FREEDOM OF ASSOCIATION IN CANADA

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The author examines extensively, the case of Lavigne v. Ontario Public Service Employees' Union which deals with the power of a trade union to support without restriction, political and ideological causes unrelated to collective bargaining. Involved in this analysis is a discussion of the Charter right under s. 2, freedom of association, and whether or not this right would also include the freedom not to associate. The author then looks at the potential political implications of the Lavigne decision.

Labour law has generated considerable controversy in Canada recently. The challenge has come however not only from governments, as in Britain, but also from the courts, armed with the Charter of Rights and thereby empowered to question every assumption about Canadian political, economic and social life. So far as labour law is concerned, the protection of the right to freedom of association has led the judges to ask whether freedom of association means not only the constitutional protection of the right to form and join trade unions, but also a constitutional protection of the right to negotiate, the right to strike,[1] and the right to picket.[2] It has also led in *Lavigne* v. *Ontario Public Service Employees' Union* [3] to the realization that rather than being a means for the protection of trade union freedoms, the Charter may well be an instrument of weakness. The *Lavigne* case was a challenge to the ability of trade unions to support without restriction political and ideological causes unrelated to collective bargaining. In effect at the heart of the case — which is Canada's equivalent of the Osborne litigation in Britain some seventy-seven years ago[4] — are simple but fundamental questions. What are the proper purposes of trade unions? Who is to determine these purposes? Is it to be the members or the courts? It is thus hardly unsurprising that the case has been billed as "the labour trial of the century".[5]

I. UNION SECURITY

The problem in the *Lavigne* case[6] is related closely to the existence of a union security agreement. Mr. Lavigne was a college teacher employed at Haileybury School of Mines. Many of the teachers at the college were members of the union, the position of the union being governed by the Colleges Collective Bargaining Act 1980.[7] This provided for the conferring

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1. *See for example, Re Service Employees' Int'l Union, Local 204 and Broadway Manor Nursing Home* (1983) 4 D.L.R. (4th) 481.
2. See *Dolphin Delivery Ltd* v. *Retail, Wholesale and Dept Store Union, Local 580* (1984) 10 D.L.R. (4th) 1981; [1986] 2 S.C.R. 573.
3. (1986) 55 O.R. (2d) 449.
4. *Amalgamated Society of Railway Servants* v. *Osborne* [1910] A.C. 87.
5. J. Clancy, W. Roberts, D. Spencer and J. Ward, *All for One. Arguments from the labour trial of the century on the real meaning of trade unionism*. (O.P.S.E.U., Toronto 1986).
6. *Supra* n. 3.
7. R.S.O. 1980, c. 74.

of exclusive bargaining status on the appropriate representative trade union,[8] which in this case was O.P.S.E.U.[9] The Act also provided by s. 53:

> 53(1) The parties to an agreement may provide for the payment by the employees of dues or contributions to the employee organization.
> (2) Where the Ontario Labour Relations Board is satisfied that an employee because of his religious convictions or belief objects to paying dues or contributions to an employee organization, the Ontario Labour Relations Board shall order that the provisions of the agreement pertaining thereto do not apply to such employee and that the employee is not required to pay dues or contributions to the employee organization, provided that amounts equivalent thereto are remitted by the employer to a charitable organization mutually agreed upon by the employee and the employee organization and failing such agreement then to such charitable organization registered as such under Part I of the Income Tax Act (Canada) as may be designated by the Ontario Labour Relations Board.
> (3) No agreement shall contain a provision which would require, as a condition of employment, membership in the employee organization.

It is important to note what s. 53 actually provides. First, it authorized an agreement between the parties whereby employees in the unit could be required to pay either dues or fees to the union (s. 53(1)), but no one could be required to join the union (s. 53(3)). It thus authorized an agency shop agreement rather than a union shop agreement, whereby everyone could be required to join the union as a condition of employment. Secondly, it provided expressly that not everyone was required to pay an agency fee. Those with religious objections were excused, provided that they did not free ride (s. 53(2)). In 1982 a collective agreement was in fact concluded, the agreement containing a union security clause which provided that "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".[10] Mr. Lavigne did not in fact join the union, but he was required, nevertheless, under the terms of the agreement to pay $338 to O.P.S.E.U., the money being paid into the general revenues of the union and used for any purpose permitted under its constitution. The aims and objects of the union are set out in Article 4 of its Constitution, as follows:[11]

> The aims and purposes of the Union shall be:
> (a) to regulate labour relations between the members and their employers and managers, said labour relations to include the scope of negotition, collective bargaining, and the enforcement of collective agreements and health and safety standards;
> (b) to organize, sign to membership, and represent employees in Ontario;
> (c) to advance the common interests, economic, social and political, of the members and of all public employees, wherever possible, by all appropriate means;
> (d) to bring about improvements in the wages and working conditions of the membership, including the right of equal pay for work of equal value;
> (e) to defend the right to strike;
> (f) to promote full employment and equitable distribution of wealth within Canadian society;

8. *Id.* at s. 52.
9. O.P.S.E.U. represents approximately 87,000 workers in Ontario. They include 63,000 direct employees of the government of Ontario — the largest single bargaining unit in Canada. They also include 12,000 academic and support staff of the Colleges of Applied Arts and Technology, and 12,000 other employees in over 200 separate bargaining units — including hospitals, laboratories, ambulance services, welfare agencies, and legal aid services.
10. *Supra* n. 3 at 458.
11. *Id.* at 458-459.

(g) to co-operate with labour unions and other organizations with similar objectives in strengthening the Canadian labour union movement as a means towards advancing the interests and improving the well being of workers generally in Canada;
(h) to promote justice, equality, and efficiency in services to the public;
(i) to strengthen, by precept and example, democratic principles and practices both in the Canadian labour union movement and in all manner of institutions, organizations and government in Canada.

The union used this power under its Constitution to contribute to a number of causes, unrelated to immediate questions of collective bargaining. These were first financial contributions to the New Democratic Party (N.D.P.); secondly, financial contributions to disarmament campaigns including the Campaign against Cruise Missile Testing; thirdly, financial contributions to a campaign opposing the expenditure of municipal funds for a domed stadium in Toronto; fourthly, financial contributions to Arthur Scargill and the striking British coalminers; and fifthly, financial contributions to Nicaragua. In each case the amount of money involved was very small, and in each case the amount of Mr. Lavigne's contribution would have been infinitesimal. For example, the disputed donations to the N.D.P. included a donation of $100 to the Oshawa N.D.P., $500 to the Ontario N.D.P., and $3,500 to the Ontario N.D.P. for a commemoration dinner. In addition to these disputed payments, Lavigne drew attention to the fact that O.P.S.E.U. is affiliated to both the Ontario Federation of Labour and to the National Union of Provincial Government Employees which is in turn affiliated to the Canadian Labour Congress. As an affiliated member of these organizations O.P.S.E.U. pays to N.U.P.G.E. 83¢ per month per employee (of which 43¢ is passed on to the C.L.C.), and to the O.F.L. 24¢ per month per employee. All three of these organizations were involved in supporting a number of social and political causes to which Lavigne objected. These included the extensive support by the C.L.C. in particular for the N.D.P. In 1979 Congress had given $389,000 for the general election campaign in that year; in 1980 this rose to $433,000 for the general election in that year and in 1984 it amounted to at least $353,000. In addition, money had been donated to the Party on other occasions to help with by-elections, and roughly $200,000 had been spent in 1983 and 1984 to mobilize union support for the Party.

It has to be said that for many years much of this expenditure by O.P.S.E.U. would have been unlawful. Until 1969 a voluntary dues check off regime operated in the public sector in Ontario. In that year a provincial regulation passed under the Public Service Act[12] introduced a new regime whereby a voluntary check off arrangement would operate in the public service for existing employees but that the check off would be mandatory for all future employees.[13] The regulation provided, however, a limitation on the uses to which mandatory dues could be applied:[14]

> . . . the deductions referred to in this section shall be remitted to the Civil Service Association of Ontario and shall be used only for purposes directly applicable to the representation of Crown employees, and shall not be used for activities carried on by or on behalf of any political party.

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12. R.S.O. 1960, c. 202.
13. O.Reg. 403/69.
14. *Id.* at reg. 24a(b).

So it was unlawful for unions governed by the regulation to spend check off income on party political purposes.[15] And it is to be noted that the regulations applied to collective agreements concluded by the colleges.[16] But it is also to be noted that the regulations were repealed in 1977 and that the ban on political action was never reintroduced.[17] So given the mandatory check off arrangement and no restriction as to how the money so deducted might be used, the question is whether offended members of the bargaining unit could claim that their rights under the Charter had been violated. The question has been raised in other provinces,[18] but none of the other cases have captured the same attention as *Lavigne*. Neither have they been as well argued. The principal questions then are whether Lavigne could establish that his right to freedom of association has been violated; and, if so, whether the respondents could establish that any such violation was protected by section one of the Charter which permits the rights and freedoms to be qualified by "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

II. THE INTERNATIONAL CONTEXT

The right to freedom of association is one which is guaranteed either expressly or impliedly in a number of jurisdictions outside Canada. In considering the question of so-called forced association, the international context reveals a number of quite different responses adopted in different jurisdictions. The first is the view that the right to freedom of association embraces a right or freedom to associate with whom one wishes, and ultimately the right not to associate at all. This is the approach adopted by the courts in both the Republic of Ireland and West Germany.[19] In Ireland, the Constitution provides that:[20]

> The State guarantees liberty for the exercise of the right of the citizens to form associations and unions.

This provision has been tested in several leading cases. The first is *N.U.R.* v. *Sullivan* [21] where the Trade Union Act 1941 provided that a trade union could apply to a Trade Union Tribunal for a determination that it alone had the right to organize workers of a particular class. The Irish Transport and General Workers' Union applied for a determination that it should have

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15. Though this restriction would not have prohibited expenditures other than partisan political ones.
16. The Ministry of Colleges and Universities Act, S.O. 1971, c. 66 expressly made the Crown Employees Collective Bargaining Act, S.O. 1972, c. 67 applicable to the community colleges. The 1972 Act had replaced the Public Sector Act.
17. O.Reg. 870/77, reg. 15. The Colleges Collective Bargaining Act, S.O. 1975, c. 74 subsequently governed collective bargaining. In 1975 a new collective agreement was signed with a dues check off clause subject to the Ontario regulations. Although the regulations were repealed in 1977, the clause appeared in successive agreements until 1981 when the clause under dispute was introduced.
18. *See Baldwin* v. *B.C. Government Employees' Union* (1986) 28 D.L.R. (4th) 301. *See also Re Bhindi and British Columbia Projectionists Local 348 of Int'l Alliance of Picture Machine Operators of the United States and Canada* (1985) 20 D.L.R. (4th) 386.
19. For comment and analysis, see F. von Prondzynski, "Freedom of Association and the Closed Shop: The European Perspective" [1982] 41 *C.L.J.* 256.
20. Article 40, clause 6,1.
21. [1947] I.R. 77.

the right to organize and represent road passenger service employees. A rival union, the National Union of Railwaymen responded by claiming that the Act was unconstitutional, a claim which was upheld by the Supreme Court.

In its decision the Court was troubled by the fact that once a determination is made by the Tribunal, the other unions are not free to organize in the sector in question. This, in the view of the Court, was unconstitutional on the ground that a law which takes away the right of individuals to form associations is not a law which could be validly made. In this case the statute had effectively deprived citizens of their free choice of the persons with whom they would associate. This was followed by the decision in *Educational Institute* v. *Fitzpatrick (No. 2)* [22] which related to a strike by employees to force other workers to join the union. In the course of the strike a picket was mounted, following which an action was brought by the employer. The defendants argued that the picketing was protected by s. 2 of the Trade Disputes Act 1906,[23] a claim which was met by the employer's contention that the statutory protection in the 1906 Act could not be used for a purpose which was unconstitutional. The question then was whether a picket designed to force people into membership of a trade union was unconstitutional on the ground that it violated freedom of association. Although there was no mention in the Constitution of the right to dissociate, it was readily implied in the following manner:[24]

> Taking the language of the Article quoted in its ordinary meaning it will be noted that what the State guarantees is 'liberty' for the exercise of the right of the citizens to form associations and unions. If it is a 'liberty' that is guaranteed, that means that the citizen is 'free' to form, and I think that must include join, such associations and unions, and, if he is free to do so, that obviously does not mean that he must form or join associations and unions, but that he may if he so wills. Apart from authority, therefore, I would myself construe the words of the Article as meaning by implication that a citizen has the correlative right not to form or join associations or unions if he does not wish to do so, and it seems to me to follow that in the case of associations or unions already formed he is free to associate or not as he pleases.

As a result it was held that the picketing was not protected by the 1906 Act.

The second response to the question of forced association has been that the freedom to associate does not imply an absolute freedom of dissociation, but it does imply a limited right of dissociation. This in fact is the approach adopted by the European Court of Human Rights in *Young, James and Webster* v. *U.K.*[25] That case was concerned with Article 11 of the European Convention on Human Rights which provides that "Everyone has the right to . . . freedom of association with others, including the right to form and to join trade unions for the protection of his interests". The complainants in *Young, James and Webster* had been employed by British Rail and had been dismissed following the introduction of an agreement

22. [1961] I.R. 345.

23. This was a pre-independence Act of the British Parliament which applied in Ireland. It provided that "It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union . . . in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or abstain from working".

24. Per Budd J. at 362.

25. [1981] I.R.L.R. 408.

between their employer and three unions. Under the agreement each employee was required, as a condition of employment, to be a member of one of the three trade unions. The only exception was that made for employees who had religious objections to union membership. None of the applicants fell into this category. Young objected to membership because he did not subscribe to the political views of the union; James opposed the union because he did not consider it effective in protecting his interests; and Webster was opposed to all unions which he regarded as being detrimental to the interests of workers and the country in general. The question before the Court was whether the dismissals of these individuals under the agreement, which had been made under the Trade Union and Labour Relations Act 1974,[26] amounted to a violation of Article 11.

The difficulty facing the Court was that again there was no express protection of the right to dissociate in the documents before it. Indeed, there was evidence from the traveaux preparatoires to suggest that such a right had been deliberately excluded from the text, because of the practice of the closed shop system operating in several of the contracting states.[27] Nevertheless, the Court took the view that although the right to dissociate might thus be outside the scope of the Convention, it was not excluded altogether. The Court held first:[28]

> a threat of dismissal involving loss of livelihood is a most serious form of compulsion and, in the present instance, it was directed against persons engaged by British Rail before the introduction of any obligation to join a particular trade union. In the Court's opinion, such a form of compulsion, in the circumstances of the case, strikes at the very substance of the freedom guaranteed by Article 11. For this reason alone, there has been an interference with that freedom as regards each of three applicants.

So existing employees at the time the agreement is signed have a right to dissociate. Secondly, the Court held:[29]

> The protection of personal opinion afforded by Articles 9 and 10 in the shape of freedom of thought, conscience and religion and of freedom of expression is also one of the purposes of freedom of association as guaranteed by Article 11. Accordingly, it strikes at the very substance of this Article to exert pressure, of the kind applied to the applicants, in order to compel someone to join an association contrary to his convictions.

So people with conscientious objections also have the right to dissociate. It is to be noted, however, that this limited right of non-association may be displaced by Article 11(2), which permits restrictions to be imposed by law provided that these are necessary in a democratic society for the protection of, *inter alia*, the rights and freedoms of others. In this case, however, there was no such necessity. This was partly because the infringement of individual rights was out of all proportion to the need to maintain the

26. The Act provided that employees and trade unions were free to enter into "union membership agreements". If such an agreement was concluded, anyone dismissed would be regarded as having been fairly dismissed. The only exception was for those people who had genuine religious objections to membership of any trade union whatsoever. The law, introduced by the Trade Union and Labour Relations Act 1974 (and amended by the Trade Union and Labour Relations (Amendment) Act 1976) was consolidated in the Employment Protection (Consolidation) Act 1978, s. 58. Since the election of the Conservative government in 1979, however, the law has been amended, and it is now very difficult to establish effective union security arrangements. See Employment Acts 1980 and 1982, discussed in P. Davies and M. Freedland, *Labour Law Text and Materials* (2nd ed. 1984) 633-670.

27. [1981] I.R.L.R. 408 at 416.

28. *Id.* at 417.

29. *Id.*

closed shop. It was pointed out, for example, that before the agreement was signed, some 95% of the employees in the railway labour force were already members of one of the three unions in question.[30]

The third response to the question of so-called forced association has been that the freedom of association does not imply any right of dissociation (whether absolute or limited), but that it does imply a duty of limited association only. That is to say, an individual may be compelled to associate, but only for limited purposes. This is the approach which has been adopted by the U.S. Supreme Court. The starting point is *Railway Employees Department* v. *Hanson* [31] where employees of the Union Pacific Railroad Co. brought an action against the company challenging a union shop agreement made under the Railway Labor Act which provided that, notwithstanding the law of any state, a carrier and a labour organization may make an agreement requiring all employees within a stated time to become members of the labour organization, provided there is no discrimination against any employee and provided that membership is not denied nor terminated "for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership". This measure was challenged, partly on First Amendment grounds, it being argued that the union shop agreement forced people "into ideological and political associations which violate their right to freedom of conscience, freedom of association, and freedom of thought".[32] The argument continued: "once a man (sic) becomes a member of these unions he is subject to vast disciplinary control and that by force of the Federal Act unions can now make him conform to their ideology".[33]

The argument failed, though the Court upheld the legislation on very narrow grounds. In the view of the Court, Congress sought to safeguard against any First Amendment difficulties by making it explicit that no conditions to membership may be imposed except as respects "periodic dues, initiation fees, and assessments".[34] The Court continued by holding that "If other conditions are in fact imposed, or if the exaction of dues, initiation fees, or assessments is used as a lever for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case".[35] It was thus held only that "the requirement for financial support of the collective bargaining agency by all who receive the benefits of its work is within the power of Congress under the Commerce Clause and does not violate either the First or the Fifth Amendments".[36] In other words, individuals may be compelled to associate, though only to the extent that they are required to pay dues.

30. For comment on the case, see M. Forde, "The European Convention on Human Rights and Labor Law" (1983) 31 *Am. Jo. of Comp. Law* 301.

31. 351 U.S. 225 (1956). The following analysis of the U.S. case-law draws heavily on K.D. Ewing, *Trade Unions, the Labour Party and the Law* (1982) 173-186.

32. *Id.* at 236.

33. *Id.* at 236-237.

34. *Id.* at 238.

35. *Id.*

36. *Id.*

There is no duty to support the association by other means. But even this is not absolute, a point confirmed in *Abood* v. *Detroit Board of Education*.[37] This case is important for two reasons. First, it upheld limited forms of union security arrangements from constitutional challenge. Here the employees in question were local government employees, with state legislation authorizing collective bargaining and permitting the parties to enter into agency shop agreements. Such an agreement existed here and it was this which Abood challenged. In endorsing *Hanson*, however, the Court took the view that the question of trade union security is fundamentally the same in the public sector as it is in the private sector and that no special dimension results from the fact that in the case in question the union represented public rather than private employees.

So in both *Hanson* and *Abood*, the employees were compelled to associate to the extent that they were required to pay a membership fee or an agency fee to the union in question. On the second claim in *Abood*, however, the employees were successful. Thus, it was also held that it was unconstitutional for the union to spend part of the fees collected in this way for political purposes over the objections of the individuals in question. In other words, although the employees could be compelled to associate by the payment of fees, this duty of limited association was restricted still further by an obligation only to pay fees for the purpose of defraying the expenses of collective bargaining. The issue related to the fact that the union, the collective bargaining agent, used money from its general treasury to support political causes. This practice was held by the Supreme Court to be unconstitutional, with Justice Stewart writing that the fact that people are compelled to make rather than prohibited from making contributions for political purposes is no less an infringement of their First Amendment rights at the heart of which 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 one's mind and conscience rather than coerced by the State.[38] He continued in the following terms:[39]

> We do not hold that a union cannot constitutionally spend 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. Rather, the Constitution requires ony that such expenditures be financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.

As to how to give effect to the objection of dissenters, the Court followed the approach which had been adopted under the Railway Labor Act cases as a means of "preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining activities".[40]

What then was the solution reached in the Railway Labor Act cases? The leading case is *International Association of Machinists* v. *Street*[41] where

37. 431 U.S. 209 (1977).

38. *Id.* at 234-235.

39. *Id.* at 235-236.

40. *Id.* at 237.

41. 367 U.S. 740 (1961).

employees objected to the fact that their union dues were being used to promote political purposes to which they objected. As in *Hanson*, a union shop agreement existed, under s. 2, Eleventh of the Act. The employees argued their case partly on First Amendment grounds, though this point was sidestepped by four of the majority of five. In delivering the judgment, Justice Brennan traced the history of the union security provisions of the Railway Labor Act and concluded that compulsory unionism had been introduced to require employees to share in the expenses of collective bargaining. The use of dues or agency fees to support political programs did not help to meet such costs and was consequently not intended by Congress when it permitted the union shop in the railways. The case was thus decided on a matter of strict construction only. There was no statutory authority to use funds contributed by individuals in a union shop for purposes other than collective bargaining. But having thus upheld the principle of the complaint, the task of the court was to find a remedy. In dealing with this issue, the majority rejected the argument that an injunction should be issued to restrain enforcement of the union shop agreement in the case of the employees in question: "Restraining the collection of all funds from the appellees sweeps too broadly, since their objection is only to the uses to which some of their money is put".[42] Rather, the court decided to send the case back to the court below for consideration of a proper remedy which would protect both the interests of the union and its dissenting members to "the maximum extent possible without undue impingement of one on the other". The court gave guidance as to what would be permissible in this respect. It said first that the safeguards should only be available to those who applied: dissent was not to be presumed. Secondly it suggested:[43]

> One remedy would be an injunction against expenditure for political causes opposed by each complaining employee of a sum, from those moneys to be spent by the union for political purposes, which is so much of the moneys exacted from him as is the proportion of the union's total expenditures made for such political activities to the union's total budget. The union should not be in a position to make up such sum from money paid by a non-dissenter, for this would shift a disproportionate share of the costs of collective bargaining to the dissenter and have the same effect of applying his money to support such political activities. A second remedy would be restitution to each individual employee of that portion of his money which the union expended, despite his notification, for the political causes to which he had advised the union he was opposed.

The amount of money which the employee would be entitled to recover in this way would be the same proportion that the expenditures for political purposes which he had advised the union he disapproved bore to the total union budget.[44]

The decision in *Street* and the approach as to remedies was endorsed by the Supreme Court in 1963 in *Brotherhood of Railway and Steamship Clerks* v. *Allen*,[45] another case decided under the Railway Labor Act. The case is important for the further advice which the Court gave as to remedies. A form of practical decree to give effect to *Street* was suggested, and on the question of calculating the proportion of political spending to

42. *Id.* at 771.
43. *Id.* at 774-775.
44. *Id.* at 775.
45. 373 U.S. 113 (1963).

other spending, it was held that since the unions possess the facts and records from which the proportion of political to total union expenditure can reasonably be calculated, basic considerations of fairness compel that they, and not the individual employees, bear the burden of proving such proportion. Equally important is the plea to the unions in *Allen* to keep these disputes out of the courts. The Court recognized that practical difficulties may attend a decree reducing an employee's obligation under the union shop agreement by a fixed proportion, since the proportion of the union budget devoted to political activity may not be constant. Such difficulties with judicial relief, thought the Court:[46]

> should ... encourage petitioner unions to consider the adoption by their membership of some voluntary plan by which dissenters would be afforded an internal union remedy. If a union agreed upon a formula for ascertaining the proportion of political expenditures in its budget, and made available a simple procedure for allowing dissenters to be excused from having to pay this proportion of moneys due from them under the union shop agreement, prolonged and expensive litigation might well be averted. The instant action, for example, has been before the courts for 10 years and has not yet run its course. It is a lesson of our national history of industrial relations that resort to litigation to settle the rights of labor organizations and employees very often proves unsatisfactory.

In delivering the opinion of the Court, Justice Brennan referred to the British Trade Union Act 1913 as a precedent for such a plan, suggesting that it might be possible for American unions to adopt something similar without legislation. He continued by saying, however, that he did not mean to suggest:[47]

> that the Act provides a perfect model for a plan that would conform with the discussion in this opinion and in Street, nor that all aspects of the English Act are essential, for example the actual segregation of political funds, nor that the particular boundary drawn by the Act between political expenditures and those germane to collective bargaining is necessarily sound.

Since that judgment was written, new legislation in Britain has redrawn the boundary between political expenditures and those germane to collective bargaining.[48] As a result the scope of the former has been enlarged and the latter narrowed.

Since the Allen judgment the Supreme Court has also addressed this question. *Ellis* v. *Brotherhood of Railway, Airline and Steamship Clerks*[49] was yet another case relating to a union security agreement negotiated under the Railway Labor Act 1951, s. 2, Eleventh. Following *Hanson* and *Street* the petitioners did not contest the legality of the agreement but argued that "they can be compelled to contribute no more than their pro rata share of the expenses of negotiating agreements and settling grievances".[50] In particular, it was argued that although the defendant union had adopted a rebate plan as proposed by *Allen*, the plan was inadequate first because of the way in which refunds were made, and secondly because of the limited range of expenditures for which relief was permitted. As to the first, it was held that it was not sufficient for a union to require

46. *Id.* at 123-124.
47. *Id.* at 123.
48. Trade Union Act 1984, s. 17.
49. 466 U.S. 435 (1984).
50. *Id.* at 439.

payment of the same amount from everyone, and then to make the rebate at some future date:[51]

> By exacting and using full dues, then refunding months later the portion that it was not allowed to exact in the first place, the union effectively charges the employees for activities that are outside the scope of the statutory authorization. The cost to the employee is, of course, much less than if the money was never returned, but this is a difference of degree only.

In the view of the Court, this arrangement enables the union to exact an involuntary loan from employees. The Court held that in future unions should either make the refunds in advance or they should pay interest with a rebate made in arrears. As to the second question it was held as a matter of principle:[52]

> when employees such as petitioners object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred, for the purposes of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

Applying this principle, it was held that three items of disputed expenditure were neither unconstitutional nor unlawful under the Railway Labor Act. These were expenditure on the union's quadrennial convention, various union social activities, and the publication of the union's journal. Other expenditures were, however, unlawful. These included expenditures incurred in recruitment campaigns as well as those incurred in litigation on questions not involving the negotiation of agreements or the settlement of grievances.[53]

III. THE LAVIGNE DECISION

As we have seen, courts in jurisdictions outside Canada have approached union security devices from three different angles. In *Lavigne* the Ontario Court has reached a conclusion very similar to that adopted by the U.S. Supreme Court, that is to say that the right to freedom of association embraces not an absolute right of non-association, nor even a qualified right of non-association, but a duty of limited association only. But because of the different linguistic framework of the Charter, the Court reached this destination by a rather different route. The first question for consideration, however, was whether the Charter applied at all. Before a court has jurisdiction on a Charter question, the case must be within the frame erected in s. 32(1). This provides that the 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 Territorires; and
> (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

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51. *Id.* at 444.

52. *Id.* at 448.

53. *Id.* at 448-455.

The first question for the Court then was whether Lavigne was complaining about conduct by the legislature or government of Canada or any of the Provinces. If not, the case would fall.

In addressing this issue, the Court was confronted with several different considerations: what is meant by government for the purposes of s. 32; what actions of government are within the scope of the Charter; and was the conduct impugned in this case governmental action? On the first of these issues, the term government was construed widely to mean not only the cabinet, the ministries and the civil service, but also the actions of Crown agencies.[54] In this case the government was involved because the governors of the college, the Council of Regents, is a Crown agent, for the following reason:[55]

> Subsection 5(2) of the Ministry of Colleges and Universities Act . . . indicates that members of the Council of Regents are appointed by the Lieutenant-Governor in Council and are charged with the task of assisting the Minister of Colleges and Universities in 'the planning, establishment and co-ordination of programs of instruction and services' for the colleges. I find it to be of some significance that the section is drafted in such a way that it employs the verb 'assist'. To say that the Council of Regents assists the Minister is to say that the Minister has the final word in respect of the running of the colleges.

This was so even though s. 2(3) of the Act provides that the Board of Regents has "the exclusive responsibility for all negotiations",[56] which in the words of White J. "might be construed as giving the Board of Regents the statutory right to bind the Minister, even against his otherwise superior discretion".[57] In so holding the Court was influenced by decisions of the Ontario Labour Relations Board in which it was held that community college staff are a special category of Crown employee working for a Crown agency and therefore exempt from the Ontario Labour Relations Act.[58]

But having established that the Council of Regents is a government agency, it then had to be shown that the Charter applied to government action of the kind in question in this case. Did it apply to contracts by government in general, and did it apply to this contract in particular? The Court replied by holding that "governmental action does include the entering into a contract by a Crown agency pursuant to powers granted by statute".[59] To hold otherwise would be to permit 'government' "to impose terms in a contract that it could not impose by statute or regulation because they breach the Charter".[60] White J. continued by holding that it is the purpose of the Charter "to permit review of situations where a governmental actor acts in such a way that the effect of its action, whether such action be of a legislative or administrative nature, potentially infringes a value protected by the Charter".[61] In this case[62]

54. *Supra* n. 3 at 474.

55. *Id.*

56. Colleges Collective Bargaining Act, R.S.O. 1980, c. 74, s. 2(3).

57. *Supra* n. 3 at 474.

58. *Civil Service Association of Ontario* v. *Fanshawe College of Applied Arts and Technology* [1967] O.L.R.B. Rep. 829, followed in *O.P.S.E.U.* v. *Sault College of Applied Arts and Technology*, unreported, 1985.

59. *Supra* n. 3 at 479.

60. *Id.*

61. *Id.* at 480.

62. *Id.* at 488.

> In determining whether or not the Charter applies I have looked at the government's role in creating a situation in which Mr. Lavigne is forced to financially support the Union. My conclusion is that the action of the Council of Regents, a Crown agency, in agreeing to the inclusion in the collective agreement of the check off clause had the effect of forcing Mr. Lavigne to financially support the Union. This, in my view, is governmental action within the meaning of s. 32 of the Charter, sufficient to attract the court's scrutiny of its constitutionality under s. 2 of the Charter.

In reaching this conclusion the Court considered but rejected the rather different approach which had been adopted by the British Columbia Supreme Court, though it has to be said that the approach in *Baldwin* v. *B.C. Government Employee's Union* [63] was far from persuasive.

Having established that the Charter applied in this case, the question was whether the government action amounted to a violation. As already pointed out, this essentially embraced two issues: did the agreement violate the right to freedom of association as protected by s. 2; and, if so, could the breach be justified wholly or partially under s. 1 which, as also already pointed out, provides that the rights guaranteed by the Charter are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". As to the s. 2 question, the difficulty facing the Court was that in protecting the freedom to associate, the Charter said nothing of the freedom not to associate. In constructing such a right, White J. analyzed the function of freedom of association. This, he said, was essentially twofold. First, it is necessary if pluralism is to survive:[64]

> The combining of the efforts of individuals to achieve a common end is essential to the dynamics of a democratic political system. Indeed, a democracy is government by association, and social and political change within a democracy is brought about largely through association. Individuals express their views and disseminate information through associations; when acting in concert with others an individual gains the capacity required to effect a political or social result. Although the maintenance of a 'free market place of ideas' is really a freedom of expression theme, in view of the fact that associations have great impact on that market, freedom of association is a necessary precondition to its existence.

And, secondly, he held that associations are the means by which individual citizens may actively participate in the political process. Thus, within "a democratic political system, voluntary private associations can serve to increase opportunities for self-realization, counterbalancing the strength of centralised power".[65] In promoting this argument, White J. was strongly influenced by the writings of Professor Emerson, who wrote that "Association is an extension of individual freedom. It is a method of making more effective, of giving greater depth and scope to, the individual's needs, aspirations and liberties".[66]

How then can the negative right be extracted from this? As to the first rationale of the freedom (the need to promote pluralism), it was held that "Forced association can restrict the free flow of ideas and thus distort the

63. (1986) 28 D.L.R. (4th) 301.

64. *Supra* n. 3 at 494.

65. *Id.*

66. T. Emerson, "Freedom of Association and Freedom of Expression" (1964) 74 *Yale Law Journal* 1 at 4.

market place".[67] The meaning of this is not explained. But it could be argued presumably that forced association distorts the market place first by giving some associations a louder voice than they should have, and secondly by impairing greater competition by preventing new associations from becoming established. It would, however, be a mistake to exaggerate this argument. For it is equally true that in reality people who do not join will not go off and form rival associations and that pluralism may depend on a measure of compulsory association. Labour is already the weaker party in the struggle with capital. The more convincing basis of the negative right then is derived from freedom of association as a means of self-expression and self-realization. Of some importance here are the following remarks of Chief Justice Dickson in the Supreme Court of Canada in an earlier Charter case. There, he said that:[68]

> 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 of 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.

White J. concluded from this that "a right to freedom of association which did not include a right not to associate would not really ensure 'freedom'".[69] It is true that here Lavigne was not required by the agreement to join the union. But that was not conclusive, for the "question which arises under s. 2 ... is whether or not Mr. Lavigne is being forced to combine with others to achieve a common end".[70] White J. had little difficulty dealing with this question, thereby concluding that there had been a prima facie breach of the Charter.[71]

As a result, the focus of attention switched to s. 1. In addressing this question the Court followed the guidelines expounded by Chief Justice Dickson in *The Queen* v. *Oakes*[72] where he said that s. 1 requires the defendant to establish two points as a condition precedent to success. The first is that there is a need to protect "collective goals of fundamental importance",[73] or in the words of White J. that there is "an important governmental objective which is acceptable in a free and democratic society".[74] Secondly, the requirement that the restriction should be reasonable and demonstrably justified involves a form of proportionality test which has three important components:[75]

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67. *Supra* n. 3 at 495 (White J.).
68. *R.* v. *Big M Drug Mart Ltd* (1985) 11 D.L.R. (4th) 321 at 354.
69. *Supra* n. 3 at 495.
70. *Id.* at 496.
71. *Id.* at 498.
72. (1986) 26 D.L.R. (4th) 200.
73. *Id.* at 225.
74. *Supra* n. 3 at 513.
75. *Supra* n. 72 at 227.

> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair as little as possible the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of sufficient importance.

In this case White J. was prepared to accept that there was an important governmental objective, the defendant thereby overcoming the first of the s. 1 hurdles, namely, the elimination of free riders in collective bargaining.

The difficulty, however, related to the proportionality test. And here it was held that there was a rational connection between the governmental objective sought to be achieved and the governmental action that was challenged: "there is a rational connection between the fostering of collective bargaining and the prevention of 'free riders' and the forced payment of dues".[76] The second aspect of the proportionality test did, however, present rather more difficulty, with White J. concluding that the government had not promoted its interests by employing means which were least restrictive of the individual's freedom. Thus, it was held, after a review of comparative material,[77] that the "collective bargaining process can be both advanced and financed by those who benefit without the use of compulsory dues for purposes beyond the immediate concerns of collective bargaining and settlement of disputes arising out of the collective agreements".[78] White J. continued by pointing out that in other countries where "a less obtrusive means has been employed than that challenged in the instant application, unions have not been paralysed and continue to be effective in advancing the interests of their members, and society at large, both through collective bargaining and political activism".[79] He concluded therefore, that:[80]

> ... it is not necessary in order to finance collective bargaining to require non-members to pay full union dues to the union which may be applied to any purpose that its constitution permits including contributions to ideological and political causes. It would be possible to draft a clause in a collective agreement providing for compulsory dues check off that restricts the use of such dues to finance activities that are directly related to the objective sought to be achieved, that is, to collective bargaining and the administration of the collective agreement. Although it may be difficult to segregate spending related to collective bargaining and collective agreement administration and spending for other purposes, it has been done in other free and democratic societies and, therefore, such a distinction could be implemented in collective agreements in Ontario affecting public sector unions. Madam Justice Wilson, in her judgment in *Singh* v. *Minister of Employment and Immigration* and six other appeals (1985) 1 S.C.R. 177 at p. 219 pointed out in course of an analysis of s. 7 of the Charter that a balance of administrative convenience could not override principles of fundamental justice enshrined in s. 7 of the Charter. Thus perceived administrative hardship imposed on the union in earmarking compulsory dues used for permissible and non-permissible purposes, and in following a pattern least obtrusive to the applicant's Charter rights, is no answer to the applicant's case.

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76. *Id.* at 514.
77. This was legislation in force in several industrialized nations such as the United Kingdom, Australia, France, Ireland, Italy, Switzerland and West Germany. White J. referred also to the constitutional law of the United States.
78. *Supra* n. 3 at 514.
79. *Id.*
80. *Id.* at 514-515.

Having thus upheld the complaint, the final question related to the remedy. The matter, however, was postponed to allow both parties to make further submissions. Counsel for the applicant was invited by White J. to make written submissions as to the appropriate declaratory relief. As a result a fresh hearing would have to be held to decide how to implement the decision. At the time of writing, some 6 months after the decision, the matter awaits to be resolved. The question raises important issues for the union. The temptation will no doubt be for the union to do as little as possible in order to protect so far as it is able the activities in which it previously engaged. On this basis the desire might be for an arrangement whereby a rebate is paid only to those who apply, and who take the trouble to discover, identify and specify the expenditure to which they are opposed. American jurisprudence suggests, however, that something more may be required. First, it may be necessary to make the rebate in advance of the contribution period, as suggested by *Ellis*.[81] Secondly, it may be necessary for the union to provide non-members (from whom they collect an agency fee) with a detailed accounting of union finance, in order to facilitate the exercise of constitutional guarantees.[82] And thirdly, it may be necessary to construct an elaborate procedure whereby members have a right to complain (with prompt access) to an independent body about the union's proposals as to what is and what is not germane to collective bargaining.[83] There are also strategic reasons which may induce unions to extend the remedy to include all members. If they fail to do this, there is a fear that some members may leave the union and become fee payers only in order to protect their freedom of conscience. The union is thus haunted by the ironical rhetoric of those who will urge people to leave the union to protect their rights.

IV. THE IMPLICATIONS OF LAVIGNE

Seen in this wider international context, *Lavigne* is hardly a surprising decision. It is to be noted, however, that not all western jurisdictions adopt such a hostile approach to union political activity, even where union security arrangements are in force. In both Australia and Sweden the matter is unregulated by law.[84] It is indeed surprising that the Australian experience was not cited in *Lavigne*, particularly as union political activity sustained challenge in the High Court of Australia.[85] Yet whatever the international context, it does not follow that the decision was necessarily the correct one to adopt in Canada or indeed that the reasoning of the Court was convincing or persuasive. In fact, three issues remain to be considered after *Lavigne*. First, what is the scope of the decision? Secondly, what are the implications of the decision on the freedom of association question? And thirdly, what are the political implications of the Court's interpretation of s. 1?

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81. *Ellis* v. *Brotherhood of Railway, Airline and Steamship Clerks* 466 U.S. 435 (1984).

82. *Chicago Teachers' Union* v. *Hudson, New York Times*. Unreported, 5 March 1986.

83. *Id.*

84. On the position in Australia, *see* K. D. Ewing, *Trade Unions, the Labour Party and the Law* (1982) 186-195. On the position in Sweden, *see* K. D. Ewing, *The Funding of Political Parties in Britain* (1987) 151-172.

85. *See Williams* v. *Hursey* (1959) 103 C.L.R. 30.

A. THE SCOPE OF *LAVIGNE*

Two questions as to scope are raised by *Lavigne*. The first is the nature of the activity which is governed by the decision, and the second is to determine which unions will be affected by it. As to the first question, the decision appears to follow the pattern set by the U.S. Supreme Court in *Abood* [86] and *Ellis*,[87] that is that fee payers may be required to pay only that proportion of members' dues which will be used for the purposes of collective bargaining, thereby excluding all expenditure on items of a social and political nature. Although this is consistent with the U.S. authorities, it contrasts sharply with the position in Britain, where the matter is governed by statute, the Trade Union Act 1913[88] (as amended by the Trade Union Act 1984).[89] The Act provides that unions wishing to engage in political activity must first ballot their members[90] and then set up a separate political fund[91] to which individual members are not required to contribute.[92] Objecting members may "contract out", provided that they do so in the prescribed way,[93] and they may not be penalised by the union for doing so.[94] This right of limited association is restricted, however, to political objects defined as meaning the expenditure of money:[95]

(a) on any contribution to the funds of, or on the payment of any expenses incurred directly or indirectly by, a political party;

(b) on the provision of any service or property for use by or on behalf of any political party;

(c) in connection with the registration of electors, the candidature of any person, the selection of any candidate, or the holding of any ballot by the union in connection with any election to a political office;

(d) on the maintenance of any holder of a political office;

(e) on the holding of any conference or meeting by or on behalf of a political party or of any other meeting the main purpose of which is the transaction of business in connection with a political party;

(f) on the production, publication or distribution of any literature, film, document, sound recording or advertisement the main purpose of which is to persuade people to vote for a political party or candidate or to persuade them not to vote for a political party or candidate.

Although it is thought in Britain that the definition is too wide, it is much less burdensome for the unions that the distinction mapped out in the U.S. by the Court in *Ellis*. All expenditures falling outside the scope of this definition may be funded by unions from their general measures, provided that they have authority in their rules. In the past unions have been held entitled to expend money to relieve the distress of victims of the Spanish

86. *Abood* v. *Detroit Board of Education* 431 U.S. 209 (1977).

87. *Ellis* v. *Brotherhood of Railway, Airline and Steamship Clerks* 466 U.S. 435 (1984).

88. For discussion of the 1913 Act, *see* K. D. Ewing, *Trade Unions, the Labour Party and the Law* (1982).

89. For discussion of the 1984 Act, *see* K. D. Ewing, "Trade Union Political Funds: the 1913 Act Revised" (1984) *I.L.J.* 227. *See also* K. D. Ewing, "Trade Unions and Politics" in R. Lewis (ed) *Labour Law in Britain* (1986).

90. 1913 Act, s. 3(1).

91. 1913 Act, s. 3(1)(a).

92. *Id.*

93. *Id.*

94. 1913 Act, s. 3(1)(b).

95. 1913 Act, s. 3(3), as am. by Trade Union Act 1984, s. 17.

Civil War[96] and to support the families of striking coalminers.[97] In such cases dissenting members have no remedy if they object.[98] It is to be noted, however, that union security arrangements are now much less common in Britain than in Canada,[99] and that where a union shop does operate, an employee has the right not to join[100] (and not to pay a fee to the union),[101] if he or she objects to membership of the union on grounds of conscience or because of some deeply held personal belief.[102]

The second question of scope is perhaps more important. This is the question of which unions are governed by the *Lavigne* principles. At first sight it appears that the decision will apply only to those unions which enter into agreements with government agents, that is to say public sector trade unions. As was pointed out by White J. the weight of authority is that the Charter does not apply to regulate private activity.[103] In this case the Charter was activated only by the presence of the government in the negotiations. Thus "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".[104] This is perhaps an important attempt at damage limitation and to that extent it is welcome. It may, however, produce a very uneasy compromise which will be very difficult to maintain. Thus, why should the right to a remedy for violation of Charter rights depend on the fact that in one case the government is the employer and that in the other it is not, particularly when in both cases the reason for the violation is ultimately the same: the existence of legislation which authorizes unions and employers to negotiate away constitutional rights? It is to be seen whether subsequent cases will manage to hold the compromise. But it may be ominous that in *R.W.S.D.U.* v. *Dolphin Delivery Ltd.*[105] the Supreme Court of Canada did not rule out the possibility of the application of the Charter to some private litigation, particularly where one of the two private parties acted on the authority of a statute which infringed the Charter rights of another.

In *Dolphin Delivery*, the Supreme Court of Canada approved the decision in *Re Blainey and Ontario Hockey Association* [106] where a girl was prevented by the O.H.A. from competing in hockey competitions because

96. *Kelly* v. *Wyld* (1937) 81 Sol. Jo. 179.

97. *Hopkins* v. *N.U.S.* [1985] I.R.L.R. 157.

98. *See* Corrigan and U.S.D.A.W. *Annual Report of the Chief Registrar of Friendly Societies* (1957).

99. The implementation of union security arrangements has been made difficult by the Employment Acts 1980 and 1982 which require a ballot of the workforce to be held, in which 80% of those eligible to vote or 85% of those voting must vote in favour of the agreement. Agreements made for the first time after 14 August 1980 must be approved by 80% of those eligible to vote. *See* Employment Protection (Consolidation) Act 1978, s. 58A.

100. In the sense that any dismissal for non-membership will automatically be unfair.

101. Employment Protection (Consolidation) Act 1978, s. 58(13).

102. *Id.* at s. 58(4).

103. *Supra* n. 3 at 474-476.

104. *Id.* at 481.

105. [1986] 2 S.C.R. 573.

106. (1986) 26 D.L.R. (4th) 728.

of her sex. Under the Ontario Human Rights Code,[107] sporting activity is expressly excluded from the proscription of the Act.[108] It was held by a majority (2:1) that the Code violated s. 15 of the Charter. So although the action was a suit between private parties, the Charter was of crucial importance to challenge the Human Rights Code (government action) which permitted (but did not require) the discriminatory practices of the Association. If we were to take the Labour Relations Act, *Blainey* could present problems here too for private litigation. Under the Act, a union may require an employer to accept the Rand formula in the collective agreement.[109] Under the Act, the parties may also agree on more far-reaching security arrangements, such as a union shop, or preference for union members.[110] Suppose the union elects to insist on the Rand formula or that the parties agree to a union shop. An employee member of the bargaining unit seeks a declaration that the employer may not deduct money from his or her wages to hand over to the union. The employer's defence, of course, will be that he acted under the authority of a statute (in the case of an agency shop) or an agreement made under the authority of a statute (in the case of a union shop). But the employee may now shout *Blainey*. For in the case of the agency shop, the employer has been required by legislation to violate the plaintiff's Charter rights, whereas in the case of the union shop, the employer has been authorized (though not required) to violate the Charter rights of the plaintiff.

B. FREEDOM OF ASSOCIATION AND ITS IMPLICATIONS

So the application of the *Lavigne* principle could yet extend beyond the public sector. If it does so, it will be despite legal reasoning which may well have rather odd implications. In *Lavigne* the action was sustained because the college was a government agent and because the effect of the collective agreement was to force the plaintiff "to combine with others to achieve a common end".[111] Yet, what if, in the next case, the defendant is a government department being challenged by a taxpayer on the ground that a particular government program compels the plaintiff, through taxation, to combine with others to achieve a common end? The effect could thus be to render all government spending unconstitutional for there will always be some taxpayer who will oppose some item of expenditure and the forced association with others which it requires. Take three examples. The first is government subsidies for political parties and candidates which are to be found in several Canadian jurisdictions. In *Re Mackay and Government of Manitoba*[112] these arrangements survived challenge on the ground that they violated freedom of conscience to the extent that they required citizens to make compulsory contributions. In rejecting the challenge Twaddle J.A. for the majority of the Manitoba Supreme Court said:[113]

107. S.O. 1981, c. 53.

108. *Id.* at s. 19(2).

109. Labour Relations Act, R.S.O. 1980, s. 43.

110. *Id.* at s. 46.

111. *Supra* n. 3 at 496.

112. (1986) 24 D.L.R. (4th) 587.

113. *Id.* at 595.

> The Consolidated Fund receives revenue from many sources and out of it many expenditures for different public purposes are made. It would be impossible and inappropriate to say which item of expenditure was supported by which item of revenue. The financial support given to a political candidate or his party cannot be attributed to any particular tax or to a payment by any particular individual or group.

Quite so. But following *Lavigne*, it would appear to be possible for a challenge to be mounted on freedom of association grounds. And here the position would be rather different. For while an individual would still be unable to point to an item of expenditure which represents his or her taxes, that is not now the point. The fact is that the taxpayer is being forced to combine with others to achieve a common end, namely the public funding of political parties, including those to which he may be conscientiously opposed.

Yet the vulnerability of the legislative branch would not be confined to issues of this kind. Take, as a second example, social legislation. Individuals may be opposed to social security and welfare legislation, business may be opposed to workers' compensation and employment standards legislation reforms. On the *Lavigne* reasoning, can this legislation seriously pass muster? Again, individuals and this time corporations[114] are being forced to combine to achieve ends which they may most strenuously oppose. And take as a third example defence and foreign affairs. The testing of cruise missiles has already survived Charter challenge.[115] But after *Lavigne*, will military affairs be subject to challenge on different grounds? If people cannot be forced into association to oppose nuclear weapons, then surely they cannot be forced into association to support nuclear weapons? Consequently, any expenditure by the Canadian government must surely be unconstitutional if challenged. And why stop at nuclear weapons? For many people, the expenditure of a standing army is no doubt a violation of their conscientious and religious beliefs. Presumably they too could claim that this expenditure is unconstitutional. Similar difficulties must surely also confront government relief programs for the Third World. Again, following *Lavigne*, taxpayers will presumably be able to claim that it is a breach of their constitutional rights should the government decide to support Nicaragua, in any way, shape or form. But presumably it is not only support of Nicaragua which would be open to question. Any foreign aid would be vulnerable. Does this mean that some religious zealot or a racist could cut aid to Africa on the ground that he or she is being forced through taxation to combine with others to associate with a cause with which he or she disapproves? Surely not. Yet these are the roads down which the logic of White J.'s reasoning takes us. It may be, of course, that logic will not be followed to its proper conclusion. But that could be done only by unprincipled reasoning, a defect not normally attributed to Canadian judges.

One possible way out of this difficulty would be to argue that all of this expenditure by government would obviously be protected by s. 1 in the sense that it could be demonstrably justified as reasonable in a free and democratic society. But why? Surely not because it is the activity of a

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114. And corporations are also protected by the Charter: *R.* v. *Big M Drug Mart* (1985) 18 D.L.R. (4th) 321.

115. *Operation Dismantle Inc.* v. *The Queen* (1985) 18 D.L.R. (4th) 481.

democratically elected government rather than the conduct of a trade union. The purpose of the Charter is to constrain the power of government,[116] and this would be undermined if the government could justify restriction simply because it is the democratically elected government. So there would have to be some governmental interest other than the mere fact that the decision in question has been taken by government. If this was sufficient, the union would have succeeded in *Lavigne*, in all cases the government would have a cast-iron defence, and the Charter would be meaningless. It would not, of course, be difficult to establish a governmental interest. The need to maintain strong political organization as a prerequisite to democracy, the need to maintain defences from external attack, and the need to relieve poverty are all relevant and perhaps persuasive. But this only takes us part of the way, leaving two questions unanswered. First, it assumes that the courts would sustain the government interest in a direct challenge to the Crown. The assumption is no doubt correct. Yet why should these goals be legitimate when authorized directly by government, but not legitimate when incurred indirectly as a result of government authorization? Secondly, it does not follow from the fact that there is a governmental interest in these questions, that the interest is a compelling one. Under s. 1 the government would have to pass the three part proportionality test, and there is no reason in principle why that should be any easier for government than it was for O.P.S.E.U. In each of the examples discussed above, it would be perfectly possible for the state interest to be promoted by less burdensome means. In each case taxpayers could be rebated a portion of their taxes. Alternatively, various items of expenditure could be funded from separate budgets to which taxpayers contract in. The result would be an absurd bureaucratic nightmare. Yet the problems facing the unions are no less absurd. It is merely a question of scale. But all this simply serves to emphasize the bizarre nature of the discussion: the logic of Lavigne is that all items of government expenditure are potentially unconstitutional unless saved by s. 1.

C. THE POLITICAL IMPLICATIONS OF LAVIGNE

The *Lavigne* case is one which begs for a sensible approach by the courts to s. 2, otherwise the danger is that everything will be potentially unconstitutional thereby placing an intolerably heavy burden on s. 1. The treatment of s. 1 in *Lavigne* is in fact the source of the third difficulty presented by the case. It was accepted that there is a strong governmental interest in fostering collective bargaining and in establishing a means of financing it. But although the point was not argued, there is surely also a strong governmental interest in maintaining competition and pluralism in the political arena. This interest is recognized implicitly in *National Citizens' Coalition Inc.* v. *Attorney-General for Canada*.[117] That case was concerned with amendments to the federal election laws. In 1974 Parliament passed the Election Expenses Act[118] which introduced sweeping reforms. These included the introduction of public funding of parliamen-

116. See *Hunter* v. *Southam Inc.* (1984) 11 D.L.R. (4th) 641, per Dickson C.J. at 650.

117. (1984) 11 D.L.R (4th) 481.

118. Election Expenses Act, S.C., 1973-74, c. 51, amending Canada Elections Act, R.S.C. 1970, c. 14 (1st Supp.).

tary candidates' election expenses; free political broadcasting for political parties; and limits on the permitted election expenses of parliamentary candidates and political parties. Parliament also endeavoured to protect the spending limits from being undermined by seeking to regulate the election expenditures of groups other than political parties. As originally enacted, it was provided that only candidates and parties could incur election expenses and that it was an offence for anyone else to do so. A defence was provided where expenses were incurred with respect to an issue of public policy and was *bona fide* in the sense that it was not done in collusion with a party or candidate for the purpose of defeating provisions on spending restrictions.[119]

This defence was removed by legislation in 1983 following the advice of the Chief Electoral Officer.[120] As a result it was an offence for anyone other than a registered party or candidate to incur an election expense. In the *National Citizens' Coalition Inc.* case it was held that this contravened s. 2 of the Charter on the ground that it violated freedom of expression, "said by many to be one of the most significant of freedoms in a democratic society since the political structure depends on free debate of ideas and opinions".[121] In reaching its decision the Alberta Court of Queens Bench drew heavily on the landmark decision of the U.S. Supreme Court in *Buckley* v. *Valeo*[122] where the Court stated:[123]

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

Although this comment was expressed in a rather different context in response to a rather different problem, it nevertheless raises points not irrelevant to our present discussion. The fact is that the decision in *Lavigne* effectively imposes a restriction on the amount of money which trade unions may spend on political communication, and it effectively imposes restrictions on the amount which the N.D.P. may spend on political communication. This is not necessarily undesirable per se. But in the context of the reality of Canadian politics in practice, it is highly undesirable. The fact is that in Canada the political voice of labour is much more muted than that of capital. Labour is already engaged in an unequal struggle. Yet the Lavigne court is now insisting that labour should fight the battle with both hands tied behind its back.

The scale of the problem is revealed by a study of the reports for 1984 submitted by the three main federal parties to the Chief Electoral Officer of Canada.[124] In that year the Progressive Conservative Party had an income of $21,979,340 of which $11,003,522 was donated by 21,286

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119. Canada Elections Act, R.S.C. 1970, c. 14, s. 70.1(4), as inserted by the Election Expenses Act, *id.* at s. 12.
120. Chief Electoral Officer of Canada, Statutory Report 1983 (Ottawa 1983) 74.
121. *Supra* n. 117 at 492.
122. 424 U.S. 1 (1976).
123. *Id.* at 19.
124. The figures in this paragraph are drawn from the Registered Parties Fiscal Period Returns 1984 (Ottawa 1985).

companies. This contrasts with the Liberal Party's income of $10,533,316 of which $5,339,729 was donated by 6,494 companies. It contrasts also with the $10,512,696 income of the federal N.D.P. of which only $2,159,055 was donated by trade unions. So the N.D.P. not only has an income which is considerably smaller than that of at least one of the corporate-based parties, it is also the case that union political donations to the N.D.P. at the federal level are a mere 10% of company donations to the other two parties. Indeed N.D.P. income was smaller than the total corporate donations to the Progressive Conservatives. The decision in *Lavigne* will serve only to widen these gaps, even if it is confined to the public sector. For it is highly unlikely that the courts will move in an even-handed manner by developing similar restraints on corporations. Indeed, it may even be that while the Charter will require protection of trade union members, it would operate to prevent a legislature from introducing similar protections for shareholders and employees. Admittedly the point is unclear and prediction is difficult. But it is to be noted that in *First National Bank of Boston* v. *Bellotti*,[125] the majority of the Supreme Court expressed the view that:

> . . . the shareholder invests in a corporation of his own volition and is free to withdraw his investment at any time and for any reason.

As a result it may be difficult to burden the corporation's right to free speech with a limit which on this line of reasoning is unnecessary. But even if it is so possible, such limits will depend on the initiative of legislatures. And given that most Canadian legislatures are controlled by business parties, how many are likely to take steps which are calculated to dissuade corporations from making gifts?

So it may be argued that there is a strong governmental interest in fostering pluralism in the political process, a development which is undermined by direct or indirect restrictions on one group but not others, particularly where the group in question is already competing at a disadvantage. And just as employees must take the burdens of collective bargaining with the benefits, so must employees (and other citizens) take the burdens of political action with the benefits. The burden again is the cost. The benefits are twofold. The first is the benefit of living in a democracy, the survival of which depends on the tolerance of the views of others, and sometimes (as with public funding of political parties) on supporting financially causes which one disapproves. The second is the practical benefits which flow from political activity. Just as the individual may make economic gains through collective bargaining, so he or she may make economic gains — directly or indirectly through political action. In the first place, the collective bargaining system itself is to a large extent the product of statute. As a result, political action is necessary to protect the statutory framework, which confers the benefits, from political attack; and political action is necessary to improve the quality of the system and to eliminate defects. Secondly, collective bargaining is not adequate to regulate all the economic rights of workers. There are certain areas where it is generally accepted that improvements can be made only by legislation. These include occupational health and safety; workers' compensation; and equal pay for work of equal value. Workers benefit from this no less

125. 435 U.S. 765 at 794 (1978).

than they benefit from collective bargaining. It too costs money and it too needs support. The benefit of a political party committed to labour was clearly demonstrated after the May 1985 provincial elections in Ontario. A new Liberal government was elected, relying on N.D.P. support because it was in a minority. The parties entered into an agreement, and among the conditions of N.D.P. support for the Liberals was legislation on job security, equal pay, and workers' compensation.[126]

V. CONCLUSION

At the time of writing, the litigation in *Lavigne* is deadlocked on the question of the appropriate remedy. By the time of publication, however, the matter may be resolved, at least at first instance, and the case may well be on appeal. If so the appeal court will have the opportunity to consider the implications of the judgment of White J. which if upheld will reverberate throughout Canada. It is true that in *Re Baldwin and B.C. Government Employees' Union*,[127] the Supreme Court of B.C. dismissed a case very similar to *Lavigne*. But as White J. pointed out, everything turns on the way in which the matter is presented and Baldwin's case was "directed to certain expenditures made by the union"[128] rather than to action by government as contractor or legislator.[129] After *Dolphin Delivery* [130] it would be open to Baldwin to challenge the legislation in a private action, and after *Lavigne* he would do so on the basis that the check off is unconstitutional (as violating his freedom of association) while conceding that it may be justified under s. 1, but only to the extent of requiring him to support collective bargaining expenditures.[131] It is also true that despite the differences between *Baldwin* and *Lavigne*, the approach adopted by White J. in the latter is still the least restrictive on the question of union security when comparison is made with a number of other jurisdictions in the world. Nevertheless, in the domestic political context the decision will be difficult to defend, particularly if it intrudes into the private sector, as it threatens to do. A much more satisfactory solution for a variety of reasons already discussed would be to concede with Taylor J. in the High Court of Australia that "assistance to one political party or another may reasonably be thought to be a legitimate method of serving the industrial interests of the members of a trade union"[132] and to treat it accordingly.

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126. An Agenda for Reform. Proposals for minority Parliaments. Toronto. May 1985 (mimeo).
127. (1986) 28 D.L.R. (4th) 301.
128. *Id.* at 304.
129. It is crucial that in Baldwin "the petitioner does not seek a declaration that [the Act] . . . is unconstitutional. He raises no objection to the fact that he is compelled by the Act to pay union dues . . . it is the use of dues money for certain purposes by the union which is being attacked" (1986) 28 D.L.R. (4th) 301 at 303. So what was being challenged was not a statute, but the exercise of powers derived from the constitution of the union.
130. *Supra* n. 105.
131. Public Service Labour Relations Act, R.S.B.C. 1979, c. 346 provides by s. 14 that every collective agreement to which it applies must provide for automatic deduction of union dues from the wages of every employee in the bargaining unit, whether or not they are members. As White J. pointed out in *Lavigne* (at 487) "The facts of the Baldwin case implicate the government more clearly than those in Mr. Lavigne's application because the British Columbia statute itself required the inclusion of a compulsory check off clause in the collective agreement".
132. *Williams* v. *Hursey* (1959) 103 C.L.R. 30 at 100.