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A BRIEF OUTLINE OF PRECEDENT CONCERNING FORCED UNION MEMBERSHIP AND USE OF UNION DUES

IN:

CANADA

47 COUNCIL OF EUROPE NATIONS

UNITED STATES

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Brief Outlines of Relevant International and Canadian Court Precedents

Supreme Court of Canada

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

The Court appeared to read a right of non-association into the *Charter's* Section 2 d) Freedom of Association provision, but with four separate opinions the scope of this new right was not clear. The Court also found that the Rand Formula of dues interferes with the freedom from compelled association. However, the majority ruled that such interference was justified under section 1 of the *Charter*. The majority decision also held that the use of the union dues did not constitute forced expression, and so there was no violation of the freedom of expression, even if dues were used for "non-collective bargaining purposes", including political purposes.

The result in unionized workplaces is that compulsory union dues for all unionized employees whether or not they are actual members of the union continues. Membership for Lavigne was voluntary based on a Rand Formula agency shop clause.

2001 *- Regina v. Advance Cutting and Coring Ltd.*
[2001] 3 S.C.R. 209; [2001] S.C.J. No. 68; 2001 SCC 70; File No.: 26664.

The Court clearly read a right of non-association into the *Charter's* Section 2 d) Freedom of Association provision. It found that the effect of Quebec legislation compelling membership in one of five unions a violation of this freedom from association but then allowed closed shops under Section 1 of the *Charter* due to the history of union violence and vandalism in the Quebec construction sector.

2007 *- Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia,*
2007 SCC 27

The Court reversed 20 years of rulings. It read into the Section 2 d) Freedom of Accociation provision a limited *Charter* right to collective bargaining, in the public sector. Relied on international instruments Canada had signed. Parliaments to decide how to implement, courts to use as interpretation guides.

European Court of Human Rights - (47 Countries)

1981 - *Young, James, and Webster v. The United Kingdom*
Application no. 7601/76; 7806/77

The Court found that the United Kingdom failed to protect the applicant's Article 11 - freedom of association rights when it allowed the inclusion of termination rights for unions in closed shop legislation. UK legislation had been changed to allow closed shop collective agreements. Some British Rail employees were opposed to the union's political agenda. The applicants refused to join; the employer fired them per union request.

The Court recognized a right of non-association even though it had been specifically considered and left out of the European Convention on Human Rights. The Court did not address whether or not the right of non-association was equal to the right of association and limited itself to banning post-entry closed shops.

1993 - *Sibson v. United Kingdom*
Application no. 14327/88

The Court did not find that the form of compulsion in this case struck at the substance of the right to not associate. A truck driver and union member resigned membership after a personal quarrel with a co-worker. Otherwise the applicant was not opposed to the union. The remaining members subsequently entered into a closed shop arrangement in order to force Sibson to rejoin or be terminated. The employer offered a comparable job at a nearby work site. Sibson did not accept and was fired. His termination was upheld.

1993 - *Sigurdur A. Sigurjónsson v. Iceland*
Application 24/1992/369/443

The Court ruled that the requirement of membership in a professional organization violated Article 11 of the European Convention. In doing so, the Court confirmed that "freedom of association" provides both the right to belong to an association and the right to remain outside of one. The Court found the violation because the applicant faced the dilemma of joining the organization or a loss of his livelihood. Court did not find it necessary to rule if negative aspect on the same footing as the positive.

The applicant stopped paying membership fees in the taxi association because he did not share view on limiting competition. He was expelled and his lost license to operate. Case not about unions and was not seen as a clear cut post-entry situation.

2006 - *Sørensen and Rasmussen v. Denmark*
Applications nos. 52562/99 and 52620/99

The Court declared closed shop collective agreement provisions illegal. They found that any form of closed shop (pre- or post-entry) violated Article 11 - freedom of association provision of the European Convention on Human Rights. The judgment combined two separate cases with different facts and was issued by the Grand Chamber – the highest level of the Court reserved for very important cases. Subsequently, Denmark also had to amend its legislation to comply.

2007 - *Evaldsson and Others v. Sweden (2007)*
Application no. 75252/01

The Court found that the mere suspicion of political uses of a union's monitoring fees (union dues) paid by employees covered by a collective agreement, but who are not members, violated the right to Peaceful Enjoyment of Possessions (or protection of property rights) under the European Convention on Human Rights (the Convention) - specifically Protocol 1, Article 1. Having found a violation under this Article the Court declined to rule on the other following Articles of the Convention:

United States Supreme Court

1937 *Virginian Railway v. System Federation No. 40*, 300 U.S. 515
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1

The Court held that compulsory collective bargaining is constitutional, but declined to address the constitutionality of exclusive representation because these cases were brought by employers, not employees forced to accept a union as their exclusive bargaining representative.

1944 *J.I. Case Co. v. National Labor Relations Board*, 321 U.S. 332
Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342

The Court interpreted the National Labor Relations and Railway Labor Acts as prohibiting individual employees from negotiating their own terms and conditions of employment where an exclusive bargaining representative has been recognized. Constitutional questions were not raised.

1944 *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192

The Court recognized that exclusive representation presents constitutional problems, but ducked the issue by holding that exclusive representatives have a duty of representing nonmembers "fairly."

1949 *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525
American Federation of Labor v. American Sash & Door Co., 335 U.S. 538

The Court ruled that state Right to Work laws are constitutional. These laws, enacted in twenty-two states as of 2007, prohibit collective agreements requiring workers to join or pay money to a union or labor organization.

1949 *Algoma Plywood Co. v. Wisconsin Bd.*, 336 U.S. 301

The Court held that the National Labor Relations ("Wagner") Act permitted state Right to Work laws even before Congress passed the 1947 Taft-Hartley Act amendments.

1954 *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17

The Court ruled that compulsory unionism agreements may not be used "for any purpose other than to compel payment of union dues and fees," *i.e.*, that employees may not be required to be formal union members and abide by internal union rules to keep their jobs.

1956 *Railway Employees' Department v. Hanson*, 351 U.S. 225

The Court held that "union shop" agreements, requiring union "membership" as a condition of employment, authorized by the Railway Labor Act are constitutional, because the only condition of employment that the Act authorizes is "financial support" of "the work of the union in the realm of collective bargaining." The Court suggested that if compulsory dues are used "for purposes not germane to collective bargaining, a different problem would be presented" under the First Amendment.

1961 *Machinists v. Street*, 376 U.S. 740

Again ducking constitutional questions, the Court ruled that the Railway Labor Act prohibits unions from using objecting non-members' compulsory dues for political purposes. The Court did not clearly define political purposes, nor did it address whether unions could lawfully use objectors' monies for non-political activities unrelated to collective bargaining. Dissenting Justice Black, predicting that the Court's rebate remedy would be ineffective, would have held the statute unconstitutional.

1963 *Railway Clerks v. Allen*, 373 U.S. 113

The Court found that, because unions hold all pertinent facts and records, they must prove the proportions of their expenses that are lawfully chargeable to objecting non-members. However, the Court reaffirmed *Street*'s rulings that only non-members who notify their union that they object are entitled to relief and that the appropriate remedies are refunds and reductions in future exactions.

1963 *National Labor Relations Board v. General Motors*, 373 U.S. 734

The Court reiterated that the "union shop" "is whittled down to its financial core," that is, unions may require payment of initiation fees and dues as a condition of employment, but may not require formal membership. In other words, in practice there is no real difference between a "union shop" agreement, which on its face purports to require "membership," and an "agency shop" agreement, which on its face only requires payment of an amount equal to or less than dues.

1963 *Retail Clerks Local 1625 v. Schermerhorn*, 373 U.S. 746, 375 U.S. 96

The Court held that state Right to Work laws may prohibit "agency shop" agreements under which employees are required to pay fees to unions to defray the costs of collective bargaining. In a second decision in the same case, the Court ruled that the state courts, not just the National Labor Relations Board, can enforce state Right to Work laws. (The National Right to Work Committee financed this case in the Supreme Court for the non-member plaintiffs.)

1968 **The National Right to Work Legal Defense Foundation was established. Unless otherwise noted, all subsequent cases listed were brought by Foundation attorneys.**

1976 *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407

The Court held that employees' "predominant job situs" determines whether a state Right to Work law applies, and that seamen employed primarily on the high seas are not protected by the Right to Work law of the state in which they were hired. The Foundation filed an amicus brief urging that Texas' existing Right to Work law protected the seaman.

1976 *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167

The Court ruled that a state may not constitutionally require school boards to prohibit non-union teachers from speaking against agency shop agreements at public meetings. The Foundation filed an amicus brief supporting the non-union teachers' free speech rights.

1977 *Abood v. Detroit Board of Education*, 431 U.S. 209

A six-member majority of the Court rejected arguments that a requirement that public employees pay agency fees to keep their jobs violates the First Amendment. The Court ruled that the agency shop as such is constitutionally valid, but only "insofar as the service charges are applied to collective-bargaining, contract administration, and grievance-adjustment purposes." The Court unanimously agreed that "a union cannot constitutionally spend [objectors'] funds for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative."

1983 *Knight v. Minnesota Community College Faculty Association*, 460 U.S. 1048

Without an opinion giving its reasons, the Court affirmed a lower court decision. In doing so, the Court rejected arguments that exclusive representation of public employees by a union, such as the National Education Association, is unconstitutional because it forces association with a political-action organization.

1984 *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271

The Court ruled that a state may constitutionally bar non-members from participating in their public employers' "meet and confer" sessions with the employees' exclusive bargaining representative on policy questions relating to employment, but outside the scope of mandatory collective bargaining.

1984 *Ellis v. Railway Clerks*, 466 U.S. 435

The Court held that the Railway Labor Act not only prohibits coerced financial support of union politics and ideological activities, but also coerced support of other activities unrelated to collective bargaining and contract administration, such as organizing, litigation not concerning an objecting employee's bargaining unit, and the parts of union publications reporting on non-chargeable activities. The Court also ruled that a "union cannot be allowed to commit dissenters' funds to improper uses even temporarily," prohibiting "rebate" schemes under which unions collect full dues, use part for improper purposes, and only later refund that part to the employees.

1985 *Pattern Makers v. National Labor Relations Board*, 473 U.S. 95

The Court recognized that the National Labor Relations Act guarantees workers the right to resign union membership at any time. The Foundation filed an amicus brief urging this ruling.

1986 *Chicago Teachers Union v. Hudson*, 475 U.S. 292

The Court unanimously held that First Amendment due process requires that certain procedural safeguards be established before compulsory union fees can be collected from public employees: adequate advance notice of the fee's basis (including an independent audit), reasonably prompt impartial review of non-members' challenges, and escrow of "amounts reasonably in dispute" while challenges are pending. Because the Court had earlier ruled in *Railway Employees' Department v. Hanson* that constitutional limitations apply to the Railway Labor Act, these procedural safeguards also must be established by railway and airline unions. *E.g.*, *Miller v. Air Line Pilots Ass'n*, 108 F.3d 1415 (D.C. Cir. 1997), *aff'd on other grounds*, 523 U.S. 866 (1998).

1988 *Communications Workers v. Beck*, 487 U.S. 735

The Court determined that Congress intended the substantially "identical" authorizations of compulsory unionism arrangements in the National Labor Relations and Railway Labor Acts "to have the same meaning." The Court, therefore, held that the former statute, like the latter, "authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" As a result, private-sector employees should have the same right not to subsidize union non-bargaining activities as railway, airline, and public employees, and should be entitled to the procedural protections outlined in *Chicago Teachers Union v. Hudson*. However, so far the National Labor Relations Board has ruled that the substantive and procedural rights of non-members are lesser under the NLRA than under the RLA and the First Amendment. *See Food & Commercial Workers Local 1036 v. NLRB*, 307 F.3d 760 (9th Cir. 2002); *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998).

1991 *Lehnert v. Ferris Faculty Association*, 500 U.S. 507

Summarizing its earlier decisions from *Hanson* through *Ellis*, the Court concluded that union activities are not lawfully chargeable to objecting non-members unless they ***both*** are "'germane' to collective-bargaining activity" and do "not significantly add to the burdening of free speech that is inherent in allowance of an agency or union shop." Applying this test, the Court ruled that objecting public employees may not be charged for litigation not directly concerning their bargaining unit, lobbying (except for ratification or implementation of their collective bargaining agreement), public relations activities, and illegal strikes. However, the Court also held that the First Amendment does not limit lawfully chargeable bargaining-related costs, to costs incurred for the objecting employees' bargaining unit.

1998 *Air Line Pilots Association v. Miller*, 523 U.S. 866

The Court ruled that non-members who do not agree to union-established arbitration procedures cannot be required to use those procedures before bringing a federal court action challenging the amount of their compulsory fees for collective bargaining.

1998 *Marquez v. Screen Actors Guild*, 523 U.S. 866

The Court held that a union does not breach its duty of fair representation "merely by negotiating" a compulsory unionism provision that says that employees must be union "members in good standing" as condition of employment without expressly explaining, in the agreement, that the National Labor Relations Act does not permit unions and employers to require that employees become formal union members in order to keep their jobs. Importantly, for the first time, the Court declared that, if a union negotiates a compulsory unionism provision, it must notify workers that they may satisfy the provision's requirement merely by paying fees to support the union's "representational activities" in collective bargaining and contract administration, without actually becoming members. The notice, must include information about the percentage of dues that must be paid – although the Court decision did not explain this requirement in its decision).

Note: All U.S. labor laws prohibit requirements that one be a union member to be hired, but allow agreements requiring membership or payment of dues after a specified period, 30 days under the NLRA, 90 days under the RLA. As such there are two meanings of membership – the lesser level is membership required and related to payment. The other form means an employee is a member who can run for union office, participate in internal union elections as well as be subject to union discipline.

2007 *Davenport v. Washington Education Association*, 127 S. Ct. 2372

The Court unanimously ruled that, because unions have no constitutional right to collect fees from non-members, a state may require unions to obtain affirmative consent before spending non-member public employees forced fees on political activities. The Court's decision also reiterated that, as the Court had decided in 1949, Right to Work laws are constitutional.

September 19, 2007

The Canadian LabourWatch Association acknowledges the significant contribution, in preparing the US section of this document, of Raymond Lajeunesse, Vice President and Legal Director of the National Right to Work Legal Defense Foundation, Inc. - http://www.nrtw.org