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Court File No. 21378

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal
of the Province of Ontario)

BETWEEN:

FRANCIS EDMUND MERVYN LAVIGNE

Appellant

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION,
ONTARIO COUNCIL OF REGENTS FOR COLLEGES
OF APPLIED ARTS AND TECHNOLOGY

Respondents

- and -

CANADIAN LABOUR CONGRESS, ONTARIO FEDERATION OF LABOUR,
NATIONAL UNION OF PROVINCIAL GOVERNMENT EMPLOYEES,
THE ATTORNEY GENERAL OF CANADA,
THE ATTORNEY GENERAL OF ONTARIO,
PROCUREUR GÉNÉRAL DE LA PROVINCE DE QUÉBEC,
THE CANADIAN CIVIL LIBERTIES ASSOCIATION,
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INDEX

		<u>PAGE NO.</u>
PART I	STATEMENT OF FACTS	1
PART II	POINTS IN ISSUE	2
PART III	ARGUMENT	4
PART IV	ORDER SOUGHT	14
PART V	AUTHORITIES	15

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FACTUM OF THE THE ATTORNEY GENERAL OF CANADA

PART I

STATEMENT OF FACTS

1. The Attorney General of Canada adopts the facts as set out in the reasons of the Ontario Court of Appeal.

PART II
POINTS IN ISSUE

10

2. By order of Dickson, C.J.C. dated the 21st day of August, 1989, the following constitutional questions were stated in this appeal:

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1. Did the Ontario Court of Appeal correctly hold that the *Canadian Charter of Rights and Freedoms*, does not apply in the circumstances of this case on the basis that the substance of the application concerns the expenditure of funds by the respondent Ontario Public Service Employees Union (OPSEU), and not the requirement that the appellant pay sums equivalent to union dues to OPSEU?

1. La Cour d'appel de l'Ontario a-t-elle eu raison de conclure que la *Charte canadienne des droits et libertés* ne s'applique pas dans les circonstances de la présente affaire, pour le motif que la requête porte essentiellement sur les dépenses effectuées par l'intimé le Syndicat des employés de la Fonction publique de l'Ontario (SEFPO) et non sur l'exigence que l'appellant verse des sommes équivalent aux cotisations syndicales du SEFPO?

30

2. If the answer to question 1 is in the negative, does the *Canadian Charter of Rights and Freedoms* apply to the requirement that the appellant pay sums equivalent to union dues to the respondent OPSEU, as provided for in article 12.01 of the collective agreement between the respondent Ontario Council of Regents and the respondent OPSEU pursuant to ss. 51, 52 and 53 of the *Colleges Collective Bargaining Act*, R.S.O. 1980, c. 74?

2. Si la réponse à la première question est négative, la *Charte canadienne des droits et libertés* s'applique-t-elle à l'exigence que l'appellant verse des sommes équivalent aux cotisations syndicales de l'intimé le SEFPO, tel que prévu à l'article 12.01 de la convention collective intervenue entre l'intimé l'Ontario Council of Regents et l'intimé le SEFPO conformément aux art. 51, 52 et 53 de la *Colleges Collective Bargaining Act*, R.S.O. 1980, chap. 74?

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3. If the answer to question 2 is in the affirmative, does the requirement that the appellant pay sums equivalent to union dues to the respondent OPSEU

3. Si la réponse à la deuxième question est affirmative, l'exigence que l'appellant verse des sommes équivalent aux cotisations syndicales de l'intimé

infringe or deny the rights and freedoms guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*?

le SEFPO porte-t-elle atteinte aux droits et libertés garantis par l'al. 2b) de la *Charte canadienne des droits et libertés*?

10 4. If the answer to question 2 is in the affirmative, does the requirement that the appellant pay sums equivalent to union dues to the respondent OPSEU infringe or deny the rights and freedoms guaranteed by s. 2(d) of the *Canadian Charter of Rights and Freedoms*?

4. Si la réponse à la deuxième question est affirmative, l'exigence que l'appelant verse des sommes équivalent aux cotisations syndicales de l'intimé le SEFPO porte-t-elle atteinte aux droits et libertés garantis par l'al. 2d) de la *Charte canadienne des droits et libertés*?

20 5. If the answer to either of questions 3 or 4 is affirmative, is the requirement that the appellant pay sums equivalent to union dues to the respondent OPSEU justified in whole or in part by s. 1 of the *Canadian Charter of Rights and Freedoms* and therefore is not inconsistent with the *Constitution Act, 1982*?

5. Si la réponse à l'une ou l'autre des troisième ou quatrième question est affirmative, l'exigence que l'appelant verse des sommes équivalent aux cotisations syndicales de l'intimé le SEFPO est-elle justifiée en totalité ou en partie par l'article premier de la *Charte canadienne des droits et libertés* et, par conséquent, non incompatible avec la *Loi constitutionnelle de 1982*?

30

The Attorney General of Canada submits that Question 1 should be answered in the affirmative. In the event that question 1 is answered in the negative, questions 2, 3 and 4 should be answered in the negative and question 5 should be answered in the affirmative.

PART III
ARGUMENT

SECTION 32 OF THE CHARTER

General Principles

3. The *Charter* applies to acts of the legislative, executive and administrative branches of government and regulates governmental action.

Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, per McIntyre J. at p. 598

4. The *Charter* does not apply to private activity *per se*. There is however, an area of activity between purely governmental activity and private activity, where a direct and precisely defined connection might be shown, in which event the *Charter* would apply.

Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd., *supra*, at pp. 601-3.

Re Blainey and Ontario Hockey Association (1986), 26 D.L.R. (4th) 728 (Ont. C.A.), per Dubin J.A. at pp. 736-7; leave to appeal refused [1986] 1 S.C.R. xii.

Re: Bhindi and British Columbia Projectionists Local 348 (1986), 29 D.L.R. (4th) 47 (B.C.C.A.), per Nemetz C.J. at p. 51-5; leave to appeal refused [1986] 2 S.C.R. v.

Daigle v. Tremblay, [1989] 2 S.C.R. 530 at p. 571.

10 Question 1: Substance of Application

5. The Ontario Court of Appeal correctly held that this application concerns the expenditure of funds received by OPSEU pursuant to the mandatory check-off clause and not simply the compulsion to pay such dues.

6. The correctness of this holding is evident from a plain reading of the relevant declarations requested by Lavigne, each of which is conditioned on the extent to which the funds in question are expended for Appendix 'A' purposes.

20 7. The evidence establishes that the expenditure of such funds is a private decision made by OPSEU, a private entity. There is no evidence that the Council of Regents was in any way involved in decisions concerning the expenditure of such funds.

8. The expenditure of such funds is clearly not an act of any branch or agent of government, nor does it have the requisite direct and precisely defined connection with governmental action which is necessary for the *Charter* to apply.

30 *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery, supra, per McIntyre J. at pp. 598-603.*

9. It is therefore submitted that this appeal should be dismissed on the ground that the *Charter* does not apply in the circumstances of this case.

Question 2: Government Action

- (i) Council Of Regents Is Not Performing A Governmental Function

10. The *Charter* applies to acts of government carried out directly by government or indirectly by a person or body acting on behalf of government.

10

11. It is submitted that the *Charter* applies only to such acts as may be characterized as governmental or state functions. Accordingly, where a person or body acts on behalf of government, its conduct should be governed by the *Charter* only to the extent that it is performing a governmental function.

12. Governmental functions are those roles played by the state in the course of governing the public at large. They are typically implemented through unilateral measures taken by the state to effect goals which it perceives to be in the best interests of the citizenry.

20

13. Conversely, it is submitted that a collective agreement such as this does not constitute governmental action and therefore the *Charter* does not apply to it.

Retail Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd., supra, per McIntyre J. at pp. 593-603.

Re Blainey and Ontario Hockey Association, supra, per Dubin J.A. at pp. 736-8.

30

Re Bhindi and British Columbia Projectionists Local 348, supra, per Nemetz C.J. at pp. 51-5.

Re Ontario English Catholic Teachers' Association and Essex County Roman Catholic School Board (1987), 36 D.L.R. (4th) 115 (Ont. Div. Ct.) per Anderson J. at pp. 130-6; leave to appeal refused [1988] 2 S.C.R. viii.

Re McKinney v. Board of Governors of University of Guelph (1987), 46 D.L.R. (4th) 193 (Ont. C.A.) at pp. 204-19.

10

Harrison v. University of British Columbia; Connell v. University of British Columbia (1988), 49 D.L.R. (4th) 687 (B.C.C.A.) at pp. 691-7.

Tomen v. Federation of Women Teachers' Associations of Ontario (1989), 70 O.R. (2d) 48 (C.A.), at pp. 53-5.

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Bartello v. Canada Post Corp. (1987), 62 O.R. (2d) 652 (H.C.), per Henry J. at pp. 664-6.

14. Such an approach, which characterizes activities as governmental or non-governmental functions for the purposes of section 32, is consistent with the purpose of the *Charter*. That purpose is to protect the individual from government abusing its extraordinary power or imposing infringements on fundamental rights and freedoms. The purpose of the *Charter* is not to protect citizens from the effects of bilateral arrangements reached through negotiation.

30

Re Blainey and Ontario Hockey Association, supra, per Dubin J.A. at pp. 736-7.

Re Bhindi and British Columbia Projectionists Local 348, supra, per Nemetz C.J. at p. 54.

Re Ontario English Catholic Teachers' Association and Essex County Roman Catholic School Board, supra, per Anderson J. at p. 130.

40

Hunter v. Southam Inc., [1984] 2 S.C.R. 145, per Dickson J. at p. 156.

Cheall v. United Kingdom (1986), 8 E.H.R.R. 74.

15. This collective agreement is not governmental action because the element of negotiation with a private party negates any suggestion of "governmental intervention to compel or constrain".

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 per Dickson J. at p. 346.

10 16. This approach is also consistent with the wording of section 32, which relates the application of the *Charter* to acts of the federal or provincial government within their respective areas of legislative competence.

17. It is therefore submitted that when the Council of Regents negotiated and entered the collective agreement with OPSEU it was not exercising a governmental function and therefore the *Charter* does not apply.

(ii) Article 12.01

20 18. Article 12.01 is part of a contract negotiated by OPSEU, a private union, and the Council of Regents, a statutory body. It is a consensual provision governing the parties to this agreement for the currency of the agreement and has no effect on other members of the public.

Re Ontario English Catholic Teachers' Association and Essex County Roman Catholic School Board, *supra*, per Anderson J. at pp. 132-3.

Bartello v. Canada Post Corp., *supra*, per Henry J. at pp. 664-6.

30 *Re McKinney and Board of Governors of University of Guelph*, *supra*, at pp. 214-5.

19. The *Charter* does not apply to Article 12.01 since that article does not constitute governmental action nor is it law for the purposes of the *Charter*.

(iii) Sections 51-53 of the *Colleges Collective Bargaining Act*

20. Sections 51 and 52 of the *CCBA* establish a general statutory regime within which the provisions of collective agreements are negotiated. They do not affect the characterization of this collective agreement, particularly Article 12.01 thereof, as a non-governmental action.

10

21. Sections 51 and 52 of the *CCBA* do not compel the payment of sums equivalent to dues by non-members of unions, nor do they compel membership in the union.

22. Accordingly, sections 51 and 52 of the *CCBA* do not convert this collective agreement into an act of government or a law to which the *Charter* might apply.

20

23. Section 53 of the *CCBA* is a permissive provision which does not compel any payments to be made by employees. It leaves this option to be negotiated by the contracting parties.

24. Whether mandatory payments are incorporated into a collective agreement is a matter of private conduct which the legislature is not obliged to ensure is in conformity with the *Charter*.

Tomen v. Federation of Women Teachers' Associations of Ontario, supra, at pp. 54-5.

25. It is therefore submitted that the *Charter* does not apply since the alleged infringement of rights is caused solely by the fact that OPSEU, a purely private organization not itself subject to the *Charter*, incorporated Article 12.01 into its collective agreement although not required to do so by sections 51-53 *CCBA*.

SECTION 2(B) OF THE CHARTER

Question 3: Freedom of Expression

10 26. It is submitted that the requirement to pay sums equivalent to union dues is not expression and does not fall within the sphere of conduct protected by section 2(b) of the *Charter*. Accordingly, it cannot infringe Lavigne's freedom of expression.

Irwin Toy Ltd. v. Attorney General of Quebec,
[1989] 1 S.C.R. 927, at pp. 967-8.

20 27. Activity which does not convey or does not attempt to convey a meaning, and thus has no content of expression, is not within the protected sphere of freedom of expression.

Irwin Toy Ltd. v. Attorney General of Quebec,
supra. at pp. 968-71, 978.

28. It is submitted that the factors considered by the Court of Appeal, the ability to disavow the cause and the lack of public identification with the cause, are relevant to a determination of whether an individual's freedom of expression has been violated. They are indicia of whether the activity sought to be protected did convey or attempted to convey a meaning and therefore constitutes expression for the purposes of section 2(b) of the *Charter*.

29. The Appellant Lavigne's only act was to make an involuntary contribution to the general revenues of OPSEU. His ability to disavow causes supported by OPSEU remained unfettered and there was no public identification of Lavigne with such causes. The simple act of contributing does not convey any meaning, nor is it an attempt to do so.

10 30. Some greater connection between the actions of Lavigne and the content of the expression should be necessary for this activity to fall within the protected sphere of freedom of association. The connection between OPSEU's views and Lavigne's payments is too remote to give the latter the status of *Charter* protected expression.

SECTION 2(D) OF THE CHARTER
Question 4: Freedom of Association

31. This Court has set the parameters of freedom of association in the trilogy of cases interpreting section 2(d) of the *Charter*, in particular in the *Alberta Reference* case.

20 *Reference Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 ("*Alberta Reference*").

Public Service Alliance of Canada v. The Queen, [1987] 1 S.C.R. 424.

Saskatchewan v. Retail, Wholesale & Department Store Union, [1987] 1 S.C.R. 460.

30 32. The essence of freedom of association is "the freedom to work for the establishment of an association, to belong to an association, to maintain it and to participate in its lawful activity without penalty or reprisal".

Reference Re Public Service Employee Relations Act, *supra*, per Le Dain J. at p. 391, and McIntyre J. at p. 407.

33. Section 2(d) is not applicable only in the employment context. It applies to "a wide range of associations or organizations of a political, religious, social or economic nature" with a wide variety of objects and activity, and must be interpreted in this larger perspective.

Reference Re Public Service Employee Relations Act, supra, per Le Dain J. at pp. 390-1.

10 34. Neither Article 12.01 of Lavigne's collective agreement nor sections 51 to 53 of the *CCBA* violate freedom of association as defined by this court. None of these provisions impinge on Lavigne's ability to establish, belong to, maintain or participate in any type of association.

Merry v. Manitoba, [1989] 6 W.W.R. 665 (Man. C.A.).

20 35. It is true that there may be some element of maintenance of the association by virtue of the payments Lavigne must make. However, it is submitted that such a contribution, by itself, does not bring Lavigne into association with OPSEU for the purposes of invoking section 2(d) of the *Charter*.

36. Rather, it is submitted that to maintain an organization one must do more than make a mere involuntary financial contribution. Maintenance of an association entails some action supportive of the existence of the association, for example attending meetings or volunteering to work for the organization.

30 37. Absent such supportive action, an individual is not brought into association with the thoughts, opinions or objectives of the association and the individual's freedom of association is not affected.

38. If a compulsory payment of money constitutes "association", a very wide range of activity would receive *Charter* protection. For example, the payment of taxes could be seen as "associating" with government objectives. It is submitted that this is an undesirable and incorrect result.

MacKay v. Government of Manitoba, [1989] 2 S.C.R. 357.

Prior v. The Queen (1989), 10 N.R. 401 (F.C.A.); leave to appeal to S.C.C. dismissed, February 22, 1990.

10 39. Moreover, in considering section 2(d) in the context of the interrelated fundamental freedoms, Lavigne is not being constrained to act contrary to his conscience or to adopt thoughts, beliefs or opinions with which he disagrees.

40. Finally, it is submitted that if there is any impact on freedom of association in these circumstances, it is "trivial or insubstantial" and does not meet the threshold for a violation of freedom of association.

Jones v. The Queen, [1986] 2 S.C.R. 284.

20 **Question 5: Requirements are Justified**

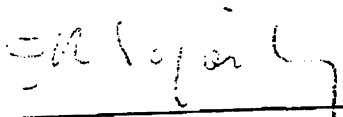
41. It is submitted that the requirement that Lavigne pay OPSEU sums equivalent to union dues is justified by section 1 of the *Charter*. As the principles of law applicable to section 1 are well established, the Attorney General of Canada makes no further submissions with respect to this question.

PART IV
ORDER SOUGHT

42. It is submitted that the constitutional questions should be answered as follows:

- (a) Question 1 should be answered in the affirmative;
- (b) If necessary, questions 2, 3 and 4 should be answered in the negative;
- (c) If necessary, question 5 should be answered in the affirmative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



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Of Counsel for the Attorney General of Canada

PART V
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	<u>PAGE</u>
1. <i>Bartello v. Canada Post Corp.</i> (1987), 62 O.R. (2d) 652 (H.C.J.)	7, 8
2. <i>Cheall v. United Kingdom</i> (1986), 8 E.H.R.R. 74	8
3. <i>Daigle v. Tremblay</i> , [1989] 2 S.C.R. 530	4
4. <i>Harrison v. University of British Columbia; Connell v. University of British Columbia</i> (1988), 49 D.L.R. (4th) 687 (B.C.C.A.)	7
5. <i>Hunter v. Southam Inc.</i> , [1984] 2 S.C.R. 145	7
6. <i>Irwin Toy Ltd. v. Attorney General of Quebec</i> , [1989] 1 S.C.R. 927	10
7. <i>Jones v. The Queen</i> , [1986] 2 S.C.R. 284	13
8. <i>MacKay v. Government of Manitoba</i> , [1989] 2 S.C.R. 357	13
9. <i>Merry v. Manitoba</i> , [1989] 6 W.W.R. 665 (Man. C.A.)	12
10. <i>Prior v. The Queen</i> (1989), 101 N.R. 401 (F.C.A.)	13

11. *Public Service Alliance of Canada v. The Queen*, [1987] 1 S.C.R. 424 11
12. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 8
13. *Re Bhindi and British Columbia Projectionists Local 348* (1986), 29 D.L.R. (4th) 47 (B.C.C.A.) 4, 6, 7
14. *Re Blainey and Ontario Hockey Association* (1986), 26 D.L.R. (4th) 728 (Ont. C.A.) 4, 6, 7
15. *Re McKinney and Board of Governors of University of Guelph* (1987), 46 D.L.R. (4th) 193 (Ont. C.A.) 7, 8
16. *Re Ontario English Catholic Teachers' Association and Essex County Roman Catholic School Board* (1987), 36 D.L.R. (4th) 115 (Ont. Div. Ct.) 7, 8,
17. *Reference Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 11, 12
18. *Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 4, 5, 6,
19. *Saskatchewan v. Retail, Wholesale & Department Store Union*, [1987] 1 S.C.R. 460 11
20. *Tomen v. Federation of Women Teachers' Associations of Ontario* (1989), 70 O.R. (2d) 48 (C.A.) 7, 9