FREEDOM OF ASSOCIATION AND COMPULSORY UNION DUES: TOWARDS A PURPOSIVE CONCEPTION OF A FREEDOM TO NOT ASSOCIATE

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I. INTRODUCTION

In *Re Lavigne and Ontario Pub. Serv. Employees Union*,[1] the Supreme Court of Ontario determined that an individual employee's freedom of association under subsection 2(d) of the *Canadian Charter of Rights and Freedoms*[2] was infringed by governmental action which resulted in the compelled payment of union dues to his bargaining agent under an agency shop collective agreement provision. The Court went on to uphold the compelled payment of dues under an agency shop provision, insofar as the dues were used by the union for collective bargaining purposes, as a reasonable limit of the employee's freedom of association under section 1 of the *Charter*. However, it held that the compelled payment of dues which were used by the union for non-collective bargaining or political purposes could not be justified as a reasonable limit under section 1.

The *Lavigne* decision is of major interest and concern to the labour movement and labour scholars as it is the first superior court decision to deal with the extent to which the freedom of association found in subsection 2(d) of the *Charter* may provide for an individual freedom to "not associate", and the implications of such a freedom of non-association for union security provisions in Canada.[3] While there has been a great deal

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1 (1986), 55 O.R. (2d) 449, 29 D.L.R. (4th) 321 [hereinafter *Lavigne*].

2 Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

3 Other attempts to challenge union security provisions on the basis of a freedom of non-association under subsection 2(d) have been dismissed on the basis that the *Charter* was not applicable to the impugned provision (*Bhindi* v. *British Columbia Projectionists Local 348* (1985), 63 B.C.L.R. 352, 20 D.L.R. (4th) 386 (S.C.), *aff'd* 4 B.C.L.R. (2d) 145, 29 D.L.R. (4th) 47 (C.A.), leave to appeal refused 6 B.C.L.R. (2d) xl [hereinafter *Bhindi*]) or the use of union dues by a union (*Baldwin* v. *British Columbia Gov't Employees Union* (1986), 3 B.C.L.R. (2d) 242, 28 D.L.R. (4th) 301 (S.C.) [hereinafter *Baldwin*]).

of litigation concerning the impact of subsection 2(d) on collective bargaining legislation in Canada since the proclamation of the *Charter*, the primary concern of such litigation has been the content of the positive aspect of the freedom of association:[4] the extent to which subsection 2(d) protects the right to form an association and the right of members of the association to act in concert to further the fundamental purposes of the association. Unions have argued, for the most part unsuccessfully, that the freedom of association extends beyond the freedom to form and join unions, to protect the freedom of workers to engage in collective bargaining activity (including picketing and strike activity) to further their fundamental purpose of bettering their social and economic interests. While the extent of the positive aspect of the freedom remains uncertain pending a Supreme Court of Canada decision on the issue, *Lavigne* raises the question of the extent to which the freedom found in subsection 2(d) may include a negative aspect — a freedom of non-association — and the extent to which individual workers may be insulated from compelled association with unions and the causes they support by means of union security provisions.

The *Lavigne* decision is also of interest for its somewhat ambiguous ruling on the extent to which the *Charter* may apply to union security provisions and other collective agreement provisions. Unions, particularly public sector unions, face the prospect that many of their activities may be subject to ongoing judicial scrutiny and supervision under the *Charter*.

The issues raised by *Lavigne* concerning the recognition of a freedom of non-association in the *Charter*, its implications for union security provisions and other forms of governmentally compelled association, and the applicability of the *Charter* to collective agreement provisions, all raise fundamental questions concerning the appropriate judicial review role which our courts should adopt under the *Charter* in this area. The adoption of a *Charter of Rights and Freedoms* has been criticized by some for the potential transfer of a policy-making function from democratically elected legislatures to the judiciary. The primary concerns raised by this shift in political power to the courts are twofold. First, the judiciary may, by adopting interpretations of the *Charter* rights and freedoms which are based on liberal values or notions of individualism and formal equality, significantly hamper efforts to further collective interests through social welfare legislation designed to promote redistribution of resources and real equality. This is of particular concern in Canada where we have a political tradition tinged with a positive acceptance of interventionist government regulation in many spheres of private activity. The second major concern is not so much related to the substance of the values which the judiciary may impose in their judicial review function as it is concerned with the potential for the legalization of political issues and the concom-

[4] *See infra*, note 45 and accompanying text.

itant depoliticization of such issues which that entails.[5] Political issues will be determined in legal fora by judges and lawyers and not by the political activity of citizens or their representatives. Political solutions and policy choices will be legitimated by their adoption in the legal forum.

To a certain extent, the result in *Lavigne* can be regarded as fulfilling the worst expectations of these two criticisms of the change in judicial function under the *Charter*. The *Lavigne* Court developed an incredibly broad and individualistic notion of freedom of non-association under subsection 2(d), one which would find that freedom to be *prima facie* violated whenever an individual is compelled to combine his efforts with others towards a common end. This open-ended test could render any form of governmental compulsion to combine efforts with others toward a common end, including government taxation, constitutionally suspect under subsection 2(d) and thus requiring justification under section 1 of the *Charter*. While this may be a notion of freedom of association which fits well with eighteenth and nineteenth century liberal notions of individualism,[6] it is an unpurposive and unprincipled interpretation of freedom of association which fails to give adequate recognition to the need for governments in modern society to require compulsory association for important regulatory or "provision of services" purposes.

In the final analysis, after applying section 1 of the *Charter* to compulsory agency shop dues, the *Lavigne* Court adopts a standard for distinguishing between permissible and impermissible union expenditures using dissenting employees' dues. The standard is identical to the one adopted by the United States Supreme Court under the First Amendment. Union expenditures using an objector's compelled dues for "collective bargaining" purposes are permissible while union expenditures for "non-collective bargaining" purposes are not. As the American experience demonstrates, there is no magic or certainty to this standard. Under this test it is the courts and not a legislature or the majority of workers in a bargaining unit who will define what are legitimate interests and goals for workers and what activities are appropriate to further the collective interests of workers. The judiciary has invited itself to undertake an ongoing judicial review of individual union activities, political and otherwise, with all of the impositions of judicial values and assumptions which that entails, to determine whether they are legitimate "collective bargaining" activities. In many respects the adoption of this American approach represents the legalization of political issues in a microcosm.

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[5] *See* H. Glasbeek & M. Mandel, *The Legalisation of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms* in R. Martin, ed., SOCIALIST STUDIES: A CANADIAN ANNUAL NO. 2 (Winnipeg: Baker Graphics Canada, 1984) 84.

[6] "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves *and abhors*, is sinful and tyrannical" (emphasis in original). T. Jefferson, *A Bill for Establishing Religious Freedom* in J. Boyd, ed., THE PAPERS OF THOMAS JEFFERSON, vol. 2 (Princeton: Princeton Univ. Press, 1950) 545.

Dissenting workers are invited to seek a legal solution when they disagree with policies arrived at by a majority of workers, rather than working through the internal political processes of the bargaining unit or the broader political processes of the state.

The American approach to a freedom of non-association in relation to compulsory union dues is also fundamentally flawed in that it rests on the untenable premise that the business concerns and political concerns of unions are separable. While it is doubtful that his premise was ever tenable, it is certainly not the case in modern Canadian society where government intervention and regulation in most spheres of economic and social life is now the norm. Even the most business-minded unions know they have to be interested in politics and politicians to adequately represent workers' interests, just as they know that the most business-minded of employers are interested in politics and politicians. Thus, the American approach to restrictions on uses of objecting employees' compulsory union dues is based on a false liberal notion of business unionism.

In this article, I wish to argue against the adoption under the *Charter* of an American approach to a freedom of non-association in respect of compulsory union dues. I will also provide suggestions for a truly purposive approach to the recognition of a freedom of non-association under subsection 2(d). My argument acknowledges the need to recognize a freedom of non-association but suggests the recognition of a concept of this freedom which protects the constitutional interests at stake without unduly hindering the government's ability to compel the combining of efforts by individuals to further collective social and economic interests. Not every form of compelled association imposed to further collective interests threatens the relevant constitutional interests. What is required under subsection 2(d) is an approach to freedom of non-association that finds forms of compelled association constitutionally suspect only when dangers to those interests are present.

I commence with a summary of the *Lavigne* decision and its adoption of the American notion of freedom of non-association. I proceed to a discussion of the development of the American doctrine, criticisms of it and the implications of its adoption under the *Charter*. I conclude with some suggestions for a purposive approach to the development of a freedom of non-association in Canada.

II. The *Lavigne* Decision

The applicant, Mervyn Lavigne, was a community college instructor at Haileybury School of Mines, one of twenty community colleges established in Ontario under the *Ministry of Colleges and Universities Act*.[7] The respondent, Ontario Council of Regents for Colleges of Applied Arts

[7] R.S.O. 1980, c. 272.

and Technology,[8] had been designated as the exclusive bargaining agent for college employers in a centralized province-wide scheme of collective bargaining established for all Ontario colleges in the *Colleges Collective Bargaining Act*.[9] Under the Act there are two province-wide bargaining units for college employees, one for academic staff and one for support staff. The respondent Ontario Public Service Employees Union (OPSEU) is the bargaining agent for both of these units.

The applicant was a member of the academic staff bargaining unit but had never been a member of OPSEU. Nevertheless, he was required to pay the equivalent of regular union dues to OPSEU under an agency shop clause[10] contained in the collective agreement between OPSEU and the Council of Regents. The relevant sections of the *Colleges Collective Bargaining Act* (sections 51, 52 and 53) did not require the compulsory payment of union dues by all employees in the bargaining unit, but were *permissive* in nature, leaving it open to the parties to negotiate over the inclusion of an agency shop clause in their collective agreement.[11]

The main thrust of the applicant's *Charter* challenge was the claim that the compelled payment of union dues to OPSEU under the agency shop clause violated his *Charter* freedoms of association and expression, insofar as the compelled dues were used by the union for non-collective bargaining purposes.[12] Mr. Lavigne sought a declaration that sections 51, 52 and 53 of the Act were in violation of the *Charter* and therefore of no

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[8] A body established under s. 5(2) of the *Ministry of Colleges and Universities Act*, R.S.O. 1980, c. 272.

[9] R.S.O. 1980, c. 74, s. 2(3).

[10] "Agency shop" (Rand formula) clauses require all members of the bargaining unit, including non-union members, to pay to the union an amount equal to the regular union membership dues. Deductions are usually required to be made by the employer at source. Agency shop clauses are to be distinguished from the other common types of union security, such as the union shop clause which requires all employees in the bargaining unit to become and remain members in good standing of the bargaining agent union within a short period of becoming an employee in the bargaining unit, and a closed shop clause which requires the employer to hire only members of the bargaining agent union for employment within the bargaining unit.

[11] Under subsection 53(1) of the *Colleges Collective Bargaining Act*, R.S.O. 1980, c.74, the parties to a collective agreement "may provide for the payment by the employer of dues or contributions to the employee organization". Subsection 53(2) contains provisions allowing for objection to the payment of dues to the union on religious grounds and payment of the equivalent of union dues to a charitable organization where the Ontario Labour Relations Board upholds the objection on religious grounds. This is a relatively standard religious exemption found in most jurisdictions in Canada. However, subsection 53(3) prohibited the inclusion of union shop, closed shop or any other form of union security clauses which required employees to be members of the bargaining agent union as a condition of employment.

[12] The applicant also claimed that subsection 59(2) of the *Colleges Collective Bargaining Act*, R.S.O. 1980, c. 74, which deemed all employees in the bargaining unit to be on strike while the union was on strike and prohibited them from being paid even if they continued to work during a strike, contravened his freedoms of expression and association and violated his equality rights. This claim was rejected for reasons that are not material to the issues addressed in this article.

force and effect, to the extent that they resulted in the compulsory payment of dues to OPSEU and the dues were used for a number of specified "non-collective bargaining" purposes. The applicant also sought a declaration that the entering into of a collective agreement by the Council of Regents, which provided for compulsory payment of dues to OPSEU, was in violation of the *Charter* to the extent that the agreement permitted the compulsory dues to be used for the specified "non-collective bargaining" purposes. In terms of remedial measures, the applicant sought declarations that would effectively require employees to expressly "opt-in" to support the specified "non-collective bargaining" purposes before compulsory union dues could be deducted for those purposes.[13]

The expenditures objected to by the applicant as "non-collective bargaining" in nature were numerous and were specified in some detail. However, they can be summarized briefly under the following general headings:

1. Financial contributions to a political party;
2. Financial contributions to disarmament and other peace campaigns, including the *Operation Dismantle* litigation;
3. Financial contributions to campaigns concerning the expenditure of government funds, including the expenditure of funds for a domed stadium in Toronto;
4. Financial contributions to unions and workers in foreign countries, including contributions to striking coal miners in the United Kingdom;
5. Financial contributions to other social causes (for example, free choice in relation to abortion); and
6. The portion of affiliation dues paid by OPSEU (out of compulsory dues) to affiliated or parent labour organizations — National Union of Provincial Government Employees (NUPGE), the Ontario Federation of Labour (OFL) and the Canadian Labour Congress (CLC) — used for political and social causes of the type described in paragraphs (1) – (5).

It is important to note at this juncture that the applicant was not simply arguing that the union's use of compelled dues for the impugned purposes infringed his freedoms of association and expression. To do so would have invited serious difficulties concerning the application of the *Charter*. The union was a private organization and it would have been difficult to argue that its expenditure of union dues constituted governmental action sufficient to justify the application of the *Charter* under section 32. Instead, the applicant took the position that compelled payment of dues itself, to be used for any purpose, constituted a *prima facie* violation of subsection 2(d) and subsection 2(b) of the *Charter*. However,

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[13] *Lavigne*, *supra*, note 1 at 455-6, 29 D.L.R. (4th) at 327-8.

the applicant conceded that at the level of analysis under section 1 of the *Charter*, compelled payment of dues under an agency shop clause was a reasonable limit on his *Charter* freedoms insofar as the dues were used for collective bargaining activity, but he argued that compelled payment of dues used for non-collective bargaining purposes could not be justified as a reasonable limit under section 1. After characterizing the applicant's challenge in this fashion, Mr. Justice White set out the issues in the application in the following fashion:

> 1. Did the *Charter* apply to the activity complained of by Mr. Lavigne?
> 2. Had the applicant's right to freedom of association in subsection 2(d) of the *Charter* been infringed?
> 3. Had the applicant's right to freedom of expression in subsection 2(b) of the *Charter* been abridged?
> 4. If there had been a *prima facie* breach of the applicant's fundamental freedoms, was this breach justified under section 1 of the *Charter*?

The Court's ruling on the applicability of the *Charter* raises important issues concerning the application of the *Charter* to union security provisions in both the public and private sectors and therefore merits some comment.

A. *The Applicability of the Charter*

Relying on the recent Ontario Court of Appeal decision in *Re Blainey and Ontario Hockey Ass'n*,[14] Mr. Justice White began his analysis of the issue of *Charter* applicability by adopting the premise that the *Charter* applies only to governmental action and does not reach private activity. The determination that sufficient governmental action was present appears to be based on two grounds: the existence of the *permissive* authorization for an agency shop clause in section 53 of the *Colleges Collective Bargaining Act*,[15] and the agreement by the Council of Regents, found by the Court to be a Crown agency, to the inclusion of the agency shop clause in the collective agreement. It is important to note, however, that Mr. Justice White appears to rely primarily on the latter ground.[16]

1. *Permissive Legislative Provisions*

The Court failed to come to a conclusive determination as to whether the permissive provision of section 53 of the Act would have been sufficient, absent a governmental actor as employer, to constitute the governmental action required under section 32 of the *Charter*. Mr. Justice White suggested that such permissive provisions may be sufficient in

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[14] (1986), 54 O.R. (2d) 513, 26 D.L.R. (4th) 728 (C.A.), leave to appeal refused, Supreme Court of Canada Service, L. 559 [hereinafter *Blainey*].

[15] R.S.O. 1980, c. 74.

[16] *Lavigne*, *supra*, note 1 at 481, 29 D.L.R. (4th) at 353.

themselves because by their inclusion the legislature had "approbated the legitimacy of such clauses", a position which Mr. Justice White did not regard as neutral.[17] However, he expressed serious doubt about whether permissive provisions were an adequate basis for *Charter* application.[18]

Even if one accepts that the *Charter* does apply only to governmental action, which is the position adopted recently by the Supreme Court of Canada,[19] the potential applicability of the *Charter* to union security provisions entered into under permissive statutory sections remains a troublesome one for unions in Canada. Virtually every Canadian labour relations jurisdiction (except Quebec) has enacted statutory provisions for the private sector which expressly *permit* the parties to a collective agreement to negotiate a closed, union, or agency shop clause or some variation thereof.[20] In addition, Quebec and Manitoba have mandated agency shop

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[17] *Ibid.*

[18] *Ibid.*

[19] In its recent decision in *Retail, Wholesale & Dep't Store Union Local 580* v. *Dolphin Delivery Ltd.* (1986), [1987] 2 S.C.R. 573 [hereinafter *Dolphin Delivery*] the Supreme Court of Canada endorsed the *Blainey* ruling that the *Charter* applies only to governmental action. It held that the *Charter* did apply to the common law but would only be applicable to the common law where a governmental actor relied on the common law to restrain a *Charter* right or freedom. The *Charter* did not apply to private litigation where one of the parties was relying on a common law doctrine to restrain the exercise of a *Charter* right, nor would a court's enforcement of a common law rule which limited a *Charter* right constitute governmental action and make the *Charter* applicable. The *Charter* could only apply to private litigation where one of the parties acted on the authority of governmental action — a statute — and invoked it to produce an infringement of the *Charter*. However, other than establishing clearly that governmental action must be present for the *Charter* to apply and indicating that it will apply to governmental agencies, the decision provides no clear indication of how the *Charter* application issues discussed here should be resolved.

For commentary which suggests that the *Charter* (or at least some of its provisions) should be found to be applicable to private activities, *see* M.R. Doody, *Freedom of the Press, The Canadian Charter of Rights and Freedoms, and A New Category of Qualified Privilege* (1983) 61 CAN. BAR REV. 124; D. Gibson, *Distinguishing the Governors from the Governed: The Meaning of "Government" Under Section 32(1) of the Charter* (1983) 13 MAN. L.J. 505; B. Slattery, *Charter of Rights and Freedoms — Does It Bind Private Persons?* (1985) 63 CAN. BAR REV. 148. *See also R.* v. *Lerke* (1984), 55 Alta. R. 216, 11 D.L.R. (4th) 185 (Q.B.); *R.* v. *G.B.* (1983), 24 Alta. L.R. (2d) 226, (*sub nom. Edmonton Journal* v. *A.G. Alberta*) 146 D.L.R. (3d) 673 (Q.B.).

For commentary arguing that the *Charter* should apply only to restrain governmental action, *see* K. Swinton, *Application of the Canadian Charter of Rights and Freedoms* in W.S. Tarnopolsky & G.A. Beaudoin, eds., CANADIAN CHARTER OF RIGHTS AND FREEDOMS: COMMENTARY (Toronto: Carswell, 1982) 41 at 44-9 [hereinafter Swinton]; P.W. Hogg, CONSTITUTIONAL LAW OF CANADA 2nd ed. (Toronto: Carswell, 1985) at 674-7 [hereinafter Hogg]; A.A. McLellan & B.P. Elman, *To Whom Does the Charter Apply? Some Recent Cases on Section 32* (1986) 24 ALTA. L. REV. 361; G. Otis, *The Charter, Private Action and the Supreme Court* (1987) 19 OTTAWA L. REV. 60. In *Dolphin Delivery*, the Supreme Court of Canada relied on the views of Professors Swinton, Hogg, McLellan and Elman. However, they disagreed with Hogg's view that a court order in private litigation enforcing a common law rule that infringes one party's *Charter* rights of freedoms constitutes governmental action sufficient to make the *Charter* applicable.

[20] For example, maintenance of membership or preferential hiring clauses. *See*

provisions as a minimum form of union security in the private sector.[21] Also, in the Canadian federal jurisdiction and several provinces, including Ontario, private sector legislation requires that an agency shop provision be included in a collective agreement at the request of the bargaining agent union.[22]

There is little reason to doubt that the *Charter* will be held to be applicable to the latter two types of statutory provisions where the attack is on the compulsory payment of any dues for whatever purpose as a *prima facie* violation of subsection 2(d) of the *Charter*. In both cases the effect of the legislative provision itself would be that the decision to include an agency shop clause is not left to the parties in any true sense. One can identify the existence of *coercive* power and it would be difficult to argue that compulsory payment of dues did not result in a very direct manner from governmental action. While there may be room to argue that provisions which merely require the inclusion of an agency shop provision at the request of a union do not involve sufficient governmental action to make the *Charter* applicable, the success of such an argument is unlikely. To accept that an express government grant of power to a private actor to impose a specific condition on others does not constitute sufficient governmental action to allow for *Charter* review of that action would allow for widespread circumvention of the *Charter* by governmental delegation to private actors.

Absent the presence of a governmental actor as employer, however, the *Charter* should not apply to a union security clause agreed to by the parties under a permissive legislative provision. In such cases there is no exercise of coercive power or constraint, either directly or indirectly, by a governmental actor. The existence of a union security provision results from the freedom to contract of the parties and the operation of market forces, not from the permissive legislative provision. Nor can permissive statutory provisions concerning union security clauses in collective agreements be regarded as significant governmental encouragement or "approbation" of such clauses when the legislative scheme of which they are part is looked at in its entirety. In virtually all jurisdictions in Canada, permissive provisions of the type found in subsection 46(1) of the Ontario *Labour Relations Act*[23] are included merely to preserve, with some restrictions to protect individual employees from abuse, the ability of unions

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G.W. Adams, CANADIAN LABOUR LAW (Aurora: Canada Law Book, 1985) at 779-82 [hereinafter Adams] for a summary of the types of union security clauses and the permissive legislation for private sector labour relations in the various jurisdictions.

[21] *See ibid. See also* Manitoba *Labour Relations Act*, S.M. 1972, c. 75, s. 68 and Quebec *Labour Code*, R.S.Q. 1977, c. C-27, s. 47.

[22] *See* Adams, *ibid. See also Canada Labour Code*, S.C. 1984, c. 39, s. 162; Saskatchewan *Trade Union Act*, R.S.S. 1978, c. T-17, s. 36; Ontario *Labour Relations Act*, R.S.O. 1980, c. 228, s. 43.

[23] R.S.O. 1980, c. 228.

and employers to agree to union security provisions at common law.[24] Permissive legislative provisions are made necessary by other provisions in collective bargaining legislation which create general prohibitions against trade unions or employers acting in a coercive or intimidating manner to compel any person to become or refrain from becoming a member of a trade union and which also bar employers from participating in the union administration, or contributing financial or other support to a trade union.[25] Consistent with the premise that permissive provisions concerning union security are merely an attempt to preserve the common law freedom to contract of the parties in the face of these general prohibitions introduced in collective bargaining legislation, most of the permissive provisions include wording similar to the following:

> *Nothing in this Act prohibits* the parties . . . from inserting in the collective agreement a provision requiring . . . membership in a specified trade union. . . .[26]

Moreover, it is important to note that permissive legislative provisions concerning union security clauses commonly contain additional constraints on the implementation and enforcement of union security provisions which limit the freedom to contract of the parties at common law by prohibiting the abuse of union security provisions to obtain the discharge of employees who have been expelled from union membership for opposing the union or on other discriminatory, arbitrary or unreasonable grounds.[27] When examined in light of the entire legislative context, permissive legislative provisions should not be viewed as positive governmental action which encourages union security provisions, but rather as part of a legislative regime for collective bargaining which leaves intact the common law freedom to contract of the parties, but places some constraints on their freedom to agree to and enforce union security provisions. When viewed in this light, it is difficult to regard permissive legislation concerning union security provisions as governmental action justifying the invocation of the *Charter*.

My contention that permissive legislative provisions concerning union security agreements should not invoke *Charter* review of union security arrangements is supported to some extent by the decision of the British Columbia Court of Appeal in *Bhindi*.[28] In *Bhindi* the applicants challenged

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[24] *See Crofter Hand Woven Harris Tweed Co.* v. *Veitch* (1941), [1942] A.C. 435, [1942] All E.R. 142. *See also* Adams, *supra*, note 20 at 796.

[25] *See, e.g.*, Ontario *Labour Relations Act*, R.S.O. 1980, c. 228, ss. 64, 66, 70; British Columbia *Labour Code*, R.S.B.C. 1979, c. 212, s. 4(3).

[26] Newfoundland *Labour Relations Act*, S.N. 1977, c. 64, s. 31 (emphasis added). *See also* British Columbia *Labour Code*, R.S.B.C. 1979, c. 212, s. 9(1) which states: "This Act shall not be construed as precluding the parties to a collective agreement from inserting in it a provision. . . ."

[27] *See, e.g.*, Ontario *Labour Relations Act*, R.S.O. 1980, c. 228, s. 46(2); British Columbia *Labour Code*, R.S.B.C. 1979, c. 212, s. 9(2).

[28] *Supra*, note 3, 4 B.C.L.R. (2d) at 145, 29 D.L.R. (4th) at 47.

a closed shop provision in a collective agreement entered into under the permissive subsection 9(1) of the British Columbia *Labour Code*.[29] The majority of the Court of Appeal first rejected the applicant's argument that the *Charter* applied to private contractual arrangements between a union and a private employer, adopting the view that the language of section 32 of the *Charter* and the intent of the framers of the *Charter* indicated that it was to apply only to matters emanating from government action. To hold that the *Charter* applied to private contractual arrangements would interfere greatly with the freedom to contract of private parties, a freedom which was encompassed by section 26 of the *Charter*.[30] However, the majority went on to reject the argument that the closed shop clause in the collective agreement was imbued with sufficient governmental action to invoke *Charter* scrutiny because of the permissive legislation in the *Labour Code*. On this issue, the majority concluded:

> In myopinion the government's enactment of the Labour Code with a provision allowing the closed shop does not transform the closed shop provision into governmental action. The collective agreement before us was not mandated by the Legislature. It was entered into by two parties to a contract. Its contents do not reflect government policy. The Labour Code establishes the procedure whereby private parties may conclude an enforceable collective agreement but clearly it does not require the parties either to reach such an agreement or to include in it a closed shop provision. . . .
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> The Labour Code neither mandates nor encourages the parties to include a closed shop provision.[31]

While the reasons of the majority in *Bhindi* support the argument for the non-applicability of the *Charter* to union security clauses entered into under permissive legislative provisions, it must be noted that the applicant in *Bhindi* did not attack the validity of the permissive legislative provision itself but restricted his attack to the closed shop contract clause. He relied on the permissive legislation only as a basis for arguing that the closed shop clause was an exercise of governmental authority. Therefore, the decision is not a clear authority for the proposition that the *Charter* is not applicable where the challenge is against permissive legislation allowing the inclusion of a union security clause in the collective agreement. Nevertheless, the reasons quoted from *Bhindi* and the doubts expressed by Mr. Justice White in *Lavigne* as to the applicability of the *Charter* to challenges based solely on a permissive legislative provision are supportive of the view that union security clauses entered into under permissive legislation should not be subject to review under the *Charter*.[32]

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[29] R.S.B.C. 1979, c. 212.

[30] *Bhindi*, *supra*, note 3, 4 B.C.L.R. (2d) at 153-4, 29 D.L.R. (4th) at 54-5.

[31] *Ibid.* at 156, 29 D.L.R. (4th) at 56.

[32] In my opinion, the recent decision of the Supreme Court of Canada in *Dolphin Delivery*, *supra*, note 19, provides no clear guidance on this issue. However, there is some *dicta* in the decision (*see* pages 602-3) which might support the application of the *Charter* where private parties are acting pursuant to permissive legislative authority.

2. *Governmental Actor as Employer*

For Mr. Justice White the pivotal findings which required *Charter* review of the agency shop clause were: (1) the identity of the employer as a Crown agency and therefore a government actor for the purposes of the *Charter*; (2) that the Council of Regents' agreement to include the agency shop clause in the collective ageement constituted governmental action; and (3) that the alleged violations of subsection 2(d) of the *Charter* were said to occur when the payment of dues was compelled under the agency shop clause, regardless of what the dues were used for, and not at the point at which the dues were spent by the union. Based on these findings, Mr. Justice White concluded:

> [I]n view of the manner in which Mr. Lavigne's application has been structured I must apply the *Charter* to examine the *compelled payment of dues* (as opposed to *the use of dues* by the union) in relation to the concepts of freedom of expression, freedom of association and the issues raised by s. 1. 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*.[33]

The Court's finding that the *Charter* should be applicable to actions of Crown agencies would appear to be consistent with even the most restrictive views of the scope of activity to which the *Charter* should apply. Hogg's[34] analysis would seem to endorse the Court's finding in this regard. However, Swinton,[35] while recognizing that the *Charter* can apply to Crown agencies, adds an important qualification: that in determining the applicability of the *Charter* to the action of a Crown agency a court should apply an "express governmental function test", differentiating between cases where the Crown agent is exercising a "legislative or regulative function" (where *Charter* review is appropriate), and cases where the Crown agent is engaging in commercial activities or non-governmental functions. Thus the focus should not be simply on the traditional common law test for Crown agencies — the extent of control exercised by the government over the agency — but also on the function that the agency is performing in any given case.

In *Lavigne*, Mr. Justice White found that the "Council of Regents" was a Crown agency after applying the traditional common law test concerning the extent of control by the government. Under the *Ministry of Colleges and Universities Act*[36] all members of the Council of Regents

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[33] *Lavigne*, *supra*, note 1 at 488, 29 D.L.R. (4th) at 360.
[34] *Supra*, note 19 at 572.
[35] *Supra*, note 19 at 58-9.
[36] R.S.O. 1980, c. 272.

were appointed by the Cabinet and given the task of "assisting" the Minister of Colleges and Universities in the instalment and administration of educational programs and services in the colleges. Thus the Minister retained final authority in respect of the running of the colleges. The provision in the legislation designating the Council of Regents as the exclusive bargaining agent for college employers had the effect of appointing the Council as the agent for the Minister in contract negotiations. Thus, the Council was a government actor.[37]

However, identifying the employer as a government actor did not end the enquiry as to the application of the *Charter*. The Court went on to find that government contracting practices could be subject to the *Charter* and also determined that the negotiation of a collective agreement by a government employer constituted the exercise of a governmental function.[38]

The findings that the *Charter* applies to Crown agencies (as determined by a governmental control test) and to governmental contracting practices are consistent with a purposive approach to the interpretation of section 32 of the *Charter*. If the purpose of the *Charter* is to constrain *governmental* action inconsistent with the rights and freedoms set out therein,[39] it would be inconsistent with that purpose to allow the government to circumvent the *Charter* guarantees and constraints through the devices of Crown agencies and government contracts.

However, far greater difficulty arises when one attempts to apply a governmental function test to determine whether the *Charter* should apply to particular Crown agency actions or governmental contracts. The respondent in *Lavigne* argued that the negotiation of a collective agreement by the Crown agency was not the exercise of a governmental function because it was an activity engaged in by private commercial employers who must deal with unions. Hence, it was not an act of government *qua* government, but was similar to government contracts for office supplies.

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[37] *See Lavigne, supra*, note 1 at 474, 29 D.L.R. (4th) at 346. Note that a contrary finding with respect to the applicability of the *Charter* to universities was made in several recent decisions. *See Harrison* v. *University of British Columbia* (1986), 30 D.L.R. (4th) 206, [1986] 6 W.W.R. 7 (B.C.S.C.); *Re McKinney and Bd. of Governors of the Univ. of Guelph* (1986), 57 O.R. (2d) 1, 32 D.L.R. (4th) 65 (H.C.) [hereinafter *Re McKinney*]. In both cases there was a finding that having regard to the autonomy of universities from governmental control, they were not governmental actors (certainly not Crown agencies). Both Courts also seemed to conclude that universities, although they were creatures of statute and were exercising general statutory powers, could not be considered to be exercising a governmental authority or function in determining their emloyment policies. While community colleges and their governing body, the Council of Regents, can certainly be more easily identified as governmental actors given the far greater extent of governmental control over their activities, it would seem that one could still make the argument that if the universities do not exercise a governmental function in determining their employment policies, community college employers are similarly not exercising a governmental function in so doing.

[38] *See Lavigne, supra*, note 1 at 477 and 482, 29 D.L.R. (4th) at 349 and 354.

[39] *Hunter* v. *Southam Inc.* (1984), [1984] 2 S.C.R. 145 at 156-7, 11 D.L.R. (4th) 641 at 650 [hereinafter *Hunter*].

Mr. Justice White rejected this argument by finding that the provision of adequate educational facilities and teaching staff was an integral part of the government's public duty to provide and administer a public community college system. Because the administration of the community college system was not a commercial activity on the part of the government, the negotiation of a collective agreement to ensure adequate teaching staff should also not be regarded as the exercise of a non-governmental or commercial function. The fact that in the negotiation of a contract the governmental actor may not be exercising its bargaining power to impose impugned provisions on private parties but may be simply agreeing to their inclusion at the insistence of a private party was not considered relevant. Because the governmental employer, instead of rejecting the union's demand, sanctioned the inclusion of the impugned provision in the contract, and did so as the government's agent, that was sufficient to constitute governmental action for the purpose of section 32 of the *Charter*.[40]

The *Lavigne* findings concerning governmental action raise the potential for widespread *Charter* review of all provisions in contracts between governmental actors and private actors. At bottom, the decision seems to suggest that the *Charter* will apply to any provision in a government contract for services or supplies which is necessary for the governmental actor to carry out its public function. On this reasoning there would seem to be no rational basis for distinguishing between a union security provision and any other provision in a collective agreement. In all cases there is governmental action, at least in the form of acquiescence, to the provisions in the agreement. Public sector unions may look on this aspect of the *Lavigne* decision with some ambivalence as it could open up the employer's conduct of employee relations to challenges under the *Charter*. However, it could also undermine considerably the union's role as exclusive bargaining agent and enforcer of collective agreement provisions by opening up to individual employees the ability to challenge collective agreement provisions and their administration under the *Charter* without the union's consent. The ambivalence of public sector unions on this issue is demonstrated by their unsuccessful attempts to have the *Charter* apply to University mandatory retirement policies,[41] but have it not apply to the compulsory deduction of union dues under an agency shop provision.

One final aspect of the Court's ruling on the applicability of the *Charter* is significant. Shortly before *Lavigne* was decided, the Supreme Court of British Columbia, in *Baldwin*,[42] decided that the *Charter* did not apply to a union's use of compulsory dues under an agency shop clause in a collective agreement between a government employer and a union. The agency shop clause was compulsory under a mandatory provision of the British Columbia *Public Service Labour Relations Act*.[43] Thus, on the

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[40] *See Lavigne*, *supra*, note 1 at 480-1, 29 D.L.R. (4th) at 352-3.

[41] *See Re McKinney*, *supra*, note 37.

[42] *Supra*, note 3.

[43] R.S.B.C. 1979, c. 346, s. 14.

facts, it seemed that there was a much stronger case for a finding of governmental action and the application of the *Charter* than was the case in *Lavigne*. Nevertheless, in *Baldwin*, Mr. Justice Mackoff was able to find that the *Charter* did not apply on the basis that the applicant's challenge was against the *use of his compelled dues* for certain purposes by the union and not against the *compelled payment of dues* itself under the agency shop clause or the statutory provision which mandated the agency shop clause. At the stage of expenditure of funds by the union, governmental involvement was at an end and any attempt to find governmental action in activities by private entities that are facilitated by or arise eventually out of government intervention would make section 32 far too broad in its application to private activity.

In *Lavigne*, Mr. Justice White was able to distinguish *Baldwin* on the basis that whereas Mr. Baldwin alleged that the *Charter* violation arose on the union's *use of dues* for certain expenditures, Mr. Lavigne alleged that the compelled *payment of dues* to the union for any purposes, including collective bargaining purposes, abridged his fundamental freedoms of association and expression. Mr. Lavigne's application was framed so that the manner of how the dues were spent by the union was only relevant to the analysis of reasonable limits under section 1 of the *Charter*. If one focussed on the compelled payment of dues as constituting the *prima facie Charter* violation, one found governmental action in the form of agreement to the agency shop clause by the government actor.

3. *The Freedom of Non-Association*

The *Lavigne* decision represents the first significant attempt by our courts to deal with the extent to which the freedom of association found in subsection 2(d) may have a negative aspect, guaranteeing the right of the individual to be free from compelled association with groups or causes against her wishes. In the early days of the *Charter* some commentators noted the potential for the freedom of association to be used as a "double-edged sword": in its positive aspect protecting the freedom of individuals to form associations and potentially protecting the freedom of an association from interference by the state with its internal structure, purposes and activities, but in its negative aspect protecting an individual's freedom not to associate with others.[44]

The great bulk of litigation under subsection 2(d) to date has concerned the positive aspects of the freedom. In particular, several right-to-strike cases have raised the issue of whether or not the freedom of association protects the objects of an association and the means used to

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[44] I. Cotler, *Freedom of Assembly, Association, Conscience and Religion* in W.S. Tarnopolsky & G.A. Beaudoin, eds., THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: COMMENTARY (Toronto: Carswell, 1982) at 171.

achieve them.[45] There have been two predominant and opposing lines of opinion adopted in these cases. The prevalent opinion in various Courts of Appeal has been that freedom of association is to be interpreted narrowly to protect the individual's freedom to "enter into consensual arrangements. It protects neither the objects of the association nor the means of attaining those objects."[46] It does not protect the right of employees to act in concert to further their economic objectives and therefore does not protect employees' right to bargain collectively or to strike.

The opposing line of opinion urges a broad purposive approach to interpreting the freedom of association, one which strives for a generous (rather than legalistic) interpretation aimed at fulfilling the purpose of the guaranteed freedom.[47] The courts adopting this approach have held that the freedom must extend to protection for the essential purposes of the association and the means or activities which are designed to further those purposes. Without protection for the purposes of association and the means necessary to attain those purposes, freedom of association would be a hollow right, devoid of practical value. Under this view of the freedom, subsection 2(d) would protect the right to bargain collectively and the right to strike, which are necessary means for the attainment of the social and economic purposes of a union.[48]

Unfortunately, Mr. Justice White did not attempt to resolve this divergence of opinion. Instead, he merely indicated that the narrow interpretation of the freedom limiting it to a right to join in consensual association was too narrow for the interpretation of a constitutional document.[49]

The omission in *Lavigne* to conceptualize the positive aspect of freedom to associate leads to a failure to even consider the argument that this freedom protects the rights of union members (or the majority of employees in the bargaining unit) to negotiate and enforce union security provisions.[50] And yet, if freedom of association is found to include

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[45] *See Retail, Wholesale and Dep't Store Union, Locals 544, 496, 635 and 955* v. *Saskatchewan* (1985), 39 Sask. R. 193, 19 D.L.R. (4th) 609 (C.A.), *rev'd* (9 April 1987), (S.C.C.) [unreported] [hereinafter *R.W.D.S.U.*]; *Dolphin Delivery*, *supra*, note 19; *Reference Re Compulsory Arbitration* (1984), 57 Alta. R. 268, (*sub nom. Reference Re Pub. Serv. Employee Relations Act, Lab. Relations Act and Police Officers Collective Bargaining Act*) 16 D.L.R. (4th) 359 (C.A.), *aff'd* (9 April 1987), (S.C.C.) [unreported] [hereinafter *Compulsory Arbitration*]; *Re Serv. Employees' Int'l Union, Local 204 and Broadway Manor Nursing Home* (1983), 44 O.R. (2d) 392, 4 D.L.R. (4th) 231 (Div. Ct.), *aff'd in part and rev'd in part on other grounds* 48 O.R. (2d) 225, 13 D.L.R. (4th) 220 (C.A.) [hereinafter *Broadway Manor*]; *Public Serv. Alliance of Canada* v. *R.* (1984), [1984] 2 F.C. 562, 11 D.L.R. (4th) 337 (T.D.), *aff'd* [1984] 2 F.C. 889, 11 D.L.R. (4th) 387 (A.D.), *aff'd* (9 April 1987), (S.C.C.) [unreported] [hereinafter *P.S.A.C.* v. *R.*]. *See infra*, Postscript text accompanying note 161.

[46] *See, e.g., P.S.A.C.* v. *R.*, *ibid.*, [1984] 2 F.C. at 895, 11 D.L.R. (4th) at 392; *see also Dolphin Delivery*, *ibid.*; *Compulsory Arbitration*, *ibid.*

[47] *See Hunter*, *supra*, note 39; *R.* v. *Big M Drug Mart Ltd.* (1985), [1985] 1 S.C.R. 295 at 344, 18 D.L.R. (4th) 321 at 359 [hereinafter *Big M*].

[48] *See R.W.D.S.U.*, *supra*, note 45; *Broadway Manor*, *supra*, note 45.

[49] *Lavigne*, *supra*, note 1 at 493, 29 D.L.R. (4th) at 365.

[50] Adams, *supra*, note 20 at 799.

protection for the purposes of an association and collective activities undertaken to attain those objectives, the negotiation and enforcement of a union security clause can be seen as an important means to further the union's collective bargaining purposes. Because union security provisions significantly enhance the bargaining strength of a union *vis-a-vis* the employer, they must be regarded as a means of attaining the union's fundamental purpose of bettering the employee's lot. Arguably, a finding that the union security provision is, in itself, an exercise of the freedom of association of the majority should have a significant impact on a court's attempt to set out the negative or individual aspect of the freedom, under either subsection 2(d) or section 1 analysis. Yet these considerations are ignored in *Lavigne*.

However, Mr. Justice White did purport to apply a purposive approach to his interpretation of subsection 2(d). He began by identifying two general rationales for the group of fundamental freedoms which have been important in the development of American jurisprudence on the freedom of expression: the "political process rationale", which identifies the fundamental freedoms as essential to the health of a free and democratic political system; and the "individual liberty or personhood rationale", which recognizes the fundamental freedoms as reflecting a belief in human worth and dignity requiring the protection of individual liberty to allow for the development of self-potential.

Mr. Justice White then defined "association" in the context of subsection 2(d) as "the joining or combining of two or more individuals to achieve a common end".[51] Thus freedom of association should protect the combining of efforts of individuals to achieve a common end. For Mr. Justice White, this concept fit well with both rationales. The ability of individuals to combine to achieve a common end is essential to the workings of a democratic political system. Social and political change in a democracy is brought about largely through association, and an individual when acting in concert with others gains the capacity required to effect a political or social result. Also, because associations can have a great influence on the marketplace of ideas, freedom of association is a necessary precondition to the existence of the free marketplace. With regard to the individual liberty and personhood rationale, voluntary private association can increase opportunities for individual self-realization by counterbalancing the strength of centralized powers.

From these premises the Court moved to the assertion of a negative right to refrain from combining with others. In terms of the democratic process rationale, forced association could restrict the free flow of ideas and thereby distort the marketplace. Also, a negative right not to associate would appear to be implicit in the word "freedom". This approach is supported by an account of the nature of "freedom" from Chief Justice Dickson in *R.* v. *Big M Drug Mart*:

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[51] *Supra*, note 1 at 494, 29 D.L.R. (4th) at 366.

> Freedom can primarily be characterized by the absence of coercion or constraint. . . . 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.[52]

On this analysis the freedom of association issue in *Lavigne* was reduced to the apparently simple question of *whether or not the applicant was being forced to combine with others to achieve a common end.* This test for violation of a freedom not to associate was met merely by the collective agreement clause requiring Lavigne to pay dues to the union which compelled him to combine his financial resources with those of union members to achieve their objectives. Thus, compelled membership in the union was not necessary to find a violation of subsection 2(d); the compelled combining of financial resources to achieve a common end was sufficient.

The articulation of this extremely broad and open-ended standard for a freedom of non-association is the result of a formalistic and positivist approach to the interpretation of the freedom and the absence of a truly purposive approach. It is broad enough to require all forms of compelled association through compulsory combining of efforts to be justified under section 1 analysis. Such a broad test would render compulsory student unions, professional associations and even forms of government taxation constitutionally suspect. One could even argue monopoly utility service entities should be caught under the broad standard in *Lavigne*. What the Court failed to do was return to its statement of the constitutional interests at stake and attempt to create a test for freedom of non-association which would identify forms of compelled association that endangered those interests. The Court's failure to do so is highlighted by its rejection of the applicant's freedom of expression claim on the basis that the compelled contribution did not interefere with political process or individual liberty interests at stake.

4. *Freedom of Expression*

In attempting to define the interests protected by freedom of expression in subsection 2(b) of the *Charter*, Mr. Justice White first adopted the two major purposes or rationales for free speech developed in American jurisprudence referred to in his discussion of freedom of association.[53] Mr. Justice White then concluded that, for the same reasons freedom of

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[52] *Supra*, note 47 at 336-7, 18 D.L.R. (4th) at 354.

[53] *Lavigne*, *supra*, note 1 at 508, 29 D.L.R. (4th) at 380. These two rationales are discussed with great eloquence in *Abrams* v. *United States*, 250 U.S. 616 (1919) (Holmes J. in dissent), and *Whitney* v. *California*, 274 U.S. 356 (1927) (Brandeis J. concurring).

association must include a right not to associate, freedom of expression included a right to refrain from expression.[54]

In spite of this, it was held that Lavigne's freedom of expression was not infringed by the compelled payment of dues. In light of the two recognized purposes for free speech, forced payment of dues could infringe his subsection 2(b) rights if the expression of the ideology or politics of the group were attributed to the objecting payor, or if his capacity to engage in expression was reduced as a result of the payment of compulsory dues. The record in this case did not support any claim that Lavigne would become associated or identified with the political causes of the union by virtue of his forced financial contributions. The Court held that moral affront to the compelled payor was not enough absent an identification with political or ideological ends of the union. While recognizing that compelled dues could reduce the finances available to the objecting payor to support causes of his choice, the Court rejected this argument as a basis for finding infringement of freedom of expression. The objecting dues payor remained as free to express his views in any public or private forum as he was before the union collected his dues and there was no evidence that Lavigne's capacity to express his views about the union or the causes it supported was impaired. The argument that compelled dues reduced resources to express support for other views was based on the far-fetched assumption that the portion of mandatory dues in question were the last funds available to the applicant for speech. If this argument were accepted it could lead to a challenge of taxes imposed by the government and that would be unacceptable. Therefore, there was no *prima facie* violation of Lavigne's freedom of expression.[55]

5. *Section 1 Analysis*

Having found a *prima facie* violation of subsection 2(d), Mr. Justice White engaged in a section 1 analysis to determine whether the compelled payment of dues constituted a reasonable limit which was demonstrably justified in a free and democratic society. In doing so he applied the "ends and means" test established for section 1 by the Supreme Court of Canada in *R.* v. *Oakes*.[56]

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[54] *Lavigne*, *ibid.* at 509, 29 D.L.R. (4th) at 381.

[55] *Lavigne*, *ibid.* at 511, 29 D.L.R. (4th) at 383. This portion of the judgment relies heavily on the dissent of Frankfurter J. in *International Ass'n of Machinists* v. *Street*, *infra*, note 74 at 806 and the criticisms of the American jurisprudence holding compelled dues for political purposes to be a violation of the First Amendment in N.L. Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association* (1984) 36 RUTGERS L. REV. 3 at 28 [hereinafter Cantor].

[56] (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, Dickson C.J.C., [hereinafter *Oakes*]. Under the ends aspect of the test, the governmental objective of the measures limiting the *Charter* right must be of sufficient importance to warrant overriding a *Charter* right or freedom. At a minimum the objective must relate to concerns that are pressing and substantial in a free and democratic society. Under the means aspect of the test,

The "ends" aspect of the test was clearly met in *Lavigne*. The general objective of collective bargaining legislation is to promote industrial peace through collective bargaining. The particular objective of an agency shop clause is to further enhance peace and stability in industrial relations by the elimination of the "free-rider" problem. To preserve the strength of bargaining agents and ensure their ability to carry out their functions, and to avoid resentment and dissension amongst employees, all employees who share the benefits of collective bargaining must also share its burdens and costs. This constitutes a significant governmental objective that justifies overriding individual rights.[57]

Mr. Justice White also found that the first part of the "means" test was met by the agency shop provision, as there was a rational connection between the fostering of collective bargaining and the prevention of "free-riders".

However, the means chosen — the agency shop clause — did not satisfy the ambiguous requirement that the means impair the freedom of association as little as possible. Collective bargaining causes could be advanced and financed by all employees who benefit without the use of compulsory dues for purposes other than collective bargaining and collective agreement enforcement. Mr. Justice White attempted to support his conclusion on the least restrictive means test with a superficial comparative analysis of *legislation* in force in the United Kingdom, several other European countries and in Australia, which prohibits the use of compulsory dues for *contributions to political parties or candidates*. He also alluded to the United States First Amendment doctrine espoused in *Abood* v. *Detroit Bd. of Educ.*[58] and subsequent cases which restricts the use of an objector's compulsory union dues to purposes germane to collective bargaining. After finding that unions have not become paralyzed and ineffective in these circumstances, he concluded:

> [I]t 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

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Oakes prescribes a three part proportionality test as follows:

(1) The measures adopted must be rationally connected to the recognized objective.
(2) Even if rationally connected to the objective, the measures should impair "as little as possible" the right or freedom in question.
(3) There must be proportionality between the effects of the measures responsible for limiting the *Charter* right and the objective which has been identified as of "sufficient importance".

[57] *Supra*, note 1 at 513, 29 D.L.R. (4th) at 391.

[58] 431 U.S. 209 (1977) [hereinafter *Abood*].

> 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 . . . perceived administrative hardship imposed on the union in earmarking compulsory dues used for permissible and non-permissible purposes, and in following a pattern least obstrusive to the applicant's Charter rights, is no answer to the applicant's case.[59]

Mr. Justice White also concluded that the third branch of the means test, the proportionality between the effects of the measures limiting the *Charter* freedom and the government objective, could not justify the agency shop clause to the extent it compelled payment of dues which were used for non-collective bargaining purposes. In doing so he failed to address union arguments that the free-rider rationale for compelled dues should be applicable to activities undertaken in the political process to further the interests of workers. He also failed to accept arguments that any infringement of the applicant's *Charter* freedom was *de minimus* because he was only being asked to contribute very small amounts to non-collective bargaining purposes. Mr. Justice White stated:

> I am prepared to conclude that the impact on the individual in this case, although it may be small in pecuniary amount, is serious enough that it requires that the government be required to accomplish its objective by using the least obstrusive method available. The principle which I think must be established, then, is that compulsory dues may only be used for the purpose which justifies their imposition and for no other purpose beyond that. In other words, *the use of compulsory dues for purposes other than collective bargaining and collective agreement administration cannot be justified in a free and democratic society, where the individual objects to such use.*[60]

In the final analysis, apart from the question of remedy which has yet to be decided by the Court,[61] the *Lavigne* decision adopted the current American position on a right not to associate with respect to the use of compelled dues under an agency shop agreement. While the Court did discuss the American doctrine and its development to a limited extent in *Lavigne*, it failed to address adequately the numerous criticisms which have been levelled at that doctrine and the implications of those criticisms for the adoption of a similar doctrine under the *Charter*. I now turn to a discussion of criticisms of the American doctrine and their relevance to the judicial choice of whether to adopt a similar principle in Canada.

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[59] *Lavigne*, *supra*, note 1 at 515, 29 D.L.R. (4th) at 387.

[60] *Ibid.* at 516-7, 29 D.L.R. (4th) at 388-9 (emphasis added).

[61] The Court chose to defer the fashioning of a suitable remedy until further submissions from counsel on that question. The applicant had requested a declaration that would effectively prohibit the union from collecting any compulsory dues for non-collective bargaining purposes until the employee had signed a form expressing his consent to such a payment. This will be referred to below as an opt-in remedy.

III. The United States Position

Labour relations policy in the United States with respect to union security provisions differs substantially from that followed in Canada. The closed shop is prohibited under both the *National Labor Relations Act (NLRA)*[62] and the *Railway Labor Act (RLA)*.[63] Both acts also effectively prohibit what we know in Canada as a union shop clause — one which requires employees to become and remain members in good standing as a condition of employment. Under the provisions in the *NLRA* and the *RLA* permitting union shop clauses, union membership and continued employment may only be made conditional upon the payment of regular union dues and initiation fees (not fines or penalties).[64] The employee remains free to breach all other union rules and remain employed. Thus, the "union shop" permitted by American labour law is more like the agency shop than a true union shop. The agency shop is also permitted under national labour law.[65] However, under the *NLRA* individual states are permitted to enact state laws banning any form of union security provision within their boundaries.[66]

It is against the backdrop of this legislative policy, a policy dating back to the period right after World War II[67] which did not look kindly on union security provisions generally, that the development of American jurisprudence on the right not to associate must be understood. Under American labour policy, unions enjoyed far less freedom of contract in the area of union security provisions than their Canadian counterparts who have operated under a legislative scheme which permitted most forms of union security. And as we shall see, the United States judiciary has intervened to give even greater recognition to the individual's freedom to not associate, at the expense of the ability of unions to take collective action under union security provisions.

Despite the fact that the United States Constitution does not refer to freedom of association, the United States Supreme Court has, in the past thirty years, repeatedly recognized it as "among the preferred rights

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62 29 U.S.C. §158(a)(3) (1982).

63 45 U.S.C. §152, Fourth (1982).

64 *See* 29 U.S.C. §158(a)(3) (1982); 45 U.S.C. §152, Eleventh (1982).

65 *Se N.L.R.B.* v. *General Motors Corp.*, 373 U.S. 734 (1963).

66 29 U.S.C. §164(b) (1982). Note that the *RLA* does not contain a similar provision, so that union security clauses under the *RLA* are effective in the face of state right-to-work laws.

67 Prior to 1947, the *Wagner Act* contained no prohibitions against closed or union shop agreements. In 1947 the *Taft-Hartley Act* restricted union security clauses to the agency shop or qualified union shop clauses. All forms of union security clauses were prohibited under the *RLA* from 1934 to 1951 to rid the railway industry of company dominated unions. In 1951 Congress enacted section 2, Eleventh of the *RLA* to allow for the same type of union security clause as could be agreed to under the *NLRA* to deal with the free- rider problem. *See generally* H.H. Wellington, Labour and the Legal Process (New Haven: Yale Univ. Press, 1968) at 234-5 [hereinafter Wellington].

derived by implication from the first amendment's guarantees of speech, press, petition, and assembly".[68] Nevertheless, the Court has never recognized freedom of association as an independent right, one which protects the right of individuals to perform in association with others any actions which he is not prohibited from pursuing as an individual.[69] Consistent with the view of freedom of association as a mere derived or implied right, the Court has limited the protection for the right to act in association to the protection for concerted action to achieve purposes independently protected by the First Amendment; action such as political advocacy, litigation or religious worship.[70]

In *Railway Employees' Dep't* v. *Hanson*,[71] the plaintiff employee argued that a qualified union shop provision agreed to under the permissive provision in the *RLA* violated his First Amendment freedom of association, conscience and thought. He also alleged that the violation was made more serious by the fact that his compulsory dues were being used for political and ideological purposes. The United States Supreme Court upheld the union shop clause and the *RLA* provision, but did so on the limited basis that union security provisions which compelled mere payment of dues to finance expenditures germane to collective bargaining did not violate the First Amendment. A requirement for financial support for the collective bargaining agency by all who receive the benefits of its work was justified in light of Congress' interest in eliminating the free-rider problem and thereby maintaining labour peace through collective bargaining.[72] Nevertheless, the Court declined to comment on the issue of whether a union's use of compulsory dues for political purposes over the objections of individual employees might violate the First Amendment, finding that the record on this issue was incomplete.[73]

In the 1961 decision of *International Ass'n of Machinists* v. *Street*,[74] the United States Supreme Court was confronted with a record which established that the plaintiff's compulsory union fees were being used to fund campaigns for political candidates and to promote political and economic doctrine with which he disagreed. Nevertheless, Mr. Justice Brennan, writing for the majority, avoided the First Amendment issues raised by the plaintiff. He admitted that serious First Amendment issues

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[68] L.H. Tribe, AMERICAN CONSTITUTIONAL LAW (Mineola: Foundation Press, 1978) at 700-1 [hereinafter Tribe]. *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958) is usually recognized as the first Supreme Court decision to recognize freedom of association as a right protected by the Constitution. *See* T.I. Emerson, *Freedom of Association and Freedom of Expression* (1964) 74 YALE L.J. 1. However, the United States Supreme Court had approved the recognition of the value of freedom of association in support of expression and advocacy in earlier cases. *See* R. Raggi, *An Independent Right to Freedom of Association* (1977) 12 HARV. C.R.-C.L.L. REV. 1 at 3 [hereinafter Raggi].

[69] *See* Tribe, *ibid.* at 701; Raggi, *ibid.* at 15.

[70] *See* Tribe, *ibid.* at 703.

[71] 351 U.S. 225 (1956) [hereinafter *Hanson*].

[72] *Ibid.* at 238.

[73] *Ibid.* at 235.

[74] 367 U.S. 740 (1961) [hereinafter *Street*].

were raised by the application but relied on the principle of interpretation that even where serious doubt about the constitutionality of a statute is raised, the Court should, where fairly possible, first attempt to arrive at a construction of the statute by which the constitutional issue could be avoided. By means of a selective reading of legislative history, Mr. Justice Brennan was able to construe the permissive union shop provision in the *RLA* as implicitly prohibiting the use of union shop fees to support political causes opposed by the employee.[75] He delivered the following ruling on limitations on the power of unions to use compulsory dues for purposes opposed by individual payors:

> We are not called upon to delineate the precise limits of that power in this case. . . . Its use to support candidates for public office, and advance political programs, *is not a use which helps defray the expenses of the negotiation or administration of collective agreements, or the expenses entailed in the adjustment of grievances and disputes. . . . [W]e hold . . . that s. 2, Eleventh is to be construed to deny the unions, over an employees' [sic] objection, the power to use his exacted funds to support political causes which he opposes.*[76]

The majority's ruling was ambiguous in several respects. First, in terms of a standard for distinguishing between permissible and impermissible expenditures, the Court seemed to refer to a test of whether the expenses were *germane to collective bargaining purposes* as a standard for permissible expenditures. However, in its identification of impermissible expenditures, the decision focused on support for political causes. If the standard was "germaneness" to collective bargaining purposes, this raised several questions. Would it allow for expenditures for political and social causes that were related to collective bargaining purposes, such as lobbying for more favourable collective bargaining legislation or better occupational health and safety legislation? Would it also mean that courts could rule that certain non-political expenditures were expenses for non-collective bargaining purposes and therefore could not be paid for with compelled dues against an objector's wishes? And a fundamental question relevant to both of the foregoing issues was what definition was to be given to "collective bargaining purposes" by the courts. Did it refer to collective bargaining in a narrow sense, for example, collective agreement negotiation and settlement of disputes under the collective agreement? In any event, adoption of the "germane to collective bargaining purposes" standard would mean that the courts had undertaken the task of ongoing judicial review of individual union expenses to decide whether compulsory union dues could be used for those expenditures against the wishes of objectors. As one critic of *Street* noted, this was "likely to lead to distinctions that rest on fiat alone".[77]

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[75] *Ibid.* at 768.
[76] *Ibid.* at 768-9 (emphasis added).
[77] Wellington, *supra*, note 67 at 263.

Mr. Justice Frankfurter (joined by Mr. Justice Harlan) delivered a strong dissent in which he construed the statute to allow unions to use objector's compelled dues for political expenditures but argued for the rejection of the plaintiff's First Amendment challenge. For Mr. Justice Frankfurter, any infringement of the First Amendment interests of the plaintiff was too miniscule to warrant constitutional recognition.[78] The dissenter remained free "to express his view in any public or private forum as freely as he could before the union collected his dues".[79] Arguments that the individual's capacity for expression or association concerning causes he supported was reduced by the compulsory fees would be equally applicable to forced payment of federal taxes and no one contended that taxes infringed on First Amendment rights.

More importantly, Mr. Justice Frankfurter rejected the majority premise that political activity was not legitimately related to the collective bargaining function of unions and hence did not come within the scope of the free-rider rationale. The purported distinction between collective bargaining activity and political activity ignored the history of labour's involvement in politics and the benefits won for labour through such political activity. The notion that the economic and political concerns of labour were separable was pre-Victorian: "It is not true in life that political protection is irrelevant to, and isolated from, economic interests. It is not true for industry or finance. Neither is it true for labour."[80]

Although the majority in *Street* did not reach the constitutional issues, their ruling had clear First Amendment implications because they let it be known they were construing the statute in a fashion that would avoid serious questions of constitutional validity. The seeds were sown for the development of a constitutional freedom not to associate with respect to compulsory dues. The doctrine finally matured in the 1977 decision of *Abood*.[81]

In *Abood*, the plaintiff employees, some of whom were union members, asked the Court to declare an agency shop clause in a public sector collective agreement invalid. State law permitted agency shop clauses in the public sector and the highest state court had interpreted the law as placing no limitations on the use of union dues. Therefore, the United States Supreme Court could not avoid the constitutional issue.

Mr. Justice Stewart, writing for the majority, upheld the agency shop clause insofar as compulsory fees were used for collective bargaining purposes.[82] The Court found that compelled contribution to a bargaining agent to support collective bargaining activities interfered with employees' freedom to associate for the advancement of ideas, or to refrain from

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[78] *Street*, *supra*, note 74 at 817.
[79] *Ibid.* at 806.
[80] *Ibid.* at 814-5.
[81] *Supra*, note 58.
[82] *Ibid.* at 223.

doing so; however, the Court extended *Hanson*[83] to the public sector and held that this infringement on employees' freedom not to associate was justified by the government interest in avoiding the free-rider problem and preserving labour peace through collective bargaining.[84] Insofar as compulsory fees were used against objectors' wishes for "*purposes of collective bargaining, contract administration, and grievance adjustment*", there was no First Amendment violation.[85]

Mr. Justice Stewart held, however, that the use of agency shop dues for "*political and ideological purposes unrelated to collective bargaining*" would violate the First Amendment rights of freedom of association and expression of employees who objected to such expenditures.[86] Compelled contributions to organizations for political purposes were no less an infringement of First Amendment rights of freedom of association, belief and expression than prohibition of political contributions to an organization for the purposes of spreading a political message, which had been held to violate the First Amendment in *Buckley* v. *Valeo*.[87]

The majority acknowledged that there would be difficulty in applying the ambiguous standards it had stated. Difficult problems would often arise in drawing lines "between collective bargaining activities, for which contributions may be compelled, and ideological activities *unrelated* to collective bargaining, for which such compulsion is prohibited".[88] The Court also suggested that, while it was drawing a line similar to that imposed in *Street*[89] as a matter of statutory construction, "in the public sector the line may be somewhat hazier".[90] They hinted that lobbying activities concerning contract approval or budgetary and appropriation decisions may fall within the realm of collective bargaining.[91] The Court refused, however, to attempt to draw the line in *Abood*, asserting that the evidentiary record was incomplete.

The Court in *Abood* did little to resolve the problem of ambiguity inherent in the *Street* decision. On the one hand, where the Court stated its holding concerning impermissible expenditures, it referred only to *ideological activities unrelated* to collective bargaining. This can be interpreted as authority for the use of compelled dues for any expenditure which can be said to further collective bargaining purposes, even if they may have political aspects (for example, some lobbying activities).[92] It can also be taken as authority for the use of compelled dues for purposes

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[83] *Supra*, note 71.
[84] *Supra*, note 58 at 224.
[85] *Ibid.*
[86] *Ibid.* at 234-5.
[87] 424 U.S. 1 (1976).
[88] *Abood, supra*, note 58 at 234-5.
[89] *Supra*, note 74.
[90] *Abood, supra*, note 58 at 236.
[91] *Ibid.*
[92] *See* K. Cloke, *Mandatory Political Contributions and Union Democracy* (1981) 4 INDUS. REL. L.J. 527 at 545 [hereinafter Cloke].

that might be described as not germane to collective bargaining in the narrow sense but which are also non-political (for example, union social activities and perhaps organizing expenses).

On the other hand, when stating its affirmative holding concerning permissible expenditures for collective bargaining purposes, the Court seemed to refer to a very narrow conception of collective bargaining limited to the negotiation and administration of collective agreements.[93] This limited concept of collective bargaining may well be inconsistent with the free-rider rationale that the Court appears to rely on to distinguish between permissible and impermissible expenditures. One who benefits from legislative reform achieved by union political activity without contributing is as much a free-rider as one who benefits from improvements achieved by negotiating a collective agreement.[94] Nevertheless, *Abood* could be interpreted in a fashion which narrowly restricts a union's use of compelled dues. This lack of internal coherence in the rationale of *Abood* led lower courts to take widely differing views on the scope of permissible expenditures from compulsory dues.[95]

The difficulties raised by the ambiguity of the *Street-Abood* doctrine and the problem of ongoing judicial scrutiny of union activities for appropriateness according to judicial values surfaced in blatant form in *Ellis*.[96] The plaintiff employees in that case contended that their First Amendment rights of non-association and speech were violated by the use of their compulsory dues for national union conventions, union social activities and publications, organizing activities and litigation which did not directly concern any member of the bargaining unit. However, because the union security clause at issue had been agreed to under the permissive provision of the *RLA*, the Court first had to decide whether the expenditures were allowable under the statutory construction of the *RLA* imposed in *Street* before considering the impact of the First Amendment. First Amendment issues would arise only if the *RLA* permitted some of these expenditures to be made from compelled dues.

The Court noted that in its previous cases it had never tried to define the line between permissible and prohibited expenditures beyond stating a general test of "ideological causes not germane to . . . duties as collective-bargaining agent".[97] No clear test had been established for the expenses at issue. Thus the Court perceived a need for a more specific

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[93] *Abood, supra*, note 58 at 232.

[94] D.B. Gaebler, *Union Political Activity or Collective Bargaining? First Amendment Limitations on the Uses of Union Shop Funds* (1981) 14 U. CAL. D.L. REV. 591 at 600.

[95] *Compare* the narrow view in *Robinson* v. *New Jersey*, 547 F. Supp. 1297 (D.N.J. 1982), *modified* 565 F. Supp. 942 (D.N.J. 1983), *rev'd* 741 F.2d 598 (3d Cir. 1984), *cert. denied* 105 S. Ct. 1228 (1984), *with* the broad view in *Ellis* v. *Brotherhood of Ry. Workers*, 685 F.2d 1065 (9th Cir. 1982), *aff'd in part and rev'd in part* 104 S. Ct. 1883 (1984) [hereinafter *Ellis*].

[96] *Ibid.*, 104 S. Ct. 1883 (1984).

[97] *Ibid.* at 1892.

test for permissible uses of compulsory dues against the wishes of objectors. Mr. Justice White, writing for the majority, asserted that the test must be based on the free-rider rationale and went on to create the following test:

> [W]hen employees . . . object to . . . particular union expenditures, the test must be whether the challenged expenditures are *necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.* 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.*[98]

Under this test, use of compelled fees for conventions, social activities and publications (to the extent they did not discuss activities that could not be charged to objectors) were held to be permissible. Conventions were viewed as normal union activity necessary to maintain the union and discharge its duties as a bargaining agent.[99] Publications were regarded in a similar fashion, subject to the limitation that compelled dues could not be used to pay for those lines of a publication that discussed activities which unions could not pay for with compelled dues.[100] Union social activity expenditures were upheld on the basis that they were a normal feature of union operations and Congress must have been aware of them when they enacted section 2, Eleventh of the *RLA*.[101] Of course, similar observations could be made about union political activities and organizing activity.

The Court held, however, that expenditures for organizing activities and litigation that did not directly concern bargaining unit employees could not be paid for with compelled dues. The Court refused to accept the argument that the free-rider rationale should extend to benefits gained by increased organization. The link between increased organization and increased benefits to employees in the bargaining unit was considered to be too tenuous.[102] The Court's test for a direct relationship between litigation and specific bargaining unit interests also appears to be based on a very restrictive view of the free-rider rationale. The Court held that litigation in which the union had joined with other airline unions seeking to protect the rights of airline employees generally during airline bankruptcy proceedings could not be paid for with compelled dues.[103]

The Court then proceeded to a consideration of whether the three expenditures found to be permissible under the *RLA* were prohibited under

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[98] *Ibid.*
[99] *Ibid.* at 1892-3.
[100] *Ibid.* at 1894.
[101] *Ibid.* at 1893.
[102] *Ibid.* at 1894-5.
[103] *Ibid.* at 1895.

the First Amendment freedom not to associate recognized in *Abood* and upheld all three expenditures.[104] The three expenses at issue represented "little additional infringement of First Amendment rights beyond that already accepted. . . . The very nature of the free rider problem and the governmental interest in overcoming it require that the union have a certain flexibility in its use of compelled dues."[105] This was so despite the fact that conventions and publications involved direct communication and expression of ideas and raised serious First Amendment concerns. The Court apparently was trying to maintain consistency between the *RLA* standard and the First Amendment standard for permissible expenditures.

In some respects, *Ellis* can be viewed as a clarification of the impact of *Abood* on permissible uses of compulsory dues. It appears to reject an interpretation of *Abood* adopted by some lower level courts, "that would have permitted compelled financing only of activities directly related to discrete performance of narrowly defined duties of collective bargaining contract administration, and grievance adjustment".[106] Thus the "in-between" expenses, those that could not be classified as political or collective bargaining *per se*, may be paid for with objectors' compelled dues if they can be justified under a "flexible" free-rider approach.

Moreover, the Court's putative adoption of a more flexible free-rider rationale as a standard, both under the *RLA* and the First Amendment, could give broader scope generally to the range of activities that can be financed with compelled fees. This is particularly the case in light of the Court's holding that the free-rider rationale justified the use of compelled fees for conventions and publications, despite the recognition that both of these activities involved expression of ideas and despite the recognition by Mr. Justice Powell, in dissent, that union conventions normally provide an opportunity for some partisan political activity.[107] Thus, it is arguable that *Ellis* could allow for some "political activity" expenditures from compelled funds if they can be seen as conferring some collective benefit on employees in the unit to satisfy the free-rider rationale.

However, such positive commentary on the impact of the *Ellis* decision is more than counterbalanced by an assessment of the Court's irrational application of its free-rider rationale to organizing expenses. Here, the Court's finding continues to be very ambiguous and lends itself to distinctions between permissible and impermissible collective bargaining purposes based solely on judicial fiat. There is no logical basis for the finding that the free-rider rationale justifies the use of compelled dues for union social activities but not for organization expenses. The fundamental premise of collective bargaining is that there is strength in numbers. Unions rely on organization to obtain and *maintain* membership

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[104] *Ibid.* at 1895-6.

[105] *Ibid.* at 1896.

[106] Note, *Developments in the Law: Public Employment* (1984) 97 HARV. L. REV. 1611 at 1701-6.

[107] *Ellis*, *supra*, note 95 at 1897-9.

numbers and financial resources which in turn are the primary determinants of their bargaining power.[108] This is of particular importance when an impasse in bargaining arises.

In addition, unions must work to organize the non-union companies in their industry to protect the wage levels and jobs of workers in organized bargaining units.[109] If a union fails to organize widely in their industry it may find that the organized employer, faced with competition from non-union shops, is forced to either cease operations or refuse all union demands for improvements in wages and conditions in order to remain competitive. Thus, as a general rule, all workers represented by unions should benefit from the organization of non-union companies.[110]

The importance of ongoing organization to protect the collective bargaining interests of employees in unionized shops is recognized clearly by unions. It has been estimated that one third of national union expenditures goes for organizing expenses.[111] Yet *Ellis*, despite all these advantages from increased organization that accrue to organized workers, states that the free- rider rationale justifies the use of compelled dues for union social activities but not for organization expenses. Nevertheless, organization expenses are "germane" to collective bargaining purposes and one who does not pay to support organizing efforts is a free-rider who will reap the benefits of increased unionization without bearing the cost.

While the disallowance of expenditures for organizing and litigation was done pursuant to the statutory standard under the *RLA*, it has constitutional significance because the Court acknowledged that the free-rider rationale was the basis for the standard for compellable expenditures using objectors' fees under both the *RLA* and the First Amendment.[112] The internal inconsistency in *Ellis* between the Court's statement of "flexible" free-rider rationale and its treatment of organization expenses demonstrated an ambivalence that is sure to lead to continuing difficulty and inconsistency in attempts by the lower courts to apply the *Ellis* standards to rule on individual union expenditures.[113] On the one hand,

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[108] *See* J.W. Henkel & N.J. Wood, *Limitations on the Uses of Union Shop Funds After Ellis: What Activities Are "Germane" to Collective Bargaining?* (1984) 35 LAB. L.J. 736 at 744 [hereinafter Henkel & Wood].

[109] *Ibid.* at 745.

[110] *Ibid.*

[111] *See* Henkel & Wood, *supra*, note 108 at 744.

[112] *Ellis*, *supra*, note 95 at 1896.

[113] Recent lower court decisions applying *Ellis* bear out this prediction. In *Robinson* v. *New Jersey*, 741 F.2d 598 (3d Cir. 1984), the Circuit Court gave an expansive reading to the free-rider rationale of *Ellis* to uphold a statute authorizing a public sector union's use of compelled dues for lobbying expenditures. The Court held that *Ellis* allowed for use of compelled dues for lobbying activities where "effective representation necessarily includes taking positions on issues affecting membership". (*Ibid.* at 610.)

However, in *Beck* v. *Communication Workers of America*, 776 F.2d 1187 (4th Cir. 1985), the Court held that the *Ellis-Abood* rule on the use of compelled dues applied to union security agreements entered into under *National Labour Relations Act*, 29 U.S.C. §158(a)(3) (1982). It then adopted a very narrow reading of the *Ellis* standard to disallow

by preaching the virtues of flexibility and leeway for the union's use of compelled dues, the Court could be seen as indicating a desire to extricate itself from ongoing judicial scrutiny of individual union expenses. However, the Court's treatment of organizing and litigation expenses indicated the courts' willingness to engage in an ongoing supervision of union activities to determine how well they accord with judges' views of appropriate activity for a bargaining agent.

One final aspect of the American doctrine of great significance to the judicial choices which must be made in this area under subsection 2(d) of the *Charter* involves the question of remedies. In *Street*[114] and subsequent cases objecting dues payors have requested a remedy which would amount to an injunction against any political or non-collective bargaining expenditure from compulsory dues. More commonly referred to as an "opt-in" remedy, this would require each employee to provide a written authorization for his dues to be used for political expenditures before any portion of his dues could be used for such purposes. This is the form of remedy requested by the applicant in *Lavigne*.

The United States Supreme Court has repeatedly rejected an "opt-in" remedy. In *Street* the Court held that an injunction against all political expenditures from union dues in the absence of individual authorization may well violate the First Amendment rights of the majority of union members, for the "majority also has an interest in stating its views without being silenced by the dissenters".[115] Consequently, the Court in *Street* required an opt-out remedy. The individual objector had to make his objection to political expenditures known to the union. If the objector had expressed his desire to opt-out then the Court could order restitution to the objector of that portion of his dues that had been used for political purposes over his objection and could order an injunction against future compelled payment of that portion of the dues that was proportionate to the proportion of total union expenses used for the impermissible purposes.[116] Shortly after *Street*, the Court gave strong indications that it did not want to become entangled in supervising the remedial process and strongly urged unions to adopt their own internal procedure for rebates and future reductions for objectors.[117]

However, the Court has recently indicated a willingness to have courts become entangled in supervising procedures for the opt-out remedy.

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the use of compelled dues for lobbying expenditures and seemed to require the union to show, with respect to every expenditure, that it was directly related to the performance of the collective bargaining functions of negotiation or administration of the collective agreement. There was no reference to a need for flexibility and the Court upheld, for the most part, a lower court ruling that only nineteen percent of the compelled dues were chargeable to dissenting employees. The contrast in the tenor and results of the two decisions is remarkable.

[114] *Supra*, note 74.

[115] *Ibid.* at 773.

[116] *Ibid.* at 774-5.

[117] *See Brotherhood of Ry. & S.S. Clerks* v. *Allen*, 373 U.S. 113 (1963).

In 1984, in *Ellis*, the Court held that the union's rebate scheme, under which employees were given proportional rebates at regular[118] intervals for impermissible expenditures they objected to, was not constitutional because it required the objector to make a temporary involuntary loan to causes to which he objected. Other procedures such as advance reduction of dues or interest bearing escrow accounts were required to prevent the temporary unauthorized use of objectors' funds.[119]

Finally, in the recent case of *Chicago Teachers Union* v. *Hudson*,[120] the Court went much further in terms of supervising internal union procedures for administering an opt-out solution. The union, in an attempt to comply with the *Abood-Ellis* doctrine, had identified the portion of union dues which were being used for collective bargaining purposes and non-collective bargaining purposes as 95 per cent and five per cent respectively. It had then agreed with the employer to a scheme whereby non-member employees were only required to contribute 95 per cent of regular union dues and had notified the employees of the nature of the remaining five per cent expenditures. It had also set up an internal procedure whereby objecting employees could object to the 95 per cent portion of compulsory dues on the basis that some of the expenditures which comprised the 95 per cent portion were not collective bargaining related expenses. The union procedure for objections enabled the objector to examine union records and could culminate in an arbitration concerning disputed expenditures to be heard by an arbitrator chosen by the union president. The procedure also provided for the placement of all of an objector's agency shop fees in an escrow account upon the filing of an objection until the dispute was resolved.

The United States Supreme Court held that these procedures did not adequately protect an objector's First Amendment rights. They were defective in that they failed to provide potential objectors with adequate information concerning the basis for the collective bargaining proportionate share from which the advance deduction of dues was calculated. As well, the union procedures did not provide for a reasonably prompt decision by an *impartial* decision-maker concerning disputed expenditures. While the Court was not clear on what it meant by an adequate explanation of the basis for determining the compulsory collective bargaining share of the fees, it would appear that unions now have the obligation to provide employees, in advance, with an itemized account of all union expenditures. It seems that the union must also provide for what is likely to be a fairly expensive arbitration process with an impartially chosen arbitrator.

Thus, while the Court has not forsaken the opt-out remedy in favour of an opt-in solution, it has moved to a position on remedies which has the potential to significantly augment the degree of ongoing judicial supervision and intrusion in union activities created by its previous hold-

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[118] *Supra*, note 95.
[119] *Ibid.* at 1890.
[120] 106 S. Ct. 1066 (1986) [hereinafter *Hudson*].

ings on the substantive standard for permissible and impermissible expenditures. There is now the potential for significant judicial supervision, not only in terms of the distinctions to be made concerning what are appropriate collective bargaining activities, but also in terms of the procedures used to notify employees of union activities and expenses and to resolve disputes between objectors and unions over union expenditures.

The American experience on the question of remedies to protect an objector's First Amendment rights under the *Abood-Ellis* doctrine should be of great relevance to the judicial choices raised by the *Lavigne* decision. If our courts choose to accept the apparently simple but actually ambiguous and difficult standard for permissible expenditures adopted in *Lavigne*, American caselaw indicates the potential for significant ongoing judicial entanglement on both substantive and remedial procedural issues. And the potential for judicial entanglement is unlikely to differ significantly based on the choice between an opt-in or opt-out remedy. In both cases disputes will arise over what are permissible or impermissible expenditures and over the procedure to be followed to resolve such disputes.

The choice of remedial measures, however, may be of great significance in terms of impact on union treasuries. Research done since *Abood* suggests that the United States Supreme Court's refusal to accept an opt-in remedy has prevented the *Abood* doctrine from having a major impact on union activities and their choice to pursue "non-collective" bargaining activities. The result of one study suggests that, at least in the case of large well-established unions, only a miniscule proportion of workers in affected bargaining units would opt out of contributing to non-collective bargaining purposes. Unions that implemented dues rebate and reduction schemes for political expenses after *Abood* have experienced little impact on their treasuries.[121] While the procedural requirements imposed in *Hudson*[122] may have some impact on this limited use of the right to opt out, the American approach to freedom of non-association in the union dues context may have a limited impact on union activities as long as the Court adheres to an opt-out remedy. It is also possible to speculate that an opt-in remedy may have a far more dramatic impact on union's ability to enage in non-collective bargaining activity.[123]

In terms of the choice of remedies to be made in the Canadian context, if the *Lavigne* approach to freedom from compelled payment of dues which are ultimately used for non-collective bargaining purposes is adopted, our courts should recognize that an opt-in remedy is unacceptable for the same reason that the United States Supreme Court in *Street* found

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[121] Henkel & Wood, *supra*, note 108 at 745-6.

[122] *Supra*, note 120.

[123] These observations on the potential significance of the choice between an opt-in or opt-out remedy in terms of their impact on union treasuries are supported by the findings of the Ontario Law Reform Commission on the impact of opt-in as opposed to opt-out approaches to class actions. Ontario Law Reform Commission, REPORT ON CLASS ACTIONS, vol. 2 (Toronto: Ministry of the Attorney-General, 1982) at 467-8.

it to be unacceptable. An opt-in remedy, which amounts to an injunction against the use of compulsory dues for non-collective bargaining purposes, would constitute an infringement of the freedom of speech and association for the majority of employees who wish to have their dues used for these purposes. The appropriate remedy to balance the competing interests involved should require objectors to opt out. An opt-in remedy would give too much weight to individual interests at the expense of the interests of the majority.

IV. *Lavigne* — The Adoption of a Flawed American Doctrine

In *Lavigne*, Mr. Justice White has adopted an ambiguous standard for distinguishing between permissible and impermissible activities similar to the position taken by the United States Supreme Court. Despite the political nature of the expenditures at issue in the applicant's challenge, the focus appears to be not on a test for impermissible expenditures of "uses for political purposes", but rather on a standard for permissible expenditures of "uses for collective bargaining" in a narrow sense; a standard which is potentially more restrictive of union uses of dues. In the words of Mr. Justice White: "[T]he use of compulsory dues for purposes other than collective bargaining and collective agreement administration cannot be justified in a free and democratic society, where the individual objects to such use."[124]

It can be argued that this purported distinction between collective bargaining activity and other activities, including political activities, rests merely on a narrow liberal notion of collective bargaining and the function of unions as being restricted to "business unionism". This distinction, however, is flawed. The attempt to distinguish the economic and political concerns rests on the misguided premise that unions can represent the economic interests of workers effectively without engaging in political activity. If this was ever more than a myth, it is certainly not the case in a post laissez-faire society in which government intervention and regulation in most spheres of economic and social life is a daily event. In such a society, it is *necessary* for unions to engage in political activity to ensure that government regulation takes a form that is favourable, or at least not adverse, to the economic interests of its constituents. If they do not, they may find that their bargaining position *vis-a- vis* employers has been substantially weakened or undermined by government legislation or policy. As Wellington has noted concerning the American doctrine:

> The economic position of both labor and management — their power at the bargaining table — is dependent upon many variables, not the least of which . . . is ever changing federal and state law. The impact upon eco-

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[124] *Lavigne*, *supra*, note 1 at 516-7, 29 D.L.R. (4th) at 388-9.

> nomic power of federal legislation which makes certain employer and union practices illegal is obvious . . . [l]ess obvious, but also important to the power of the union at the bargaining table, are minimum wage legislation, social security legislation, legislation dealing with unemployment and workmen's compensation, and the many other forms of welfare legislation which provide a foundation upon which unions may build in bargaining with management. Another factor that may be equally important to the union's economic position at the bargaining table is tariff legislation or other types of industry protecting or subsidizing enactments. More attenuated perhaps, but still important, are the general economic policies of an administration. (Is it any wonder that business-minded unions are interested in politics and politicians?)[125]

Indeed, it can be asserted that unions have no choice but to engage in political activities. They know that the interests of employers will be well represented in the political arena through lobbying activities, through the support of sympathetic politicians or, in the case of public sector unions, by the fact that the employer is the government. Thus they know that they may face a legislature that is critical of union activities and unsympathetic to workers' interests if they fail to engage in political activity.[126]

While these criticisms of the distinction between the collective bargaining interests and political activities of unions first arose in the American context, they are at least equally, and perhaps more, applicable to the Canadian context. Governments in Canada have, as a general rule, been more willing than their American counterparts to regulate and intervene in the economic and social spheres of life. In the recent past they have proven to be quite willing to regulate the economy directly in a manner which is detrimental to the interests of labour, by imposing wage control legislation.[127]

The economic and political concerns of workers may be even more inseparable in the public sector in which *Lavigne* arose. Due to constraints on the scope of subjects such as bargaining and strike activity which are often imposed on public sector workers by labour legislation, political lobbying activity may often be the only effective means for the union to represent the interests of its constituents. Also, in the public sector the unions' bargaining position will often be more severely affected by governmental decisions concerning fiscal policy, appropriations and the provision of government services.

A more realistic view of the relationship between union political activities and the economic concerns of workers would recognize that political activity is a reasonable, and in many cases a *necessary*, means of attaining the union's legitimate purpose of advancing or protecting the socio-economic interests of workers and is therefore "wholly germane to

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[125] Wellington, *supra*, note 67 at 247.

[126] L.G. Reynolds, LABOUR ECONOMICS AND LABOUR RELATIONS 3d ed. (Englewood Cliffs, New Jersey: Prentice-Hall, 1959) at 80- 1.

[127] *See, e.g., Public Sector Compensation Restraint Act*, S.C. 1980-81-82-83, c. 122; *Inflation Restraint Act, 1982*, S.O. 1982, c. 55; *Anti-Inflation Act*, S.C. 1974-75-76, c. 75.

a union's work in the realm of collective bargaining".[128] Contrary to the restrictive notion of the free-rider rationale employed in the American decisions and in *Lavigne*, one who benefits from pro-labour measures achieved by political expenditures without contributing is as much a free-rider as one who benefits from measures attained through bargaining with the employer.[129]

While it was unclear before *Ellis*,[130] the United States Supreme Court in *Abood*[131] implied, and in *Ellis* held, that even non-political expenditures must meet the standard of being germane or related to collective bargaining purposes to be chargeable to dissenters. Thus the Court has embarked on a process of judicial review of individual union activities, a process in which judges, guided by their own social and political values, "may be tempted to substitute their own judgment for that of the union, or question its wisdom on a case-by-case basis".[132] The Court has invited itself to define the scope of collective bargaining purposes and activities which are appropriate for a union to pursue in the interests of workers. It is the Court, and not the legislature or the majority of workers in a bargaining unit, who will define what is in the socio-economic interests of employees. This is an approach which could "translate into constitutional law the same sorts of arbitrary distinctions between legal and illegal union objectives that were inserted into the common law of labor by the judges in the conspiracy and injunction cases".[133] The limited experience we have had with United States Supreme Court determination of the validity of specific expenditures from compelled dues suggests that this criticism has merit. The distinction made by the Court in *Ellis* between organizing expenses and union social activities would appear to be arbitrary at best.

While the legitimacy of judicial review of union expenditures under subsection 2(d) of the *Charter* may be less questionable than under the American Constitution because of the express mandate for judicial review found in section 24 of the *Charter*, the desirability of judicial supervision of union purposes and activities on an ongoing basis should be questioned on the basis of criticisms raised by the American experience. The danger that *ad hoc* judicial review of individual union expenditures under an ambiguous standard could lead to artificial and arbitrary distinctions between permissible and outlawed union objectives is as much a danger under the *Charter* standard adopted in *Lavigne* as it is under the First Amendment. Other Canadian courts should consider carefully the prospect of ongoing supervision of union objectives and activities before embracing the *Lavigne* adoption of the American approach to reconcile the competing interests of the majority and dissenters.

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[128] J.A. Woll, *Unions in Politics: A Study in Law and the Workers' Needs* (1961), 34 S. CAL. L. REV. 130 at 142.

[129] *See* Cloke, *supra*, note 92 at 574.

[130] *Supra*, note 95.

[131] *Supra*, note 58.

[132] Cloke, *supra*, note 92 at 571.

[133] Wellington, *supra*, note 67 at 246.

Another factor which should be relevant to the consideration of whether to adopt an American approach to restrictions on the use of compelled dues — a factor which was not addressed by the Court in *Lavigne* — is the very different social values and legal structures of the two countries with respect to compulsory unionism. As we have seen, American labour policy has given far less value to the collective interests served by compulsory unionism and has chosen instead to give pre-eminence to the American values of individual liberty and freedom. Canadian labour policy, in its acceptance and endorsement of most forms of compulsory unionism, has given far greater recognition to the collective interests which they serve, thereby downplaying the values of individual liberty and freedom. While pre-*Charter* Canadian labour policy is unlikely to be determinative of the meaning to be given to freedom of association under the *Charter*, the differences in the social and legal cultures of the two countries concerning compulsory unionism should be given some weight by a court considering the adoption of American doctrine to define this aspect of the freedom of association under the *Charter*. At the very least this difference in societal values should be of significance in a court's consideration of what constitutes a "reasonable limit" under section 1.

In *Lavigne*, however, Mr. Justice White failed to refer to these traditional differences between Canadian and American legislative policy concerning union security. Instead he chose to focus on the controversial decision of the majority of the Supreme Court of Canada in *Oil, Chemical and Atomic Workers Int'l Union, Local 16-601* v. *Imperial Oil Ltd.*[134] That decision upheld a provision of the British Columbia *Labour Relations Act*[135] prohibiting the use of any union membership dues or agency shop dues for contributions to political parties or political candidates at the federal or provincial level. Mr. Justice Martland, for the majority, upheld the legislation on a division of powers basis as being legislation in relation to property and civil rights in the province, but in the course of doing so he appeared to recognize implicitly what might be referred to as a freedom not to associate as a civil liberty at common law.[136]

Mr. Justice White's treatment of the *Oil, Chemical and Atomic Workers* case failed to deal adequately with a competing notion of freedom of association raised in the dissent of Mr. Justice Abbot in that case. The dissent held that the British Columbia legislation was beyond provincial legislative competence in that it interfered with the freedom of political expression and freedom of association of the majority of workers in a union, freedoms which were essential to the democratic processes of parliamentary government.[137] This one-sided treatment of the *Oil, Chem-*

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[134] (1963), [1963] S.C.R. 584, 41 D.L.R. (2d) 1 [hereinafter *Oil, Chemical and Atomic Workers*].

[135] R.S.B.C. 1960, c. 205, s. 9, *as am. Labour Relations Act Amendment Act, 1961*, S.B.C. 1961, c. 31, s. 5.

[136] *Oil, Chemical and Atomic Workers*, *supra*, note 134 at 592-3, 41 D.L.R. (2d) at 11.

[137] *Ibid.* at 599, 41 D.L.R. (2d) at 4-5.

ical and Atomic Workers case is indicative of Mr. Justice White's general approach in *Lavigne*, one which focuses on the negative aspect of the freedom in subsection 2(d) without addressing the other side of the "sword" — that is, the extent to which the issue of uses of compelled dues may raise freedom of association interests of the majority of workers represented by the union. As indicated above, the extent to which freedom of association may go beyond mere protection for the right of individuals to join in association to protect the essential purposes of an association and collective activities undertaken to further those purposes has yet to be determined. Mr. Justice White alludes to this uncertainty but appears to lean toward a broader conception of the positive aspect of the freedom, one which goes beyond a mere right to join in association and protects the right to combine efforts or activities toward a common end. Yet he fails to address the possibility that if subsection 2(d) protects the essential purposes of an association and the freedom of the collective to engage in activities to pursue those purposes, the negotiation and enforcement of union security clauses and their use of compelled fees to further the interests of the collective represent an exercise of the freedom of association of unions and the majority of the workers represented by the union. In that case, judicial interference with the enforcement of an agency shop clause or the use of compelled fees could constitute a *prima facie* infringement of the freedom of association rights of the union and a majority of its constituents, and Canadian courts should be required to balance the constitutional interests of the collective against the constitutional interests of individual dissenters. Recognition of a competing constitutional interest of the collective should influence both the determination of the scope given to the individual's freedom of non-association and the determination of whether a union's use of compelled dues constitutes a "reasonable limit" on the dissenter's freedom under section 1 of the *Charter*.

The decision in *Lavigne* to adopt the American standard is also objectionable in another important aspect of the Court's reasons. The Court engages in a comparative analysis in its discussion of reasonable limits under section 1. Mr. Justice White notes that several other countries, including the United Kingdom, Australia, France, Ireland, Italy and West Germany, have *legislation* which prohibits the use of compulsory dues for *contributions to political parties or candidates*. He then appears to lump in with this data the *Abood-Ellis* judicial doctrine as justification for adopting the American approach of judicial review of expenditures to determine if they are germane to collective bargaining. Of course, these two approaches — a legislative prohibition against political party or candidate contributions, and a judicial review of individual union expenditures to determine their relationship to collective bargaining purposes narrowly defined in business unionism terms — are by no means synonymous. While the legislative prohibition against political party contributions is objectionable because of the untenable distinction between the economic and political concerns of unions, at least this approach is one which allows unions to continue to undertake political activity in the form of lobbying to further worker's interests and allows the free-

rider rationale to operate in this sphere of political activity. It also avoids the dangers of intrusive ongoing judicial supervision of union activities on a case-by-case basis to determine whether they are related to some judicial conception of collective bargaining purposes. Unlike the American approach adopted in *Lavigne*, judges are not given the task of determining the legitimacy of even non-political uses of compulsory dues. In addition, the European and Australian legislative approach does have some precedent in the Canadian experience as demonstrated by the *Oil, Chemical and Atomic Workers*[138] case and a few public sector collective bargaining statutes.[139] Yet Mr. Justice White unjustifiably translates the less intrusive legislative prohibition against contributions from union dues to political parties or candidates into support for the adoption of the far more intrusive American approach to freedom of non-association. Thus legislated political solutions are used as support for the legalization of politics.

The standard for a constitutional freedom of non-association adopted in *Lavigne* can also be criticized for its failure to consider adequately the extent to which it may have ramifications for judicial review of the activities of other governmentally mandated or supported associations. Until recently, American courts have not been as eager to apply the doctrine of freedom of non-association to other compulsory associations, such as state bar associations or student unions, as they have been to apply it to labour unions.[140] However, since *Abood*,[141] the lower courts addressing the issue have held consistently that the *Abood* doctrine applies to a state bar association's use of compulsory dues paid by lawyers as a requisite for practice privileges,[142] even though there has been a great deal of disagreement concerning the distinction between permissible and impermissible dues in the state bar context.[143] The *Abood* doctrine has also been applied recently to prohibit a state university scheme under which mandatory college student dues are used to support political and ideological causes against the wishes of dissenters.[144] However, efforts to

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[138] *Supra*, note 134.

[139] *See, e.g., Public Service Staff Relations Act*, R.S.C. 1970, c. P-35, s. 39(2); *Crown Employees Collective Bargaining Act*, R.S.O. 1980, c. 108, s. 1(g). *See generally* F.W. McIntosh, *A Comparative Study of Legislative Control of Union Political Activity in England, United States & Canada with final emphasis on Public Sector Unions in Canada* (1976) 3 QUEEN'S L.J. 58.

[140] *See Lathrop* v. *Donohue*, 367 U.S. 820 (1961) (re bar associations) [hereinafter *Lathrop*]; *Kania* v. *Fordham*, 702 F.2d 475 (4th Cir. 1983) (re student unions).

[141] *Supra*, note 58.

[142] *See, e.g., Schneider* v. *Colegia de Abogados de P.R.*, 565 F. Supp. 963 (D.P.R. 1983), *vacated sub nom. Romany* v. *Colegia de Abogados de P.R.*, 742 F.2d 32 (1st Cir. 1984); *Arrow* v. *Dow*, 544 F. Supp. 458 (D.N.M. 1982); *Falk* v. *State Bar of Michigan*, 305 N.W. 2d 201 (1981). Note that the constitutional issue was raised but not resolved in *Lathrop*, *supra*, note 140.

[143] *See Falk* v. *State Bar of Michigan*, 342 N.W. 2d 504 (1983), *cert. denied* 105 S. Ct. 315 (1984).

[144] *Galda* v. *Rutgers*, 589 F. Supp. 479 (D.N.J. 1984), *vacated* 722 F.2d 1060 (3d Cir. 1985), *cert. denied* 106 S. Ct. 1375 (1986).

have the *Abood* doctrine applied to the use of assets by corporations to support political causes against the objections of dissenting shareholders have been unsuccessful, primarily on the basis that dissenting shareholders did not suffer from compulsion or coercion to the same degree as employees in a union shop because they were free to discontinue their investment.[145]

Under the broad test adopted by *Lavigne* for finding a *prima facie* violation of subsection 2(d) — whether a person has been "forced to combine with others to achieve a common end", which includes "a compelled combining of financial resources"[146] — it is difficult to make any "principled" distinction between compulsory union dues and compulsory professional association fees, student union fees and corporate shareholders investments, assuming of course that there is sufficient governmental action to make the *Charter* applicable. One can even argue that the *Lavigne* test for compelled association through compelled financial contributions to achieve a common purpose is sufficiently broad to encompass different forms of government taxation as a *prima facie* violation of subsection 2(d).

As Professor Cantor has demonstrated in his criticism of the *Abood* doctrine, in all cases of forced payment to such service associations — whether it be compulsory bar association fees, student union fees, some forms of government taxation, or the requirement in some instances, that a corporation's stockholders or customers support a corporation's political messages — the individual is faced with forced payments in return for services or benefits and the prospect that such forced payments may eventually be used in part for purposes to which the contributor is ideologically opposed.[147] While the degree of coercion may vary somewhat, in each case the payor may be compelled to support indirectly causes he opposes through financial contribution which may lessen somewhat his ability to contribute to causes he supports. Cantor asserts that these instances of compelled association should all be treated in a similar fashion. Each forced payment to service associations should not be constitutionally suspect unless they can be said to affect the critical constitutional interest at stake: the government establishment of, or support for, particular political causes and the governmental imposition of ideological conformity. Agency shop clauses and other forms of forced payment to service institutions referred to here generally do not affect these constitutional interests and the mere fact that workers and other forced payors may be offended to see their forced payment eventually benefit certain political causes they oppose is not sufficient to warrant a constitutional prohibition of political uses of compelled funds, provided the dissenting

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[145] *International Ass'n of Machinists* v. *Federal Election Comm'n*, 678 F.2d 1092 (D.C. Cir. 1982), *aff'd* 459 U.S. 983 (1982).

[146] *Lavigne*, *supra*, note 1 at 496-7, 29 D.L.R. (4th) at 368-9.

[147] *See* Cantor, *supra*, note 55 at 4.

payor is not put in a position where he personally will be identified as supporting the causes which have indirectly received his support.[148]

Mr. Justice White attempts to distinguish unions from other compelled associations on the basis that they are somehow less "voluntary" than other groups such as state bar associations or student unions,[149] yet his analysis is not convincing. There is a varying degree of coercion in all three forms of association. In each case the payor would have to forego significant benefits in order to withdraw from the association to avoid supporting causes he opposes. The worker paying agency shop fees would have to quit that particular employer but may be able to find work elsewhere. The student may have to give up attending that university to avoid paying the compulsory fees but may be able to go to another university. However, the lawyer, when faced with compulsory bar association fees, must pay these fees or be faced with the prospect of being unable to practise law in that jurisdiction, a jurisdiction which may be the only one in which he is qualified to practise. If one were to assess degrees of voluntariness, the state or provincial bar association should be regarded as a less voluntary form of association than a union with bargaining rights. In addition, unions are more voluntary than state or provincial bar associations in that a majority of workers can always bring about the termination of the union representation for employees in a bargaining unit, while it is doubtful that the same can be said about a state bar association or provincial law society which has been designated by the government as the governing authority for the profession in that jurisdiction. Thus, state or provincial bar associations are less "voluntary" service organizations than unions in most important aspects.

Put in its best light, the *Lavigne* Court's distinction between forced payments to unions and forced payments to other "compulsory" service associations would appear to be simply irrational, particularly when one tries to apply the Court's broadly stated test of compelled combining of efforts to further a common purpose as the standard for *prima facie* infringement of the freedom not to associate. At worst, it can be regarded as an indication of judicial disapproval or dislike for the political perspective which unions have come to be associated with in the public mind and judicial approbation for the more conservative or political centre orientation which might be commonly attributed to state or provincial bar associations.[150] In either case the distinction is ill-considered and unsatisfactory. What is required is not further attempts at unprincipled distinctions between various forms of compelled association which governments have found it necessary to impose in order to provide effective services, to enable and encourage collective activity, or to provide forms of self-regulation in various spheres of economic and social activity. Instead,

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[148] *Lavigne*, *supra*, note 1 at 507, 29 D.L.R. (4th) at 379.

[149] *Ibid.*

[150] *Ibid.* There is some suggestion in the judgment at this point that the basis of Mr. Justice White's distinction is based on a negative attitude towards union politics.

what is required is a truly purposive standard for the freedom to not associate, one which provides protection for the constitutional interests which are at stake in recognizing a freedom not to associate and does not regard all forms of compelled contribution to further a common end in the collective interest as a *prima facie* infringement of subsection 2(d).

V. Towards a Purposive Freedom of Non-Association

There are two rationales or purposes which are commonly put forward for the fundamental freedoms found in section 2 of the *Charter*. The first is a political process rationale: the argument that these freedoms (sometimes referred to as "political" freedoms) must be protected in order to preserve and maintain a democratic political system. The second major rationale is one which focuses on the individual rather than the political process, and identifies individual liberty and the development of the individual as an ultimate good worthy of protection. The political process rationale is perhaps most consistent with Canada's pre-*Charter* legal history. Several Supreme Court of Canada justices suggested in the 1930's, 1940's and 1950's that an "implied bill of rights" protecting the traditional political freedoms should be derived from the preamble to the *British North America Act, 1867*[151] because they were so essential to the maintenance of a parliamentary democracy which was recognized by the preamble as our chosen system of government.[152] Nevertheless the Supreme Court of Canada in *Big M* appears to have recognized the individual liberty rationale and a belief in human worth and dignity as a second rationale for the fundamental freedoms found in section 2.[153]

In *Lavigne*, Mr. Justice White commences his attempt to arrive at a purposive interpretation by identifying these twin rationales as the purposes of both freedom of expression and freedom of association.

On the basis of this identification of a twofold rationale for freedom of association, the Court in *Lavigne* arrives at the open-ended test of whether an individual is forced to combine with others to achieve a common end, which includes compelled contribution of financial resources to a common end, as the standard for finding infringement of a subsection 2(d) freedom of non-association. Yet the Court, in arriving at the open-ended standard, fails to make any attempt to refer back to the two constitutional interests previously identified to demonstrate the manner in which the compelled contribution at issue will detrimentally affect

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[151] *Constitution Act, 1867* (U.K.) 30 & 31 Vict., c. 3.

[152] *See Reference Re Alberta Legislation* (1938), [1938] S.C.R. 100, [1938] 2 D.L.R. 81, Duff C.J.C., *aff'd* (*sub nom. A.G. Alberta* v. *A.G. Canada*) [1939] A.C. 117, [1938] 4 D.L.R. 433 (P.C.); *Saumur* v. *City of Quebec* (1953), [1953] 2 S.C.R. 299, [1953] 4 D.L.R. 641, Kellock and Locke JJ.; *Switzman* v. *Elbing* (1957), [1957] S.C.R. 285, 7 D.L.R. (2d) 337, Rand and Abbot JJ. Note that the only justice to unequivocally adopt the implied bill of rights theory was Mr. Justice Abbot in *Switzman* v. *Elbing*.

[153] *Supra*, note 47 at 344-5, 18 D.L.R. (4th) at 359.

those interests. In failing to do so, the Court arrives at an unpurposive and unprincipled standard for recognition of a freedom of non-association.

This failure to establish a purposive standard for freedom of non-association, one which incorporates and protects the identified purposes, is puzzling because Mr. Justice White does apply a purposive analysis to reject the applicant's claim that his freedom of expression was violated by the forced contribution of funds to causes which he opposed. While subsection 2(b) was found to incorporate a freedom to refrain from expression, when the political process and individual liberty rationales were considered, the compelled contributions could not be found to infringe the objector's freedom of expression. The objector's individual liberty interests were not threatened because he was unlikely to be identified with the political and social causes of the union by virtue of his forced payments. Moral affront to the objector was not enough. Nor were the political process interests affected. The objector's capacity to engage in expression and support causes was not signficantly reduced as a result of his mandatory dues because he remained as free to express his views in any public or private forum as he was before the union collected his dues. It would be far-fetched to assume that the portions of mandatory dues at issue represented the last funds available to the objector for speech, and to do so would lead to unacceptable challenges to government taxes.[154]

A purposive approach to recognition of a freedom of non-association should result in a similar finding on the objector's freedom of association complaint. A compelled combining of efforts towards a common end, often required in modern society in the form of forced payments to regulatory or service associations to further the collective social welfare, should only be held to constitute an infringement on an individual's freedom of association where it can be found to affect detrimentally the constitutional interests of maintaining free and democratic political processes or individual liberty interests in terms of development of self-potential. It could even be argued that individual liberty interests can be adequately protected under the other fundamental freedoms found in subsections 2(a), (b) and (c) without the need to recognize them as interests in need of protection under a freedom of non-association. But even if one accepts the protection of individual liberty interests in terms of development of self-potential as a purpose of a freedom of non-association, it does not follow that all forms of compelled combining with others toward a common end should be regarded as violations of one's freedom of association.

In terms of the political process and individual liberty interests at stake, there are four primary dangers to those interests which various forms of forced contributions to service associations may represent and which a doctrine of freedom of non-association should guard against. The first is governmental establishment of, or support for, particular political

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[154] *Lavigne*, *supra*, note 1 at 509-11, 29 D.L.R. (4th) at 381-3.

parties or causes.[155] The second is impairment of the individual's freedom to join or associate with causes of his choice. The third is the imposition of ideological conformity. The fourth is personal identification of an objector with political or ideological causes which the service association supports. If one of these dangers is present in a governmentally supported scheme for forced payments in return for services, then the potential exists for interference with a free and deliberative democratic process or infringement of the individual liberty interest in freedom to develop one's self-potential, and the compelled association should be held to be *prima facie* violative of subsection 2(d). In the absence of those dangers, the moral affront suffered by workers or other forced contributors in seeing their forced payments ultimately used to benefit certain political causes "does not warrant constitutional prohibition of political uses of extracted funds".[156] The objector's remedy for his moral affront is to use his positive freedom to associate with others to oppose the causes he objects to, either in political processes which are internal to the service association or in the broader public political processes of the state.

If one applies this purposive standard for a freedom of non-association to compulsory agency shop dues there is no *prima facie* violation of subsection 2(d), even where the union ultimately uses agency shop fees for political activities to promote workers' interests. Government support for the forced payment of dues is not tied to the promotion of particular political perspectives or ideology, but rather to the union's provision of the service of representation of workers' interests.[157] There is simply no evidence that governments in Canada have authorized the agency shop to promote a particular political perspective. The content of political positions adopted by unions is left to be determined by the majority of workers in the bargaining unit and will often be in opposition to government positions.

Nor does the compelled payment of agency shop dues distort the free marketplace of ideas by impairing the ability of objectors to join with others in associations of their choice or support other political causes. The objector remains as free to join other associations or support other political causes as he was before the forced payment of dues, as Mr. Justice White found in his consideration of the applicant's freedom of expression arguments. The argument that objectors' capacity to associate with or support other associations or causes they favour is reduced depends on the far-fetched argument that the contested portion of the fees represents their last available funds and would also support challenges to different forms of government taxation.

Nor can it be said that the forced payment of dues, a portion of which ultimately goes to support causes to which the payor may object, involves the imposition of ideological conformity. Supporters of the New

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[155] Cantor, *supra*, note 55 at 7.
[156] *Ibid.*
[157] *Ibid.* at 35.

Democratic Party (NDP) in this country have long lamented the inability of organized labour to deliver NDP votes in provincial and federal elections and political scientists have noted the lack of a strong connection between worker representation by unions and individual workers voting in support of the NDP.[158]

Finally, as Mr. Justice White himself found in *Lavigne*, there is no basis for concluding that the forced payment of dues to a union (or other service association for that matter) results in personal identification or association of an objector with political or ideological causes which the union may ultimately choose to support using part of the objector's compelled dues. As Professor Cantor has observed in his criticisms of the American doctrine, payors are free to speak and associate as they please and "they are not compelled to identify with or embrace the ideological causes chosen by the service institution in pursuing the mutual service aim".[159] Objectors are no more personally identified with the causes supported by the union than objecting taxpayers are identified with government policies they oppose.

In summary, it should not be any form of compelled combining with others to achieve a common end which violates an individual's freedom of association. Regard should be given to the political process and individual liberty purposes of the freedom. Where compelled contribution to a service institution does not threaten those constitutional interests it should not be regarded as constitutionally suspect. Where compelled contribution to an association which provides a significant service does not entail the government establishment of a particular political party, cause or ideology, impairment of a payor's freedom to associate or express himself as he pleases, the imposition of ideological conformity, or identification with particular political causes or ideology on the part of an objecting payor, then the constitutional interests at stake are not threatened.

The standard for a violation of an individual's freedom of non-association should be one of compelled association which results in one of these dangers to the identified constitutional interests or purposes. Compelled payment of agency shop dues, a portion of which may ultimately be used to support political causes which the payor objects to, does not violate this purposive standard. The acceptance of such a purposive standard for a freedom of non-association is consistent with recognition of the need for governments, in order to further collective interests, to assign important service and regulatory functions to private and quasi-private sector service institutions and to allocate the burden of such services and regulation to all those who benefit in some sense from performance of the service or regulative function.[160] The realities of

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[158] G. Horowitz, CANADIAN LABOUR IN POLITICS (Toronto: Univ. of Toronto Press, 1968).

[159] *Supra*, note 55 at 51.

[160] *Ibid.*

government and industrial relations in a post-laissez-faire industrial society militate against the recognition of the *Lavigne* conception of the freedom of non-association, a conception of the freedom which is more consistent with nineteenth century notions of individual liberalism than it is with modern realities.

VI. Postscript

At the time of writing, the *R.W.D.S.U.*,[161] *Compulsory Arbitration*[162] and *P.S.A.C.* v. *R.*[163] cases on the positive aspects of the freedom of association had not been decided by the Supreme Court of Canada. On April 9, 1987, the Supreme Court of Canada rendered decisions in all three cases, affirming the Court of Appeal decisions in *Compulsory Arbitration* and *P.S.A.C.* v. *R.* but reversing the decision of the Court of Appeal in *R.W.D.S.U.* While not wishing to explore the ramifications of these decisions fully in this brief postscript (that is a task to be taken up in a future article), it is important to note two aspects of these decisions which have implications for the analysis in the foregoing article.

The pivotal issue in all three cases was the extent to which the freedom of association in the *Charter* would provide protection for the right to strike and bargain effectively. The upshot of the three decisions was that four out of six judges (Le Dain, Beetz, La Forest and McIntyre JJ.) held that freedom of association did not encompass protection for the right to strike or bargain collectively. In the central decision of the trilogy, the *Compulsory Arbitration* case, which provides the reasons on which the other two decisions are based, Mr. Justice Le Dain (Beetz and La Forest JJ. concurring) appeared to adopt the position that subsection 2(d) of the *Charter* did not provide general protection for the activities of an association in pursuit of its purposes or objects, but would only protect activities in association insofar as they represented the exercise of other fundamental freedoms, such as freedom of expression. Thus, three of the justices seem to have adopted an approach to the positive aspect of freedom of association that is similar to the American approach to the implied right of freedom of association. Mr. Justice McIntyre (writing alone in all three decisions) in the *Compulsory Arbitration* case also rejected the broad interpretation of subsection 2(d) which would have encompassed a general protection for associational activities necessary to further the fundamental objects of the association. However, he went further than Le Dain, Beetz and La Forest JJ. in that he held that freedom of association encompassed, in addition to protection of the right of individuals to join in consensual association with others in common

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[161] *R.W.D.S.U.*, *supra*, note 45.
[162] *Compulsory Arbitration*, *ibid.*
[163] *P.S.A.C.* v. *R.*, *ibid.*

pursuits and the collective exercise of other constitutional rights in association with others, protection for all activities pursued in association with others that a person could lawfully pursue as an individual. Thus, the state could not permit an individual to engage in an activity and yet forbid groups from doing so. But no protection was provided under subsection 2(d) for associations to do what it is unlawful for the individual to do, or for the association to do that which could not meaningfully be done by individuals acting alone. In a dissenting opinion in the *Compulsory Arbitration* case (concurred in by Madame Justice Wilson), Chief Justice Dickson found that the rights to bargain collectively and strike were protected by subsection 2(d) on the basis that freedom of association encompassed the freedom of persons to join and *act* with others in common pursuits. They appeared to adopt the broad and liberal interpretation of subsection 2(d) discussed in the foregoing article.[164]

To the extent that Le Dain and McIntyre JJ. reject a notion of freedom of association which protects the activities of persons in association undertaken to further the essential purposes of the association, their opinions undermine one of the arguments put forward in my article for not adopting the American approach to freedom of non-association in the compulsory union dues context. It would appear that after these rulings it will be difficult to argue, as I have done, that courts should regard the negotiation and enforcement of union security provisions as an exercise by the majority of workers in the bargaining unit of their constitutional freedom of association. In short, the fact that the negotiation of union security clauses may be seen as an associational activity undertaken to further the essential purpose of the association to protect the economic interests of workers, may not be regarded as a competing *constitutional* interest which the courts should consider in defining the scope of an individual worker's freedom of non-association.

However, in other respects my arguments concerning the non-adoption of an American approach to freedom of non-association in the union dues context are not undermined by these cases and, in fact, receive some support from certain views expressed by Le Dain and McIntyre JJ. concerning the inappropriateness of ongoing judicial review of complex collective bargaining legislation for its constitutional validity under the *Charter*. Both Le Dain and McIntyre JJ. question the wisdom of embarking on an interpretation of subsection 2(d) which will entail ongoing judicial review and entanglement in the area of collective bargaining legislation, legislation which is seen as involving a complex and delicate balancing of competing interests in a field which has been recognized by the Court as requiring a specialized expertise. While much of the commentary is directed towards the impact of constitutionalizing the right to strike, there is clearly a general sentiment expressed, particularly by Mr. Justice McIntyre, that courts are ill-suited to resolve questions of labour relations policy, and that they should be loathe to interfere with legislative

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[164] *Ibid.*, *see* accompanying text.

judgments concerning the appropriate balancing of competing interests in the area of collective bargaining.[165] The prospect of ongoing judicial review of legislative compromises in the area of labour legislation under section 1 of the *Charter* is viewed with some disdain by both Le Dain and McIntyre JJ. in their separate opinions. These general views on the appropriateness of judicial review of collective bargaining legislation under the *Charter* would seem to support my arguments concerning the undesirability of ongoing judicial review of union uses of compulsory dues to determine if they are for "collective bargaining", as opposed to "non-collective bargaining", purposes.

VII. ADDENDUM

On July 7, 1987, after this article had gone to press, Mr. Justice White rendered a judgment on the remedy issue in *Lavigne*.[166] The judgment adopts the American position on the appropriate remedy, as described in the article. An "opt-in" remedy was rejected in favour of an "opt-out" remedy which requires dissenting non-union members to object to the use of dues for non-collective bargaining purposes before they will be entitled to a refund of dues and a proportionate reduction in future dues. In addition, in a complex five page declaratory order, the Court ordered the union to create a procedural framework for objections to union expenditures which contains the same procedural fairness requirements as those imposed by the United States Supreme Court in *Hudson*.[167] In dealing with the actual expenditures at issue in *Lavigne*, the Court demonstrated the inherent difficulty in applying the collective versus non-collective bargaining purposes standard, particularly in its treatment of union contributions to political parties. The Court admitted that contributions to political parties may promote collective bargaining concerns but held these to be impermissible expenditures because of their "political" nature.

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[165] *See Compulsory Arbitration, ibid.* at 23-30 of the unreported decision.

[166] *Lavigne* v. *Ontario Pub. Serv. Employees Union* (7 July 1987) RE6 81-85 (S.C. Ont.).

[167] *Supra*, note 120.