LabourWatch Summary of

Lavigne v. Ontario Public Service Employees Union ([1991] 2 S.C.R. 211)

Executive Summary

This case dealt with a challenge to the Colleges Collective Bargaining Act because of its incorporation of the Rand formula whereby an employer deducts a portion of the wages of all unionized employees in a bargaining unit, union Members or not, to go to the union as union dues ("checkoff") and in particular, what the union uses these dues for. The issue was the use of dues for purposes such as support for political parties or causes in Canada and other countries that the unionized employee objected to being associated with via his dues.

Ultimately the Court upheld the union's ability to collect full dues from non-Members of a union in a unionized workplace and the union's ability to use dues for political and other purposes that the individual employee might be opposed to.

Summary

Francis (Merv) Lavigne had been a teacher at a provincial post secondary educational institution – a community college in Ontario. Lavigne had not voluntarily become a Member of the Ontario Public Services Employees Union ("OPSEU") and at the time, the Collective Agreement did not require him to become an OPSEU Member as a condition of employment. However, he was still required to pay fees (dues) to the union pursuant to, what is known in Canada as the Rand formula.

Under OPSEU's constitution, it was allowed to use the dues towards the advancement of the "common interests, economic, social and political, of the members and of all public employees, wherever possible, by all appropriate means". OPSEU put some of the money towards interests such as disarmament campaigns, the very militant National Union of Mine Workers in the United Kingdom, a health care workers' union in Nicaragua, and sponsored events for the New Democratic Party – a Canadian political party at federal and provincial levels of government that pursues socialist principles.

The practice was and is still not unusual for unions across Canada, but Lavigne opposed many of the causes supported by OPSEU with what he saw as his money. He brought an application for declaratory relief against the union on the basis that the *Colleges Collective Bargaining Act*, which gave the union the power to allocate funds to causes of their choosing, violated his right under the Canadian Charter of Rights and Freedoms, to freedom of association under section 2(d) and under 2(b) his freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication of the *Charter*.

The Decision

The Court unanimously held that the *Charter* did apply because in this case the obligation to pay dues can be attributed to government. However, it also decided not to grant Lavigne the relief requested, but for varying reasons. Lavigne is a very difficult decision to read because there are four separate judgments. It appears that the court was very divided in its rationale.

Some observers say that the majority decision held there was a violation of Lavigne's freedom of association (section 2(d) of the *Charter*) - that the Rand formula interferes with the freedom from compelled association – what is generally known in international human rights terms as the negative right of non-association. However, the majority ruled that such interference was justified under section 1 of the *Charter*. The majority decision held that the use of the union dues did not constitute forced expression, and so there was no violation of the freedom of expression.

Section 1 states:

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.

The minority decision held that there was no violation at all, but if there was it would be saved under Section 1. The minority decision disagreed with the majority by finding the use of the union funds did have expressive content, but the payments did not imply that Lavigne supported any of the union's causes and did not prevent him from expressing his own personal views. Accordingly, there was no violation of the freedom of expression.

Lavigne is often cited for establishing the negative right not to associate as a *Charter* right in Canada. Specifically, the majority judgment states: "Recognition of the freedom of the individual to refrain from association is a necessary counterpart to meaningful association in keeping with democratic ideals. Thus, freedom from forced association and freedom to associate should not be viewed in opposition, one "negative" and the other "positive". They are not distinct rights, but two sides of a bilateral freedom which has as its unifying purpose the advancement of individual aspirations."

LabourWatch Commentary

In 2007, Canada increasingly stands alone in the world in allowing such violations of employee rights of non-association and freedom of expression. As a result of judicial rulings or legislation, workers in many countries but particularly all of the European Union, Australia, New Zealand and parts of United States are protected from forced union membership as a condition of employment. As such, unionized employees, who may be a member of a bargaining unit in a unionized workplace, but who do not choose to additionally become Members of the union, either do not pay dues at all or they pay dues that are related to the administration of the collective agreement that governs their employment only and not for other union interests such as the support for political parties and social causes the union leaders choose to support on behalf of their actual Members.

Lavigne was supported in his case by a Member of the Canadian LabourWatch Association – the National Citizen's Coalition. Many unions succeeded in getting intervenor status and in the end the Court also awarded costs to the unions that represented hundreds of thousands of dollars that the NCC raised and paid on Lavigne's behalf.

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

Francis Edmund Mervyn Lavigne *Appellant*

v.

Ontario Public Service Employees Union and Ontario Council of Regents for Colleges of Applied Arts and Technology *Respondents*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, Canadian Labour Congress, Ontario Federation of Labour, National Union of Provincial Government Employees, Confederation of National Trade Unions and Canadian Civil Liberties Association *Interveners*

Indexed as: Lavigne *v.* Ontario Public Service Employees Union

File No.: 21378.

1990: June 18, 19; 1991: June 27.

Present: Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and McLachlin JJ.

on appeal from the court of appeal for ontario

Constitutional law -- Charter of Rights -- Application -- Union entering into collective agreement with community college containing mandatory dues check-off clause -- Employee objecting to expenditure of union dues on causes unrelated to collective bargaining -- Whether Charter applies -- Colleges Collective Bargaining Act, R.S.O. 1980, c. 74, s. 53 -- Canadian Charter of Rights and Freedoms, s. 32(1).

Constitutional law -- Charter of Rights -- Freedom of association -- Union entering into collective agreement with community college containing mandatory dues check-off clause -- Employee objecting to expenditure of union dues on causes unrelated to collective bargaining -- Whether s. 2(d) of Canadian Charter of Rights and Freedoms infringed -- If so, whether infringement justifiable under s. 1 of Charter -- Colleges Collective Bargaining Act, R.S.O. 1980, c. 74, ss. 51, 52, 53.

Constitutional law -- Charter of Rights -- Freedom of expression -- Union entering into collective agreement with community college containing mandatory dues check-off clause -- Employee objecting to expenditure of union dues on causes unrelated to collective bargaining -- Whether s. 2(b) of Canadian Charter of Rights and Freedoms infringed -- If so, whether infringement justifiable under s. 1 of Charter -- Colleges Collective Bargaining Act, R.S.O. 1980, c. 74, ss. 51, 52, 53.

The appellant, a community college teacher, is required to pay dues to respondent Union under a mandatory check-off clause (art. 12) in the collective agreement between it and respondent Council of Regents, the bargaining agent for college employees. Such clauses, which incorporate the Rand formula, are permitted by

s. 53 of the *Colleges Collective Bargaining Act*. The appellant objected to certain expenditures made by the Union such as contributions to the NDP and disarmament campaigns and applied for declaratory relief. The trial judge declared that ss. 51, 52 and 53 of the *Colleges Collective Bargaining Act* and the provisions of the collective agreement were of no force and effect in so far as they compelled appellant to pay dues to the union for any purposes not directly related to collective bargaining. He found that the *Canadian Charter of Rights and Freedoms* applied, that appellant's freedom of association guaranteed by s. 2(*d*) had been infringed and that the infringement was not justified under s. 1. There was no infringement of appellant's freedom of expression. The Court of Appeal reversed the judgment. It found that the use of the dues by the Union was a private activity by a private organization and hence beyond the reach of the *Charter*. In any event there had been no infringement of appellant's freedom of association, since he remained free to associate with others and oppose the Union. The court agreed with the trial judge's finding that appellant's freedom of expression was not infringed.

Held: The appeal should be dismissed.

Per La Forest, Sopinka and Gonthier JJ.: The *Charter* applies to this case since the obligation imposed on Lavigne to pay dues can be attributed to government. While it is the collective agreement, not the legislation, which compels appellant to make contributions to the Union, the Council of Regents is an emanation of government. The Minister exercises full control over all the Council's activities, including collective bargaining with college employees, who are Crown employees, and the Council is

therefore a Crown agent. The government, through the Minister, has a power of routine or regular control, and the Council is thus simply part of the fabric of government. Further, the Council's agreement to the inclusion of art. 12 in the collective agreement is, by itself, government conduct. Even assuming that art. 12 was included solely at the Union's request, it is also the result of the Council's undertaking to deduct union dues at source, and the performance of that undertaking must surely qualify as government action. The *Charter* applies to government even when it engages in activities that are in form "private" or "commercial", and the provision and management of the labour force necessary for the provision of public education cannot in any event be considered commercial.

The Rand formula violates s. 2(*d*) of the *Charter* because it interferes with the freedom from compelled association. The essence of the s. 2(*d*) guarantee is protection of the individual's interest in self-actualization and fulfillment that can be realized only through combination with others. The protection of this interest and the community interest in sustaining democracy requires that freedom from compelled association be recognized under s. 2(*d*). Forced association will stifle the individual's potential for self-fulfillment and realization as surely as voluntary association will develop it, and society cannot expect meaningful contribution from groups or organizations that are not truly representative of their memberships' convictions and free choice. Recognition of the freedom of the individual to refrain from association is a necessary counterpart to meaningful association in keeping with democratic ideals. Thus, freedom from forced association and freedom to associate should not be viewed in opposition, one "negative" and the other "positive". They are not distinct rights, but two

sides of a bilateral freedom which has as its unifying purpose the advancement of individual aspirations. Full meaning should be given to s. 2(*d*), even though some aspects of the freedom may be protected by other provisions of the *Charter*; individual rights and freedoms are overlapping rather than discrete. Section 2(*d*) does not provide protection from all forms of involuntary association, however. It was certainly not intended to protect against the association with others that is a necessary and inevitable part of membership in a modern democratic community.

The payment of dues, which is the extent of the appellant's association with the Union, is an associative act within the meaning of s. 2(*d*) of the *Charter*. Dues are used to further the objects of the Union, and are essential to the Union's right to "maintain" the association, an aspect of the freedom to associate recognized under s. 2(*d*) of the *Charter*. The freedom of association of an individual member of a bargaining unit will be violated when he or she is compelled to pay dues that are used to support causes, ideological or otherwise, that do not directly relate to collective bargaining. This is consistent with the generous approach to be applied in interpreting rights under the *Charter*, and derives logically from the premise that the forced association is permissible when the combining of efforts of a particular group of individuals with similar interests in a particular area is required to further the collective good. When that association extends into areas outside the realm of common interest that justified its creation, it interferes with the individual's right to refrain from association. In this case, certain of the Union's expenditures violate appellant's freedom of association as they are not sufficiently related to the concerns of the bargaining unit or to the Union's functions as exclusive bargaining representative.

The limitation on appellant's freedom of association is justified under s. 1 of the *Charter*. The state objectives in compelling the payment of union dues which can be used to assist causes unrelated to collective bargaining are to enable unions to participate in the broader political, economic and social debates in society, and to contribute to democracy in the workplace. These objectives are rationally connected to the means chosen to advance them, that is the requirement that all members of a unionized workplace contribute to union coffers without any guarantee as to how their contributions will be used. The minimal impairment test is also met. An opting-out formula could seriously undermine the unions' financial base and the spirit of solidarity so important to the emotional and symbolic underpinnings of unionism. The alternative of having the government draw up guidelines as to what would be deemed valid union expenditures could give rise to the implication that union members are incapable of controlling their institutions. Given the difficulty of determining whether a particular cause is or is not related to the collective bargaining process, the courts should not involve themselves in drawing such lines on a case-by-case basis.

The appellant's contribution to the Union cannot be said to be an attempt to convey meaning, and his freedom of expression guaranteed by s. 2(*b*) of the *Charter* has therefore not been infringed.

Per Wilson and L'Heureux-Dubé JJ.: Government action sufficient to attract *Charter* review is present in this case in so far as the adoption of the Rand formula is concerned. The *Charter* applies to acts of government entities broadly construed. An

activity will also be subject to *Charter* review if it was subject to such significant government control that it may effectively be considered an act of government for *Charter* purposes. Here the Council of Regents is a Crown agent established, funded and heavily controlled by government. The provision of education at the community college level is also a function of modern government, discharged in the public interest. The college and the Council of Regents are thus part of government for purposes of s. 32(1) of the *Charter*. The fact that the impugned action is a product of the joint effort of government and a private entity, the union, does not make that action any less governmental, otherwise all government contracts would be immune from judicial review. Government action was also involved in this case since there was clear government control over the decision to apply the Rand formula to all members of the bargaining unit. Dues expenditure is not itself government action, and therefore the *Charter* does not apply to such expenditure.

Appellant's freedom of association has not been violated in this case. The purpose of s. 2(*d*) is to protect association for the collective pursuit of common goals. It should not be expanded to protect a right not to associate. The real harm produced by compelled association is not the fact of association but the enforced support of views, opinions or actions one does not share or approve. Sections 2(*b*) and 7 of the *Charter* are available to redress these harms in appropriate cases. Even if this Court were to recognize a right not to associate under s. 2(*d*), this right has not been infringed here since it cannot be broader in scope than the positive right to associate previously defined by this Court. Appellant's claim is inextricably connected to the association's objects which this Court has repeatedly said s. 2(*d*) does not protect.

Appellant's freedom of expression guaranteed by s. 2(*b*) of the *Charter* has not been infringed. The fact that appellant is denied the right to boycott the Union's causes prevents him from conveying a meaning which he wants to convey, and the activity in which he wishes to engage therefore falls within the sphere of conduct protected by s. 2(*b*). Volunteering financial support is expressive for some people, and a refusal to provide monetary assistance is equally expressive. The government's intention was not to control the conveyance of meaning, however. The purpose of the Rand formula is simply to promote industrial peace through the encouragement of collective bargaining. It does not purport to align those subject to its operation with the union or any of its activities, since it specifically provides for dissent by stipulating that no member of the bargaining unit is required to become a member of the union. Nor does the Rand formula have the effect of depriving appellant of his right to express himself freely. The compelled payment of dues does not publicly identify him with the Union's activities, and does not prevent him from expressing his own views. Compelled financial support does not necessarily violate freedom of expression. The fact that appellant is obliged to pay dues pursuant to the agency shop clause in the collective agreement does not inhibit him in any meaningful way from expressing a contrary view on the merits of the causes supported by the Union.

The Rand formula would in any event meet the requirements of s. 1 of the *Charter*. The objective of the impugned legislation, which is to promote industrial peace through the encouragement of free collective bargaining, is sufficiently pressing and substantial to warrant overriding a constitutional right. Union discretion in relation to

dues expenditure forms part of the means by which the legislature sought to achieve its aim, and there is a rational connection between promoting collective bargaining and permitting unions to invest dues in ways they believe will best serve their constituencies. The minimal impairment test is also met. Placing restrictions on the way in which unions may spend their dues will lead to interminable problems and jeopardize the important government objective at stake. While other means might have been available to the legislature to achieve its objective, none is clearly superior in terms of accomplishing the goal of promoting collective bargaining and respecting the rights of individual employees as far as possible. Here the violation of appellant's rights was minor. His identification, if any, with the causes supported by the Union was indirect and he was completely free to express himself on these causes as he saw fit. The impingement on appellant's *Charter* rights was thus not out of proportion to the legislature's objective in promoting collective bargaining.

Per Cory J.: The reasons of La Forest J. were agreed with on the question of what constitutes "government". In all other respects the reasons of Wilson J. were concurred with.

Per McLachlin J.: For the reasons given by La Forest J., the *Charter* applies to the activities in question in this case. There is no violation of s. 2(*d*), however, since the payments do not bring appellant into association with ideas and values to which he does not voluntarily subscribe. Assuming that a right not to associate exists, its purpose must be to protect the interest of individuals against enforced ideological conformity. The requirement that appellant make payments to the Union, which the Union may

thereafter spend partly on causes he does not support, does not fall within this interest. Under the Rand formula, there is no link between mandatory dues payment and conformity with the ideas and values to which appellant objects. By declining to become a member of the union, the individual dissociates himself from the union's activities. Forced payments in return for services thus entail no imposition of ideological conformity. Practicality and policy support this approach, since extending s. 2(*d*) to cover compelled financial contributions *per se* would recognize the *prima facie* validity of a plethora of claims and put the courts into the business of assessing the justifiability of many government actions in circumstances where there may be no threat to any constitutional interest.

The payments at issue do not constitute expression under s. 2(*b*) of the *Charter*.

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By La Forest J.

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S.C.R. 313; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Lyons*, [1987] 2 S.C.R. 309; *International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435 (1984); *Lehnert v. Ferris Faculty Association*, 114 L.Ed. 2d 572 (1991); *R. v. Oakes*, [1986] 1 S.C.R. 103; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Lathrop v. Donohue*, 367 U.S. 820 (1961); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

By Wilson J.

Applied: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; **disapproved:** *Re Bhindi and British Columbia Projectionists Local 348* (1985), 20 D.L.R. (4th) 386; *Re Baldwin and B.C. Government Employee's Union* (1986), 28 D.L.R. (4th) 301; **distinguished:** *Oil, Chemical and Atomic Workers International Union v. Imperial Oil Ltd.*, [1963] S.C.R. 584; *Young, James and Webster v. United Kingdom* (1980), 3 E.H.R.R. 20; **referred to:** *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Fanshawe College of Applied Arts and Technology*, [1967] O.L.R.B. Rep. 829; *Sault College of Applied Arts and Technology*, [1985] O.L.R.B. Rep. 1293; *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367; *R. v. Skinner,* [1990] 1 S.C.R. 1235; *Arlington*

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By Cory J.

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By McLachlin J.

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APPEAL from a judgment of the Ontario Court of Appeal (1989), 67 O.R. (2d) 536, 56 D.L.R. (4th) 474, 31 O.A.C. 40, 37 C.R.R. 193, 89 C.L.L.C. 14,011, setting aside White J.'s judgments (1986), 55 O.R. (2d) 449, 29 D.L.R. (4th) 321, 86 C.C.L.C.

14,039 and (1987), 60 O.R. (2d) 486, 41 D.L.R. (4th) 86, 87 C.C.L.C. 14,044 declaring that appellant's *Charter* rights had been violated. Appeal dismissed.

Dennis O'Connor, Q.C., Ronald Foerster and *Diane Oleskiw*, for the appellant.

S. T. Goudge, Q.C., and *Ian McGilp*, for the respondent the Ontario Public Service Employees Union.

Brenda J. Bowlby and *Stephen J. Shamie*, for the respondent the Ontario Council of Regents for Colleges of Applied Arts and Technology.

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Robert E. Charney and *S. A. Kennett*, for the intervener the Attorney General for Ontario.

Jean Bouchard, for the intervener the Attorney General of Quebec.

J. Sack, Q.C., S. M. Barrett and *E. Poskanzer*, for the interveners the Canadian Labour Congress and the Ontario Federation of Labour.

J. Cameron Nelson and *John McNamee*, for the intervener the National Union of Provincial Government Employees.

Guylaine Henri, for the intervener the Confederation of National Trade Unions.

No one appeared for the intervener the Canadian Civil Liberties Association.

//*Wilson J.*//

The reasons of Wilson and L'Heureux-Dubé JJ. were delivered by

WILSON J. -- This is an appeal from the judgment of the Ontario Court of Appeal holding that the expenditure by a union of union dues extracted from non-members pursuant to a mandatory check-off clause in a collective agreement on union-related causes did not violate either s. 2(*d*) or s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*.

I. The Facts

Since 1974 the appellant has been a teaching master at the Haileybury School of Mines. He is a member of the academic staff bargaining unit represented by the respondent Union, OPSEU. He has never become a member of the respondent Union, nor has he been required to become a member. He has, however, been required to pay dues to the respondent Union. The dues are deducted from his pay cheque under

the terms of the collective agreement between the respondent Council of Regents and OPSEU. The dues are paid into the general revenues of the Union and may be used for any purpose contemplated by the Union's constitution.

Article 4 of OPSEU's constitution sets out the aims and purposes of the organization. Specifically, the Union is required to regulate labour relations between its members and their employers, including such things as collective bargaining. General objectives of the Union include the advancement of the "common interests, economic, social and political, of the members and of all public employees, wherever possible, by all appropriate means".

Mr. Lavigne is opposed to the use of his dues to support causes which come within the broader aims of the Union's constitution. OPSEU made several contributions out of its general revenues to which the appellant objected. It is not necessary to list these contributions in any detail. Suffice it to say that donations were made to disarmament campaigns including the campaign against cruise missile testing, to a campaign opposing the expenditure of municipal funds for the SkyDome stadium in Toronto, to the National Union of Mine Workers in the United Kingdom in support of their strike, to a health care workers' union in Nicaragua, and tickets were purchased for events sponsored by the New Democratic Party. Mr. Lavigne has also drawn attention to the fact that OPSEU passed a resolution in favour of free choice with respect to abortion.

Under OPSEU's constitution certain percentages of the dues paid are paid to another organization, the National Union of Provincial Government Employees

(NUPGE), which in turn pays dues to the Canadian Labour Congress (CLC). The respondent Union is also a member of the Ontario Federation of Labour (OFL). Each of these organizations, like the respondent Union, uses its dues to support union-related causes.

The appellant brought an application for declaratory relief against the respondents. He sought a declaration that, in so far as ss. 51, 52 and 53 of the *Colleges Collective Bargaining Act*, R.S.O. 1980, c. 74, result in compulsory payment of dues which in turn may be expended on any of the above listed purposes, they violate ss. 2(*b*) and 2(*d*) of the *Charter*. In addition, the appellant sought declaratory relief that would require the respondent Union to account for money spent on listed purposes that he maintained did not relate to collective bargaining.

White J. held at trial in reasons delivered July 4, 1986 that the appellant's right to freedom of association was infringed and indicated that he was prepared to grant declaratory relief in regard to the compulsory payment of dues. White J. then asked for further submissions as to the form the remedy should take and on July 7, 1987, made specific orders as to the form of the declaratory relief. The respondents appealed to the Court of Appeal for Ontario which allowed the appeal and set aside the orders of the trial judge.

II. The Courts Below

Supreme Court of Ontario ((1986), 55 O.R. (2d) 449)

The trial judge first dealt with the issue of whether the *Charter* applied to the activity complained of by the appellant. He noted that the *Charter* does not apply to private activity but by s. 32 applies to, *inter alia*, "the legislature and government of each province in respect of all matters within the authority of the legislature of each province". It was his opinion that the *Charter* applies to actions of Crown agencies in certain cases. After examining the provisions of the relevant legislation and case law involving community colleges White J. held that the respondent Council of Regents was a Crown agency.

However, White J. noted that merely deciding that the respondent Council of Regents was a governmental actor did not dispose of the question whether the *Charter* reaches the activities complained of in this case. He held at p. 479 that:

> . . . governmental action does include the entering into of a contract by a Crown agency pursuant to powers granted by statute in the context of the facts at bar. To hold otherwise would be to permit "government", as identified in s. 32(1) of the Charter, to impose terms in a contract that it could not impose by statute or regulation because they breach the Charter. Such an arrangement would defeat the purpose of the Charter.

White J. thus found that the alleged violations of the *Charter* flowed from the decision of the Council of Regents to agree to the inclusion of the Rand formula in the collective agreement. Because the Council could have rejected the Union's demand that the clause be included, and because it made this agreement as a government agent, government action within the meaning of the *Charter* was involved.

In response to the Union's argument that no government action was involved because s. 53 of the *Colleges Collective Bargaining Act* (upon which the applicant was relying) was permissive and not mandatory, White J. held at p. 481:

> The applicant does not rely solely on s. 53 of the *Colleges Collective Bargaining Act*, however, and possibly this enabling section of the statute alone would not have been enough to justify Charter review of a clause contained in a collective agreement had a Crown agency not negotiated the contract. Absent a governmental actor in the contract negotiations, there would be a strong argument against the application of the Charter on the basis that the statutory provision left the decision of whether or not to include an agency shop clause in the collective agreement to the parties; the effect of the legislative provision would not be the forced payment of dues.

Turning to the application of s. 2(*d*) of the *Charter*, White J. found that the guarantee of freedom of association included the right not to associate. He reviewed the case law in Canada and in the United States and concluded at p. 508 that "[i]f a governmental agent acts so as to force an individual to financially support a union when he opposes the union, its objects, and its methods, then his freedom of association has been abridged." It was his view that the combined operation of ss. 51 through 53 of the *Colleges Collective Bargaining Act* brought Mr. Lavigne into association with the Union. To White J., it was sufficient that the appellant had to contribute financially to the Union and it was not necessary in order to establish a violation of s. 2(*d*) to show that he was forced to become a member of OPSEU.

With respect to s. 2(*b*), however, the trial judge found that there was no infringement of the appellant's freedom of expression because the evidence did not establish that the ideology of the group was attributed to the appellant, nor did it establish

that the appellant's freedom to express himself was restricted in any way as a result of paying the dues.

White J. then reviewed the legislation to see if the infringement of the appellant's s. 2(*d*) right was justified under s. 1 of the *Charter*. He concluded that the infringement was sufficiently serious that it required the government to use the least intrusive means possible to achieve the legislative purpose. He concluded that dues paid under compulsion could only be used for the purpose which justified their imposition and not for other purposes. He reserved on the question of the appropriate remedy.

Supreme Court of Ontario ((1987), 60 O.R. (2d) 486)

After his decision holding that the appellant's s. 2(*d*) right had been infringed, White J. issued his remedial order and his reasons therefor. He noted that the enforcement provisions of the *Constitution Act, 1982* are contained in ss. 52 and 24. He held that both of these sections require the court to consider s. 1 of the *Charter* in awarding an appropriate remedy.

Under s. 52 any law inconsistent with the Constitution is of no force and effect to the extent of the inconsistency. White J. held that the appellant was entitled to have ss. 51, 52 and 53(1) and (2) of the *Colleges Collective Bargaining Act*, which enabled the respondent Council to enter into the collective agreement, declared of no force and effect so far as they affected him.

With respect to s. 24(1) White J. noted that a court of competent jurisdiction may grant such remedy as it considers appropriate and just in the circumstances. He concluded that the declaratory relief was most appropriate in the circumstances. In considering the impact of s. 1 on his order White J. noted that the purpose of the impugned legislation was to promote industrial peace and avoid "free riders". He recognized that the compulsory payment of union dues, "the Rand formula", has generally achieved this purpose and is an accepted principle of labour law in Canada. Another factor to be taken into account in fashioning a remedy is that the invasion of the rights of the appellant should be minimized as much as possible. White J. stated at p. 506:

> . . . I prefer to give what I consider to be due weight to the historical experience of the Rand formula in Canada; to choose an opt-out factor for inclusion in the declaratory remedy that I shall grant; and to seek to apply the *Oakes* case to minimize the invasion of the applicant's freedom of association in structuring the remedy.

White J. concluded that the appellant was entitled to a declaration that the impugned sections of the *Colleges Collective Bargaining Act* and the provisions of any collective agreement authorized thereby are of no force and effect in so far as they compel him to pay dues to the Union for any of the purposes not directly related to collective bargaining. He found that most of the expenditures to which Mr. Lavigne had objected were impermissible, except for the contributions made to other unions. He approved of these expenditures on the basis that they were related to collective bargaining in that they promoted union solidarity. White J. also found it necessary, in order to prevent compulsory subsidization of political causes, that the Union keep detailed records of its expenditures and that these records be available to all members of

the bargaining unit. He ordered the Union to establish an opt-out mechanism for fees for dissenting employees.

There was substantial argument as to the question of costs before White J. The appellant's costs were underwritten by a group known as the National Citizens' Coalition (referred to as the NCC). The appellant had agreed to pay any costs awarded to him to the NCC and the NCC had agreed to discharge any award of costs against the appellant so far as it was able. White J. rejected the respondent Union's argument that the appellant was not entitled to costs because he had not suffered any pecuniary loss. He was of the opinion that "[t]o the extent that the N.C.C. or any other specific interest group puts responsible Charter litigation within the reach of the individual Canadian, they should not, even indirectly, be deterred" (p. 527). He did not consider this to be a case of divided success, but considered that the appellant was not entirely successful in his application. He awarded the appellant 60 per cent of his costs to be paid by the respondent Union and the interveners NUPGE, the CLC and the OFL.

Court of Appeal ((1989), 67 O.R. (2d) 536)

Referring to *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, the court noted that the *Charter* only applies to an exercise of or reliance upon government action. The court noted that, in order to determine whether or not there is "governmental action" such as to bring the *Charter* into play, it is first necessary to determine the status of the parties. The court agreed with the trial judge's finding that the respondent Council

of Regents was a Crown agency. The court also considered it beyond serious dispute that OPSEU is a private entity. The court continued at p. 552:

> As White J. pointed out, finding that the Council of Regents is a government body does not dispose of the question of whether the Charter reaches the activities complained of in this case; it is necessary to find governmental action inconsistent with the rights and freedoms set out in the Charter.

In determining whether or not there was "governmental action" that would bring the *Charter* into play the court found that the fact that the appellant sought declarations relating to the expenditure of funds rather than seeking to have the legislation itself declared unconstitutional was significant. The court held at pp. 556-57:

> There was no evidence that the Council of Regents was in any way involved in decisions relating to the expenditure of the funds received by O.P.S.E.U. pursuant to the mandatory check-off clause. The mere making of the funds available to the union by the Council without direction of any kind as to use does not convert the union's expenditures into governmental action. The use of the dues by O.P.S.E.U. was a private activity by a private organization and hence beyond the reach of the Charter.

Nonetheless, the court briefly outlined its views on whether or not there was an infringement of the appellant's rights under the *Charter*. In its opinion, there is no infringement of the appellant's right to freedom of association in this context. The court noted at p. 562 that freedom of association "safeguards the right of individuals to associate with each other for the purpose of protecting common interests and pursuing common goals." Requiring that dues be paid to the Union does not restrict this right because the employee remains free to associate with others and is free to oppose the Union. At most, the provisions create a financial bond.

The court refused to rule on whether the *Charter* includes freedom to "refrain from association", although it noted that this "negative" interpretation of the right to freedom of association runs counter to the Supreme Court of Canada rulings that the purpose of s. 2(*d*) of the *Charter* is to foster and protect the ability of a person to join with others to engage in activities toward a common purpose or goal. Even if such a negative freedom is constitutionally protected, the appellant's rights would not be infringed by the compulsion to pay union dues. The court stated at p. 565 that "[a] right to refrain from association does not, in our opinion, necessarily include a right not to be required to support an organization financially." Any restriction on how a union might spend its dues is a legislative matter rather than a matter for the courts. The court agreed with the trial judge's finding that the appellant's freedom of expression was not infringed.

On the issue of costs, the court agreed that there was nothing improper in obtaining backing to fund *Charter* litigation which could be prohibitively expensive for ordinary citizens. The court held that there was no reason why costs should not follow the event. The interveners, NUPGE, the CLC and the OFL, were seriously affected by the appellant's application and were entitled to their costs on appeal and at the trial level. Due to the limited involvement of the respondent Council of Regents at the appellate level, there was no order as to costs with respect to it.

III. The Relevant Legislation

The *Colleges Collective Bargaining Act*:

51. An agreement is binding upon the Council, the employers and the employee organization that is a party to it and upon the employees in the bargaining unit covered by the agreement.

52. Every agreement shall be deemed to provide that the employee organization that is a party thereto is recognized as the exclusive bargaining agent for the bargaining unit to which the agreement applies.

53. -- (1) The parties to an agreement may provide for the payment by the employees of dues or contributions to the employee organization.

The collective agreement:

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

The *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:

. . .

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

. . .

(*d*) freedom of association.

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

IV. The Issues

The following constitutional questions were stated by Dickson C.J. on August 21, 1989:

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

2. If the answer to question 1 is in the negative, does the *Canadian Charter of Rights and Freedoms* apply to the requirement that the appellant pay sums equivalent to union dues to the respondent OPSEU, as provided for in article 12.01 of the collective agreement between the respondent Ontario Council of Regents and the respondent OPSEU pursuant to ss. 51, 52 and 53 of the *Colleges Collective Bargaining Act*, R.S.O. 1980, c. 74?

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

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

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

V. Analysis

1. *Does the Charter Apply*?

Section 32(1) of the *Charter* provides:

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

The parties are fundamentally divided over the substance of Mr. Lavigne's complaint in this appeal. The respondent Union maintains that Mr. Lavigne is really taking issue with its spending decisions and not with the compelled contribution of dues *simpliciter*. OPSEU and the interveners all argue that the question of how the Union spends its dues is beyond *Charter* review. They say that the Union is a private entity and that the *Charter* does not apply to private entities. Accordingly, how the Union spends its dues is not a decision susceptible of constitutional attack.

Mr. Lavigne, on the other hand, maintains that the focus of his complaint is on the fact that he is compelled to contribute to the Union. He says that whether or not he might be willing to contribute to OPSEU for some purposes rather than others is a matter to be considered under s. 1 of the *Charter* and not under s. 32.

It should perhaps be noted that it was precisely this issue, the proper characterization of the appellant's dispute, that drove White J. and the Court of Appeal to different conclusions respecting the applicability of the *Charter* in this case. The trial judge saw the case as raising the issue of the compelled contribution of union dues irrespective of the use to which these dues were put. He distinguished opposing case law on this basis. Contrariwise, the Court of Appeal saw in Mr. Lavigne's action an attack on union spending plain and simple.

It is true that other courts have treated the issue of the real focus of challenges mounted against various forms of union security as virtually determinative of the question of the applicability of the *Charter*. In *Re Bhindi and British Columbia Projectionists Local 348* (1985), 20 D.L.R. (4th) 386 (B.C.S.C.), a group of employees sought to challenge an article in a collective agreement between the union and Famous Players Ltd. which provided for a "union shop", i.e., the employer agreed to hire only those projectionists supplied by the union. The petitioners were unable to find full-time work because the respondent Union would not admit them to membership. They sought to challenge this article on the basis that it infringed their *Charter* rights.

In dealing with the question of the application of the *Charter* the petitioners argued that the Constitution did apply to the collective agreement (and therefore the impugned article) because the British Columbia *Labour Code*, R.S.B.C. 1979, c. 212, expressly permitted such provisions. Section 9(1) of that Act provided:

> **9.** (1) This Act shall not be construed as precluding the parties to a collective agreement from inserting in it a provision

(a)requiring membership in a specified trade union as a condition of employment;

(b)granting preference in employment to members of a specified trade union; or

(c)precluding the carrying out of such provisions.

Gibb J. found, however, that the petitioners did not wish to impeach the statute but only the article in the collective agreement. At page 396 of his reasons he said:

> It is important to note, in considering this ground, that the petitioners do not seek to impeach these, or any other, provisions of the *Labour Code* as being inconsistent with the Charter under s. 52 of the *Constitution Act, 1982*. Their challenge is to the closed-shop clause of the collective agreement, and it was the unanimous request of all parties that I limit these reasons to answering the question posed. Given what I have already said about the intent and meaning and purpose of the Charter, it seems to me that a considerable feat of mental gymnastics is required to find that a clause in a contract is void and of no effect because inconsistent with the Charter, without preceding it by a finding that the law which gives it life is void and of no effect because inconsistent.

In *Re Baldwin and B.C. Government Employee's Union* (1986), 28 D.L.R. (4th) 301 (B.C.S.C.), the petitioner was employed as a correctional officer by the provincial government. He was a member of the bargaining unit represented by the respondent, B.C.G.E.U., but was not a member of the union. Section 14 of the *Public Service Labour Relations Act*, R.S.B.C. 1979, c. 346, provided that every collective agreement was to contain a compulsory dues check-off provision. Mr. Baldwin objected to the dues which he was compelled by statute to pay being put to certain political, social and economic causes. Mackoff J. dismissed the application. He found unpersuasive counsel's argument that constitutional limitation should be read into the section. At pages 304-5 he stated:

> Unlike the statute in the *Hoogbruin* case, which gave a right and by failing to do something took that right away, s. 14 neither gives to the petitioner nor takes away from him any entitlement to say as to how the union is to spend its dues money. Nor does the statute regulate the union in the expenditure of these funds. Such expenditures are made by the union executive, democratically elected by the members and in accordance with the B.C.G.E.U. constitution.

In my view, neither *Re Bhindi* nor *Re Baldwin* adequately addresses the issue of the *Charter*'s application to collective agreements and union security provisions in particular. To my mind, it is insufficient to attempt to deal with the applicability issue by narrowly or broadly construing the character of a claim. This is not to say that the Court ought not to pay heed to the way in which such complaints are framed. Indeed, in this case, the fact that the appellant has focused on compelled contributions and not on union expenditures will have important ramifications for the disposition of this appeal. However, I do not think the matter can be dealt with in a satisfactory way simply by framing the issue as to whether the *Charter* applies in terms of whether the appellant's claim is "about" union spending specifically or the Rand formula generally. Fortunately, this Court has recently had several opportunities to consider the scope and meaning of s. 32(1) of the *Charter* and these decisions provide helpful guidance for determining this difficult issue.

In *Dolphin Delivery*, *supra*, the appellant union (RWDSU) was the federally certified bargaining agent for a group of employees who had been locked out during an industrial dispute by their employer Purolator, a courier company. The union threatened to picket the premises unless Dolphin Delivery ceased to do business with Purolator and its related companies. Relying on common law torts governing industrial disputes, the

respondent delivery company applied for and was granted a *quia timet* injunction restraining the "secondary" picketing from proceeding before it had begun. On appeal of that order RWDSU invoked s. 2(*b*) of the *Charter* arguing that the common law rules supporting the injunction unreasonably infringed the union's freedom of expression. One of the issues this Court had to decide was whether in the circumstances the union could invoke the protection of the *Charter*.

McIntyre J., writing for the majority, was thus faced with two questions: (1) whether the *Charter* applies to the common law; and (2) whether the *Charter* applies to private litigation. Relying on s. 52, McIntyre J. noted that it would be "wholly unrealistic" to hold that the *Charter* did not apply to the common law. The real problem, in his view, was whether the *Charter* applied to the common law in the context of private litigation divorced completely from any connection with government. McIntyre J. saw as an essential feature of the *Charter* its primary focus on government and not private citizens. Hence, it was his view that the *Charter* applied only to government and not to private actors. At pages 598-99 he said:

> It is my view that s. 32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government. It will apply to those branches of government whether or not their action is invoked in public or private litigation. It would seem that legislation is the only way in which a legislature may infringe a guaranteed right or freedom. Action by the executive or administrative branches of government will generally depend upon legislation, that is, statutory authority.

As to the scope of what was meant by the term "legislation" McIntyre J. said at p. 602:

> It would also seem that the *Charter* would apply to many forms of delegated legislation, regulations, orders in council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the Legislatures. It is not suggested that this list is exhaustive.

Dolphin Delivery thus established that the *Charter* at least applies to traditional government bodies and to the quintessential fruits of government action, legislation.

In *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, the next case to deal with this issue, a different question faced the Court, namely whether the *Charter* applied to an order of an adjudicator appointed by statute. In that case an employee who had been dismissed from his employment without just cause grieved his discharge under the *Canada Labour Code*, R.S.C. 1970, c. L-1. The arbitrator who heard the grievance found the dismissal to be unlawful and ordered the employer to respond to requests for references concerning the dismissed employee in certain circumscribed ways. Slaight Communications objected to the order on the ground that it infringed its freedom of expression guaranteed by s. 2(*b*) of the *Charter*.

Lamer J., writing for a unanimous Court on this issue, held that the *Charter* applies to an adjudicator such as the one who made the impugned order. At pages 1077-78 he explained:

> The fact that the *Charter* applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives <u>all</u> his powers from the statute. [Emphasis in original.]

Slaight Communications thus established that an entity need not be part of "government" in the strict sense adopted by McIntyre J. in *Dolphin Delivery* in order to attract constitutional review.

The true reach of this expanded notion of government came before the Court for authoritative examination in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229. At issue in *McKinney* was the constitutionality of the policy of mandatory retirement in force at several of Ontario's universities. As the universities clearly were neither "government" in the sense contemplated in *Dolphin Delivery* nor were exclusively creatures of statute similar to the statutorily appointed labour arbitrator in *Slaight Communications*, the Court was required to consider the scope of the application of the *Charter* in relation to such bodies. I proposed a comprehensive test for determining *Charter* applicability to so-called "non-governmental" bodies. At page 370 I said:

> . . . I would favour an approach that asks the following questions about entities that are not self-evidently part of the legislative, executive or administrative branches of government:
>
> 1. Does the legislative, executive or administrative branch of government exercise general control over the entity in question?
>
> 2. Does the entity perform a traditional government function or a function which in more modern times is recognized as a responsibility of the state?
>
> 3. Is the entity one that acts pursuant to statutory authority specifically granted to it to enable it to further an objective that government seeks to promote in the broader public interest?

One of the questions that arose in *McKinney* was whether the *Charter* could only be invoked against a government actor, broadly construed, or whether it could also

apply to what would otherwise be a non-government actor when it engaged in government action. I noted that the "control test" embraces both of these possibilities in that it asks whether the government controls in a general way an entity that is not part of the legislative, executive or administrative branches of government, or whether there is a clear nexus between government and the particular activity under attack. It was my view that an exclusive focus on whether such a specific and defined nexus existed between government and the impugned act was problematic. At pages 360-61 I said:

> More problematic, in my view, is the second limb of the control test: namely, the search for a specific nexus between government and the impugned act. In many instances, it may be that the relevant branch of government does not exercise control over the entity's activities in as direct a way as in the *Douglas College* case, but that the entity is nonetheless a governmental actor. One need only think of those bodies that are created by statute, that depend heavily on government funding and that receive broad policy directives concerning their overall mandate from one of the branches of government, but that are deliberately placed at arm's length and given the freedom to make a wide range of choices about how to implement particular policies. This kind of arrangement is hardly novel, particularly in areas where ministers and government departments do not wish to be involved in complex and politically sensitive decisions concerning the allocation of government funds or the specific application of particular policies. Decisions of these kinds often require choosing between irreconcilable demands, and governments have therefore frequently found it prudent to create agencies or tribunals that can make these decisions free from political pressure. Thus, even although such arm's length organizations have often been created with a view to performing tasks that a government department had previously performed or might otherwise have performed, one cannot necessarily point to a nexus between the government and the arm's length organization's day-to-day activities.

I fully appreciate that in *McKinney* and the appeals which were heard along with it only two of my colleagues endorsed my test for determining whether or not a body is a government actor for purposes of s. 32(1) of the *Charter*. On the other hand, I am unable to find a different test of general application enunciated in the reasons of the

majority. Those reasons appear to me to reflect an *ad hoc* approach to the status of each entity brought before the Court in order to determine whether or not it forms "part of the apparatus of government" so as to be subject to *Charter* review. This being so, I do not feel as constrained by precedent as I otherwise might. Indeed, I am unchastened in the view that this Court has a duty to take a structured approach to this issue and establish appropriate criteria if at all possible for distinguishing those bodies which are subject to *Charter* constraint from those which are not. In any event, whether I am right or wrong on this, I believe that the *ad hoc* approach would yield the same result in this particular case.

What then is to be gleaned from the case law to date? It seems to me that the decisions of the Court establish that there are two ways in which the *Charter* may be invoked. First, the *Charter* applies to acts of "government". What constitutes "government" for this purpose includes not only the legislative, executive or administrative branches of government in the sense contemplated by McIntyre J. in *Dolphin Delivery*, but also other non-traditional government bodies such as those contemplated in *Slaight Communications* and *McKinney*. In other words, the *Charter* applies to "government" entities broadly construed. Second, an activity will be subject to *Charter* review if, even although the act was not performed by "government", it was subject to such significant government control that it may effectively be considered an act of government for *Charter* purposes.

Applying these principles from the case law to the present appeal, it can readily be seen that the application of s. 32 in this case is complex indeed. There are two

entities involved, the Union and the School of Mines acting through the Council of Regents, and two particular acts, the enactment of a permissive provision in the legislation and the collection of dues pursuant to it. I turn then to consider whether any of these bodies or acts are sufficiently "governmental" to invite application of the *Charter*.

(a) Government Actors

It goes without saying that unions are not, even on the broad test suggested in *McKinney*, governmental entities. Indeed, part of the *raison d'être* of unions, especially public sector unions, is to challenge and work in opposition to government. This is not to say that no union could ever be considered to be part of "government" for the purposes of s. 32. It may well be that some unions are so intimately connected with government that their actions will be subject to constitutional scrutiny. In this case, however, it is clear that OPSEU is not in such a symbiotic relationship with government and consequently its actions standing by themselves do not fall within the scope of s. 32.

What is the effect of finding that the Union is not a governmental entity? OPSEU argues that if the *Charter* does not apply to the Union the manner in which it spends its dues is completely protected from constitutional review. I do not believe this follows. If the collection of union dues pursuant to the Rand formula is somehow governmental in nature, and one of the effects of this governmental action is that dues are spent in constitutionally offensive ways, then it seems to me that union spending may well factor into the constitutional analysis. This would flow from the fact that

government activity may violate guaranteed rights and freedoms under the *Charter* either through its purpose or its effect: see *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. However, I would quickly add that because government action may have this effect and thus bring the issue of union spending into the constitutional equation does not mean that a remedy for the infringement of *Charter* rights and freedoms will necessarily lie against the Union or that the government may thereby regulate how the Union chooses to spend its money. Because the *Charter* only applies to government, the issues of liability and relief can only be determined in relation to government and not private actors.

We must look, therefore, to the other actor involved in the collection and expenditure of union dues. It is my view that the application of the three-part test advanced in *McKinney* leads to the conclusion that the School of Mines acting through the Council of Regents is a government entity and that the *Charter* applies to it.

The "Control Test"

There is no question but that the School of Mines is a governmental entity. Community colleges are established and governed by the Minister of Colleges and Universities. The Minister, on behalf of the provincial government, determines the activities engaged in by the colleges. Legislation authorizes the Minister to make regulations governing their administration, college curricula, admission requirements, tuition fees and teaching qualifications. A substantial portion of the costs of establishment and maintenance of the colleges is paid out of government funds, both provincial and federal, earmarked for education. The Minister also exercises a

substantial degree of control over the capital expenditures and financing of the colleges: see *Ministry of Colleges and Universities Act*, R.S.O. 1980, c. 272, ss. 4 and 5.

It is also clear that the Council of Regents is controlled by government. The Council is a statutory body designated by the legislation as a Crown agent and entirely composed of members appointed by the Lieutenant Governor in Council. The purpose of the Council is to "assist" the Minister in the planning, establishment and coordination of programmes of instruction and services for the colleges. Under the Regulations the Boards of Governors of the colleges are subject to the control of the Council which in turn is subject to the control of the Minister: see *Ministry of Colleges and Universities Act*, s. 5(2) and R.R.O. 1980, Reg. 640. The Council is responsible for collective bargaining under s. 6(1) of the Regulations. As well, under s. 2(3) of the *Colleges Collective Bargaining Act* the Council has exclusive responsibility for all negotiations on behalf of employers covered by the Act.

In my view, the government controls the School of Mines and the Council of Regents so that these entities should be viewed as part of government for purposes of s. 32. I find, therefore, that the application of the control test provides a strong indication that the compelled payment of dues to the union through the joint action of the Council and OPSEU is government action for purposes of the *Charter*.

The Government Function Test

In *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, the role of government in the creation of Canadian community colleges was examined, revealing that these educational institutions are creatures of government and always have been. This is no less true for Ontario community colleges including the Haileybury School of Mines. The community college system in Ontario was created in 1965 with the passage of the *Department of Education Amendment Act 1965*, S.O. 1965, c. 28 (amending the *Department of Education Act*, R.S.O. 1960, c. 94). Under that Act the Minister of Education was authorized to create colleges of applied arts and technology. Twenty-two colleges were established across the province. I conclude, therefore, that the provision of education at the community college level is a function of modern government.

Statutory Authority and the Public Interest Test

In *Douglas College*, *supra*, I applied this branch of the s. 32 test and found that it too had been met. The reasons I gave for so holding are equally applicable to the present appeal. At page 612 I said:

> It has already been established that the College is an agent of the Crown and is empowered to conduct its affairs through its enabling statute. It has also been shown that the provision of technical education at the community college level is a matter for which the government has assumed responsibility. Government involvement in this area is easily justified. In brief, the availability of adequately trained technical support staff is essential to the successful growth and expansion of the economy. Technological advancement is thwarted without a sophisticated labour force ready to work in these fields. It has thus been in the public interest that educational services be provided in technical areas.

In my view, the School (including the Council of Regents) is an agent of the Crown. Certainly this has been the view of the Ontario Labour Relations Board for well over 20 years: see *Fanshawe College of Applied Arts and Technology*, [1967] O.L.R.B. Rep. 829. This view has recently been affirmed by the Board in *Sault College of Applied Arts and Technology*, [1985] O.L.R.B. Rep. 1293. In that case, OPSEU applied to the Board to be certified as the exclusive bargaining agent under the *Labour Relations Act*, R.S.O. 1980, c. 228. The Union argued that changes in the governing legislation -- the repeal of the *Department of Education Act*, *supra*, and its replacement with the *Ministry of Colleges and Universities Act*, *supra* -- suggested that the college was no longer an agent of the Crown and that therefore the *Labour Relations Act* applied to the employees seeking to be represented by the Union. The Board disagreed, holding that the labour relations of Sault College remained governed by public sector labour relations legislation. I agree with this decision and find that the Haileybury School of Mines is an agent of the Crown as is the Council of Regents.

As in *Douglas College*, the fact that the Council of Regents is a Crown agent established, funded and heavily controlled by government, together with the fact that the School of Mines is discharging a government function in the public interest, leads me to conclude that the School of Mines and the Council of Regents are part of government for purposes of s. 32(1) of the *Charter*.

Because this appeal was heard before the release of this Court's decision in *McKinney*, some of the issues raised by the parties have already been dealt with. Be that as it may, it would be helpful if some of these issues were specifically addressed and

clarified in this appeal. Of particular interest is the submission of the Union that because what is at issue in this case is a term of employment jointly agreed upon by the bargaining agent and the Council of Regents, the *Charter* does not apply. To my mind, the fact that the impugned action is a product of the joint effort of government and a private entity does not make that action any less governmental for purposes of s. 32(1). Were it otherwise, all government contracts would be immune from judicial review. I cannot accept that government should be able to avoid its constitutional obligations simply by electing to govern its affairs through the vehicle of contract.

The Union also argues that the *Charter* should only apply to actions which are part of government's function and not to all acts performed by a government actor. Some support in the academic literature for this position may be found in Swinton, "Application of the Canadian Charter of Rights and Freedoms", in Tarnopolsky and Beaudoin, *The Canadian Charter of Rights and Freedoms* (1982), at p. 41. Professor Swinton does not appear to have taken a firm position that the *Charter* does not apply to government actions which are essentially of a private, commercial or contractual nature. As I perceive her argument, government contracting practices should be subject to the *Charter* so as to prevent government from using the contractual device to avoid judicial review: see p. 51. On the other hand, when one is dealing with Crown corporations, it may be stretching matters too far, in her view, to characterize their business activities as governmental functions. At pages 57-58 she states:

> More difficulty lies with the range of subordinate agencies and Crown corporations subject to the Charter. One method for defining which of these fall within "government" would be to use a test of Crown agency, assuming one rejects an argument that government establishment or ownership *per se* brings them within the Charter, even if they have a corporate identity

> separate from the Crown. I do not believe that such a bright line test is helpful. A company such as Air Canada is similar in operation to private carriers like Canadian Pacific. It is regulated by the same government entity, the Canadian Transport Commission, and competes for routes and passengers. Its shareholders may be the people of Canada, but otherwise it is similar to any commercial airline. Why should the Charter be applied to its fare or hiring policies?

It is not necessary in this appeal to decide whether Crown corporations are government entities or, if not, whether the purely business activities of such corporations constitute government action for the purposes of s. 32(1) of the *Charter*, and I would not want my reference to Professor Swinton's words to be taken as disapproving. It is sufficient in this case, however, to say that one of the parties to the collective agreement containing the impugned provision is a government entity and that therefore the provision is subject to the *Charter*. There are very good reasons for holding that the *Charter* applies to all activities of governmental entities and not merely those we might characterize as falling within its proper governmental domain. In many respects the way in which government conducts its affairs serves as a model for organization in the private sphere. In the past government has imposed restrictions upon itself in its dealing with its employees, presumably in the hope that private employers would follow suit: see *Employment Equity Act*, S.C. 1986, c. 31. And in so far as the *Charter* is concerned there is no reason why a duty to comply with the Constitution in all its dealings should not be imposed upon those entities found to be governmental.

I am prepared to find that the *Charter* applies to the provision in the collective agreement on the sole ground that one of the parties to it was a government entity. However, since the parties and the interveners have directed much argument to

the question whether government action was involved in this appeal, it might be helpful to deal with those submissions.

(b) Government Action

Two "acts" involved in the circumstances of this appeal have been cited as providing sufficient government action to attract the application of the *Charter*. The appellant argues that the collection of mandatory dues occurred pursuant to statute. He also maintains that government action was involved when the government exercised specific and substantial control over the decision of the Council of Regents to agree to the Rand formula. I propose to deal with these arguments in turn.

The appellant argues that ss. 51 through 53 of the *Colleges Collective Bargaining Act* bind him to the collective agreement entered into between the School and OPSEU, mandate the Union as his representative, and in this context permit an agency shop. This combination, he asserts, is government legislative action sufficient to trigger the application of the *Charter*. The Union, on the other hand, argues that the legislation does not compel Mr. Lavigne in the way he contends. It argues that the legislation is permissive and only "compels" majority rule. OPSEU says that it is incorrect to suggest that, but for the *Colleges Collective Bargaining Act*, the appellant would not be compelled to pay dues. Rather, any obligation in that regard is determined as a matter of bargaining strength of the parties. In this case the legislative provisions which the appellant seeks to challenge are merely permissive, they only confer rights and obligations on private parties, and therefore they are not subject to *Charter* scrutiny.

In *Dolphin Delivery, supra*, McIntyre J. held that the *Charter* applies to *inter alia* the legislative branch of government and consequently to the fruits of its efforts, namely legislation. Superficially, therefore, it would appear that compelled dues contribution is a matter subject to constitutional review since the statute in issue here explicitly permits this practice. McIntyre J. also said, however, that the *Charter* does not apply to private action. Would this principle not be violated if the *Charter* were held to apply to permissive legislation? In my opinion, the answer to this question must be yes. It is trite knowledge that what is essentially regulatory legislation governing private parties' dealings among themselves constitutes much of the work of Parliament and the Legislatures. Such statutes serve to set the boundaries of private action but are in general unconcerned with how citizens choose to conduct themselves within those boundaries. Thus, in a great many instances "permissive legislation" does not connote governmental approval of what is permitted but connotes at most governmental acquiescence in it.

On the other hand, it must be recognized that if this Court were to hold without qualification that the *Charter* does not apply to permissive legislation, the door would surely be open to widespread abuse at the hands of government. This Court has already acknowledged that technical avoidance of the application of the *Charter* is to be discouraged. Thus, for instance, in *McKinney* the Court remained unconvinced that the word "law" in s. 15 should be read restrictively so as to exclude contracts. Foreseeing the misuse to which such a finding could be put, La Forest J. commented at p. 277:

> It would be easy for the legislatures and governments to evade the restrictions of the *Charter* by simply voting money for the promotion of certain schemes.

By analogy, it is easy to envision that government may avoid its duty to respect the guarantees embodied in the *Charter* through the vehicle of permissive legislation. This, of course, is a result which this Court should seek to avoid. What qualifications therefore need to be added to the general principle that permissive statutory provisions standing alone are insufficient to call the *Charter* into play?

As a general observation, I would think that in each case all the circumstances would have to be carefully examined to determine whether government had significantly encouraged or supported the act which is called into question. Depending upon the context, the enactment of a permissive provision may indeed support a finding of governmental approval or encouragement of a particular activity sufficient to invoke the protective guarantees of the *Charter*.

In the present case, it is unnecessary to deal conclusively with this issue since, in my view, there has been clear government control over the decision to apply the Rand formula to all members of the bargaining unit. Here, the provincial government exercised substantial control over the terms of employment at the School of Mines. As I have already demonstrated, collective bargaining at the School is the responsibility of the Council of Regents. The Council is a Crown agent mandated to act as the representative of the Minister. Further, under the Regulations its decisions are subject to Ministerial approval. On the basis of these facts, I believe that government has had a strong hand in orchestrating the particular action now being challenged.

In summary, therefore, I find that government action sufficient to attract *Charter* review is present in this case in so far as the adoption of the Rand formula is concerned. This result flows from the fact that it was a government entity which participated in agreeing to this form of union security. Also, while it is not necessary to our conclusion, it is also the fact that government exercised particular and substantial control over this act thereby bringing it into the category of government action. With respect to the issue of how the dues are spent, I have found that dues expenditure is not itself government action, and therefore the *Charter* does not apply to such expenditure. I turn now to the substance of the appellant's challenge.

2. *Freedom of Association*

Section 2(*d*) of the *Charter* provides:

2. Everyone has the following fundamental freedoms:

. . .

(*d*) freedom of association.

The appellant argues that because he is compelled to contribute financially to the Union, he is thereby brought into association with OPSEU against his wishes. Mr. Lavigne maintains that it is this mandatory payment of dues alone which gives rise to a violation of s. 2(*d*) and that the manner in which the Union spends his dues is irrelevant as far as his associational rights are concerned. The respondent Union, on the other hand, argues that the scheme of mandatory dues deduction does not infringe s. 2(*d*). It maintains that s. 2(*d*) does not include a freedom <u>not</u> to associate, but guarantees only

a freedom to associate, i.e., to join together collectively. OPSEU also contends that even if s. 2(*d*) does in fact protect the right of individuals not to associate, such a right has not been infringed in the present case. The principal issue raised by this ground of appeal is therefore whether s. 2(*d*) of the *Charter* only protects freedom to associate or whether it also safeguards the right of individuals to refuse to associate.

This Court has already had occasion to review the scope of the freedom guaranteed by s. 2(*d*) and those decisions may prove of some assistance in answering this question. In *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (the *Alberta Reference*), a challenge was launched against the constitutionality of certain legislative provisions prohibiting strikes and providing for compulsory arbitration of labour disputes in the Alberta public sector. It was claimed that these provisions violated the union's right to strike which, it was said, formed an integral part of freedom of association under s. 2(*d*). The union's claim for the constitutional entrenchment of the right to strike was rejected by the majority. While the members of the Court varied in their opinions as to whether and why the right to strike was or was not constitutionally entrenched, they were in agreement as to the general purpose behind the guarantee of freedom of association. At page 334 Dickson C.J. explained the role of freedom of association in the following terms:

> Freedom of association is the freedom to combine together for the pursuit of common purposes or the advancement of common causes. It is one of the fundamental freedoms guaranteed by the *Charter*, a *sine qua non* of any free and democratic society, protecting individuals from the vulnerability of isolation and ensuring the potential of effective participation in society. In every area of human endeavour and throughout history individuals have formed associations for the pursuit of common interests and aspirations. Through association individuals are able to ensure that they have a voice in shaping the circumstances integral to their needs, rights and freedoms.

At pages 365-66 he continued:

> The purpose of the constitutional guarantee of freedom of association is, I believe, to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends.
>
> As social beings, our freedom to act with others is a primary condition of community life, human progress and civilized society.
>
> . . .
>
> Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict.

Even although the Chief Justice wrote in dissent, his view that s. 2(*d*) was intended to protect the right of individuals to form collectivities was endorsed by all his colleagues. For example, Le Dain J. commented on the significance of the freedom at p. 391:

> Freedom of association is particularly important for the exercise of other fundamental freedoms, such as freedom of expression and freedom of conscience and religion. These afford a wide scope for protected activity in association. Moreover, the freedom to work for the establishment of an association, to belong to an association, to maintain it, and to participate in its lawful activity without penalty or reprisal is not to be taken for granted.

McIntyre J. too accepted Dickson C.J.'s conclusion as to the purpose behind s. 2(*d*). He stated at pp. 393 and 395 respectively:

> The value of freedom of association as a unifying and liberating force can be seen in the fact that historically the conqueror, seeking to control foreign peoples, invariably strikes first at freedom of association in order to eliminate

> effective opposition. Meetings are forbidden, curfews are enforced, trade and commerce is suppressed, and rigid controls are imposed to isolate and thus debilitate the individual. Conversely, with the restoration of national sovereignty the democratic state moves at once to remove restrictions on freedom of association.
>
> . . .
>
> While freedom of association like most other fundamental rights has no single purpose or value, at its core rests a rather simple proposition: the attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and cooperation of others. "Man, as Aristotle observed, is a `social animal, formed by nature for living with others', associating with his fellows both to satisfy his desire for social intercourse and to realize common purposes." (L. J. MacFarlane, *The Theory and Practice of Human Rights* (1985), p. 82.)

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. 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 the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 ("*P.I.P.S.*"). Here a challenge was launched against a statutory scheme which provided for certification of bargaining agents in the complete discretion of the government. The majority of the Court held that the statute did not infringe s. 2(*d*), finding that the issue had been effectively determined in the *Alberta Reference*. At pages 401-2 Sopinka J. summarized the findings of the various members of the Court in the *Alberta Reference* as follows:

> Upon considering the various judgments in the *Alberta Reference*, I have come to the view that four separate propositions concerning the coverage of the s. 2(*d*) guarantee of freedom of association emerge from the case: first, that s. 2(*d*) protects the freedom to establish, belong to and maintain an association; second, that s. 2(*d*) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that s. 2(*d*) protects the exercise in association of the

> constitutional rights and freedoms of individuals; and fourth, that s. 2(*d*) protects the exercise in association of the lawful rights of individuals.

Cory J., in dissent, agreed that the social purpose of the s. 2(*d*) freedom had been established by the *Alberta Reference*, saying at p. 379 that "[f]reedom of association is the freedom to join together for the purpose of achieving common goals."

The law as laid down in the *Alberta Reference* has also been accepted outside the collective bargaining context. In *R. v. Skinner*, [1990] 1 S.C.R. 1235, for instance, the soliciting provision of the *Criminal Code*, R.S.C. 1970, c. C-34, was challenged *inter alia* on the basis that it infringed s. 2(*d*) of the *Charter*. Dickson C.J., writing for the majority, held that the target of s. 195.1(1)(*c*) was expression rather than association and that the protection afforded by s. 2(*d*) was accordingly not engaged by that section of the *Code*. Even although the Chief Justice ultimately held that s. 2(*d*) was not applicable in the circumstances, in the course of making that determination he commented on the import of the decision in the *Alberta Reference* at p. 1243 as follows:

> In *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, this Court undertook a full review of the historical origins and constitutional scope of freedom of association. I find it unnecessary to repeat here the purposes and meaning of the s. 2(*d*) *Charter* guarantee explored in the judgments in that case.

I disagreed with the Chief Justice that s. 2(*d*) was not applicable to the activity targeted by s. 195.1(1)(*c*) of the *Criminal Code*, i.e., the sale of sex. I fully agreed, however, that the purpose of the guarantee of freedom of association was to protect the coming together of individuals to pursue common goals.

Hence, it would appear that this Court has been unanimous in finding on more than one occasion and in a variety of contexts that the purpose which s. 2(*d*) is meant to advance is the collective action of individuals in pursuit of their common goals. The lower courts have interpreted this Court's position as being that the *Charter* does not guarantee a freedom not to associate: see *Arlington Crane Service Ltd. v. Ontario (Minister of Labour)* (1988), 67 O.R. (2d) 225 (H.C.), and *Re Pruden Building Ltd. and Construction & General Workers' Union Local 92* (1984), 13 D.L.R. (4th) 584 (Alta. Q.B.).

The appellant seeks, however, to limit the scope of what was said in the *Alberta Reference* and its progeny. Mr. Lavigne argues that this Court's conclusion as to the scope of s. 2(*d*) was reached in the context of governmental intrusion upon collective action and that the question whether s. 2(*d*) includes a freedom not to associate has never actually been before the Court. The appellant urges the Court to expand the reach of s. 2(*d*) to include the right not to associate and cites a number of authorities in support of this position.

Mr. Lavigne relies on the decision of this Court in *Oil, Chemical and Atomic Workers International Union v. Imperial Oil Ltd.*, [1963] S.C.R. 584. In that case, provincial law prohibited unions from making any contribution to political parties or political candidates out of the moneys they acquired through dues check-off schemes and required them to issue a declaration indicating their compliance with the legislation in this regard. Mandatory dues deduction and mandatory union membership were agreed upon between the employer and the union and a provision to that effect was

incorporated into the collective agreement. When the union failed to make the statutory declaration, Imperial Oil refused to continue to make the deductions. The union then sued the company for the funds. In seeking to justify its actions the union argued that the legislation was *ultra vires* the province of British Columbia because it purported to regulate matters relating to federal elections and fundamental rights both of which were matters of federal rather than provincial jurisdiction under the *Constitution Act, 1867*.

In the course of finding that the legislation was in pith and substance in relation to property and civil rights and therefore within the jurisdiction of the provincial legislature, Martland J. remarked at p. 593:

> The *Labour Relations Act* has materially affected the civil rights of individual employees by conferring upon certified trade unions the power to bind them by agreement and the power to make agreements which will compel membership in a union. Such legislation falls within the powers of the Legislature . . . . The legislation which is under attack in the present proceedings, in my opinion, does nothing more than to provide that the fee paid as a condition of membership in such an entity by each individual employee cannot be expended for a political object which may not command his support. That individual has been brought into association with the trade union by statutory requirement. [Emphasis added.]

While this comment seems on its face to support Mr. Lavigne's argument, its significance in terms of the present appeal is diminished by the following considerations. Most importantly, the process of characterizing a law for the purposes of division of powers determinations is quite a different exercise from construing a law for purposes of the *Charter*. This point is made unequivocally clear by the decision of this Court in *Big M Drug Mart*, *supra*, and more recently in *Douglas College*, *supra*. Second, it is clear that what was at issue in *Oil, Chemical* was a "closed shop" rather than an "agency shop"

provision. That is to say, the article negotiated between the union and the employer and incorporated into the collective agreement in that case made it a condition of employment that employees actually join the union rather than simply pay the equivalent of union dues. To the extent that this fact influenced the thinking of Martland J., that situation is clearly distinguishable from the present. Mr. Lavigne has not been compelled to become a member of the Union and, indeed, has exercised his prerogative to refrain from doing so.

The appellant also relies on the decision of the European Human Rights Commission in *Young, James and Webster v. United Kingdom* (1980), 3 E.H.R.R. 20. In that case a complaint was lodged that a closed shop clause negotiated into a collective agreement violated associational rights as guaranteed by Article 11 of the European Convention on Human Rights. The complainants were dismissed from their employment with British Rail after, the agreement having been ratified by the employer and the bargaining agent, they refused to join the union. The Commission agreed that a violation of the Convention had been established. It is my opinion, however, that *Young, James and Webster* actually provides scanty support for the appellant's position. As was the case in *Oil, Chemical* and unlike the present case, the impugned article of the collective agreement provided for a "closed shop". More crucial is the fact that the Commission expressly refused to base its decision on a right not to associate, a point which is made clear by the Commission's statement at pp. 26-27 that it did "not have to discuss the more general question whether or not the positive freedom guaranteed by Article 11 (1) implies also a negative freedom". Indeed, the gist of the decision is that the complainants' positive associational rights were violated because they were

prohibited from joining a union of their choosing. That the heart of the decision rested on this footing is made abundantly clear by the following remarks of the Commission at p. 26:

> As regards the individual to whom the rights mentioned in Article 11 are guaranteed, these words imply that a worker must be able to choose the union which in his opinion best protects his interests, and if he considers that none of the existing trade unions does so effectively, to form together with others a new one. This is particularly important since unions, as these cases show, may have political affiliations. [Emphasis added.]

Finally, Mr. Lavigne relies heavily on American authority in support of his submission as to the reach of s. 2(*d*), and in particular, the decision of the Supreme Court of the United States in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). At issue there was the constitutionality of an agency shop provision negotiated in a collective agreement. Like Mr. Lavigne, the appellants in that case contended that the partial expenditure of their money by the union on political causes which they did not support infringed their constitutional rights under the First Amendment. The United States Supreme Court agreed and ordered the union to refund those portions of the dues which were earmarked for political causes.

Unlike the other sources upon which the appellant draws for support it is clear that the Supreme Court in *Abood* did indeed recognize a right not to associate. But while *Abood* is by far the strongest authority for the constitutional protection of such a right, this 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. Thus in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, Lamer J. stressed the pre-eminent role of s. 1 of our *Charter* which differentiates our constitution from that of our American neighbours. And in *McKinney*, *supra*, the concept of government was examined from a peculiarly Canadian perspective in order to construe what was meant by the word "government" in s. 32 of the *Charter*.

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. The constitutional interlocking of freedom of speech and freedom of association in the United States emerges clearly from the various opinions rendered in *Abood*. For instance, Stewart J. wrote at p. 233: "Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments." In the view of the majority it was the compelled expression of political views which formed the essence of the violation. At pages 234-35 Stewart J. said:

> [The appellants] specifically argue that they may constitutionally prevent the Union's spending a part of their required service fees to contribute to political candidates and <u>to express political views</u> unrelated to its duties as exclusive

> bargaining representative. We have concluded that this argument is a meritorious one.
>
> . . .
>
> The fact that the appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights. For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. [Emphasis added.]

See also: Reena Raggi, "An Independent Right to Freedom of Association" (1977), 12 *Harv. C.R.-C.L. Law Rev.* 1.

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* at p. 364 where he said:

> I am unable, however, to accept that freedom of association should be interpreted so restrictively. Section 2(*d*) of the *Charter* provides an explicit and independent guarantee of freedom of association. In this respect it stands in marked contrast to the First Amendment to the American Constitution. The derivative approach [employed by the American courts] would, in my view, largely make surplusage of s. 2(*d*).

In *R. v. Skinner*, *supra*, it was likewise made clear that, while *Charter* guaranteed freedoms are mutually reinforcing, they remain separate and distinct. For Dickson C.J. it was implicit that the application of s. 2(*d*) was not triggered where it was evident that the legislation was primarily aimed at human activity covered by another *Charter* guarantee, in that case the expressive activity protected by s. 2(*b*). It was my view, on the other hand, that both s. 2(*b*) and s. 2(*d*) could be invoked so long as the activities involved were the kind these provisions were meant to safeguard against

legislative intrusion. In spite of these differences of opinion it was accepted by all in *Skinner* that freedom of association serves a very different function from freedom of expression.

In summary, none of the authorities cited by the appellant provide unequivocal support for his position that a right not to associate should be recognized as encompassed by s. 2(*d*). Precedent aside, the appellant suggests that if s. 2(*d*) protects the right to associate, it should also as a matter of simple logic protect the converse, i.e., the right not to associate. This Court rejected reasoning like this in *R. v. Turpin*, [1989] 1 S.C.R. 1296, where it was argued that if s. 11(*f*) of the *Charter* guaranteed the right to be tried by a jury and an accused could waive that right, then the section must necessarily also guarantee him the right to be tried by a judge alone. This argument was met with the following response at p. 1321:

> There is no constitutional right to a non-jury trial. There is a constitutional right to a jury trial and there may be a "right", using that term loosely, in an accused to waive the right to a jury trial. An accused may repudiate his or her s. 11(*f*) right but such repudiation does not, in my view, transform the constitutional right to a jury trial into a constitutional right to a non-jury trial so as to overcome the mandatory jury trial provisions of the *Criminal Code*.

To my mind, the appellant has not advanced sufficiently compelling reasons to justify extending freedom of association, having regard to its purpose, to include a freedom not to associate. In the words of Dickson J. in *Big M Drug Mart*, *supra*, at p. 344, this would be "to overshoot the actual purpose of the right or freedom in question". The purpose behind s. 2(*d*) has already been fully and fairly discussed and there seem to me to be good reasons for affirming the interpretation given to the

provision. For instance, 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.

I should add that restricting the reach of s. 2(*d*) to positive associational rights best accords with a serious and non-trivial approach to *Charter* guarantees. In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, this Court rejected the "mere distinction" approach to construing the meaning of "discrimination" in s. 15 of the *Charter* because to do so would trivialize the very important promise of equality embodied in that section. If every difference in treatment gave rise to a violation of s. 15, the real value of the guarantee of equality would be lost. A similar approach may be taken toward s. 2(*d*). It is a fact of our civilization as human beings that we are of necessity involved in associations not of our own choosing. That being so it is naive to suggest that the Constitution can or should enable us to extricate ourselves from all the associations we deem undesirable. Such extrication would be impossible and even to attempt it would make a mockery of the right contained in s. 2(*d*).

Several examples were cited in oral argument which demonstrate how a right not to associate would lead to absurd results. The most compelling of these was the analogy drawn to the mandatory payment of taxes. Following the line of logic which the

negative freedom analysis commands, our system of taxation arguably brings all taxpayers into forced association with the political party in power, its policies and the uses to which our tax money is put. If it were the case that s. 2(*d*) protected such compelled associations, all taxpayers with a grievance to air would theoretically be able to come before the courts and insist that each tax expenditure be subjected to analysis under s. 1.

The appellant sought to distinguish this situation on the footing that citizens subject to taxation agree to be bound by such a system when they choose to be "members" of a community governed by democratically elected representatives. To my mind, there is no distinction in principle between our overall system of government and the role of taxation within it and the mini-democracy of the workplace. Under our labour relations regime all members of the bargaining unit have an equal opportunity to participate in choosing who is to represent them and to join the ranks of the union or not as they see fit. Further, as in our system of representative democracy, members of a bargaining unit may also decide to oust their bargaining agent if dissatisfied with its performance. Hence, the system of compulsory dues check-off is no different in principle from the system of taxation in a democracy and Mr. O'Connor's attempt to differentiate between these two regimes is without merit.

I think it clear that even if it were the business of the courts in upholding the Constitution to scrutinize tax expenditures, a proposition with which I have some considerable difficulty, it would be unwise to devote our limited judicial resources to such endeavours. Indeed, this is precisely the difficulty which has arisen since the

decision in *Abood*, *supra*. In that case the United States Supreme Court expressly refrained from deciding which expenditures were or were not made for "legitimate" collective bargaining purposes, leaving it up to the courts below to determine these matters. As a consequence litigation of this kind has been going on for years: see, e.g., *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435 (1984). In short, the recognition of compelled contributions as constitutionally impermissible has given rise to an endless train of disputes in the United States.

In Canada, by contrast, the courts have thus far sought to deal with the practical problems to which the recognition of negative associational claims gives rise in a very different fashion. To avoid the "floodgates" problem Canadian courts have attempted to differentiate between serious and trivial violations of s. 2(*d*). For instance, in *Merry v. Manitoba and Manitoba Medical Association* (1989), 58 Man. R. (2d) 221 (Q.B.), provincial law required all licensed medical practitioners to contribute annual dues to the Association regardless of their membership status. Merry, a licensed medical doctor who was not a member of the Association, applied for a declaration that the legislation violated his s. 2(*d*) rights. He objected to having to pay dues to the Association because it supported certain causes to which Dr. Merry was vehemently opposed. Rather than accepting that a violation of s. 2(*d*) had been established and proceeding to analyze the justiciability of the expenditures under s. 1, the court drew a distinction between constitutionally significant and constitutionally insignificant compelled associations. Similarly, the Court of Appeal in the present case dealt with the issue of the appellant's right to refrain from associating with the Union in the same

manner, by characterizing his claim as falling within the realm of the constitutionally insignificant.

In my view, neither the approach of the Canadian nor that of the American courts particularly commends itself. As soon as the Court is placed in the position of having to choose between so-called meaningful and trivial constitutional claims, an opening for the exercise of arbitrary line drawing has been created. On the other hand, it would be an abdication of this Court's responsibility to ensure access to justice if it turned a blind eye to the problems which recognition of a right not to associate will generate. Cognizant of these problems commentators have proposed various approaches designed to curb constitutional excesses. In the United States, for example, Professor Cantor in his article "Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association" (1983), 36 *Rutgers L. Rev.* 3, argues at p. 25 that:

> . . . moral affront or upset to conscience from being used as a financial instrument is not, by itself, a serious constitutional injury. Indeed, such incursions upon conscience through forced "support" of distasteful causes is an inevitable concomitant of living in an organized society. While it would be *nice* to avoid all spiritual and ideological affronts to persons forced by government to pay monies, the critical issue for first amendment purposes is whether the payor is required to associate with or appear to endorse in some fashion a distasteful cause selected by government. [Emphasis in original.]

In Canada, similar limitations have been proposed in relation to s. 2(*d*). Professor Etherington, for example, has argued 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, that what lies at the heart of the claim not to associate are interests in the preservation of the democratic political system and in the

protection of individual liberty. Professor Etherington envisions four ways in which these interests might be endangered by forced contributions which a freedom of non-association should guard against: (1) government establishment of, or support for, particular political causes; (2) impairment of individual freedom to join or associate with causes of his or her choosing; (3) imposition of ideological conformity; and (4) personal identification of the individual payor with causes which he or she does not support.

In my view, Professor Etherington's and Professor Cantor's analyses both contain necessary and desirable limitations which must be affixed to any negative right to associate. And indeed, adoption of either approach would minimize the problems to which negative association rights can give rise. However, I remain of the view that s. 2(*d*) should not be expanded to protect the right not to associate. As Mr. Nelson suggested, other *Charter* guaranteed rights and freedoms adequately protect the type of interests which underlie claims based on a right not to associate. As was evident throughout this appeal, the real harm produced by compelled association is not the fact of the association itself but the enforced support of views, opinions or actions one does not share or approve. 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.

Having found that s. 2(*d*) includes only the positive freedom to associate, the question remains whether Mr. Lavigne's freedom of association has been violated in this case. The appellant has not been prevented from forming or joining associations of his

choosing. It is my view, therefore, that the appellant's right to freely associate has not been infringed and this ground of appeal must accordingly fail.

I should perhaps add that even if this Court were to recognize a right not to associate under s. 2(*d*), I would still hold that this right has not been infringed in the present case. My main reason for so concluding is that, if a negative right does indeed exist, it surely can be no broader in scope than the positive right to associate previously defined by this Court.

Beginning with the *Alberta Reference* and culminating most recently in the decision in *P.I.P.S.*, *supra*, this Court has repeatedly stated that s. 2(*d*) does not protect the objects of an association. Unions have accordingly been denied constitutional protection for activities which are central, indeed fundamental, to their effective functioning within our system of collective bargaining. Mr. Lavigne submits, however, that while the objects of an association are irrelevant to the claims of collectivities of working people, they may legitimately be taken into account when assessing the claim of an individual who objects to being associated with the objects of such a collectivity. I do not believe it is open to the Court to engage in one-sided justice of this kind. Since s. 2(*d*) protects both individuals and collectivities, if the objects of an association cannot be invoked to advance the constitutional claims of unions, then neither, it seems to me, can they be invoked in order to undermine them. Even although the appellant has framed his claim in terms of his compelled association with the Union *simpliciter* (i.e., in terms of his having been forced to pay dues), it is clear that his only real objection is to certain forms of union expenditure. Mr. Lavigne's claim is thus inextricably connected

to the objects of the association, a factor which this Court has consistently stated has no place in s. 2(*d*), and not merely to the existence of the association.

3. *Freedom of Expression*

Section 2(*b*) of the *Charter* provides:

2. Everyone has the following fundamental freedoms:

. . .

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

There can be little doubt as to the fundamental nature of the guarantee of freedom of expression. As was stated by McIntyre J. in *Dolphin Delivery, supra*, at p. 583:

> Freedom of expression is not, however, a creature of the *Charter*. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society. Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon its maintenance and protection.

The sentiments of McIntyre J. have been echoed by this Court on various subsequent occasions. The appellant has invoked this fundamental guarantee in this appeal. He argues that his freedom of expression is infringed by his being compelled to pay the equivalent of union dues. Mr. Lavigne submits that this compelled payment constitutes an expression of support by him not only for the Union itself but also for the "causes"

supported by the Union. Since he in fact supports neither the Union nor its causes, this compelled mode of expression infringes his s. 2(*b*) right.

This Court fully examined the nature and purpose of s. 2(*b*) in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927. At issue in that case was the constitutionality of legislative provisions prohibiting commercial advertising aimed at children. There, the majority set out at pp. 978-79 the steps to be carried out in any s. 2(*b*) analysis:

> When faced with an alleged violation of the guarantee of freedom of expression, the first step in the analysis is to determine whether the plaintiff's activity falls within the sphere of conduct protected by the guarantee. Activity which (1) does not convey or attempt to convey a meaning, and thus has no content of expression or (2) which conveys a meaning but through a violent form of expression, is not within the protected sphere of conduct. If the activity falls within the protected sphere of conduct, the second step in the analysis is to determine whether the purpose or effect of the government action in issue was to restrict freedom of expression. If the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee. In determining whether the government's purpose aims simply at harmful physical consequences, the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity. If the government's purpose was not to restrict free expression, the plaintiff can still claim that the effect of the government's action was to restrict her expression. To make this claim, the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing. [Emphasis in original.]

The test articulated in *Irwin Toy* has formed the basis of this Court's approach to freedom of expression questions: see *Committee for the Commonwealth of Canada v.*

Canada, [1991] 1 S.C.R. 139; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; and *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232. It is to be noted, however, that this test was framed in the context of governmental restrictions on expression and not, as in the present case, in the context of "forced" expression. Thus, the first issue which must be addressed is whether it is appropriate to apply *Irwin Toy* in this case.

In my view, the approach to s. 2(*b*) developed in *Irwin Toy* is sound. It begins by asking whether it is "expression" in which a plaintiff wishes to engage, and, if the answer to that question is yes, it then turns to the issue of how government has impeded that desire. Thus, the first branch of the test focuses on the plaintiff and questions whether the activity in which he or she wishes to participate is expression. The second branch logically concerns the impact of the impugned law. If the "purpose" of the law is aimed at controlling expression, a violation of s. 2(*b*) is automatic. On the other hand, if the aim of the legislature was not directed at controlling expression, then the plaintiff must cross a further hurdle in order to establish an infringement of his or her *Charter* right. In such cases, it is not sufficient that the law has some "effect" on expression. The plaintiff must demonstrate that the meaning which he or she wishes to convey relates to the purposes underlying the guarantee of free expression. And there is a clear foundation for the addition of this extra step. Because the word "expression" in s. 2(*b*) has been broadly construed, most laws will have some impact on expression, intended or otherwise. Given this, it makes very good sense to ensure that unintended effects do not receive constitutional protection unless they strike at the heart of s. 2(*b*).

How do these principles fit in cases where, instead of restricting expression, government is compelling expression? It seems to me that as long as the activity in which a plaintiff wishes to engage falls within the protected sphere of activity, the first step will be satisfied. If the government's purpose was to put a particular message into the mouth of the plaintiff, as is metaphorically alleged to be the case here, the action giving effect to that purpose will run afoul of s. 2(*b*). If, on the other hand, the government's purpose was otherwise but the effect of its action was to infringe the plaintiff's right of free expression, then the plaintiff must take the further step and demonstrate that such effect warrants constitutional disapprobation. It seems to me therefore that the interpretive approach established in *Irwin Toy* readily lends itself to the analysis of claims based on compelled expression and I will follow it in my approach to s. 2(*b*) in this case.

(a) The First Step

The first step, then, is to ask whether the activity in which the appellant wishes to engage falls within the sphere of conduct protected by s. 2(*b*), i.e., whether the activity conveys a meaning and, if so, whether the expression takes an acceptable form. With respect to the question of the form of the expression, this Court has stated that certain manifestations of expressive behaviour will not be protected by the *Charter*. The quintessential example of the unprotected form is physical violence, an example which was initially cited by McIntyre J. in *Dolphin Delivery*, *supra*, and was applied in the later case of *R. v. Keegstra*, *supra*. No difficulty is posed by the form of expression involved in the present appeal.

With respect to the question whether the activity conveys a meaning, it is by now quite clear that all meanings, however repugnant and regardless of their impact, are protected by s. 2(*b*). Thus, in *R. v. Keegstra*, Dickson C.J., writing for the majority, observed that even expression which is inimical to the preservation and promotion of other *Charter* values is not excluded from the ambit of s. 2(*b*). The idea that the guarantee of freedom of expression extends to all messages was perhaps most aptly put by the Court in *Irwin Toy*, *supra*, at p. 968:

> Freedom of expression was entrenched in our Constitution . . . so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream.

Even although the Court has interpreted s. 2(*b*) in this generous way, it has not so far suggested that any activity which conveys meaning automatically falls within its compass. This point was made in *Irwin Toy* at p. 969:

> We cannot, then, exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. Of course, while most human activity combines expressive and physical elements, some human activity is purely physical and does not convey or attempt to convey meaning. It might be difficult to characterize certain day-to-day tasks, like parking a car, as having expressive content. To bring such activity within the protected sphere, the plaintiff would have to show that it was performed to convey a meaning. For example, an unmarried person might, as part of a public protest, park in a zone reserved for spouses of government employees in order to express dissatisfaction or outrage at the chosen method of allocating a limited resource. If that person could demonstrate that his activity did in fact have expressive content, he would, at this stage, be within the protected sphere and the s. 2(*b*) challenge would proceed.

The distinction between expression and expressionless activity is illustrated by the decision in the companion appeal of *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712. In that case, the appellant Ford sought to challenge Quebec's language bill which required that public signs, commercial advertising and firm names be posted solely in the French language. Among the issues which the Court had to determine was whether freedom of expression was infringed through restriction on the use of language. The Court found that it was, saying at pp. 748-49:

> Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the *Charter of the French Language* itself indicates, a means by which a people may express its cultural identity.

To date, only one activity has been found to be beyond the protective reach of s. 2(*b*). In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code, supra*, the majority of this Court dismissed the argument that the activity prohibited by s. 193 of the *Code* (keeping a common bawdy-house) was protected expression under the *Charter*. Indeed, the majority gave the submission very short shrift, remarking at p. 1206: "I do not believe that "expression" as used in s. 2(*b*) of the *Charter* is so broad as to capture activities such as keeping a common bawdy-house".

Thus, while the Court has stated its unwillingness to pick and choose between "good" and "bad" meanings within the context of s. 2(*b*), preferring to leave the exercise of balancing competing values to s. 1 of the *Charter*, it has not gone so far as to say that any activity which potentially conveys meaning is protected by freedom of

expression. And this is not surprising since to so hold would certainly trivialize a fundamental guarantee which has been described as the cornerstone of democracy.

It must therefore be determined whether the activity in which the appellant wishes to engage conveys a meaning. The nub of Mr. Lavigne's argument is that the scheme of mandatory dues check-off deprives him of his right to refuse to support the Union and the causes it supports. He says, in effect, that it deprives him of the right to take a contrary position on these causes or to refrain from taking any position on them at all. It compels him, he submits, to be identified with them and therefore conveys a meaning in the sense discussed in *Irwin Toy*.

It was noted in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, *supra*, that silence may in certain circumstances constitute expressive activity within the meaning of s. 2(*b*). At page 1184 Lamer J. said:

> Obviously, almost all human activity combines expressive and physical elements. For example sitting down expresses a desire not to be standing. Even silence, the apparent antithesis of expression, can be expressive in the sense that a moment's silence on November 11 conveys a meaning.

I do not think that Lamer J. was saying in this passage that silence in general conveys a meaning but that it may in some special circumstances such as the two minutes' silence on Armistice Day. Silence can, indeed, in some circumstances speak louder than words but the question raised by the plaintiff as far as silence is concerned is whether his s. 2(*b*) right to freedom of expression includes a right to take no position as well as a right to take a contrary position.

I do not consider it necessary in this case to decide whether freedom of expression under s. 2(*b*) encompasses a right not to express oneself at all on an issue since it seems to me clear that the essence of Mr. Lavigne's complaint is not that he wishes to take a neutral or no position in relation to some of the causes supported by the Union but that he is vigorously opposed to some of them and objects to being compelled, as he says, to be identified with them through the payment of the equivalent of union dues. His objection, as I understand it, is to being compelled to say something rather than to being denied the right to say nothing.

There is no question in my mind that the Union's contributions to various purposes convey meaning for it. Similarly, for some members of the bargaining unit represented by OPSEU the contribution of dues to the Union signifies for them support for the Union and perhaps more generally for the union movement and the interests it supports. Clearly, therefore, volunteering financial support is expressive for such people. Particularly in this day and age where money is an extremely powerful way of expressing support, the channelling of contributions is expressive indeed. It is also unquestionably true that a refusal to provide monetary assistance, to boycott, in other words, is equally expressive. I agree, therefore, with the appellant that the fact that he is denied the right to boycott the Union's causes prevents him from conveying a meaning which he wants to convey. The real question, however, is whether it is the action of government which has in either purpose or effect impinged upon this expressive activity.

(b) <u>The Second Step</u>

What was the purpose behind the government action in this case? I think it clear that it was never the intention of government in enacting the impugned sections of the *Colleges Collective Bargaining Act*, or in agreeing with OPSEU to incorporate the Rand formula into the collective agreement, to control the conveyance of meaning. Indeed, to suggest that it was seems to me to misapprehend the purpose of the agency shop and the vital role it plays in the regulation of Canadian labour relations.

The history behind the agency shop device in Canada demonstrates that the purpose of the Rand formula is simply to promote industrial peace through the encouragement of collective bargaining. I will have more to say on the purpose behind compulsory dues check-off schemes in my analysis of the application of s. 1 of the *Charter* later in these reasons. For the moment, suffice it to say that the Rand formula is but one aspect of a complex legislative regime which attempts to strike a balance between the interests of capital and labour. The Rand formula has grown in popularity in this country precisely because it is a fair means to achieve that balance without which collective bargaining cannot succeed. Compulsory dues check-off is a means by which to shore up union strength in bargaining relationships plagued by inequality. 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.

But does the Rand formula have the effect of depriving the appellant of his right to express himself freely? In *Irwin Toy*, as I indicated earlier, this Court held that, where a law only incidentally affects freedom of expression, a plaintiff, in order to reap the benefit of s. 2(*b*), must show that the expression in which he or she wishes to engage feeds the purpose behind the guarantee. In this case the courts below found that Mr. Lavigne's freedom of expression was not infringed at all. The Court of Appeal agreed (at p. 568) with the findings of White J. at trial who said at pp. 509-10:

> As I see it, a possible impingement on Mr. Lavigne's freedom of expression might arise on the facts in two ways. First, there could be a curtailment of rights under s. 2(*b*) of the Charter if the expression of the ideology or political persuasion of the group is attributed to the reluctant fees payor. This would be of concern in the case at bar if Mr. Lavigne were to become "associated" or identified with the ideological and political causes that the Union supports by virtue of the financial contributions that he is forced to make. An abridgment of expression in this sense would stem from the concept of freedom of thought as an extension of individual liberty. The record simply does not support any such claim . . . .
>
> The second way in which a possible freedom of expression impingement could arise in this context would be if Mr. Lavigne's capacity to engage in "expression" were reduced as a result of mandatory dues. Arguably, compelled payment of dues reduces the financial resources available to the objecting dues payor to support causes of his own choosing; this results in a burdening of freedom of expression. . . . I respectfully agree with the following passage from the dissent of Frankfurter J., which, in my opinion, disposes of the argument that Mr. Lavigne's freedom of expression has been burdened (at p. 806):

. . . the gist of the complaint here is that the expenditure of a portion of mandatory funds for political objectives denies free speech -- the right to speak or to remain silent -- to members who oppose, against the constituted authority of union desire, this use of their union dues. No one's desire

> or power to speak his mind is checked or curbed. The individual member may express his view in any public or private forum as freely as he could before the union collected his dues. Federal taxes also may diminish the vigour with which a citizen can give partisan support to a political belief, but as yet no one would place such an impediment to making one's views effective within the reach of constitutionally protected `free speech'.
>
> I cannot see that the record for this application supports the argument that Mr. Lavigne's capacity to express his views about the Union, or about the causes it supports has been impaired in any way.

White J. was clearly of the view that the compelled payment of dues did not have the effect of publicly identifying Mr. Lavigne with the Union's activities. Nor did it, in his view, prevent Mr. Lavigne from expressing his own views. This was conclusive of the issue in White J.'s opinion. The appellant argues that the courts below erred in considering these factors relevant to the issue of the infringement of his s. 2(*b*) rights. He submits that the fact that he is compelled to provide affirmation of the Union's activities in the form of union dues is sufficient in itself to ground a breach. OPSEU disagrees that the factors of public identification and ability to disavow are irrelevant. The Union argues that these factors would only be irrelevant if the compelled message was content-based. In its view, where the message is content-neutral a challenger must also establish one of the above two factors for an infringement of expressive rights to be found. OPSEU argues that the mere contribution of money is content-neutral and that to establish a violation Mr. Lavigne must therefore show either public identification or inability to disavow.

The appellant relies on earlier American authorities for his position: see *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943); *Wooley v. Maynard*, 430 U.S. 705 (1977), *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241

(1974), and *Elrod v. Burns*, 427 U.S. 347 (1976). These authorities were discussed in a more recent decision of the United States Supreme Court, *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

In *PruneYard* a group of protestors to a United Nations resolution sought to obtain signatures for their petition in a local shopping centre. They were informed by a security guard that they would have to leave because their activity violated shopping centre regulations prohibiting any visitor or tenant from engaging in any public expressive activity that was not directly related to the centre's commercial purposes. Rehnquist J., who delivered the opinion of the court, found that the shopping centre owner's freedom of speech would not be infringed if the petitioners were permitted to convey their message on his property. In doing so, he distinguished both the *Wooley* and *Barnette* decisions.

In *Wooley* the appellants had obscured the motto "Live Free or Die" on the licence plates of their motor vehicle on the grounds of religious objection. A New Hampshire statute required non-commercial motor vehicles to bear plates with the motto on them and made it a misdemeanour to cover it up. The appellants were found guilty of violating that statute but refused to pay the fine and were sentenced to 15 days in jail. In consequence, they brought an action seeking declaratory and injunctive relief on the basis that the statute violated their rights under the First Amendment.

Rehnquist J. discussed the *Wooley* decision in *PruneYard* at pp. 86-87:

. . . in *Wooley* v. *Maynard* . . . this Court concluded that a State may not constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public. This rationale applies here, [the appellants] argue, because the message of *Wooley* is that the State may not force an individual to display any message at all.

> *Wooley*, however, was a case in which the government itself prescribed the message, required it to be displayed openly on appellee's personal property that was used "as part of his daily life," and refused to permit him to take any measures to cover up the motto even though the Court found that the display of the motto served no important state interest. Here, by contrast, there are a number of distinguishing factors. Most important, the shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please. The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition thus will not likely be identified with those of the owner. Second, no specific message is dictated by the State to be displayed on appellants' property. There consequently is no danger of governmental discrimination for or against a particular message. Finally, as far as appears here appellants can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law.

The court similarly distinguished *Barnette* and *Tornillo* respectively. *Barnette* involved the compelled recitation of a message containing an affirmation of belief. In contrast to the situation then before it, the court in *Barnette* found the compulsion unconstitutional because it required the "individual to communicate by word and sign his acceptance" of government-dictated political ideas (at p. 88).

Tornillo was of even less assistance because it concerned the compulsion of a newspaper to print political candidates' replies to editorial criticisms. Such compulsion, in the court's view, would "dampe[n] the vigor and limi[t] the variety of public debate". It was an unjustified intrusion into the function of editors, an intrusion which was not at issue in *PruneYard* (at p. 88).

PruneYard would appear to stand for the proposition that no infringement of freedom of speech will be found unless (1) there is state compulsion of the content of the message; (2) there is public identification of the complainant with that message; and (3) the complainant is not able to disavow belief in the content of the message. To the extent that *PruneYard* fully represents the current state of American law on this issue the appellant would seem to be incorrect in his assertion that ability to disavow and public identification are irrelevant under the First Amendment. These factors clearly play some role, although arguably they do not account for the whole of the jurisprudence.

The dispute between the parties in this appeal over the correct interpretation of American "compelled speech" doctrine does not, however, advance the present inquiry very far. The question is and always should be whether the principles of American constitutional law should be adopted into the Canadian constitution. Two "compelled speech" decisions of this Court are instructive on this question: *National Bank of Canada v. Retail Clerks' International Union*, [1984] 1 S.C.R. 269, and *Slaight Communications Inc. v. Davidson*, *supra*.

National Bank involved the validity of an order issued by the Canada Labour Relations Board by way of remedy for certain flagrant unfair labour practices committed by the Bank during a union organizing drive. In particular, the Board ordered the employer to read a letter to its employees stating that it approved of unionization. This Court held that the Board had no jurisdiction to order such a remedy on the footing that no essential connection existed between the act alleged, its consequences, and the

remedy imposed. Beetz J. added in *obiter* that the remedy would also violate the *Charter*. He said at p. 296:

> This type of penalty is totalitarian and as such alien to the tradition of free nations like Canada, even for the repression of the most serious crimes. I cannot be persuaded that the Parliament of Canada intended to confer on the Canada Labour Relations Board the power to impose such extreme measures, even assuming that it could confer such a power bearing in mind the *Canadian Charter of Rights and Freedoms*, which guarantees freedom of thought, belief, opinion and expression. These freedoms guarantee to every person the right to express the opinions he may have: *a fortiori* they must prohibit compelling anyone to utter opinions that are not his own.

A similar challenge to a labour relations remedy was brought in *Slaight Communications*. There, the respondent Davidson was employed as a radio time salesperson for the radio station Q107. He was terminated ostensibly on the basis that his performance was unsatisfactory. Davidson grieved his termination before an arbitrator appointed under the *Canada Labour Code*, R.S.C. 1970, c. L-1, who found that he had been unjustly dismissed. By way of remedy the arbitrator ordered that, when faced with a request for a reference regarding Mr. Davidson's work, Slaight Communications was to provide a letter of recommendation consisting only of the facts found by the arbitrator (which in this case, it should be noted, were uncontested) together with a statement that the arbitrator had held that the respondent had been unjustly dismissed. The arbitrator also ordered the employer not to respond to requests for references except by way of the above letter. These two orders were referred to as the positive and negative orders.

Two issues were before the Court. First, the employer contended that the orders were patently unreasonable and thus should be set aside. Second, Slaight argued

that, even if the orders were reasonable in the administrative law sense, they were unconstitutional as infringing s. 2(*b*) of the *Charter*. The majority held that both the positive order (*per* Lamer J.) and the negative order (*per* Dickson C.J.) infringed s. 2(*b*) but were reasonable and demonstrably justified under s. 1. With regard to the positive order, Lamer J. stated at p. 1080:

> There is no doubt in the case at bar that the part of the order dealing with the issuing of a letter of recommendation places, in my opinion, a limitation on freedom of expression. There is no denying that freedom of expression necessarily entails the right to say nothing or the right not to say certain things. Silence is in itself a form of expression which in some circumstances can express something more clearly than words could do. The order directing appellant to give respondent a letter containing certain objective facts in my opinion unquestionably limits appellant's freedom of expression.

Dickson C.J., speaking of the negative order, stated at p. 1050:

> Adjudicator Joliffe's order that Slaight Communications Inc. answer any reference inquiry exclusively by sending the specified letter is an infringement of s. 2(*b*) freedom of expression. The government is attempting to prevent Q107 from expressing its opinion as to the qualifications of Mr. Davidson beyond the facts set out in the letter. The harm that it was aiming to prevent, decreased job prospects for Mr. Davidson, is only relevant to s. 1 analysis and not to s. 2(*b*) analysis.

On the basis of the foregoing authorities, it seems to me that this Court has already accepted that public identification and opportunity to disavow are relevant to the determination of whether s. 2(*b*) has been violated. In *National Bank*, while Beetz J. remarked that s. 2(*b*) prohibited compelling anyone to utter opinions that are not his own, it is important to remember that the order in question in that case provided that management was to read a letter containing views which it did not share and was specifically prohibited from expressing any of its own opinions during the reading. Even

although these factors were not explicitly mentioned, it is plain to see that both public identification and the opportunity to disavow played a strong role in the decision.

Similarly, in *Slaight Communications* the arbitrator combined both of these factors in his award for the clear purpose of controlling the behaviour of the recalcitrant employer and thus achieving the desired remedial effect. The employer was obliged to send out a letter of reference displaying its signature and was expressly prohibited from saying anything else in relation to the dismissed employee. As in the case of *National Bank* it was the combination of these factors which grounded the s. 2(*b*) breach.

I think it worthy of note also that the prevailing wisdom in the lower courts has been to similar effect. For examples of cases in which the factors of public identification and opportunity to disavow played a role in the s. 2(*b*) analysis see: *Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers, Local 832*, [1988] 5 W.W.R. 544 (Man. Q.B.); *OPSEU* v. National Citizens' Coalition (1990), 90 D.T.C. 6326 (Ont. C.A.), and *Isabey v. Manitoba Health Services Commission*, [1986] 4 W.W.R. 310 (Man. C.A.).

Quite apart from these decisions it would be my view that as a matter of principle concerns over public identification and opportunity to disavow should form part of the s. 2(*b*) calculus. I have only one reservation and that is that care should be exercised in considering whether or not one truly has the opportunity to disavow. Opportunity must be meaningful and we should not be too quick to ascribe to persons opportunities and abilities which they do not really possess. That aside, I favour the

inclusion of these factors because both are directed to preserving and promoting the fundamental purpose of the s. 2(*b*) guarantee, namely to ensure that everyone has a meaningful opportunity to express themselves. If a law does not really deprive one of the ability to speak one's mind or does not effectively associate one with a message with which one disagrees, it is difficult to see how one's right to pursue truth, participate in the community, or fulfil oneself is denied.

I return, therefore, to the question whether the mandatory payment of dues infringes s. 2(*b*). To my mind, compelled financial support does not necessarily violate freedom of expression. For example, all members of the community are compelled to pay taxes on pain of legal penalty. It seems axiomatic that the payment of taxes does not signify in the eyes of others support for the uses to which tax money is put or support for the political party in power or, indeed, support for the idea of government at all. The constitutionality of compelled payments has in fact been recently litigated. In *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, this Court rejected a claim that *The Election Finances Act*, S.M 1982-83-84, c. 45, infringed taxpayers' freedom of expression. The Act provided for the payment of a portion of campaign expenses out of the Consolidated Revenue Fund of Manitoba to election candidates who received a designated proportion of the votes in provincial elections. Cory J. briefly disposed of this argument, stating at pp. 366-67:

> It was said that the statutory funding of candidates could, whenever a losing candidate or candidates received 10 per cent of the vote, force a taxpayer to support a candidate whose views are fundamentally opposed to that of the taxpayer. This enforced support of a contrary view was said to infringe the taxpayer's right to freedom of expression. I cannot accept that contention. The Act does not prohibit a taxpayer or anyone else from holding or expressing any position or their belief in any position. Rather, the Act seems to foster and

> encourage the dissemination and expression of a wide range of views and positions. In this way it enhances public knowledge of diverse views and facilitates public discussion of those views.

See also *Prior v. Canada* (1989), 101 N.R. 401 (F.C.A.) where a challenge on religious grounds to tax dollars being expended for military purposes failed for the same reason.

In my view, the present case is analogous to *MacKay*. The fact that the appellant is obliged to pay dues pursuant to the agency shop clause in the collective agreement does not inhibit him in any meaningful way from expressing a contrary view as to the merits of the causes supported by the Union. He is free to speak his mind as and when he wishes. Nor does his being governed by the Rand formula have such an effect. It is a built-in feature of the Rand formula that Union activities represent only the expression of the Union as the representative of the majority of employees. It is not the voice of one and all in the bargaining unit. I find therefore that the appellant's s. 2(*b*) right has not been infringed.

4. *Section 1 of the Charter*

Although it is not necessary for me to consider s. 1 of the *Charter* in light of my conclusion that neither s. 2(*d*) nor s. 2(*b*) has been infringed, I am considering its application in case my conclusion is in error and for the sake of completeness.

The role of s. 1 in the *Charter* was first given full consideration by this Court in *R. v. Oakes*, [1986] 1 S.C.R. 103. The "test" which was established in that decision

and which has been consistently applied in the jurisprudence since was succinctly stated by Dickson C.J. in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 768:

> Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a "pressing and substantial concern". Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights.

It is this test which must be applied in determining whether the Rand formula meets the requirements of s. 1 of the *Charter*.

(a) The Legislative Objective

The parties have agreed that the purpose behind the *Colleges Collective Bargaining Act*, including s. 53, is to promote industrial peace through the encouragement of free collective bargaining. This is a standard feature of Canadian labour relations law: see George W. Adams, *Canadian Labour Law: A Comprehensive Text* (1985), at pp. 16-17. How does our system of collective bargaining work to achieve this end? Labour relations legislation characteristically consists of a complex interlocking network of provisions, some favouring the interests of unions and others favouring the interests of management, individual employees and the public at large. Viewed in its entirety, the system seeks to strike a balance between these frequently

divergent interests, thereby encouraging negotiation and compromise and consequentially industrial peace.

The agency shop, as part of this scheme, is obviously a device which serves the interests of organized labour. Paul J. J. Cavalluzzo has canvassed the ways in which the Rand formula assists unions in his article "Freedom of Association -- Its Effect Upon Collective Bargaining and Trade Unions" (1988), 13 *Queen's L.J.* 267, at pp. 287-88. These may be summarized as: (1) to prevent "free riders", i.e., to compel all members of the bargaining unit to pay for union representation; (2) to assist in building employee solidarity; and (3) to inhibit employer attempts to undermine the trade union. Hence, while it is clear that the narrow purpose behind s. 53 is to shore up union strength, it is also manifest that agency shop provisions are part of the larger framework put in place to reduce industrial conflict.

Is the preservation of industrial peace an objective so pressing and substantial as to warrant overriding a constitutional right? I think it axiomatic that the answer to this question is "yes". I move on, therefore, to consider whether or not the second branch of the *Oakes* test is satisfied.

(b)The Proportionality of the Means

A serious dispute has developed between the parties which must be resolved before the elements of the proportionality branch of the *Oakes* test can be applied. While

the parties are in general agreement as to the legislature's objective, they disagree as to the means the legislature has chosen in order to achieve it.

The appellant submits that the legislature sought to achieve its purpose of promoting harmonious labour relations by permitting the parties to the collective agreement to compel non-members to subsidize "collective bargaining" services which the Union provides. In the appellant's view it was not the aim of the legislature to promote union "political" activity. The Union, on the other hand, frames the legislature's objective more broadly and sees in the legislature's actions an intent to encourage industrial peace through the promotion of strong unions. In the view of the Union and the various labour organizations it was within the contemplation of the legislature that unions, in the legitimate pursuit of their aims, would engage in "political" activities.

The appellant relies on a number of sources to support his view that the legislature never intended to permit unions to use their dues for matters unrelated to contract negotiation and administration. In particular, he cites decisions of this Court in which the impartiality of the public service was considered: see *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, and *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455. His argument appears to be that since the legislature obviously has prohibited individual employees from engaging in political activity, it surely could not have intended to permit unions to participate in such activity.

While the record is bereft of any direct evidence of legislative intent in relation to the *Colleges Collective Bargaining Act*, several other sources would indicate

that the government was fully cognizant of the types of activities in which unions engaged but determined nonetheless to take a "hands off" approach to the matter. For example, in the debates which preceded the enactment of *The Labour Relations Act, 1950*, S.O. 1950, c. 34, legislation similar to that now under consideration, the then Minister of Labour, the Honourable Mr. Daley, noted the Province's commitment to the system of collective bargaining and went on to say in relation to the issue of union security (Proceedings of the Twenty-Third Legislature of the Province of Ontario, March 8, 1950, at pp. B-10 and B-11):

> You will note in this legislation the absence of any proposed reference to union security. That was intentional on my part. I do not believe it is a matter for legislation.
>
> Organized labour has a job to do itself. If it does it well by organizing the workers and winning the confidence of the workers, and establishes itself by these actions in the confidence of the employer, then union security will follow just as sure the sun follows rain.
>
> If it fails to win this confidence of management and labour, then it should not expect legislation to give it something it does not merit. The field is theirs, and they should accept the responsibilities that must go hand in hand with power.

See also April 4, pp. B-7, B-8, B-9, April 5, pp. DD-20, DD-21, EE-1, EE-2, and April 6, p. EE-4.

There are other indications that the government was fully aware not only of the range and nature of union security clauses but of the fact that unions devoted moneys obtained pursuant to such provisions to matters that they alone considered to be in their best interests and worthy of their support. For example, the evidence discloses that Justice Rand, in making the famous award in 1946 (*Ford Motor Co. of Canada Ltd. v.*

U.A.W.-C.I.O., reprinted in 1 C.L.L.R. (CCH, 1989), para. 2150) was himself fully aware that the union involved in that case, the United Automobile Workers, had long supported the C.C.F. Rand J. nonetheless ordered compulsory dues check-off and placed no restriction on the expenditure of non-member dues. The only obligation he imposed on the union in awarding the agency shop was that dues deductions be carried out in accordance with the union's constitution and that non-members receive the same representational benefits as members. At page 1121 he said:

> It may be argued that it is unjust to compel non-members of a union to contribute to funds over the expenditure of which they have no direct voice; and even that it is dangerous to place such money power in the control of an unregulated union. But the dues are only those which members are satisfied to pay for substantially the same benefits, and as any employee can join the union and still retain his independence in employment, I see no serious objection in this circumstance. The argument is really one for a weak union.

Perhaps most relevant to this issue is the history of Ontario Regulation 403/69. At the time of its enactment the regulation prohibited the contribution of union dues to political parties. This limited restriction was repealed in 1977, leaving unimpeded union discretion as to how to expend its lawfully earned income. It seems to me, therefore, that the legislative history of Reg. 403/69 demonstrates that the Province of Ontario, although well aware of the greater political involvement of unions, chose to take a *laissez-faire* approach to this issue.

Taken together, these legislative, adjudicative and social facts provide strong support for the view that the Government of Ontario knew that unions like OPSEU might devote part of their revenues to what the appellant labels "political" and not "collective bargaining" purposes. I find, therefore, that union discretion in these matters

forms part of the means by which the legislature sought to achieve its aim of minimizing industrial conflict through the system of collective bargaining.

Before leaving this issue, however, I would like to emphasize that union discretion in relation to dues expenditure is but one aspect of the means adopted by the legislature in this case. Other components of the statutory scheme established by the *Colleges Collective Bargaining Act* include the fact that all members of the bargaining unit decide, in a democratic fashion, who is to be their bargaining agent (s. 68), but no one is compelled to actually join the union (s. 53(3)). Once certified, the bargaining agent must represent all employees in the unit without discrimination (s. 1(*g*)) and without regard to their membership status (s. 76). Finally, all employees may participate equally in the decision to effectively "fire" the union (s. 71). All of these features of the system, in addition to the "hands off" approach to dues expenditures, must be considered in the proportionality analysis.

(i) *Rational Connection*

Is there a rational connection between the legislature's objective and the means by which it has sought to achieve it? The appellant's answer to this question is "no". Mr. Lavigne maintains that, while compelling non-members to pay the equivalent of union dues is rationally connected to the objective of promoting industrial peace, this is so only in so far as those dues are put to pure "collective bargaining" purposes. It is the appellant's position that to confer a complete discretion upon the Union to spend the dues as it sees fit, and in particular to spend dues on political parties and issues unrelated

to the particular workplace in which dues payors are employed, does not further the goal of industrial harmony. In other words, Mr. Lavigne contends that the provision is overbroad.

In contrast, OPSEU maintains that collective bargaining is encouraged by allowing unions to bargain for the Rand formula and to spend those moneys obtained pursuant to such clauses in their discretion. Along with the other labour organizations, the respondent says that industrial peace requires that strong, independent unions exist in order to represent fully the interests of working people. A legislative regime which allows unrestricted bargaining for the Rand formula builds the strength and independence of unions by permitting them to determine where, when and whether to give support to other entities which will act in their interests.

The appellant relies on *The Adams Mine, Cliffs of Canada Ltd.*, [1982] O.L.R.B. Rep. 1767, as well as the *Abood* decision, *supra*, in support of his argument that union spending on political matters is not rationally connected to the legislature's goal of promoting industrial peace.

In *Adams Mine* the union had commenced a program of on-the-job canvassing in relation to an upcoming federal election. The employer attempted to put a stop to this activity by informing the employees that canvassing on company property was strictly prohibited. The Steelworkers then commenced an action before the Ontario Labour Relations Board maintaining that the mine had unlawfully interfered in union activities contrary to the legislation. It asked the Board to grant a cease and desist order,

the effect of which would be to allow the canvassing to continue. Adams Mine opposed the application on the footing that the Board was without jurisdiction to hear the complaint. The matter, it said, had to do with politics and not with collective bargaining.

The majority of the Board declined jurisdiction. At page 1787 the Chair said:

> On considering the material as a whole, we have come to the conclusion that in the circumstances of this case the activity is too remotely connected to the dominant purpose of the *Labour Relations Act* to attract the right asserted by the complainant. In our view, the communications in issue before us are not as connected to concerns of the bargaining unit employees as employees as they are to their concerns as voters. [Emphasis added.]

In my view, *Adams Mine* does not provide strong support for the appellant's position. The exercise of determining whether a government objective and the means employed to achieve it are rationally connected for the purposes of s. 1 of the *Charter* is very different from the process of interpreting a statute. Moreover, it seems to me that *Adams Mine* is best understood as a decision dealing specifically with the issue of union canvassing or solicitation. Indeed, in the view of the dissenting member of the Board the issue before the Board was not whether political canvassing was a legitimate activity of the union but whether the union was entitled to engage in it on company property. The Act itself contained specific provisions dealing with canvassing on company property on company time. That situation seems to be a rather far cry from the issue before us on this appeal.

The appellant also relies upon *Abood*, *supra*, in support of his view that union expenditure of dues on matters other than contract negotiation and administration is not rationally connected to the goal of promoting collective bargaining. In my view, *Abood* did not address that issue. What the United States Supreme Court held was that it was unconstitutional for unions to spend non-member dues on "political" causes. It is not apparent on the face of the decision that the Court was guided by a specific concern over the relationship between union spending and industrial peace.

It seems to me that we are still left asking ourselves whether permitting unions to engage in the kind of activities to which the appellant has taken exception is rationally connected to the goal of promoting collective bargaining. Some commentators have suggested that, even if the interests of unions are considered to be primarily economic, there is nonetheless plenty of justification for permitting them to contribute to causes removed from the particular workplace. For example, Professor Etherington, op. cit., states at p. 34 of his article:

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

Similarly, Benjamin Aaron, in his article "Some Aspects of the Union's Duty of Fair Representation" (1961), 22 *Ohio S.L.J.* 39, stated at p. 62:

> The welfare of organized labour is affected not only by so-called "labour legislation," but also by executive, legislative, and judicial decisions with respect to monetary and fiscal policy, defense, education, health, and many other issues. Finally, policies are made by men, and it is sheer sophistry to argue that although a union may legitimately support certain legislative objectives, it may not spend its funds to secure the election of candidates whom it hopes or has reason to believe will work to achieve labor's goals.

I agree with Professors Etherington and Aaron that union involvement outside the realm of strict contract negotiation and administration does advance the interests of the union at the bargaining table and in arbitration. However, I do not believe that the role of the union needs to be confined to these narrow economic functions. In the past, this Court has not approached labour matters from an exclusively economic perspective. For example, in *Slaight Communications*, *supra*, Dickson C.J. adopted the expression of Professor David Beatty that "labour is not a commodity" (David M. Beatty, "Labour is not a Commodity", in Barry J. Reiter and John Swan (eds.), *Studies in Contract Law* (1980)). The idea that is meant to be captured by this expression is, I think, that the interests of workers reach far beyond the adequacy of the financial deal they may be able to strike with their employers. At page 1055 the Chief Justice made it clear that the interests of labour do not end at some artificial boundary between the economic and the political. He expressed the view that "[a] person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being" (quoting from the *Alberta Reference*, at p. 368) and that viewing labour as a commodity is incompatible with that perspective. Unions' decisions to involve themselves in politics by supporting particular causes, candidates or parties, stem from a recognition of the expansive character of the interests of labour and a perception of collective bargaining as a process which is meant to foster more than mere economic

gain for workers. From involvement in union locals through to participation in the larger activities of the union movement the current collective bargaining regime enhances not only the economic interests of labour but also the interest of working people in preserving some dignity in their working lives.

The point has been eloquently put by both courts and academics alike. For instance, this position was boldly and convincingly put by Frankfurter J. in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), a decision which preceded *Abood*, *supra*. Frankfurter J. vehemently opposed the finding of the majority that collective bargaining purposes do not include political support. At pages 800-801 and 812 he said:

> The statutory provision cannot be meaningfully construed except against the background and presupposition of what is loosely called political activity of American trade unions in general and railroad unions in particular -- activity indissolubly relating to the immediate economic and social concerns that are the *raison d'être* of unions. It would be pedantic heavily to document this familiar truth of industrial history and commonplace of trade-union life. To write the history of the Brotherhoods, the United Mine Workers, the Steel Workers, the Amalgamated Clothing Workers, the International Ladies Garment Workers, the United Auto Workers, and leave out their so-called political activities and expenditures for them, would be sheer mutilation . . . . This aspect -- call it the political side -- is as organic, as inured a part of the philosophy and practice of railway unions as their immediate bread-and-butter concerns.
>
> . . .
>
> For us to hold that these defendant unions may not expend their moneys for political and legislative purposes would be completely to ignore the long history of union conduct and its pervasive acceptance in our political life.

The Judicial Committee of the Privy Council took a similar, though less impassioned, position on this issue in *Collymore v. Attorney-General of Trinidad and Tobago*, [1969] 2 All E.R. 1207, where it said at p. 1211:

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

The *Oakes* inquiry into "rational connection" between objectives and means to attain them requires nothing more than a showing that the legitimate and important goals of the legislature are logically furthered by the means government has chosen to adopt. Whether collective bargaining is understood as primarily an economic endeavour or as some more expansive enterprise, it is my opinion that union participation in activities and causes beyond the particular workplace does foster collective bargaining. Through such participation unions are able to demonstrate to their constituencies that their mandate is to earnestly and sincerely advance the interests of working people, to thereby gain worker support, and to thus enable themselves to bargain on a more equal footing with employers. To my mind, the decision to allow unions to build and develop support is absolutely vital to a successful collective bargaining system. I find therefore a rational connection between promoting collective bargaining and permitting unions to invest "Rand dues" in ways they believe will best serve their constituencies.

(ii) *Minimal Impairment*

In *Oakes*, this Court held that measures which infringe upon rights and freedoms guaranteed in the *Charter* must, in order to be justified, interfere with those rights and freedoms as little as possible. This branch of the proportionality test, strict though it may be, was specifically designed to ensure that government, in pursuing its legitimate objectives, take some care to respect the fundamental rights and freedoms of its citizens. Obviously, where other means present themselves which would achieve the same objective with less intrusion upon entrenched constitutional interests, such means are to be preferred.

To be sure, imposing an obligation on the legislature to safeguard *Charter* rights above all else will sometimes pose intractable difficulties. As cases came forward which underlined the problems raised by an unyielding application of the minimal impairment test, this Court began to articulate a more relaxed standard for this branch of *Oakes* and stipulated the circumstances in which the adoption of the more relaxed standard might be appropriate.

It was recognized in *Edwards Books*, *supra*, for instance, that legislatures should be given some latitude in protecting the interests of individual employees *vis-à-vis* their more powerful employers. The Province of Ontario enacted the *Retail Business Holidays Act*, R.S.O. 1980, c. 453, which deemed Sunday to be a common pause day in the retail sector but provided an exemption for small retailers who did not conduct business on Saturdays. The concern of the legislature was that workers be afforded a day of rest and the means it adopted to achieve that goal was sensitive to the religious freedoms of a segment of the retail community.

This Court upheld both the pause day provision and the exemption. From an examination of the various interests at stake to which the legislature had regard, i.e., the interests of consumers, retailers and employees, it became evident that the scheme adopted by the legislature was not significantly worse than any other proposed scheme. There was no doubt that fault could be found with each proposal. However, the measures ultimately adopted had the advantage of best protecting the interests of those most disadvantaged by open Sunday shopping, namely retail sector employees. Even although other measures were available, none were clearly better in terms of protecting the interests of employees and at the same time minimizing the negative effect of Sunday closing on retailers and consumers. Dickson C.J. commented at p. 779 that in such circumstances the *Oakes* test should be applied with a modicum of restraint:

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

Dickson C.J. concluded at p. 782:

> In my view, the principles articulated in *Oakes* make it incumbent on a legislature which enacts Sunday closing laws to attempt very seriously to alleviate the effects of those laws on Saturday observers. The exemption in s. 3(4) of the Act under review in these appeals represents a satisfactory effort on the part of the Legislature of Ontario to that end and is, accordingly, permissible.

In the later case of *Irwin Toy*, *supra*, the Court was again faced with a situation in which rigorous application of the minimal impairment test seemed to be unjustified. The Province of Quebec had enacted a legislative ban on television advertising directed towards children. This ban was challenged as trenching too seriously on freedom of speech. The evidence disclosed that televised advertising was particularly detrimental to children under the age of 6 as that group was the least able to differentiate fact from fiction and was thus the most credulous when presented with advertising messages. With respect to older children, research results indicated that the ability to view advertising critically and in an adult way occurred somewhere between the ages of 7 and 13. The legislature took a cautious and protective approach, prohibiting all advertising directed to those under the age of 13.

Dickson C.J., Lamer J. and I held that the provision was reasonable and demonstrably justified within the meaning of s. 1. Referring to *Edwards Books*, *supra*, the Court differentiated between those cases where a strict application of the minimal impairment test was justified and those cases where some deference to the choice of the legislature seemed appropriate. At pages 993-94 we said:

> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function . . . .
>
> In other cases, however, rather than mediating between different groups, the government is best characterized as the singular antagonist of the individual whose right has been infringed. For example, in justifying an infringement of legal rights enshrined in ss. 7 to 14 of the *Charter*, the state, on behalf of the whole community, typically will assert its responsibility for prosecuting

> crime whereas the individual will assert the paramountcy of principles of fundamental justice. There might not be any further competing claims among different groups. In such circumstances, and indeed whenever the government's purpose relates to maintaining the authority and impartiality of the judicial system, the courts can assess with some certainty whether the "least drastic means" for achieving the purpose have been chosen, especially given their accumulated experience in dealing with such questions. . . .

Cognizant of the body of opinion on the effects of advertising on children and the legislature's desire to protect the younger members of the community from being misled, we understood our task in that case to be as follows (at p. 994):

> In the instant case, the Court is called upon to assess the competing social science evidence respecting the appropriate means for addressing the problem of children's advertising. The question is whether the government had a reasonable basis, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government's pressing and substantial objective.

And at page 999 we concluded:

> While evidence exists that other less intrusive options reflecting more modest objectives were available to the government, there is evidence establishing the necessity of a ban to meet the objectives the government had reasonably set. This Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups. There must nevertheless be a sound evidentiary basis for the government's conclusions.

It seems to me that this Court has agreed that a form of "reasonableness" test may be preferable to a strict application of the minimal impairment branch of *Oakes* in those circumstances where the Legislature must mediate between the claims of competing groups, and especially where, in doing so, it opts to protect the interests of the disadvantaged and disempowered. In those cases, the Court will defer to the choice of

the legislature so long as alternative measures for meeting or promoting the government's goals are not clearly superior.

Which form of the minimal impairment test is appropriate in this case? In my view, the government has not in this instance acted as the "singular antagonist", to use the words of the Court in *Irwin Toy*. Rather, the features of this case are analogous to those in *Edwards Books* and *Irwin Toy*. First, our system of labour relations is, as I have mentioned, premised on the attempted accommodation of a wide variety of divergent interests. Absent those situations where the law clearly and unreasonably favours the interests of one group over the constitutional rights of another, it would be unwise for the courts to tinker with this system. It was in just such circumstances as these that the Court in *Irwin Toy* suggested that the courts should not try to "second guess" the legislature as to where to draw the precise line.

Additionally, as I have also mentioned, collective bargaining is a mechanism by which individual employees come together and form a union to represent their interests. The whole purpose of unionization is to strengthen the position of these employees in order to offset the countervailing power of employers. Rather than simply enacting legislation aimed solely at protecting individual workers by curtailing and controlling employer abuses (e.g., minimum wage, occupational health and safety, and workers' compensation legislation), government established our current regime of collective bargaining. The purpose of this system is also to curb the excesses of the common law of the employment relationship and to thereby assuage industrial tensions. This is achieved, not through legislative protectionism, but rather through the promotion

of the self-advancement of working people. Thus, these two systems differ in respect of the mechanisms they adopt to achieve their ends, but both individual employment law and collective employment law aim to advance the interests of a vulnerable group, the individual employees. It is my opinion, therefore, that the question we must ask ourselves at this point in the inquiry is whether other mechanisms exist for achieving the aims of the legislature, and if so, whether those mechanisms are clearly superior to the measures currently in use.

Mr. Lavigne contends that restricting the uses to which dues could be put would be such a better alternative. It is his position that the imposition of such a restriction would more effectively safeguard the *Charter* rights of non-members and would not affect the Union adversely. In support of this claim the appellant has made reference to the experience of other jurisdictions.

Mr. Lavigne notes that legislatures have in the past placed restrictions on the way compelled dues could be spent: see *Labour Relations Act Amendment Act, 1961*, S.B.C. 1961, c. 31, s. 5, and *The Industrial Relations Act*, S.P.E.I. 1962, c. 18, s. 48. Both these provisions restricted only the right to make contributions for electoral purposes and not for the "non-collective bargaining" purposes cited by the appellant. These provisions have since been repealed: see *Labour Code of British Columbia*, S.B.C. 1973, c. 122, s. 151, and *Prince Edward Island Labour Act*, S.P.E.I. 1971, c. 35, s. 76(1)(a). To my mind, the fact that some jurisdictions at one time imposed restrictions on the Rand formula does not advance the inquiry. We simply do not know whether the old system worked or why it was abandoned.

The appellant also makes reference to the reports of two commissions established to consider certain aspects of labour relations policy in Canada. The first of these is the Little Report, "*Collective Bargaining in the Ontario Government Service: A Report* (1969)". In his report Judge Little recommended that mandatory dues check-off be established in the public service but that the dues obtained pursuant to such clauses not be used for purposes which did not benefit all members of the bargaining unit. As the CLC points out, however, Judge Little was not concerned with union "political" activity generally but rather with activities which were engaged in for the enjoyment of union members alone. In any event, the regulation (O. Reg. 403/69) giving effect to Judge Little's recommendations has been repealed.

The second report to which the appellant has made reference is the Report of the federal Task Force on Labour Relations (the Woods Report). It recommended that a mechanism be established for dissenting members to opt out of union donations to political parties. As was the case with the recommendations made in the Little Report, the findings of the Woods Task Force are of limited utility for present purposes since the thrust of its recommendations centred on contributions to political parties and not political matters more generally.

Finally, the appellant points out that in other jurisdictions it has been accepted that unions may not use dues extracted from non-members to support political parties. In particular, he cites provisions adopted in the United Kingdom, Australia and New Zealand, Western Europe, and the United States. It is true that our courts have

found the experience in other "free and democratic" societies useful in determining whether means adopted in this country are the best alternative: see *Re Federal Republic of Germany and Rauca* (1983), 41 O.R. (2d) 225 (C.A.). For obvious reasons, however, one must be careful in relying on provisions from foreign jurisdictions. The development of law in different cultures with different political, historical, and social traditions may not be easily transferred into the Canadian context. And indeed, particularly when one is dealing with labour legislation, it has been noted that each jurisdiction has its own unique method of regulating industrial relations. This point has been well made by one of the leading labour scholars, Otto Kahn-Freund. In his article "On Uses and Misuses of Comparative Law" (1974), 37 *Mod. L. Rev.* 1, Professor Kahn-Freund explains at p. 21:

> The law of labour relations comprises a number of separable elements: It is concerned with individual relations between employers and workers -- wages and hours of work, safety and health, holidays and pensions. It is however also concerned with collective relations between unions and other groups of workers and management, with the way the labour market is organized through understandings between them, the way rules are established through their agreements, and the way conflicts between them are fought and settled. In my opinion the first element -- individual labour law -- lends itself to transplantation very much more easily than the second element -- that is collective labour law. Standards of protection and rules on substantive terms of employment can be imitated -- rules on collective bargaining, on the closed shop, on trade unions, on strikes, can not.

Of the jurisdictions to which the appellant has referred only the United States has adopted a regime of collective bargaining which resembles our own. Indeed, collective labour relations in Canada have in large part been modelled on American legislation. Accordingly, if any comparison is to be made in this case with other jurisdictions, the only reasonable and safe jurisdiction to examine is the United States.

It is clear that, since the decision of the United States Supreme Court in *Abood*, unions have not been permitted to contribute non-member dues to "non-collective bargaining" purposes. And if union spending were restricted in Canada in this way, it is certainly true that Mr. Lavigne's *Charter* rights would be impaired less than they are absent the restriction. What, however, would be the effect on the goal of promoting collective bargaining? The American experience in this respect is instructive.

The *Abood* decision seems to have given rise to a lengthy series of disputes over what are legitimate collective bargaining activities and what are not. For example, the United States Supreme Court did not have to grapple with the ultimate effect of its ruling in *Abood* until several years later in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, *supra*. The union had secured a union shop provision in the collective agreement and expended the dues obtained pursuant to that article in accordance with its constitution. The following expenditures were challenged as not being "necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues" (p. 448): union conventions, social activities, publications, organizing, and litigation. The majority of the court found that all the expenditures were legitimate except for union organizing, litigation (apart from litigation incidental to contract administration and negotiation and disputes arising in the bargaining unit) and union publishing on "political" issues.

What has been the result of this litigation? Mr. Sack has advanced a very persuasive argument that the court's decision was in error. Whether he is right or wrong in his criticism of *Ellis*, it seems to me that his argument makes the problem with the *Abood* approach very clear. Because drawing a distinction between collective bargaining and politics is so difficult it will always be debatable whether a union has "crossed the line" in contributing its dues to certain purposes. And where there is room for reasonable disagreement over the propriety of union spending there is bound to be litigation. In my view, nothing could be more incompatible with the promotion of collective bargaining. Since the ultimate aim of the system is to encourage the parties to settle their own disputes, any ruling which will encourage the parties to rush off to court is clearly counter-productive.

Another result of the ruling in *Abood* has been the disproportionate weakening of the union voice. Professor Tribe in *Constitutional Choices* (1985) made this point eloquently when he said at p. 202:

> In theory, of course, employers and employees are supposed to get evenhanded treatment in the legal administrative framework within which labor disputes -- including those involving free speech -- are handled. In reality, however, workers have found themselves at a substantial disadvantage. When unions speak out on political matters, for example, they must (upon request) refund to dissenting members the prorated cost of such activity. Corporations do not have this problem; corporations may speak out on political subjects in spite of shareholder dissent. Corporations also speak with a far louder voice, heavily outspending labor on the dissemination of their views. Indeed, the proof of this imbalance of power can be seen in the results: "the failure of labor to pass any legislation affecting the basic structure of private sector bargaining since 1935," and the decline in the rate of union representation of American workers from 35 percent in the 1940s to barely 20 percent in 1980. [Citations omitted.]

In my view, Canadian trade unions would in all probability meet the same fate if the *Abood* rationale were adopted here. For the reasons expressed by Professor Tribe it is naive to suggest that imposing an obligation to refund dues will not work an unfair burden on unions. Given that the success of collective bargaining in this country depends in a fundamental way on an appropriate balance being struck among the various interest groups involved in industrial relations, to upset that balance will clearly defeat the legislature's objective.

In summary, it seems to me that placing restrictions upon the way in which unions may spend their dues will lead to interminable problems and jeopardize the important government objective at stake in this appeal. The point should be stressed that, if Mr. Lavigne's *Charter* rights have indeed been infringed, that infringement has been occasioned through measures that significantly modify its impact. Some of the key features of the scheme are worth repeating: the Union may only compel the payment of dues from each member of the bargaining unit after a majority of those employees have exercised their choice to be represented by the Union; all employees are free to join the Union or not, and the bargaining agent may not discriminate against any member of the bargaining unit on the basis of union membership; and if the members of the bargaining unit find that they are unhappy with their bargaining representative, they may take a vote to decertify the Union.

Taking these factors into account it seems to me that the legislature has opted for a very reasonable and fair compromise. The Union, once certified, has been permitted to exercise authority over the members of the bargaining unit in many respects.

However, with that authority comes a great deal of responsibility. As well, the entire process of union representation carries the hallmark of democracy. This is not a case of the heavy hand of government coming down and enforcing its will with little or no regard for the rights and freedoms of those affected. The features of the scheme suggest to me that, while other means might have been available to the legislature to achieve its objective, none is clearly superior in terms of both accomplishing the goal of promoting collective bargaining and respecting as far as possible the rights of individual employees.

(iii) *Effects*

The *Charter* does not require the elimination of "minuscule" constitutional burdens: see *Edwards Books*, *supra*, at p. 759. The point of this branch of the proportionality test is to ensure that laws which otherwise pass constitutional muster should not be struck down when the unconstitutional effects they produce are "trivial" or "insubstantial": see *R. v. Jones*, [1986] 2 S.C.R. 284, *per* Wilson J. at p. 314 writing for the majority of the Court on this point.

In *Edward Books* Dickson C.J. stated at p. 759:

> Section 2(*a*) does not require the legislatures to eliminate every minuscule state-imposed cost associated with the practice of religion. Otherwise the *Charter* would offer protection from innocuous secular legislation such as a taxation act that imposed a modest sales tax extending to all products, including those used in the course of religious worship. In my opinion, it is unnecessary to turn to s. 1 to justify legislation of that sort.

And later he states at p. 759:

> In short, legislative or administrative action which increases the cost of practising or otherwise manifesting religious beliefs is not prohibited if the burden is trivial or insubstantial: see, on this point, *R. v. Jones*, [1986] 2 S.C.R. 284, *per* Wilson J. at p. 314.

In this case the violation of the appellant's rights was minor. His identification, if any, with the causes supported by the Union was indirect and he was completely free to express himself on these causes as he saw fit. Additionally, the scheme adopted by the legislature makes some accommodation of the interests of persons like the appellant. In my view, it cannot be said that the impingement on the appellant's *Charter* rights was out of proportion to the objective of the legislature in promoting collective bargaining.

VI. Disposition

I would dismiss the appeal with costs to Ontario Public Service Employees Union, Canadian Labour Congress, Ontario Federation of Labour and National Union of Provincial Government Employees.

I would answer the constitutional questions as follows:

> 1.Did the Ontario Court of Appeal correctly hold that the *Canadian Charter of Rights and Freedoms* does not apply in the circumstances of this case, on the basis that the substance of the application concerns the expenditure of funds by the respondent Ontario Public Service Employees Union (OPSEU), and not the requirement that the appellant pay sums equivalent to union dues to OPSEU?

No.

2.If the answer to question 1 is in the negative, does the *Canadian Charter of Rights and Freedoms* apply to the requirement that the appellant pay sums equivalent to union dues to the respondent OPSEU, as provided for in article 12.01 of the collective agreement between the respondent Ontario Council of Regents and the respondent OPSEU pursuant to ss. 51, 52 and 53 of the *Colleges Collective Bargaining Act*, R.S.O. 1980, c. 74?

Yes.

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

No.

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

No.

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

In light of my answers to questions 3 and 4 it is not necessary to answer this question.

However in the event I am in error in my answers to questions 3 and 4 or either of them, I would have answered this question in the affirmative.

//*La Forest J.*//

The reasons of La Forest, Sopinka and Gonthier JJ. were delivered by

LA FOREST J. -- The broad issue in this appeal is whether the Rand formula, under which dues may be collected from non-union members of a collective bargaining unit for use by the union in its discretion, impermissibly infringes the non-union members' freedom of association and of expression guaranteed by s. 2(*d*) and s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* in a situation where the employer is a Crown agency and the dues are distributed to causes unrelated to the collective bargaining process.

I have had the advantage of reading the reasons of my colleague, Justice Wilson, and would dispose of the appeal as she does, but I have reached that conclusion by a different route and have therefore felt constrained to write.

Facts

The respondent, the Ontario Council of Regents for Colleges of Applied Arts and Technology, was established under s. 5(2) of the *Ministry of Colleges and Universities Act*, R.S.O. 1980, c. 272. Under the Act, it has the task of assisting the Minister of Colleges and Universities in the planning and establishment of programs for the colleges. Its members are appointed by the Lieutenant-Governor in Council. The

Colleges Collective Bargaining Act, R.S.O. 1980, c. 74, designates the Council of Regents as the bargaining agent for the college employers. The Council has entered into a collective agreement with the respondent Union (OPSEU), which represents community college teachers.

Since 1974, the appellant, Lavigne, has been a teaching master at the Haileybury School of Mines. He is a member of the academic staff bargaining unit represented by the Union, but has never become or been required to become a member of the Union. When the Union required its members to strike, the appellant continued to work without pay. He has, however, been required to pay dues to the Union. These are deducted from his pay cheque under the terms of the collective agreement, and are paid into the general revenues of the Union and used for any purpose authorized by its constitution.

Under the Union's constitution, certain percentages of the dues are paid to another organization, the National Union of Provincial Government Employees (NUPGE), which, in turn, pays dues to the Canadian Labour Congress (the CLC). The Union is also a member of the Ontario Federation of Labour (the OFL). Each of these organizations, including the respondent Union, uses its dues to support union-related causes. Article 4 of the Union's constitution sets out the aims and purposes of the organization. Specifically, the Union is required to regulate labour relations between its members and their employers, including such matters as collective bargaining. The general objectives of the Union include the advancement of the "common interests,

economic, social and political, of the members and of all public employees, wherever possible, by all appropriate means".

Lavigne challenged certain expenditures made by the Union such as financial contributions to a political party (the NDP), disarmament campaigns, Arthur Scargill and the striking United Kingdom coal miners, a campaign opposing the expenditure of municipal funds for the SkyDome stadium in Toronto, and pro-choice groups respecting abortions. The *Colleges Collective Bargaining Act* allows for the compulsory payment of dues. Formerly, s. 45 of Ontario Regulation 749, R.R.O. 1970, provided that such deductions could only be used for purposes relating to representation of employees and not for activities relating to political parties, but this provision was repealed in 1977.

The appellant brought an application for declaratory relief against the Union in the Supreme Court of Ontario. He sought a declaration that s. 59(2) of the *Colleges Collective Bargaining Act*, which provides that an employee who works during a strike shall not be paid, violates the *Constitution Act, 1982*. He also sought a declaration that, in so far as ss. 51, 52 and 53 of the Act result in compulsory payment of dues that are used for any of the listed purposes, they violate the *Constitution Act, 1982*. As well, he sought declaratory relief that would require the Union to account for money spent on listed purposes unrelated to collective bargaining.

In reasons delivered July 4, 1986, White J. held that the appellant's right to freedom of association was infringed, and he indicated that he was prepared to grant

declaratory relief in regard to the compulsory payment of dues. He also held that s. 59 was constitutionally valid and that the appellant's equality rights were not infringed. White J. then asked for further submissions as to the form the remedy should take, and on July 7, 1987, he made specific orders as to the form of the declaratory relief. The Union appealed to the Court of Appeal of Ontario, which allowed the appeal and set aside the orders of the trial judge. The appellant's cross-appeal to have s. 59 declared unconstitutional was dismissed. My colleague Wilson J. has reviewed these judgments, and it is thus unnecessary for me to do so.

The appellant sought and was granted leave to appeal to this Court, and the following constitutional questions were stated by the Dickson C.J. on August 21, 1989:

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

2. If the answer to question 1 is in the negative, does the *Canadian Charter of Rights and Freedoms* apply to the requirement that the appellant pay sums equivalent to union dues to the respondent OPSEU, as provided for in article 12.01 of the collective agreement between the respondent Ontario Council of Regents and the respondent OPSEU pursuant to ss. 51, 52 and 53 of the *Colleges Collective Bargaining Act*, R.S.O. 1980, c. 74?

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

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

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

The Attorneys General of Canada, Ontario and Quebec intervened, as did the following bodies: NUPGE, the CLC and OFL conjointly, the Confederation of National Trade Unions and the Canadian Civil Liberties Association.

Two different types of issues arise under the constitutional questions. The first has to do with the application of the *Charter*, i.e., whether the activities the appellant complains of can be attributed to government as required by s. 32 of the *Charter*. The second type deals with whether these activities, assuming they can be attributed to government, impermissibly infringe on the appellant's rights under s. 2(*b*) and s. 2(*d*) of the *Charter*. I turn first to the issues concerning the application of the *Charter*.

Application of the *Charter*

In relation to whether the activities complained of by the appellant fall within s. 32, two distinct arguments were made. First, the respondents assert that the substance of the appellant's appeal is a challenge to the constitutionality of the uses to which the respondent Union puts the money collected on its behalf by the appellant's employer, the Council of Regents. It was argued that since the Union is clearly a private entity, its decisions as to how it spends its money are not amenable to *Charter* challenge. This is the application argument referred to in the first constitutional question. I will refer to it, as have the parties, as the "Substance of the Application" argument.

The second, and more elaborate, s. 32 argument is referred to in the second constitutional question. It concerns the applicability of the *Charter* to the article of the collective agreement between the Union and the Council under which the latter collects union dues from all employees represented by the former regardless of whether or not they are members of the Union. This article has been adopted pursuant to s. 53 of the *Colleges Collective Bargaining Act*, which stipulates that the "parties to an agreement may provide for the payment by the employees of dues or contributions to the employee organization". As will be apparent, this argument goes beyond a narrow consideration of the substance of the appellant's particular claim and raises the general question of the applicability of the *Charter* to labour relations in the public sector.

I will consider each of the arguments respecting the application of the *Charter* separately.

The Substance of the Application

In my view, the appellant must succeed on the first issue. It is incorrect to characterize his challenge as one confined to the constitutionality of the Union's expenditure decisions. The constitutional challenge mounted by the appellant impugns the conduct of the Council of Regents or the Ontario Legislature in permitting the use of his contributions for purposes unrelated to collective bargaining. While the conduct of the Union is an essential component of the appellant's case, it need not be looked upon as the direct focus of the constitutional challenge, but rather as part of the factual context in

which the constitutionality of the conduct of the Council of Regents or the Legislature must be assessed. The appellant surely can argue that the Legislature or the Council of Regents violated his freedom of association and expression by entering into an arrangement forcing him to contribute to the Union knowing that it would spend the money on things that have only a minimal or no relation to collective bargaining. In this respect, one could put the question in this appeal as follows: given that the Union spends money in the manner it does, can the Council or the Legislature constitutionally force the appellant, and others in his position, to contribute to the Union's coffers, without limiting the use to which the money so contributed is put?

This in itself does not dispose of the *Charter* application issue. The appellant alleges that his rights were violated by the joint operation of the legislative decision to allow the Council to compel him to contribute to the Union and by the Council's undertaking to the Union to compel such contribution. It remains to determine whether this allegation can be supported. At this stage, it is necessary to turn to the issues raised in the second constitutional question which more generally involve the application of the *Charter* to collective bargaining in the public sector.

Public Sector Collective Bargaining and the Charter

I should note from the outset that I do not agree with the appellant's submission that the conduct about which he complains can be attributed to the Ontario Legislature. No legislation compels him to make contributions to the Union. What compels him to do so is art. 12 of the collective agreement signed by the Union and the

Council. It is true, of course, that s. 53(1) of the *Colleges Collective Bargaining Act*, which provides in general terms for the collection of dues from employees by the Union, permits the parties to agree to a provision such as art. 12. However, parties to collective agreement negotiations would be free to agree to art. 12 independently of any legislative "permission" such as that in s. 53(1). Such provisions are not, in other words, illegal or invalid in the absence of legislative prohibition.

In fact, it is art. 12 itself that imposes an obligation on Lavigne to pay dues. Section 53(1) affects no one's rights until it is "activated" by the agreement between, in this case, the Union and the Council. It is that agreement which brings the mandatory check-off to bear on particular individuals in the position of Lavigne. One might say that the agreement is the conduct which is the immediate "cause" of the violation the appellant alleges.

The situation is not dissimilar to that dealt with by this Court in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. That case, like this one, was concerned with labour relations in the public sector. In *Slaight*, it was not the union which was given a discretion but an arbitrator in resolving a dispute under a collective agreement in the public sector. The Court made clear that the exercise of such a discretion was subject to *Charter* review, though the statute granting the discretion could not be attacked on the ground that an arbitrator might exercise his discretion in violation of the *Charter*. Similarly, the appellant's *Charter* rights in the present case could not have been violated until such time as the Council and the Union actually agreed to art. 12.

The fact that the challenged conduct cannot directly be attributed to the Legislature renders the question of the application of the *Charter* somewhat more complex. The exercise of a general power under a provision of a collective agreement or other contract in the private sector would not be invalid simply because private parties acted in a manner contrary to the *Charter*. In order for the *Charter* to apply, a government actor is required. This was made clear in the discussion of the application of the *Charter* in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; see also *Re Bhindi and British Columbia Projectionists Local 348* (1986), 29 D.L.R. (4th) 47 (B.C.C.A.).

In my view, the respondents and the interveners were correct in conceding that the Council of Regents is an emanation of government. Since this appeal was argued, this Court has confirmed that view in its decision in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570. That case, like the present appeal, involved a collective agreement between the college and the Association (a union under the applicable legislation). There the Minister of Education by statute exercised a degree of control over the college that closely matched that exercised by the Ministry over the Council in the present case. It is true that in *Douglas* the college's constituent Act expressly described it as an agent of the Crown, whereas here the Act simply gives the Minister power to conduct and govern the colleges and in this endeavour the Minister is to be "assisted" by the Council. But the reality is the same. The government, through the Minister, has the same power of "routine or regular control", to use the expression of the majority of this Court, in *Harrison v. University of British Columbia*, [1990] 3

S.C.R. 451, and *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, companion cases to *Douglas*.

Like the college in *Douglas*, therefore, the Council is simply part of the fabric of government. As stated by the majority in *Douglas* (at p. 584), "Its status is wholly different from the universities in . . . *McKinney v. University of Guelph* [also issued concurrently with *Douglas*] . . . and *Harrison v. University of British Columbia* . . . which, though extensively regulated and funded by government, are essentially autonomous bodies." The majority in the above cases relied solely on the element of control in determining what fell within the apparatus of government, although it made clear that government may, in some circumstances, be subject to *Charter* scrutiny in respect of activities in the private sector where the government could be said to have some responsibility for that activity. Therefore, the courts below were correct in holding that the Council was a Crown agent. The Minister exercised full control over all of the Council's activities, including collective bargaining with college employees who were Crown employees.

Having determined that the Council is a government actor, the next question is whether the Council's agreement to the inclusion of art. 12 and the obligation it imposes on persons such as Lavigne is, by itself, government conduct. This issue, too, was decided in *Douglas*. Speaking on this point for the majority (Dickson C.J., La Forest, Gonthier and Cory JJ.; Wilson J. agreeing but on separate grounds), I thus put the matter (at p. 585):

> For reasons discussed in *McKinney v. University of Guelph*, *supra*, I am of the view that the collective agreement is law. It was entered into by a government agency pursuant to powers granted to that agency by statute in furtherance of government policy. The fact that the collective agreement was agreed to by the appellant association does not alter the fact that the agreement was entered into by government pursuant to statutory power and so constituted government action. To permit government to pursue policies violating *Charter* rights by means of contracts and agreements with other persons or bodies cannot be tolerated. The transparency of the device can be seen if one contemplates a government contract discriminating on the ground of race rather than age.

In that case, the provision in question was in direct violation of the *Charter,* but I am no more comfortable with a provision that grants a broad discretion to a union under a collective agreement governing labour relations in the public sector. The government certainly is responsible for the management of its own operations. For reasons already given, I see no real difference between this and the situation that arose in *Slaight Communications*.

The Union argued, however, that the article that is alleged to violate the appellant's rights in this case cannot be construed as government activity because it was included in the collective agreement at the insistence of the Union, not the Council of Regents. Even assuming that art. 12 was inserted into the collective agreement solely at the Union's request, it does not follow that the obligation it imposes on Lavigne to contribute to the Union cannot be attributed to government. While it may be correct, as a general principle, to say that government acquiescence in the face of the conduct of a private party does not transform that conduct into government action, it is crucial in this case to keep in mind the content of art. 12.

Article 12 represents an undertaking on behalf of the Council of Regents, as agent for the community colleges of Ontario, to deduct union dues from every employee within the bargaining unit represented by the Union. It is the performance of this undertaking by the government entities which the Council represents in collective bargaining, the community colleges, that forces persons in the position of the appellant to contribute to the Union's coffers. It would seem to follow that art. 12 is as much the result of the Council's undertaking to deduct union dues at source as it is of the desire of the Union to have such deduction made on its behalf. It would also follow that, even if the inclusion of art. 12 in the collective agreement was not the result of government action, the performance of the undertaking which it contains by the administration of the community college for which Lavigne works must surely qualify as government action. As I observed in *McKinney*, that a particular measure can be attributed to the initiative of a private party, as opposed to the government, might be a factor in a s. 1 analysis, but it does not *ipso facto* preclude a finding of government action.

It was also argued that the *Charter* does not apply to government when it engages in activities that are, in the words of the CLC and the OFL, "private, commercial, contractual or non-public [in] nature". In my view, this argument must be rejected. In today's world it is unrealistic to think of the relationship between those who govern and those who are governed solely in terms of the traditional law maker and law subject model. We no longer expect government to be simply a law maker in the traditional sense; we expect government to stimulate and preserve the community's economic and social welfare. In such circumstances, government activities which are in form "commercial" or "private" transactions are in reality expressions of government

policy, be it the support of a particular region or industry, or the enhancement of Canada's overall international competitiveness. In this context, one has to ask: why should our concern that government conform to the principles set out in the *Charter* not extend to these aspects of its contemporary mandate? To say that the *Charter* is only concerned with government as law maker is to interpret our Constitution in light of an understanding of government that was long outdated even before the *Charter* was enacted.

The respondents put forward the argument that the government will be placed at a competitive disadvantage if it has to comply with the provisions of the *Charter* when acting as a buyer or a seller in the private marketplace. In no respect is this argument compelling. It would be surprising if pragmatic concerns as to competitiveness could automatically immunize government action in the marketplace from *Charter* scrutiny. It must be borne in mind that the *Charter* is not intended to serve a simply negative role by preventing the government from acting in certain ways. It has a positive role as well, which might be described as the creation of a society-wide respect for the principles of fairness and tolerance on which the *Charter* is based. I cannot believe that this less tangible but equally important aspect of the *Charter*'s role in our society would be advanced if the *Charter*'s applicability fell to be determined by reference to the government's commercial competitiveness. Through the process of applying the *Charter* to government decision-making, the government becomes a kind of model of how Canadians in general should treat each other. The extent to which government adherence to the *Charter* can serve as an example to society as a whole can

only be enhanced if the government remains bound by the *Charter* even when it enters the marketplace.

These considerations seem to me to be especially strong when the "commercial" activity in question is the negotiation of a collective agreement. While the example the government may be able to set by conforming with the *Charter* when buying paper clips may be minimal, the example it can set by complying with *Charter* principles when negotiating the terms and conditions of employment could be very significant.

Finally, I should add that I seriously doubt that the provision and management of the labour force necessary for the provision of public education can really be considered commercial. Education has been a matter of concern to Canadian governments from early colonial days, and has become of prime concern since at least the 19th century. Surely, the arrangements for the provision of a labour force to achieve that objective must also be viewed as essentially public in nature.

On the basis of the foregoing, I conclude that the conduct of which the appellant complains constitutes government action with the result that the *Charter* applies to the case at bar.

Breach of the *Charter*

I turn now to the appellant's contention that the Council of Regents, by compelling him to contribute to the Union, violated his constitutionally protected freedoms of association and of expression. I shall deal with freedom of association first.

Freedom of Association

It is clear that the Rand formula cannot be attacked on the ground that it interferes with any right the appellant may have to associate with others in the pursuit of collective activities or common goals. If the formula can, of itself, be said to violate s. 2(*d*) of the *Charter*, it is because it interferes with what has been described as the negative aspect of freedom of association -- the freedom not to associate with others. Therefore, the initial question is whether the scope of s. 2(*d*) includes freedom from compelled association.

The historical origins, purposes and meaning of the s. 2(*d*) *Charter* guarantee were reviewed thoroughly by this Court in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (the *Alberta Reference*), in the context of a union's right to act collectively in launching a strike. The fundamental nature of the guarantee as articulated by the members of this Court echoed the classic statement of freedom of association made over a century ago by Alexis de Tocqueville in *Democracy in America* (1945), vol. I, at p. 196:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears . . . almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.

In a complex modern democracy, it is nothing less than imperative that the individual be afforded the freedom to join with others in the pursuit of common goals.

The essence of the freedom is the protection of the individual's interest in self-actualization and fulfillment that can be realized only through combination with others. McIntyre J., with whom the majority agreed as to the characterization of the s. 2(*d*) right, made this clear in the *Alberta Reference*, *supra*, at p. 395:

> While freedom of association like most other fundamental rights has no single purpose or value, at its core rests a rather simple proposition: the attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and cooperation of others. "Man, as Aristotle observed, is a `social animal, formed by nature for living with others', associating with his fellows both to satisfy his desire for social intercourse and to realize common purposes." (L. J. MacFarlane, *The Theory and Practice of Human Rights* (1985), p. 82.)

It is important to recognize that while it is true, as Wilson J. states in her reasons, at p. 000, that "freedom of association is meant to protect the collective pursuit of common goals", such protection is afforded ultimately to further individual aspirations. Association is but "an extension of individual freedom": Thomas Emerson, "Freedom of Association and Freedom of Expression" (1964), 74 *Yale L.J.* 1, at p. 4.

This is not to deny, however, that there is a community interest embodied in the freedom of association. This interest might be expressed as the interest of society at large in the contributions in political, economic, social and cultural matters which can be made only if people are free to work in concert. In addition, it is axiomatic that there is a

community interest in sustaining democracy, an essential element of which is associational activity. The question, then, is whether the protection of this community interest and the antecedent individual interest requires that freedom from compelled association be recognized under s. 2(*d*) of the *Charter*.

In my view, the answer is clearly yes. 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. One need only think of the history of social stagnation in Eastern Europe and of the role played in its development and preservation by officially established "free" trade unions, peace movements and cultural organizations to appreciate the destructive effect forced association can have upon the body politic. 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*. In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, Dickson J. had this to say, at pp. 336-37:

> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from

> compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain or sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience. [Emphasis added.]

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*.

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, which provides 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.

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*, [1986] 1 S.C.R. 103, at p. 136), 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 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.

It does not necessarily follow, however, that s. 2(*d*) of the *Charter* protects us from any association we may wish to avoid. In a word, I do not think the freedom of association is necessarily a right to isolation. As a matter of metaphysical and sociological reality, "no man is an island", and the *Charter* must be taken to recognize this. At the very fundamental level, it could certainly not have been intended that s. 2(*d*) protect us against the association with others that is a necessary and inevitable part of membership in a democratic community, the existence of which the *Charter* clearly assumes. Thus, 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 given the comprehensive nature of its authority and functions. In Justice Holmes' phrase, the state is "the one club to which we all belong" and its activities will inevitably associate us with policies and groups with which we may not wish to be associated: see Robert Horn in *Groups and the Constitution* (1971), at p. 3.

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.

Application to the Present Case

The issue to be decided in the case at hand is whether the mandatory payment of union dues violates Mr. Lavigne's right to be free from compelled association within the meaning of s. 2(*d*) of the *Charter*. A preliminary issue is whether the payment of dues, which is the extent of Mr. Lavigne's association with the Union, can even be considered an associative act within the meaning of s. 2(*d*). This proposition was rejected by the Court of Appeal in the following terms ((1989), 67 O.R. (2d) 536, at p. 565):

> [Lavigne's] payment to the union under the agency shop agreement cannot be construed as placing his stamp of approval on anything done by the union or on any cause to which it might contribute.

What the Court of Appeal in effect has said is that association necessarily involves expression. In its view, one associates with a group only when one acts in such a way as to announce to the world that one belongs to the group in question and approves of what it does. Since being forced to make a contribution to an organization by virtue of one's membership in a particular bargaining unit could not reasonably be interpreted as such an act, it does not come within the protection from association provided by the *Charter*.

As intimated, this seems to confuse the right of association with the right of expression and to derive ultimately from the thinking surrounding the issue in the United States. In that country, freedom of association is treated as an aspect of freedom of expression. This is done out of necessity, because the United States constitution contains no express guarantee of freedom of association. Our Constitution, in contrast, guarantees freedom of association in its own right. We are not constrained by the text to define association in terms of expressive activity. Nor do I think that we are so constrained by the purpose and values underlying the freedom.

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. It is quite reasonable for people to object to supporting causes of which they disapprove, whether or not others would believe that they subscribe to those causes. 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.

Can forced payment to the Union be said to impair this freedom? In the *Alberta Reference*, *supra*, four aspects of association were identified: the right to establish, belong to and maintain organizations, and to participate in their activities.

Employing this analytical framework, the relevant question is whether the payment of dues falls into any of these categories of association. I think it is fair to construe payment of dues which are used to further the objects of the Union as "maintaining" or "participating in" this particular association. In fact, OPSEU forcefully argued that the mandatory contribution of union dues under an agency shop provision is an essential component of the Union's right to "maintain" the association under s. 2(*d*) of the *Charter*.

I categorically reject the argument of the Union and supporting interveners that all four aspects of freedom of association identified in the *Alberta Reference*, *supra*, have to be compelled before the freedom from forced association can be said to have been violated. It would be ludicrous to interpret a statement that freedom to associate requires all these conditions as establishing the rule that the freedom to associate will only be violated if all these conditions are denied. By definition, if the freedom consists of the right to organize, belong to and maintain, as well as the right to participate in an association, then the denial of any one of these rights denies the freedom. The obverse of this is that one does not have to be forced to establish, belong to, maintain and participate in an association before the freedom becomes operative. Being forced to do any one of these things is sufficient.

The significance of forced payment of dues is perhaps best appreciated in light of the historical context in which the freedom developed. No one would have suggested that dissenters who for years objected to the payment of tithes in support of the established Church approved of that Church when they grudgingly handed over their money to the local parson. And yet it was eventually recognized that being forced to

financially support another's faith, especially one antagonistic to the existence of one's own, was a violation of one's conscience. While this argument was largely made in terms of religious freedom, I think the underlying reasoning has broader applicability.

Having concluded that financial contribution to an organization alone may constitute association within the meaning of the *Charter*, I now turn to the question whether the compelled contribution to the Union in this case can be said to violate the appellant's right of non-association as protected by s. 2(*d*).

As I indicated above, the right of an individual to refrain from associating with others is a qualified one. To hold otherwise would be to deny the realities of modern society and would open the door to frivolous claims. As Douglas J. stated in *International Association of Machinists v. Street*, 367 U.S. 740 (1961), at pp. 775-76 (concurring opinion):

> Some forced associations are inevitable in an industrial society. One who of necessity rides busses and street cars does not have the freedom that John Muir and Walt Whitman extolled. The very existence of a factory brings into being human colonies. Public housing in some areas may of necessity take the form of apartment buildings which to some may be as repulsive as ant hills. Yet people in teeming communities often have no other choice.
>
> Legislatures have some leeway in dealing with the problems created by these modern phenomena.

Douglas J. concludes that, when an individual's association with others is "compelled by the facts of life", *supra*, at p. 776, the government may intervene to shape the form that association will take, within certain prescribed limits.

In essence, whether, and under what circumstances, such government intervention is permissible is the broad issue presented by this appeal. More particularly, the threshold issue in this case is whether Parliament or the legislatures may create democratically run bodies comprised of persons naturally associated with one another in certain activities or interests, and grant them authority to direct those activities without breaching the freedom of association -- in the present case, unions.

The legislative mandate for unions under the legislative regime in effect throughout this country would, if freedom of association is not defined in terms of some purposive constraints, not only violate a person's right not to associate, but their right to associate as well, by prohibiting that person from establishing or joining a rival association representing that person's interest except as this might be permitted by the applicable legislation. NUPGE's factum aptly describes the underlying structure of Canadian labour legislation in the following passage, citing P. Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (1980), at pp. 124-25 and 143-45:

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

The arguments of the parties really only tangentially touched on the issue of whether the general structure of labour relations in Canada can be constitutionally attacked on the ground that it compels working through a single bargaining agency. They largely proceeded on the assumption that it was in that respect constitutionally unimpeachable. Counsel for the appellant, by conceding that dues might properly be collected for the purposes of financing collective bargaining, must obviously have intended to concede the larger right. I do not doubt that he was correct in doing so.

Collective bargaining is one means of addressing the concerns of labour relations in a modern industrial society. The importance of the role that the collective bargaining movement has historically played in improving the conditions of workers in this country cannot be denied. It is not unreasonable for the legislature to require those workers who receive the benefits from collective bargaining to contribute towards its cost.

I would also add that some of the concerns which might normally be raised by a compelled association are tempered when that association is, as in this case, established in accordance with democratic principles. Professor Norman Cantor, "Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association" (1983), 36 *Rutgers L. Rev.* 3, is clear in his view that government should be able to confer on democratic institutions powers to receive payments for services and to contribute to causes serving their ends even though these may be objected to by dissenters. He states, at pp. 6-7:

It is too facile . . . to label as "forced ideological association" compelled payments to service institutions -- institutions which then, acting in accord with fiduciary standards and in the interests of those serviced, expend part of the collected monies for political action. Government should be able to assign certain important functions, such as labor representation, to the private sector and to distribute related costs to all those who benefit from the performance of that function. The constitutional interests genuinely at stake do not preclude the collection of service fees from ideologically offended payors.

> Forced payments in return for services entail no imposition of ideological conformity. Nor do the amounts collected impair the ability of workers to conduct their own political expression. To the extent that it offends workers and other forced contributors to see their monies ultimately benefit certain political causes, that harm does not warrant constitutional prohibition of political uses of extracted funds. A worker who complains about a union's political expenditures in pursuit of employment-related worker benefits should have no more first amendment right to a refund of the relevant portion of fees paid than a taxpayer who objects to various political expenditures by the government.

Cantor is there speaking of freedom of expression as he must, of course, in the context of the United States Constitution. It must be remembered that the debate in that country has of necessity been framed in terms of a right of association flowing from the freedom of expression; there is no express guarantee of freedom of association. Nevertheless, it may also be maintained that Cantor argues for a definition of freedom of association in accordance with purposes more attuned to modern life.

Professor Brian 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, has this to say, at p. 43:

A compelled combining of efforts towards a common end, often required in modern society in the form of forced payments to regulatory or service associations to further the collective social welfare, should only be held to constitute an infringement on an individual's freedom of association where it can be found to affect detrimentally the constitutional interests of maintaining free and

> democratic political processes or individual liberty interests in terms of development of self-potential.

This sort of approach, I may say, appears consistent with the view expressed by Dickson J. in *R. v. Big M Drug Mart*, *supra*, at p. 344, that the guaranteed freedoms must be understood purposively in light of the interests they were meant to protect. While they should be interpreted generously and not legalistically, he added, "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 . . . be placed in its proper linguistic, philosophic and historical contexts".

Professor Etherington attempts to add further content to his purposive definition by identifying four primary liberty interests that can be threatened by compelled association (at pp. 43-44):

> In terms of the political process and individual liberty interests at stake, there are four primary dangers to those interests which various forms of forced contributions to service associations may represent and which a doctrine of freedom of non-association should guard against. The first is governmental establishment of, or support for, particular political parties or causes. The second is impairment of the individual's freedom to join or associate with causes of his choice. The third is the imposition of ideological conformity. The fourth is personal identification of an objector with political or ideological causes which the service association supports. If one of these dangers is present in a governmentally supported scheme for forced payments in return for services, then the potential exists for interference with a free and deliberative democratic process or infringement of the individual liberty interest in freedom to develop one's self-potential, and the compelled association should be held to be *prima facie* violative of subsection 2(d).

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.

This brings us to the specific nature of the alleged violation in the present case. While the appellant's proposition in its broadest compass comes close to claiming a right to isolation despite his natural association with his fellow workers, what he really objects to is the compelled payment of dues which are then used to support matters that are not, in his view, related to collective bargaining concerns. This, of course, poses a more difficult problem.

It must be recognized that there is a vast difference between saying that the *Charter* does not entitle a person to artificial isolation from his or her co-workers, and saying that that person never has a right to object to the extent or nature of his or her association with them. To bring the discussion down to earth somewhat, I would suggest that a worker like Lavigne would have no chance of succeeding if his objection to his association with the Union was the extent that it addresses itself to the matters, the terms and conditions of employment for members of his bargaining unit, with respect to which he is "naturally" associated with his fellow employees. Few would think he should not be required to pay for the services the Union renders him in this context. Significantly, he does not object to these matters. With respect to these, the Union is simply viewed as a reasonable vehicle by which the necessary interconnectedness of Lavigne and his fellow workers is expressed.

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.

I would at this point respond to the Union's argument to the effect that Lavigne's claim can be characterized as the claim of the minority to be free from the democratically expressed will of the majority of the community, the bargaining unit,

which the Union represents. Consistent with what I have already stated, I would say that this characterization of Lavigne's claim is more clearly defensible as it relates to his association with the Union when it is engaged in representing Lavigne and his fellow workers in collective bargaining, grievance arbitration, and the like. But, as noted, it is not as clear as regards the extent to which Lavigne's claim relates to his association with the Union in its capacity as an organization which speaks on matters of local, national and world politics. The essential question is whether democracy in the workplace has been kept within its proper or constitutionally permissible sphere.

The experience of the United States is helpful in considering this difficult issue. The courts in that country have attempted to make a clear distinction between an individual's relationship with government and his or her relationship with other democratic institutions, such as professional associations and unions. Thus Powell J. in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), had this to say, at p. 259, n. 13:

> Compelled support of a private association is fundamentally different from compelled support of government. Clearly, a local school board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent. But the reason for permitting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. The withholding of financial support is fully protected as speech in this context.

With respect to democratic institutions other than the government, and to unions in particular, the United States Supreme Court has attempted to draw the line between those actions designed "to promote the cause which justified bringing the group

together" (p. 223) (quoting *Machinists v. Street*, *supra*, at p. 778), and those actions which fall outside that sphere. Thus in *Abood*, the court concluded that a union could not constitutionally spend the funds of dissenting employees on "ideological causes not germane to its duties as collective-bargaining representative" (p. 235). This standard was reiterated by the court seven years later in *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435 (1984), at p. 456; see also *Lehnert v. Ferris Faculty Association*, 114 L.Ed. 2d 572 (1991).

Although it is useful to look to and perhaps draw from the American experience, one must always be alert to the social and political differences between the two countries which are relevant to constitutional jurisprudence. As noted previously, the express mention of freedom of association in the *Charter* argues for a broader interpretation than has been accorded the right in the United States, where its existence has had to be gleaned from the freedom of expression, and only forced contributions to ideological causes are open to constitutional challenge. The presence of s. 1 in our *Charter* also encourages a broader reading of the guaranteed rights and freedoms because they can by that provision be shaped by the reasonable limits to any right or freedom that must exist in a free and democratic society.

This is the approach that has been followed by this Court in dealing with the *Charter*. In the United States, the courts have accommodated other individual rights by restricting the guaranteed rights in <u>particular contexts</u>. My colleagues propose a much narrower approach to the right of association than that adopted in the United States or in this country by limiting it <u>in the abstract</u> -- Wilson J. by restricting the right to its

"positive" aspects, and McLachlin J. by adopting a restrictive approach to the purposes of the right. This narrowing of the right, in my view, is contrary to the generous approach *Big M Drug Mart* instructs us to take to constitutional rights, and gives inadequate attention to the fact that the *Charter* provides a flexible instrument to tailor the right in context by means of s. 1, which permits such reasonable limits as may be necessary in a free and democratic society.

It is somewhat ironic that in the United States, where there is only a right of freedom of expression, the courts have extended this concept to protect against forced payments to ideological causes, even where there is no personal identification of the payor. In Canada, where we have an explicit right of freedom of association, and a mandate of broad interpretation with the additional possibility of limitation under s. 1, my colleagues would hold that forced payment in support of ideological causes does not even amount to a *prima facie* violation of an individual's rights.

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. As I stated previously, this distinction derives logically from the fact that the reason the forced association is permissible is because the combining of efforts of a particular group of individuals with similar interests in a particular area is required to further the collective good. When that association extends into areas outside the realm of

common interest that justified its creation, it interferes with the individual's right to refrain from association.

I hasten to add, and it will become more evident later, that I am quite aware that it may be desirable -- indeed, from a practical standpoint, necessary -- for a union to engage in the broader political and social processes of the country. Nor am I insensitive to the difficulty of attempting to draw a line between activities that are related to the workplace and those that are not. But one must be wary here of confusing the interests of the union with the requirements of the *Charter*. And as Le Dain J., speaking for the majority, observed in the *Alberta Reference*, *supra*, at p. 390, meaning can only be given to s. 2(*d*) of the *Charter* in the context of the wide range of associations and activities to which the right must be applied. The right must be interpreted "in this larger perspective, and not simply with regard to the perceived requirements of a trade union, however important they may be"; see also concurring opinion of McIntyre J., at pp. 393-94.

I need not pursue the matter further, however. I conclude that, whatever the precise dividing line may be, the appellant has sufficiently discharged the burden of establishing that his rights under the *Charter* have been infringed in this case. Expenditures relating to items such as the disarmament movement and opposition to the SkyDome violate the appellant's freedom of association under s. 2(*d*) of the *Charter*, as these expenses are not sufficiently related to the concerns of the appellant's bargaining unit, or to the Union's functions as exclusive bargaining representative.

I now turn to the issue whether there is a justifiable limitation under s. 1 of the *Charter*.

Section 1

In dealing with s. 1, I propose to focus on the alleged interference with the appellant's freedom of association in connection with the use of his money for assisting causes to which he objects. He concedes that the collection of dues to support collective bargaining in the workplace is a reasonable limitation to his freedom of association under s. 1. And it will be obvious from what I have said previously that I agree that, in so far as the Rand formula provides for a mechanism for the payment of dues to the Union for collective bargaining, it does not infringe on the freedom of association. I confine myself, then, to a discussion of the issues regarding the compelling of "dissenters" like Lavigne to contribute to a fund used for causes not directly related to the workplace.

To take the first step in the *Oakes* test (*R. v. Oakes*, [1986] 1 S.C.R. 103), what can be said to be the state objective in compelling someone like the appellant to pay dues to the Union knowing that those dues could be used to fund activities not immediately relevant, or at all relevant to the representation of his interest at the bargaining table? There appear to be two closely interrelated objectives.

The first is to ensure that unions have both the resources and the mandate necessary to enable them to play a role in shaping the political, economic and social context within which particular collective agreements and labour relations disputes will

be negotiated or resolved. The balance of power between management and labour at any given time or in any particular industry or workplace is a product of many factors. It is, in part, clearly a product of factors specific to the industry or workplace in question, such as productivity, and the existence or non-existence of a history of bitter strikes and sharp practice. But it is also in part a product of more general factors, such as the prevailing public sentiment as to the importance of unions or the state of the economy. It is also a product of the state of government legislation and policy, most obviously in the area of labour relations itself, but also in regard to social and economic policy generally. Government policy on day-care, for example, will affect what a union can achieve for its members at the bargaining table. If universal day-care is paid for by taxpayers as a whole, union negotiators in a particular workplace will not have to pay for it by making wage concessions as a way of convincing the employer to provide it. Even if the government introduces certain taxes, the balance of power between workers and management may be affected. Concerned to cushion their membership against a tax's inflationary effect, unions may have to make concessions in areas they would otherwise have fought for, such as vacation time or worker safety. This, then, is one of the principal objectives that lies behind the government's willingness to force contribution to union coffers knowing that it will be spent on things not immediately related to collective bargaining on behalf of the workers making the contributions.

The second government objective I have alluded to explains why government puts no limits on the uses to which contributed funds can be put. This objective is that of contributing to democracy in the workplace. The integrity and status of unions as democracies would be jeopardized if the government's policy was, in effect,

that unions can spend their funds as they choose according to majority vote provided the majority chooses to make expenditures the government thinks are in the interest of the union's membership. It is, therefore, for the union itself to decide, by majority vote, which causes or organizations it will support in the interests of favourably influencing the political, social and economic environment in which particular instances of collective bargaining and labour-management dispute resolution will take place. The old slogan that self-government entails the right to be wrong may be a good way of summing up the government's objective of fostering genuine and meaningful democracy in the workplace.

I turn now to the proportionality tests. Is there a rational connection between the state objectives identified, which is to encourage union democracy and to permit unions to be players in the broader political, economic and social debates in society, and the means chosen to advance those objectives, the requirement that all members of a unionized workplace contribute to union coffers without any guarantee as to how their contributions will be used? In my view, the answer must clearly be yes. Compelling contributions by all represented by the union, all who benefit from the union's attempt to push the general political, social and economic environment in a direction favourable to unions and their members, provides the union with the stable financial base needed to underwrite political, economic and social activism. The fact that no restriction is put on the manner in which contributed money is expended leaves the decision as to what is and what is not in the interests of the union and its members in the hands of the union membership. It, therefore, clearly has the effect of promoting democratic unionism.

I turn to the question of minimal impairment. It could be argued that the state objectives of fostering a politically active union movement guided by democratic decision-making could be achieved while more fully respecting the rights of those in the position of the appellant. They could simply be given a right of "opting out" of paying dues to the extent that such dues are spent promoting opinions or organizations with which they disagree. Alternatively, the government could impose some guidelines on what causes will be deemed to be within the legitimate area of interest of unions. Surely the state could preclude unions from spending money on things like opposition to the SkyDome or Arthur Scargill without undermining the unions' ability to influence affairs relevant to collective bargaining or rendering democracy in the workplace meaningless.

The problem with the opting-out formula is that it could seriously undermine unionism's financial base. It could perhaps even undermine its membership base, since its availability would be an incentive to refrain from becoming a member of a union. If one could opt out, there would be less incentive to become a member, since, presumably, one of the present advantages of membership is that one gets a vote on how one's money will be spent. This would obviously be less attractive if one could unilaterally prevent one's money from being spent on matters of which one disapproves. I would add that the ability to opt out would undermine the spirit of solidarity which is so important to the emotional and symbolic underpinnings of unionism.

To return to the effect an opting-out alternative would have on the finances of unionism, as Lavigne's claim makes clear, those compelled to pay dues will not only

object to the spending of union money on things that are "clearly" not relevant to collective bargaining. For example, he objects to the Union's support for the NDP. It was submitted, however, and there is evidence to support the view that the cause of unionism and of working people generally has been advanced by the NDP. The respondents referred to the role that party played in the establishment of medicare, pensions, and unemployment insurance, and of what unions would have had to give up in the way of demands in other areas in order to get medical coverage from employers, private unemployment insurance coverage, and so on. In the light of the foregoing, it is inconceivable that support of the NDP could be considered irrelevant to the union's obligation to represent those who pay dues to it. But the important point is that if individuals can "opt out" of supporting the NDP, the unions will simply have much fewer dollars to support it.

The NDP is rather an obvious example. Another, which might be said to be unrelated to collective bargaining, is support for one or another of the various women's groups active on today's political landscape. Many individual contributors would probably not want their dollars going to the support of such causes. But when one thinks of the continuing wage disparity between men and women in most lines of work, there can be little doubt that a union could credibly argue that in supporting feminist groups, it hopes to play a role in changing the social attitudes that contribute to continued wage discrimination against its female members.

My point here is not that the union should or should not support, or be allowed to support this or that cause. Rather, it is that the number of causes it will be

able to support will be severely reduced, if individual contributors are free to "opt out" in order to avoid funding causes they find distasteful. The ability of unions to favourably affect the political, social and economic environment in which collective bargaining and dispute resolution take place will be correspondingly reduced. Just as importantly, these developments will have serious consequences for the state objective of encouraging healthy democratic decision-making and debate within unions. Under an opting-out regime, the criterion under which expenditure decisions will be made may well become the acceptability of proposed expenditure to those likely to exercise the right to opt out, rather than a genuine attempt to identify and pursue what is in the best interests of those represented by the union.

As to the alternative under which the government would draw up guidelines as to what would be deemed valid union expenditure and what would not, I would first of all reiterate the point made earlier that this could give rise to the implication that union members are incapable of controlling their own institutions. This kind of paternalism would not do much for the status of unions as self-governing and democratic institutions. Just as importantly, I would draw attention to what I have already said about the difficulty of determining whether a particular cause is or is not related to the collective bargaining process. The appellant complains of what he deems to be glaring examples, but as I have tried to illustrate, many activities, be they concerned with the environment, tax policy, day-care or feminism, can be construed as related to the larger environment in which unions must represent their members. Where one chooses to draw the line will depend on one's political and philosophical predilections, as well as one's understanding of how society works. A legislature may at some point, as apparently was the case in

Ontario in the past and continues to be the case in other jurisdictions, decide that it will draw lines between proper and improper use of union dues. In the meantime, I think it would be highly unfortunate if the courts involved themselves in drawing such lines on a case-by-case basis. Such a result would ensue if the Court were to conclude that the limits on the appellant's s. 2(*d*) rights in this case are not "demonstrably justified in a free and democratic society".

In this regard, I think it is appropriate to address McLachlin J.'s assertion that recognizing a right to freedom of association in this context will subject the courts to an endless stream of frivolous claims challenging compelled financial contribution. As I have already indicated, s. 2(*d*) of necessity assumes the validity of association with the government and its policies. Accordingly, an individual is not entitled to use s. 2(*d*) as a means of challenging the expenditure of tax dollars. The same is true of other associations that inhere in the very structure of a democratic society. In the latter case, it is true, enforced expenditures must be confined within their proper ambit, but the resolution of that issue involves substantially the same considerations as the determination of whether they fall within its ambit for administrative law purposes, a question that calls for determination in any event. It is also worth noting that in the United States, although the courts have adopted a somewhat more rigorous approach, the simple fact is that the legal system has not been subjected to an uncontrollable flood of litigation.

Freedom of Expression

In my view, the courts below arrived at the correct conclusion on this issue. This Court has, in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 968, stated that "[a]ctivity is expressive if it attempts to convey meaning". I do not think that the appellant's contribution to the Union can be said to be an attempt to convey meaning. I fail to see how Lavigne, as one of many who either willingly or unwillingly contribute to the Union, can be said to be responsible for the use to which the money contributed is put. Nor would reasonable people regard him as responsible for the use to which that money was put. In short, the manner in which the Union expends its funds would properly be regarded as the expression of the opinions and positions of the Union *qua* corporate entity. It would not be regarded as an expression of the thoughts and opinions of the many individuals who contribute to the Union's coffers.

I find support for this view in the concurring judgment of Harlan J. in *Lathrop v. Donohue*, 367 U.S. 820 (1961). In that case, a state bar association compelled the payment of dues from all members of the state's legal profession. Although the majority decided the case in favour of the association without having to address the constitutional question, Harlan J., with whom Frankfurter J. agreed, addressed the first amendment question directly. To do so, he had to distinguish the court's earlier decision in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), in which it had struck down a state ordinance requiring all school children to salute the flag. Harlan J. stated, at p. 858:

> What seems to me obvious is the large difference in degree between, on the one hand, being compelled to raise one's hand and recite a belief as one's own, and, on the other, being compelled to contribute dues to a bar association fund which is to be used in part to promote the expression of views in the name of the organization (not in the name of the dues payor), which views when adopted

> may turn out to be contrary to the views of the dues payor. I think this is a situation where the difference in degree is so great as to amount to a difference in substance.

While I have no doubt that the contribution of money to a fund would in many circumstances constitute an activity capable of expressing meaning, I do not think it does in the circumstances of the present case. The appellant is one of many anonymous contributors to a fund which will be spent in the name of the Union as representative of the majority of employees. More particularly, the Rand formula is so designed that he is not even a member of the Union.

Disposition

For these reasons, I would dismiss the appeal with costs to the Ontario Public Service Employees Union, the Canadian Labour Congress, the Ontario Federation of Labour and the National Union of Provincial Government Employees.

I would answer the constitutional questions as follows:

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

No.

2. If the answer to question 1 is in the negative, does the *Canadian Charter of Rights and Freedoms* apply to the requirement that the appellant pay sums

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

Yes.

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

No.

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

Yes, to the extent that these sums are expended on matters not substantially related to the labour relations process.

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

Yes.

//*Cory J.*//

The following are the reasons delivered by

CORY J. -- On the question as to what constitutes "government" I am bound by the reasons of the majority in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229. I therefore agree with the reasons expressed by Justice La Forest on this issue.

In all other respects I am in agreement with the reasons of Justice Wilson.

//*McLachlin J.*//

The following are the reasons delivered by

MCLACHLIN J. -- I have read the reasons of Justices Wilson and La Forest. I agree with their conclusion that the *Canadian Charter of Rights and Freedoms* applies to the Union's activities, for the reasons expressed by La Forest J. I also agree with my colleagues that the payments at issue do not constitute expression under s. 2(*b*) of the *Charter*. I depart from my colleague La Forest J. on a single point. In my view, the payments here in question do not violate s. 2(*d*) because they do not bring Lavigne into association with ideas and values to which he does not voluntarily subscribe. As I find no violation of s. 2, I consider it unnecessary to make any comment concerning the respective s. 1 discussions of my colleagues.

I. The Scope of Freedom of Association in s. 2(*d*) of the *Charter*

In order to determine whether the payments at issue fall under the guarantee of freedom of association in s. 2(*d*) of the *Charter* it is necessary to consider the purpose of the right, that is the interests it was intended to protect: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. It is also necessary to have regard to the history and context of the right and activity in question: *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326. See also *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, *per* La Forest J.

A. *The Interests Protected by s. 2(d)*

Freedom of association protects the freedom of individuals to interact with, support and be supported by, their fellow humans in the varied activities in which they choose to engage: *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, *per* Dickson C.J., dissenting in the result. We are social animals, and as such can fully actualize ourselves only in interaction with others. Viewed thus, freedom of association most fundamentally protects the right of the individual to realize his or her full potential by acting in association with others. Social self-actualization lies at the heart of freedom of association.

The next question is whether s. 2(*d*) includes a right <u>not</u> to associate. While it is not necessary for my purposes to resolve that issue, I am inclined to the view that the interest protected by s. 2(*d*) goes beyond being free from state-enforced isolation, as contended by the interveners OFL and CLC. In some circumstances, forced association

is arguably as dissonant with self-actualization through associational activity as is forced expression. For example, the compulsion to join the ruling party in order to have any real opportunity of advancement is a hallmark of a totalitarian state. Such compulsion might well amount to enforced ideological conformity, effectively depriving the individual of the freedom to associate with other groups whose values he or she might prefer. As La Forest J. suggests, at p. 000, "Forced association will stifle the individual's potential for self-fulfillment and realization as surely as voluntary association will develop it."

In my view, freedom from compelled association, whatever its ambit, could not extend to the payments here at issue. Freedom not to associate, like freedom to associate, must be based on the value of individual self-actualization through relations with others. The justification for a right not to associate would appear to be the individual's interest in being free from enforced association with ideas and values to which he or she does not voluntarily subscribe. For the purposes of this case, I shall refer to this as the interest in freedom from coerced ideological conformity.

It follows from this definition that negative associational activity falling under s. 2(*d*) is not to be determined by the type of the coerced activity impugned (e.g. mandatory payments), but by whether the activity associates the individual with ideas and values to which he or she does not voluntarily subscribe. This approach is similar to that taken toward the right of expression in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, where it was held that the test for whether conduct falls

within s. 2(*b*) of the *Charter* was not the activity *per se* (e.g. speech or conduct), but whether the activity was one intended to convey meaning.

If one accepts that the interest protected by the right not to associate is the interest in being free from enforced ideological conformity, then one cannot assume that payments fall within s. 2(*d*) simply because they be used to support a group cause. It is necessary to go further and ask whether the payments are such that they associate the individual with ideas and values to which he or she does not voluntarily subscribe. Applying an objective standard, the final test is this: are the payments such that they may reasonably be regarded as associating the individual with ideas and values to which the individual does not voluntarily subscribe? This is not to suggest that public identification is an essential prerequisite to any involuntary association; the point, rather, is that before any involuntary association can be said to arise, there must be activity which can fairly be adjudged to bring an individual into association with ideas or values to which he or she does not voluntarily subscribe.

B. *The Nature of the Payments*

As asserted by Wilson J. in *Edmonton Journal*, context is vital in determining whether an impugned activity falls under a *Charter* guarantee. It is therefore necessary to consider the nature of the payment at issue in this case and the circumstances in which the issue arises.

The payments in question are compelled under legislation applying the Rand formula. The Rand formula has been part of Canadian labour relations for many years. It was designed to resolve the problem of persons such as Lavigne, whose employer contracts with a union of which they do not wish to be a member. The formula permits individual employees to choose not to belong to the union, but stipulates that they must pay union dues, in order to avoid the unfairness of giving non-union employees a "free ride". In essence, while not a member of the union, the person who opts out is required to pay dues on the basis that he or she benefits from the activities of the union on behalf of all employees.

The need for compromises such as the Rand formula arises from the fact that Canadian labour relations generally permit only one union to represent all employees in a designated work grouping. This may be contrasted with the quite different system prevailing in parts of Europe, where a worker may choose between several different unions. In a system which permits only one union, there may be workers who do not wish to associate themselves with it. The Rand formula allows a worker to choose whether or not to be a member of the union, but requires that in any event he or she pay dues. As such, it represents a carefully crafted balance between the interest of the majority in the union and individuals who may not wish to belong to the union. (It should not be overlooked in considering the dynamics of this balance that the individual members comprising the majority of the union may have a constitutionally protected right under s. 2(*d*) to pursue activities with which certain members may not wish to associate themselves.)

It is against this background that the payments at issue on this appeal must be viewed.

II. Does the *Charter* Apply?

The question is whether the payments here at issue constitute associational activity under s. 2(*d*) of the *Charter*, taking a purposive view of the right (i.e., viewing it in terms of the interests it is designed to protect) and a contextual view of the payments.

Assuming that a right not to associate exists, it follows from what I have already said that its purpose must be to protect the interest of individuals against enforced ideological conformity. Does the requirement that Lavigne make payments to the Union, which the Union may thereafter spend in part in support of causes which Lavigne does not support, fall within this interest?

In my view, it does not. The test, as set out above, is whether the payments can reasonably be regarded as associating the individual with ideas and values to which the individual does not voluntarily subscribe. The payments here at issue do not meet this test because under the Rand formula there is no link between the mandatory payment and conformity with the ideas and values to which Lavigne objects.

The fact that one pays money which may ultimately be expended in support of a cause does not necessarily associate one with the cause. In buying an automobile, for example, one does not by paying money to the dealer indicate any support for the way

the dealer or the manufacturer of the vehicle may spend the portions of the price it retains as profit. The same applies to a payment to a telephone utility for a service some might regard as essential. In both situations, the payment is devoid of ideological content. It is merely an exchange for something one wants. Similarly, in paying taxes, one is not endorsing the purposes to which the government may devote those taxes. The transaction does not connote association on the part of the payor with the causes the government may support.

Mandatory payments under the Rand formula fall into the same category. 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. Fairness dictates that those who benefit from the union's endeavours must provide funds for the maintenance of the union. But the payment is by the very nature of the formula bereft of any connotation that the payor supports the particular purposes to which the money is put. By the analogy with government, the payor is paying by reason of an assumed or imposed obligation arising from this employment, just as a taxpayer pays taxes by reason of an assumed or imposed obligation arising from living in this country. By the analogy of commerce, the payor is simply paying for services and benefits received.

The comments of Cantor, "Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association" (1983), 36 *Rutgers L. Rev.* 3, at p. 7, are apposite:

> Government should be able to assign certain important functions, such as labor representation, to the private sector and to distribute related costs to all those who benefit from the performance of that function. The constitutional interests genuinely at stake do not preclude the collection of service fees from ideologically offended payors.
>
> Forced payments in return for services entail no imposition of ideological conformity. Nor do the amounts collected impair the ability of workers to conduct their own political expression. To the extent that it offends workers and other forced contributors to see their monies ultimately benefit certain political causes, that harm does not warrant constitutional prohibition of political uses of extracted funds. [Emphasis added.]

For these reasons, I agree entirely with the Court of Appeal's characterization of Lavigne's position ((1989), 67 O.R. (2d) 536, at p. 565):

> He is not forced to join the union; he is not forced to participate in its activities, and he is not forced to join with others to achieve its aims.
>
> . . .
>
> . . . neither the payment, nor the use to which any part of it might be put by the union or any labour body with which it is affiliated, operates so as to compel the non-member to join or associate with any political party or to join or associate with causes other than those of his choice or to be identified with any of the aims and objectives of the union. In the absence of dangers of this nature, we see no threat to any constitutional interest protected by s. 2(*d*).

I add two ancillary points.

First, practicality and policy support this approach, in my view. I see no escape from the conclusion that extending s. 2(*d*) to cover compelled financial contributions *per se* would recognize the *prima facie* validity of a plethora of claims and put the courts into the business of assessing the justifiability of a great many government actions (whether by the means of distinguishing between "immediate concerns" and

more attenuated goals under s. 2(*d*), as on La Forest J.'s analysis, or under s. 1 of the *Charter*) -- in circumstances where there may be "no threat to any constitutional interest", as the Court of Appeal put it. Examples of potential claims abound. Customers of telephone companies are compelled to pay government-set rates for provision of a service that could be regarded as a necessity; does that mean that gives individuals the constitutional right to object to company expenditures of which they do not approve? If tax revenues are used to support a particular regime in a foreign country (as, for example, happened when Canada subsidized the building of a Canadian nuclear reactor in Romania), is the taxpayer who objects to the regime forced to "associate" with it, or with other taxpayers who may support our government's policy? If a government expends funds for the performance of abortions, is a person who morally objects to abortions entitled to withhold taxes?

To distinguish the payment of tax, my colleague La Forest J. refers to the ground asserted by Powell J. in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), at p. 259, n. 13, that governments are "representative of the people", while a union is "representative only of one segment of the population". With respect, I find this a debatable distinction. In the case of both a country and a union, money is taken only from those who are legally represented by the payor. The same problem of dissenters from policy and the same considerations of benefits received arise in each case. Nor can the two situations be distinguished on the ground that the union's expenditures may be less justifiable than government's. Public financing of particular causes goes well beyond an even-handed subsidizing of mainstream political parties.

The second ancillary point relates to the American jurisprudence on this subject. Neither Wilson J. nor La Forest J. adopts an "American" approach. However, in view of the submissions of the parties, it may be worth noting certain differences between the legal position in the United States and in Canada. First, the origin of the constitutional protection in the United States is quite different. The United States Constitution does not guarantee freedom of association. The jurisprudence has developed as a branch of the law on freedom of expression, influenced to some extent by the non-establishment clause and the strong aversion in American jurisprudence of state support for any religion: see *International Association of Machinists v. Street*, 367 U.S. 740 (1961) *per* Black J., dissenting, at p. 790. Secondly, labour relations in the United States are quite different than in Canada. Labour unions play a much larger role in the Canadian economy than in the American, and the government-sanctioned structures for bargaining and dispute resolution found here are unique to this country. It follows that the American attitude toward unions may be more confining than the Canadian approach. Finally, the American distinction between core "collective bargaining" purposes of unions and less immediate "political" purposes adopted by La Forest J. in his s. 2(*d*) analysis is not uncontroversial, even in the United States: see Cox, *Law and the National Labor Policy* (1983), at p. 107, and Tribe, *Constitutional Choices* (1985), at p. 202. As La Forest J. notes in his discussion under s. 1, there is a strong and useful tradition in this country of affiliation between labour unions and political activity. A strong argument can be made that to achieve their legitimate ends and maintain the proper balance between labour and management, unions must to some extent engage in political activities: see, for example, Weiler, "The Charter at Work: Reflections on the Constitutionalizing of Labour and Employment Law" (1990), 40 *U.T.L.J.* 117, at p. 169.

I add a final caveat. The question of whether compelled payment constitutes associative conduct arises only in the context of the negative right, and should not be read as undermining the positive right to maintain organizations affirmed by Le Dain J. in the *Alberta Reference*, *supra*. I do not view this as advocating an approach to s. 2(*d*) that is necessarily narrower than the American conception of freedom of association (see reasons of La Forest J.).

I conclude that the agreement which compels Lavigne to make payments to the Union does not fall within the concept of compelled association because it does not associate him with the causes to which the Union may devote a portion of its funds.

III. Conclusion

I would dismiss the appeal on the terms proposed by La Forest J. I would answer the constitutional questions as follows:

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

No.

2.If the answer to question 1 is in the negative, does the *Canadian Charter of Rights and Freedoms* apply to the requirement that the appellant pay sums equivalent to union dues to the respondent OPSEU, as provided for in

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

Yes.

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

No.

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

No.

The fifth question does not arise.

Appeal dismissed with costs.

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