12-23-1996

Re Canada Post Corp and CUPW (Safire)

Innis Christie

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IN THE MATTER OF A FORMAL ARBITRATION:

BETWEEN:

THE CANADIAN UNION OF POSTAL WORKERS

(The Union)

and

CANADA POST CORPORATION

(The Employer)

and

PHILIP WILLIAM SAFIRE

(Affected Employee)

RE: *Nova Local; Philip Safire Refusal to Join the Union,* CUPW No. 096-92-01003

BEFORE: Innis Christie, Arbitrator

HEARING DATE: January 9, 1996

AT: Halifax, Nova Scotia

FINAL WRITTEN SUBMISSIONS: May 10, 1966

FOR THE UNION: Jeff Woods, CUPW Regional Grievance Officer
Ed Johnson, Regional Union Representative
Randy Mapp, President, Nova Local
Kevin Buckland, Chief Shop Steward, Nova Local
Betty MacDonald, Secretary-treasurer, Nova Local

FOR THE EMPLOYER: Philip M. Dempsey, Counsel
Joseph P. Doucette, Labour Relations Officer

FOR PHILIP WILLIAM SAFIRE: Himself

DATE OF AWARD: December 28, 1996

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Union grievance dated June 29, 1994 alleging breach of the Collective Agreement between the parties bearing the date July 31, 1992, which the parties agreed is the applicable collective agreement, and in particular of Article 4.07, in that the Employer continued to employ Philip William Safire although he refused to be come a member of the Union. In the Grievance the Union requested that the Employer dismiss Mr. Safire from employment and compensate the Union for costs incurred as a result of the Employer's failure to comply with the Collective Agreement. At the hearing the Union made it clear that it is requesting an order that the Employer terminate Mr. Safire if he does not become a member of the Union as soon as possible after the issue of an award upholding this grievance. No damages are sought and the issue of costs was not pursued.

At the outset of the hearing in this matter the representatives of the parties agreed that I am properly seized of it and that I should remain seized after the issue of this award to deal with any matters arising from its application.

AWARD

Philip Safire was offered and accepted a position as Part-time Mail Service Courier with the Employer on May 5, 1994. The Employer has checked off and remitted his dues to the Union as required by Article 4.01 of the Collective Agreement but he has refused to join the Union. The Union's position is that in continuing to employ Mr. Safire under those circumstances the Employer is in breach of the Collective Agreement, most particularly Article 4.07. The Employer purports to take a neutral

position, but has in fact refused to terminate Mr. Safire, stating through counsel that it is "not certain that the *Canada Labour Code* would support termination for refusal to sign a membership card."

Mr. Safire says, he could not, and cannot, in good conscience, join the Union or swear the oath of membership, and claims that in seeking to force him to become a member by filing this grievance the Union is acting in breach of its own constitution and in contravention of his rights under the *Canadian Charter of Rights and Freedoms*, the *Canada Labour Code* and the *Canadian Human Rights Act.* He has made it clear that his objection is based on "principle and philosophy", and not on religion, either in respect of Union membership itself or the swearing of the oath.

This matter first came on for hearing before Arbitrator Judge J. A. MacLellan in the regular arbitration procedure on November 16, 1994. Arbitrator MacLellan accepted submissions of the Employer and counsel on behalf of Mr. Safire that this grievance should be processed as a formal grievance because, if it succeeds, Mr. Safire may be discharged. It is now before me in the formal process under Article 9.26(6) of the Collective Agreement. An immediate difficulty at the hearing before me was that Mr. Safire was no longer represented by legal counsel because, he said, perfectly plausibly, he could not afford it, but he raised complex legal questions, particularly in alleging contravention of his rights under the *Canadian Charter of Rights and Freedoms.*

Procedure. The hearing before me on January 9, 1996, proceeded as follows. The Union and Employer explained the issues as they saw them and, very generally, their

respective positions. I explained to Mr. Safire that, because his rights were at stake and his interests differed from the Unions', he had a right to participate in the hearing as a third party, and to be represented by counsel if he wished. He asserted that he wished to be represented by counsel and had been represented in the hearing before Arbitrator MacLellan, but that he could not afford further representation. He also asserted that the Union was obliged to provide him with representation. I told him that I had no jurisdiction and could not advise him of his rights in that respect. He declined my offer of an adjournment to procure representation.

The parties put in certain documentary evidence to which I refer below, by agreement, including Mr. Safire's agreement. Each, including Mr. Safire, made an opening statement. The Union called two witnesses, Betty MacDonald, the Local's Secretary-treasurer, and Randy Mapp, the Local's President, who were cross-examined by Mr. Dempsey, counsel for the Employer, and Mr. Safire. Mr. Safire testified in his own behalf and was cross-examined by Mr. Dempsey, representing the Employer, and by Mr. Woods, representing the Union.

Mr. Woods had said earlier that he had come prepared to argue on the basis of the Collective Agreement, but not on the basis of the *Canadian Charter of Rights and Freedoms*, the Canadian *Human Rights Act* or the *Canada Labour Code*, all of which had been invoked in vague and general terms by Mr. Safire. He has asked for an adjournment to respond in writing to any such arguments. I had asked Mr. Dempsey whether the Employer would address those issues and he too had said that he had not come prepared to do so and had no instructions to that effect. I suggested that, because

Mr. Safire was unrepresented, the statutory and *Charter* issues could be most satisfactorily dealt with if the Employer were prepared to make the first submissions on them, in response to the Union's arguments based on the Collective Agreement. The Union would then respond to both the Employer and Mr. Safire, with the Union having the last word on the Collective Agreement issues and the Employer and Mr. Safire the last word on any issues flowing from the statutes or the *Charter*

Following a brief adjournment in which he contacted the Employer in Ottawa, Mr. Dempsey advised that his instructions were that the Employer would reconsider the question of making submissions on the impact of the statutes and the *Charter*. Subsequently, the hearing adjourned on the basis that he would advise me three days later whether or not the Employer had decided to do so. I ruled that the nature and order of written submissions would be determined by the Employer's decision, and set out two alternative procedures for submissions.

In a letter dated January 12 and faxed to me that day Mr. Dempsey stated as follows:

> ... we wish to advise that the Corporation will make no submissions with respect to Section 2(d) of the ***Charter***.
>
> Given Mr. Safire's position regarding his rights vis-a-vis the ***Charter***, you indicated that the Corporation will have the availability of a limited response to the C.U.P.W.'s submissions on the application of the ***Charter***, if necessary.
>
> With respect to the application of the ***Canada Labour Code***, the Corporation reserves the right to make submissions regarding the ***Code*** and the matter of the remedy sought by the C.U.P.W. in this case against Mr. Safire.

> However, in light of the evidence of Mr. Safire regarding conduct directed toward him as a result of his refusal to become a member of the C.U.P.W., the Corporation reserves the right of response regarding its interests should this matter be raised by Mr. Safire in his submissions.

In light of this, the process as prescribed by me at the hearing was to be:

> 1. I would do some reading and thinking about whether there appear to be statutory and Charter issues that the Union should address, and advise the parties of my conclusions.
>
> 2. Within a reasonable time, as I would direct, the Union would submit its written argument based on the Collective Agreement, and on statutory and Charter issues if I had advised that I considered there to be serious issues which should be addressed. Copies would, of course, go to the Employer and Mr. Safire.
>
> 3. Within a reasonable time, as I would direct, the Employer would respond to the Union's submissions, but would make no submissions on statutory and Charter issues if none had been made by the Union. Copies would, of course, go to the Union and Mr. Safire.
>
> 4. Within a reasonable time as I would direct, Mr. Safire would make any submissions he wished to make, with copies to the Union and the Employer.
>
> 5. The Union would have a right to reply to both the Employer and Mr. Safire, with, of course, copies to both. Neither the Employer nor Mr. Safire would have any further right of submission, except with my consent on the basis that the Union's reply had raised something new.

To the extent that Mr. Dempsey's letter sought to impose a different order of submissions on the procedure to be followed, and to gain the last word, I did not accept

it. If the Employer wanted to have the last word on the statutory and Charter issues it should have accepted my suggestion that the process would be best served by the Employer going first on those issues.

In accordance with paragraph 1 of the process as prescribed by me at the hearing, by letter dated January 23, 1996, I advised the parties of my conclusions about whether there appeared to be statutory and Charter issues that the Union should address. I return to those "conclusions" below, following my statement of the relevant facts. In that letter I also set out a timetable for written submissions. Subject to extensions subsequently requested and granted, that timetable was adhered to.

The Union took outside counsel in this matter, and on February 19, 1996, I received the Union's submissions from Thomas A. MacDougall, Q.C.. On March 6 I received the Employer's submissions from Mr. Dempsey. Mr. Safire also took outside counsel, and on March 28, 1996, I received submissions on his behalf from Ian C. Pickard. On May 10 I received Mr. MacDougall's response to both of these sets of submissions. There was no request for further submissions.

The Facts. The facts relevant here are of two kinds; first, the Union's Constitution, By-laws policies and practices, in relation to employees in the bargaining unit and in relation to the Employer under the Collective Agreement, and, second, what was done by the Union, Mr. Safire and the Employer in connection with Mr. Safire becoming or not becoming a member of the Union.

There is no issue here of the Employer's obligation under Article 4.01 of the Collective Agreement to check off from their monthly earnings the ordinary membership dues "of all employees in the bargaining unit" and remit them to the Union in accordance with Article 4.04. The issue arises in connection with Article 4.07:

> 4.07 Compulsory Membership
>
> (a) Any regular employee hired after the signing of this agreement shall, as a condition of employment, become a member of the Union at the time of hiring, or as soon as possible, in accordance with clause 6.03.
>
> (b) The Corporation will not be obliged to terminate any employee whose membership rights have been revoked by the Union.

There is no dispute that at the relevant times Mr. Safire was a regular, not a term or casual, employee, and had been since May 5, 1994. He started as a casual letter carrier in 1991. When he went to work he knew Canada Post was a unionized work place but he did not know whether casuals were covered by the Collective Agreement and did not ask the Employer, although, he testified, such things mattered to him. In that role he was approached by Mr. Randy Mapp, President of the Nova Local, and urged to join the Union. He testified that he had then read the Union's Constitution and policies, had found them offensive and did not wish to join. He was not specific about which asects of the Union's Constitution and policies offended him. He came to understand that

working on 19 day term contracts he was subject to some of the terms of the Collective Agreement, and did not object to paying Union dues in return for representation.

On one occasion in 1991 Mr. Safire had been assigned to work at Dartmouth Main Post Office and, not knowing there was a dispute between the Employer and the Union there, as he left the building found himself confronted with a picket line, which he believes to have been illegal. Union members, including Mr. Mapp, called him derogatory names as he left in a cab to deliver mail. When he returned there was no longer a picket line.

Mr. Safire testified that upon becoming a regular employee he knew that the Collective Agreement would apply to him fully and that both he and the Employer were bound by it. He did not interpret the Collective Agreement as requiring him to become a Union member, and he knew the Union took the opposite view. He had been urged by two shop stewards to sign a membership card. One of them, at least, told him he had to do so to get in the good graces of the membership, because Randy Mapp had been telling people that he was a picket line crosser. He refused, on grounds of conscience, to sign the application and as a result was subjected to verbal pressure by the shop stewards, and ultimately was threatened, he said, with physical violence and loss of his job.

Mr. Safire testified that his objection to joining the Union is that to do so he would have to swear the membership oath, which is set out below. He says that as a man of conscience and honour he cannot swear to bear allegiance to the Constitution and policies of an organization which he knows he disagrees with in important respects, and which he cannot support as he believes the oath requires him to. Moreover, politically and ideologically he disagrees with many of the Union's positions and actions. He alleges that the very fact that the Union, through Mr. Mapp, appears willing to

accommodate him and accept him into membership in spite of his beliefs is yet another reason why he cannot, in good conscience, join; because, as he sees it, the Union does not even live up to its own stated constitutional principles. His objections extend to signing the application for membership because of the undertaking it contains to be bound by the Constitution and by-laws of the Union.

Under date of May 20, 1994, Betty MacDonald, the Union's Secretary-treasurer wrote to Mr. Safire as follows:

> I understand you are a new regular employee of Canada Post.
>
> I have enclosed an application for membership in the Canadian Union of Postal Workers (CUPW) for your completion. I draw your attention to Article 4.07 [quoting it]
>
> Please complete the card and return it in the envelope provided along with the five dollar initiation fee which is required under the CLRB.

On June 15 Ms. MacDonald wrote to Paul MacNeil, Manager Collections and Deliveries for the Employer in Halifax, stating that she had not received a "status form" for Mr. Safire from the Employer nor a membership card and initiation fee from him. She asked that Mr. MacNeil "review this situation and reply to me as soon as possible", and concluded by saying that if she had not received a reply by July 7 she would "proceed in other directions". On June 24, 1994, Mr. MacNeil acknowledged her letter, saying he would contact staffing about the status form and Labour Relations about "the signing of the card etc."

The "status form" referred to is the Notice of Change form referred to in Article 6.03(b). Article 6.03 provides:

> 6.03 New Employees
>
> (a) The Corporation agrees to acquaint new employees with the fact that a collective agreement is in effect. On the first day of work in his or her job, the supervisor shall provide the employee with a copy of the collective agreement and introduce him or her to his or her union steward and his or her alternate.
>
> (b) The Corporation shall give without delay to the newly appointed employee as well as to the local of the Union a copy of the Notice of Change form.
>
> (c) On the first day's work of an employee in a new position, the supervisor shall introduce him or her to his or her union steward and his or her alternate.
>
> (d) During the first week of work of new employees or employees in a new position, the steward or his or her alternate shall be allowed, during the hours of work, a period of fifteen (15) minutes to confer with them.

The evidence does not suggest any continuing failure to comply with Article 6.03.

It was following Ms. MacDonald's June 17, 1994, letter that the Union first received written notification of Mr. Safire's stance. Dated June 22, he wrote to the Union, to the attention of Betty MacDonald:

> This letter is to acknowledge receipt of your letter addressed to Paul MacNeil concerning me, of which a copy was sent by your office to me.
>
> Please be advised that no letter dated May 20th, 1994, or any other letter from your office was received by me.
>
> As far as signing a membership card and remitting five dollars I am not required to do so according to the Collective Agreement. For Article 4.07(a) outlines how this is to be done in Article 6.03, and no where does it firmly and concretely state that a membership must be signed and a fee of five dollar be remitted to CUPW. Those article aside there are numerous other articles that permit me to refuse to sign a membership card and remit five dollars. ...

Ms. MacDonald acknowledged in her testimony that she had no way of knowing whether her letter of May 20 had reached Mr. Safire.

On June 28, John Buckland, 1st Vice president of the Nova Local replied to Mr. MacNeil on behalf of Randy Mapp, President of the Local, as follows:

> ... It is the position of the Local Union that it is incumbent on the employer to enforce the provisions of the CPC/CUPW Collective Agreement and in particular Articles 4 and 6 at clauses 4.07 and 6.03.
>
> Accordingly the Local Union requests that you communicate your position concerning this matter in writing and without delay. I await your reply.

Under date of June 29, 1994, Mr. MacNeil wrote to Ms. MacDonald apologizing for the delay in her receipt of the "change in union affiliation or status change" which had

been prepared on June 2. The form, dated June 2, is in evidence. Mr. MacNeil's concluding paragraph sets out the stance since taken by the Employer:

> With regard to Mr. Safire's status in the union; this is a matter to be resolved between CUPW and the individual, not the employer and the union.

The Union has never accepted that position. Also in evidence is a letter of October 7, 1994, from Edward Johnson, Union Representative, to Joseph Doucette, Labour Relations Officer with the Employer, which sets out in full the Union's argument on this matter, and indicates that a copy was sent to Mr. Safire. Neither the Employer nor Mr. Safire disputed that this letter had been duly received.

The Union's Constitution and the by-laws of the Nova Local are in evidence by agreement. What I refer to here as the Constitution is a red booklet bearing the Union logo and the words "National Constitution Adopted 1993" on one cover. The French version is on the reverse. There is a table of contents showing that the first 153 pages consist of 11 articles, and starting at page 154 there is a section entitled "Rituals and Ceremonies". These pages are white. In the middle of the booklet, not shown in the table of contents, is a section of grey pages entitled "National Policies Adopted 1993".

Article 1.04 of the Constitution provides:

Eligibility for Membership

1.04 Any employee who does not perform managerial functions is eligible for membership in the Union under the following conditions:

(a) if he/she signs an application for membership card;

(b) if he/she undertakes to comply with the Constitution and policies of the Union and the by-laws of his/her Local;

(c) if he/she pays the initiation fee, subject to section 9.24;

(d) if he/she is accepted by the Local.

Article 02.01 of the Nova Local By-laws is in practically identical terms.

Betty MacDonald testified that applicants for membership sign an application card, salmon coloured for part-time employees and white for full-time employees, and pay the initiation fee of $5.00. Above the line for the applicant's signature, cards of both colours contain the following words:

> "I hereby apply for membership in the Canadian Union of Postal Workers and I undertake, covenant and agree to be bound by the Constitution and by-laws of the Canadian Union of Postal Workers. I hereby request that the union dues authorized under the Constitution of the C.U.P.W. be remitted to the National Headquarters of the said Union.

She provides a standard form receipt to each new member for his or her initiation fee and the applications for membership, with a covering letter, to the National Secretary-treasurer of the Union, listing the applicants with their social insurance numbers. The National Office assigns a membership number and sends a membership card to each applicant, keeps the top half of the application for membership for its records and sends the bottom half back to the Local. At that point, Ms. MacDonald says, she considers the applicant a member in good standing.

In response to cross-examination by the Employer's counsel, Ms. MacDonald testified that normally the regular Local membership meetings are held on the fourth Saturday of the month.. Swearing in new members is always an early agenda item. In fact, Article 5.02 of the Local by-laws of the Nova Local provides, under the heading "**Agenda**":

> 05.03 The agenda for regular Membership meetings shall be as follows:
>
> (a) acceptance and initiation of candidates for Membership according to the National Constitution;

In order to participate a new member has to fill in the application card, pay $5.00 and, if he or she attends a meeting, be sworn in. Before that it is strictly a paper process, and a lot of people, she said, simply do not come to any meetings. Article 1.04 of the Constitution does not, according to Ms. MacDonald, accurately represent the way people become members of the Union.

Mr. Safire pointed out to Ms. MacDonald that Article 13(j) of the Union Constitution speaks to her role, providing:

> 9.13 The Local Secretary-Treasurer shall perform the following duties unless delegated to another local officer by the local by-laws: ...
>
> (j) establish and maintain an efficient system for the membership control and check-offs.

She testified, however, that her role is limited to the paper work described above, making sure the fees are paid and the proper material sent to the Union head office.

Randy Mapp, President to the Nova Local, testified that to become a member under Article 4.07 of the Collective Agreement it is necessary to comply with Article 1.04 of the CUPW Constitution, and that nothing else is required. In his direct testimony he stated that it is not necessary to take an oath; that he too considers an applicant to be a member in good standing once Ms. MacDonald has done the paperwork she described. He knew of no one who had ever not been accepted by the membership in accordance with Article 1.04(d) of the Constitution, and there is no motion at a meeting or Union administrative process in connection with that.

At p. 154 of the Union Constitution the following appears:

RITUAL AND CEREMONIES

Opening of Local Union Meetings:

"Brothers and Sisters:

> We are about to open this meeting of the Local, Canadian Union of Postal Workers. If there is anyone present not entitled to remain, he/she will please retire. Officers will take their respective places and the Tyler will guard the door."

Mr. Mapp testified that when he calls a meeting of the Nova Local to order he does not make that statement. He went on to say, however, that the oath for new members is always the first order of business. In cross-examination he modified this by saying it is done when required, if new members are present and step forward. If this were so in the case of Mr. Safire, he said, the oath would be administered.

Also on p. 154 of the booklet containing the Union's Constitution the following appears:

> **Initiation of Candidates for Membership**
>
> (The proposed new members are brought before the Presiding Officer and each gives his/her name to the Presiding Officer.)
>
> (Presiding Officer to the meeting:)
>
> > "Will the members please stand."
>
> (To the proposed new members:)
>
> > "Please repeat after me this obligation of all members of the Canadian Union of Postal Workers."
> >
> > "I , do solemnly promise, on my most sacred word of honour, that to the best of my ability I will bear allegiance to this Union, to its Constitution and to its policies and to the by-laws of this Local Union.

> I will seek to conduct myself at all times in a manner that will bring credit to this Union. I will not defraud this Union nor allow others to defraud it, if it is my power to prevent it.
>
> I shall remember the proud motto of organized labour and this Union - that an injury to one is an injury to all."

(To the meeting:)

> "Sisters and Brothers, we welcome these new members into our ranks."

(Shake hands with the new members.)

In cross-examination by Mr. Dempsey Mr. Mapp agreed initially that to become a member of the Union a person has to satisfy all four criteria set out in Article 1.04 of the Constitution , and that part of that is the procedure set out on p. 154. I found this contradictory to his earlier testimony, but Mr. Mapp did not appear aware of this when he agreed with the proposition put to him by Mr. Dempsey. In the cross-examination that followed Mr. Mapp reverted to what he had said in direct, maintaining that if Mr. Safire signed an application card and paid his initiation fee, and had been given a membership number, he would be a member of the Union, although if he had never been sworn in a membership meeting "he could not represent the Union". Mr. Mapp testified that "we have many members who haven't taken the oath". "Historically", he said, this is what had happened. Mr. Mapp acknowledged that he did not believe that the National President, whom he said "interprets the National Constitution", had said that Article 104(d) of the Constitution is to be waived.

Under his leadership, Mr. Mapp said, Mr. Safire could have, and still could, become a member of the Union without swearing the oath. In that period, that is since 1990, he said, every member had become such by signing an application card, paying his or her initiation fee, and being given a membership number.

Mr. Mapp testified that although he has taken this oath and the oath taken by officers-elect set out on p. 156 of the booklet containing the Union's Constitution he, himself, does not agree with every policy set out in the grey pages of the booklet containing the Union's Constitution. I note that the officers' oath contains no specific mention of the Union's policies, as the membership oath does.

Mr. Safire questioned Mr. Mapp about his familiarity with the background to this grievance. Mr. Mapp said that he thought Mr. Safire's unhappiness with the Union arose when he felt mistreated by Union members for crossing a picket line while working as a casual. There was an exchange about whether there had in fact been a picket line, and its legality, when Mr. Safire went to work during a dispute between the Union and the Employer in Dartmouth in 1991. Mr. Mapp stated that in his view this was past and was not relevant to the issue before me here, or to Mr. Safire's membership in the Union. They disagreed over the effect of the oath; Mr. Mapp maintaining that it did not require Mr. Safire to agree with the Union's policies, but only to confine his disagreement with them to Union forums. The Union, he said, is a democratic institution which will respond to internal initiatives to change.

In response to Mr. Safire's assertion that there were other regular employees of the Employer who are not members of the Union, Mr. Mapp said that he was not aware of this. In redirect he said he was aware of new members who had not taken the oath, and

of some who had refused or declined to do so. This had not prevented them from becoming members of the Union and it had not resulted in their expulsion or suspension.

In the latter connection, according to Mr. Safire, Article 8 of the Union's Constitution, headed "**Discipline**" is relevant:

> **Offences and Penalties**
>
> 8.01 Penalties may be imposed on a member or officer of the Union or Local if he/she committed any of the following offences:
>
> (a) if he/she did not comply with the provisions of the present Constitution or the by-laws of his/her Local;
>
> (b) if he/she did not comply with the policies of the Union; ...
>
> 8.02 The following penalties may be imposed on a member or officer of the Union or Local: ...
>
> (f) expulsion from the Union.
>
> 8.03 the aforesaid penalties may only be enacted pursuant to the rules ad procedures laid down in the following sections.

In assessing such matters, Mr. Mapp said in redirect, he has to take the law into account.

Mr. Safire testified that he had been told by Joe MacKenzie, a shop steward, that even if he signed a application for membership he would not now be accepted. This hearsay

evidence is contrary to Mr. Mapp's testimony and Mr. Woods' assurances at the hearing. Mr. Safire made it clear in his testimony that even if he was given assurances that he could become a Union member simply by signing the application and paying $5.00 he would not do so. He said, very clearly, that, quite apart from the oath, he would not join the Union "as it stands". He could not, he said, align himself with the politics and philosophy of the Union.

The Issues. In accordance with paragraph 1 of the process as prescribed by me at the hearing, in my letter dated January 23, 1996, I advised the parties of my conclusions about whether there appeared to be statutory and Charter issues that the Union should address, as follows:

> I have thought about the statutory and Charter issues. I must emphasize that I have reached no conclusions and will give full consideration to any submissions made in accordance with the procedure I have established for this matter. My thoughts about the statutory and Charter issues are as follows:
>
> On the facts, the Union will argue that, under the Union Constitution, as applied, Mr. Safire does not have to take the oath. Regardless of my conclusion on that, it is clear the Union's position is that he has to become a member if he is to retain his employment. Thus:
>
> Paragraphs 95(e) and (f) of the Canada Labour Code should be addressed, both in terms of their applicability here and my jurisdiction to apply them.
>
> It seems clear on the facts that there is no element of discrimination on any ground addressed by the Canadian Human Rights Act here, so neither directly nor by virtue of the reference to "discriminatory"

manner in s. 95(f) of the Canada Labour Code, does the Canadian Human Rights act appear to have any application.

It seems clear on the facts that there is no issue here of religious objection, so s. 70(2) of the Canada Labour Code does not, on its face, help the Employer or Mr. Safire, but s. 2(a) of the Charter goes to conscience as well as religion. Conceivably, the Charter could be directly relevant here, or it might be relevant as dictating an expansive application of s. 70(2).

More significantly, is there a Charter issue of freedom of association here? The majority of the Supreme Court of Canada in *Lavigne v. OPSEU* (1991), 81 DLR (4th) 545; [1991] 2 SCR 211, appeared to think that s. 2(d) of the Charter bestows a right of non-association.

Obviously the Charter applies to the Canada Labour Code but does the Charter apply to Canada Post as a Crown corporation, or to the CUPW as a Union bargaining with a governmental actor. If so, it is clear from *Weber v. Ontario Hydro* (June 29, 1995), 95 CLLC para. 210-027, that I have jurisdiction to apply the Charter, and should do so.

The question here, as in *Lavigne,* might be whether the freedom of non-association is breached by this Collective Agreement, which contains more than a Rand formula union security provision, and this Union constitution, and if so, whether either or both are over-ridden in accordance with s. 1 of the Charter. Perhaps there is also a question of whether freedom of conscience in this context is over-ridden in accordance with s.1.

Submissions of Counsel to the Union. Counsel to the Union submits that Article 4.07 is clearly mandatory and has been violated, and that the Employer must, therefore, put Mr. Safire on notice with a time fixed at which he will be terminated if he continues to refuse to join the Union. This is so because Article 4.07(a) of the Collective

Agreement makes membership a condition of employment and because, by creating an exception, 4.07(b) obviously implies that in all other instances of non-membership the Employer must terminate. Section 68 of the *Canada Labour Code* makes it clear that there is no unfair labour practice contrary to section 96 where a union seeks to enforce a union security clause, except in the cases specified in Sections 70(2) and 95(e).

Counsel to the Union also submits that I as arbitrator have no jurisdiction to apply Section 95(e) and (f) of the *Canada Labour Code*, which, in any case, have no application here. There is no evidence, he submits, that the Union applies its membership criteria in a discriminatory fashion. The Union makes the same submission with respect to Section 70(2). If Mr. Safire feels he is being discriminated against in these ways he should file a complaint with the Labour Relations Board, which he has not done.

Finally, Counsel to the Union submits that Section 2(a) of the *Canadian Charter of Rights and Freedoms* is not relevant, the freedom of conscience referred to there being only freedom of religion. Alternatively, he submits that no freedom of Mr. Safire's, of conscience or otherwise, protected by the *Charter*, has been infringed. Most specifically Section 2(d) granting freedom of association has not been infringed, either because the *Charter* does not apply, because that particular freedom has not been infringed or because any infringement is protected by Section 1.

Submissions of Counsel to the Employer. Counsel to the Employer submits that Union's failure to follow all of the conditions in its Constitution and Local By-Laws prevent it from relying on its Constitution to support the termination of Mr. Safire. If Article 4.07(b) is to be interpreted purposefully as requiring the Employer to terminate if

the employee does not become a member of the Union, the words "if accepted by the Local" must be read into it. Further, Counsel to the Employer submits that until the Union and Mr. Safire have settled their differences in accordance with the Union's internal procedure he can remain an employee and the Employer will, as a condition of employment, deduct and remit his dues. The requested termination of Mr. Safire is, in his submission, both premature and improper.

Counsel to the Employer submits that my jurisdiction as arbitrator is broad, and that I have power to rule whether there has been a breach of Section 95(f) of the *Canada Labour Code,* in that the Union has acted in a discriminatory manner. If there has been such a breach then the Union has not acted properly in accord with its constitution, which is something I must determine in ruling on whether it has appropriately called upon the Employer to terminate. The Employer made detailed submissions on this point.

The Employer's submissions did not address the *Charter.*

Submissions of Counsel to Mr. Safire. Counsel to Mr. Safire joins in the submissions on behalf of the Employer, and also submits that I must determine whether Mr. Safire has failed to become a member of the Union in the manner intended by Article 4.07 of the Collective Agreement, that Article 6.03 determines the meaning of "member" for these purposes and that, on the evidence, Mr. Safire did become a member in this sense. Both the Employer and Mr. Safire having acted in accordance with Article 6.03, there has been no breach of Article 4.07. In his submission, "Member" in this context has a different meaning from "membership" in the Union's Constitution, which is not referenced in Article 4.07, as Article 6.03 is. Moreover, the evidence suggests that

"membership" in the Constitution has no fixed meaning, as the Local Union appears to think it can waive any aspect of it.

Counsel to Mr. Safire further submits the Mr. Safire is willing to become a member of the Union for purely collective bargaining purposes as it relates to the operation of the Collective Agreement, but will not sign the membership card or take the oath "as he does not agree with the Union's political ideology nor the content of its constitution bylaws and policies." To force him to do so breaches his rights under Section 2(d) of the *Charter*, as interpreted in *Lavigne v. OPSEU* (1991), 81 DLR (4th) 545; [1991] 2 SCR 211, and the *Charter* is applicable to Canada Post and its collective agreements. No other section of the *Charter* is referred to in his submissions. As arbitrator, Counsel to Mr. Safire submits, I have jurisdiction to apply the *Charter.*

Decision. I have concluded that the Employer must terminate Mr. Safire if he does not join the Union in accordance with the requirements of its Constitution, subject to limitations imposed by Section 2(d) of the *Charter*, as interpreted by the Supreme Court of Canada in *Lavigne v. OPSEU,* on the obligations he can be required to undertake. My consideration of the submissions of the parties follows, concluding with my consideration of the impact of section 2(d) of the *Charter.* My more fully detailed order to the Employer is set out at the end of this award.

(i) The Collective Agreement. The central question here is whether, by failing to terminate Mr. Safire, the Employer has breached Article 4.07 of the Collective Agreement which, it will be recalled, provides:

4.07 Compulsory Membership

(a) Any regular employee hired after the signing of this agreement shall, as a condition of employment, become a member of the Union at the time of hiring, or as soon as possible, in accordance with clause 6.03.

(b) The Corporation will not be obliged to terminate any employee whose membership rights have been revoked by the Union.

The obvious implication of Article 4.07 is that if an employee ceases to be a member of the Union, or refuses to join, he or she must be terminated by the Employer. To this effect paragraph 4.07(a) is reinforced by the broad, but precisely defined, exception created by paragraph 4.07(b), which clearly contemplates that there will be termination in situations that fall within 4.07(a) but outside 4.07(b).

I agree with the decision of the B.C. Labour Relations Board in *B.C. Hydro and OTEU, Local 378 and Christopher Tottle* (1978), CLLC para. 16,155 (Weiler, Chair), at p. 606, where it concludes that a "condition of employment" union security clause like Article 4.07, and like the one the B.C. Board was dealing with, can only reasonably be interpreted as stating a mutual intent that the non-member is to be terminated. That has been accepted by arbitrators at least since the award of Arbitrator Laskin (later Chief Justice of Canada) in *Re Toronto Printing Pressmen and Assistants Union No. 10 and Northern Miner Press Ltd.* (1958), 8 LAC 251, cited by Counsel for the Union.

In that context I agree that in such cases the burden is on the Union as stated in the contemporaneous Laskin award in *IAM v. Orenda Engines Ltd.* (1958), 8 LAC 116, at p. 119, quoted by Counsel for Mr. Safire,

> A Board, approaching such a question in the knowledge of the exacting burden of proof imposed upon a company which alleges it discharged for just cause, can be no less zealous in protecting the individual employee where his discharge is sought by a union through (as here) automatic response by the company.

I note as well the passage quoted from the award of Arbitrator Munroe in *Re Rogers Cable TV and IBEW, Local 230* (1987), 31 LAC 62, at p. 69,

> ...the individual whose dismissal is sought by the trade union is entitled to take advantage of contract ambiguities, in the same manner that ambiguities generally favour the employee in the ordinary instance of an employer-initiated termination.

However the collective agreement in *Rogers Cable TV* had a quite different wording, and I stress that in *Orenda,* consistently with *Printing Pressmen,* the Board chaired by Arbitrator Laskin found that the Employer had an obligation to terminate under a collective agreement like the one before me here, although not on the facts of that particular case. The following passages are germane here:

> Counsel for the company contended that no express requirement of dismissal is found in Article 4.03... [at p. 120] ...it would be pushing

> technical interpretation to the point of erosion of meaning to hold that all art. 4.03 has achieved was to leave it to the employer's discretion whether to enforce the agreed union security clause. ...
>
> This board determines, for the reasons given, that art. 4.03 compels the company, upon notice by the union within a reasonable time, to terminate the employ of a person whose union membership has been cancelled. [at p. 121]

The Union's Constitution and By-laws. In *IAM v. Orenda Engines Ltd.* Arbitrator Laskin went on to say;

> ...In imposing upon the company a duty to enforce art. 4.03 in the interests of the union, the board must surely require the union to give particulars in its notice to the company, particulars which would enable the company to satisfy itself that its duty to dismiss is founded upon proper cause under the union's constitution and by-laws. It is a little unreal to say, in the face of union security provision such as that before this board, that the union's constitution and by-laws remain matters of internal union concern only. [at p. 123]

As submitted on behalf of the Employer, I reject the suggestion by Mr. Mapp, President of the Local, and Ms. MacDonald, its Secretary, that an employee of the Employer is a member in good standing once he or she has filed out the Union's Application for Membership and Ms. MacDonald has done the paperwork she described in her testimony. On the face of the Union's Constitution, membership is not automatic. If there were unequivocal evidence to the effect that, in practice, a formal step to becoming a Union member is uniformly skipped it might, for some purposes, appropriately be considered no longer part of the Constitution, but there is no such evidence here.

I have concluded that to become a member of the Union, unless these requirements were waived by some person or body in the Union with authority, or at least apparent authority, to do so, Mr. Safire would have had to, and could now be required to, comply with each of the requirements of Article 1.04 of the Union's Constitution: (i) sign an application for membership card, (ii) undertake to comply with the Constitution and policies of the Union and the by-laws of his Local, (iii) pay the initiation fee of $5.00, and (iv) be accepted by the Local. I am not satisfied on the evidence that there was any such waiver.

Signing the application for membership card required him, in effect, to state in writing "... I undertake, covenant and agree to be bound by the Constitution and by-laws of the Canadian Union of Postal Workers", and being accepted by the Local required him to be prepared to swear the oath that he would, to the best of his ability, "bear allegiance to this Union, to its Constitution and to its policies and to the by-laws of this Local Union".

In reaching this conclusion I have rejected the submission by Mr. Safire's Counsel that in determining whether Mr. Safire has failed to become a member of the Union in the manner intended by Article 4.07 of the Collective Agreement, I should read Article 6.03 as determining the meaning of "member" for these purposes. A natural reading of Article 4.07 is that it refers to Article 6.03 with respect to the time at which, and the process by which, a regular employee is to be put in contact with the Union. That is what Article 6.03 is all about. There is simply no way in which it can be interpreted as

defining, or providing for what is to constitute, membership. Clearly, Mr. Safire did not become a member of the Union because he did not meet the requirements of Article 1.04 of the Constitution, and they were not effectively waived.

The *Canada Labour Code*. Article 4.07 is a standard union shop security clause, unquestionably within the ambit of Section 68(a) of *the Canada Labour Code*;

> 68. Nothing in this Part prohibits the parties to a collective agreement from including in the collective agreement a provision
>
> (a) requiring, as a condition of employment, membership in a specified trade union;

The union unfair labour practice provisions of the *Canada Labour Code* limit the effect of such union security clauses in two ways; by limiting what a union may demand of the employer and by limiting what the union itself can do . The relevant paragraphs of Section 95 provide;

> 95. No trade union or person acting on behalf of a trade union shall,
>
> (e) require an employer to terminate the employment of an employee because the employee has been expelled or suspended from membership in the trade union for a reason other than failure to pay the periodic dues, assessments and initiation fees uniformly required to be paid by all members of the trade union as a condition of acquiring or maintaining membership in the trade union.

> (f) expel or suspend an employee from membership in the trade union or deny membership in the trade union to an employee by applying to the employee in a discriminatory manner the membership rules of the trade union.

Subject to these unfair labour practice limitations, the *Code* obviously contemplates that a union security clause may cause the termination of an employee who is not a member of the union signatory to the collective agreement in which it appears.

The *Canada Labour Code* provides for the remedying of these unfair labour practices by complaint to the Canada Labour Relations Board, which has the power to investigate, attempt to settle, hold hearings and issue orders binding on all parties where appropriate. Obviously, as arbitrator under the Collective Agreement, I have no jurisdiction or power to enforce these provisions. I can, however, interpret the *Canada Labour Code* where its provisions bear on the interpretation and application of the Collective Agreement. Where a possible interpretation of the Collective Agreement puts it in conflict with the *Code* I may be persuaded to give the Collective Agreement an interpretation which avoids that conflict, or I may find the Collective Agreement to be void for illegality where it clearly conflicts with the law. For instance, I would not, and could not, enforce the Collective Agreement in a way that required the commission of an unfair labour practice.

In *Weber v. Ontario Hydro*, [1995] 2 SCR 929, in considering whether the jurisdiction of the regular courts was ousted in favour of that of an arbitrator under the collective agreement binding on the parties, McLachlin J., for the majority, stated;

> The appellant Weber also argues that arbitrators may lack the legal power to consider the issues before them. This concern is answered by the power and duty of arbitrators to apply the law of the land to disputes before them. To this end arbitrators my refer to both the common law and statutes: *St. Anne Nackawic* [[1986] 1 SCR 704]; *McLeod v. Egan*, [1975] 1 SCR 517. As Denning L.J. put it "[t]here is not one law for arbitrators and another for the court, but one law for all": *David Taylor & Son Ltd. v. Barnett*, [1953] 1 All ER 843 (CA), at p. 847. this also applies to the *Charter*: *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 SCR 570, at p. 597.

On the face of it, the scope of the Employer's obligation to the Union under Article 4.07(a) is broadly limited by 4.07(b), and within that broad limitation what the Union may demand of the Employer is more narrowly constrained by the unfair labour practice law of Section 95(e). From the point of view of an arbitrator, therefore, Section 95(e) adds nothing, because any limitation it might impliedly put on Article 4.07(a) is already there by virtue if 4.07(b).

Section 95(f) operates quite differently from 95(e), because it constrains what the Union itself may do, not what it may demand of the Employer. Potentially it constrains the Union where Article 4.07(b) of the Collective Agreement does not, because it addresses denial of membership as well as revocation of membership by suspension or expulsion.

If I were satisfied that the Union is denying Mr. Safire membership in breach of Section 95(f) "by applying to [him] in a discriminatory manner [its] membership rules" the

question would arise whether, by enforcing Article 4.07, I would be giving effect to the Union's unfair labour practice contrary to public policy, and in a way that I could not take to have been intended by the parties to the Collective Agreement.

This could, possibly, be seen as a case of "effectively" denying Mr. Safire membership by imposing inappropriate demands on him, but I cannot characterize this as a case in which Mr. Safire was denied an opportunity to join the Union. In more straight forward terms, he has never tried to join the Union, and has made it perfectly clear that he has no desire to join the Union , as long as he must, in writing or by sworn oath, undertake to comply with the Constitution, policies and by-laws of the Union. His counsel states that Mr. Safire has never refused to become a member of the Union, just to take the oath and sign the membership card because it contains a commitment to take the oath. In my opinion that amounts to refusing to join the Union, and the real question is whether he was justified in so doing.

However, I have concluded that there is no evidence that the Union has applied its membership rules to Mr. Safire "in a discriminatory manner". On the face of the Union's Constitution the requirements of membership are the same for all, and, while there is scope for discrimination in the requirement that prospective members must be "accepted by the membership" there is no convincing evidence here that Mr. Safire has not been or would not be accepted for discriminatory reasons. However unprincipled he may think it to be, for the officers of the Union to offer to waive the requirement of the oath in his case is not to "deny membership in the trade union to [him] by applying to [him] in a discriminatory manner [its] membership rules." It is the exact opposite.

Section 70(2) of the *Canada Labour Code* provides that the Canada Labour Relations Board may relieve a union member from the obligation of paying dues, and direct that an equal amount be paid to an agreed charity "[w]here the Board is satisfied that the employee, because of religious conviction or beliefs, objects to joining a trade union...". On the evidence, religion is not the basis of Mr. Safire's objection, and, in any case, if it were, his remedy under Section 70 would be by way of an application to the Board.

The Canadian Human Rights Act. As I suggested in my request to the parties for submissions, it seemed to me then that there is no element here of discrimination on any ground addressed by *The Canadian Human Rights Act.* None of the parties suggested otherwise.

The *Canadian Charter of Rights and Freedoms* - 2(a) freedom of conscience and religion. In my request to the parties for submissions I raised the issue of freedom of conscience, because in his testimony Mr. Safire had stressed that his objection to joining the Union, although not religious, was one of principle. None of counsel, including Counsel to Mr. Safire pursued this, except, briefly, Counsel for the Union. His submission was that there is authority for the proposition that, in the context of the *Charter,* freedom of conscience, has been taken to mean conscience in the context of religion. He quoted the statement of the Supreme Court of Canada in *R. v. Big M Drug Mart Ltd.*, (1985) 18 DLR (4th) 321 (SCC) at p. 361;

> ...the concepts of freedom of religion and freedom of conscience become associated, to form, as they do in S. 2(a) of our *Charter,* in the single integrated concept of "freedom of conscience and religion...

The *Canadian Charter of Rights and Freedoms* - 2(d) freedom of association. As I stated at the outset of this award, I have concluded that Section 2(d) of the *Charter* limits the demands the Union can make on Mr. Safire and, consequently, the Employer's obligation to terminate him for not becoming a member of the Union. This, of course, means that I have concluded that I have jurisdiction to consider the *Charter*, that it applies here and that the Supreme Court of Canada's interpretation of Section 2(d) in *Lavigne v. OPSEU* (1991), 81 DLR (4th) 545; [1991] 2 SCR 211, is relevant here.

As Arbitrator Laskin (as he then was) said in *IAM v. Orenda Engines Ltd.* (1958), 8 LAC 116, at p. 119, "It is a little unreal to say, in the face of union security provision such as that before this board, that the union's constitution and by-laws remain matters of internal union concern only. [at p. 123]". My jurisdiction and mandate is to interpret and apply the Collective Agreement, specifically Article 4.07(a), which I repeat here for convenience;

4.07 Compulsory Membership

(a) Any regular employee hired after the signing of this agreement shall, as a condition of employment, become a member of the Union at the time of hiring, or as soon as possible, in accordance with clause 6.03.

But I cannot determine what is involved in becoming a member, or whether this requirement in the Collective Agreement is rendered void or in some way limited by law, including by the *Charter of Rights and Freedoms,* without examining the Union's Constitution and By-laws. I have no jurisdiction with respect to the Union's Constitution and By-laws standing alone, but with respect to the Collective Agreement my jurisdiction to take the *Charter* into account is the same as my jurisdiction to take the *Canada Labour Code* into account. See *Weber v. Ontario Hydro*, [1995] 2 SCR 929 and my discussion above of section 95(e) and (f) of the *Canada Labour Code,* above.

The issue then is whether the requirements of Article 1.04 of the Union's Constitution, that Mr. Safire (i) sign an application for membership card, (ii) undertake to comply with the Constitution and policies of the Union and the by-laws of his Local, (iii) pay the initiation fee of $5.00, and (iv) be accepted by the Local, are rendered void or in some way limited by Section 2(d) of the *Charter*. The real question is with respect to the requirement that he "undertake to comply with the Constitution and policies of the Union and the by-laws of his Local", both in writing in by oath.

In *Bartello v. Canada Post Corp.* (1987), 46 DLR (4th) 129 Henry J. of the Ontario High Court ruled that the Charter applies to Canada Post, the Employer here, because under the *Canada Post Corporation Act* SC 1980-81-82-83, c. 54 it "is a part of the executive or administrative function of the Government of Canada" After considering specific statutory provisions which it is unnecessary to detail here he ruled, at p. 140;

> ... In the final analysis the corporation may be given directions by the Minister of the Governor in Council, and it must comply with them; the power is there to control almost any aspect of the administration, even though in practice it may seldom be exercised.

However, His Lordship concluded, at p. 143, that the *Charter* did not apply to "the contractual relationship evidenced by the collective agreement between Canada Post and the union as the certified bargaining agent of the plaintiff". He reached this conclusion on the bases that "the creation of the [employment] relationship through collective bargaining is not part of the process of governing - the corporation does not thereby impose on the employees a law or administrative decision."[at p.141] and that in entering the collective agreement Canada Post was not directed by the Minister or the Governor in Council "except for residual authority to give directions."

I agree with and accept Henry J.'s ruling that the *Charter* applies to the Employer here, but, in light of the subsequent judgements of the Supreme Court of Canada in *Douglas/Kwantlen Faculty Assn. v. Douglas College,* [1990] 3 SCR 570 and in *Lavigne v. OPSEU* his conclusion that the *Charter* does not apply to the Employer's collective agreements cannot be regarded as good law. In *Lavigne* at p. 620 [of 81 DLR (4th) 545] La Forest J. states for the majority;

> Having determined that the council is a government actor, the next question is whether the council's agreement to the inclusion of [the collective agreement provision there in issue] and the obligation it imposes on persons such as Lavigne is, by itself government conduct. This issue, too, was decided in *Douglas.* Speaking on this point for the majority (Dickson C.J.C., La Forest, Gonthier and Cory JJ.; Wilson J. agreeing but on separate grounds) I thus put the matter (at p. 111):

> For reasons discussed in *McKinney v. University of Guelph*, I am of the view that the collective agreement is law. ... To permit government to pursue policies violating Charter rights by means of contracts and agreements with other persons or bodies cannot be tolerated. ...

For the minority in *Lavigne* Wilson J. held more simply, at p. 569 [of 81 DLR (4th) 545], "I am prepared to find that the Charter applies to the provision in the collective agreement on the sole ground that one of the parties to it was a government entity."

There thus being no ground in law for concluding other than that the *Charter* applies to the Collective Agreement before me here, I turn to the question of whether the Section 2(d) "freedom of association" guarantees a freedom not to associate. Here again, the judgment of La Forest J. for himself, Sopinka and Gonthier JJ. in *Lavigne* appears to me to be definitive. After careful elaboration of this question His Lordship states, at p. 624 [of 81 DLR (4th) 545];

> 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. ...

McLachlin J. equally clearly concurs in this. [at pp. 642-3 of 81 DLR (4th) 545]

Again, speaking for himself for himself, Sopinka and Gonthier JJ., La Forest J. Lordship goes on to elaborate at considerable length, the following passages being of particular relevance here;

> Thus I doubt that s. 2(d) can be said to free us from all legal obligations that flow from membership in the family. And the same can be said of the workplace. In short there are certain associations that are accepted because they are integral to the very structure of society. ... state compulsion in those areas may require assessment against the nature of the underlying associational activity the state has chosen to regulate. [at p. 626 of 81 DLR (4th) 545]
>
> ... one does not have to be forced to establish, belong to, maintain and participate in an association before the freedom becomes operative. Being forced to do any one of these things is sufficient. ... the threshold issue in this case in whether Parliament or the legislatures may create democratically run bodies of persons naturally associated with one another in certain activities or interests, and grant them authority to direct those activities without breaching the freedom of association - in the present case, unions.[at p. 628-9 of 81 DLR (4th) 545]
>
> ... the view expressed by Dickson J. in *R. v. Big M Drug Mart* [*supra*] at pp. 359-60, [was] that the guaranteed freedoms must be understood purposively in light of the interests they were meant to protect. ... **the individual's freedom of association will not be violated unless there is a danger to a specific liberty interest such as the four identified by Professor Etherington above. This approach only applies, however, so long as the association is acting in furtherance of the cause which justified its creation.** [at p. 631-2 of 81 DLR (4th) 545 - emphasis added]

On the preceding pages La Forest J. had referred to Professor Brian Etherington's article, "Freedom of Association and Compulsory Union Dues: Toward a Purposive Conception of a Freedom to Not Associate" (1987), 19 Ottawa L. Rev. 1, in which,

at pp. 43-4 the author had identified specific liberty interests in freedom from: (i) being forced to support political parties or causes, (ii) having the individual's freedom to join or associate with causes of his or her choice impaired, (iii) the imposition of ideological conformity and (iv) the personal identification of an objector with political or ideological causes which the service association supports.

On p. 635 La forest J. added "When that association extends into areas outside the realm of common interest that justified its creation, it interferes with the indvidual's right to refrain from association".

McLachlin J. departed from these views of the application of the freedom not to associate only in that she held that there was no link between the payment of dues under the Rand formula union security clause there in question and "enforced ideological conformity" with "ideas and values to which Lavigne objects". [at pp. 642 and 645 of 81 DLR (4th) 545]

Thus, in my opinion the Supreme Court of Canada has ruled in *Lavigne* that s. 2(d) of the *Charter* guarantees a freedom not to associate, and has expressed the view that in the context of union security clauses; (1) this is freedom from being forced to belong to, maintain or participate in a union, where the union is not "acting in furtherance of the cause which justified its creation", "cause" meaning the general justification for the legislative mandate for unions in Canada, and (2) even where the union is acting in furtherance of that cause, "the individual's freedom of association will ... be violated [where] there is a danger to a specific liberty interest **such as**" [emphasis added] the four examples quoted.

Obviously, this two-part *"Lavigne"* freedom not to associate is ill-defined, and, insensitively brought to bear, is capable of being destructive of unions, which are very clearly mandated by legislation in Canada, and which, historically and under Canadian law, are indeed "integral to the very structure of society". See the judgment of MacIntyre J. in *Re Public Service Employee Relations Act (Alta.),* [1987] 1 SCR 313, 38 DLR (4th) 161. It must be emphasized that in *Lavigne* La Forest J. also recognized that "it may be desirable - indeed from a practical standpoint, necessary - for a union to engage in the broader political and social processes of the country." His Lordship also saw "the difficulty of attempting to draw a line between activities that are related to the workplace and those that are not." [at pp. 635 of 81 DLR (4th) 545]

Moreover, a finding that Mr. Safire's s. 2(d) "*Lavigne* freedom of association" is being infringed would demand the application of the test in *R. v. Oakes* (1986), 26 DLR (4th) 200 (SCC), to determine whether the *prima facie* infringements are saved by s. 1 of the *Charter* as being "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". As Counsel for Mr. Safire put it, given that Mr. Safire acknowledges that the initiation fee and dues do not infringe his s. 2(d) freedom, "Is the limitation which forces him to adhere to the policies, Constitution and Bylaws of the Union in order to be an employee of Canada Post a reasonable one that can be demonstrably justified in a free and democratic society?" There is no rationale, he submits, to save the provisions of Article 4.07 of the Collective Agreement under s. 1 of the *Charter.*

According to his Counsel, what Mr. Safire objects to is having to swear to adhere to and be bound by the Constitution, By-laws and policies of the Union "that do not in any

way relate to the representation of his interest at the bargaining table". The Union, Counsel submits, has his dues and he acknowledges that they represent him at the bargaining table. "Why" Counsel asks, "is it necessary to go further than that?"

Counsel for the Union, on the other hand, simply asserts that if there is any infringement of the *Charter* here it is minimal and justified under s. 1. Counsel for the Union relied upon the pre-*Lavigne* decision of the Saskatchewan Labour Relations Board in *Remai Investment Company Ltd. v. Saskatchewan Joint Board Retail, Wholesale and Department Store Union* (1987), 18 CLRBR (NS) 75. Bearing in mind that the Board there was dealing with the constitutionality of union security provisions in the *Saskatchewan Trade Union Act,* whereas I am dealing with union security provisions in this particular Collective Agreement, I agree generally with their analysis, but have concluded that here the *Oakes* test does not result in the conclusion that the *Charter* does not limit the Collective Agreement provisions in question.

First, for the reasons given by the Saskatchewan Board, quoting from Weiler, *Reconcilable Differences* (1980), I agree that union security may be sufficiently pressing and substantial to warrant over-riding the constitutionally protected "*Lavigne*" freedoms not to associate. Second, the means adopted here, in the Article 4.07 and the Union's constitution, that is "the union shop" and the associated membership oaths, are rationally connected to the proper objectives of union security.

However, as a matter of proportionality, it does not appear to me that Article 4.07 and the Union's constitution impair the "*Lavigne*" freedoms not to associate as little as possible. To meet that test the relevant provisions in those documents must be read subject to the "*Lavigne*" freedoms not to associate, unless, in the particular

circumstances the Union can show that the legislatively mandated purposes of the Union cannot be satisfied if full effect is given to the freedoms guaranteed by Article 2(d) of the *Charter*, as interpreted in *Lavigne*. In other words, where the Union denies membership on the basis that it cannot accept membership subject to the "*Lavigne*" freedoms not to associate, it will be for the Union to show in particular sets of circumstances that its legislatively mandated purposes cannot be met unless there is a s.1 limitation on the "*Lavigne*" freedoms not to associate.

Moreover, it is impossible to say on the evidence before me whether there is an acceptable proportionality between the Article 4.07 and the Union's constitution, and its effects on Mr. Safire, because I do not know what those effects are.

In summary: Mr. Safire has a two-part "*Lavigne*" freedom not to associate; (1) this is freedom from being forced to belong to, maintain or participate in a union, where the union is not "acting in furtherance of the cause which justified its creation", "cause" meaning the general justification for the legislative mandate for unions in Canada, and (2) even where the union is acting in furtherance of that cause, "the individual's freedom of association will ... be violated [where] there is a danger to a specific liberty interest **such as**" [emphasis added] the four examples quoted by La Forest J. in *Lavigne*: (i) being forced to support political parties or causes, (ii) having his freedom to join or associate with causes of his choice impaired, (iii) the imposition of ideological conformity and (iv) being personally identified with political or ideological causes which the Union supports and to which he objects.

This freedom does not entitle Mr. Safire to refuse to join the Union here, but it does entitle him to refuse to join on any basis other than that his oath or promise upon

becoming a member of the Union is limited by these "*Lavigne*" freedoms not to associate. In other words, the provisions of Article 4.07 of the Collective Agreement, and for those purposes the provisions of the Union's Constitution, are not voided by s.2(d) of the *Charter*, but they must be "read down" to accord with it.

This is a matter of substance, not form. If Mr. Safire is required to swear an oath or sign an application form in order to enjoy all the benefits of membership, he can do so in full confidence that, regardless of the words used, the legal effect of this Award is that the Collective Agreement does not allow the Employer to terminate him for insisting upon his "*Lavigne*" s.2(d) *Charter* freedoms, subject to the Union proving that in the particular circumstances its legislatively mandated purposes cannot be met unless there is a s. 1 limitation on his "*Lavigne*" freedoms not to associate.

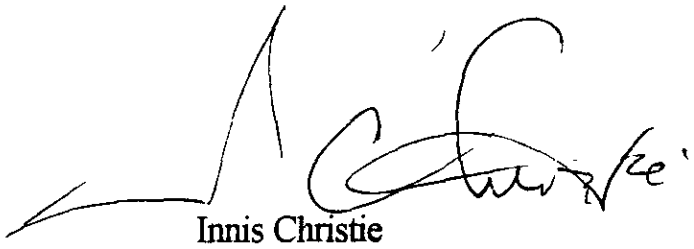
If in any particular circumstance the Union purports to require the Employer to terminate Mr. Safire on the basis that he is not a member, the Employer will not be required to do so, and, indeed, will not be allowed to do so, if it, or Mr. Safire, can show that Mr. Safire's "*Lavigne*" s.2(d) *Charter* freedoms would be infringed, subject to the Union showing a s.1 justification in the terms discussed here. The delicate balances at both stages will, in the end, have to be determined at arbitration, with appropriate evidence of the specifics; evidence which is lacking here.

Conclusion and Order. The grievance is allowed in part. No later than one month from the date of this award the Employer must terminate the employment of Philip Safire unless he has become a member of the Union, or has unequivocally, in writing with a copy to the Employer, held himself out to the Union as ready and

willing to become a member and, formally or in effect, has been denied membership in the Union.

It is to understood, and need not be set out in any agreement between Mr. Safire and the Union, that his membership in the Union will be subject to his "*Lavigne*" s.2(d) *Charter* freedoms as described here. No requirement that Mr. Safire subscribe to the existing form of words in the oath of membership or on the application form, nor any existing provision in the Constitution, By-laws or policies of the Union, all of which are to be read subject to Mr. Safire's "*Lavigne*" s.2(d) *Charter* freedoms, shall constitute the effective denial of membership in the Union.

As agreed by the parties at the outset of the hearing, I remain seized of this matter and will reconvene at the request of either party, or Mr. Safire, to deal with any real issue of substance involved in the application of this award. Once Mr. Safire becomes a member of the Union I will have fulfilled my mandate and will not remain further seized of this matter. I note that from then on Article 4.07(b) would appear to apply to the issues considered here.



Innis Christie

Arbitrator