¶ 178 McIntyre J. rejected the last two interpretations as being inconsistent with the individual nature of the right of association. In his view, those interpretations mean that collective activities would enjoy a broader constitutional protection than acts done on a purely individual basis. Such theories would also grant a broader constitutional right to members of an association than to non-members (supra, at p. 404). McIntyre J. rejected, as well, the first approach as too narrow. In his opinion, freedom of association was concerned, not with the purposes of an association, but rather with the methods used to pursue or attain them (p. 406). He suggested that an interpretation of freedom of association which distinguishes the act of association from the objectives of the association would be more appropriate. Section 2(d) would thus protect the act of getting together with other persons to form an association, but not the purposes of the union. The purpose of the association would become relevant only if it were unlawful. McIntyre J.'s opinion held that the constitutional guarantee should include, at a minimum, the right to establish and carry on lawful and common pursuits in association with others. The constitutional guarantee would further the collective exercise of individual constitutional rights. It would also attach constitutional protection to all the acts of a group, which could be lawfully performed by an individual (at p. 408):

> This approach, in my view, is an acceptable interpretation of freedom of association under the Charter. ... this definition of freedom of association does not provide greater constitutional rights for groups than for individuals; it simply ensures that they are treated alike. If the state chooses to prohibit everyone from engaging in an activity and that activity is not protected under the Constitution, freedom of association will not afford any protection to groups engaging in the activity. Freedom of association as an independent right comes into play under this formulation when the state has permitted an individual to engage in an activity and yet forbidden the group from doing so. Moreover, unlike the fourth approach, the inquiry is firmly focussed on the fundamental purpose of freedom of association, namely, to permit the collective pursuit of common goals.

¶ 179 On the basis of his definition of the right of association as an instrument of individual [page313] self-fulfilment, McIntyre J. refused to grant Charter protection to now traditional labour practices or institutions like the right to strike or the right to collective bargaining. The constitutional guarantee would not extend to the purpose and objects of the common action. Despite Dickson C.J.'s dissent in the trilogy, as discussed above, the jurisprudence of the Court has remained faithful to this approach. (See Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner), supra; Delisle, supra.)

¶ 180 Before turning to other aspects of the guarantee of freedom of association, it should not be forgotten that this interpretation of the constitutional guarantee of individual rights has been applied by the Court in other areas of human activity. In Reference re Public Service Employee Relations Act (Alta.), Le Dain J. had already cautioned against an extension of a constitutional protection to collective bargaining rules for the very reason that freedom of association was not limited to the domain of labour relations. If this constitutional guarantee

were to apply to the widest range of associations with the most diverse objects and activities, extending constitutional protection to a legislative creation like collective bargaining might have unforeseeable consequences and widen the sphere of constitutional protection to undefined and unknowable activities, well beyond the proper domain of s. 2(d). (See Le Dain J.'s reasons, at p. 391.) As Le Dain J. had foreseen, the jurisprudence of the Court has had the opportunity to consider the nature of the constitutional guarantee in a variety of cases involving different aspects of the human impulse to associate with others.

¶ 181 For example, a minority of the Court would have invoked the guarantee in order to strike down rules adopted by the Alberta Law Society which prohibited lawyers from associating with anyone who was not a practitioner or a resident in Alberta. (See Black v. Law Society of Alberta, [1989] 1 S.C.R. 591, at pp. 636-38, per McIntyre J.) More unexpectedly, an infringement of the guarantee was [page314] raised, albeit unsuccessfully, to challenge s. 195.1 of the Criminal Code which prohibited communication for the purpose of prostitution (see R. v. Skinner, [1990] 1 S.C.R. 1235; Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123). In the area of political activity, s. 2(d) was used in conjunction with s. 2(b) to attack some aspects of the Quebec legislation on the conduct of referendums (Libman v. Quebec (Attorney General), [1997] 3 S.C.R. 569, at para. 36). Another recent case, which concerns a farm marketing scheme, illustrates the potential scope of the application of the constitutional guarantee of freedom of association. A group of egg producers in the Northwest Territories had challenged the national egg marketing scheme. In their opinion, it violated ss. 6 and 2(d) of the Charter. The producers asserted that the farm marketing system prevented them from associating with others in the marketing of eggs, in violation of s. 2(d). A majority of the Court upheld the validity of the scheme and dismissed the constitutional challenge. Rejecting the views expressed by the Court of Appeal for the Northwest Territories as to the applicability of s. 2(d), Iacobucci and Bastarache JJ. discussed again the nature of the constitutional guarantee in their joint reasons. They pointed out that freedom of association protected only the associational aspects of the activities, but not the activity itself. If the activity was to be protected constitutionally, that protection had to be found elsewhere than in s. 2(d). The argument raised by the egg producers would have constitutionalized all commercial relationships under the rubric of association (see Canadian Egg Marketing Agency v. Richardson, [1998] 3 S.C.R. 157, at para. 109).

¶ 182 As we have seen, the jurisprudence of this Court on freedom of association has been concerned mainly with attempts to extend the area of constitutional protection to rights and practices not specifically mentioned in the Constitution. The case at bar raises a different problem. The Charter is invoked in support of a challenge of a form of union security created by the Construction Act. It requires [page315] consideration of the Lavigne case where the Court had to deal with a challenge to a form of union security, the Rand formula, which provided for the compulsory payment of union dues by non-members.

I. The Lavigne Judgment

¶ 183 In Lavigne the appellant Lavigne was a teacher at an Ontario college. He challenged the constitutional validity of the Rand formula included in the collective agreement entered into between the union certified to represent the teachers of the college and his employer. Lavigne chose not to join the union. Under the Rand formula, he was nevertheless required to pay union dues to the union, which used them to support a variety of labour and social causes. Lavigne objected to the withholding of dues from his pay. He argued that the clause forced him to support causes to which he was ideologically opposed and which were not directly related to his employment, and thus infringed his freedom of association under the Charter. Lavigne claimed that the right of association included a mirror right of non-association, which was as much a part of the constitutional guarantee as the positive right to enter into an association.

¶ 184 Even though the Court was unanimous in rejecting the constitutional challenge, the case provoked strong disagreements. Four different sets of reasons were written. The disagreements in the reasons concerned mainly the existence of a negative right not to associate. (See, for example, B. Etherington, "Lavigne v. OPSEU: Moving Toward or Away From a Freedom to Not Associate?" (1991), 23 Ottawa L. Rev. 533, at p. 547.)

¶ 185 Lavigne had brought a narrow point before the Court. He conceded that the compelled payment of union dues, under the Rand formula, while still a breach of his freedom of association, would nevertheless be a reasonable limit on his right under s. 1 inasmuch as his dues were used for collective bargaining activity only. On the other hand, the withholding of dues for other purposes would not be justified under s. 1. In the end, Lavigne's challenge to the Rand formula failed. Nevertheless, the members of the Court took different roads to reach this [page316] result. More particularly, they split on the question of whether the Charter's s. 2(d) protection incorporated a negative component, a right not to associate.

¶ 186 Writing on this point for three members of the Court, Wilson J. held that freedom of association should be viewed only as a positive freedom. The recognition of a freedom not to associate would negate the nature and purpose of s. 2(d). Quoting from Sopinka J.'s reasons in the Northwest Territories case, she viewed s. 2(d) as a positive measure designed to foster the creation and life of associations. On the other hand, Wilson J. agreed with earlier labour cases that s. 2(d) offered no protection to the objectives of the association, despite their fundamental importance to the life of the group. Section 2(d) would protect the collective exercise of individual rights protected by the Constitution. It would also safeguard the collective exercise of other legitimate individual activities.

¶ 187 Wilson J. rejected the view that any positive right was mirrored by a corresponding negative right. She found this concept contrary to the very purpose of freedom of association and thought it would also engage courts in a very delicate, if not impossible, exercise of balancing between the conflicting positive and negative freedoms. Wilson J. also feared a trivialization of the Charter guarantee. She noted that, unavoidably, human beings in society become members of associations or groups they did not elect to join, be they the state or the family. Wilson J. denied that the mere fact of compelled participation would cause any prejudice attracting Charter review. If an association by its activities breached, for example, some other right like freedom of opinion, the Charter itself would grant sufficient protection to the complainant, but would not require the express acknowledgment of a right not to associate.

¶ 188 This negative right would also be inconsistent with the jurisprudence of the Court, which, in the [page317] labour trilogy, had disagreed with the granting of any constitutional protection to the purposes and objectives of an association. These purposes should remain irrelevant when assessing the application of any negative right of association. The compulsory withholding of union dues should thus fall outside the scope of the Charter.

¶ 189 A majority of the Court took a different view. Although McLachlin J. (as she then was) writing for herself, and La Forest J., who wrote for three members of the Court, did not agree on the scope of the right not to associate, they both were of the opinion that such a right not to associate existed as a necessary component of the guarantee of freedom of association under s. 2(d) of the Charter.

¶ 190 La Forest J. held that the Rand formula infringed s. 2(d), but was justified as a reasonable limit under s. 1. He adopted a broad definition of the right not to associate. It is founded on the premise that, although designed to allow people to join with others, freedom of association constitutes a natural right granted to every person, but also an individual right. As such, its purpose remains the self-realization of individuals through the creation of relationships with others. In La Forest J.'s view, some aspects of individual self-realization and fulfilment might never be attainable without the cooperation and association of others. (See Lavigne, supra, p. 317, per La Forest J.; also Reference re Public Service Employee Relations Act (Alta.), at p. 395, per McIntyre J.)

¶ 191 This characterization of the right of association means that it protects the person, but not the group or its activities. Given the individual nature of the right, forced association may jeopardize the potential for self-realization which grounds the constitutional guarantee. A negative freedom to refuse to associate would then appear as a necessary component of the constitutional right to safeguard the autonomy of choice indispensable to individual self-realization.

¶ 192 La Forest J. ascribed this broad content to the negative guarantee, in order to safeguard the [page318] individual right at stake. He refused to separate the positive and negative aspects of the constitutional guarantee. They appeared to him as "two sides of a bilateral freedom", unified by the same purpose of advancing individual aspirations (at p. 319). He noted that art. 20 of the Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), explicitly recognized the negative component of freedom of association as follows:

> 1. Everyone has the right to freedom of peaceful assembly and association.
> 2. No one may be compelled to belong to an association.

¶ 193 Therefore, despite the absence of any express recognition of that negative right in the Canadian Charter, the nature of the guarantee of freedom of association required the acknowledgement of the negative component. In La Forest J.'s view, it was necessary to give effect to the concerns about the protection of individual freedoms and instruments of self-fulfilment which stand at the core of the right of association. La Forest J. disagreed with Wilson J. on the risk of trivializing s. 2(d). On the contrary, the presence of the negative component would strengthen the constitutional guarantee to freely associate.

¶ 194 Despite the importance La Forest J. attached to the right not to associate, he asserted that internal limits should be read into that right. He viewed certain forms of association as unavoidable in human society. Any right of non-association should not be confused with the right to isolation. His reasons state that varied forms of forced association are unavoidable, like the state or the family. More particularly, he conceded that some form of forced association might become a necessary incident of life in the workplace (at p. 321).

> ... it could not be said that s. 2(d) entitles us to object to the association with the government of Canada and its policies which the payment of taxes would seem to entail ... .
>
> [page319]
>
> Realistically, too, as I will more fully explain later, the organization of our society compels us to be associated with others in many activities and interests that justify state regulation of these associations. Thus I doubt that s. 2(d) can entitle us to be free of all legal obligations that flow from membership in a family. And the same can be said of the workplace. In short, there are certain associations which are accepted because they are integral to the very structure of society. Given the complexity and expansive mandate of modern government, it seems clear that some degree of involuntary association beyond the very basic foundation of the nation state will be constitutionally acceptable, where such association is generated by the workings of society in pursuit of the common interest. However, as will be seen, state compulsion in these areas may require assessment against the nature of the underlying associational activity the state has chosen to regulate. [Emphasis added.]

¶ 195 I take these comments to mean that the state, the family and the workplace create some forms of association immune in principle from Charter review. La Forest J. added that an employee like Lavigne would have no chance of success by raising an objection to the mere fact of forced association, if his union had limited its activities to matters like the negotiation and enforcement of working conditions. The constitutional guarantee of s. 2(d) would not be engaged when the association is compelled by what La Forest J. termed "the facts of life" (p. 324). It would come into play only when the act of forced association threatens an identified liberty interest (pp. 328-29). La Forest J. commented that some of those primary liberty interests had been properly identified in a paper on s. 2(d) by Professor Etherington, while giving them a broad interpretation and without seeking to define them exhaustively. (See B. Etherington, "Freedom of Association and Compulsory Union Dues: Towards a Purposive Conception of a Freedom to not Associate" (1987), 19 Ottawa L. Rev. 1, at

pp. 43-44.) The first liberty interest that might be threatened by forced association was the governmental establishment or support of parties or causes. The second was defined as the impairment of an individual freedom to join a cause of one's choice. [page320] The third and fourth consisted of the imposition of ideological conformity.

¶ 196 Forced association would not, in itself, offend s. 2(d). The complainant would have to demonstrate a threat to a liberty interest worthy of protection (at pp. 328-29):

> There is much to be said for this approach to the freedom of association. However, it may also be argued that the values identified by Professor Etherington are merely some of the core values protected by s. 2(d), and that other values less central to the freedom may, in proper context, merit Charter protection. In either case, I am of the view that such an approach is only applicable once one has overcome the threshold issue I have identified earlier, namely, whether in a particular case it is appropriate for the legislature to require persons with similar interests in a particular area to become part of a single group to foster those interests. To put it another way, one must, to use Professor Etherington's words, first be satisfied that the "compelled combining of efforts towards a common end" is required to "further the collective social welfare" (p. 43). Where such a combining of efforts is required, and where the government is acting with respect to individuals whose association is already "compelled by the facts of life", such as in the workplace, the individual's freedom of association will not be violated unless there is a danger to a specific liberty interest such as the four identified by Professor Etherington above. This approach only applies, however, so long as the association is acting in furtherance of the cause which justified its creation. Where the association acts outside this sphere, different considerations arise.

¶ 197 La Forest J.'s view of the workplace as the source of some forms of compelled association reflects the nature of the enterprise, as a work environment. Canadian labour law has acknowledged the complexity of the concept of enterprise and of the associative aspects of its life. The jurisprudence of this Court on the transfer of enterprises and its effect on union bargaining rights is strikingly illustrative in this respect, as it defines the enterprise not only as a mere addition of means of production, [page321] but also as an amalgamation of human beings, both in management and in the unionized work force, all working towards some common entrepreneurial purpose. (See U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048; Lester (W.W.) (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740, [1990] 3 S.C.R. 644; R. P. Gagnon, Le droit du travail du Québec: pratiques et théories (4th ed. 1999), at pp. 329-30.) In the context of individual labour relationships, the Civil Code of Québec, S.Q. 1991, c. 64, now views the existence of a contract of employment as closely tied in with the concept of enterprise:

> 2097. A contract of employment is not terminated by alienation of the enterprise or any change in its legal structure by way of amalgamation or otherwise.
>
> The contract is binding on the representative or successor of the employer.

¶ 198 The nature of an enterprise means that an employee must work in a complex environment, where he or she must collaborate with others in the pursuit of a common purpose. An employee shares with others the common status of a person whose activity takes place under the control of management and experiences the fundamental imbalance of economic and legal power inherent in the employment relationship. (See Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701, at paras. 90-93, per Iacobucci J.) This employee may then share a common interest with others in attaining some balance of power in the life of the enterprise. Participation in a union may become the natural consequence of one's worklife.

¶ 199 In La Forest J.'s opinion, an obligation to join a union whose purposes would be limited to collective bargaining would not even trigger the application of s. 2(d). On the other hand, La Forest J. held that the support

of some political groups by the union and the allocation of parts of union dues to support causes outside the narrow framework of collective bargaining would infringe s. 2(d) (p. 333). Nevertheless, he found in Lavigne's case that such an infringement was justified under s. 1. He acknowledged that unions played a wider [page322] role in Canadian society than merely negotiating and implementing labour agreements. In his opinion, they were voices representing legitimate interests within Canadian society. Their involvement in political matters flowed from their role in the field of labour relations. The freedom to spend union dues was considered critical to the safeguarding of the ability of unions to engage in debates on broad societal issues. In this respect, La Forest J. pointed out that it became difficult to draw a clear distinction between expenses for collective purposes and for other goals. The structure and the management of labour relations may themselves become a political issue and often will affect the quality of life and working conditions within the enterprise. In addition, the Rand formula settled the problem of the free rider who benefits from union services at no cost to himself. This obligation to pay dues promoted interest and participation in union affairs and strengthened democratic values within a union.

¶ 200 McLachlin J. shared the view that freedom of association is a right belonging to the individual, created to foster his or her potential for self-realization. Nevertheless, McLachlin J. seemed to define this negative right in a more restricted way than La Forest J. Her interpretation seems to be tied in with her concern for a global interpretation of the Charter, whereby the guarantee of freedom of association would be viewed in the perspective of other constitutional rights. At this point, McLachlin J. was close to the approach advocated by Wilson J., but she shared La Forest J.'s views that, by reason of the very nature of the constitutional guarantee, it had to incorporate a negative component in order to safeguard the liberty interests involved.

¶ 201 McLachlin J. would not exclude any specific categories of forced association from the scope of the guarantee. She refused to engage in an analysis of the group's initial reason for forming. Neither would she inquire whether the activities arising out of the forced association could fall within or outside [page323] its original purpose. The single determining factor in McLachlin J.'s view appeared to be the presence of an ideological coercion which she did not define. Compelled association would breach s. 2(d) only when it imposed ideological conformity. McLachlin J. seemed to view the mere fact of involuntary association as essentially neutral, if the forced activity does not impose the ideas of the group on the member. In such a case, the compelled association does not engage the negative freedom not to associate. The element of compelled ideological conformity is measured objectively. The inquiry seeks to ascertain whether forced activity would bring the individual into "association with ideas and values to which he or she does not voluntarily subscribe" (p. 344).

¶ 202 In McLachlin J.'s opinion, there was no link between the compulsory payment of dues and the ideas and values to which Lavigne did not subscribe (p. 340). She pointed out that the Rand formula did not force employees to become members of the union. As a beneficiary of its services, it would only be fair that an employee like Lavigne would have to pay union dues (p. 347). McLachlin J. saw very little associative content in the mere fact of having to pay dues. The payment of union dues would rather amount to compensation for services rendered, without implying ideological conformity (p. 347). The freedom not to associate protects the rights of freedom of thought, opinion and expression. Barring any infringement of this fundamental right to intellectual freedom, associational activities like the payment of dues will not engage s. 2(d).

J. Democratic Values and Association

¶ 203 Despite their different approaches, McLachlin and La Forest JJ. appeared to agree on a common vision of the nature of the freedom to associate. Although in obiter, McLachlin J. shared La Forest J.'s view that the negative component will not always mirror the positive element of freedom of association. They also both recognized the democratic rationale for denying that all forms [page324] of compelled association would infringe s. 2(d). According to La Forest J., some forms of forced association, whose existence flows from sharing the life and values of a democratic society, cannot be dispensed with, and will not breach the Charter. Moreover, some of the concerns raised by forms of compelled association would be alleviated when

the association itself is established and managed in accordance with democratic principles (at p. 326). After finding a breach of the right not to associate, La Forest J. moved to a s. 1 analysis. In that discussion he commented that the Rand formula seeks to foster democracy by encouraging participation in the union and in democratic discussion on its activities and expenditures.

¶ 204 While McLachlin J. found no breach, and therefore had no need to address a s. 1 justification, she also noted the legal relationships that exist between citizen and state and between workers and bargaining agents as justification for forced association, absent the element of ideological conformity. A common understanding of the need for some forms of compelled association appears in both sets of reasons. Within this approach, the work environment may be one of those places where a form of forced relationship will arise out of the need to associate, to cooperate, and to find a proper voice in the dialogue or conflicts with the other parties to the employment relationship. The judgment in Lavigne viewed those forms of forced association as legitimate, when they respect democratic values. An individual may be forced to associate so long as he or she is not stripped of the right to disassociate from the ideology of the group, and not deprived of his or her liberty interests guaranteed by the Charter. In the end, neither La Forest J. nor McLachlin J. held that all compelled associations, more particularly those arising out of the application of union security clauses, are per se violative of s. 2(d) of the Charter.

¶ 205 The present case presents a more difficult problem than the application of the Rand formula canvassed in Lavigne. The Construction Act imposes [page325] an obligation to join one of five unions. The question becomes whether this fact per se triggers the negative component and becomes a breach of s. 2(d) of the Charter that must be justified under s. 1. If we adopt this route, it might well mean that all forms of compulsory membership provided for or even authorized under statute would be open to challenge under the Charter.

¶ 206 A proper analysis of Lavigne and of the nature of the constitutional guarantee does not allow for such a result. Although differing in some respects, McLachlin J.'s and La Forest J.'s reasons both refused to view the negative right as a simple mirror image of the positive right of association. Both Justices accepted that the nature of a workplace and the status of the persons participating in its life and experience created associations that became unavoidable or "compelled". The use of the notion of ideological conformity by McLachlin J. or La Forest J.'s concerns for the safeguarding of broad liberty interests acknowledged the need for association, as well as the need to join, which may be required in some aspects of life in the workplace. At the same time, they intended to meet the need to safeguard democratic values and to foster them in the area of labour relations. Their reasons reflect the view that some forms of compelled association might breach s. 2(d) of the Charter if the fact of association imposes on an individual values and views of the world antithetical to his or her own.

¶ 207 The Court found a balance in Lavigne. This balance is now at stake in the present case. The majority of the Court in Lavigne found that there was a negative right not to associate. Although it acknowledged the need for such a right, it accepted a democratic rationale for putting internal limits on the right not to associate. La Forest J. regarded the Constitution's presumption of democracy as a reason for concluding that forced associations which flow from the functioning of democracy cannot be severed with the aid of the Charter (pp. 317 and 320-21). Democracy is not primarily about [page326] withdrawal, but fundamentally about participation in the life and management of democratic institutions like unions.

¶ 208 An approach that fails to read in some inner limits and restrictions to a right not to associate would deny the individual the benefits arising from an association. This Court has maintained, since the labour law trilogy of 1987, that the right of association intends to foster individual autonomy and attaches to individuals. At the same time, the exercise of the right of association also reinforces the ability of an individual to convey ideas and opinions, through a group voice, as the Court acknowledged in the Libman case, while discussing political and ideological associations. It should not be viewed as an inferior right, barely tolerated and narrowly circumscribed.

K. Freedom of Association and the Employment Relationship

¶ 209 In the present case, it must be acknowledged that the law challenged by the appellants legislates a form of union shop. All construction workers must elect one of five union groups as their collective bargaining representative. Their union dues go to these groups or their affiliates. If the appellants' arguments were to be accepted, the answer to the constitutional question would be short; the right not to associate would have been infringed and the law would not pass constitutional muster. A more refined approach elicits a different answer.

¶ 210 In spite of the acknowledgement of the existence of a right not to associate, the guarantee of freedom of association is not engaged by the legislative scheme challenged in the present appeal. Freedom of association, even with its negative component, does not express a right to isolation, as La Forest J. observed in Lavigne. To this I would add there is a unique quality of association connected to individual self-realization. It gives the associates, "the partners", a common strength that enables the furtherance of individual goals and aspirations in [page327] a way that escapes the efforts of a man or woman acting alone. The birth and development of a strong and diverse civil society in modern democracy bears witness to that special quality of a social activity. The community, as well as the individual, benefits from it. One cannot presume that the Charter addresses only the relationship between isolated individuals and the state. It is also concerned with the interaction of groups and "mini" societies within the broader Canadian society. The incorporation of a guarantee of freedom of association in the Charter signals the strong societal interest in a broad interpretation of freedom of association, although always in accord with the democratic values of Canada. It signals the importance of the social element of man's self-actualization. It demonstrates the importance of communication and of cooperation between human beings.

¶ 211 As La Forest J. stated in the Lavigne case, some forms of association arise from the human condition. Others find their source in the necessities and realities of life. Relationships born and organized around the workplace may create a need for a stronger bond between groups and persons undergoing the same experiences while at work.

¶ 212 As this Court has acknowledged, the employment relationship rests on an imbalance of power between ordinary workers and those who employ them. The power to direct the work and fix the conditions of employment is usually exercised unilaterally by employers. Entering into an employment relationship means accepting the existence and exercise of that power. Often, especially during periods of economic downturn or unemployment, the employee has little option but to accept what is offered.

¶ 213 The Civil Code of Québec identifies clearly the nature of the employment relationship when it defines the contract of employment as an agreement based on the acceptance of the authority of the employer:

[page328]

> 2085. A contract of employment is a contract by which a person, the employee, undertakes for a limited period to do work for remuneration, according to the instructions and under the direction or control of another person, the employer.

¶ 214 Professors P. Verge and G. Vallée, in a recent study of the principles of labour law, stated that the fundamental nature of the employment relationship, whatever its form and shape, rests on an inequality which reflects an imbalance of economic power. Subordination and inequality remain at the core of the relationship:

> [TRANSLATION] Therefore, although the employment relationship may be reflected in different status levels within the company, it is nonetheless still an employment relationship. As a rule, in spite of variations in the length of employment or in the relationship itself, or even in the identity of the ultimate user of the work, the subordination to

> the employer which is characteristic of the relationship is still present. Viewed subjectively -- that is, in relation to the overall situation of the employee -- the insecurity of the employment in fact intensifies the employee's economic dependency on any employer for which he or she might work.
> (Un droit du travail? Essai sur la spécificité du droit du travail (1997), at p. 21)

See also Morin and Brière, supra, at pp. 212-13; Gagnon, supra, at pp. 51-52.

L. The History of Labour Relations

¶ 215 The existence of this fundamental inequality has provoked the long and continuing search for a new balance in labour relations. A common instrument has been the association of persons seeking to agree and thus acquire a degree of control over their working conditions. Since the industrial revolution, association and the right to associate have been viewed as critical tools in the fight for a more stable and sometimes more equitable employment relationship. (For a short outline of the history of labour law, see A. W. R. Carrothers, E. E. Palmer and W. B. Rayner, Collective Bargaining Law in Canada (2nd ed. 1986), at pp. 3-30; Gagnon, LeBel and Verge, supra, at pp. 16-32; G. W. Adams, Canadian Labour Law (2nd ed. (loose-leaf)), at pp. 1-1 to 1-11.)

[page329]

¶ 216 Nevertheless, the right of association faces an inner tension in the striving to create a different work environment. The refusal of some to join the group weakens the efforts to achieve the goals of the majority. For these reasons, compelled associations in many forms became a reality of labour relations in several countries including Canada. Various forms of union security clauses ranging from the obligation to pay union dues to the obligation to hire only members of a certain union group were included in collective agreements and applied. In different ways, these arrangements attempted to resolve the tension and contradiction between the two competing aspects of the right of association.

¶ 217 Although Lavigne did not address the whole issue of union security, as it dealt only with an obligation imposed on non-members to pay union dues, it nevertheless held that some forms of compelled association in the workplace might be compatible with Charter values and the guarantee of freedom of association. The acknowledgement of a negative right not to associate would not justify a finding of an infringement of the guarantee whenever a form of compelled association arises. Otherwise, it would mean that the mere fact of association might amount to a breach of the Charter. An inquiry must take place into the nature of the commitment to an association. In the case of a legislated form of union security, the nature of the legislative scheme must also be closely scrutinized.

¶ 218 The Construction Act imposes an obligation to join a union group. The obligation remains, nevertheless, a very limited one. It boils down to the obligation to designate a collective bargaining representative, to belong to it for a given period of time, and to pay union dues. The Act does not require more. At the same time, the Act provides protection against past, present and potential abuses of union power. Unions are deprived of any direct control over employment in the industry. They may not set up or operate an office or union hall (ss. 104 and 119 of the Act). No discrimination is allowed against the members of different unions. [page330] Provided they hold the required competency certificates, all workers are entitled to work in the construction industry without regard to their particular union affiliation. Specific guarantees against discrimination are found in ss. 94 and 102. Section 96 grants members clear rights of information and participation in union life. The law allows any construction worker to change his or her union affiliation, at the appropriate time. As it stands, the law does not impose on construction workers much more than the bare obligation to belong to a union. It does not create any mechanism to enforce ideological conformity.

¶ 219 In Lavigne, both La Forest and McLachlin JJ. limited the right not to associate when certain liberty interests were affected. Their comments also imply that such liberty interests, no matter how broad, must be asserted and identified. In the Lavigne case, the appellant claimed, although unsuccessfully as it turned out, that some union activities in support of political and social causes breached his right not to associate. He did not ground his case on a bare assertion that he could not accept financing a union or joining it, without more.

¶ 220 As appears from the evidence, the situation is completely different in the case at bar. No witness came forward to assert that he felt or believed that joining a union associated him with activities he disapproved of, or with opinions he did not share. In order to trigger the negative guarantee in this case, ideological conformity or breach of another liberty interest would have to be found in the fact that unions, as other groups belonging to or participating in a democratic society, sometimes engage in public debate, take positions on issues concerning their members, or comment on broad social or political questions.

¶ 221 Our Court would have to presume that, because they take part in social debate, unions in Quebec [page331] or elsewhere act in breach of the democratic values of our society, and of the liberty interests and the freedom of opinion and expression of their members. Still, if union members assert such a concern, it may have to be addressed. Accommodation may become necessary to safeguard the democratic character of unions and of the society within which they operate. For example, concerns about equality rights may impose a review of some union practices and even of specific provisions of labour agreements. (See C. Brunelle, Discrimination et obligation d'accommodement en milieu de travail syndiqué (2001), at pp. 236 et seq.) It would be rash to attempt an exhaustive definition of all situations and cases where liberty interests falling within the scope of the negative right would have to be accommodated. Such liberty interests must, at least, be advanced, which was not the case in the courts below and in this Court.

¶ 222 The record supporting the appeal appears sketchy about the reasons why construction workers would object to belonging to a union. In the evidence introduced at trial before Judge Bonin, in the Court of Québec, the appellants offered a few witnesses. Most of them were either contractors or promoters, although a few construction workers gave evidence. In general, these witnesses voiced deep disagreement with the legislative and regulatory scheme in force in the Quebec construction industry. The employers affirmed that the rules governing employment and hiring prevented them from hiring whom they wanted. They also believed that the Office de la construction referred them incompetent workers. The construction workers complained about the absence of a right of free entry into the employment market. Some witnesses expressed their concern about the Quebec laws imposing strict professional certification on contractors and they expressed a preference for a freer regulatory environment.

¶ 223 No evidence was introduced about union practices that would impose values or opinions on their members. No evidence was offered about the internal life of construction unions or about the [page332] constraints they might seek to impose upon members. There was no indication that free expression is limited by union activities of such a nature that forced association would trigger the guarantee of s. 2(d). The nature of a particular legislative or regulatory system, in an important part of the economy like the construction industry, may certainly be subject to criticisms or political discussions. Nevertheless, personal disagreements with the extent of a strict regulatory system do not suffice to mount a successful Charter challenge. It should now be clear that the mere fact of compelled association will not, by itself, involve a breach of the Charter. More is needed in order to trigger the negative component of s. 2(d).

M. Evidence of Ideological Coercion

¶ 224 May the Court presume ideological coercion from the fact that, at times, Quebec unions, like other groups, have advocated particular causes? They have expressed varying, and often conflicting, views on social, economic and political issues. Even amongst themselves, they have differed about the direction of society, its priorities and those of the labour movement. The existence of those orientations, nevertheless, does not mean that ideological, political or philosophical conformity was being imposed on Quebec construction workers and

that this fact in itself triggers the negative right not to associate and hence a prima facie violation of s. 2(d) of the Charter.

¶ 225 In order to reach such a result, the Court would have to take judicial notice of the presumed ideological bent of Quebec unions. The Court would have to judicially notice that ideological orientations or the adoption of social and political causes within the union movement mean that a form of intellectual conformity is being imposed by unions on their members, and that the liberty interests of those members are being jeopardized. Judicial notice certainly has its place in constitutional adjudication. Recently, in R. v. Find, [2001] 1 S.C.R. 863, [page333] 2001 SCC 32, McLachlin C.J. reflected on its role. The key to judicial notice which emerges in Find will be a distinction between facts and inferences to be drawn from these facts. In Find, the facts regarding sexual assault were uncontested and accepted by judicial notice, but the inferences from those facts on which the appellant sought to rely, namely, that they led to widespread bias against those accused of sexual assault, could not be judicially noticed (para. 86). (See also Law, supra, at paras. 77 and 79, per Iacobucci J.)

¶ 226 The fact that unions intervene in political social debate is well known and well documented and might be the object of judicial notice. Indeed, our Court acknowledged the importance of this role in the Lavigne case. Several ideological currents have criss-crossed the history of the Quebec labour movement. It was never unanimous about its direction, even about the need to enter the political arena or to involve itself in broader societal issues beyond the horizon of the bargaining unit. (See P. Verge and G. Murray, Le droit et les syndicats: aspects du droit syndical québécois (1991), at p. 225.) These authors underscore the weakness of the formal links between the Quebec unions and political parties (pp. 238-39). They add that it is impossible to determine whether union political positions had any real influence on their members (p. 239). More recent studies of voting attitudes seem to indicate that, in fact, Canadian unions exert very little influence on the voting behaviour of their members, as at least one Canadian political party, the New Democratic Party, has found repeatedly to its sorrow (see A. Blais et al., "Making Sense of the Vote in the 2000 Canadian Election", paper prepared for the Annual Meeting of the Canadian Political Science Association, Quebec City, May 2001).

¶ 227 Taking judicial notice of the fact that Quebec unions have a constant ideology, act in constant [page334] support of a particular cause or policy, and seek to impose that ideology on their members seems far more controversial. It would require a leap of faith and logic, absent a proper factual record on the question. The assertion seems to rest on the tenuous line that, although we do not have any evidence to this effect, coercion on the individuals should be inferred from "ideological" trends present in the labour movement. This "fact" is unlike issues of notorious discrimination against certain groups in Canadian society, and unlike the disadvantage experienced by women and children after a divorce, both facts of which this Court has taken judicial notice (see R. v. Williams, [1998] 1 S.C.R. 1128, and Willick v. Willick, [1994] 3 S.C.R. 670). In this case, it cannot be said that some form of politicization and ideological conformity which allegedly flows from the political and social orientation of the labour movement is self-evident. Instead, such views evidence stereotypes about the union movement as authoritarian and undemocratic, and conjure images of workers marching in lock step without any free choice or free will, under the watchful eyes of union bosses and their goon squads.

¶ 228 In fact, democracy undergirds the particular form of union security provided for by the Construction Act. Throughout the conflicts and difficulties that marred the history of the construction industry, a critical flaw of the regime appeared to be the lack of participation in the life of unions and the need to reestablish and maintain member control over their affairs. While it also facilitated the evaluation of the representativeness of the unions, the obligation to choose and join a union answered this critical need in a way that a different union security arrangement, like the Rand Formula, would not have addressed. The dues check-off scheme, like the Rand formula, disposes of the free rider problem, but the employee remains outside the life of the union. In other security arrangements, a member may choose to remain aloof and refrain from attending meetings, voting for union officers [page335] and taking part in discussions. Affiliation means that he or she has, at least, gained the ability to influence the life of the association whether or not he or she decides to exercise this right.

¶ 229 In the case of the construction unions, a heightened degree of participation in the life of the associations appeared necessary in order to foster union democracy. At the same time, the legislative formula left workers a choice among the various groups active in the construction industry. These groups had held widely different views on the role of labour unions in society. Their orientations represented a broad spectrum of opinions, both about the orientation of society and about the functions of unions. The legislative solution represented an answer to some of the pressing problems that the Quebec construction industry had been confronted with during several years. The degree of relative peace and equilibrium reached by the time the present case started bears witness to the basic soundness of this legislative choice, which expresses a deep concern for democratic values. One might think that an absolute right to withdraw at will, even with payment of service fees for unions, would not preserve and develop the internal democracy of union groups in the same manner. It would deprive the dues-paying worker of any influence on the life of the union and on the determination of working conditions meant to be extended to the entire industry or a sector thereof, as rules of public order.

¶ 230 Union members seem to act very independently from their union when it comes to the expression of their political choices and, even more so, to their voting preferences, come election time. Existence of attempted ideological conformity, let alone its realization, seems highly doubtful. In addition, in Quebec, the labour movement faces particular constraints flowing from the strict legislation on the financing of political parties and referendums. The Election Act, R.S.Q., c. E-3.3, forbids contributions by persons other than electors which, by definition, are not corporations, unions or associations: J. P. Boyer, Money and Message: The Law Governing [page336] Election Financing, Advertising, Broadcasting and Campaigning in Canada (1983), at pp. 219-40. The same limitations apply under the Referendum Act, R.S.Q., c. C-64.1. (See also Libman, supra.)

¶ 231 In this context, there is simply no evidence to support judicial notice of Quebec unions ideologically coercing their members. Such an inference presumes that unions hold a single ideology and impose it on their rank and file, including the complainants in this case. Such an inference would amount to little more than an unsubstantiated stereotype.

¶ 232 The appellants have based their case on the notion of some absolute right to refuse to associate and on their strong disagreement with the complex and extensive regulatory system governing the construction industry in Quebec. However, they presented no evidence that the legislation imposes a form of ideological conformity or threatens a liberty interest protected by the Charter, which is necessary to infringe the right not to associate under s. 2(d). The evidence does not even indicate whether unions are engaged in causes and activities that the appellants disapprove of. It is not a subject where judicial knowledge could and should replace proper evidentiary records unless the fact of joining a union would be, of itself, evidence of a particular ideological bent. One would have to presume that, because Quebec unions, as well as many other groups, take positions on social, economic and political issues, they impose an ideological coercion on their members or, in some way, impair the liberty interests protected by the Charter. The well-known fact of trade union participation in public life in Canada does not demonstrate that every union worker joining a union under a union security arrangement should be considered prima facie a victim of a breach of the Charter. After all, in Lavigne, our Court has accepted that the participation of labour unions in public life is an important aspect of their societal role. The application of the negative right not to associate may not rest on a generalized suspicion [page337] of the nature of unions and their management or internal life. Nor should the right of association be viewed primarily as an empty shell devoid of any positive or substantive meaning. Ironically, if another view prevails, what would be left in the Charter, at least in the field of labour relations, would be essentially a negative freedom not to associate. It would be used to deprive, inasmuch as possible, associations of workers of their effectiveness in the workplace and of their influence in society.

N. The Impugned Legislation

¶ 233 Although, as noted above, the mobility rights issue was clearly left out by the parties and by the legal questions raised in this appeal, nevertheless, some comments appear in order, given the views expressed by Bastarache J. This issue underscores the dangers of constitutional adjudication, based essentially on conjectures about the effect of the legislation, in the absence of a proper factual foundation. One such danger is that by considering an issue neither put before the lower courts nor part of the stated questions for this Court, the mis en cause Attorney General may be prejudiced. I will also return to this point in the discussion of the s. 1 Charter justification.

¶ 234 The structure of the work force in the Quebec construction industry has had an impact on the mobility problem. Before and during the period of implementation of the present labour relations regime, the conflict between workers staying and working in a region and those often moving from site to site throughout the province, more particularly in specialized crafts, caused much of the violence which occurred in the 1960s and 1970s on construction sites. Given the high rate of instability of the work force, concerns about the protection [page338] of "true construction workers" led to a search for a form of seniority or, at least, regional preference.

¶ 235 The Commission de la construction has regularly analysed the nature and composition of the work force in its yearly analysis of the Quebec construction industry. Some of these analyses may be found in the Record of the Attorney General. From the 1992 report, it appears that around 100,000 workers had been employed in the industry. Four-fifths of them were either qualified or specialized workers and apprentices. The report noted a high rate of departure from and entries into the industry, as well as a very significant rate of geographical mobility:

> [TRANSLATION] The temporary nature of the employment generated by business cycles, the seasonal climate and employee turnover requires significant mobility on the part of the work force. This mobility, which is the second characteristic of the construction industry, occurs from one job site to another, from one employer to another and even from one region to another.
> (Analyse de l'industrie de la construction au Québec 1992, supra, at p. 29)

¶ 236 From the report of the Commission, it appears that the work pool system does not substantially impair mobility between regions, when the need arises. Also, the evidence does not support the view that a wall has been built between Quebec and other provinces. Moreover, such concerns have largely been addressed by political and legal developments in the industry since 1991. The intervener Commission de la construction asserts in its factum, at p. 10, that the requirement of a domicile does not allow workers from outside Quebec to vote for the purpose of assessing union representativeness, but did not prevent workers from taking jobs in Quebec, provided they obtained a competency certificate and opted for one of the five union groups while working in Quebec. Also, it should be noted that the requirement of a domicile in Quebec, in s. 30, was removed by the Act to amend the Act Respecting [page339] Labour Relations, Vocational Training and Manpower Management in the Construction Industry and other legislative provisions, S.Q. 1993, c. 61, s. 15(3).

¶ 237 A changing approach led to agreements with other provinces which intended to address the problems of work force mobility and the transferability of contractors' licences. See, for example, É. Dunberry, "Les ententes de libéralisation des marchés", in Ogilvy Renault, La construction au Québec: perspectives juridiques (1998), 45. The author notes that after the conclusion of an agreement between Ontario and Quebec, the National Assembly amended the Construction Act and other laws and regulations, S.Q. 1995, c. 8. These agreements dealt directly with interprovincial mobility problems (at p. 62):

> [TRANSLATION] The amendments removed the requirement that a contractor maintain a place of business in Quebec and enabled the journeyman apprentice or the apprentice from another province to work in any region in Quebec of his or her choosing.

See also pp. 72-73.

¶ 238 The work pool system does not appear to have been an inflexible mechanism that created an impenetrable wall in the industry. If it was a wall, the statistics seem to point to a conclusion that it has proven rather porous. A substantial potential for mobility has now been built into it.

O. Policy Considerations

¶ 239 The question at stake in this appeal should thus be left to the political process. Such a solution would be consistent with the jurisprudential attitude of the Court that was summarized above. It retains a balance in the application of the Charter. It leaves the legal management of labour relations to Parliament and legislatures as well as to the parties to labour agreements, as the majority of the Court has held consistently since the labour law trilogy of 1987. The management of labour relations requires [page340] a delicate exercise in reconciling conflicting values and interests. The relevant political, social and economic considerations lie largely beyond the area of expertise of courts. This limited and prudent approach to court interventions in the field of labour relations reflects a proper understanding of the functions of courts and legislatures. In the application of the Charter, it also avoids characterizing any kind of governmental action in support of human rights as a prima facie infringement of the Charter that would have to be justified under s. 1.

P. Comparative Law Aspects

¶ 240 In the Lavigne case, after considering the experience of the United States and Europe, the Court rejected the path taken by American jurisprudence and by some judgments of the European Court of Human Rights. It found that the nature of the constitutional guarantee of freedom of association found in the Charter and the particular Canadian experience in the field of labour relations warranted a different approach and distinct solutions.

¶ 241 In their pleadings, the appellants put great emphasis on a comparative law argument based on American jurisprudence and on their interpretation of European case law. I will now turn briefly to this comparative law argument. I will first consider the American jurisprudence and then some European case law.

(1) American Jurisprudence

¶ 242 As explained by Dickson C.J. in Reference re Public Service Employee Relations Act (Alta.), supra, at pp. 344 et seq., the American Constitution does not explicitly protect the freedom of association. This right is seen as primarily derived from the First Amendment, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the [page341] press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

¶ 243 The United States Supreme Court has also cited the liberty and due process clauses of the Fifth and the Fourteenth Amendments and even the Ninth Amendment in generating a constitutional freedom to associate. Nevertheless, the source of the right to associate was usually to be found in the First Amendment, as a corollary of freedom of speech.

¶ 244 While the United States Supreme Court has been willing to recognize a right not to associate, also based on the rights of free speech and belief, the history of its jurisprudence shows that the court has not invalidated every form of compelled association. It has attempted to draw a distinction between traditional union functions and political activities and has sought to protect the right of individual members to restrict the

use of their dues in respect of causes they disapprove of. A more exhaustive review of this jurisprudence would not be useful, and I will only outline its most important features.

¶ 245 The Supreme Court refused to invalidate the provisions of a state constitution that restrained or prohibited some forms of closed shop or union shop (Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); American Federation of Labor v. American Sash & Door Co., 335 U.S. 538 (1949)). On the other hand, the court found that the provisions of the Railway Labour Act which authorized a form of union shop did not infringe the First Amendment, absent evidence that it deprived employees of their freedom of thought and conscience: Railway Employes' Department v. Hanson, 351 U.S. 225 (1956), at p. 238.

¶ 246 In a later case, it held that the compulsory withholding of union dues from wages was only a device to compel otherwise "free riders" to share in the cost of negotiating and administering collective agreements. Yet such compulsory [page342] dues should not be used to compel employees to support causes that they oppose: International Association of Machinists v. Street, 367 U.S. 740 (1961). (See also Brotherhood of Railway and Steamship Clerks v. Allen, 373 U.S. 113 (1963).) In Abood v. Detroit Board of Education, 431 U.S. 209 (1977), the Supreme Court revisited the problem of the relationship between compelled union support and the guarantee of freedom of speech and opinion. On this occasion, it examined the validity and effect of an agency-shop clause similar to the Rand formula whereby every employee represented by the union, whether he or she had joined it or not, had to pay it a service fee equal to union dues. A group of employees objected to the enforcement of this provision. In their view, such a provision deprived them of their freedom of association protected by the First Amendment. They asserted that they were opposed to the payment of union dues to unions as well as to collective bargaining in the public sector and objected to various social and political activities carried on by their union. A majority of the Supreme Court held that the obligation to join the union was constitutionally justified "by the legislative assessment of the important contribution of the union shop to the system of labour relations established by Congress" (p. 222, per Stewart J.). Union dues could be exacted as long as they were used for collective bargaining, contract administration and grievance-adjustment purposes. Beyond that, the obligation to contribute to causes that members disapproved of violated their freedoms of association, speech and belief protected by the First Amendment.

¶ 247 Since Abood, a recurrent problem in the application of union-agency clauses has remained the proper delineation between core union functions and more peripheral activities, as dues may be collected from unwilling employees only for the traditional collective bargaining purposes. This analysis has required the creation of subtle distinctions within the broad range of possible union activities. [page343] Dissenting employees are now entitled to a procedure that mitigates the infringement of their First Amendment rights by preventing the use of their contributions for impermissible purposes (see Ellis v. Brotherhood of Railway, Airline & Steamship Clerks, 466 U.S. 435 (1984); Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986); Communications Workers of America v. Beck, 487 U.S. 735 (1988); Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991)).

¶ 248 This Court has already chosen to diverge from the American approach taken to the right not to associate. Unlike in the United States, the Lavigne case held that a statutory system which allows for compulsory union dues is justified, even when the union spends the money for causes other than "traditional" union purposes, and even when some dues payers oppose some of the causes supported.

(2) The Jurisprudence of the European Court of Human Rights

¶ 249 My colleague Bastarache J. relies on the text of several international instruments to support the wide scope he gives to the negative freedom to not associate. An examination of the judicial interpretation of one of these instruments indicates that a negative right has been adopted but with limits. The appellants also invoked a number of judgments of the European Court of Human Rights. Like the Charter, the European Convention for

the Protection of Human Rights and Fundamental Freedoms affirms the existence of a broad right of association without expressly acknowledging the presence of a negative mirror component.

Article 11

> (1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and [page344] are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

¶ 250 Nevertheless, despite this silence of the Convention, since Young, James and Webster, Eur. Court H.R., judgment of 13 August 1981, Series A No. 44, the European Court has moved towards a recognition of the right not to associate as a necessary component of the guarantee of freedom of association under art. 11(1) of the Convention. In this case, in the opinion of the court, a union shop arrangement which imposed ideological conformity under the threat of dismissal from employment infringed art. 11 of the Convention and was not held to be justifiable. The court, nevertheless, held that not all forms of compelled association were inconsistent with art. 11. For example, a public interest law compelling doctors to join a professional regulatory body did not engage the guarantee of freedom of association (Le Compte, Van Leuven and De Meyere, Eur. Court H.R., judgment of 23 June 1981, Series A No. 43). In Sigurjonsson v. Iceland, Eur. Court H.R., judgment of 30 June 1993, Series A No. 264, the court clearly accepted that a right not to associate should be read into the guarantee of art. 11(1). In that case, it found that the legislative obligation to join a taxi-driver's union infringed the guarantee of freedom of association. It viewed this compulsion as a violation of the freedom of opinion of the complainant. On the other hand, the court held that art. 11 did not grant an employer the right to refuse to enter into a collective agreement as required by the relevant national legislation (Gustafsson v. Sweden, Eur. Court H.R., judgment of 25 April 1996, Reports of Judgments and Decisions 1996-II). In a recent judgment, outside the sphere of labour relations, an obligation to join hunter associations under a French law was declared invalid. On this occasion, the court reasserted the existence of the negative component of the guarantee of freedom of association (Chassagnou and Others v. France [page345] [GD], Nos. 25088/94, 28331/95 and 28443/95, ECHR 1999-III).

¶ 251 It must be understood, as well, that the European Convention is applied in a legal environment that reflects a different history of labour relations than in Canada or Quebec, in particular. The structures and methods of collective bargaining, the patterns of union organization and their status within the enterprise all differ deeply from the Canadian experience in the development of labour law and the management of labour relations. These labour systems may reject the principle of monopoly representation by a particular union or forms of union security like the union shop and the compulsory check off of union dues. On the other hand, the right to strike may be affirmed by the constitution itself, as in France. (See A. Mazeaud, Droit du travail (2nd ed. 2000), at pp. 204-5.) Many European nations recognize the broad societal role which unions play, and have entrenched union rights to participate in the management of private commercial and industrial enterprises. (See M. Weiss, "Workers' Participation in the European Union", in P. Davies et al., eds., European Community Labour Law: Principles and Perspectives (1996), 213; B. Bercusson, European Labour Law (1997), at pp. 248-61.) The labour laws of a country evidence a social and political compromise about the place of unions in that society and the proper balance between unions and employers. Thus, interesting as it may be, the consideration of European jurisprudence is not determinative, although it confirms an interpretation whereby a limited right to refuse to associate should be read into s. 2(d) of the Charter.

Q. The Justification of the Limitation

¶ 252 In the present case, the appellants have not made out a case that the challenged legislation establishes a form of ideological conformity that would trigger the application of s. 2(d). Moreover, [page346] the compulsion to join a union in this case is carefully embedded in a democratic process which safeguards each member's right to support or withdraw support from a particular union at regular intervals. Therefore I find no breach of the freedom to associate as protected under s. 2(d) of the Charter. Given this conclusion, it is not necessary to discuss the application of s. 1 of the Charter and the constitutional question should be answered in the negative. Nevertheless, I am willing to assume that an infringement of a constitutional right not to associate occurred in order to further address the justification of the law under s. 1 and to demonstrate that, even if it had infringed the s. 2(d) right not to associate, the law would still pass full constitutional scrutiny.

¶ 253 The state bears the onus of justifying a law which infringes the Charter. The state must comply with three requirements. It must first establish that the limitation of the freedom is prescribed by law. The law must then address pressing and substantial objectives. It must finally be shown to be a proportionate and measured response to this societal need. This third requirement is further subdivided into three components. The law must be rationally connected to the state's objectives. The means chosen must impair the right as little as possible. Finally, the advantages arising out of the law must outbalance its negative effects. (See Oakes, supra; Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203, at paras. 21 and 97 et seq.; Egan v. Canada, [1995] 2 S.C.R. 513, at para. 182; Sharpe, supra, at para. 78, per McLachlin C.J.)

¶ 254 The appellants argued that the mis en cause has not succeeded in her attempt at justification, in particular by failing to demonstrate any rational connection between compelled union membership and the objective of peace, stability and efficient operations in the construction industry. Moreover, even if such a rational connection had been demonstrated, they added that the means chosen fail the proportionality test.

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¶ 255 In any s. 1 analysis, courts must identify the objectives of the impugned law with care. (See RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199.) The purposes of the legislation at the time of its enactment must be fully identified to make sure that they remain consonant with Charter values (R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at p. 331). Furthermore, the state must justify the specific infringing measure, not simply the law as a whole. (See RJR-MacDonald, per McLachlin J., at paras. 143-44.) At the same time, however, the analysis should not be carried out in a vacuum. The place and function of the challenged provisions in the legislative scheme must be carefully identified. The nature of the system and its broader objectives have to be kept in mind. The analysis should not consider the infringing provision apart from its legislative context. (See Vriend v. Alberta, [1998] 1 S.C.R. 493, at paras. 101-3.)

¶ 256 In the case at bar, the Court is considering legislative rules situated within a complex social and economic environment. At the time of the law's adoption, the government was mediating as a policy maker, between different and, at times, conflicting groups. It did not act as the antagonist of an individual who complains that his or her rights have been infringed. (See Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, at pp. 993-94; R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, at p. 779.)

¶ 257 Legislatures are entitled to a substantial, though not absolute, degree of latitude and deference, to settle social and economic policy issues (RJR-MacDonald, at para. 134, per McLachlin J.). Courts should be mindful to avoid second-guessing legislatures on controversial and complex political choices (M. v. H., [1999] 2 S.C.R. 3, at para. 79, per Cory and Iacobucci JJ.). As discussed above, the jurisprudence acknowledges that legislative policy-making in the domain of labour relations is better left to the political process, as a general rule.

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¶ 258 The first stages of the justification procedure do not need much discussion. The limits are prescribed by law. The law also addresses a pressing and substantial purpose, as emphasized above. The history of the legislation demonstrates that the National Assembly of Quebec tried to address problems that had become a pressing social and economic issue, which led to a process of trial and error that lasted for several years. Indeed, it is still going on. (See evidence of Réal Mireault, Attorney General's Record, at p. 116. See also G. Hébert, Labour Relations in the Quebec Construction Industry, Part I: The System of Labour Relations (1977), at pp. 9-64; Rapport de la Commission sur la stabilisation du revenu et de l'emploi des travailleurs de l'industrie de la construction (1990) ("report of the Picard-Sexton Committee"), at pp. 29 and 44-45.)

R. Justification

¶ 259 It is inaccurate to paint the pressing and substantial objective of the impugned law as merely an historical justification predating the Charter. First, the advent of the Charter has required throughout Canada an extensive reassessment of the legislation then in place. When called upon to rule on a challenge to a law's constitutional validity, courts have had to measure that law to the standards and constitutional values of the Charter. At the same time, the analysis of the law requires a full consideration of its sources and of its place in the evolution of the legal system. The law flows from our past experiences, in its failures and disappointments, trials and successes. It is grounded on a wealth of historical developments and human experience that the Charter does not command the courts to discard. On the contrary, the Charter is itself an expression of our traditions, of our debt to them as well as of the evolving values of our society, and the need to accommodate those values in the development of our legal system.

¶ 260 The Charter represents a stage in the development of the law, not a cut-off date where everything begins completely anew. In this respect, the evidence offered by the mis en cause demonstrates [page349] the remarkable continuity of the nature and problems in the construction industry. This evidence was brought up to date within the limits and constraints inherent in the nature of evidence in social policy issues. It must also be recalled that it was presented in relation to the issues framed by the appellants themselves and which are reflected by the constitutional questions stated by this Court. Without going back to the entire record and the history of the legislative and regulatory system put in place at this point, the overarching purpose of the legislature had become the stabilization of a major industrial sector. To this end, an appropriate collective bargaining system had to be created to fit the needs of the industry. In order to further this purpose, union democracy amongst some labour groups had to be reinstated, maintained and fostered. The problem of competency of contractors, as well as of the work force, had to be addressed. Moreover, the legislature sought to assure a degree of employment stability to construction workers.

¶ 261 The means chosen by the legislature have been discussed at length in these reasons, but I will return to them. A system of centralized labour relations with recognized bargaining agents was set up. Bargaining agents were recognized and a mechanism of assessment of their representativeness was put in place. Meanwhile, the National Assembly sought to address the problem of the competency of the work force and of the contractors. The instability of employment, at the same time, remained the concern that the creation of employment preferences sought to address.

¶ 262 A rational connection existed between these measures and their goal. The voting procedure constituted the fairest and most effective way to determine the representativeness of unions. The obligation to join them demonstrated the will to involve workers in the management of their association, to foster and increase their participation in union life and in their decisions, after a period where democratic values had often been flouted by some local unions. The legislature viewed this form of security as a better instrument to maintain and develop democracy than the Rand formula, under [page350] which workers pay for services and have no say on the most important issues concerning the association and its members.

¶ 263 The measures represent a considered policy choice which every government has had to reassess in Quebec since 1968. As appears from the record filed by the Attorney General, the Cliche Commission

reviewed the system then in place in 1974 and 1975. In 1978, a new administration asked a committee (the C.E.R.L.I.C.) chaired by Professor Gérard Hébert, then a well-known specialist in labour relations problems, to reexamine the legislative framework. In 1990, a committee chaired by Professor Jean Sexton and Mr. Laurent Picard revisited the problem of employment stability and preferences which Justice Alan Gold had examined some 20 years before that at the request of another government. In 1993, a Sommet de l'industrie was organized by the Quebec government. In 1994, the residential sector was partly deregulated. In 1995, a new government brought it back under the Act, although the industry was now divided into four sectors: commercial, industrial, public works and residential. Since 1993, measures have been put in place to improve interprovincial contractor and employee mobility. (See Dunberry, supra.) Although some of these developments postdate the beginning of this litigation, they bear witness to the constant attention given to the problems of the industry and the relevance of the measures taken to address them.

¶ 264 Over the last 30 years, despite all the changes which have occurred in the industry, its basic characteristics and problems have remained fundamentally the same. In 1968, Professor Dion wrote:

> Workers and contractors are affected by the characteristics of the industry: sectionalization, specialization, precariousness, mobility, instability and insecurity. It is not surprising that disputes should arise in the field of [page351] labour relations, not only between workers and employers but also among the workers themselves.

(See G. Dion, "Jurisdictional Disputes", in H. C. Goldenberg and J. H. G. Crispo, eds., Construction Labour Relations (1968), 333, at p. 336. See also C. Leclerc and J. Sexton, La sécurité d'emploi dans l'industrie de la construction au Québec: un rêve impossible? (1983), at pp. 26-27.) In 1978, the C.E.R.L.I.C. again noted the problems caused by the structural characteristics of the industry. In 1990, the report of the Picard-Sexton Committee emphasized once more the instability of employment in the industry, the mobility of its work force and the very small size of most employers. Its report commented that in 1988, 110,530 workers had worked within the industry. On the other hand, there were more than 17,000 registered contractors (pp. 16-17).

¶ 265 As it still does, the construction industry played a major role in the economy and development of the province. Its labour relations were constantly in turmoil for several years. Union democracy was in peril. It had become difficult to set up a workable system of collective bargaining. A resolution of these difficulties involved both the establishment of the representative status of labour unions as well as the safeguarding of union democracy. The National Assembly of Quebec sought, in this way, to address the objective of establishing peace and economic efficiency in the industry. Given the nature of these difficulties, the provisions involving the selection of a bargaining representative, the obligation to choose among a limited number of union groups and compulsory financial support were related to this objective. They attempted to create a workable mechanism to establish the representativeness of unions while safeguarding union pluralism. There is no evidence that any active employee association in the industry was left out of the process. On the contrary, the Legislature usually tried to take into account the numerous changes in the organization of the labour groups. In this manner, these measures directly aim to further important social and economic purposes (Canada (Human Rights [page352] Commission) v. Taylor, [1990] 3 S.C.R. 892, at pp. 925-26; Lavigne, at p. 291).

S. Minimal Impairment and the Balancing of Effects

¶ 266 The core issue in the s. 1 analysis in this case lies in the application of the minimal impairment test. The appellants argue that there is nothing like this Quebec legislation anywhere else in Canada. Other less stringent measures that respect the right not to join a union are thus possible, they submit.

¶ 267 Courts must keep in mind that the minimal impairment test must not be applied too literally. It does not eliminate any margin of discretion in the selection of the appropriate legislative measure. Especially in the realm of social and economic policy, it does not remove the need for a degree of deference toward legislative

choices. Courts have been mindful of the need for such an approach in the field of labour relations. (See U.F.C.W., Local 1518 v. KMart Canada Ltd., [1999] 2 S.C.R. 1083, at para. 62; Reference re Public Service Employee Relations Act (Alta.), at pp. 391-92 and 420.)

¶ 268 The minimal impairment test does not require that government demonstrate that the measure adopted is the least intrusive possible. The effects of legislative choices, especially in the realm of social and economic policy, remain hard to assess. The best social science evidence will seldom allow for more than an informed guess as to the effect of legislation. As a result, our Court has often stated the need for reasonable assessment of the means used to reach the legislative objectives (Ross v. New Brunswick School District No. 15, [1996] 1 S.C.R. 825; R. v. Chaulk, [1990] 3 S.C.R. 1303; Libman, supra, at paras. 59 and 62; Eldridge v. British Columbia (Attorney General), [1997] 3 S.C.R. 624, at para. 85, per La Forest J.; M. v. H., supra, at para. 79; Little Sisters Book and Art Emporium v. Canada (Minister of Justice), [2000] 2 S.C.R. 1120, [page353] 2000 SCC 69, at paras. 68 and 198). An author recently characterized the nature of the evidence required as being A [TRANSLATION] "reasonable correlation between the phenomenon to be regulated and the harmful effects attributed to it" (J.-F. Gaudreault-DesBiens, Le sexe et le droit: Sur le féminisme juridique de Catharine MacKinnon (2001), at p. 91).

¶ 269 Moving to the weighing of beneficial versus detrimental effects of this labour relations scheme, at this stage of the Oakes test, the construction industry cannot be put under a microscope. As of now, no computer may foresee the impact of alternative policy choices. In the present case, the Court must also review a complex legislative scheme under circumstances where a degree of deference is due to the legislature, given that the problems of the industry are ongoing, and that its nature has not changed substantially over the last 30 years. One fact, at least, is known -- that the system put and kept in place seems to work reasonably well. It may certainly inconvenience some people who try to enter the industry or would prefer an unregulated or non-unionized environment. At present, though, there is no such thing as a constitutional right to a non-regulated and non-unionized business environment.

¶ 270 As discussed above, the Quebec construction industry is undoubtedly highly regulated. Nevertheless, the overall scheme works and allows for a degree of mobility of the work force, and seems to meet the manpower needs of the industry. Particular measures challenged in this appeal fall within this scheme. It must be noted, also, that, if given a reasonable interpretation, these provisions do not forbid union membership either before, during or after the reference period set out in the Act, and do not infringe the positive aspect of the constitutional guarantee. They represent a carefully tailored response to problems met by the industry and their advantages outweigh such inconveniences as they may cause. The requirement of compulsory membership must be put in context. It sought to facilitate an assessment of union representativeness, which [page354] was critical for the proper operation of the collective bargaining system in the construction industry. It also sought to address a problem of democratic management in a number of labour unions. When it chose a technique of compulsory membership, at the same time, the legislature balanced this obligation with a number of measures designed to enhance and protect the democratic life of the unions. A choice was offered among all union groups active within the industry. These groups, moreover, cannot refuse workers applying to join them (s. 94). Union constitutions and by-laws must meet the requirements set forth in ss. 95 and 96. Elections of union officers, strike votes and approval of collective agreements require a secret vote. The right to dissent is affirmed and protected at any union meeting and vote (s. 96(2)(b)). Union members are entitled to detailed financial statements and reports. No discrimination is allowed against a worker who becomes a member of another union (s. 102). Penal provisions reinforce the implementation of these rules.

¶ 271 The system also intends to give a limited degree of protection to construction workers against unemployment or, at least, to create more stability in the job market. As appears from the statistical reports of the Commission de la construction, these measures do not seem to prevent labour mobility. As a policy choice, it does not seem unreasonable to try to develop a system of regional preferences which addresses the tension between the provincial nature of parts of the construction industry and its highly local character in other sectors. Also, this system does not seem to impede unduly labour mobility within the regions and the

province. The opportunity to join a union in the context of this industry and the ability to participate in all its decisions involving its labour relations system in the orientation of the union also seems a reasonable option.

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¶ 272 In the environment of the construction industry, considering its experience, this legislative choice offers more advantages than disadvantages. Therefore, even if the law breaches a negative right of freedom to associate, it would thus be justified under s. 1. Reasonable measures were adopted to reach the objectives of the legislature and have proven well attuned to the concerns of the industry for many years.

¶ 273 Labour relations involve diverse and conflicting interests. Labour legislation is a regular object of political debate. Governments must balance the interests of competing groups that often target completely different objectives. In its search for a stable labour relations regime in the construction industry, the Quebec legislature, during a period of several years, adopted the system which is challenged. It created a fully unionized and centrally controlled multi-trade collective bargaining structure. The labour standards negotiated through this process are deemed to be rules of public order which bind the parties, employees as well as employers in the province. Unions have lost all legal control over hiring which has been brought under the jurisdiction of a public body, the Office de la construction, which also enforces labour standards. In addition, the Commission manages a system of vocational certification. The employers are also subject to a general system of professional qualifications applicable to all trades in the industry.

¶ 274 Other provinces have adopted different systems, but some have moved gradually toward centrally controlled bargaining structures. (For example, see Adams, supra, at pp. 15-43 to 15-53.) The province of Quebec set up its system of centralized bargaining at an earlier time and gave it a more expansive application. (See Adams, supra, at pp. 15-43 to 15-45.) The presence of an obligation to choose among several unions seems also specific to Quebec.

¶ 275 In general, differences between legislative approaches to similar problems are part of the very [page356] fabric of the Canadian constitutional experience. Provincial differences must be factored into any proper analysis of the concept of minimal impairment, when assessing the validity of provincial legislation. Our Court in the Quebec Secession Reference (Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at paras. 55-60), acknowledged again the foundational nature of the principle of federalism in Canada. In a system of divided legislative authority, where the members of the federation differ in their cultural and historical experiences, the principle of federalism means that the application of the Charter in fields of provincial jurisdiction does not amount to a call for legislative uniformity. It expresses shared values, which may be achieved differently, in different settings.

¶ 276 In the context of the life and history of every Canadian province and region, this Court's approach to the values of Canadian federalism accepts the legislative solutions specific to each province. The Court should give close attention to the context and factual background that led to the adoption of the impugned legislation as well as to its overall effect.

¶ 277 Viewed in the context of the particular historical experience of Quebec's labour relations, the law meets the minimal impairment test. This limited form of compelled association respects fundamental democratic values. It requires only a limited commitment from construction employees. They must choose a collective bargaining agent. The legislation gives them a choice among five union groups. It appears that no new group has been left out of the process. The law also calls upon construction employers to support the chosen approach. Nothing more is imposed by the law.

¶ 278 As we have seen above, the Construction Act imposes strict obligations on unions in respect of internal democracy. Any form of employment discrimination is also forbidden. The whole process of hiring

has been entirely removed from union control. The Quebec legislation has completely [page357] stripped Quebec unions of the traditional powers they held in this respect. Through a difficult process of legislative experimentation, the legislation has reestablished a degree of peace and union democracy in the Quebec construction industry. These advantages clearly outweigh their limited impact upon the asserted negative right to not associate.

¶ 279 The Court is called upon to consider the validity of a complex legislative scheme, born out of a history of attempts, failures and disappointments. At the time the present litigation started, this legislation presented the result of about 30 years of legislative work to create a proper system of collective bargaining in the industry. This process of adjustment has continued since the beginning of the present litigation. Indeed, the appellants are now challenging legislative provisions which have been substantially altered since the charges were laid. A considerable degree of deference is due to the legislature and the difficulties inherent in the art of government in such a traditionally fractious environment. Court intervention might affect sensitive aspects of a carefully balanced scheme and is not warranted in the circumstances of this case.

¶ 280 I thus propose that the appeal be dismissed. The constitutional questions should be answered in the negative as follows:

1. Do ss. 28-40, 85.5, 85.6, 119.1 and 120 of an Act Respecting Labour Relations, Vocational Training and Manpower Management in the Construction Industry and s. 23 of the Regulation respecting the election of a representative association by the employees of the construction industry restrict the guarantees of freedom of association under s. 2(d) of the Canadian Charter of Rights and Freedoms?

   No.

2. If so, is the restriction justified under s. 1 of the Charter?

   No need to answer.

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The following are the reasons delivered by

¶ 281 IACOBUCCI J.:-- I have read the lucid reasons of my colleagues in this appeal and I find myself in an unusual situation. Like Bastarache and LeBel JJ., I disagree with L'Heureux-Dubé J. that the freedom of association guaranteed by s. 2(d) of the Canadian Charter of Rights and Freedoms does not encompass a negative right to be free from compelled association. Such a negative right was found by a majority of the Court in Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211. I am also of the view that this right is infringed by the legislation at issue in the present appeal. Although Bastarache J. shares this opinion, I would adopt an approach that differs from the one that he relies on to find a s. 2(d) violation. Furthermore, in contrast to Bastarache J., I find that this constitutional breach can be justified under s. 1 of the Charter. Therefore, for the reasons that follow, I would concur with the disposition reached by L'Heureux-Dubé and LeBel JJ., and I would therefore dismiss this appeal.

¶ 282 According to both Bastarache and LeBel JJ., the proper test for determining whether there has been a violation of the right to be free from compelled association is whether the legislation at issue imposes a form of "ideological conformity". Accordingly, where the requirement of membership in a group forces the members to associate involuntarily with certain ideas or principles, the negative freedom not to associate within s. 2(d) has been breached. However, while Bastarache and LeBel JJ. generally agree on the applicable analytical framework, their views differ in respect to its application in the present appeal. LeBel J. recognizes that the Act

Respecting Labour Relations, Vocational Training and Manpower Management in the Construction Industry, R.S.Q., c. R-20 (the "Construction Act") requires construction workers to join union groups, but qualifies this as a very limited obligation, stating that it "boils down to the obligation to designate a [page359] collective bargaining representative, to belong to it for a given period of time, and to pay union dues" (para. 218). Further, LeBel J. stresses that there is a lack of evidence to demonstrate that the union groups involved in the present appeal impose specific ideological tenets or values on their members. This is the critical factor which leads to his determination that the provisions of the Construction Act do not infringe the freedom from compelled association under s. 2(d) (see para. 220).

¶ 283 In contrast, Bastarache J. finds that this legislation does involve ideological coercion. His view in this regard is premised on an analysis which demonstrates how Quebec's major union groups have historically adopted particular political positions. As a result, these groups have moved beyond the mandate of protecting employees within the workplace to the larger political sphere, where they have associated themselves with and promoted specific social and economic views. Bastarache J. thus maintains that compulsory membership in such politicized union groups is a form of ideological coercion, which gives rise to a violation of s. 2(d) (see paras. 27-29).

¶ 284 Unlike my colleagues Bastarache and LeBel JJ., I have serious reservations about basing the analysis of the negative right within s. 2(d) on an inquiry principally into whether the state has obliged the adoption of a certain ideology. While such an approach was employed by McLachlin J. (as she then was) in Lavigne, it has never been adopted by a majority of this Court. As such, I find the basis for relying on the "ideological conformity" criterion in assessing an alleged violation of the s. 2(d) right not to associate somewhat unclear. Further, because this test is so elusive and abstract, it will be difficult to apply in a consistent, clear and meaningful way. In what types of activities must an association engage for there to be "ideological conformity"? Is it enough for the group to donate funds to a particular cause or effort on one occasion or more; if the latter, how many? What if its leaders support a political party or personality, or take a clear stance on an issue that is at the [page360] heart of social controversy? These questions will rarely, if ever, generate a unanimous or unequivocal response, given the subjectivity embedded in the "ideological conformity" test, and the varying degrees to which one might perceive that certain morals or beliefs are being imposed.

¶ 285 In preference to the "ideological conformity" test, I would adopt an analysis that construes the negative freedom within s. 2(d) more broadly. That is, I would endorse the analytical framework set out by La Forest J. in Lavigne. According to La Forest J., where the state obliges an association of individuals whose affiliation is already "compelled by the facts of life" (such as in the workplace), and the association serves the common good or "further[s] the collective social welfare", s. 2(d) will not be violated unless the forced association imposes a danger to a specific liberty interest. Although the imposition of "ideological conformity" was one of the threats to liberty that La Forest J. identified, he also recognized other potential dangers. In particular, he noted the possible impairment of an individual's freedom to join or associate with causes of his or her choice, the likelihood that a member would be identified with causes the association supports, and the potential for governmental establishment of, or support for, particular political parties or causes (Lavigne, at pp. 328-29).

¶ 286 According to this view, it seems to me that where legislation compels the association of professional or skilled organizations, in which membership must be acquired to carry on one's profession or trade, such state action generally will be constitutionally valid. This is primarily because membership in the association is integral to, and serves as a reflection of, the member's work capabilities and/or professional status. Further, this structure created by the legislation will serve the public interest. Thus, unless it can be shown that the compelled association seriously undermines an individual's liberty interests, the guarantees [page361] afforded by s. 2(d) will have been respected in such circumstances.

¶ 287 The legislation at issue in the present case, however, is quite different and is unique in Canada insofar as its compelled union membership is concerned. Most notably, within the terms of the legislation, it fails to

provide any justification for the compelled union association that it envisages for Quebec's construction industry. Membership in union groups is not contingent upon any competency requirements and thus, there is no public assurance that workers within these groups will have the necessary skills and abilities to carry out their trade. As a result, I am of the view that the state-imposed association established by the Construction Act does not promote the common good, or "further the collective social welfare" within the context of s. 2(d) of the Charter.

¶ 288 Furthermore, I believe that the provisions of this legislation impair the appellants' liberty interests. The present appeal involves construction workers in Quebec who have no choice but to unionize in order to carry out their work. Their liberty is further restricted by the fact that they must become members of one of five union groups that have been specifically accepted by the state. In my view, these factors provide a clear indication that the legislative scheme established by the Construction Act results in a serious impairment of individual liberty interests. In particular, it requires that even those morally opposed to union membership belong to such an association, and it limits the individual's freedom to join the association of his or her choice.

¶ 289 For these reasons, I am of the view that the Construction Act does not pass constitutional muster when assessed through the lens of s. 2(d), as interpreted by La Forest J. in Lavigne. This being the case, it becomes necessary to examine whether this constitutional infringement can be saved under s. 1 of the Charter.

¶ 290 Although LeBel J. found that the Construction Act did not violate the right to be free from compelled association under s. 2(d), he proceeded to consider the application of s. 1 of the Charter. He [page362] concluded that even if the legislation restricted the appellants' constitutional guarantees, it was justified under s. 1. I agree with this part of LeBel J.'s analysis. In particular, I share his view that the Construction Act was adopted within a unique and complex historical context, and served to promote distinct social and economic objectives that were, and remain, pressing and substantial. Further, based on the reasoning of LeBel J., I am of the view that the legislation is rationally connected to these objectives, it minimally impairs the freedoms guaranteed under s. 2(d), and its benefits outweigh its deleterious effects.

¶ 291 For all of the foregoing reasons, I believe that the Construction Act may remain in force, and I would dismiss the appeal. Accordingly, I would answer the constitutional questions as follows:

1. Do ss. 28-40, 85.5, 85.6, 119.1 and 120 of an Act Respecting Labour Relations, Vocational Training and Manpower Management in the Construction Industry and s. 23 of the Regulation respecting the election of a representative association by the employees of the construction industry restrict the guarantees of freedom of association under s. 2(d) of the Canadian Charter of Rights and Freedoms?

   Yes.

2. If so, is the restriction justified under s. 1 of the Charter?

   Yes.

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QL Update: 20011019
cp/e/qllls