

IN THE 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)

- and -

THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Respondents
(Intervenors)

FACTUM

**SUBMITTED ON BEHALF OF THE INTERVENOR
THE CANADIAN CIVIL LIBERTIES ASSOCIATION**

LERNER & ASSOCIATES
Barristers & Solicitors
Scotia Plaza, 19th Floor
40 King Street West
Toronto, Ontario
M5H 3Y2

Solicitors for the Intervenors.
The Canadian Civil Liberties Association
Earl A. Cherniak, Q.C.
Maureen B. Currie

SOLOWAY, WRIGHT
Barristers & Solicitors
99 Rue Metcalfe Street
Ottawa, Ontario
K1P 6L7

Ottawa Agents for the
for the Intervenors.

TO: **THE REGISTRAR OF THIS COURT**

AND TO: **GOWLING, STRATHY
& HENDERSON**
Barristers & Solicitors
Suite 2400, 2 First Canadian Place
Toronto, Ontario
M5X 1A4

Solicitors for the Respondent,
Ontario Public Service
Employees Union

Stephen T. Goudge, Q.C.
Ian McGilp
(416) 862-8484

**GOWLING, STRATHY
& HENDERSON**
Barristers & Solicitors
160 Elgin Street, Suite 2400
Ottawa, Ontario
K1N 8S3

Ottawa Agents for the
Respondent, Ontario Public
Service Employees Union

AND TO: **HICKS, MORLEY, HAMILTON,
STEWART, STORIE**
Barristers & Solicitors
30th Floor, Box 371
Toronto-Dominion Centre
Toronto, Ontario
M5K 1K8

Solicitors for the Respondent,
Ontario Council of Regents for
Colleges of Applied Arts and
Technology

Brenda J. Bowiby
Stephen Shamie
(416) 352-1011

BURKE-ROBERTSON
Barristers & Solicitors
70 Gloucester Street
Ottawa, Ontario
K2P 0A2

Ottawa Agents for the
Respondent, Ontario Council
of Regents for Colleges of
Applied Arts and Technology

AND TO: **NELSON McNAMEE**
Barristers & Solicitors
238 Jane Street
Toronto, Ontario
M6S 3Z1

Solicitors for the Respondent,
National Union of Provincial
Government Employees

J. Cameron Nelson
Allan Manson

AND TO: **BORDEN & ELLIOT**
Barristers & Solicitors
40 King Street West
Toronto, Ontario
M5H 3Y2

Solicitors for the Appellant,
Dennis O'Connor, Q.C.
Christopher D. Bredt
Ronald Foerster
(416) 367-6000

SCOTT & AYLEN
Barristers & Solicitors
60 Queen Street
Ottawa, Ontario
K1P 5Y7

Ottawa Agents for
the Appellant.

AND TO: **SACK, GOLDBLATT & MITCHELL**
Barristers & Solicitors
20 Dundas Street West
Suite 1130, P.O. Box 180
Toronto, Ontario
M5G 2G8

Solicitors for the Respondents,
Canadian Labour Congress
and Ontario Federation of Labour

Jeffrey Sack, Q.C.
Steven Barrett
(416) 977-6070

SOLOWAY, WRIGHT
Barristers & Solicitors
99 Metcalfe Street
Ottawa, Ontario
K1P 6L2

Solicitors for the Respondents,
Canadian Labour Congress and
Ontario Federation of Labour

AND TO: **ATTORNEY-GENERAL OF ONTARIO**
Constitutional Law & Policy
7th Floor, 720 Bay Street
Toronto, Ontario
M5G 2K1

Robert E. Charney
(416) 326-4452

SOLOWAY, WRIGHT
Barristers & Solicitors
99 Metcalfe Street
Ottawa, Ontario
K1P 6L2

Ottawa Agents for the
Attorney General of Ontario

AND TO: **ATTORNEY-GENERAL OF BRITISH
COLUMBIA**

BURKE-ROBERTSON
Barristers & Solicitors
70 Gloucester Street
Ottawa, Ontario
K2P 0A2

Ottawa Agents for the Attorney
General of British Columbia

AND TO: **PROCUREUR GENERAL DE LA
PROVINCE DE QUEBEC**

**NOEL, DECARY, AUBRY
& ASSOCIES**
111 Champlain Street
Hull, Quebec
J8X 3R1

Agents for the Procureur
general de la province de
Quebec

AND TO: **ATTORNEY-GENERAL OF CANADA**
Department of Justice
Ottawa, Ontario
K1A 0H8

John C. Tait, Q.C.
Deputy Attorney General
of Canada

AND TO: **CONFEDERATION DES SYNDICATS
NATIONAUX**

**NOEL, DECARY, AUBRY
& ASSOCIES**
111 Champlain Street
Hull, Quebec
J8X 3R1

Agents for the Confederation
des syndicats nationaux

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PART I - THE FACTS

a) Nature of the Application

1. This is an appeal by the Appellant, Francis Edmund Mervyn Lavigne ("Lavigne"), from the Order of the Ontario Court of Appeal released January 30, 1989, wherein a unanimous Court of Appeal, consisting of Dubin A.C.J.O. and Robins and Houlden J.J.A., allowed an appeal from the judgment of White, J. dated July 2, 1987. Lavigne challenges, pursuant to the Charter of Rights and Freedoms ("the Charter"), Sections 51, 51 and 53 of the Colleges Collective Bargaining Act ("CCBA") and the entering into of a collective agreement by the Respondent, the Ontario Council of Regents for Colleges of Applied Arts and Technology. Lavigne submits that Sections 51, 51 and 53 of the CCBA in combination with the collective agreement forces him into association with the Ontario Public Service Employees Union ("OPSEU") by making OPSEU his exclusive bargaining agent, binding him to the collective agreement and compelling him to support and maintain OPSEU financially. He alleges that this is in violation of Section 2(b) and 2(d) of the Charter and that the compulsory payment of dues cannot be justified pursuant to Section 1 of the Charter to the extent that such dues are used to provide financial contributions to causes with which he disagrees. The Court of Appeal held that the conduct challenged was private activity to which the Charter did not apply and that, in any event, Lavigne's freedom of association and freedom of expression were not infringed, even if the Charter were applicable.

b) General

2. With respect to the nature and the history of this appeal, the Intervenor, The Canadian Civil Liberties Association ("CCLA") adopts the facts as set out in

the Factums of the Respondents the Ontario Public Service Employees Union (OPSEU) and the National Union of Provincial Government Employees (NUPGE) and those set out in the reasons for judgment below in addition to the facts set out herein.

3. With respect to the organization, purposes, activities and expenditures of the Respondents, OPSEU, Ontario Federation of Labour ("OFL"), and Canadian Labour Congress ("CLC"), CCLA adopts the facts as set out respectively in the Factums of NUPGE, OPSEU, OFL, and CLC in addition to the facts set out herein.

c) Canadian Civil Liberties Association

4. The CCLA is a national organization created in 1964 with more than 7,000 paid supporters drawn from all walks of life, seven affiliated chapters across the country, and some fifty associated group members which themselves represent several thousand members.

Affidavit of Alan Borovoy, (Leave Application), dated October 20, 1989, at page 2.

5. The CCLA was originally constituted for the purpose of promoting respect for and observance of fundamental human rights and civil liberties and to defend, extend and foster the recognition of those liberties, and it has carried out those purposes since its inception.

Affidavit of Alan Borovoy, dated October 20, 1989, at page 2.

6. The major objectives of the CCLA continue to include the promotion of the legal protection of the freedom and dignity of the individual against unreasonable invasion by public authority and the promotion of fair procedures for the determination of each individual's legal rights and obligations.

Affidavit of Alan Borovoy, dated
October 20, 1989, at pp. 2.

7. The CCLA was granted leave to intervene by this Court on February 2, 1990.

PART II - POINTS IN ISSUE

8. CCLA will address only the issue of Lavigne's right to restrict the spending decisions of a union pursuant to Sections 2(b) and 2(d) of the Charter. CCLA's position is that, even if Lavigne's freedom of association and expression are assumed to be infringed in this case, the vindication of his claim would produce even greater infringements on these fundamental freedoms for the members of OPSEU.

PART III - ARGUMENT

9. Lavigne is claiming that his Charter rights entitle him to withhold a few dollars a year from OPSEU, which is obliged by law to provide a collective bargaining service for him. He wants to ensure that "his" money is not used for non-collective bargaining purposes of which he does not approve. But to uphold his claim would require judicial scrutiny over all the expenditures made by OPSEU.

10. If the expenditures of a union were subject to such continuing judicial surveillance, the effective freedom of association for the majority of dues paying members would suffer an infringement. Freedom of association must include not only the right to join with others, but also a right to act in concert with them. Such rights cannot viably co-exist with outside scrutiny over all decisions to spend money. Non-members of the union would be able to exert a significant influence and control over an organization they had declined to join.

11. An important component of freedom of association for those who join an organization with a democratic structure is the right to use the whole or part of the organization's funds as the membership sees fit without being subject to dictation or interference by third parties.

12. OPSEU is obliged by law to provide collective bargaining service for all employees in the bargaining unit, whether or not they are members. By virtue of the Rand formula, such employees are required to pay dues to OPSEU even if they elect not to become members. So long as OPSEU fulfils its collective bargaining obligations for the employees, it is subject to no relevant statutory restrictions on the use it may make of the dues money it receives. Those who are dissatisfied with OPSEU's performance have the right to participate in its democratic processes in order to change its policies. They may seek legislation to regulate or restrict the way the union spends these funds.

13. So long as bargaining unit employees have an effective right to join and participate in the union and so long as the processes of the union are democratic, any coercive interference with the union's decisions over how it spends the money it receives would violate the freedom of association for the majority of its dues paying members. Such a violation should require the kind of justification that is provided under Section 1 of the Charter.

14. The threat to the majority's freedom of association would be exacerbated by any judicial attempt to distinguish expenditures that have a valid collective bargaining rationale from all of the union's other expenditures. There is a significant risk that such distinctions would be arbitrary at worst and misconceived at best. Bargaining is often critically influenced by political considerations. A negotiated pay raise, for example, would lose much of its value if the federal budget substantially increased inflation or unemployment. Similarly, such matters as the state of the environment and the prospects for world peace can often affect what happens at the bargaining table, sometimes in the short term, sometimes in the long term. Freedom of association requires that members of unions be free to make their own judgments as to what is in their best bargaining interests. This freedom would necessarily be reduced if the judgment of the members were subjected to legal challenge by every non-member who disagreed with this or that expenditure. These distinctions are best made in the crucible of the democratic process, not the courtrooms.

15. Unions have never been solely devoted to collective bargaining. Throughout their history, they have advanced the interests of working people in a variety of ways - through mutual welfare schemes, educational programmes and political action. Presumptively, they should be able to use their funds as they see fit in accordance with their Constitution and by-laws, in order to carry out their mandate. If this right is to be modified, the vehicle for doing so should be legislation which is narrowly tailored to a particular evil that requires redress rather than a general challenge under the Charter which is necessarily concerned with broad principles and drawn in broad terms.

16. Even if it is assumed that the payment of a few dollars per year by Lavigne to OPSEU represents an infringement on his freedom of association and

expression, that infringement, at most, should be regarded as significantly less consequential than the infliction of judicial scrutiny over all the expenditures incurred by OPSEU.

17. In no other respect is it even claimed that Lavigne's fundamental freedoms are at issue in this case. He remains free to express, espouse, accept or not accept, any belief or opinion and associate with anyone for the purpose of pursuing such beliefs and opinions. He remains free to speak against and work against causes that the union supports.

18. To the extent that the issue in this case involves a conflict between Lavigne and others in the bargaining unit over their freedoms of expression and association, there is no reason why the majority should not prevail.

"Coercion is perfectly compatible with democracy. Why? Because a democracy does not try to obtain unanimous consent. Instead it relies on the principle of majority rule to decide what its policies will be."

Weiler, Paul C., Reconcilable Differences; New Directions in Canadian Labour Law (Toronto: Carswell, 1980) page 143.

"In a government based on democratic principles, the benefit as perceived by the majority prevails. And the individual citizen would raise but a faint cry of invasion of his constitutional rights should he seek to avoid his obligations because of a difference in personal views."

Cox, Archibald, Law and the National Labor Policy, (Los Angeles: Institute of Industrial Relations, University of California (1960)).

19. To allow persons in Lavigne's position to deduct proportionally from their dues amounts spent by a union for purposes with which they disagree would produce a situation of unwarranted discrimination. Unlike most other institutions in our society, unions would be essentially prevented from treating as their own money they receive for service performed.

20. In comparing the relative value of the freedoms in conflict, it is helpful to consider comparable arrangements elsewhere in our society. In the economic sector, as long as a legally endorsed monopoly, for instance Bell Canada, performs the services it has undertaken to perform, the money paid to it is generally considered its own to spend on its valid interests as it sees them. The regulated telephone rates paid by the public are no less coercive than the union dues Lavigne pays. Just as his right to work at the job of his choice depends upon his willingness to pay those dues whether or not he joins OPSEU, so are the rights of the public to telephone service dependent upon its willingness to pay Bell Canada's prescribed (and regulated) telephone rates. Since many people cannot function without telephones, and since Bell is a government authorized monopoly, the public is effectively compelled to pay money to Bell Canada. Yet Bell Canada remains free, by itself or through its parent corporation, to spend its money on political and other causes of its choosing.

21. Similarly, so long as unions perform their legal obligations, there is no legal basis to deny them comparable rights over the money they receive. Thus, to effectuate the right claimed by Lavigne to withhold part of his dues is to diminish the legal right of OPSEU over its legally acquired funds.

22. It is arguable that unions in the position of OPSEU should be permitted more, not less, leeway than certain other institutions in our society. Bargaining

unit employees are generally entitled, at no extra cost, to become members of the unions to which they must pay dues. As such, they acquire a right to participate in the critical questions affecting their union - its policies, officers, causes and contributions. Telephone rate payers, for example, enjoy no comparable right to influence the behaviour of the institution they patronize.

23. Similarly, all residents of Canada are required to pay taxes. Conscientious objection to government or its policies does not create legal immunity from payment of taxes or the ability to proportionally deduct money. The remedy, for those dissatisfied with the manner in which the government chooses to spend its money, is in the democratic process.

24. Once it is acknowledged that a case involves a conflict of fundamental freedoms, the circumstances may be such that the Court can accord special weight to the policy preferences of the elected legislatures. Here, the applicable legislation strikes a delicate balance between those who choose for and against union representation. In the opinion of Oliver Wendell Holmes, legislation that attempts in this way to resolve inequities in the community should be sustained,

"unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law."

Holmes, J. in Lochner v. New York,
198 U.S. 45, 25 S. Ct. 539, 49 L.
Ed. 937 (1905) page 76.

While these words were uttered in dissent, they influenced subsequent American jurisprudence.

25. To provide effective balance to ever-increasing corporate and governmental power, unions must be as independent as possible of state control. In democratic societies, they represent one of the indispensable counterweights to potential authoritarianism in government. It was no accident that the totalitarian regimes of the 20th century - Fascist, Nazi and Communist - almost invariably accorded a high priority to the suppression of the free trade union movement and the jailing of its leaders. In the words of the eminent American philosopher of democracy, Sidney Hook:

"... particularly important is the existence of free trade unions as a countervailing force both to the economic power of corporate management and, save for exceptional areas bearing on public safety, to the power of the state itself."

Hook, Sidney, Philosophy and Public Policy (Carbondale: Southern Illinois, University Press, (1980)) at 47.

26. Just as Professor Hook noted the importance of free trade unions to the democratic system, he made special mention of the importance of political power to the very existence of free trade unions:

"The very existence and survival of trade unions, as history shows, depended on protective legislation. In other words, the economic power of both capital and labour stems substantially from political power."

Hook, Sidney, Philosophy and Public Policy, (Carbondale: Southern Illinois, University Press, (1980)) page 47.

27. As important as it is that the Charter be interpreted so as to promote and protect fundamental freedoms, it is also important that, in the guise of protecting such freedoms, the Charter not be used to undermine the effective autonomy of society's infrastructure and the equitable arrangements that are made within the community and the voluntary sector of it. To allow those in the position of Lavigne to control a union from the outside would have the effect of reducing the freedom of association of those who make up the union.

28. In the words of Alexis De Tocqueville:

"The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and acting in common with them. The right of association therefore appears ... almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society."

Democracy in America: Volume I,
(P. Bradley, ed.), 1945 at page 196.

29. As John Stuart Mill stated:

If public spirit, generous sentiments, or true justice and equity are desired, association, not isolation, of interest, is the school in which these excellences are nurtured.

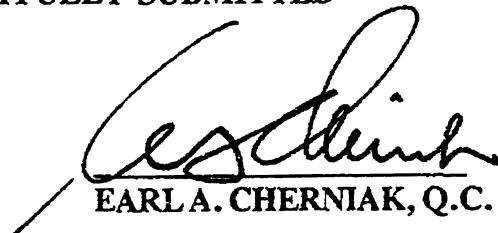
Mill, J.S., Principles of Political Economy, (1893) Volume 2, at page 352.

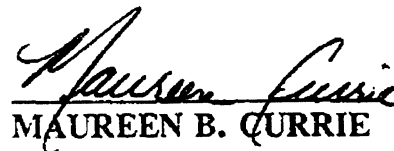
30. The Charter Right of freedom of association includes the right of members of an organization to be free to make their own judgments as to what is in their best interests. If these judgments are to be impugned, the impetus should come within the organization. Lavigne's protection is in his right to join or not to join the organization; and to use or not to use the democratic process. This does not require the intervention of the Court, where such intervention would interfere with the freedom of association of others.

PART IV - ORDER REQUESTED

It is respectfully submitted that this appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED


EARL A. CHERNIAK, Q.C.


MAUREEN B. CURRIE

of Counsel for the Canadian
Civil Liberties, Intervenor

Toronto, Ontario

May 24, 1990