

Individual and Collective Rights in Canadian Labour Law

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I. INTRODUCTION

UNIONS EXIST TO ENABLE individuals, who separately could not hope to counter large and powerful industrial forces, to resist them collectively. From the point of view of distributive justice, the intended result is desirable: a more level playing field, workers competing fairly with capitalists in the labour-capital marketplace. What may be lost in the equation are the rights of the individual worker, particularly the worker who dissents from the activities of "his" union. The individual member's subservience to union decisions is *compelled* by judicial deference to the union's perceived need for "effective bargaining authority" and "internal solidarity." It may be argued that the degree of subservience was conditioned by turn-of-the-century circumstances which no longer apply; that compelled solidarity is not *real* solidarity, and that unions in the long run do not gain from such compulsion; even that a consequence is to make unions another layer of control over workers' lives, a sort of "secondary management" rather than the intended liberating force.

This paper examines the conflict between individual and collective rights in Canadian labour law and concludes by focusing on the landmark judgment of the Supreme Court of Canada in *Lavigne v. Ontario Public Service Employees Union*.¹

In 1953 the Supreme Court of Canada decided *Smith & Rhuland Limited and the Queen, on the Relation of Brice Andrews et al.*² A union had been denied certification by the Nova Scotia Labour Relations Board on the ground that its secretary-treasurer, Bell, was

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¹ [1991] 2 S.C.R. 211, 81 D.L.R. (4th) 545 (cited to D.L.R.) [hereinafter *Lavigne*].

² [1953] 2 S.C.R. 95.

both a "dominating influence" within the union and a member of the communist party.³ For the majority, Mr. Justice Rand wrote:

To treat that personal subjective taint as a ground for refusing certification is to evince a want of faith in the intelligence and loyalty of the membership of both the local and the federation

I am unable to agree ... that the Board has been empowered to act upon the view that official association with an individual holding political views considered to be dangerous by the Board proscribes a labour organization. Regardless of the strength and character of the influence of such a person, there must be some evidence that, with the acquiescence of the members, it has been directed to ends destructive of the legitimate purposes of the union, before that association can justify the exclusion of employees from the rights and privileges of a statute [the Nova Scotia *Trade Union Act*] designed primarily for their benefit.⁴

The judgment upheld the collective right of a union to obtain certification notwithstanding the political or ideological views of its chief organizer. The decision presages two recurrent judicial attitudes: one, sympathy for a union's right to organize, be certified, and bargain collectively; two, a benign, rather paternalistic assumption that if the union's rights are protected, then individual member's rights must also be secure.

In the 1959 Supreme Court of Canada case *Syndicat Catholique des Employés de Magasins de Québec, Inc. v. Compagnie Paquet Ltée.*,⁵ a large minority of employees wished not to pay union dues. The company collected the dissenters' dues but deposited them into a special account and notified the union. The union lost an action to collect the dues in both the Quebec Superior Court and the Quebec Court of Queen's Bench. The Courts held that dues-deduction was "not a 'condition de travail' within the meaning of [Quebec's] *Professional Syndicates' Act* and ... *Labour Relations Act* and that consequently, it was outside the scope of the contracting power of the union and the company when they made their collective labour agreement."⁶ On further appeal, the majority of the Supreme Court held:

A term either is or is not a "condition de travail." The test must be its real connection with the contract of labour, and assent ... of the individual member of the bargaining unit seem[s] to me to ... have no relevancy in the determination of the question.

³ *Ibid.* per Rand J. at 96.

⁴ *Ibid.* at 99-100.

⁵ [1959] S.C.R. 206, 18 D.L.R. (2d) 346.

⁶ Quoted from the reasons of Judson J., 18 D.L.R. (2d) at 351.

The union is ... the representative of all employees in the unit for the purpose of negotiating the labour agreement. There is no room left for private negotiations between employer and employee. Certainly to the extent of the matters covered by the collective agreement, freedom of contract between master and individual servant is abrogated. The collective agreement tells the employer on what terms he must in future conduct his master and servant relations⁷

The *Syndicat Catholique* case is fundamental in Canadian labour law. It incorporates the so-called Rand formula: although not all employees need be union members, all members of a bargaining unit must pay dues (or their equivalent in charitable contribution); in exchange all participate in the employment gains secured by the union. This approach precludes any possibility of private employment contracts between individual bargaining-unit members and an employer.

The trade-off, on its face, seems reasonable. On the one hand, unions would be in an impossibly weak position if employees were allowed to negotiate individually; management could readily "break" unions if dissidents could be offered better conditions than the union had secured at the bargaining table. On the other hand, it is obvious that individual employees lack the economic power of the factory owner. Although some argue that improved working conditions for labourers should better be left to employment standards legislation, the power of money to influence legislators makes a contest between capitalist and worker no less unequal in the legislative forum. Labourers might wait long were they to forego their ability to form trade unions in favour of beneficent employment standards legislation.

But what individual employees lose in the equation is not trivial. Individual employees are not parties to the contract which governs their terms and conditions of employment. Individual rights *vis-à-vis* their employer are replaced by rights in respect of their union, which, in turn, is mandated to advance the interests of bargaining-unit members. But the rights of an individual worker *vis-à-vis* his union are of a different sort from contract rights; they are largely "democratic" rights and, as such, are less malleable to individual will.

Professor David Beatty contends that even the "Rand-formula" compromise robs individuals of liberty:

If a worker wants to participate in the formulation and administration of the rules which govern how she can realize her occupational objectives, the principle of exclusive representation requires her to join the association which has been granted this decision-

⁷ *Ibid.* at 353-354.

making monopoly by the state. Because the principle makes the union chosen by the majority of workers the exclusive agent for all dealings between employers and their employees, a worker must join that particular union in order to be able to participate in the collective processes of industrial government. Practically speaking she has no other choice. To say that a person must give up the benefits of participation and personal self-government that the legislation is intended to promote, unless she joins an association which may be antagonistic to her beliefs, entails a degree of coercion which is no different to [sic] the imposition of a fine. If the worker insists on her freedom to remain outside that organization she cannot, by definition, have any further involvement in the decision-making processes except in trivial and peripheral ways. If the parallel principle were applied to the rule-making processes of our society at large, it would mean all opposition members in Parliament would have to take out membership in the government party if they wished to have any further involvement in the legislative and executive processes of government.⁸

The completeness of an employee's loss of personal power is emphasized in *Syndicat Catholique* when the Supreme Court asks:

How did this compulsory check-off of the equivalent of union dues become a term of the individual employee's contract of employment? They were told by the notice that in future this deduction would be a term of their contract of employment. They were put to their election at this point either to accept the new term or to seek other employment. They made their election by continuing to work and the deductions were actually made⁹

The phrase "or to seek other employment" is reminiscent of the old joke about a boss's "open door policy": "the door is always open; if you don't like it here, you can walk out the door and work elsewhere."

The *Syndicat Catholique* reasoning was reinforced by the majority decision of Chief Justice Laskin in *McGavin Toastmaster Ltd. v. Ainscough*.¹⁰ In that case, some employees illegally struck (a term of the collective agreement forbade strikes during the currency of the agreement), following which the company closed its plant. The employees claimed severance pay pursuant to their collective agreement, but the company refused, taking the position that by striking illegally, each employee had fundamentally breached and repudiated his employment contract, and hence, had lost all rights to claim collective-agreement benefits. The employees had not been discharged, the company contended, but each had elected to leave the company's employ. Mr. Justice Laskin ruled as follows:

⁸ *Putting the Charter to Work* (Kingston and Montreal: McGill-Queen's University Press, 1987) at 137.

⁹ *Supra* note 5 at 354.

¹⁰ [1976] 1 S.C.R. 718, (1975), 54 D.L.R. (3d) 1 (cited to D.L.R.).

The reality is, and has been for many years throughout Canada, that individual relationships as between employer and employee have meaning only at the hiring stage and even then there are qualifications which arise by reason of union security clauses in collective agreements. The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective agreement which, as the one involved here, deals with discharge, termination of employment, severance pay and a host of other matters that have been negotiated between union and company as the principal parties thereto¹¹

Thus in *McGavin Toastmaster*, the merging and loss of individuals' rights in those of the collective operated as a shield for workers. The striking employee may not fundamentally breach, or repudiate, a contract of employment because he is not a party to it.

Nevertheless, unions are not omnipotent. In *Hoogendoorn v. Greening Metal Products and Screening Equipment Company and the United Steelworkers of America, Local 6266*,¹² the individual unit member, Hoogendoorn, refused to sign a document authorizing union dues. Union and management agreed to submit the issue to a single arbitrator for adjudication. Hoogendoorn was neither notified of the arbitration hearing nor given opportunity to intervene. The arbitrator found that collective bargaining required dues payment for Hoogendoorn, and that, because of his refusal to contribute, Hoogendoorn should be dismissed. The case was appealed to the Supreme Court of Canada; Hall J. held:

[T]he learned arbitrator correctly understood what he was adjudicating upon, namely, Hoogendoorn's continued employment and nothing else The arbitration proceeding was unnecessary as between the union and the company. Both fully understood and agreed that the collective agreement required Hoogendoorn to execute and deliver to the company a proper authorization form for deduction of the monthly union dues being paid by members of the union. Both wanted him to do so Both knew he was adamant in his refusal. The proceeding was aimed at getting rid of Hoogendoorn as an employee because of his refusal either to join the union or pay the dues. It cannot be said that Hoogendoorn was being represented by the union in the arbitration proceeding. The union actively took a position completely adverse to Hoogendoorn. It wanted him dismissed.

[I]t was improper for the learned arbitrator to proceed as he did in Hoogendoorn's absence. The issue here is whether natural justice was done by proceeding in his absence and without notice to him.¹³

¹¹ *Ibid.* at 5-8.

¹² [1968] S.C.R. 30.

¹³ *Ibid.* at 38-41.

The Supreme Court held that the arbitrator violated the principles of natural justice by ordering Hoogendoorn's dismissal. Thus, the Court subordinated the union's right to make decisions binding on the membership to the superordinate requirement of natural justice. But Hall J. was not unopposed. Judson and Ritchie JJ. dissented; concurring, Cartwright J. emphasized that "the decision in this appeal turns on the peculiar facts of the case."¹⁴

Individual rights were also protected in *Re Ontario Public Service Employees Union and Forer*.¹⁵ Forer, a member of O.P.S.E.U. which in turn is a member of the Ontario Federation of Labour and the Canadian Labour Congress, invoked a section of the *Crown Employees Collective Bargaining Act* which allows an employee whose religious convictions preclude paying union dues to direct an equivalent amount to a charitable organization.¹⁶

Forer, who was a member of the Lubavitch Hasidim sect of the Jewish people, objected to an O.F.L. resolution calling upon the C.L.C. to recognize the Palestinian Labour Organization (P.L.O.) as the legitimate representative of the Palestinian people.

The Ontario Court of Appeal held:

It cannot be said that [the Tribunal's] interpretation of s. 16(2) was patently unreasonable when it held that Forer was entitled to exemption from paying dues to OPSEU "because of his religious convictions and belief."

... The words "his religious conviction and belief" must be considered from the subjective point of view of the applicant. The Tribunal must be convinced that the applicant's views are sincerely held as religious convictions in order to ensure that they are not advanced as a subterfuge to escape the payment of dues. The Tribunal cannot impose its own or any other *a priori* view of what is "religious" on the applicant. The word "religious" does not require that the individual's beliefs must be the tenets of any religious denomination. Only in rare cases will it be necessary to test an applicant's convictions against some objective definition of the word "religious."¹⁷

¹⁴ *Ibid.* at 32.

¹⁵ (1985), 52 O.R. (2d) 705 (O.C.A.).

¹⁶ R.S.O. 1980, c. 108, s. 16(2): Where the Tribunal is satisfied that an employee because of his religious convictions or belief objects to paying dues or contributions to an employee organization, the Tribunal shall order that the provisions of the collective agreement pertaining thereto do not apply to such employee and that the employee is not required to pay dues or contributions to the employee organization, provided that amounts equivalent thereto are remitted by the employer to a charitable organization mutually agreed upon by the employee and the employee organization and failing such agreement then to such charitable organization registered under Part I of the *Income Tax Act* (Canada) as may be designated by the Tribunal.

¹⁷ *Supra* note 15 at 708.

By placing primacy on the subjective views of the objector, the court clearly favoured the rights of the individual over those of the group. But one must note that the religious exemption is a narrow one and not uniformly granted.

Rules governing workers' relations with their employers, with their unions, and with others in the collective bargaining context have been promulgated in various Labour Relations Acts usually incorporating some version of the Rand formula. General rules also arise from determinations of Labour Relations Boards, of arbitrators, and of courts. It is ironic, therefore, that in *RWDSU v. Dolphin Delivery Ltd.*,¹⁸ a case in which secondary picketing was in issue, the Supreme Court of Canada held that the *Canadian Charter of Rights and Freedoms* guarantee of free expression could not be invoked because there was no governmental action.

The facts of *Dolphin Delivery* were these: locked-out employees of Purolator Courier wished to picket the business place of Dolphin Delivery Ltd.; the latter's collective agreement had a clause legitimizing refusal to cross a picket line established in compliance with the *British Columbia Labour Code*. The RWDSU, a federally certified union representing Purolator's workers, applied to the B.C. Labour Relations Board for a declaration that Purolator, another company named Supercourier Ltd., and Dolphin Delivery were all "allies." The effect of such a declaration would have been to render lawful the picketing of Dolphin. The Board, however, held that it had no jurisdiction because the union was federally certified. Since the *Canada Labour Code* was silent on the issue, the lawfulness of the picketing fell to be determined under common law. Dolphin sought and obtained an injunction to prevent the picketing before any occurred. In the Supreme Court of Canada, the main issue canvassed was whether the injunction given by the lower court and based upon the common law tort of inducement to breach of contract violated the *Charter's* free-expression guarantee.

McIntyre J., writing for the Supreme Court majority, held that:

... The *Charter* would apply to many forms of delegated legislation, regulations, orders-in-council, possibly municipal by-laws, and by-laws and regulations of other creatures of Parliament and the Legislatures Where such exercise of, or reliance upon, governmental action is present and where one private party invokes or relies upon it to produce an infringement of the *Charter* rights of another, the *Charter* will be applicable. Where, however, private party "A" sues private party "B" relying on the common law

¹⁸ [1986] 2 S.C.R. 573.

and where no act of government is relied upon to support the action, the *Charter* will not apply

In the case at bar ... we have no offending statute. We have a rule of the common law which renders secondary picketing tortious and subject to injunctive restraint, on the basis that it induces a breach of contract. While ... the *Charter* applies to the common law, we do not have in this litigation between purely private parties any exercise of or reliance upon governmental action which would invoke the *Charter*. It follows then that the appeal must fail.¹⁹

Given that government legislation establishes collective bargaining regimes, controls the formation of unions, sets out their rights and obligations in respect of employers, members, and the general public, it seems unrealistic to characterize unions as "purely private parties." Is not the Court's interpretative function, albeit what is being interpreted is common law, sufficient state involvement to make the *Charter* applicable? Apparently not; McIntyre J. wrote as follows:

While in political science terms it is probably acceptable to treat the courts as one of the three fundamental branches of government, that is legislative, executive, and judicial, I cannot equate for the purposes of *Charter* application the order of a court with an element of governmental action. This is not to say that the courts are not bound by the *Charter*. The courts are, of course, bound by the *Charter* as they are bound by all law. It is their duty to apply the law, but in doing so they act as neutral arbiters, not as contending parties involved in a dispute. To regard a court order as an element of governmental intervention necessary to invoke the *Charter* would, it seems to me, widen the scope of *Charter* application to virtually all private litigation. All cases must end, if carried to completion, with an enforcement order and if the *Charter* precludes the making of the order, where a *Charter* right would be infringed, it would seem that all private litigation would be subject to the *Charter*. In my view, this approach will not provide the answer to the question.²⁰

Beyond the "floodgates" aspect, the real concern addressed here is not clear. Section 52(1) of the *Constitution Act, 1982* provides that "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of inconsistency, of no force or effect." Section 32(1) of the *Charter* (which is Schedule B of the *Constitution Act, 1982*) stipulates as follows:

32(1) This Charter applies

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

¹⁹ *Ibid.* at 602-604.

²⁰ *Ibid.* at 600-601.

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

If the courts had been held by the Supreme Court majority to be part of the "government of Canada" or "government of each province", the effect would have been to render court orders reviewable in light of the *Charter*, but nothing more. A jurisprudence would quickly have sprung up, probably justifying most types of orders currently made, with some balancing done under s. 1 of the *Charter*. In short order that jurisprudence would likely have throttled the flow of cases to a trickle. The harm that would have been wrought on Canadian society is not obvious. If the *Constitution* (and, therefore, the *Charter*) truly is the "supreme law of Canada," should judges be issuing orders that are not in conformity with it? Should they be permitted to grant orders violating a *Charter* right or freedom if such orders have not been demonstrated to be "justified in a free and democratic society?"

Professor Beatty has commented on this issue:

Any ambiguity that the word "government" entails dissolves when it is read in the context of the *Charter* as a whole. In particular s. 52 points strongly to the conclusion that all three branches of government must respect our new constitutional constraints. That section states clearly and unequivocally that, as part of the constitution, the *Charter* is the supreme law of Canada and *any law [sic]* which is inconsistent with its terms has no legal force or effect. To read the language in s. 32 to refer only to the legislative and executive but not the judicial arm of government would entail, as a matter of consistency, a parallel interpretation of s. 52, thereby excluding the common ... law from its terms.

... It is difficult to imagine how any counter-argument could possibly be sustained. Limiting the application of the *Charter* to the executive institutions of government would mean the courts, which have been assigned the function of infusing our constitutional values into the structures of state, could themselves ignore, or even worse, deliberately violate, its terms. It would mean that in defining and fleshing out the principles and rules which make up our labour code, legislators, members of the executive, and their subordinate agents ... would be obliged to respect the rights and freedoms of every individual in our society but judges would not.²¹

If a union is a "purely private party," notwithstanding the government regulation superimposed upon it, individual members would seem to be unable to invoke the *Charter* in respect of the unions' behaviour towards them. Members, having had their rights reduced to the "merely democratic" within the union collectivity, find themselves unable to invoke the supreme law of Canada, the *Charter of Rights and Freedoms*.

²¹ *Supra* note 8 at 56-57.

The issue came squarely before the Supreme Court of Canada in *Lavigne v. Ontario Public Service Employees Union*.²² Lavigne, a teacher in Ontario's Community College system, mandatorily paid dues to O.P.S.E.U., but chose not to be a union member. He objected to the union's use of the dues it collected for, amongst other things donations to disarmament campaigns, to a campaign opposing the public financing of the building of the SkyDome stadium in Toronto, financial support of the N.D.P., etc.²³ The Supreme Court found that the requirement to pay dues arose from a term of the collective agreement between O.P.S.E.U. and the Ontario Council of Regents:

[The] Council of Regents is controlled by government. [It] is a statutory body designated by the legislation as a Crown agent and entirely composed of members appointed by the Lieutenant-Governor in Council Under the regulations the boards of governors of the colleges are subject to the control of the council which in turn is subject to the control of the Minister The council is responsible for collective bargaining ... [and] ... has exclusive responsibility for all negotiations on behalf of employers covered by the [*Colleges Collective Bargaining*] Act.

... [T]he school (including the Council of Regents) is an agent of the Crown.²⁴

As for the status and proper characterization of the union, Madame Justice Wilson held that "It goes without saying that unions are not ... government entities. Indeed, part of the *raison d'être* of unions, especially public sector unions, is to challenge and work in opposition to government."²⁵ Nevertheless,

Because the *Charter* applies to government, the issues of liability and relief can only be determined in relation to government and not private actors.

²² *Supra* note 2. I do not suggest that *Lavigne* and the other cases cited herein exhaust Canadian judicial commentary on the issue of group rights of unions. The so-called "trilogy of labour cases" — *PSAC v. Canada* [1987] 1 S.C.R. 424, *RWDSU v. Saskatchewan* [1987] 1 S.C.R. 460, and *Reference re Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313, in the Supreme Court of Canada — all address the impact of s. 2(d) of the *Charter* on the rights of unions to bargain collectively, to strike, and so on, but they touch only by inference on rights of individuals within the group. Similarly tangential is *Arlington Crane Service Ltd. v. Ontario (Minister of Labour)* (1988), 67 O.R. (2d) 225 (O.H.C.) wherein the individual never got into the bargaining unit, and so the issue of the individual's right versus the group's *within* the union was not directly addressed. Thus *Lavigne*, it is submitted, constitutes the highest (and most recent) case dealing squarely with the issue which is the subject of this paper.

²³ per Wilson J. at 552.

²⁴ *Ibid.* at 566–567.

²⁵ *Ibid.* at 565.

... [T]he fact that the impugned action is a product of the joint effort of government and a private entity does not make that action any less governmental for the purposes of s. 32(1) [of the *Charter*]. Were it otherwise, all government contracts would be immune from judicial review. I cannot accept that government should be able to avoid its constitutional obligations simply by electing to govern its affairs through the vehicle of contract.²⁶

Can one then infer that members of public sector unions have access to *Charter* protection while other organized workers do not? Ought the employer's identity to determine such a crucial issue?

In summary, on this branch of her enquiry, Madame Justice Wilson found:

... that government action sufficient to attract *Charter* review is present in this case in so far as the adoption of the Rand formula is concerned. This result flows from the fact that it was a government entity which participated in agreeing to this form of union security. Also, while it is not necessary to our conclusion, it is also the fact that government exercised particular and substantial control over this act thereby bringing it into the category of government action. With respect to the issue of how the dues are spent, I have found that the dues expenditure is not itself government action, and therefore the *Charter* does not apply to such expenditure.²⁷

While logically pleasing, Judge Wilson's separation of the collection from the expenditure of the dues obviates the essence of Lavigne's complaint. What concerned Lavigne (if not necessarily his sponsors) was the *combined effect* of those two features — that he was compelled to contribute through the union to causes, *apparently without limit*, which were to him abhorrent. Though the sponsor — the National Citizens' Coalition — may have had in mind the complete destruction of the Rand formula, there is no evidence that Lavigne himself had so broad an agenda.

In the Supreme Court of Ontario,²⁸ White J. addressed Mr. Lavigne's concern squarely; in the words of Madame Justice Wilson, "he concluded that dues paid under compulsion could only be used for the purpose which justified their imposition and not for other purposes."²⁹ In his separate concurring Supreme Court of Canada judgment, Mr. Justice La Forest seems similarly to have grasped the issue:

²⁶ *Ibid.* at 565, 568.

²⁷ *Ibid.* at 571.

²⁸ (1986), 29 D.L.R. (4th) 321, 55 O.R. (2d) 449.

²⁹ *Lavigne, supra* note 1 at 554.

The appellant surely can argue that the legislature or the Council of Regents violated his freedom of association and expression by entering into an arrangement forcing him to contribute to the union knowing that it would spend money on things that have only a minimal or no relation to collective bargaining. In this respect, one could put the question in this appeal as follows: given that the union spends money in the manner it does, can the council or the legislature constitutionally force the appellant, and others in his position, to contribute to the union's coffers, without limiting the use to which the money so contributed is put?³⁰

On the issue of the *Charter's* s. 2(d) freedom-of-association guarantee, Wilson J. took an uncharacteristically narrow approach, again fearing to open the floodgates:

[T]he appellant has not advanced sufficiently compelling reasons to justify extending freedom of association, having regard to its purpose, to include freedom not to associate [O.P.S.E.U.] argued that to include a negative freedom of association within the compass of s. 2(d) would set the scene for contests between the positive associational rights of union members and the negative associational rights of non-members. To construe the section in this way would place the court in the impossible position of having to choose whose s. 2(d) rights should prevail. I agree with counsel for the respondent that an interpretation leading to such a result should be avoided if at all possible.³¹

Why is not s. 1 of the *Charter* appropriate for precisely such balancing? The Courts, particularly Wilson J. and her Supreme Court colleagues, have not shied away from such delicate balancing in areas with more worrisome public ramifications (e.g., criminal law). To note that unions would not have survived without government intervention is trite; so is the necessity to abridge individual's rights in favour of unions' rights to ensure survival, as was recognized by so great a civil libertarian as Mr. Justice Ivan Rand.³² Policing the boundaries of the

³⁰ *Ibid.* at 617.

³¹ *Ibid.* at 579.

³² See *Ford Motor Co. of Canada Ltd. v. U.A.W.-C.I.O.*, reprinted in 1 Can. Lab. L. Rep. (CCH, 1989), para. 2150, as cited in *Lavigne*, *supra* note 1 at 599. This is the interest arbitration which first presented the "Rand formula," used by Wilson J. in *Lavigne* (at 599) in support of non-restriction of unions' expenditures of dues:

Justice Rand ... was ... fully aware that the union involved in that case ... had long supported the C.C.F. Rand J. none the less ordered compulsory dues check-off and placed no restriction on the expenditure of non-member dues. The only obligation he imposed on the union in awarding the agency shop was that dues deductions be carried out in accordance with the union's constitution and that non-members receive the same representational benefits as members.

But note the paternalism, verging on snobbishness, in what Rand J. actually wrote:

socially imposed "contract" is to be expected of the highest court in its

It has been suggested that the union officers, as other labour leaders, are primarily concerned with the maintenance of their positions and power and no doubt some of them have experienced stirrings of that nature. But union organization is admittedly necessary in the present set-up of our society and we cannot expect these men who have gifts of leadership ... to be quite free of those human frailties from which only few saints escape. The only effective remedy for abuse of this nature is a greater democratization of the union.

...
The large body of employees from their stature and their average skills are inescapably of a class that must be governed more or less in the mass and by mass techniques and one chief object of the plant law is to diffuse authority among the labour representatives to make administration as flexible as possible. But in such a body we cannot look for that generalized individuality in understanding and appreciation of the necessity for employee organization which craftsmen have tended to evolve. Their objectives and their conception of union functions are much too simplified for that Then too, the union has little to offer the men except their plant law: there is less individual appeal of or opportunity for social activities or union benefit provisions than in other cases of labour. In these conditions, it is, in my opinion, essential to the larger concern of the industry that there be mass treatment in the relation of employees to that organization that is necessary to the primary protection of their interests.

...
The obligation to pay dues should tend to induce membership, and this in turn to promote that wider interest and control within the union which is the condition of progressive responsibility. If that should prove to be the case, the device employed will have justified itself. The union on its part will always have the spur to justify itself to the majority of the employees in the power of the latter to change their bargaining representatives.

...
Whether the constitution of the union is sufficiently democratic in securing the powers of the members or such money power is dangerous are matters which concern the members and the public. The remedy lies essentially in the greater effectiveness of control in the members; but outside interference with that internal management is obviously a matter of policy for the legislature. [*Ford, supra* 32 at 1119-20, 121].

Given his consciousness of the need for some sort of check on the union's powers within the scheme he was establishing, Mr. Justice Rand not surprisingly prescribed a standard for democratic reviewability which is strikingly low by today's measures: at "Term 5" of his award, he mandates that "At any time after the expiration of ten months from the date of the agreement and from time to time thereafter but with not less than one year between balloting, not less than 25 per cent of all employees to whom it applies may on application to the Minister of Labour for Ontario obtain a secret ballot ... for the selection of a bargaining agent ..." [*Ibid.* at 1123]. It is interesting to speculate as to whether Rand J., had he adjudicated during the currency of the *Charter*, would have been quite so ready, as later Supreme Court of Canada judges, to deny the protections of that document to individual members of organized work places in dealings with their so-called "mini-governments."

interpretation and application of the highest law of the land. Whence came the judicial skittishness, unless from a particular, pre-formed social consciousness? Is hallowing the compromise acceptable because in our society it is applied primarily to wage labourers? Would the judge have found more reason to intervene had the union, through an internal democratic majority vote, decided to donate money to the Ku Klux Klan?

There is an uncritical quality (again, highly uncharacteristic) to Madame Justice Wilson's analysis of the condition of a bargaining-unit dissident:

[R]estricting the reach of s. 2(d) to positive associational rights best accords with a serious and non-trivial approach to *Charter* guarantees It is a fact of our civilization as human beings that we are of necessity involved in associations not of our own choosing. That being so it is naive to suggest that the Constitution can or should enable us to extricate ourselves from all the associations we deem undesirable. Such extrication would be impossible and even to attempt it would make a mockery of the right contained in s. 2(d).

Several examples were cited in oral argument which demonstrate how a right not to associate would lead to absurd results. The most compelling of these was the analogy drawn to the mandatory payment of taxes. Following the line of logic which the negative freedom analysis commands, our system of taxation arguably brings all taxpayers into forced association with the political party in power, its policies and the uses to which our tax money is put. If it were the case that s. 2(d) protected such compelled associations, all taxpayers with a grievance to air would theoretically be able to come before the courts and insist that each tax expenditure be subjected to analysis under s. 1.

[T]here is no distinction in principle between our overall system of government and the role of taxation within it and the mini democracy of the workplace.³³

The taxation analogy rings false in the context of Justice Wilson's insistence that unions are not governmental entities but purely private parties. What is it that is unique about working people that renders philosophically permissible the imposition on them of private "mini-governments" with powers she finds analogous to state taxation? Moreover, taxation is a special case. It is not uncommon for religious objectors to be allowed to have the equivalent of union dues directed to charity. No such option exists in tax law.

No doubt we are not solitary animals in a jungle, and the essence of civilization is co-operation for the common good. Law *per se* compromises individual rights in favour of the group. We generally accept such laws because their beneficial consequences outweigh their negative infringement on liberties, or else because our objection is

³³ *Lavigne, supra* note 1 at 580.

insufficiently strenuous to occasion civil disobedience (or even, perhaps, to warrant the time, money and stamina required to litigate to the Supreme Court of Canada). Madame Justice McLachlin, in her separate but concurring judgment in *Lavigne*, notes that feature of social existence in advancing her own “floodgates” argument:

[E]xtending s. 2(d) to cover compelled financial contributions *per se* would recognize the *prima facie* validity of a plethora of claims and put the courts into the business of assessing the justifiability of a great many government actions ... — in circumstances where there may be “no threat to any constitutional interest,” as the Court of Appeal put it. Examples of potential claims abound. Customers of telephone companies are compelled to pay government-set rates for provision of a service that could be regarded as a necessity; does that mean that gives individuals the constitutional right to object to company expenditures of which they do not approve? If tax revenues are used to support a particular regime in a foreign country (as, for example, happened when Canada subsidized the building of a Canadian nuclear reactor in Romania), is the taxpayer who objects to the regime forced to “associate” with it, or with other taxpayers who may support our government’s policy? If a government expends funds for the performance of abortions, is a person who morally objects to abortions entitled to withhold taxes?³⁴

Her Ladyship might have added that most Canadian jurisdictions compel car insurance; that compulsion, some argue, forces each driver into association (much like *Lavigne*’s with O.P.S.E.U.) with insurance companies, many of which, no doubt, make political contributions out of premium profits to political parties to which one might object. But one can switch insurance companies until one finds a satisfactory one (at least in theory), whereas one cannot switch unions and still teach in Ontario’s Community College system. Madame Justice McLachlin notices that difference when she finds that:

The need for compromises such as the Rand formula arises from the fact that Canadian labour relations generally permit only one union to represent all employees in a designated work grouping. This may be contrasted with the quite different system prevailing in parts of Europe, where a worker may choose between several different unions. In a system which permits only one union, there may be workers who do not wish to associate themselves with it.³⁵

Just so, but why does the judge not then conclude that under such a regime individuals’ rights deserve greater protection?

Justice McLachlin’s questions do not seem entirely rhetorical. It may well be that the Constitution is seldom if ever invoked to set limits on

³⁴ *Ibid.* at 647.

³⁵ *Ibid.* at 644–645.

actions of telecommunications companies operating under government-set rates, but that limitations are established is certain — not merely in respect of rates but also in respect of performance. It is difficult to imagine regulatory bodies, perhaps even courts, not considering or responding to complaints arising from a decision of Bell Canada to donate a portion of profits acquired from government-set rates to say, a group favouring abortion on demand or, perhaps, an end to the use of animals in medical research. Would not the C.R.T.C. at least consider whether, in the circumstances, it had allowed the rates to be set too high?

Other analogies used by McLachlin J. are of no greater assistance; for example,

The fact that one pays money which may ultimately be expended in support of a cause does not necessarily associate with the cause. In buying an automobile, for example, one does not by paying money to the dealer indicate any support for the way the dealer or the manufacturer of the vehicle may spend the portions of the price it retains as profit [T]he payment is devoid of ideological content. It is merely an exchange for something one wants.³⁶

Again, the comparison is not apt. Unions are not usually thought of as profit-making bodies. The money they expend is avowedly spent on behalf of union members, of all bargaining-unit members equally in the provision of services, of all workers generally if the political component is fully accepted. The value and place of unions in modern society, not to mention those projects and groups which they support, would not be characterized by most as “devoid of ideological content.” The dissident individual may not even be getting, in the exchange, “something [he or she] wants.” He or she might have wanted a car but instead have acquired a propagandist.

Madame Justice McLachlin adopts as “apposite” the comments of Normal L. Cantor in “Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association.”³⁷ That portion of his article which she reproduces is devoid of analysis and merely asserts Professor Cantor’s opinion, but the fact that it is invoked in support of her analysis invites comment. Here is part of the quotation:

Government should be able to assign certain important functions, such as labour representation, to the private sector and to distribute related costs to all those who

³⁶ *Ibid.* at 645.

³⁷ (1983) 36 Rutgers L. Rev. 3 at 7.

benefit from the performance of that function. The constitutional interests genuinely at stake do not preclude the collection of service fees from ideologically offended payors.³⁸

Is there then, according to that view, any limit to the government's ability to "assign ... important functions ... to the private sector" and thereby to render *Charter* guarantees moot?

McLachlin J. indicates that she is "inclined to the view that the interest protected by s. 2(d) goes beyond being free from state-enforced isolation In some circumstances, forced association is arguably as dissonant with self-actualization through associational activity as is forced expression."³⁹ But she finds that s. 2(d) does not apply to the *Lavigne* circumstances.

Mr. Justice La Forest, in separate but ultimately concurring reasons in *Lavigne*, has less difficulty than many of his colleagues with the notion that freedom of association includes freedom not to associate:

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

In my view, the answer is clearly yes. Forced association will stifle the individual's potential for self-fulfilment and realization as surely as voluntary association will develop it. Moreover, society cannot expect meaningful contribution from groups or organizations that are not truly representative of their memberships' convictions and free choice Recognition of the freedom of the individual to refrain from association is a necessary counterpart of meaningful association in keeping with democratic ideals.

... Government tyranny can manifest itself not only in constraints on association, but in forced association. There is no logical inconsistency in accepting this reality. Nor do I accept the proposition that including the right to be free from compelled association within the reach of s. 2(d) will weaken or "trivialize" the cherished right to be free to form associations. It will do nothing but strengthen it.⁴⁰

But he is not dogmatic:

Realistically ... the organization of our society compels us to be associated with others in many activities and interests which justify state regulation of these associations. Thus I doubt that s. 2(d) can entitle us to be free of all legal obligations that flow from membership in a family. And the same can be said of the workplace. In short, there are certain associations which are accepted because they are integral to the very structure of society. Given the complexity and expansive mandate of modern government, it seems clear that some degree of involuntary association beyond the very basic foundation of

³⁸ *Lavigne*, *supra* note 1 at 646.

³⁹ *Ibid.* at 643

⁴⁰ *Ibid.* at 623-625.

the nation state will be constitutionally acceptable, where such association is generated by the workings of society in pursuit of the common interest. However, as will be seen, state compulsion in these areas may require assessment against the nature of the underlying associational activity the state has chosen to regulate.⁴¹

Mr. Justice La Forest, supported by Sopinka and Gonthier JJ., holds that Lavigne's freedom of association was infringed in contravention of s. 2(d) of the *Charter*, but that the infringement was demonstrably justified in a free and democratic society. La Forest J. then makes these interesting comments about his colleagues' contrary views:

My colleagues propose a much narrower approach to the right of association than that adopted in the United States or in this country by limiting it *in the abstract* [sic] — Wilson J. by restricting the right to its "positive" aspects, and McLachlin J. by adopting a restrictive approach to the purpose of the right. This narrowing of the right ... is contrary to the generous approach *Big M Drug Mart* instructs us to take to constitutional rights, and gives inadequate attention to the fact that the *Charter* provides a flexible instrument to tailor the right in context by means of s. 1, which permits such reasonable limits as may be necessary in a free and democratic society.

It is somewhat ironic that in the United States, where there is only a right of freedom of expression, the courts have extended this concept to protect against forced payments to ideological causes, even where there is no personal identification with the payor. In Canada, where we have an explicit right of freedom of association, and a mandate of broad interpretation with the additional possibility of limitation under s. 1, my colleagues would hold that forced payment in support of ideological causes does not even amount to a *prima facie* violation of an individual's rights.⁴²

On the applicability of s. 2(d), La Forest J. concludes that:

... whatever the precise dividing line may be, the appellant has sufficiently discharged the burden of establishing that his rights under the *Charter* have been infringed in this case. Expenditures relating to items such as the disarmament movement and opposition to the SkyDome violate the appellant's freedom of association under s. 2(d) of the *Charter*, as these expenses are not sufficiently related to the concerns of the appellant's bargaining, or to the union's functions as exclusive bargaining representative.⁴³

Civil libertarians may take comfort in these words but only briefly; in his section 1 analysis, Justice La Forest holds that the two government objectives of ensuring "that unions have both the resources and the mandate necessary to enable them to play a role in shaping the political, economic and social context within which particular collective agreements and labour relations disputes will be negotiated and

⁴¹ *Ibid.* at 626.

⁴² *Ibid.* at 634.

⁴³ *Ibid.* at 635.

resolved"⁴⁴ and "contributing to democracy in the workplace"⁴⁵ are sufficiently pressing and substantial to warrant overriding the *Charter* freedom. The means chosen to achieve those objectives are rationally connected to them because:

Compelling contributions by all represented by the union, all who benefit from the union's attempt to push the general political, social and economic environment in a direction favourable to unions and their members, provides the union with the stable financial base needed to underwrite political, economic and social activism. The fact that no restriction is placed on the manner in which contributed money is expended leaves the decision as to what is and what is not in the interests of the union and its members in the hands of the union membership. It, therefore, clearly has the effect of promoting democratic unionism.⁴⁶

Turning to the issue of whether the means chosen to further the government's objections impairs *Charter* rights as little as possible, Justice La Forest admits the possibility of an argument in favour of allowing an individual to "opt out" of paying dues "to the extent that such dues are spent promoting opinions or organizations with which they disagree." Alternatively, the government could impose guidelines on what causes are "within the legitimate area of interest of unions."⁴⁷ The "opting out" alternative is rejected by the Judge as being likely to undermine a union's financial base, even (perhaps) its membership base, but does not such a concern call into question the fundamental *raison d'être* of unions as representatives of their members? Justice La Forest asserts, "[T]he ability to opt out would undermine the spirit of solidarity which is so important to the emotional and symbolic underpinnings of unionism."⁴⁸ That approach is based on several assumptions: one is that the "to-the-extent" amount would ever be significant enough in the context of over-all dues to provide the inducement feared. Another is that unions, as presently constituted in Canada, are *per se* good, and necessarily to be encouraged. In the *Charter* context, acquiescing to the infringement of a fundamental freedom because of "emotional and symbolic underpinnings" has a curious ring.

⁴⁴ *Ibid.* at 636.

⁴⁵ *Ibid.* at 637.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.* at 637

⁴⁸ *Ibid.* at 638.

Mr. Justice La Forest is also concerned that "Under an opting-out regime, the criteria under which expenditure decisions will be made may well become the acceptability of proposed expenditure to those likely to exercise the right to opt out, rather than a genuine attempt to identify and pursue what is in the best interests of those represented by the union."⁴⁹ While that is not exactly a "floodgates" argument, it is curious that the judge would countenance what he has found with certainty to be an infringement of a *Charter* right out of fear lest something uncertain might happen in future. Indeed, La Forest J. does not appear to read the American experience in the same way as do his colleagues: "It is also worth noting that in the United States, although the courts have adopted a somewhat more rigorous approach, the simple fact is that the legal system has not been subjected to an uncontrollable flood of litigation."⁵⁰ His concerns regarding the "guidelines" option are *sui generis*:

... this could give rise to the implication that union members are incapable of controlling their own institutions. This kind of paternalism would not do much for the status of unions as self-governing and democratic institutions. Just as importantly, I would draw attention to ... the difficulty of determining whether a particular case is or is not related to the collective bargaining process Where one chooses to draw the line will depend on one's political and philosophical predilections, as well as one's understanding of how society works [I]t would be highly unfortunate if the courts involved themselves in drawing such lines on a case-by-case basis. Such a result would ensue if the court were to conclude that the limits on the appellant's s. 2(d) rights in this case were not "demonstrably justified in a free and democratic society."⁵¹

But does the presence of "guidelines" — the *Charter* — in Canadian society at large "give rise to the implication" that citizens are "incapable of controlling their own institutions?" Under the *aegis* of the *Charter*, courts frequently draw lines dependent on "one's political and philosophical predilections, as well as one's understanding of how society works," in many instances — for example, in the criminal law — "on a case-by-case basis." Why would that be particularly "unfortunate" in the labour context?

In the result, four Supreme Court judges — Wilson, L'Heureux-Dubé, Cory and McLachlin JJ. — found that the *Lavigne* circumstances did not demonstrate a violation of the individual's s. 2(d) rights (or any other *Charter* violation); three judges — La Forest,

⁴⁹ *Ibid.* at 639.

⁵⁰ *Ibid.* at 640

⁵¹ *Ibid.* at 639.

Sopinka, and Gonthier JJ. — found that s. 2(d) freedom of association was infringed, but that the violation was demonstrably justified in a free and democratic society. None found any violation of s. 2(b) freedom of expression.

All the judges gave deference to the concept of democracy in the workplace and to an implied need for government to bolster it, so much so that courts ought not to intrude. None remarked on the difficulties individual members face in trying to enforce such democracy, without *Charter* protection and without recourse to the Courts.

Absent *Charter* protection, what is so paternalistically thrust on workers is not workplace democracy but, rather, something tantamount to another layer of management possessing an additional level of control over workers' lives.

II. CONCLUSION

THE HISTORICAL PURPOSE OF unions, broadly speaking, was to increase the dignity of workers' lives by giving workers better standards of living, more control over their working lives, and more power. Arguably, judicial over-deference to unions in their dealings with individual bargaining-unit members furthers that purpose no more than over-deference to management. Moreover, it seems at least possible, even adopting the protective position espoused by the Supreme Court of Canada, that compelling unions to be responsive to concerns of individual unit members might generate more respect and support for unions than they currently receive. Individuals who feel that their concerns are respected are unlikely to be dissident.

The conclusion reached by the Supreme Court in *Lavigne* is not necessarily wrong; rather, it favours collective rights over individual rights. Such a result is not compelled by the *Charter*; indeed seems antithetical to it. Whether there is other justification for the *Lavigne* result remains to be seen in time.

In sum, through deference to basic union principles of majoritarianism and exclusivity, and to perceived requirements of unions for survival, the Courts have generally enhanced unions' powers in Canadian society. No argument against that trend is offered here. Rather, it is submitted that such enhancement should, particularly in light of the *Charter*, be accompanied by an equal strengthening of individual members' rights lest s. 52 of *The Constitution Act, 1982* became the ultimate irony for organized workers in Canada.