Case Name:

North Vancouver Teachers' Association (Re)

Between
Justin Wasilifsky & Nancy Wasilifsky (the "Wasilifskys"), and
North Vancouver Teachers' Association *(the "NVTA"), and
British Columbia Teachers' Federation *(the "BCTF"), and
The Board of School Trustees of School District No. 44 (North Vancouver) (the "North Vancouver School District" or the "District"), and
Confederation of Canadian Trade Unions *(the "CCU"), and
B.C. Federation of Labour (the "BC Fed") *(collectively, the "Unions")

[1991] B.C.L.R.B.D. No. 110

12 C.L.R.B.R. (2d) 161

No. C112/91

(Reconsideration of IRC No. C169/89, itself a

reconsideration of IRC No. C243/88)

Case No. 2353 & 2354

British Columbia Industrial Relations Council

Heard: May 22, 23; June 20, 1990
Judgment: June 3, 1991

Panel: Edward R. Peck, Commissioner
Ken Albertini, Chairman, Adjudication Division
Richard S. Longpre, Vice-Chairman
Barry Goff, Vice-Chairman
Shelley Nitikman, Vice-Chairman

Joseph S. Crowder, Vice-Chairman
V.A. Pylypchuk, Vice-Chairman

Counsel: Randy J. Kaardal for the Wasilifskys Allan E. Black for the NVTA and the BCTF Leo McGrady and Gina M. Fiorillo for the CCU John Baigent for the BC Fed

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I

This decision concerns two applications--one brought by the NVTA/BCTF, and the other by the CCU--under Section 36 of the Industrial Relations Act (the "Act") for reconsideration of IRC No. C169/89 ("Wasilifsky"), which itself constitutes a reconsideration of IRC No. C243/88. This matter had its origin in applications for exemption from trade union membership under Section 11 of the Act by Nancy Wasilifsky and Justin Wasilifsky. Section 11 says the following:

> 11.(1) Where the council is satisfied that an employee, because of his religious conviction or belief,
> (a) objects to joining a trade union, or
> (b) objects to the paying of dues or other assessments to a trade union,
> the council may order that the provisions of a collective agreement requiring membership in a trade union as a condition of continued employment do not apply to the employee and that the employee is not required to join the trade union, to be or continue to be a member of the trade union, or to pay any dues, fees or assessments to the trade union, so long as amounts equal to any dues, fees or other assessments are paid by the employee to or are remitted by the employer to a charitable organization agreed on by the employee and the trade union or, if the employee and the trade union fail to agree, then to a charitable organization that is registered as a charitable organization in Canada under Part 1 of the Income Tax Act (Canada) and that is designated by the council.
> (2) [Repealed 1987-24-10, effective July 27, 1987 (B.C. Reg. 246/87).]
> (3) Notwithstanding any other provision of this Act, a person exempted under subsection (1) of this section is not entitled to participate in a vote conducted by

> a trade union or in a vote held for the purposes of this Act.

The Wasilifskys claim that membership in the BCTF is incompatible with their religious convictions or beliefs. When the original panel refused the Wasilifskys' applications, they applied for reconsideration under Section 36 of the Act. A majority of the reconsideration panel allowed the applications and granted the exemption. It is from the decision of the majority that the NVTA/BCTF and CCU now appeal. The BC Fed appears as an interested party.

After reviewing the evidence and hearing all the submissions, the Panel allows in part the applications for reconsideration. The Wasilifskys remain exempt from trade union membership, but are required to pay dues to the NVTA/BCTF.

II

BACKGROUND

(a) Historic Background to Section 11 of the Act

Ontario was the first jurisdiction in Canada to provide a statutory exemption for individuals with deeply held religious beliefs who opposed joining a union or paying union dues. Cases such as Hoogendoorn v. Greening Metal Products (1967), 67 CLLC 14,064 (S.C.C.)[1], illustrate the difficulties encountered by persons religiously opposed to trade union membership, and provided the impetus necessary for such organizations as the Committee for Justice and Liberty, and the Christian Labour Association of Canada (the "CLAC") to lobby for changes to labour legislation.[2] In 1970, the Ontario legislature introduced Section 39 into that province's Labour Relations Act (R.S.O. 1970, c. 232, s. 39). The first applications under that legislation involved Dutch immigrants to Canada who were either active members of the Christian Reformed Church or Canadian Reformed Church, or active supporters of the CLAC.

The historic development of trade unionism in The Netherlands, with its close ties to religion, was at the root of this unique form of opposition to trade unionism. In the latter part of the 19th Century, Dutch trade union membership was organized according to an individual's religion. Catholic workers belonged to Catholic unions and Protestant workers to Protestant unions. The Protestant community was further split on the issue of union membership, with some favouring a socialist-led union and others a Christian-based union that rejected the notion of a class struggle in favour of principles of the Holy Bible. Eventually, these two Protestant groups, along with the Catholics, formed their own unions. Trade union membership was dependent upon personal religious beliefs and had nothing to do with an ongoing collective bargaining relationship. Because the Dutch labour relations system did not incorporate the concept of exclusive bargaining agency, it was not unusual for members of different unions to work side-by-side in the same workplace. The comments of the Ontario Labour Relations Board in Tange Co. Ltd. (1961), 62 CLLC 16,224 (OLRB), illustrate the difficulties that arose from the differences in the two systems:

> Among other documents offered in evidence by the applicant is Exhibit 9, a statement directed to the Ontario Labour Relations Board which purports to have been adopted by the C.L.A.C. at its convention held on September 26th, 1959. This Exhibit reads in part as follows:

> ...We beg to be allowed at this point to present some background history of the C.L.A.C. It is undeniable that the organization was established largely by workers from Europe who had been members of certain Christian trade unions. Mr. Fuykschot had been a leader in such a movement during several decades. It is not surprising therefore that in the beginning mistakes were made. He had no knowledge of the Canadian Labour Laws, did not understand that only one union can represent the employees in an appropriate unit and that therefore to bar an employee from a union on creedal or other grounds would deprive that worker of the right to have a voice in the union that would represent him and thus in collective bargaining. In the Netherlands, where Mr. Fuykschot received his training, employees could be members of either one of two Christian organizations, either Roman Catholic or Protestant, or of a "neutral" union, all three as one bargaining with employers on an industry-wide basis....
>
> ...Coupled with that problem was the question of dual membership. It arose from the fact that many Christian workers who had joined one of the CLAC general membership locals were faced with the problem of the closed or union shop in their employment. It should be well understood that the CLAC was organized because many Christian workers had very serious conscientious objections to membership in the existing unions. They hoped that it would be possible to build up a strong labour movement based on Christian social principles in which they believed, so that it would not be necessary for them to hold membership in so-called neutral union [sic] to obtain a livelihood. But, many of them were placed before the choice of joining such a union or giving up their employment. Quite a number joined such a union and desired also to retain membership in the CLAC general membership local to support and strengthen the movement. But there were those in the CLAC who considered such dual membership incompatible and therefore demanded that the workers in question make a final choice, either one or the other.
>
> (at 999-1000)

While the religious divisions amongst trade union members no longer characterize the Dutch labour relations system, the beliefs held by the Dutch emigrating to this Country in the years following World War II led to their becoming the initial proponents and users of the religious exemption provision.

British Columbia followed the Ontario example in 1973 when the government introduced the exemption for religious opposition to trade unionism at the same time as other major amendments to the labour legislation. The debate in the Legislature did not concern itself with whether an applicant had to be opposed to all trade unions or just one trade union: rather it was concerned with the general scope of the exemption and whether the dues should continue to be remitted to the union. Members of the Opposition proposed an amendment to that section allowing exemption from both membership in the trade union and the payment of dues, but from the government's perspective an exemption from dues payment was out of the question. This is illustrated in British Columbia, Leg-

islative Assembly, Debates of the Legislative Assembly, Vol. 2, No. 1 (22 October 1973) by a comment of the then Premier:

> I find it absolutely essential in a free society that people have some mechanism to opt out. I do. People who do make decisions based on conscience are more than welcome in any democratic society and particularly more than welcome in totalitarian states.
>
> But there is a penalty for stepping out of tune. Everybody must pay taxes; everybody must deal in the reality of the world they live in. Had I been in a position to have my taxes deducted for defence, to write down to Ottawa and say, "Deduct my share of income tax from national defence because I don't believe in Bomarc missiles," what opportunity would there have been for that? There isn't. There is an alternative to what we have posed, and the alternative is to get involved in the union movement.
>
> But if you're prepared to opt out of society, or opt out of the organization, you must pay what society demands and you must pay what the group demands. You can't go to the work place and expect your fellow workers to spend their evenings, their weekends, organizing and struggling and fighting for better work conditions while you walk on and say, "I want no part of it; I won't even pay my fair share of it," and yet still expect to get the same wages and working conditions. You must pay, Mr. Chairman.
>
> (at 837)

Of the amendment generally and the payment of dues, the Labour Minister of the day said this:

> No one is being coerced into joining a trade union. The provision is contained in this Act which gives every worker a free democratic vote on the question of representation. It seems to me that you're simply decrying the opportunity for workers to have a fairer opportunity to record their own preferences.
>
> One the question of the religious conscience clause and the proposition of allowing them to direct payment of the equivalent of trade-union dues to some other tribunal, I want to say this: I respect the groups that are objecting on the basis of religious conscience, at least some of them. There are a number of different types; there are a number of different religious denominations, I want to stress that. Most of them, in my view, are very sincere.
>
> But I think it's a dangerous principle when we start to write legislation which will provide minority groups to opt out of decisions of the majority....
>
> (at 843)

It is obvious from this discussion that the government saw Section 11 as striking a balance between individual religious beliefs and the need for financial contributions toward trade union expenses. Exemption from membership was sufficient to respect individual religious beliefs, but exemption from dues could not be justified on the basis of religious beliefs: individuals who benefited financially from the actions of the union should contribute to defray expenses incurred to obtain those benefits. The question of which religious groups could benefit from Section 11 was left to the discretion of the Labour Relations Board.

The 1973 version of Section 11 (Labour Code of British Columbia Act, S.B.C. 1973, (2nd Sess.), c. 122) said this:

> 11.(1) Where
> (a) a collective agreement requires membership in a trade-union as a condition of employment or continued employment; and
> (b) an employee included in, or affected by, the collective agreement satisfies the board that, by reason of his religious beliefs he is opposed to joining, or belonging to, a trade-union,
> the board may, by order, exempt the employee from compliance with that provision of the collective agreement; and, in that case, shall order that the employee make a written assignment of wages pursuant to section 10 to the trade-union in an amount equivalent to the union dues payable from time to time by the employees to the trade-union and that such assignment shall not be revoked without the consent of the board; but, for the purpose of Part III and section 81 of Part V, the employee shall be deemed not to be an employee.

The interpretation placed on the section by the Labour Relations Board in Cliff Straub and Canadian Union of Public Employees, Local 411, BCLRB No. 11/76, [1976] 1 Can LRBR 261, applied a subjective test to examine the applicant's religious beliefs and required a successful applicant to object to membership not in just one union, but in all unions. The Board decided that Section 11 required opposition to the concept of trade unionism and thus rejected the Ontario approach which permitted an exemption if the applicant was opposed to membership in a particular trade union due to, among other things, religiously based opposition to a specific trade union policy.

In 1987 an amendment to Section 11 was introduced which provided for the payment of dues to a charitable organization in lieu of a union where an applicant was successful in obtaining an exemption from the payment of dues. As in 1973, the debate centred on the issue of "free riding". In response to Opposition questions concerning obligations of a union to represent the interests of a

person excluded under Section 11, the then Minister of Labour said (British Columbia, Legislative Assembly, Debates of the Legislative Assembly, Vol. 3, No. 20 (29 May 1987)):

> The knowledge that I had from labour, as a matter of fact, on this issue is that a number of labour organizations had already agreed that those who had received exemption from the Labour Relations Board under the conscientious objection clause were in fact paying their annual or monthly assessment, whatever the case may be, to charities--by agreement with labour, which saw no difficulty in that at all. They had some concern that the number of objectors might be increased, or whatever, but the way the wording is now, they've seen very little difficulty with the situation. In fact, in many cases they were agreeing to it already, recognizing that they were responsible for representing...or at least that conscientious objectors got the benefit of representation as it relates to negotiations and so on.
>
> (at 1469)

Whether or not an amount in lieu of dues could be paid to a charity was the government's focus. As in the 1973 debates, the scope of the exemption was not specifically addressed.

(b) History of Proceedings in this Application

The Wasilifskys first applied for an exemption under Section 11 in time for the 1988/89 school year. The original panel decided the matter without the benefit of an oral hearing and dismissed their applications. Under the test for exemption outlined by the Labour Relations Board in Straub, supra, the Wasilifskys did not qualify for an exemption. They do not object to all trade unions, only to the NVTA/BCTF and only because of their abortion policies.

The Wasilifskys applied for reconsideration of the original decision under Section 36 and were successful. In IRC No. C169/89, the Wasilifsky panel allowed the application on the basis of a new interpretation of Section 11. Rather than following the test in Straub, supra, the panel held that Section 11 exemptions were available to persons holding sincere religious convictions who objected to trade union membership because of a policy of that union and not because they were opposed to all unions.

(c) Factual Background to this Application

These facts are summarized from the findings of the panel in Wasilifsky, supra. The Wasilifskys are high school teachers employed by the North Vancouver School District. Presently, the collective agreement between the NVTA and the District requires all teachers, as a condition of employment, to become NVTA members. The NVTA's constitution also requires them to become members of the BCTF. The Wasilifskys are devout Catholics who support the Church's principles enunciated in the Encyclical Letter "Of Human Life (Humane Vitae)" authored by Pope Paul VI, 1968; the 1988 Pastoral Letter on Abortion by Archbishop Carney of the Vancouver Archdiocese; Pope John Paul II's 1980 treatise on "The Freedom of Conscience and of Religion", his 1981 Encyclical Letter "On Human Work", and his 1987 Encyclical Letter "On Social Concern"; and a document prepared by the 1975 Sacred Congregation of the Faith, "Declaration on Procured Abortion". As a consequence the Wasilifskys disagree with the use of any artificial means of contracep-

tion and emphatically reject the notion of freedom of choice in abortion. Their religious beliefs cause them to oppose the following BCTF policy:

> 42.05 - That the BCTF support the right of females regardless of age, marital status, income or geographical location to:
> (a) have access to a full range of information, counselling and medical services with respect to their health and well-being;
> (b) decide whether or when to have children.
>
> 42.09 - That the CTF [Canadian Teachers' Federation] should seek to have abortion removed from the Criminal Code of Canada.

They characterize these policies as "pro-abortion" and say they are untenable and in conflict with their sincerely held religious views. Only a policy opposed to choice in abortion or one that is "neutral" is acceptable to the Wasilifskys. However, like the Church, they are in favour of trade unionism: they support the right of workers to organize themselves into groups to improve their working conditions, but they oppose the use of violence to achieve political goals.

The Members' Guide to the B.C. Teachers' Federation defines BCTF policies as "statements of objectives" that the organization wants to attain or retain, and/or beliefs expressed by it on any matter. Policies deal with matters over which the BCTF "does not have complete control" and may involve a government, university, school board or other organization (see Members' Guide, at 19). They are approved at the BCTF Annual General Meeting ("AGM") through a democratic process that is unnecessary to describe in detail here; suffice it to say that an individual can initiate a policy that must be advanced through a process culminating in a vote amongst delegates selected locally who attend an AGM. Policies 42.05 and 42.09 were approved via this process and were passed at the 1981 AGM.

The Wasilifsky panel stated that the Wasilifskys were "devastated" (at 5) by these policies and in 1982 began a campaign to change them through the internal process described above. To this end, they wrote to the editor of the BCTF newsletter objecting to the BCTF's active support of these policies. They conducted a survey of teachers in five North Vancouver schools and compiled data which revealed that 104 of the 105 respondents favoured a neutral BCTF position. The Wasilifskys attended the AGMs in 1983, 1984 and 1985, introducing resolutions to remove the offensive policies, but without success. Mrs. Wasilifsky concluded that only by advancing to the "inner core" of the BCTF could the desired changes be made and to this end she sought elected office in both the NVTA and BCTF in 1985, 1986 and 1987. Both the Wasilifskys attempted to advance several resolutions which reflected a neutral position at both the 1986 and 1987 AGMs, but again they were unsuccessful.

For his part, Mr. Wasilifsky explored ways in which to avoid BCTF membership but when he realized that it was a statutory term and condition of employment (and so remained until 1987) he began to look for work in a jurisdiction where the union's policy objectives would not offend his religious convictions. His plans in this regard were interrupted by the terminal illnesses of two close family members who due to a lack of medical insurance coverage required financial assistance with medical bills. Because of the need for an uninterrupted income, Mr. Wasilifsky remained in his job.

In his mind this alternative was the lesser of two evils: membership in an organization with repugnant policies as against abandonment of family obligations. It was not until the death of the two family members in 1985 that Mr. Wasilifsky actively sought new employment. Ultimately, he could not secure suitable alternate employment. In 1987 both Justin and Nancy Wasilifsky became aware of Section 11 of the Act and, after seeking legal advice, initiated their applications for exemption from membership and dues.

Currently, the Wasilifskys do not belong to either the BCTF or NVTA, as required by the collective agreement. Unlike the situation before July 1987, BCTF membership is no longer a statutory term and condition of employment. The original panel found that the Wasilifskys would join the BCTF willingly if the organization would change its position on abortion. Nancy Wasilifsky took a slightly different position before the Wasilifsky panel, saying she would have to think about it. The Wasilifskys refuse to pay union dues even though they approve of the collective bargaining activities of both the BCTF and the NVTA. The Wasilifsky panel found that paying dues was repugnant to Justin Wasilifsky because such payments "constitute[d] material cooperation with intrinsic evil" (at 10).

Even though the Wasilifskys remained BCTF members after the death of their relatives, there is no doubt about the depth of their religious beliefs. They are both avid students of Catholic theology and have a library of over 1,000 volumes on that subject. Mr. Wasilifsky testified that the Church permits Catholics to have different moral positions with regard to the same factual circumstances, but that it has excommunicated persons who publicly express a pro-choice position on abortion. With regard to the apparent inconsistency in their decision to continue working after the death of their relatives, Mr. Wasilifsky made several observations. First, they had attempted to work within the BCTF in order to make the policy more compatible with their religious beliefs; second, they "joined" the BCTF prior to the adoption of the disputed policy and remained members because it was a requirement of the statute; and third, he decided to work elsewhere and had taken several steps in that direction. The Wasilifskys both freely acknowledge that the BCTF and the NVTA have never prevented them from practising their faith or espousing their religious views. Nevertheless they maintain that continuing membership in those organizations places them in intolerable spiritual conflict with their beliefs and consciences.

Their views on abortion are fervent: they cancelled a credit card of a national bank which supports an abortion clinic, and they refuse to receive medical care in any hospital where abortions are performed. So strong are their views on the latter point that they have entered into a pact with each other: each promises to refuse medical treatment for the other when the latter is incapable of making such a decision.

III

ARGUMENTS

(a) NVTA/BCTF

The NVTA/BCTF submits that the Wasilifskys have been long-standing and active members of the BCTF, as well as active trade union members in Ontario. While they are bound by a policy determined by the Union's internal democratic processes, the Wasilifskys remain free to express their own views on abortion and to practise their faith. They have managed to reconcile their beliefs with membership in the BCTF for many years: 1981 to 1988. Moreover, the Wasilifskys' position

that membership in the BCTF had previously been compulsory is without merit. The issue of voluntariness remains the same: membership in the BCTF was mandatory under compulsion of statute before, and is equally mandatory now under compulsion of a collective agreement.

The NVTA/BCTF says that to allow the Wasilifskys an exemption on the basis of their objection to one trade union policy is to change thirteen years of consistent practice under Straub, supra, without explicit direction from the Legislature. The radical change in policy introduced by Wasilifsky, supra, is on its face not warranted by the changes made to Section 11 of the Act. Either the Straub, supra, or the Wasilifsky, supra, interpretation is possible on the language of Section 11 but the better view is that the plain meaning of "objects to a trade union" does not encompass the broader concept of objecting to a policy. The Legislature had an obvious opportunity to correct any perceived shortcomings of the Straub, supra, interpretation when other changes to Section 11 were made in 1987, but the Legislature's focus as disclosed by Hansard was strictly on the payment of dues to a charity. Such absence of comment should be taken as a legislative endorsement of Straub, supra.

Other jurisdictions, such as Canada (see Barker v. Teamsters, Local 938 (1986), 86 CLLC 16,031 (CLRB); Tim Gordon (1988), 3 CLRBR (2d) 245); Alberta, Saskatchewan (see Neufeld v. CUPE, Local 1949 (1986), 87 CLLC 16,001 (Sask. LRB)) and Manitoba, all subscribe to Straub, supra, because that decision respects the delicate balance between union security and individual religious beliefs. The approach in Ontario which permits religious exemption on the basis of a single union policy was rejected by B.C. and other jurisdictions. The Ontario interpretation is inappropriate for this jurisdiction because of significant differences in the legislation. In the Ontario Labour Relations Act, a temporal limitation confines the exemption to the duration of the collective agreement. Further, an application can be made only by those persons employed at the start of the collective agreement. There is no such temporal limitation in the Act and it is inappropriate to have such a broad interpretation which is temporally open ended.

It is conceded, however, by the NVTA/BCTF that the Colleges Collective Bargaining Act, R.S.O. 1980, c. 74, of Ontario under which the case of Paul H. Tremblay (1984), 6 CLRBR (NS) 289 was decided does not contain a temporal limitation similar to that in the Ontario Labour Relations Act. Moreover, the Ontario Board, in interpreting Section 53 of the Colleges Collective Bargaining Act, confirmed its interpretation of Section 47 of the Ontario Labour Relations Act. The Board declined to depart from a consistent approach which it had followed for over 15 years. Notwithstanding the lack of temporal limitation in the Colleges Collective Bargaining Act and what that implies, the NVTA/BCTF urges that in British Columbia there ought not to be a departure from 13 years of consistent practice under Straub.

According to the NVTA/BCTF, the essence of the dispute before this Panel is whether an exemption should be available to applicants who object to membership in a particular trade union because of one or more of its policies, or only to those who oppose membership in all trade unions because of their objection to the concept of unionism. It is to be noted that the legislation does not refer to "policy", only to a "trade union", but Wasilifsky, supra, fails to distinguish between the two. Further, a proper analysis of Section 11 would focus on an applicant's beliefs rather than the policies of a trade union. The Legislature could not have intended Section 11 exemptions to apply to trade union policies for one simple administrative reason: any change in trade union policy could result in a rash of applications. Moreover, the remedy of exemption is out of proportion to the complaint, since an applicant could complain about a minuscule union policy and qualify for a full exemption

which results in a withdrawal of financial support for all union efforts even though the rest of the union's policies or actions are acceptable to the applicant. Objections to policy can be effectively addressed by internal union procedures which allow members to work within the democratic structure to effect policy change. Where the applicant's objection is to trade unionism in general, exemption is the only effective remedy and is thus in proportion to the objection. Opposition on religious grounds must be to a trade union as a fixed or lasting entity manifested through its fundamental functions and not to some minuscule policy. Finally, the Council should not become involved in internal trade union matters and should leave matters such as trade union policy to the will of the majority.

(b) The BC Fed

The BC Fed argues that this is an important case for reconsideration for two reasons. First, the policy considerations which drive the Council's interpretation of Section 11 must include the importance of bargaining unit security which allows workers to take collective action necessary to improve their working conditions. An important collateral consideration is minimizing the number of free riders. Second, there has been no explicit direction from the Legislature directing the Council to change its policy. The BC Fed says the Wasilifsky panel erred in three significant ways: its examination of the history of Section 11; its interpretation of religious freedom; and its interpretation of the Act. The BC Fed concedes that the Wasilifskys are sincere, that their objection to membership is religious, and that the proper test to assess the nature and depth of their religious beliefs is subjective.

The BC Fed agrees that the language of Section 11 can bear either the Wasilifsky or the Straub interpretation. Consequently the Council faces a policy choice in deciding which interpretation it should prefer. However, the BC Fed says that for good sound policy reasons the Straub interpretation is to be preferred.

While the language of Section 11 is not helpful in resolving the present issue, the history of Section 11 does not support the interpretation of Wasilifsky, supra, since the panel in Straub, supra, specifically discussed and rejected the Ontario approach. Nor is the exemption provision as initially enacted unfair to the rest of the bargaining unit: from 1974 to 1987 the dues from an exempt member went to the union so that other members of the bargaining unit were not financially penalized by another's exemption. However, since 1987 and introduction of the option to send an equivalent sum to charity, a broader based exemption would necessarily require those remaining in the unit to bear an even more disproportionate share of the financial responsibility for collective bargaining.

Moreover, the chief distinction between an objection of the Wasilifsky kind and a Straub objection is that the Wasilifskys' problem with the union policy is amenable to the democratic process while Straub's problem was not. In Straub, supra, exemption was the only solution because Straub's objection went to the heart of what a trade union is. Consequently, for Straub it was the very act of joining a union which was offensive and it is that which meets the requirements of Section 11. The Wasilifskys, on the other hand, can continue to work to change the offensive policy within the Union. The act of joining per se is not offensive to them. They are better served by being on the inside as opposed to being excluded from the union. If the Council wants to strengthen individual rights, it should enhance the workings of trade union democracy.

Finally, as a matter of sound labour relations policy, the Council should not be sitting in judgment of matters, such as abortion, that are peripheral to labour relations. In this regard, we are urged to adopt the dissenting opinion in Wasilifsky, supra.

The BC Fed also argues that the Wasilifsky interpretation cannot be justified in the name of freedom of expression or freedom of religion under the Canadian Charter of Rights and Freedoms[3] (the "Charter"). In order for there to be an abridgement of religious freedom, the impugned legislation must force an individual to participate in an offensive activity, or the offensive measure must impose type of external restraint on the individual's religious practice or beliefs. This is not the case where, as here, a monetary contribution is made to a collective bargaining representative who in turn takes a position on certain social issues. In support of this argument, the BC Fed cites the Federal Court of Appeal's decision in Prior, infra. With regard to freedom of expression, it is necessary for the impugned measure to compel a certain course of action or force the Wasilifskys to associate with a view they do not share; since they are not identified with the offensive policy or required to agree with it as a condition of membership, there is no breach of their freedom of expression rights.

In the alternative, the BC Fed argues that there is sufficient discretion in Section 11 to permit an exemption while requiring that dues be paid to the Union. This, according to the BC Fed, would be a sound middle position permitting exemption based on the test in Wasilifsky, supra, while at the same time ensuring that no fundamental unfairness to other members of the bargaining unit occurs through a requirement that they bear a disproportionate financial burden.

(c) The CCU

According to the CCU, the fundamental principle of union security must be considered in order to arrive at a proper interpretation of Section 11. Since trade union security is the cornerstone of the collective bargaining system, any exemption should be narrowly construed lest it seriously jeopardize the union's role in encouraging effective labour relations in this Province. The Straub interpretation, which has minimal impact on and which recognises the paramountcy of union security, should be retained. When negotiating a collective agreement, a union may adopt policies or methods which offend an individual's conscience as long as it is done to fulfil the union's obligation to the membership as a whole. It is important to bear in mind that in matters beyond the limits of Section 46, a union cannot bind its membership. This is analogous to the position adopted by the courts in such cases as Prior v. the Queen, [1988] 2 F.C. 371 (F.C.T.D.), affd (1989) 101 N.R. 401 (F.C.A.) leave to appeal to S.C.C. denied February 10, 1990, and Lavigne v. OPSEU (1989), 56 D.L.R. (4th) 474 (Ont.C.A.). In Prior, the Federal Court of Appeal found that the requirement to make financial contributions to government which indirectly support causes or views distasteful to an individual does not interfere with freedom of religion or conscience. The Ontario Court of Appeal in obiter dicta in Lavigne expressed a similar view. Individuals remain free to express their own thoughts or opinions and are in no way personally identified with the offending policy. Thus no exemption should be available for objections to a non-bargaining policy or other matter over which a union cannot bind its membership.

The CCU maintains that the Wasilifsky panel erred when it changed Council policy without explicit direction from the Legislature. This is particularly true given that the Legislature seemed to tacitly approve of the status quo in 1987 when it altered other aspects of Section 11 but left its major thrust intact. Nor did the Legislature add any words to the legislation, which it could easily have done, such as "or objects to the policy or policies of a trade union".

A broader interpretation of Section 11 is also incompatible with the purposes and objects of the Act since it weakens the collective bargaining regime. The CCU cites, in particular, Sections 27(1)(a), (b) and (c):

> 27.(1) The council...shall have
> regard to the following purposes and objects:
> (a) securing and maintaining industrial peace and furthering harmonious relations between employers and employees;
> (b) improving the practices and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees;
> (c) promoting conditions favourable to the orderly and constructive settlement of disputes between employers and employees or their freely chosen trade unions....

By decreasing the numbers in the bargaining unit, it diminishes a union's economic strength. Such a broad interpretation is also potentially divisive in the workplace because non-members are perceived to be free riders.

Moreover, "intra faith" divisions in the workplace may also result from a broader exemption: a gap is created between co-religionists who apply for an exemption and those who do not, and between those who receive an exemption and those who do not. Additionally, intra faith pressures may increase the number of applicants. This does nothing to advance the Act's objective of securing and maintaining industrial peace.

On the other hand, the Act clearly recognizes the need to provide for dissent. Individuals, who as members remain free to express personal views and to participate in the internal democratic processes of a union in order to change offending policies, are protected by Sections 7, 4(3), 5(2), 5.1 and 52 which ensure that an individual can hold unpopular or contrary views without fear of reprisal. Finally, says the CCU, the approach taken in Wasilifsky, supra, leads the Council into an internal trade union matter best left to the membership and the union's democratic processes. Involvement in such matters peripheral to the Council's statutory mandate requires a restrained approach such as that in Straub, supra.

(d) Nancy and Justin Wasilifsky

Argument on behalf of the Wasilifskys began with a reminder about the scope of reconsideration and the need for this Panel to confine its review to the facts as previously determined. The Wasilifskys assert that the Council, as an administrative tribunal, has the jurisdiction to change its interpretation of statutory provisions in accordance with changing circumstances. Additionally, there was explicit direction from the Legislature in 1987 when it changed Section 11 so that the section mirrors the equivalent section in the Ontario legislation. Thus, the Ontario approach is correctly adopted in Wasilifsky since the changes to Section 11 are intended to be purposive, providing greater protection to individuals, particularly when viewed in light of the changes to Section 27. Section 27 requires the Council to have regard to the rights of individuals when interpreting the Act, including Section 11. Furthermore, Section 3(3)(e), requiring an employer to agree to a Rand formula union security provision, was passed after Straub, supra. Thus, the assumptions underlying

Straub, in particular the importance of union security, should be re-examined in light of prevailing circumstances.

Section 8 of the Interpretation Act, R.S.B.C. 1979, Chap. 206, which requires every "remedial" enactment to be given a "fair, large and liberal construction and interpretation as best ensures the attainment of its objects" also highlights the need to re-visit Section 11 in its new statutory context. The fact that Section 11 ought to be given a broad interpretation is reinforced by Section 37(3) of the Interpretation Act:

> (3) An amendment, consolidation, re-enactment or revision of an enactment shall not be construed to be or to involve an adoption of the construction that has by judicial decision or otherwise been placed on the language used in the enactment or on similar language.
>
> (emphasis added)

Thus the mere re-enactment of Section 11 in 1987 does not mean that Straub is the only correct approach.

The Wasilifskys say that Section 11 must also be interpreted in light of the Charter, in particular the provision concerning freedom of conscience and religion (Section 2(a)) and equality rights (Section 15). They say that their right to freedom of religion is offended because they are required to belong to an organization that promotes or supports the right of women to have abortions. They must leave their employment or suffer intolerable conflict with their religious beliefs. The Straub interpretation offends equality rights by distinguishing arbitrarily between members of different faiths. Successful applicants come from only certain religions. Individuals of other religions can never qualify under Straub, even though they are sincerely troubled on religious grounds by a position adopted by their bargaining agent.

It is illusory, the Wasilifskys argue, to distinguish between an objection to a trade union, per se, and an objection to its policies: a trade union is the sum of its policies. And even though one may argue that some policies are more important than others, it does not make sense to deny an exemption because an applicant objects to a trivial or unimportant policy of a union. They ask: "If the policy is trivial to the union, why do they need it?"

In order to justify a breach of the substantive Charter rights, there must be cogent and compelling evidence of "a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society" (see R. v. Oakes, [1986] 1 S.C.R. 103, (1986), 26 D.L.R. (4th) 200 (S.C.C.)). The Wasilifskys say that the Straub interpretation meets none of the Oakes tests. First, there is no rational connection between union security provisions and the requirement that an applicant object to all trade unions. Second, Straub, supra, does not impair rights as little as possible. And third, there is no proportionality between the rights protected and the damage done by the breach. That is, the protection of bargaining unit stability resulting from Straub, supra, does not outweigh the damage to the rights of Justin and Nancy Wasilifsky. Most important to remember is that Section 11(3) disentitles an exempted individual from participating in votes under the Act or organized by a trade union.

Finally, the Wasilifskys say there is no real damage to the integrity of union security provisions by Wasilifsky, supra. Any "bulge" cannot be attributed to the widened test set, but rather to

the number of eligible applicants. Approximately 30,000 teachers were certified for the first time in 1988 and only now are eligible for the Section 11 exemption.

(e) Reply of BC Fed

In reply to the Wasilifskys' arguments on the Charter, the BC Fed also spoke on behalf of the NVTA/BCTF. It argued that the Straub interpretation of Section 11 did not breach either equality rights (Section 15(1)) or freedom of religion (Section 2(a)). The Charter is a neutral element in this case because it is not violated whether one employs the Straub test or the Wasilifsky test. Further, if there is a violation, it is saved by Section 1 because the otherwise invalid measure is "demonstrably justified in a free and democratic society".

The Section 15 arguments submitted by the Wasilifskys are based on the "similarly situated" test which was rejected by the Supreme Court of Canada in Andrews v. Law Soc. of B.C., [1989] 2 W.W.R. 290 (S.C.C.), and which ought to be rejected by this Panel. Because the test requires all persons who are similarly situated to be similarly treated, it does not provide for legitimate distinctions amongst various groups in society. According to the BC Fed, different treatment for certain groups is the hallmark of legislation and only a distinction that singles out members of a particular religion from other citizens is discriminatory. Adherents of a particular religion are not singled out for treatment under Straub; they do not fail because they are Catholic. Rather they fail because they do not conform to the statutory criteria which deny exemptions to members of all religious groups alike. Straub does not single out a particular group. Instead it is premised on two important facets of our collective bargaining system: there should be no free riders, and decisions affecting the collectivity should be made by majority vote.

Nor can the Wasilifskys successfully argue that mandatory membership, or payment of dues, breaches their freedom of religion since they remain free to voice their personal views on abortion and to practise their faith. Further, even if freedom of religion or equality rights are infringed by Straub, supra, the Straub test survives any Charter challenge by meeting the Section 1 analysis set out in R. v. Oakes, supra. An exemption is conferred only on those whose objection to joining a union (i.e., those who object to the very concept of trade unionism and all trade unions) cannot be ameliorated through their union's democratic processes, thus preserving two very significant policies: respecting the internal democratic processes of the union and the limitation of free riders.

(f) Reply of NVTA/BCTF

The NVTA/BCTF caution the Panel to consider the potential for erosion of the bargaining unit by a wider Section 11 test. They submit that there was no explicit legislative direction to change policy and that neither the increased emphasis on individual rights in Section 27 nor passage in 1977 of Section 3(3)(e) are sufficient to justify such a marked departure in policy. The NVTA/BCTF also argue that Section 37(3) of the Interpretation Act is of no assistance in this case since the section was passed to ensure that re-enactment of a section does not affect prior judicial consideration (see Turner v. I.C.B.C. (1982), 137 D.L.R. (3d) 188 (B.C.S.C.)). The Panel would be wrong to equate a trade union with trade union policies--a union is more than that, having members and an existence independent of its policies. But even if it can be equated with its policies, an exemption should not be available for opposition to one policy. Finally, NVTA/BCTF take issue with the Wasilifskys' use of the word "trivial" to describe the impugned policy; it is more accurate to describe it as a "minuscule" policy.

(g) Reply of the CCU

The dispute here involves a purely private matter to which the Charter does not apply (see Section 32(1)(b)). Even if it did apply, there is no breach of substantive religious rights because the Wasilifskys remain free to practise their religion as they see fit. Section 11 is intended to accommodate religious beliefs by exempting those individuals who are bound by trade union actions or policies within the confines of Section 46. For matters peripheral to collective bargaining, an exemption is not necessary. Simply because the Wasilifskys' beliefs are offended, a breach of religious rights does not necessarily follow. It takes something more than a minimal breach (see Jones v. The Queen (1986), 31 D.L.R. (4th) 569 (S.C.C.)). As for a breach of equality rights, the Straub test is not arbitrary and does not single out persons of a particular faith. A differential impact, by itself, is insufficient to establish a breach of Section 15(1). Finally, even if there is an infringement of the Charter, the requirement of Straub, supra, is demonstrably justified and therefore saved by Section 1 of the Charter. Straub properly balances collective bargaining considerations and individual religious beliefs, and only minimally impairs religious rights.

(h) Reply by the Wasilifskys

The Wasilifskys agree that the Council, in interpreting the Act, must have regard for the Constitution; thus Section 11 must be interpreted in light of the law of the land including the Constitution and Charter. Contrary to the assertion of the BC Fed, this Panel cannot avoid a Charter analysis by upholding Wasilifsky. Rather, the Panel must first interpret the statute and then ensure that its interpretation does not violate the Charter. Further, the Wasilifskys say that it is a mortal sin for them to continue belonging to the BCTF as long as the noxious policy remains unchanged, and that the Council should be particularly mindful of the historic prominence of religious persecution when interpreting Section 11. They also state that their equality rights arguments do not turn on the "similarly situated" test. In order for the Council to uphold otherwise invalid measures under Section 1, there must be some evidence that the broader test actually weakens trade union security or that it opens the litigation floodgates. Finally, they say that even if the Charter does not apply, labour tribunals such as the Council must interpret legislation in a manner consistent with the spirit of the Charter.

IV

PRELIMINARY MATTERS

(a) Reconsideration of a Reconsideration

Before proceeding with the substantive issues in this case, it is appropriate to make a few brief comments about the Council's approach to reconsideration of a matter that was previously reconsidered. As recently noted in Granville Island Hotel & Marina Ltd., IRC No. C127/90, a reconsideration of a reconsideration will be entertained in only the rarest of circumstances. Labour relations policy considerations place a premium on speedy resolution of differences and on certainty in the law. Neither of these considerations is fostered by a policy that permits, on a regular basis, a second reconsideration. There are narrow exceptions to this general rule and one arises "where the decision being reconsidered itself sets a new precedent" (Granville Island, supra, at 3). Since Wasilifsky, supra, marks a significant departure from the manner in which Section 11 had been in-

terpreted since Straub, supra, this case fits the narrow exception described above. Thus, it is appropriate to proceed.

(b) Policy Review by Tribunals: Jurisdiction

At the heart of this case is the Council's jurisdiction to review its interpretation of Section 11 for policy reasons in the absence of specific or explicit direction from the Legislature. It is generally accepted by the parties that the wording of Section 11 is broad enough to support both the Straub and the Wasilifsky interpretations. It has also been argued convincingly that the changes to Section 11 itself are insufficient to reflect a desire on the part of the Legislature to revisit the Straub interpretation. The Wasilifskys urge this Panel to alter the approach taken since Straub and say that the change in circumstances and legislative context justifies a new approach to Section 11. Predictably, those seeking to uphold Straub--the NVTA/BCTF, CCU and the BC Fed--say that the Council cannot justify a radical change to Section 11: the absence of legislative change to Section 11 means the Legislature approved of the Straub interpretation and application of the section. Accordingly, no change in policy is appropriate at this time.

Any resolution of this issue must necessarily be grounded in basic rationale governing a quasi-judicial regulatory tribunal such as the Council. Adams in his book, Canadian Labour Law (Aurora: Canada Law Book, 1985), said this:

> "The rule of discretion" as opposed to "the rule of law", is indispensable to any scheme of regulation. Labour relations legislation is typical administrative law containing a variety of discretions ranging from the power to determine an appropriate bargaining unit to the power to refuse to inquire into an unfair labour practice. It has been said that such discretion represents the power of a regulator to achieve the positive purposes that form the foundation to any regulatory statute. It permits the tailoring of legal solutions to the variety of circumstances that come within an administrative tribunal's jurisdiction. Discretion permits for the implementation of practical judgments on a case-by-case basis sensitive to the nuances of each such situation.
>
> (at 219-20)

The Supreme Court of Canada has repeatedly emphasized the need for curial deference to expert tribunals, which should be given the widest latitude to address the array of problems within their jurisdiction (see C.L.R.B. v. Halifax Longshoremen's Ass'n (1983), 144 D.L.R. (3d) 1; CAIMAW, Local 14 v. Paccar Canada Ltd. (1989), 62 D.L.R. (4th) 437). This is so because in the words of Spencer J. of the British Columbia Supreme Court: "The panel...[is]... bound to implement the Industrial Relations Act and its underlying policy" (see Const. & Gen. Labourers' Union Locs. 602, 1070 & 1093 v. Armeco Const. Ltd. (1988), 34 B.C.L.R. (2d) 395 at 399).

The experience of the Canada Labour Relations Board in Curragh Resources et al (1988), 18 CLRBR (NS) 233, is instructive. Curragh, supra, concerned the ability of a tribunal to review the policy and statutory interpretation governing successor rights when Parliament did not make any explicit changes. The Canada Board addressed its powers of reconsideration in a policy matter:

> The jurisprudence has made it clear that s. 119 does not require that there be an application or a complaint from any party, affected or otherwise, before the Board may "review, rescind, amend, alter or vary any order or decision". In other words, any order or decision, or any element thereof, may be reviewed, changed or eliminated altogether by the Board on its own motion. (See particularly Canada Post Corp. (1987), as yet unreported CLRB decision No. 628, pp. 22 to 25).
>
> The review power, including the authority to review and change decisions on the Board's own motion, is broad. Its exercise would be restrained only, it would seem, by such factors as Board policies and the principles to be inferred from the Code's preamble and its over-all objectives.
>
> (at 236, emphasis in original)

In Bank of Nova Scotia and Retail Clerks, [1982] 2 Can LRBR 21, the Canada board disavowed an earlier policy concerning a freeze of terms and conditions of employment, even though the legislation had not been changed. It was the Board's view that since its interpretation was supported both by the law and by labour relations policy it was acting within its jurisdiction (at 32).

This Panel endorses the view of the Canada Board in Curragh, supra, and upholds the Council's ability to change and manage policy in keeping with changing labour relations conditions in the community. More importantly, this is not the first occasion when the Council and its predecessor, the Labour Relations Board has changed the interpretation of a particular section without explicit legislative direction. Perhaps the most dramatic example of a policy change occurred in Westar Timber Ltd., BCLRB No. 47/87, (1987), 14 CLRBR (NS) 360, which altered the Board's approach to partial decertification. Before Westar, applications for partial decertification were brought under Section 52(2); after that decision, they came under Section 36:

> Having considered all of these authorities, we are satisfied that the Board has the jurisdiction and authority to deal with the Certain Employees' application under s. 36 of the Labour Code. We reject the submissions of counsel for the Union to the contrary. We agree with the submission of counsel for the Employer that, in light of the judicial interpretation of the predecessor provisions to s. 36 of the Labour Code, there was not a need for the Legislature to include an express statutory provision in the Code similar to that found in the Nova Scotia, New Brunswick, and Prince Edward Island legislation in order for the Board to possess this jurisdiction.
>
> (at 370)

Another example is found in Downie Street Sawmills, BCLRB No. 16/83, which set out a new analysis for applications under Section 52(2) of the Labour Code. The Board moved away from an examination of the quality of trade union representation toward an examination of the true wishes of the employees. Similarly, the issue of bargaining unit composition in the construction industry was changed by the Council's decision in Cicuto & Sons Contractors Ltd., IRC No. C271/88 (Reconsid-

eration of BCLRB No. 52/87), which, contrary to earlier practice, allowed all-employee rather than craft units in the construction industry. Perhaps the most appropriate comment about the tribunal's ability to change its policy was made in Beechwood Construction Ltd., BCLRB No. 32/77, [1977] 2 Can LRBR 218, at 231: "The language of the Board's decisions, in contrast to the language of the Code, is not cast in marble and must be susceptible to refinement and alteration in light of the unfolding experiences and re-examination of the Board."

The Supreme Court of Canada's decision in Hirsch v. Protestant Bd. School Com'rs of Montreal et al, [1926] 2 D.L.R. 8 cited by counsel for the NVTA/BCTF in support of its case, is not helpful because the case deals strictly with a point of statutory interpretation uninfluenced by a question concerning the scope of regulatory power conferred on a regulatory tribunal. In Hirsch, the Court found that the general wording of a statute concerning the education of religious minorities did not support a specific right of Jewish persons to be represented on the Protestant board of school commissioners:

> ...but in the drafting of this statute, we see no satisfactory evidence of an intention to disturb the constitution of the controlling authority of the Protestant schools. Indeed it is apparent that the main purpose, if not the only purpose which at the time was considered of present consequence, was the admission of the Jewish children to the Protestant separate schools as they existed at Montreal, and, when we find that all the provisions in detail necessary for the purpose were specially enacted, it cannot be supposed that the design to transfer a right to participate in the government of the Protestant schools to the Jews, presumably to an extent proportionate to their numerical strength, with all the rights and incidents attendant upon such a change in the constitution of the governing board, would have escaped special mention had anything so important been within the contemplation of the Legislature.
>
> (at 24-25)

According to this passage, the Court could not infer a specific right that differed from a long-standing interpretation of the general wording of the statute. In any event, Hirsch is not on point. We are satisfied that Section 11 can be interpreted both in the manner proposed by Straub, supra, or Wasilifsky, supra. Each interpretation is an expression of policy and the difference between them is accounted for by the weight given to different policy considerations. Selection of either equally probable interpretation is thus a matter of policy determination for an expert tribunal that is obliged as a matter of law to implement broad policy objectives set out by the Legislature. This is not a simple matter of statutory interpretation.

(c) Circumstances Justifying Policy Review

What considerations will lead the Council to review a long-standing policy? Passage of time alone is insufficient to justify change, although the labour relations environment may change over time such that re-examination of existing policy may become desirable. Changes in the economy along with changes in the employment environment may call for a review of the way in which the law is to be interpreted even where there is no explicit interpretation mandated by the wording of the legislation itself. In this case, the review is also called for by, among other things, not the

changes in Section 11 itself, but rather the tenor of the legislation generally, most particularly those changes introduced in 1987 to Section 27 which sets out the purposes and objects of the Act. Section 27 now places the rights of individuals on the same plane as the rights of the parties (and the public interest), providing a new perspective from which to assess Section 11. While Section 27 certainly cannot be used to create rights, it is the backdrop for the interpretation of other substantive portions of the Act. In this regard, we echo the sentiments of the panel in White Spot Limited, IRC No. C133/87:

> The Council under Section 27 of the Act undoubtedly has a right to choose a policy it considers appropriate to further the objectives of the Act. The Council also has the authority to re-examine any policy previously adopted and formulate new standards and to announce a contrary policy which it believes is more conducive to good industrial relations.
>
> (at 8, emphasis added)

Moreover, passage of the Charter which occurred in the intervening period between Straub, supra, and Wasilifsky, supra, hails an era of judicial interpretation that places greater emphasis on individual rights (see Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313 at 342; PSAC v. Canada, [1987] 1 S.C.R. 424; RWDSU v. Saskatchewan, [1987] 1 S.C.R. 460).

Finally, and most importantly, like previous Wasilifsky panels, this Panel is faced with a fact situation which undeniably and directly calls the Straub interpretation of Section 11 into question. The concrete fact situation presented by Wasilifsky was only a hypothetical consideration for the Straub panel when it considered and rejected the Ontario approach to a religious exemption. Now, we are faced squarely with a case which challenges that approach. Against a backdrop which places a new emphasis on individual rights as enacted by the Legislature, and against the backdrop of the Charter which at a minimum must guide statutory interpretation this Panel, like the panels before it, must revisit the Straub interpretation if only to ensure that the policy considerations underlying that interpretation remain valid and unaffected by the passage of time and the intervention of the statutory and constitutional amendments cited above.

V

THE APPLICATION: NON-CONTENTIOUS MATTERS

This decision is intended to provide a comprehensive statement of policy respecting Section 11 of the Act. Therefore, a number of matters which have been settled in various decisions of the Council bear restating here. First, who can make an application? Second, what constitutes a religious objection, and is the test to be applied subjective or objective? Third, how will an application based on mixed motives be treated? Fourth, how are the bona fides of the religious objection to be determined? Finally, what evidence must the applicant adduce to satisfy the Council of the bona fides of the religious objection?

(a) Who Can Apply?

An exemption under Section 11 is available only to an applicant who is "an employee". Section 1(1) defines an employee as "a person employed by an employer". It is a broad definition that

leaves a great deal to the discretion of the Council. The comments of the panel in Debbae G. Duncan, IRC No. C42/90, are apposite:

> Whether or not a person is an employee depends on the circumstances of each case. The typical employee is usually interviewed, hired and is paid a fixed wage. She performs tasks for the Employer subject to its direction, her work is evaluated, and she is subject to discipline (Cranbrook and District Hospital, BCLRB No. 128/74, [1975] 1 Can LRBR 42).
>
> (at 5)

In Duncan, the applicant possessed all the "usual indicia" (at 5) of an employee, except she had not joined the union in circumstances where the collective agreement required union membership as a condition of employment. Lack of trade union membership was not an impediment to employee status in the opinion of the panel since the collective agreement provision "is best described as a condition of continued employment, rather than a prerequisite of employee status for the purposes of the Act" (at 5). However, the mere potential of employment is not sufficient to support employee status under the Act (see John McNeilly, BCLRB No. 39/82).

While employee status is largely a function of individual circumstances, it is nonetheless desirable to set down some general guidelines for potential applicants. To begin with, the Council will entertain Section 11 applications once a person has been hired, even though the employee has not yet reported for work. An application can also be made where an offer of employment has crystallized and only an exemption under Section 11 stands in the way of the applicant commencing work. (See Peters, IRC No. C28/91, recon. of IRC No. C226/90.) Moreover, employees who work for an employer on an ad hoc, "as required", or on-call basis may have a sufficient employment nexus to qualify as an employee for the purpose of Section 11 (see Kelly Penner, IRC No. C219/90). It is inappropriate, however, for someone who has simply applied for work to make a Section 11 application. And as the comments in Duncan indicate, refusal to join the union will not interfere with standing to apply.

(b) What Constitutes a Religious Objection and What Test Determines the Bona Fides of a Religious Objection?

The Shorter Oxford English Dictionary defines religion this way:

> [...obligation (as of an oath), bond between man and the gods, scrupulousness, scruple(s), reverence for the gods...]
>
> Action or conduct indicating a belief in, reverence for, and desire to please, a divine ruling power; the exercise or practice of rites or observances implying this...
>
> Recognition on the part of man of some higher unseen power as having control of his destiny, and as being entitled to obedience, reverence, and worship; the general mental and moral attitude resulting from this belief, with ref. to its effect upon the individual or the community...

The meaning of "religious objection" has been examined at length by both the Ontario and B.C. Labour Relations Boards. In Ontario, one of the leading cases on this point is Schochet v. OPSEU, [1983] OLRB Rep. September 1472, which concerned an application for exemption by a Jewish rabbi, a philosophy professor, who objected to membership in the union. His objection arose because of a pro-Palestine Liberation Organization resolution passed at a meeting of the Ontario Federation of Labour of which the OPSEU was a member. The Ontario Federation of Labour supported the PLO as the legitimate representative of the Palestinian people and urged the CLC to call upon the Canadian government to support peace initiatives in the Middle East. Schochet maintained that the Jewish religion does not distinguish between religious beliefs and nationhood for Israel, and that anything to do with Israel was religious. The Ontario Board dismissed his application on the ground that his objection was not a religious one:

> The applicant admits to a potential overlap between political and religious matters in the context of his faith. Indeed, ambiguity in this respect is inevitable when a religion is tied to the well-being of a nation state. The case turns on our refusal to accept, as the applicant asserts, that in this context "everything is religious". The applicant is clearly a religious person but a religious person is capable of giving a patently unreasonable religious interpretation to an event and thereby assert a personal feeling or political viewpoint. This, we find, has happened in the instant matter. While the resolution is objectionable to the grievor, we must determine whether the claim he asserts against the respondent is religious in nature. In this respect, it is to be noted that the resolution's actual terms contain many views currently proposed by many staunch supporters of Israel. The resolution is thereby not openly provocative and the applicant appeared as much if not more concerned with the press coverage it received as with its contents. Also of significance is the fact that his objection could be withdrawn if OPSEU issued an opposing press release, a fact suggesting a distinctly political motive. Just as important is the applicant's unwillingness to acknowledge that OPSEU itself has no corporate policy dealing

> with the contents of the resolution and this Board is even unaware of how OPSEU delegates voted on the resolution. In this context, the assertion of an objection against OPSEU carries with it the perception of a non-religious motive - the achievement of opposing press coverage through the actions of the only labour body connected with the OFL over which the applicant has some bargaining leverage. The refusal of the applicant to acknowledge and accept that OPSEU is a member of the CLC which rejected the resolution only adds to this perception.
>
> (at 1483, emphasis added)

The Schochet decision had this to say about "religion":

> It is the view of the Board that a conviction or belief, to be "religious" within the meaning of the section, must in some way relate to the more orthodox view of "religion" prevalent in the community. That is, the beliefs must relate to the Divine (in some form) and man's perceived relationship to the Divine, rather than to concepts which deal only with man-made institutions, and the relationship of men inter se. As the High Court of Australia noted in Adelaide Company of Jehovah's Witnesses Inc. v. The Commonwealth (1943), 67 C.L.R. 122, at pages 123 and 124, in defining the statutory limits on freedom of religion:
>
> > It is true that in determining what is religious and what is not religious the current application of the word "religion" must necessarily be taken into account.
>
> This is not to say, of course, that moral precepts may not form an important part of any religion. As the Court observed in Anderson, 9 O.R. (2d) 341:
>
> > It is trite to say that in some circumstances, or with respect to some individuals, matters of morality might well be quite separate and distinct from matters of religious belief. However, it does not follow that a matter of individual morality and conscience may not for some individuals be an important

> element or tenet in the
> religious convictions or belief.

Indeed, it may be argued that religion has no greater importance than in the moral precepts which it imparts, and on the basis of which an individual carries out his daily life. The Board is simply observing that the use of the term "religious" in section 39 appears to require more than merely a code of behaviour or system of worldly standards, standing alone. As McRuer C.J.H.C. noted in dealing with the related word, "creed", in Trenton Construction Workers Association, Local No. 52 v. Tange Company Limited, 63 CLLC 15,459:

> Whatever meaning one gives to the word "creed" it must involve a declaration of religious belief. Religious belief, theology and standards of ethical or social conduct are all very different things.

Nor is it sufficient for an applicant simply to state that his worldly standards evolve from his concept of God and God's will. It is the task of the Board to satisfy itself that this is the case.

(at 1481-82)

The Ontario Board in Schochet, in addition to requiring a subjective examination of the applicant's religious beliefs, also required an objective examination to ensure that the applicant's beliefs were, indeed, religious. The assertion by the applicant that the applicant's beliefs were "religious" did not necessarily make them so. There had to be some link between the tenets of the religion as the word is commonly understood and the applicant's subjective belief. Where the motive appeared to be a mixed one, the Ontario board dismissed the application.

Subsequent to Schochet, the Ontario Court of Appeal in Re Ontario Public Service Employees Union and Forer (1986), 52 O.R.(2d) 705, granted a religious exemption to another applicant who, because of his Jewish religion, objected to the pro-PLO stance of the OPSEU. Unlike the board in Schochet, the Court of Appeal in Forer allowed a religious exemption, finding that Forer's objection was solely rooted in his religion. (Note that while Forer had been successful before the board, the decision had been quashed by the Divisional Court.) The test set out by the original tribunal and endorsed by the Court of Appeal, seemed to be somewhat looser and more subjective than that posed in Schochet:

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

(at 725, emphasis added)

All that was necessary to satisfy the Court was a link or nexus between religious convictions and the objection. It did not emphasize the tenets of the applicant's formal religion. In defining "religious" as opposed to "political", the Court went on to endorse the following passage from the original tribunal decision:

> ...we do not have the authority to grant an exemption to persons who are religious and who have social or political views unconnected to their religion which are contrary to those of the employee organization. There must be relationship [sic] between the religious convictions or belief and the objection to the payment of dues.

(at 709)

The Court also endorsed a liberal definition of "religious", noting the close tie between religious conviction and political actions in places such as the Middle East. It went on to say this about the Canadian mosaic:

> It seems to me that in the multicultural country which Canada has become there will have to be even greater toleration of a wide variety of religious beliefs and practices than existed before the Charter. Certainly, for the purposes of s. 16(2) of the Act, views cannot be described as "non-religious" because they differ from the religious beliefs of the dominant groups in society.

(at 727)

In Ontario the courts and the labour board require a link or nexus between "religion" as it is understood in an objective sense and the "religious" beliefs of the applicant: neither calls for an extensive examination of the tenets of the religion.

The position taken in this Province was articulated by Vice-Chairman Morrison in Straub, supra, this way:

> We are dealing primarily in a subjective area when we determine the individual religious beliefs of an applicant. But in ascertaining that those objections are founded on religious grounds, as opposed to philosophical, political or social, there must, of necessity, be some objective inquiry into the nature of those religious beliefs. This is a collateral enquiry to the main one. It is not the actual tenets of the religion which are decisive. This Board

> is not engaging in a theological inquiry, but rather, an inquiry into what is the applicant's belief and understanding of his own religion. Part of that determination requires some objective look at the religion of the applicant; it does not involve a full scale doctrinal investigation and analysis of the Seventh Day Adventist Church, or any other Church or religion.
>
> To return again to the pacifist, he may be a Roman Catholic. He may have found the basis of his opposition to war within his religious convictions. His interpretation may well be at odds with the majority of his faith, but his views cannot be said to be right or wrong. It is a matter of individual interpretation and religious belief. His religion and its tenets were viewed from an objective point of view, but only to assist in evaluating his sincerity as a professed conscientious objector.
>
> (at 269-70, emphasis in original)

We see no reason to depart from this particular test in Straub, supra. We will continue to employ a subjective test to determine whether the applicant's sincerely held views are religious. We will not engage in a theological enquiry, nor will we quarrel with the applicant's interpretation of his or her religion. We will assess the objection to union membership through the eyes of the applicant, but as the Court said in Forer, supra, the Council must be satisfied objectively that there is some nexus between the applicant's religious beliefs and the objection to union membership and/or payment of dues. As well, we will objectively assess whether there is consistency between the applicant's conduct and his or her stated religious beliefs and convictions and moreover, whether opposition to union membership is religious, moral, ethical, philosophical or political.

(c) The Case of Mixed Motivation

Another, closely related problem is the "mixed motive" case, where an applicant's objection is not motivated solely by both religious beliefs or convictions. The Wasilifsky panel acknowledged the mixed motive case in the following passage:

> Many of the British Columbia decisions which reject applications for exemption have done so on the basis that the applicant exhibits mixed motives for his or her objection, or that the objection does not otherwise stem from religious conviction or belief however sincere and dedicated the individual's faith may be.
>
> (at 40)

However, this problem was not at issue before that panel and consequently it did not explore the matter. The requirement for an application to be solely motivated by religious considerations

creates an insurmountable and unrealistic obstacle for most applicants and is one this Panel will not uphold. Most people hold a variety of views on a subject which may span the spectrum from religious to secular. An applicant may very well be opposed to union membership on moral, ethical, political, or philosophical grounds in addition to religious grounds. It is sufficient in our view if the foremost and primary motivation driving the application is religious. The fact that the applicant also holds political, philosophical, moral or ethical views related to the applicant's religious objection will not serve to disqualify an application (see Joe Nitsch, IRC No. C254/89). Moral, ethical, philosophical or political objections alone, however deeply held, will not justify an exemption. A moral objection is not necessarily a religious one, and moral objections to union membership, unconnected to religious beliefs, will not result in an exemption. Finally, deeply held religious views by themselves do not justify exemption where there is no connection between those views and the objection to membership in a trade union.

(d) How are the Bona Fides of the Religious Objection to be Determined?

While we adopt a primarily subjective approach to Section 11 and do not require religious beliefs to be the sole motivating factor, the applicant is not thereby relieved from satisfying the Council of the bona fides of the religious beliefs. Rather, the onus is on the applicant to persuade the Council on a balance of probabilities that the applicant's religious beliefs are sincerely and deeply held and that they are the primary motivating reason for the objection. A panel hearing evidence must be satisfied that the applicant is not simply seeking a convenient way to evade payment of dues. Consistent with the test for credibility set out in Faryna v. Chorny, [1951] 2 D.L.R. 354 (B.C.C.A.), the Council will consider the demeanour of the witness and determine whether the testimony is compatible with "a preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (at 357). Factors such as whether the applicant applied at the earliest possible opportunity or whether the applicant has been able to accommodate both religious beliefs and trade union membership in the past are relevant to the inquiry. However, the Council will not develop a checklist to be mechanically applied in each and every case. A checklist approach would lead to a strictly objective rather than a primarily subjective determination.

(e) What Evidence Must an Applicant Adduce to Satisfy the Council of the Bona Fides of the Religious Objection?

What degree of incompatibility between the religious objection and trade union membership is necessary to warrant an exemption? The test as set out by the Wasilifsky panel is as follows:

> In those cases where a panel is satisfied that an individual's objection is based on bona fide religious belief, there has been an assessment as to whether trade union membership or support is irreconcilable with the individual's religious beliefs. The exemption provision is intended to protect individuals who fall within this category. Our decision does not alter that practice. A panel must always assess

> the probable consequences to an applicant of not being granted the exemption. If a panel concludes that the evidence does not establish a need to exclude the individual from union membership, no exemption should be granted despite the sincerity of the individual's religious conviction or beliefs. An application under Section 11 must be supported by evidence proving that the objection is because of religious conviction or belief, that is, the applicant must prove that his or her beliefs are profoundly held and that they are so pervasive in his or her life that trade union membership is irreconcilable with those beliefs.
> (at 40, emphasis added)

The foregoing passage is perceived to have been interpreted by subsequent panels as setting an extremely high standard, one requiring the applicant to resign from employment if the application is unsuccessful (see Daryl Anaka, IRC No. C12/91). Whether or not such a result was intended by the majority in Wasilifsky, supra, or by subsequent Council decisions, we take this opportunity to inform the labour relations community that such a standard is unwarranted. This was not the standard in B.C. from Straub onward. It should not now be the new hallmark of a successful application. We endorse what the Straub panel had to say in this connection:

> And while it should not be an easy matter for someone to opt out of the bargaining unit, and perhaps threaten the very existence of that bargaining unit, neither should it be necessary for an applicant to lose a job to prove a point when the religious beliefs are sincere. As stated in the Stel case [infra], at p. 368: "It is not necessary for an applicant to become, as Stel's counsel put it, an 'economic martyr' before being entitled to an order under this section."
>
> (at 272)

The applicant must establish that he or she experiences great discomfort or anxiety or suffers a crisis of conscience and that such manifestations are the result of deeply held religious beliefs causing this conflict with trade union membership. The applicant must satisfy the Council on the balance of probabilities that exemption from the bargaining unit is justified.

VI

THE APPLICATION: THE NARROW ISSUE

(a) What Trade Union Activity Justifies Exemption?

The critical difference between Straub, supra, and Wasilifsky, supra, is the nature of the objection which justifies exemption. Whereas the Straub interpretation requires an applicant to object

to all trade unions, Wasilifsky, supra, permits an exemption from membership in a particular union based on an opposition to a specific policy or policies of the union.

The Straub interpretation was based on an analogy to conscientious objectors:

> This issue involves the concept of a trade union. Can an individual justify a stand in which he objects on the basis of religious beliefs to one trade union but not another? We think not. To illustrate, the analogy of the pacifist or conscientious objector whose convictions are against his participation in a war. If a pacifist objected to participating in only the Viet Nam [sic] war, but his objections were not to wars as such, any and all wars, then he would hardly qualify as a conscientious objector as we understand the term. So too must a person objecting to unions on the basis of religious beliefs object to any and all unions, not to just one particular union.
>
> (at 266)

This analogy was rejected in Wasilifsky because the panel did not consider it apt. One reason was that the American and English military exemption legislation expressly required the conscientious objector to object to war in all forms whereas Section 11 does not say that objection on religious grounds must be to all trade unions.

In Canada, it was the Military Service Act, S.C. 1917, c. 19, that provided relief from military service. Conscientious objectors were not eligible for an exemption from military service, but rather for a postponement. The National Selective Service Mobilization Regulations established a postponement for any applicant who "conscientiously objected, by reason of religious training or belief, to war in any form or to the taking of human life." As with the American legislation, the fact that the Canadian legislation refers to "war in any form" limits its usefulness as an analogy to interpret Section 11. Moreover, an applicant for conscientious exemption under the Military Service Act had to apply every six months for an exemption and the effects of a military exemption order were limited in any event since the successful applicant was required to perform alternate service. But under the Straub interpretation of Section 11, the successful applicant qualified for a complete and permanent exemption from membership in the union.

We concur with the line of reasoning of the Wasilifsky panel on this point. To be useful, an analogy must be based on parallel factual circumstances. Because of the differences in the legislation, we must reject the analysis that relies on similarities to the conscientious objector in the United States, Canada and Britain.

The Ontario Labour Relations Board, when faced with this same question in Stel v. The Corporation of the Borough of North York, [1971] OLRB Rep. July 363, concluded that similar wording in its statute did not lend itself to an interpretation requiring objection to all trade unions:

> It is our opinion that the words in question, "a trade union" are open to the interpretation as contended for by the applicant, that is, as meaning one trade union. If that be the case, then the words would be synonymous with "the trade union" in the latter part of subsection 1 of section 35A because it would make no sense to order exemption for an employee objecting to joining trade union A, but not objecting to joining the trade union which is

> party to the collective agreement binding on the employee. In support of this construction is the fact that the definite article "the" could not meaningfully have been used before "trade union" in clauses (a) and (b) as indicating a single union. If "the" had been used instead of "a", "the trade union" at that place in subsection 1 would have been left hanging in the air. On the other hand, if the Legislature had intended that the objection must be to joining all trade unions, then it would have been a simple matter to have used "all" or "any", keeping in mind the fact that it could not use "the".
>
> (at 370)

Having attached no significance to the omission of "the" from the section, while at the same time noting the omission of "all" before "trade union", the Ontario board concluded that the wording of the section does not sustain an interpretation that requires an objection to all trade unions. Moreover, it noted that an objection to all trade unions was not the fair and liberal construction called for by the Interpretation Act; consequently, it rejected the approach taken in Straub.

We reject the argument that the broader approach under the Ontario Labour Relations Act is inappropriate here, simply because of the temporal limitations on applications contained in the Ontario legislation. It is to be recalled that the Ontario legislation permits an application to be made only by persons employed at the time a collective agreement containing a union security provision is concluded. Persons commencing employment after an agreement is concluded are not eligible. However as the NVTA/BCTF conceded, the Crown Employees Collective Bargaining Act, R.S.O. 1980, c. 108, s. 16, and the Colleges Collective Bargaining Act, R.S.O. 1980, c. 74, s. 53 are identical to the Ontario Labour Relations Act but contain no temporal limit. Yet, decisions under both statutes use the test for exemption developed under the Ontario Labour Relations Act. In applying Section 53 of the Colleges Collective Bargaining Act in the case of Paul H. Tremblay, the Ontario Board used the same test and the same fair and liberal interpretative approach as it did in interpreting the Ontario Labour Relations Act. It was not dissuaded from that approach by the lack of temporal limits. While we recognize that temporal limits strike a far different balance, we believe, as must have the Ontario Board in Tremblay, supra, that temporal limits alone are not sufficient to reject applications made on the basis of religious objections of the applicants to a single trade union.

We agree with the NVTA and the BC Fed that the literal wording of Section 11 is not particularly helpful in providing guidance as to the scope of the objection. The interpretation followed by this tribunal since Straub is one that the wording of the section can reasonably bear. In fact, the wording of the section can literally bear either the Stel or the Straub approach and therefore, both the original panel's decision and Straub, supra, are equally correct. Moreover, we were given no guidance by the Legislature--the debates in 1973 and 1987 are silent on this point. The Government made major changes to the Act in 1987 but the focus of its changes to Section 11 did not target the issue with which we are saddled. We accept that there is no direct legislative mandate to alter Straub, supra. On the other hand, we do not agree with the Union's argument that absent a legislative directive, the Council has no authority to reconsider its Section 11 jurisprudence. Where an interpretation of a section of the Act is based on policy, it makes no sense that the Council should not be cognizant of changes in the industrial relations community as well as the legal and legislative framework that impact on that policy; and where appropriate, respond by amending that policy.

We accept the Wasilifskys' argument that the Charter forms part of the backdrop for a proper interpretation of Section 11. The Unions, and in particular the CCU, oppose this argument claiming that the substance of it requires application of the Charter to the private relationship between a union and its membership. While this is not a Charter case per se,[4] we are satisfied that we must interpret Section 11 in a manner that respects the values and principles underlying the Charter.

A similar approach was considered by the panel in Doman Forest Products Limited, IRC No. C76/91, which involved a Section 108 appeal of an arbitration award. There, an arbitrator did not apply the Charter to the collective agreement, but rather interpreted the collective agreement in light of the principles enshrined in the Charter when he considered the admissibility of certain evidence gained through surveillance of the grievor. The Council in Doman upheld the arbitrator's treatment of the evidence and in so doing distinguished between application of the Charter and statutory interpretation that takes the Charter into account:

> First, it is clear on a fair reading of the awards that the Arbitrator did not apply the Canadian Charter of Rights and Freedoms to a private collective agreement relationship but rather conditioned his application of common law principles to be "consistent with the fundamental values enshrined in the Constitution".
>
> (at 4)

This is what the Wasilifskys are asking us to do in this case and we see no reason to depart from the reasoning of the panel in Doman, supra. Thus, we use the Charter only as an aid to interpretation.[5]

It is clear that the two rights which clash in this case are the individual's right of religious freedom as protected by the Charter and the union's right to security as established by the Act. In the absence of Section 11, we believe that the Union's right to security through mandatory membership and payment of dues, even where it abridges religious freedom, might well constitute a demonstrably justified limitation that is tolerated in a free and democratic society. However, Section 11 expresses a legislative intention that union security ought not to override the Charter protected right of religious freedom. But by necessary implication in the context of the Act as a whole, that goal must be balanced against the Legislature's desire to ensure a union's right to security through mandatory membership and payment of dues. While the test employed in applying Section 11 cannot reintroduce the very interference with religious freedom which the existence of Section 11 is designed to foreclose, it cannot go so far as to totally obviate the requirement to take a union's right to security into account.

We have further concluded that the amendments to the Act generally, including Section 27, with its new emphasis on individual rights, suggest that a more expansive interpretation ought to be applied to Section 11. The Council has already been mindful of that direction in its decisions. In Esther Finch, IRC No. C33/90 and Ron Peters, supra, we have endeavoured to ensure that there are few technical barriers to Section 11 applications.

It is also our experience, indeed it is the crux of this case, that many trade unions are more involved in social issues today than they were at the time of the Straub decision. Perhaps some unions believe that in order to bring real change to the working lives of their membership they must do more than seek amendments to the governing collective agreement from year to year. As a consequence, trade unions often take stands on issues not directly related to the collective bargaining re-

lationship between their members and a particular employer. By the same token, trade union membership like membership in most organizations, tends to have a fairly representative cross section of the general population and as such embraces people of various national and religious backgrounds. It is reasonable to assume that under such circumstances where unions take positions on an ever broadening field of issues, clashes are bound to occur from time to time between a union policy on some issue and certain individuals' religious beliefs. Nothing is more illustrative of that proposition than the issues of choice and right to life which have polarized large segments of our society.

The policy justification for the Straub interpretation was grounded in the justifiable concern over free riders. Excerpts from Hansard (1973) noted earlier indicate that the then Premier emphasized the need to balance respect for religious beliefs with the problem of "free riders" and the need to distribute the costs of collective bargaining evenly amongst all members of the bargaining unit. (This consideration remains notwithstanding amendments to the section in 1987). Achieving that balance is difficult at best and the result can always be questioned from the point of view of fairness (R. Rideout, Rideout's Principles of Labour Law, 5th ed. (London: Sweet & Maxwell, 1989):

> The principal justification for the closed shop is that it ensures that all those who will benefit from the union's negotiating strength share the cost of maintaining that strength, both in terms of payment of union dues and loss of wages and job security as a result of participation in industrial action. Various devices have been tried whereby the freedom of an individual not to join a union can be maintained without him enjoying a direct financial advantage, but none succeed in subjecting him to obligations equivalent to those of union membership.
>
> (at 301)

Considering the need for bargaining unit solidarity to effectively press for better terms and conditions of employment with the need to distribute the costs of collective bargaining amongst everyone in the bargaining unit, and contrasting that with the respect to be accorded individual religious beliefs, there can be no doubt that any interpretation of Section 11 must balance the competing interests of collective bargaining rights with individual religious beliefs.

As previously noted, Straub required religious opposition to all trade unions. Straub imposes an objective threshold which all applicants must meet in order to succeed under Section 11. In our view, this interpretation is not responsive to the spirit and intent of Section 11 when viewed in the context of the Charter, Section 27 or the expanded involvement of trade unions into broad social issues. This Panel is of the view that the Straub test is too narrow, one not suited to either the changing religious fabric of the Province or the new legal environment in which the labour relations system must function.

The Panel also accepts the Unions' concern that on its face the first reconsideration panel and the Ontario approach appear to go too far. It must not be forgotten, in spite of the added emphasis upon individual rights, that one of the traditional purposes of the Act has been and continues to be the maintenance and promotion of industrial peace in a unionized environment. To that extent, the legitimate aspirations of trade unions including union security must be fostered and protected to the fullest extent possible within the four corners of the legislation. The Unions say Wasilifsky, supra, opens the door to the proposition that objection to even the most innocuous union policy or resolution, whether acted upon or not, whether dormant or forgotten, could lead to an exemption from membership and dues if it is opposed on religious grounds. We agree that not all opposition to trade union membership should lead to such an exemption, even where the opposition is based on a "religious" belief which is sincerely held.

We are convinced that it is no longer enough to permit exemptions only where opposition exists to all trade unions; there are circumstances where religious opposition to one trade union will require this tribunal to grant exemption from the membership requirement. A simple example is readily available within the trade union movement itself. CLAC is a trade union which embraces a Christian philosophy in carrying out its rights and obligations under the Act. It may well be that a member of a different religious denomination, while not opposing trade unionism in general, would find his or her religious beliefs incompatible with membership in CLAC because of CLAC's embracement of Christianity. This example readily illustrates the deficiency in the Straub approach.

Consequently, the Panel agrees that it is possible to obtain an exemption under Section 11 based on religious opposition to a policy or resolution adopted by a single trade union. The question to be determined is whether a reasonable person holding the religious belief or beliefs of the applicant would find that policy to be offensive to those religious beliefs. We reiterate that the test must be subjective. While a relationship to formal or denominational structures may be important in helping a panel assess the veracity and sincerity of an applicant's beliefs, it is but a factor to be considered in the course of a panel's deliberations. The applicant's peculiar or particular religious beliefs, whether they coincide with a formal denominational dogma or not, will not be questioned.

The mere passing of a policy or resolution by a union, in and of itself, is not sufficient in the normal course of events to form a basis for a Section 11 exemption. Unions, like other organizations, may adopt policies or statements of principles which are no more than an expression of the topical views of the delegates attending a convention. On the other hand, a policy may form the basis of a successful Section 11 application where the policy or resolution has a direct or substantial impact on the applicant's religious beliefs. This may occur in a variety of ways. For example, the policy may identify the applicant with a cause which is incompatible with his religious beliefs. In such cases, the Council will consider, among other things, whether or not a reasonable person, upon learning that the applicant is a member of the particular union, associates the applicant with that policy. Or, the policy may require the applicant to make a personal commitment to a cause which is incompatible to his or her religious beliefs. Another example is where the policy results in the union using membership dues to make a direct financial contribution in support of or to a cause which is incompatible with the applicant's religious beliefs. In such a case, in addition to issue of membership, the Council will also consider whether it is appropriate to exempt the applicant from the payment of dues under Section 11(1)(b). If the applicant can adduce evidence suggesting that the union has expended funds in advancement or support of whatever policy forms the basis of an applicant's objection, the Union will bear the onus to show that no such expenditures have been made.

In our view, this strikes a fair balance. Unions must accept that adopting certain policies may well offend the religious beliefs of some of their members who will feel compelled to seek exemptions under Section 11. On the other hand, the wages received, the benefits provided and the terms and conditions secured through union representation demand a certain level of support from all employees of the bargaining unit, even where the union adopts certain policies that are objectionable to an applicant because of the applicant's religious beliefs. Only where the Section 11 applicant can show the policy or resolution adopted by the trade union has a direct or substantial impact on his or her religious beliefs will the Section 11 application succeed.

Furthermore, the concern over free riders can be adequately addressed by treating the exemption from the payment of dues as an issue separate from the exemption from membership, and through the remedial aspects of Section 11. Consequently, we have further concluded that a broader approach in light of the Charter framework is not only warranted but can be accommodated while still keeping the concern over free riders in perspective and achieving an appropriate balance.

We would add this caveat to our conclusion. As any interpretation expressed in policy terms, our conclusion is subject to refinement on a case-by-case basis. A case might arise in the future where a trade union adopts a resolution that proves to be so offensive to an individual that the mere adoption of that policy could form the basis for an exemption from membership and/or dues under Section 11 of the Act. That in our opinion would be a rare and unusual case. The facts of the instant case do not amount to such a situation.

Finally, one significant difficulty arises where an exemption is possible because of opposition to a trade union policy. A policy may be changed or abolished so that the basis for the exemption no longer exists. But because Section 11 allows a permanent exemption from that trade union, the union is placed in a bind: it has neither the policy nor the union member (or, in other circumstances, the dues). In such circumstances, it is appropriate to provide a mechanism for review of the exemption in light of changing circumstances. Thus, the union may apply to the Council under Section 36 for a reconsideration of the exemption decision in light of the new evidence. At that point, it is open to both the union and the employee to adduce evidence concerning changed circumstances. The same considerations that are applied in the first application will then be applied to the new factual circumstances and a determination will then be made.

(b) Remedy

The statutory provisions governing the Council's remedial authority in this area are reproduced in part:

> 11.(1) Where the council is satisfied that
> an employee, because of his religious
> conviction or belief,
> (a) objects to joining a trade union, or
> (b) objects to the paying of dues or other assessments to a trade union,
> the council may order that the provisions of a
> collective agreement requiring membership in a
> trade union as a condition of continued
> employment do not apply to the employee and
> that the employee is not required to join the

> trade union, to be or continue to be a member of the trade union, or to pay any dues, fees or assessments to the trade union, so long as amounts equal to any dues, fees or other assessments are paid by the employee to or are remitted by the employer to a charitable organization agreed on by the employee and the trade union or, if the employee and the trade union fail to agree, then to a charitable organization that is registered as a charitable organization in Canada under Part 1 of the Income Tax Act (Canada) and that is designated by the council.

Where the Council is satisfied that the employee objects to either the payment of dues or trade union membership, it is entitled to grant the relief enumerated in the latter part of the section. This includes exemption from membership or payment of dues. The section is disjunctive, not conjunctive, so there is no requirement for a successful applicant to be exempt from both membership and dues payment. It is open to the Council to order exemption from either membership or payment of dues or both.

We draw comfort from the Alberta case of Carol Richardson and United Nurses of Alberta, (1990), 4 CLRBR (2d) 314 where the Alberta Board found on language identical to ours that a remedy of exemption from dues only was available for applicants in cases where union security was less than a closed or union shop and where membership was voluntary. The Board found that in such cases an individual could apply and receive an exemption from dues alone. We conclude that if the remedy of exemption from dues alone is available to individuals who do not need an exemption from membership and that for that purpose the word "or" is disjunctive, then there is no reason to assume that it is not disjunctive for other purposes including imposing a "Rand" solution in cases where an exemption from membership is granted.

Accordingly, it is the judgment of this Panel that an exemption from trade union membership will be granted where the objectionable policy or trade union activity does not require an expenditure by either the union or its membership, while an exemption from both membership and dues payment will be appropriate where such an expenditure is called for. A dues exemption will be ordered where there is proof of direct financial support or contribution to advancing the objectionable policy or policies. However, it is reasonable to assume that in cases where applicants object to the concept of trade unionism generally (that is those who would have qualified under the Straub interpretation) they will receive an exemption from dues in addition to an exemption from membership on the premise that the union does expend funds for collective bargaining and collective agreement administration.

We have decided to leave the issue of dues exemption to be developed and refined by the Council in future cases. We are not going to define with precision what constitutes "a financial contribution that advances the objectionable policy or policies" because the facts before us did not raise the matter and consequently the parties did not address it in their arguments. While applying our decision on this issue may be difficult, we point out it has been well settled in law that difficulty

alone is not sufficient to impeach an interpretation or relieve a trier from the responsibility of employing it.

It is important to note that the section deprives the Council of any discretion as to where the dues should be paid once the exemption from the payment of dues to the Union is granted. If an applicant is entitled to such an exemption, we must order the employer to remit the dues to a charitable organization agreed on by the employee and union, or in the absence of agreement, a charitable organization designated by the Council.

(c) Recommendations

Although the section is silent with respect to preconditions to an application under Section 11, in the interests of promoting the orderly and constructive settlement of any dispute between an employee and a freely chosen representative, we have decided as a matter of policy to recommend that all applicants from this point forward approach their bargaining agent in an effort to work out a private arrangement to deal with mandatory membership and/or dues payment prior to applying to the Council for exemption under Section 11. Similarly, we urge unions to make every effort to listen to the concerns of individual employees and to make reasonable attempts to accommodate the deeply held religious concerns of anyone contemplating application. This includes special arrangements that include (but are not limited to) exemption from membership and/or dues payment.

In addition, unions are free to take steps to reduce the impact of controversial and highly sensitive policy statements which may impact upon individual religious beliefs. While unanimity may be desirable, it is recognized by all that it is seldom present. For that reason, we have concluded that a union could easily attach a rider to its resolutions or policy statements indicating that while such policy statements were passed by a majority of the delegates to the convention, they do not necessarily reflect the view of all of the members of the union. This would certainly reduce, if not foreclose, the automatic or instant identification between an individual and the policy by virtue of membership in the union.

By the same token, if a union is contemplating expenditures in support of such a policy, nothing prevents the union from levying an additional assessment on a voluntary basis to raise funds to advance such a policy. In such an instance, because funds would only be paid by those truly supporting the policy, and no expenditures would be based on mandatory dues, fees or other assessments per se, that ground for seeking an exemption under Section 11 would effectively be foreclosed.

(d) Summary of Criteria

In summary, the Council will now assess a Section 11 application employing the following criteria:

1. Is the applicant an employee?
2. Is the objection to trade union membership and/or the payment of dues a religious one?
3. Is the religious belief the primary basis for the objection?
4. Is the religious belief of the individual bona fide?
5. Does the applicant object to the trade union in all of its manifestations or is the objection to membership in a single trade union based upon a policy or policies? Is the objectionable union policy a simple or dormant declaration or resolution? Does the union

policy call for expenditures of money, require further action or personally identify the applicant with the impugned trade union policy? Is the objectionable policy an unqualified one?

6. What remedy does the applicant seek?

(e) Procedure

1. An applicant should first approach the bargaining agent to discuss the possibility of an exemption from trade union membership without the necessity of an order from the Council pursuant to Section 11 of the Act. We urge the parties to meet and discuss the matter, keeping in mind the possibility of membership exemption with a continuing obligation to pay (all or partial) dues.
2. An applicant may apply in writing (in a letter, for example) for an exemption under Section 11. It is important to remember that the section places the onus of proof on the applicant to satisfy the Council that he or she has a sincerely held religious conviction or religious beliefs which are the cause of his or her objection to membership in a trade union. As the Council is not obliged to hold an oral hearing before issuing a decision, the applicant should provide as many details as possible in his or her written application to satisfy the Council that an exemption order is justified. At a minimum, the Council will require the following information:

    (a) There must be an explanation of the religious conviction or belief that lead to the objection to trade union membership;
    (b) A copy of the provisions of the collective agreement relevant to the claim, such as the section requiring membership and payment of dues must be enclosed;
    (c) Where the objection is based on opposition to a policy or policies of a trade union, the policies or activities that are incompatible with the religious beliefs of the individual must be identified;
    (d) Because the Council must be satisfied that an applicant holds a bona fide belief, the application should be accompanied by a letter from someone (for example, clergy, lay pastor, etc.) who knows the applicant, can vouch for the applicant's sincerity and can explain the applicant's beliefs. This letter should describe the relationship between the writer and the applicant and the reasons why the writer is familiar with the applicant and his or her religious beliefs. Even though the tenets of the applicant's religion are not determinative of the issue, the applicant may wish to submit a letter from a clergyman of the same faith. It should be remembered that these letters by themselves, will probably not establish the bona fides of the applicant's beliefs. The application will be examined in its entirety in order to make this assessment;
    (e) additional information or proof to explain the applicant's religious beliefs.

3. Once the application is made, the Council will dispatch an Industrial Relations Officer or other official to investigate the application. That individual may interview the applicant, co-workers, supervisors and other members of management,

and co-religionists of the applicant. The officer may also interview the individual whose letter accompanied the application.

4. Once the report of the above mentioned official is complete, the panel assigned to decide the matter may proceed with an oral hearing or decide on the basis of written material alone. The parties will be given an opportunity to make full written submissions regarding the application.
5. Where the order exempts the individual from paying dues, an equal amount will be remitted to a charity mutually agreed upon by the parties or, failing agreement between them, to a charity designated by the Council and registered under the Income Tax Act.
6. The parties are reminded that any individual who successfully obtains an exemption under Section 11(1) is not entitled by virtue of Section 11(3) "to participate in a vote conducted by a trade union or in a vote held for the purposes of this Act."

VII

DECISION

Application of the Law to These Facts

We agree with the Wasilifskys that this Panel is bound by the findings of fact of the original panel. We note that the Wasilifskys were devastated by the passage and active support of pro-choice resolutions by the BCTF at its AGM. The Wasilifskys actively campaigned against these policies, using the internal BCTF mechanisms, but were ultimately unsuccessful in their attempt to reverse them. They also relied on the compulsory aspect of BCTF membership to justify their continued association with the BCTF despite the repugnant policy; the fact that legislation compelled them to belong to the BCTF membership meant that membership was not a mortal sin. Not until the 1987 legislative changes and elimination of the statutory condition did they encounter religious difficulties with membership, since membership was thenceforth voluntary and not compulsory. (While we have some difficulty with the distinction and it was never satisfactorily explained by the Wasilifskys, this does not affect our ultimate determination.) But there can be no doubt about the Wasilifskys' sincerity and the fact that their opposition is firmly rooted in their religious beliefs.

To qualify for Section 11 relief, an applicant may be opposed on religious grounds to membership in only one trade union. The opposition may be based on a policy of that union that is particularly offensive to the applicant's religious convictions. The policy must have a direct or substantial impact on the applicant, not just a tangential or indirect one. In this case, the Wasilifskys argued and the original panel accepted as a fact, that it would be a mortal sin for them to belong to the BCTF and the local association so long as the offending policy remains in place. As a reconsideration panel we will not take issue with the original panel's finding on this point nor with the evidence which was before the original panel that the BCTF actively supported the pro-choice position (at 5 and 6). We are obliged to conclude that the adoption and support of these policies had, if not a direct, then a substantial impact upon Wasilifskys. Consequently, the Council will grant an exemption in these circumstances.

While the evidence shows that the impugned policy violates the Wasilifskys religious beliefs, there is no evidence that the BCTF has made any expenditures in furtherance of the objectionable policy. In such circumstances, it is inappropriate to grant an exemption from dues, with a payment

in lieu to charity. Therefore, it is the determination of this Panel that the Wasilifskys shall continue to be entitled to an exemption from NVTA/BCTF membership but shall be required from this point forward to pay union dues to the NVTA/BCTF.

In the result, the applications are allowed in part.

EDWARD R. PECK
COMMISSIONER

KEN ALBERTINI
CHAIRMAN, ADJUDICATION DIVISION

RICHARD S. LONGPRE
VICE-CHAIRMAN

BARRY GOFF
VICE-CHAIRMAN

JOSEPH S. CROWDER
VICE-CHAIRMAN

V.A. PYLYPCHUK
VICE-CHAIRMAN

SHELLEY NITIKMAN, VICE-CHAIRMAN DISSENTS AND HER REASONS ARE ATTACHED.

DISSENT

I concur with the decision of the majority insofar as it favours an extended interpretation of Section 11 and insofar as it upholds the original reconsideration decision to exempt the Wasilifskys from membership in the NVTA/BCTF. I cannot, however, agree with the majority decision to require the Wasilifskys to pay dues to the Union. I would uphold the original reconsideration decision in its entirety.

I share the concern over "free riders" and union security as expressed by my colleagues and the Unions. I agree it would be desirable if that concern could be addressed by having a Section 11 applicant continue to pay dues to the union notwithstanding that applicant's success in obtaining an exemption from union membership on religious grounds. Indeed, the 1973 Labour Code provided that very solution. But the Labour Code was amended in 1987. Now, under the Act, upon exemption from membership under Section 11, the equivalent of union dues is to be paid to a charity. It is my opinion that if the legislature had intended dues or the monetary equivalent to continue to be paid to the union in spite of exemption from membership, it would not have amended Section 11 in the way it did. Moreover, had the Legislature intended to give the Council the discretion to make dues payable to the union where no such discretion with respect to dues existed before, the legislature could have said so in clear and unambiguous language.

With the greatest respect, I cannot agree with the majority's conclusion that Section 11 as it now stands gives the Council the discretion to divorce union membership from union dues. I cannot agree that Section 11 permits the Council to refuse to exempt an applicant from the payment of dues where the applicant requests such relief and has otherwise satisfied the panel she is entitled to an exemption from union membership on religious grounds. In my view, the section is not ambiguous on its face. But if it were, and if one attempted to ascertain the Legislature's intention by resorting to

collateral sources, then I conclude the 1987 amendment debates from Hansard as set out in the majority decision, support my interpretation of the section. The then Minister of Labour said that the amendment to the section simply recognizes the reality that union dues or their equivalent were frequently paid to charities with the consent of labour. To put it another way, his remarks suggest the legislature intended to switch the payment of dues directly to a charity. They do not suggest that the conjunction between membership and dues was intended to be altered. Under the Labour Code, exemption from membership meant dues to the union; under the 1987 amendments, exemption from membership means dues to a charity.

In my view, the "or" in Section 11 does not bear the significance the majority attaches to it. Rather, the section sets out the three ways in which the Council achieves the object of exempting the applicant from the provisions of a collective agreement requiring membership in a trade union. I do not agree that Carol Richardson and United Nurses of Alberta (1989), 4 CLRBR (2nd) 314, supports the majority's interpretation of the section. That case is of interest because it illustrates the kind of circumstance in which a disjunctive "or" would be applicable: an applicant under Section 11 might, for example, request exemption only from the payment of union dues where trade union membership is not required by a collective agreement but a Rand formula type of union security clause requires all employees, whether members or not, to pay dues to the union. In my opinion, that is what the Alberta case stands for. It is not applicable to the issue being addressed by the majority in the instant decision.

I conclude that Section 11 as presently worded allows for religious exemption on two grounds: where a collective agreement requires membership as a condition of employment (or continued employment) or where the collective agreement is silent with respect to membership but does require dues. Additionally, the section as presently worded would accommodate the rare circumstance where an applicant sought exemption only from the payment of dues because her religious convictions and beliefs did not prevent her from belonging to the union. This was the case in Howard White, IRC No. C1/90 where the panel said that although it was unusual to have such an application, Section 11 clearly permitted it. The panel said an application for exemption from payment of dues only is subject to the same tests as an application for exemption from membership. White's application was dismissed because he did not demonstrate to the panel's satisfaction that his beliefs were sincere or that his professed religious convictions were irreconcilable with the payment of dues to the union.

It is my view that under Section 11, where a collective agreement requires membership in the union as a condition of employment, an applicant who qualifies for exemption--under either the Straub or the Wasilifsky interpretation--must be exempted from both membership and dues, and a dues equivalent paid to a charity. There is no discretion here, just as the Labour Relations Board under Section 11 of the Labour Code had no discretion to exempt an applicant from paying dues to the union when an exemption from union membership was granted under that section.

If I am wrong about the majority's interpretation of Section 11, I would still be unable to agree with the formulation of the basis (or the test) upon which the Council will exercise this discretion. In my respectful opinion, if a new or expanded interpretation of Section 11 is mandated by current social realities including the Charter of Rights and Freedoms (and I agree with the majority that it is), it cannot be the case that other forms of inequalities should be imposed in place of the ones the new interpretation is intended to redress.

As I understand the majority decision, an applicant who objects to all trade unions on religious grounds will always be exempt from paying dues. However, an applicant who objects to a specific trade union because a policy of that union is particularly offensive to the applicant's religious beliefs, may not receive the same relief. Both categories of applicants once exempted from membership continue to enjoy the benefits of union representation. Both, by virtue of Section 11(3), will not be entitled to participate in a vote conducted by a trade union or in any vote held for the purposes of the Act. To this extent, both applicants are treated equally. But in the case of the applicant who objects to a particular union because of a particular policy the union espouses, there will have to be evidence that monies have been expended on the offending policy whereas in the case of the applicant who objects to trade unionism per se, no such evidence will be required.

The presumption in the latter case is that the trade union always spends money to achieve its objectives. Therefore, the evidence necessary to exempt this category of applicant is, as it were, a given. However, if, for example, an applicant objects on religious grounds to the aggressive, coercive, or confrontational tactics trade unions may use to achieve their objectives but otherwise has no problem with workers collectively negotiating to improve the terms and conditions of their employment, then, to be fair and to treat applicants equally, the Council should similarly require evidence that the particular trade union to which the applicant belongs has, in fact, been confrontational, coercive, and so on. I do not urge this as a policy. I only point it out to underline what I perceive to be the basic unfairness of the majority's test.

Furthermore, in my respectful opinion, to say as the majority has, that for the applicant who objects to a particular policy of her union, an exemption from the requirement to pay dues to the union will require evidence that the union has used membership dues to make a direct financial contribution to the offending cause or in support of it, will result not only in creating categories of applicants and hence another inequality, but it will also and needlessly create numerous and perplexing problems for a panel. For example, how much money must the union spend to justify exempting the applicant from paying dues to the union and permit her instead to pay the equivalent of dues to a charity? Is $1 enough? $10? $100? $1000? Should the amount be a function of the size of the union and the amount of dues paid? Should some mathematical formula be applied? There are obviously a number of variables. I foresee this test resulting inevitably in grave inconsistencies in Council decisions to exempt applicants from paying dues to the union or not.

I am concerned as well that another unlooked for and undesirable result of the majority decision will be prolonged litigation. A test that requires evidence that the union has spent membership dues in support of an offensive policy raises the following question: what if the union makes a one-time only contribution? Will that be sufficient for an exemption from dues, or must the expenditure be on-going? If it is a once-only expenditure, will the union be entitled to apply to the Council to vary the Council's decision to exempt from dues on the grounds that the circumstances have changed? The majority decision contemplates variation applications to reverse exemptions from union membership where, for instance, the union resiles from the particular offensive policy objected to by the applicant. It seems reasonable, therefore, that in the case where the union continues to espouse the offensive policy but makes no further expenditure in support of it, the applicant originally exempted from paying dues to the union should now be required to pay them. These are but some examples of the kinds of difficult issues I believe the majority decision will raise.

Under an expanded interpretation of Section 11, it is my respectful opinion that the question to be asked, or the "test" to be applied, should be simply this: is the policy to which the applicant

objects a simple statement of policy by the union, passed but never acted upon in any way, or is it a policy which is actively, publicly, and vocally supported by the union? I would not necessarily tie the test to an expenditure of money although I agree that where a union supports a particular policy in this way, it is very likely that monies will be expended in furtherance of the cause.

On the other hand, it is also possible that the result might be the one that pertains in the majority decision in the instant case. The majority agrees, as do I, that this Panel is bound by the findings of fact made by the original reconsideration panel. One of those findings of fact, as the majority notes, is that the Wasilifskys were devastated by the passage and active support of pro-choice resolutions by the BCTF. The majority says, and I agree, there can be no doubt the Wasilifskys are sincere and their opposition to the NVTA/BCTF's pro-choice policies is firmly rooted in their religious beliefs. Additionally, the majority takes no issue with the original reconsideration panel's finding that the Wasilifskys consider it a mortal sin to belong to the BCTF and the local association so long as the offending policy remains in place. The majority says it is obliged by these findings of fact to conclude that the adoption and support of these policies had, if not a direct, then a substantial impact upon the Wasilifskys. As a consequence, it will grant the Wasilifskys an exemption from the collective agreement requirement to belong to the NVTA/BCTF.

There are other findings of fact. The original reconsideration panel said:

> The Wasilifskys' position on abortion is a profound personal religious concern which has been an important part of their lives....In their religious views, a positive act to join organizations which support a pro-choice abortion position will constitute an act that fundamentally and negatively alters their personal relationship with God, i.e., an act of intrinsic evil.
>
> (IRC NO. C169/89, at 43)

Based on all these findings of fact, I conclude that the Wasilifskys were sincerely and profoundly offended and troubled on religious grounds by the pro-choice (in their perception, pro-abortion) policy adopted by their union. There is evidence that their union is very active and vocal in support of this policy but there is no evidence (at least there was no evidence before the original reconsideration panel) that membership dues were used to make a direct financial contribution in support of the cause. Accordingly, by virtue of the test formulated by the majority, the Wasilifskys must pay dues to the union rather than to a charity; they must continue to fund the organization that has so offended their religious convictions. This seems to me to be unfair.

In my respectful opinion, the Council's new policy for Section 11 applicants should not apply to the Wasilifskys. This is not a case like Vancouver Fancy Meats, IRC No. C186/88, where a reconsideration panel held that a policy change by the Labour Relations Board should have applied "retrospectively" to an application made prior to the policy change. The instant case is distinguishable. Here, the majority decision does not say that an interpretation of a section of the Act must be corrected because it had, heretofore, been wrongly interpreted. That was the case in Westar Timber Ltd., BCLRB No. 47/87, (1987), 14 CLRBR (NS) 360 (upheld on reconsideration No. C102/87.) Rather, the instant decision speaks to the justification for an expanded interpretation of Section 11. It then proceeds to address the matter of remedy under the expanded definition and, in so doing, interprets the section in a way it had not previously been interpreted by the Council. Under such circumstances, and given that this case has been before the Council for a very long time already, it

seems to me that the new policy setting out the evidentiary requirements for future successful Section 11 applications, should not be applied to anyone who applied and was successful under Section 11 before the new policy was in place.

To summarize my position:

1. I would uphold the result of the original reconsideration decision for all of the reasons set out in the majority decision but I would uphold it in its entirety.
2. I would allow an expanded interpretation of Section 11 to permit exemption from a trade union on religious grounds;
3. I would require that an applicant who objects to a particular policy of the trade union on religious grounds, satisfy the panel that there is a nexus between the religious belief and the policy. The test whether this is so should be, as the majority states, a combination of subjective and objective assessment: "subjective" in the sense that it is the applicants' interpretation of the teachings or tenets of her religion and not the Council's interpretation, that will generally prevail. However, the nexus between those tenets and the offending policy will, of necessity, require an "objective" assessment by the Panel.
4. Given an expanded interpretation of the section, I would say that if a panel is satisfied that the religious beliefs are sincerely held and if the policy can be seen to offend those beliefs, and if the policy is one which is actively supported by the union in any way, then, provided the applicant has requested exemption from dues as well as from membership, an exemption must be given from both and the equivalent of union dues paid to a charity.
5. If the union has not actively supported the policy in any way, then, except in the most unusual circumstances, I would say that exemption from union membership and dues payment would likely be unwarranted.

SHELLEY NITIKMAN
VICE-CHAIRMAN

1 The Supreme Court of Canada examined the validity of Hoogendoorn's dismissal from work because he refused, on religious grounds, to join the union. The Court overturned the dismissal, but on procedural grounds only and did not question the union's right to seek dismissal where proper procedure was followed.

2 Paul Pelletier, "Union Security and the Religious Objector: Section 39 of the Labour Relations Act", (1978) Queen's L.J. 256.

3 Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act, 1982 being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11.

4 None of the parties challenged the validity of Section 11.

5 We have considered our interpretiation of Section 11, infra, in light of the guidelines set out by the Supreme Court of Canada in Slaight Communications v. Davidson (1989), 59 D.L.R. (4th) 416. If addressing the issue of union security in the context of Section 11 limits religious freedom, then we have concluded that it constitutes a "pressing and substantial" objective in a free and democratic society. We are convinced that our interpretation, infra, is fair and rationally connected to that objective. Moreover, the effect of our interpretation, infra, in not permitting an exemption in cases where the impugned union policy has neither a direct nor substantial impact upon the applicant's religious belief, or in seeking a link between the payment of dues and direct financial support of or contribution to the advancement of the impugned union policy is not out of proportion to that objective.