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Court File No. 21378

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

B E T W E E N:

FRANCIS EDMUND MERVYN LAVIGNE

Appellant
(Applicant)

- and -

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

Respondents
(Respondents)

- and -

CANADIAN LABOUR CONGRESS, ONTARIO FEDERATION
OF LABOUR, AND NATIONAL UNION OF PROVINCIAL
GOVERNMENT EMPLOYEES

Respondents
(Intervenors)

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B E T W E E N:

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**FACTUM OF THE INTERVENOR
THE ATTORNEY GENERAL OF ONTARIO**

PART I

STATEMENT OF FACTS

1. The Attorney General of Ontario relies upon the facts as summarized in the reasons of the Ontario Court of Appeal.

PART II

ISSUES AND LAW

2. The Constitutional Questions in this appeal are as follows:

(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?

(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?

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

(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?

(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?

3. The Attorney General of Ontario submits that the Questions should be answered as follows:

(1) Yes

(2) No

(3) No

(4) No

(5) Yes

PART III

ARGUMENT

A. SUMMARY OF THE ATTORNEY GENERAL OF ONTARIO'S ARGUMENT

4. The Appellant's reliance on ss. 51, 52 and 53 of the Colleges Collective Bargaining Act ("CCBA") does not assist the Appellant unless the Appellant can demonstrate that:

(i) ss. 51, 52 and 53 of the CCBA directly infringe the Charter, or

(ii) ss. 51, 52 and 53 of the CCBA transform the collective agreement in general, or the agency shop provision in particular, into government action within the meaning of Charter s. 32.

5. The Attorney General of Ontario submits:

(i) that ss. 51, 52 and 53 of the CCBA do not infringe the Appellant's freedom of expression or freedom of association;

(ii) that, in the alternative, any limitations on the Appellant's rights under ss. 2(b) or (d) are justified pursuant to Charter s. 1;

(iii) that the provisions of the collective agreement are a private agreement not subject to the Charter, and that these provisions are not transformed into government action by virtue of ss. 51, 52, and 53 of the CCBA.

B. SECTIONS 51 AND 52 - UNION AS EXCLUSIVE BARGAINING AGENT

6. The first issue which this Honourable Court should determine is whether sections 51 and 52 of the CCBA infringe the Appellant's rights under Charter ss. 2(b) or 2(d). Sections 51 and 52 of the CCBA establish the employee organization as the exclusive bargaining agent with the authority to represent and bind all employees in the bargaining unit. As the exclusive bargaining agent, the employee organization has the exclusive right to negotiate terms and conditions of employment, and neither the employer nor any one employee can deal on an individual basis on these matters. Pursuant to s. 5 of the CCBA, the employer is under a legal obligation to bargain in good faith with the exclusive bargaining agent.

7. In this regard, ss. 51 and 52 of the Act are virtually identical to, and have the same effect as, ss. 50 and 41(1) of the Labour Relations Act, R.S.O. 1980, c. 228, which provide for the binding effect of collective agreements on employers, trade unions and employees, and provide for the recognition of the trade union that is party to the collective agreement as the exclusive bargaining agent of the employees. (See Appendix '1') This concept of "exclusive bargaining agent" is a central feature in North American labour law and appears in every labour relations statute in Canada. Accordingly, the Court's judgment on this issue will

have a profound impact on labour relations throughout Ontario and Canada.

Paul Weiler, Reconcilable Difference (1980), at pp. 124-5

CANADA:

Canada Labour Code, R.S.C. 1985, c. L-2, ss. 36, 56

ALBERTA:

Labour Relations Code, S.A. 1988, c. L-1.2, s. 38(1), s. 126(1)

BRITISH COLUMBIA:

Industrial Relations Act, R.S.B.C. 1978, c. 212, ss. 46, 64

MANITOBA:

Labour Relations Act, R.S.M. 1987, c. L10, ss. 44(a), 72

NEW BRUNSWICK:

Industrial Relations Act, S.N.B., c. I-4, ss. 21(1)(a), 52(1), 56(2)

NEWFOUNDLAND:

The Labour Relations Act, 1977, S.Nfld. 1977, c. 64, ss. 50(a), 81(1)

NOVA SCOTIA:

Trade Union Act, S.N.S. 1972, c. 19, ss. 25, 39

PRINCE EDWARD ISLAND

Labour Act, R.S.P.E.I. 1974, c. L-1, ss. 16, 34(1)

QUEBEC:

Labour Code, R.S.Q. 1977, c. C-27, ss. 43, 67

SASKATCHEWAN:

The Trade Union Act, R.S.S. 1978, c. T-17, s. 3

8. The vesting of exclusive bargaining rights in a single union abrogates the freedom of contract between the employer and the individual employee; it does not, however, infringe the individual employee's freedom of association nor his/her freedom of expression, since these freedoms do not include the freedom to contract.

Le Syndicat Catholique des Employés de Magasins de Québec, Inc. v. La Compagnie Paquet Ltée, [1959] S.C.R. 206, at pp. 212-213, 214

Arlington Crane Service Ltd. v. Ontario Minister of Labour (1988), 67 O.R. (2d) 225, at p. 267 (H.C.of J.)

(i) Freedom of Association

9. In Re Public Service Employee Relations Act, [1987] 1 S.C.R. 313, this Court defined freedom of association as the freedom to associate with others in common pursuits, the freedom to engage collectively in those activities which are constitutionally protected for each individual, and the freedom of an individual to do in concert with others what he or she may lawfully do alone. The vesting of exclusive bargaining rights in a single union does not limit the Appellant's freedom of association in any of these respects. The Appellant remains free to join or refuse to join any union, including the exclusive representative.

Re Public Service Employee Relations Act, [1987] 1 S.C.R. 313, at pp. 398-404 (per McIntyre J.)

N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)

Minnesota State Board for Community Colleges v. Knight, 104 S. Ct. 1058, at pp. 1068-1069 (1984)

Arlington Crane Service Ltd. v. Ontario Minister of Labour, supra, at p. 285

10. The vesting of exclusive bargaining rights in a single union does prevent the Appellant from negotiating the terms and conditions of his employment directly with his employer. It is submitted, however, that this does not infringe the Appellant's right to freedom of association. The fact that the terms and conditions of the employment contract are determined by negotiations between the employer and the union does not, by itself, bring the Appellant into "association" with the union.

Arlington Crane Service Ltd. v. Ontario Minister of Labour, supra, at p. 269

11. Freedom of association does not encompass a "freedom of contract" nor a "right to bargain" either on an individual or a collective basis. Every restriction upon the use of property, and most regulation of business or industry, restrict the unrestrained freedom of individuals to contract. All of our employment standards legislation, including minimum wage, maximum hours and Sunday closing laws, interfere with the employee's freedom to contract with his or her employer. To suggest that every such restriction is a violation of freedom of "association" is "to overshoot the actual purpose of the right".

Re Public Service Employee Relations Act, supra, at 394 (per McIntyre J.)

Omni Health Care Ltd. v. CUPE, Local 1909 (Ont. Div. Ct., January 29, 1987, unreported, leave to appeal to the Ont. C.A. denied, April 6, 1987)

Re Pruden Building ltd. and Construction & General Workers Union (1984), 13 D.L.R. (4th) 584 (Alb. Q.B.)

Arlington Crane Service Ltd. v. Ontario Minister of Labour, supra

12. In Re Public Service Employee Relations Act, supra, Mr. Justice McIntyre held that "freedom of association" includes the freedom "to engage collectively in those activities which are constitutionally protected for each individual". If the right of each individual to bargain or contract was a constitutionally protected activity, then freedom of association would have included the right to bargain collectively. But the majority of the Supreme Court held that "the constitutional guarantee of freedom of association in s. 2(d) of the ... Charter ... does not include .... a guarantee of the right to bargain collectively...". Therefore, the right of each individual to bargain or contract cannot be a constitutionally protected activity.

Re Public Service Employee Relations Act, supra, at pp. 390 (per Le Dain J.), 407 (per McIntyre J.)

13. Or, to say the same thing somewhat differently, the majority of the Supreme Court, in its answers to constitutional questions 4 and 5 in Re Public Service Employee Relations Act, found that freedom of association does not guarantee the right of an employee

association to bargain with the employer. Accordingly, freedom of association cannot guarantee the right of an individual employee to bargain with his or her employer. Therefore the establishment of exclusivity pursuant to ss. 51 and 52 of the CCBA (or ss. 50 and 41(1) of the Labour Relations Act) does not infringe the Appellant's rights under Charter s. 2(d).

(ii) Freedom of Expression

14. In Irwin Toy Ltd. v. A.G. Quebec [1989] 1 S.C.R. 927, this Honourable Court held that "Freedom of expression was entrenched in our Constitution ... so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind...." The vesting of exclusive bargaining rights in a single union does not limit the Appellant's freedom of expression in any of these respects. The Appellant remains free to manifest his thoughts, opinions and beliefs.

> Irwin Toy Ltd. v. A. G. Quebec, [1989] 1 S.C.R. 927, at p. 968.

15. As indicated in para. 11, supra, every restriction upon the use of property, and most regulation of business or industry, restrict the unrestrained freedom of individuals to contract. To suggest that such legislation interferes with the employee's or employer's "freedom of expression" because it restricts their right to contract "is to overshoot the actual purpose of the right".

Accordingly, it is submitted that freedom of expression does not include the right to contract, and that, therefore, the vesting of exclusive bargaining rights in a single union does not limit the Appellant's right under Charter s. 2(b). The vesting of exclusive bargaining rights in a single union in no way restrains the Appellant's freedom to express his opinions on any issues.

> Minnesota State Board for Community Colleges v. Knight, supra, at pp. 1068-1069

(iii) Charter s. 1

16. In the alternative, if this Honourable Court decides that the vesting of exclusive bargaining rights in a single union limits the Applicant's freedom of expression or freedom of association, it is submitted that such limitation is reasonable and demonstrably justified in a free and democratic society pursuant to Charter s.1.

17. The purpose of granting exclusive bargaining rights to a single union is to foster orderly collective bargaining by minimizing conflicts between rival unions and preventing the employer from using "divide and rule" tactics to defeat the collective bargaining process. Professor Paul Weiler explains the legislative policy behind exclusivity as follows:

> The primary function of the union's legal exclusive bargaining authority is to deny to the employer the ability to strike a cheaper deal with individual timid souls: to divide and rule the work force, and thus to undercut the credibility of the union's posture at the bargaining table.

Weiler, Reconcilable Differences (1980), at pp. 124-126

See also:

Abood v. Detroit Board of Education, 431 U.S. 209, at p. 221, 97 S.Ct. 1782, at p. 1792:

> The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissention within the work force and eliminating the advantages to the employees of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labour organizations.

Minnesota State Board for Community Colleges v. Knight, supra, at pp. 1069-1070

18. It is submitted that the fostering of orderly collective bargaining is an important government objective, and that the establishment of exclusive bargaining agents is a reasonable means of achieving this objective. The rights of dissenting employees are protected by procedural and substantive safeguards in sections 65 to 82 of the CCBA. Accordingly, ss. 51 and 52 of the CCBA represent reasonable limits pursuant to Charter s. 1, and are not inconsistent with the Charter.

Case on Appeal, Vol. XI, pp. 2158-2159 (p. 566 O.R.)

Re Public Service Employee Relations Act, supra, at pp. 414-420 (per McIntyre J.)

(iv) Charter s. 32

19. It is submitted that the vesting of exclusive bargaining rights in a single union does not transform that union into a government actor to which the Charter applies pursuant to Charter s.32. The union exercises that statutory authority as a private entity, independent of government. Nor does the vesting of exclusive bargaining rights in a single union transform the collective agreement into government action which is subject to the Charter. The agreement is a private contract, not a law or an act of government, nor does achieving the agreement constitute a government function.

Arlington Crane Services Ltd. v. Ontario Minister of Labour, supra, at pp. 273-277

McKinney v. University of Guelph (1987), 63 O.R. (2d) 1, at p. 23 (C.A.)

Bhindi v. B.C. Projectionists, Local 348 (1986), 29 D.L.R. (4th) 47 (B.C.C.A.)

Madisso v. Bell Canada (1985), 22 C.R.R. 162 (Ont. H.C.), aff'd by Ont. C.A. (unreported, February 25, 1987)

Bartello v. Canada Post Corp. (1987), 62 O.R. (2d) 652, at pp. 664-665

20. In the absence of any statutory restraints, the union, as a private party, would be free to agree to any contractual terms and conditions it wished. Such terms and conditions in the collective agreement are not transformed into "government action" simply

because sections 51 and 52 of the CCBA (or sections 50 and 41 of the Labour Relations Act) preclude the employer from negotiating with individual employees. To give effect to the Appellant's submissions in this regard would subject every provision of every collective agreement across Canada to the Charter.

Le Sydicat Catholique des Employés de Magasins de Québec v. La Campagnie Paquet Ltée., supra, at p. 214

Arlington Crane Services Ltd. v. Ontario Minister of Labour, supra

C. SECTION 53 - UNION SECURITY PROVISIONS

21. Section 53(1) of the CCBA permits the parties to an agreement to "provide for the payment by the employees of dues or contributions to the employee organization". Section 53 of the CCBA does not violate the Appellant's freedom of expression nor his freedom of association. It is a permissive provision which neither mandates nor encourages the parties to a collective agreement to include an "agency shop" provision. Section 53 leaves the decision of whether or not to include an agency shop clause to the parties to the agreement.

Arlington Crane Services Ltd. v. Ontario Minister of Labour, supra, at pp. 277-281

Bhindi v. British Columbia Projectionists Local 348, supra, at p. 54:

> The Labour Code neither mandates nor encourages the parties to include a closed-shop provision. The provision is merely recognized by the Labour Code as one of

the possible varieties of contractual terms resulting from collective bargaining in the field of industrial relations.

22. The Ontario Court of Appeal correctly concluded that the Charter imposes no affirmative obligation on the legislature to prevent or prohibit private conduct. If the legislature is silent or articulates a neutral position with respect to the private conduct, then the private sector is free from both legislative and constitutional restraints with respect to that conduct.

Case on Appeal, Vol. XI, p. 2142 (p. 557 O.R.)

McKinney v. University of Guelph, supra

23. In the absence of any statutory restraints, the employer and the union, as private parties, are free to include in the collective agreement any contractual terms and conditions they wish, including a union security clause. Legislation governing labour relations is not inconsistent with s. 2(d) of the Charter merely because it does not prevent or prohibit the private conduct complained of.

Le Syndicat Catholique des Employés de Magasins de Québec v. La Compagnie Paquet Ltée., supra, at p. 214

24. Section 53 of the CCBA finds its origins in, and was modelled on, s. 46(1)(a) of the Labour Relations Act. The differences between these two provision are attributable to the fact that the Labour Relations Act is general legislation which must apply to a broad range of industrial relations contexts, while the CCBA is

carefully tailored to a specific context. But the basic purpose of s. 53 of the CCBA is identical to the purpose of s. 46(1)(a) of the Labour Relations Act.

25. The purpose of s. 46(1)(a) of the Labour Relations Act is to make clear that the question of union security provisions in the collective agreement is left to the free agreement of the parties. Section 46(1)(a) of the Labour Relations Act must be read together with, and is an exception to, the general restrictions contained in sections 66(c) and 70 of the Act. Section 46(1)(a) of the Act clarifies the prohibitions contained in ss. 66(c) and 70 of the Act by indicating that "notwithstanding" those prohibitions the Act is not intended to preclude the parties to a collective agreement from agreeing to include union security provisions in the agreement.

Arlington Crane Services Ltd. v. Ontario Minister of Labour, supra, at p. 279:

> It is obviously the policy of the Act not to interfere with this type of union security provision in a collective agreement. In the absence of statutory restraints, the employer and the union as private parties could make such an agreement and s. 46(1)(a) merely excepts the parties to the collective agreement from the constraint, if such there be, of ss. 66 and 70. Section 46(1)(a) is merely a hands-off policy -- it is neutral; it neither requires nor encourages the parties as a matter of policy to agree to such a union security clause. It only "authorizes" the inclusion of such a provision in the sense that it extracts that type of clause from other provisions of the Act that might be construed as inhibiting it.

Labour Relations Act, R.S.O. 1980, c. 228, ss. 46(1)(a), 66(c) and 70 (see Appendix 'I')

26. It is clear from the legislative debates prior to the passage of the Labour Relations Act, 1950 (S.O. 1950, c. 34), that the objective of that Act was to leave the question of union security clauses to the negotiation and agreement of the parties. Accordingly, the legislature specifically declined to mandate any form of union security in the collective agreement. Sections 46(1)(a), 66(c) and 70 of the Labour Relations Act appeared in substantially similar form as sections 33(1)(a), 47(c) and 48(1) of the Act of 1950.

Proceedings of the Second Session of the Twenty-third Legislature of the Province of Ontario:
March 8, 1950, Vol. 15, pp. B-10-B-11, per Honourable Mr. Charles Daley, Minister of Labour;

April 4, 1950, Vol. 34, pp. B-7, B-8, B-9, per Honourable Mr. L. M. Frost, Prime Minister;

April 5, 1950, Vol. 35, pp. DD-20, DD-21, per Honourable Mr. Charles Daley, Minister of Labour; pp. EE-1, EE-2, EE-4, per Honourable Mr. L. M. Frost, Prime Minister:

> "...I have no objection to any of these forms of security. They are matters which must be negotiated according to the nature and type of industry and the economic circumstances which obtain."

NOTE: Relevant portions of these proceedings are reproduced at Appendix '2'.

Labour Relations Act, S.O. 1950, c. 34, ss. 33 (1)(a), 47(c) and 48(1) (see Appendix '3')

27. Similarly, s. 53 of the CCBA must be read together with, and is an exception to, the general restrictions contained in subs. 75(2) and (3) of the CCBA, which are essentially identical to sections 66(c) and 70 of the Labour Relations Act. Section 53 of

the CCBA, like s. 46(1) of the Labour Relations Act, defines the parameters of the restrictions imposed elsewhere in the statute. In this regard, s. 53 is merely the articulation of a "hands-off" policy by the legislature so that parties to a collective agreement retain the freedom to include an agency shop clause in their agreement.

Colleges Collective Bargaining Act, R.S.O. 1980, C. 74, ss 53, 66(c) and 70 (see Appendix '1')

10 28. The alleged Charter contravention cannot be attributed to s. 53 of the CCBA. The conduct complained of by the Appellant is the conduct of private parties. The inclusion of an "agency shop" provision in a collective agreement where such provision is not prohibited by provincial law does not make this conduct government action for the purposes of Charter s. 32. Section 53 of the CCBA is not inconsistent with ss 2(b) and 2(d) of the Charter merely because it does not prevent or prohibit the private conduct complained of. Section 2 of the Charter does not give rise to an affirmative obligation on the part of government to restrict the
20 content of collective agreements.

Case on Appeal, Vol. XI, p. 2142 (p. 557 O.R.)

McKinney v. University of Guelph, supra.

Arlington Crane Services Ltd. v. Ontario Minister of Labour, supra

29. It is, therefore, submitted that ss. 51, 52 and 53 of the CCBA neither infringe the Appellant's rights under the Charter nor

subject the provisions of the collective argeement to the Charter of Rights and Freedoms.

PART IV

ORDER REQUESTED

30. It is respectfully submitted that this appeal be dismissed and that the Constitutional Questions be answered as follows:

(1) Yes

(2) No

(3) No

(4) No

(5) Yes

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated this 26th day of April,
at the City of Toronto.

Robert E. Charney, Counsel
for the Attorney General of Ontario

PART V

TABLE OF AUTHORITIES