S.C.C. No. 32968

IN THE SUPREME COURT OF CANADA
(APPEAL FROM THE ONTARIO COURT OF APPEAL)

BETWEEN

ATTORNEY GENERAL OF ONTARIO

APPELLANT
(Respondent)

-and-

MICHAEL J. FRASER on his own behalf, and on behalf of the UNITED FOOD AND COMMERCIAL WORKERS UNION CANADA, XIN YUAN LIU, JULIA MC GORMAN AND BILLIE-JO CHURCH

RESPONDENTS
(Appellants)

-and-

ONTARIO FEDERATION OF AGRICULTURE

INTERVENER
(Intervening Party in the Court of Appeal)

-and-

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PART I—OVERVIEW

1. Work is a fundamental aspect of the lives of most Canadians. Collective bargaining is an essential element in the fabric of a free and democratic society because it enhances human dignity, equality and democratic participation in the workplace.

2. Occupation forms an analogous ground protected from discrimination by s. 15 in circumstances where a group of workers with a particular occupation forms a discrete and insular minority. Protecting a marginalized occupational group from discrimination is imperative when the group is excluded from a legislative regime designed to protect the constitutional right to bargain collectively. Denying the state's protection of collective bargaining to such a group deprives its members of the most effective means of improving their material, social and political situation, thereby perpetuating their disadvantage and the prejudice against them.

3. Section 2(d) protects employees' right to bargain collectively. This protection extends to those aspects of collective bargaining necessary to ensure that the right to bargaining collectively is meaningful. As such, at a minimum, the right incorporates:

(a) An enforceable duty to bargain in good faith;

(b) A mechanism for resolving impasses in bargaining; and

(c) A democratic process for employees to choose their representative and a requirement that employers respect the results of their employees' democratic choices.

4. Section 2(d) does not require the legislature to adopt these aspects of collective bargaining in the form they take in the *Labour Relations Act;* it is open to the legislature to design such alternatives as it believes are appropriate to the agricultural sector. However, any alternative model must be carefully formulated either to meet the basic objective of ensuring that the right to collective bargaining is meaningful, or be justifiable in accordance with s. 1. The *Agricultural Employees Protection Act, 2002* ("AEPA"), which has failed to result in collective bargaining, is ineffective and does not meet the requirements of s. 2(d).

5. The exclusion of a vulnerable group from a legislative regime designed to implement a constitutional right such as freedom of association amounts to an affirmative interference with

the meaningful exercise of that right, in the sense that it orchestrates, encourages or sustains the violation of the right by private parties. In the absence of evidence that the alternative protection offered is at least as effective as the legislative regime offered to all less vulnerable groups in society, it constitutes a violation of that fundamental right.

PART II—THE CCLA'S POSITION ON THE ISSUES

6. The CCLA takes the following positions on the questions at issue:

1. Does the Agricultural Employees Protection Act, 2002, S.O. 2002, c. 16, infringe s. 2(d) of the Canadian Charter of Rights and Freedoms?

The *AEPA* infringes s. 2(d) of the *Charter*.

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the Canadian Charter of Rights and Freedoms?

The CCLA does not take a position on this issue.

3. Does s. 3(b.1) of the Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A, infringe s. 2(d) of the Canadian Charter of Rights and Freedoms?

In the absence of alternative legislation protecting agricultural workers' right to bargain collectively, *s. 3(b.1) of the LRA* infringes s. 2(d) of the *Charter*.

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the Canadian Charter of Rights and Freedoms?

The CCLA does not take a position on this issue.

5. Does the Agricultural Employees Protection Act, 2002, S.O. 2002, c. 16, infringe s. 15 of the Canadian Charter of Rights and Freedoms?

This issue should be decided in accordance with the principle that, where a group of workers in a particular occupation forms a discrete and insular minority, in that they have been historically and consistently disadvantaged, have little or no political power and are unable to change their occupation without great difficulty, their occupational status constitutes an analogous ground protected by s. 15 of the *Charter*. The CCLA submits that the case of agricultural workers meets the definition of a vulnerable group equivalent to a discrete and insular minority. In the alternative, if the Court decides that the record does not sufficiently disclose the conditions of vulnerability of the agricultural workers, CCLA submits that the case should be sent back to the trial court for a decision on this issue.

6. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the Canadian Charter of Rights and Freedoms?

The CCLA does not take a position on this issue.

7. Does s. 3(b.1) of the Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A, infringe s. 15 of the Canadian Charter of Rights and Freedoms?

The CCLA's position on this issue is the same as its position on issue 5.

8. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the Canadian Charter of Rights and Freedoms?

The CCLA does not take a position on this issue.

PART III—ARGUMENT

Work and collective bargaining in a free and democratic society

7. The CCLA's perspective on this appeal is grounded in the purpose of its work furthering civil liberties—namely, to maintain a free and democratic society in Canada. Its submissions on equality and freedom of association flow from the following assumptions about the significance of work and collective bargaining in a free and democratic society.

8. The values and principles essential to a free and democratic society include "respect for the inherent dignity of the human person, commitment to social justice and equality… and faith in social and political institutions which enhance the participation of individuals and groups in society."

> *R. v. Oakes,* [1986] 1 S.C.R. 103 at 136, Dickson C.J.C.

9. These values and principles are as important in the workplace as they are in any other social institution in Canada, because work is fundamental to the lives of most Canadians:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self respect.
>
> > *Reference Re Public Service Employee Relations Act (Alberta),* [1987] 1 S.C.R. 313 at 368, Dickson C.J.C., dissenting ["*Alberta Reference*"].

Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701 at paras. 93-94.

10. Collective bargaining is an essential element in the fabric of a free and democratic society because it enhances human dignity, equality and democratic participation in the workplace. As the Court recognized in the *Health Services* case, collective bargaining palliates the historical inequality between employers and employees. It enables employees to influence working conditions that affect both their working and personal lives. It introduces into the workplace a feature of political democracy that is a hallmark of a free and democratic society, the rule of law. It is "intrinsically valuable as an experience in self-government," for it is "the most significant occasion upon which... [many] workers ever participate in making social decisions about matters that are salient to their daily lives."

Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia, [2007] 2 S.C.R. 391 at paras. 81-85 ["*Health Services*"].

Alberta Reference, supra, at 368-370, Dickson C.J.C., dissenting.

Section 15—discrimination on the basis of occupational status

11. Although this Court has rejected claims by certain groups of advantaged professionals that their occupational status is an analogous ground protected from discrimination by s. 15, it has never categorically declared that occupational status cannot form an analogous ground.

Baier v. Alberta, [2007] 2 S.C.R. 673 at paras. 65-66 ["*Baier*"].

Delisle v. Canada (Deputy Attorney General), [1999] 2 S.C.R. 989 at paras. 44-45.

Health Services, supra, at paras. 164-166.

12. The CCLA submits that excluding a group of employees from statutory protection of collective bargaining on the basis of their occupational status can, and in certain circumstances will, constitute a breach of s. 15.

13. In particular, where a group of workers with a particular occupation forms a discrete and insular minority, in that its members have been historically and consistently disadvantaged, have little or no political power and are unable to change their occupation without great difficulty, their occupational status constitutes an analogous ground protected by s. 15 of the *Charter*. It is vital that the courts use s. 15 of the *Charter* to protect such workers from discrimination on the ground of their occupation.

Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016, at paras. 165-167, L'Heureux Dubé J., concurring ["*Dunmore*"].

14. Protecting a marginalized occupational group from discrimination is particularly imperative when the group is being excluded from a legislative regime designed to protect the constitutional right to bargain collectively. Collective bargaining provides workers with a means of reducing the inequality between them and their employer, of participating in social decisions that affect their daily lives, and of protecting and enhancing their human dignity. Denying the state's protection of collective bargaining to a marginalized occupational group deprives them of the most effective means of improving their material, social and political situation, thereby perpetuating their disadvantage and the prejudice against them. Such a result is antithetical to the purpose of s. 15 and requires justification in a free and democratic society.

Section 2(d)—the content of the constitutional right to bargain collectively

15. Following *Health Services*, the right to collective bargaining is protected by s. 2(d) of the *Charter*. This appeal involves, *inter alia*, a dispute about the content of the right. The CCLA submits that, at a minimum, s. 2(d) protects those aspects of collective bargaining that are necessary to ensure that an employee's right to bargain collectively is meaningful.

Health Services, *supra*, at para. 87.

Duty to bargain in good faith

16. In *Health Services*, where the employer was a state actor bound by the *Charter*, the Court held that the constitutional right to collective bargaining incorporated a duty to bargain in good faith. But can s. 2(d) require the state to impose a statutory duty to bargain in good faith on a private employer? Ontario says not: by its inherent nature as fundamental freedom directed toward constraining state action, freedom of association cannot impose a duty on a private citizen to bargain with another.

Health Services, *supra*, at para. 90. *Factum of the Appellant,* at paras. 111-114.

17. The CCLA submits that s. 2(d) can, and in some circumstances will, result in a private employer having a statutory duty to bargain in good faith. Ontario's position misapprehends both the nature of the impact on private employers of the government's obligations under s. 2(d) and the manner in which fundamental freedoms operate in a free and democratic society.