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Recent developments in compulsory unionism

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Compulsory unionism – involuntary association with a trade union through membership or the requirement to contribute the equivalent of periodic union dues – was at the heart of the Lavigne case, on which the Supreme Court of Canada recently ruled,[1] opting for a radically different interpretation from that of its neighbour, the United States. While current attention to this issue has focused largely on the North American side of the Atlantic, some significant developments in the area have concurrently been unfolding in the United Kingdom and Denmark, so that a general review of the subject seems timely.

Within western democracies the extent to which compulsory unionism has been an issue – or indeed, has been allowed to take root at all – has of course varied widely from one national jurisdiction to another. This article will first consider some of these variations as illustrated in the approaches adopted in Switzerland, Spain, Belgium and Germany, and will then examine in greater detail developments in the United Kingdom, Denmark, the United States and, finally, the Lavigne case in Canada.

Variations in approach

Switzerland

In Switzerland the essentially *laissez-faire* attitude characteristic of that country's approach to economic matters generally extended to labour relations as well, and came to be reflected in its courts' outright rejection of any of the typical forms of compulsory membership arrangements.[2] In 1956 this judicial proscription was formally enshrined in legislation when the Swiss Parliament expanded its Code of obligations to stipulate:

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[1] *Lavigne* v. *Ontario Public Service Employees Union* (1991), 2 S.C.R., pp. 211-352.

[2] See, for example, *Hauser* v. *Schweiz. Lithographenbund* (1956), *Entscheidungen des Schweizerischen Bundesgerichts*, 82 II 308.

> Any clause of an agreement or arrangement between the parties to compel employers or employees to join a contracting association shall be null and void.[3]

However, the Swiss had also long been familiar with another concept, known as "loyalty to the contract", which had its roots in the printing industry; from the mid-1950s onwards its popularity in other industries increased significantly. This concept amounted in essence to an agreed levy payable by the non-member employee (or the employer on the employee's behalf) in return for the right to enjoy the benefits and protection of the collective agreement.[4] These "solidarity levies" were challenged but upheld, in a number of cases, in the most important of which it was observed:

> A measure of this kind cannot be challenged. The obligation to adhere to a particular workers' organization and the obligation to adhere to a collective labour agreement negotiated by such an organization with the employers' association are two fundamentally different things which do not in the least require similar treatment. Specifically, it is difficult to see how a worker's rights as an individual would be harmed by compelling him to adhere to an agreement which had in fact been concluded just as much in his interest as well, or how such an obligation could be held to be contrary to public mores.[5]

But at the same time Swiss courts have made it clear that the amount of the levy must reasonably relate both to the proportionate costs to the union that it is meant to offset, and to the benefits of actual membership that are not being accorded the outsider, and must be less than the cost of the membership fee itself.

Spain

In Spain attempts have been made over the years to adopt the "solidarity-contribution" approach to this problem but with markedly different success. For the nearly 40 years of Franquist rule up to the mid-1970s, the obligation to join and contribute to a particular trade union was ordered by the Government. The effect on any compulsory form of union security arrangement thereafter was profound. The current Article 28 of the Constitution of 1978, for example, provides:

> Everyone has the right to unionize freely ... Trade union freedom includes the right to form trade unions and the right to belong to the trade union of one's own choosing ... Nobody will be obliged to join a trade union. (Author's translation.)

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[3] Section 356(a)(1); see also section 357b.

[4] See generally, C. A. Morand: "La liberté syndicale des salariés en Suisse", in Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht: *Freedom of the worker to organize* (Heidelberg, Springer Verlag, 1980), p. 817.

[5] *Müller und Landesverband Freien Schweizer Arbeiten* v. *Schweiz. Metalt und Uhrenarbeitesverband* (1949), *Entscheidungen des Schweizerischen Bundesgerichts*, 75 II 316.

Many collective agreements in Spain, however, apply to all of the employees in the workplace, and even where this is not the case, employers often voluntarily extend the benefits to non-members – some would argue as a means of maintaining trade union density in Spain at its traditionally low levels.[6] Initially, the pressure from trade unions for contributions from these non-member beneficiaries was strong, but even when such contributions were successfully negotiated, they came to be struck down by the Courts.[7] An attempt to redress this situation was made by the majority socialist Government in its omnibus Freedom of Association Act of 1985, expressly permitting the negotiation of such clauses in collective agreements. However, that Act itself made the effectiveness of these clauses subject to certain provisos, including employees' written consent, and it appears that the impact of the 1985 Act on the prevalence of such union security pacts has so far been negligible.

Belgium

Similarly, the problem for trade unions in Belgium has been the emphasis given the so-called "negative" aspect of the freedom to associate. Indeed, Article 1 of the Act of 24 May 1921, which covers this freedom, specifically provides:

> Universal freedom of association is hereby guaranteed. No person shall be compelled to join or refrain from joining any association. (Author's translation.)

However, as to free-ridership – the ability of non-member employees to enjoy fully the benefits and protection of the collective agreement while contributing nothing to its acquisition or maintenance – the response by trade unions in Belgium has been a little different, being the negotiation of "special-benefit" clauses granting, for example, annual bonuses or supplementary retirement benefits exclusively to persons who are in fact members of the union.[8] Made expressly conditional on respect for the "peace obligation" under the collective agreement, the propriety of such preference clauses under Belgian law appears to have remained intact and, indeed, are a common feature of Belgian labour relations.[9]

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[6] Estimated by the International Labour Organization in 1984 at between 15 and 25 per cent. See *The trade union situation and industrial relations in Spain* (Geneva, ILO, 1985), p. 29.

[7] Ibid., p. 36.

[8] See M. G. Mitchnick: *Union security and the Charter* (Toronto and Vancouver, Butterworths, 1987), pp. 64-65.

[9] On the agreement of employers, in some subsequent cases, to a straight "dues-reimbursement" bonus for union members, see R. Blanpain (ed.): *International encyclopedia for labour law and industrial relations* (Deventer, Kluwer, 1985), Vol. 2, pp. 38-39 and 147.

Germany

Once again, however, trade unions' success in achieving a compromise of this sort can be contrasted with the case of the (former) Federal Republic of Germany. As with Spain's experience under Franco, the years of Nazi repression in Germany when every worker was forced to belong to the Nazi German Labour Front left the country after the Second World War with a deep commitment to freedom in its many forms. Thus, even though the post-war Constitution made no reference to any negative freedom of association, the courts were quick to infer one, and the notion of a closed shop, in union security terms, has had no place in German law.[10] The best that trade unions in that country were able to negotiate was the kind of "differentiation" clause referred to for Belgium, which granted members of the trade union certain benefits to which non-members were not entitled. Even that arrangement, however, encountered difficulties with the courts in Germany, being held in a 1967 decision of the Labour Court still to constitute unacceptable discrimination on the basis of union affiliation.[11] Given a combination of constitutional uncertainty and employer antipathy, progress by the trade unions on this issue in Germany has been extremely difficult.[12]

Recent developments

United Kingdom

Where changes have been occurring in this sphere (namely, the United Kingdom and Denmark, as noted), they have taken the form of governments severely cutting back on the latitude that trade unions have hitherto enjoyed in negotiating the inclusion of compulsory membership clauses in their collective agreements. In the United Kingdom the Conservative Party began its current period of tenure in 1979, and since then the Government has moved to eliminate in stages the legal means whereby closed shop clauses, in either their pre- or post-entry forms, can be enforced.[13] The legislative

[10] International Research Group: *European industrial relations* (Oxford, Clarendon Press, 1981), pp. 123-124; Mitchnick, op. cit., pp. 59-62.

[11] Decision of the Grosse Senat (29 November 1967), Bundesarbeitsgericht 20,175.

[12] As one might expect, a similar situation existed in post-war France and Italy. In France the Act of 27 April 1956 specifically prohibits an employer from granting any form of "social benefits" on such basis, and in Italy section 16 of the 1970 Statute of Workers' Rights, under "Freedom of association", similarly makes it an offence to grant "any financially favourable treatment of a discriminatory nature". See also R. Blanpain (ed.): *International encyclopedia for labour law and industrial relations* (Deventer, Kluwer, 1979), Vol. 4; International Research Group (1981), op. cit.

[13] See H. Carty: "The Employment Act 1990: Still fighting the industrial cold war", in *Industrial Law Journal* (London), 1991, Vol. 20, p. 1; E. McKendrick: "The rights of trade union members – Part 1 of the Employment Act 1988", in *Industrial Law Journal*, 1988, Vol. 17, p. 141; R. Lewis and R. Simpson: "Disorganising industrial relations: An analysis of sections 2-8 and 10-14 of the Employment Act 1982", in *Industrial Law Journal*, 1982, Vol. 11, p. 227; P. Elias: "Closing in on the closed shop", in *Industrial Law Journal*, 1980, Vol. 9, p. 201.

treatment of those clauses (as will be seen in the case of the United States), has centred on the question of what is "unfair dismissal", the position in the United Kingdom at the time the Conservatives came to power being that where a closed shop or union membership agreement was in place, a dismissal for non-compliance with it was, for the most part, deemed fair. In the Employment Acts of 1980 and 1982, the initial approach of the Conservative Government was to extend the grounds upon which exemption from the union membership requirement could be based: for example, for conscientious objectors, and pre-existing employees. In 1988, however, the Government acted far more dramatically, rendering all dismissals on the grounds of non-membership in a union legally "unfair".[14] At the same time, a companion section of the Act [15] removed the immunity of unions from tort liability for any forms of industrial action designed either to enforce or to establish a closed shop arrangement. Thus at least the "post-entry" form of closed shop was stripped of its means of enforcement, and all that remained was to close the loop, by making it an unfair practice for an employer to discriminate in *hiring* on the basis of non-membership in a union. This the Government did in its Employment Act 1990.[16]

The Government also took action to stem the existence of trade union "political funds" as a major source of financing for the Labour Party, its political adversary. These political funds had existed in the United Kingdom since 1913, when the Government passed the Trade Union Act to overcome the result in *Amalgamated Society of Railway Servants* v. *Osborne*,[17] which had declared *ultra vires* the use by a trade union of its general dues revenues for "political objects". In simple terms, the Act permitted trade unions to establish a separately identified "political fund" of the union to which members would contribute for the express purpose of assisting and supporting the union's political party affiliate. With the Trade Union Act 1984 the Government achieved two objectives in connection with these political funds. Principally, it required that no money be expended out of such funds unless the fund had been the subject of a "review" ballot by the membership within the previous ten years – i.e. a vote had to be conducted amongst the members to see whether they were still in favour of such a fund.

At the same time, the 1984 Act significantly broadened the activities which were to be characterized as "political objects", notably "the production, publication or distribution of any literature, document, film, sound recording or advertisement, the main purpose of which is to persuade

[14] Employment Act 1988, section 11. Responding to cries from the labour movement for some balance, this protection from discriminatory dismissal was extended to the ground of *being* a trade union member as well.

[15] Section 10.

[16] Now all contained in the Trade Union and Labour Relations (Consolidation) Act 1992. Once again the Government, in response to trade union outcry, made it unfair to discriminate in hiring on the basis of *membership* in a union as well.

[17] [1910] Appeal Cases 87.

people to vote for a political party or candidate or to persuade them not to vote for a political party or candidate". This change caused a number of trade unions (particularly white-collar ones), which had not previously considered it necessary to establish a separate political fund, to do so now out of an abundance of caution.

The 1988 and 1990 Employment Acts also added to the regulation of trade union political funds the requirements that all ballots be held by post (i.e. away from the workplace) and be under the supervision of a clearly independent scrutineer. Provision is made for enforcement of these rules on balloting and political expenditure through complaints by employees to the Certification Officer [18] as well as the courts, and in that connection a Commissioner for the Rights of Trade Union Members (CROTUM) has been set up to provide funding assistance to such members for legal representation and advice.

The question of suitable notice to employees of their exemption rights has been a contentious one, since in the United Kingdom (except between 1927 and 1946) [19] the onus has always been on the employee to opt out of the political funding mechanism, rather than to opt into it. Faced with the threat of reversal once again in the Conservative Party's 1984 Trade Union Act amendments, the Trades Union Congress agreed to publish a Statement of Guidance with respect to the provisions its constituent unions' rule books ought to contain, in order to ensure all new and current members are informed of their rights and of the procedures for opting out.[20] More compellingly, the recent legislative initiatives in this area have tied the issuance of such notice to all members to the time of adopting a "political objects resolution" (i.e. to the establishment of the separate fund itself), and even where such resolutions are already in place they are subject to re-adoption by the membership at least every ten years.[21]

The unstated assumption by the Government in the legislative initiatives cited above was, of course, that requiring the question of funding for political action to be put to a vote by the general membership would result in the reduction of the sources of such funding. In fact, *all* of the political funds that have been put to the membership for a vote have been upheld, including some new ones established as a result of the broadening of the "political objects" definition in 1984.[22] The post-election Speech from

[18] For a history of the Certification Officer position, see K. Ewing: "Trade union political fund complaints", in *British Journal of Industrial Relations* (Oxford), 1982, Vol. 20, p. 218.

[19] Conservative Party legislation in 1927 repealing the opting-out provision of the original 1913 statute lasted until its reversal by the Labour Party in 1946.

[20] See the short note summarizing the TUC's statement by Keith Ewing in *Industrial Law Journal*, 1984, Vol. 14, p. 125.

[21] See the Trade Union and Labour Relations Consolidation Act 1992, sections 71 and 84. The notice must be in accordance with rules approved by the Certification Officer.

[22] For an analysis of the results of the initial round of balloting, see John Leopold: "Trade union political funds: A retrospective analysis", in *Industrial Relations Journal* (Oxford), 1986, p. 287.

the Throne in 1992 on behalf of the re-elected Conservatives carried with it the promise of what was then described as another "bullet aimed at the heart of union coffers": [23] the end of the employer "check-off" of union dues, without the express, written consent of the member at least every 12 months.[24] Legislation implementing the Government's Green Paper on the subject has now in fact been introduced, and is making its way through Parliament.[25]

Denmark

Similarly, in Denmark, a series of events that really had their origin in the United Kingdom has culminated in legislative initiatives aimed directly at the question of union security clauses, and at the uses to which union members' dues can lawfully be put without an individual member's consent. It should be recognized, in the first place, that the level of union density in Denmark, particularly in the blue-collar sectors, has always been amongst Europe's highest.[26] This has meant that, apart from the many closed shop provisions existing in collective agreements outside the national employer umbrella group (the DA, which forbids them), the ability effectively to apply pressure makes *de facto* closed shop conditions the general rule in a variety of industries. Traditionally, the only restriction at law upon that situation was the view of the courts that discrimination in employment on the basis of union affiliation [27] was inconsistent with the "special responsibilities" of a *public* sector employer.[28]

In 1981, however, the issue caught the attention of the Danish public when on 13 August the European Court of Human Rights released its judgement in the famous *British Rail* case, finding, at the suit of three individuals dismissed from their employment under a union security clause at British Rail, that the freedom of association guaranteed in Article 11 of the "Convention for the Protection of Human Rights and Fundamental Freedoms" carries with it the right *not* to have to join an association not of one's choosing as well.[29] Thus in 1982 the Danish Parliament passed into law

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[23] See the feature article by Michael Jones: "Neutered unions will keep Labour's might more alive", in *The Sunday Times*, 10 May 1992.

[24] For a viewpoint on the legislative initiatives signalled in the Speech from the Throne, see the booklet *Twisting the knife: LRO's guide to the Green Paper (Industrial Relations in the 1990s)* (London, Labour Research Department, 1992).

[25] For an update on the course of the legislation, the Trade Union Reform and Employment Rights Bill, see *European Industrial Relations Review* (London), No. 232, May 1993, p. 22.

[26] See Mitchnick, op. cit., pp. 40-41.

[27] Which, in Denmark, tended to mean "which union", and not "whether a union".

[28] See Per Jacobsen: "The freedom of the worker to organize in Denmark", in Max-Planck-Institut, op. cit., p. 109 ff.

[29] *British Rail* v. *Young, James and Webster*, reported in [1981] Proceedings, Series A, Volume 44; *European Human Rights Reports* (London), Vol. 4, p. 38.

an Act Respecting Protection against Dismissal on Account of Trade Union Membership.[30] That legislation allowed the courts to award damages up to 78 weeks' pay in the event of an unlawful dismissal. It did not, however, grant to the courts the power to *annul* the termination, and this shortcoming provided a continuing source of controversy in subsequent years. As it happened, a common theme in the cases that tested that legislation was the resignation from membership in a union because of its financial contributions to the Social Democratic Party, which is linked to the Danish trade union confederation.[31] Thus, when in May 1990 legislation was passed amending the 1982 Act to provide reinstatement as an option in the case of private sector employers and to *require* it in the case of public sector employers, trade unions were also given the obligation to ensure that contributions made to political parties or for other political purposes by way of the union's financial coffers were voluntary on the part of individual members.[32] Unlike the situation as it evolved in the United Kingdom, however, there is no provision for the enforcement of that obligation, and at this stage it remains essentially a matter of individual trade union discretion.

Compulsory unionism in North America

On the North American side of the Atlantic, compulsory unionism has long been a common feature of the labour relations landscape in both the United States and Canada. As in the United Kingdom, for example, there were no legal impediments to negotiating compulsory membership clauses in a collective agreement and trade unions, particularly in heavily organized sectors, often enjoyed substantial success in doing so. Unlike the United Kingdom and Europe generally, however, a trade union showing it represented a majority of employees in an appropriate bargaining unit obtained exclusive bargaining rights to represent the whole unit, and any collective agreement negotiated with the employer necessarily had application to all of the employees in that unit. That was not long in giving rise to arguments by trade unionists about free ridership. In both Canada and the United States, Governments were responsive. While at varying times

[30] Act No. 285, proclaimed 9 June 1982. A key factor driving the outcry over the British Rail case was the fact that one of the employees, Mr. Webster, was 62 years old and had 18 years of service at the time that the union security arrangement triggering his termination came into effect. Limiting itself to that kind of situation, the Danish statute created no protection for an employee advised *at the time of hiring* that membership in a particular union would be a requirement.

[31] See Per Brandt et al., discussed in *European Industrial Relations Review*, 1984, No. 125, p. 5; Blicher Hansen et al., discussed in *European Industrial Relations Review*, 1991, No. 213, p. 23; Thomas Jorgensen et al., discussed in *European Industrial Relations Review*, 1990, No. 195, p. 4.

[32] In Denmark, unlike the findings in the *Osborne* case in the United Kingdom, *supra*, there are no implicit legal restrictions on the use of such funds by a union as being *ultra vires*.

there was concern in those countries about any legislation that would force employees to become members in a particular union, the compromise eventually adopted on both sides of the border has been what is referred to in Canada as the "Rand formula",[33] which allows unions to negotiate as a condition of employment for all employers the requirement to contribute to the trade union an amount equal to the regular sums payable to the union by its members.

Thus was the issue of compulsory *membership* in a trade union statutorily avoided. It did not, however, take long for arguments of enforced ideology to resurface, particularly in the United States, concerning the use to which trade unions were putting those mandatorily paid dues. The starkly contrasting treatment of those issues in the two North American countries provides intriguing subject-matter for comparative law study.

United States

As noted, a trade union in the United States meeting the specified statutory prerequisites is entitled to be certified under the National Labor Relations Act as exclusive bargaining agent for a particular unit of employees in the enterprise – whether or not all of such employees are actually members of the trade union or even wish the trade union to represent them. As a corollary, the American courts have found that the trade union owes a duty to represent all employees in the bargaining unit fairly, and in a manner that is neither arbitrary, nor discriminatory, nor in bad faith.[34] Under the Wagner Act of 1935 (the United States original collective bargaining statute), union security agreements were permitted in any form, as long as the trade union was not dominated by the employer and had demonstrated majority support. By 1947, however, disruption to the economy caused by strikes and tales of expelled union members being dismissed had turned legislative opinion against the trade union movement, and the Taft-Hartley Act was passed into law, with a view to minimizing trade union power and the consequent disruption to commerce. The Act's Preamble articulated as its purpose, amongst others:

> ... to promote the full flow of commerce ... to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce ...

[33] After former Supreme Court of Canada Justice I. C. Rand, for his award establishing this compromise in the 1946 case of *Ford Motor Company Limited*, in Commerce Clearing House: *Canadian Labour Law Reporter* (Don Mills), Vol. 1, para. 2150.

[34] *Ford Motor Co.* v. *Huffman* (1953), 345 U.S. 330, *Labor Relations Reference Manual* (Washington, DC), Vol. 31, p. 2548; *Steele* v. *Louisville & N.R. Co.* (1944), 323 U.S. 192, *Labor Relations Reference Manual*, Vol. 15, p. 708; *Vaca* v. *Sipes* (1967), 386 U.S. 171, *Labor Relations Reference Manual*, Vol. 64, p. 2369.

Key in its elevation of the rights of individual employees over those of the trade union was an amendment to section 8 of the Wagner Act, the enabling provision which had allowed trade unions not only to negotiate compulsory membership clauses into their collective agreements, as noted above, but to enforce them through demands for a non-member's termination. The amendment limited the right of a trade union to call for termination under such clauses solely to the ground that an employee had failed to tender the equivalent of the union's periodic dues; that is, as the Supreme Court was eventually to put it, "membership, as a condition of employment, was whittled down to its financial core".[35]

But in the United States opposition continued even to that form of compromise, and it was not long before challenges were mounted in the courts. The first of a series of Supreme Court decisions, *Railway Employees* v. *Hanson*,[36] actually raised the issue in terms of section 2, Eleventh of the Railway Labor Act (the counterpart of section 8 of the Wagner Act just referred to), and the US Supreme Court held that there was nothing unconstitutional about this mandatory form of support for the costs involved in collective bargaining itself. But under the US Constitution there *is* no reference to a freedom of association and, with debate focused instead on the guarantee of freedom of speech,[37] the majority of the Court at the same time went on to add:

> If the exaction of dues, initiation fees, or assessments is used as a cover for forcing ideological conformity or other action in contravention of the First Amendment, this judgment will not prejudice the decision in that case.[38]

That next case came in *International Association of Machinists* v. *Street*,[39] raising squarely the issue of the right of the trade union to apply these mandatory dues contributions to what could be characterized as purely "political" activities. Justice Frankfurter, in a vigorous dissenting opinion, cautioned the majority:

> The statutory provision cannot be meaningfully construed except against the background and presupposition of what is loosely called political activity of American trade unions in particular – activity indissolubly relating to the immediate economic and social concerns that are the *raison d'être* of unions ...

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[35] *NLRB* v. *General Motors Corporation* (1963), 373 U.S. 734, p. 742.

[36] (1956), 351 U.S. 225, interpreting what was by then the equivalent language of section 2, Eleventh, of the Railway Labor Act.

[37] Reference is also made from time to time in this context to the Fifth Amendment, which provides in part: "No person shall be ... deprived of life, liberty, or property, without due process of law ...", and to the Fourteenth Amendment, which in its first section provides: "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[38] *Supra*, p. 238.

[39] (1961), *Labor Relations Reference Manual*, Vol. 48, p. 2345.

> For us to hold that these defendant unions may not expend their moneys for political and legislative purposes would be completely to ignore the long history of union conduct and its pervasive acceptance in our political life.[40]

None the less, the majority of the Court, after a review of the free-ridership debate that had taken place when section 2, Eleventh of the Railway Labor Act was being passed, stated:

> The conclusion to which this history clearly points is that section 2, Eleventh contemplated compulsory unionism to force employees to share the costs of negotiating and administering collective agreements, and the costs of the adjustment and settlement of disputes. One looks in vain for any suggestion that Congress also mean in section 2, Eleventh to provide the unions with a means for forcing employees, over their objection, to support political causes which they oppose.[41]

And that was to be the direction in which the Supreme Court of the United States would continue to move on this issue.[42] Following that line, the Court in *Ellis* v. *Brotherhood of Railway, Airline and Steamship Clerks*,[43] for example, upheld the application of mandatory dues to union publications related to collective bargaining, to union conventions (by a bare majority), and to the "minor incidental expenses of running a union", such as the cost of meetings and social events. At the same time, the Court declined to uphold the application of such dues to the costs of union publications not related to collective bargaining, of organizing other employees, or to costs of litigation not directly related to negotiating or enforcing the dissenters' own collective agreement.

All the cases mentioned above either arose in the public sector or involved the interpretation of section 2, Eleventh of the Railway Labor Act. For a time it appeared that the courts might decline to get involved in these matters of union affairs in private sector cases falling under the jurisdiction of the National Labor Relations Act. That was the initial position adopted by the US Court of Appeals, Fourth Circuit in *Price* v. *Automobile Workers*.[44] However, the *Price* case was reversed by the decision of the Supreme Court in *Communications Workers of America* v. *Beck* in 1988.[45]

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[40] Ibid., pp. 2361, 2366. For an amplification of that point of view, see K. Cloke: "Mandatory political contributions and union democracy", in *Industrial Relations Law Journal* (Berkeley, California), 1981, p. 527.

[41] Ibid., p. 2353. Similarly, see *Brotherhood of Railway, Airline and Steamship Clerks* v. *Allen* (1963), 373 U.S. 113.

[42] See also *Abood* v. *Detroit Board of Education* (1977), 431 U.S. 209.

[43] (1984), 466 U.S. 435. And more recently, see *Lehnert* v. *Ferris Faculty Association* (1991), *Labor Relations Reference Manual*, Vol. 137, p. 2321.

[44] (1986) *Labor Relations Reference Manual*, Vol. 122, p. 3130.

[45] *Labor Relations Reference Manual*, Vol. 128, p. 2729, 487 US 735. *Price* itself was also reversed by the Supreme Court and remanded to the District Court in (1988) *Labor Relations Reference Manual*, Vol. 128, p. 2793.

Thus the position in all sectors in the United States is now the same, namely that as regards attempts to enforce union security clauses in a collective agreement by way of termination: "No union or employer may take any action to enforce a non-union member's duty to pay any dues absent [without] a constitutionally adequate allocation procedure".[46] It might be added that this is a procedure calling for the allocation (or, effectively, separation) of funds in advance, since the Supreme Court has ruled in *Ellis*, *supra*, that a *rebate* of dues already collected, even with interest, was still constitutionally improper, as being the equivalent of an involuntary loan.[47] And, the Court has emphasized, for example in *Lehnert*, *supra*, that the burden is on the union to prove the proportion of chargeable expenses to total expenses.[48]

The litigation continues, much of it (since the *Beck* case) originating before the National Labor Relations Board (NLRB). For example, one multi-faceted case funded by various "Right to Work" committees across the country is currently before the Board on objections regarding the specific issues of the adequacy of notice to employees of their "Beck" rights, of the trade union's accounting and allocation procedure and disclosure of information related thereto.[49]

Faced with the prospects of an unending stream of such cases, the NLRB has now given notice of its intention to deal with these issues through a body of rules which it will promulgate upon completion of a broad process of public consultation.[50]

As a political footnote to all of this, it may be noted that on 12 April 1992 (then) President Bush issued Executive Order 12800, dealing directly with the subject at hand. Declaring that "principles affirmed by the Beck decision are precious to all Americans", the President told the nation that he was "directing that companies performing federal contract work must inform their employees in the clearest possible terms of their legal rights as affirmed in the Supreme Court's Beck decision".[51] That Executive Order was rescinded by incoming President Clinton within his first month of assuming office.

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[46] See *Price* v. *Automobile Workers* (1990) *Labor Relations Reference Manual*, Vol. 136, p. 2641 ff., especially p. 2643, on remand to the District Court of Connecticut.

[47] In that regard, see also the Supreme Court's subsequent decision in *Chicago Teachers Union* v. *Hudson* (1986), *Labor Relations Reference Manual*, Vol. 121, p. 2793.

[48] At p. 2328.

[49] *California Saw and Knife Works* v. *Peter Podchernikoff*, Board Case No. 34-CA-5160, consolidated with *International Association of Machinists* v. *Various Individuals*, decision of Administrative Law Judge Clifford H. Anderson released 29 May 1992.

[50] See *Federal Register*, Vol. 57, No. 184 (22 Sep. 1992); and *Federal Register*, Vol. 57, No. 199 (14 Oct. 1992).

[51] (1992), *Labor Relations Reporter* (Washington, DC), Vol. 139, p. 465.

The Canadian Lavigne case

This same issue of the use to which mandatorily collected union dues could be put has made its way through the Canadian courts only recently.[52] And with all the US jurisprudence laid before it, the Supreme Court of Canada decided on the course directly opposite to that adopted by its US counterparts. In analysing the rationale for that decision, it is important to recognize that, unlike the American Constitution, the Canadian Constitution in 1982 had appended to it a Charter of Rights [53] which included amongst its fundamental freedoms the freedom of association.[54] Thus the courts in Canada have not had to address this issue through the extension of concepts such as freedom of speech, which carry with them their own connotations as to ideological content. Secondly, since the passage of the Charter, Canadian courts, in a labour relations context, have consistently limited the freedom of association to its simplest form, namely:

> ... to unite, to combine, to enter into union, to create and maintain an organization of persons with a common purpose ...[55]

and have refused to become involved in issues such as the constitutionality of legislated restrictions on the right to strike, the right to picket, or even "free" collective bargaining itself.[56]

The decidedly non-interventionist response of the courts in the cases mentioned, where the unions had sought to use the freedom of association guarantee newly enshrined in the Charter to *expand* the protection of collective bargaining and its mechanisms, was the backdrop against which the Court ultimately came to consider the challenges to union security arrangements contained in the Lavigne case. All that the union movement had left to hope for was a similar "hands-off" response from the Court on the so-called *negative* freedom of association issue – and they were not disappointed.

Mr. Lavigne was a teacher in the government-provided community college system in the Province of Ontario. Under the governing provincial legislation, agency shop clauses were specifically permitted, and the Ontario

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[52] Culminating, as noted at the outset, in *Lavigne* v. *Ontario Public Service Employees Union* (1991), 2 S.C.R., pp. 211-352.

[53] Constitution Act, 1982, being Part I of Schedule B to the Canada Act 1982 (UK) 1982, c. 11.

[54] Section 2(d). Included as distinct freedoms were: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; and (c) freedom of peaceful assembly.

[55] As articulated by the British Columbia Court of Appeal, in Dolphin Delivery (1984), 10 D.L.R. (4th) 198, p. 207.

[56] See *Public Service Alliance of Canada* v. *The Queen*, [1984] 2 F.C. 889; Reference re Public Service Employee Relations Act (Alta.) 87 CLLC 14,021 (S.C.C.); *Public Service Alliance of Canada* v. *The Queen in Right of Canada*, 87 CLLC 14,022 (S.C.C.); *RWDSU Locals 544, 496, 635 and 955 et al.* v. *Government of Saskatchewan et al.* 87 CLLC 14,023 (S.C.C.).

Public Service Employees' Union had negotiated such a clause into the colleges' collective agreement. Mr. Lavigne, not a member of the Union, was thus obliged pursuant to that clause to contribute to the Union the equivalent of its dues, and mounted his challenge by objecting to certain uses of the Union's funds not directly related to bargaining or administering his collective agreement. These impugned uses included contributions to a political party (the trade union-backed New Democratic Party), as well as those to disarmament campaigns, "free-choice" abortion groups, a campaign to assist striking miners in Wales, and one to oppose the building of a new baseball stadium in Toronto using public money.

Writing for the majority, Madame Justice Wilson stated the primary issue before the Court to be whether section 2(d) of the Charter also protects the right of individuals to refuse to associate,[57] and then decided that it does not:

> ... restricting the reach of section 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 section 2(d).[58]

And more specifically:

> To my mind, there is no distinction in principle between our overall system of government and the role of taxation within it and the mini-democracy of the workplace. Under our labour relations regime all members of the bargaining unit have an equal opportunity to participate in choosing who is to represent them and to join the ranks of the union or not as they see fit. Further, as in our system of representative democracy, members of a bargaining unit may also decide to oust their bargaining agent if dissatisfied with its performance. Hence, the system of compulsory dues check-off is no different in principle from the system of taxation in a democracy ...[59]

Finally, drawing from the American experience, Madame Justice Wilson noted:

> I think it clear that even if it were the business of the courts in upholding the Constitution to scrutinize tax expenditures, a proposition with which I have some considerable difficulty, it would be unwise to devote our limited judicial resources to such endeavours. Indeed, this is precisely the difficulty which has arisen since the decision in Abood, *supra*. In that case the United States Supreme Court expressly refrained from deciding which expenditures were or were not made for "legitimate" collective bargaining purposes, leaving it up to the courts below to determine these matters. As a consequence litigation of this

[57] 2 S.C.R., p. 249.

[58] Ibid, pp. 259-260.

[59] Ibid., pp. 260-261

> kind has been going on for years: see, for example, *Ellis* v. *Brotherhood of Railway, Airline and Steamship Clerks*, 466 US 435 (1984). In short, the recognition of compelled contributions as constitutionally impermissible has given rise to an endless train of disputes in the United States.[60]

Madame Justice McLachlin, also writing for the majority, echoes many of these views. Assuming without deciding that a freedom not to associate can be considered to be implicit in section 2(d) of the Charter, she puts the test thus:

> ... are the payments such that they may reasonably be regarded as associating the individual with ideas and values to which the individual does not voluntarily subscribe? [61]

If not, she reasons, there is not in her view the "coerced ideological conformity" which apparently caused the US Supreme Court so much concern. Madame Justice McLachlin then adeptly encapsulates the basis for the Rand formula in Canada as follows:

> The need for compromises such as the Rand formula arises from the fact that Canadian labour relations generally permit only one union to represent all employees in a designated work grouping. This may be contrasted with the quite different system prevailing in parts of Europe, where a worker may choose between several different unions. In a system which permits only one union, there may be workers who do not wish to associate themselves with it. The Rand formula allows a worker to choose whether or not to be a member of the union, but requires that in any event he or she pay dues. As such, it represents a carefully crafted balance between the interest of the majority in the union and individuals who may not wish to belong to the union ...[62]

From that the learned Justice comes to the conclusion that:

> ... under the Rand formula there is no link between the mandatory payment and conformity with the ideas and values to which Lavigne objects.
> ... The whole purpose of the formula is to permit a person who does not wish to associate himself or herself with the union to desist from doing so. The individual does this by declining to become a member of the union. The individual thereby dissociates himself or herself from the activities of the union. Fairness dictates that those who benefit from the union's endeavours must provide funds for the maintenance of the union. But the payment is by the very nature of the formula bereft of any connotation that the payor supports the particular purposes to which the money is put. By the analogy with government, the payor is paying by reason of an assumed or imposed obligation arising from this employment, just as a taxpayer pays taxes by reason of an assumed or imposed obligation arising from living in this country.[63]

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[60] Ibid., p. 261. The Court also came to the conclusion that no violation of the "freedom of expression" guaranteed by section 2(b) of the Charter had been made out.

[61] Ibid., pp. 344-345.

[62] Ibid., pp. 345-346.

[63] Ibid., pp. 346 and 347.

In the result, the simple question in Canada is whether parties to a collective bargaining relationship are permitted by the governing statute to negotiate in their collective agreement a provision calling for compulsory membership, or compulsory payment of the equivalent of membership dues, or are not. If they are (and that is generally the case), the courts will not take it upon themselves to scrutinize the subject areas to which the chosen leaders of the union consider it appropriate to apply those dues, and to second-guess those leaders as to whether, in the courts' view, they are subject areas "sufficiently germane to the negotiation or administration of the collective agreement".[64]

[64] As the US courts have come to put it in *Ellis*, *supra*, and a host of similarly focused cases on the subject.