Court File No. A128/89

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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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)

FACTUM OF THE RESPONDENT, ONTARIO COUNCIL OF REGENTS FOR COLLEGES OF APPLIED ARTS AND TECHNOLOGY

I N D E X

PART I - THE FACTS

1. The Respondent, the Ontario Council of Regents for Colleges of Applied Arts and Technology, ("Council of Regents") acknowledges the facts as set out in paragraphs 2, 3, 4, and 5 of the Appellant's factum.

2. The Appellant ("Mr. Lavigne") initially brought a two-part application whereby he sought to challenge:

   i) the compelled payment of union dues as provided for in the collective agreement between the Respondents, the Council of Regents and the Ontario Public Service Employees Union ("OPSEU") as being contrary to his rights of freedom of association and freedom of speech as provided for in the Charter of Rights and Freedoms ("the Charter");

   ii) the validity of section 59(2) of the Colleges Collective Bargaining Act, R.S.O. 1980, c. 74, ("CCBA") as being in contravention of Sections 2 (b), 2 (d) and 15 of the Charter;

3. The Council of Regents took the following position respecting the application:

i) With respect to the issue of deduction of union dues the Council of Regents took the position that the action of the Council of Regents in entering into a collective agreement is not governmental action such that the collective agreement is subject to the Charter. However, the Council of Regents took no position on and made no submissions on the issue of whether the deduction of union dues constituted a violation of any of the Appellant's rights under the Charter.

ii) With respect to the issue of the validity of section 59 (2) of the CCBA, the Council of Regents took the position that this section was not contrary to the Charter.

4. At the trial level, Mr. Justice White determined with respect to the two parts of the application:

i) with respect to the issue of union dues, that the action of the Council of Regents in entering into the collective agreement and negotiating a compulsory dues check off provision was governmental action so that the collective agreement was subject to the Charter and the dues

provision in the collective agreement abridged the applicant's freedom of association.

ii) with respect to s. 59(2) of the CCBA, that the section did not contravene the Charter.

iii) with respect to the issue of costs that no costs would be ordered for or against the Council of Regents or the Attorney-General of Ontario. However the Respondent OPSEU and the intervenors were ordered to pay 60% of the Applicant's costs.

5. The Respondent, OPSEU, and the Intervenors, Canadian Labour Congress, Ontario Federation of Labour, and National Union of Provincial Government Employees, appealed the decision of Mr. Justice White respecting the deduction of union dues. The Appellant, Lavigne, appealed the decision of Mr. Justice White on the issue of the validity of s. 59(2) of the CCBA.

6. In the appeal before the Ontario Court of Appeal, the Council of Regents took the following positions regarding the appeals:

i) with respect to the issue of the deduction of union dues, the Council of Regents took the limited

position that the entering into of the collective agreement by the Council of Regents did not constitute government action such that the collective agreement was subject to the Charter;

ii) with respect to s. 59(2) of the CCBA, that this section does not contravene the Charter.

iii) on the issue of costs that, if successful, the Council of Regents should be awarded its costs.

7. The Ontario Court of Appeal decided that:

i) The application of Mr. Lavigne was concerned "solely" with the expenditure of funds by OPSEU and since OPSEU is a private actor, there was no governmental action present to invoke the application of the Charter.

ii) Mr. Justice White was correct in holding that s. 59(2) did not contravene the Charter.

iii) No order as to costs with respect to the Council of Regents. However, the Respondent OPSEU and the Intervenors, Canadian Labour Congress, Ontario

Federation of Labour and National Union of Provincial Government Employees, were awarded their costs of the Appeal against the Mr. Lavigne.

PART II - POINTS IN ISSUE

(A) Application of the Charter

8. The Council of Regents takes a position only with respect to the issue arising under s. 32 of the Charter of Rights and Freedoms, as to whether the Charter applies in the circumstances of this case.

9. The Council of Regents takes the position that while it is a Crown agent, its activities in entering into a collective agreement with a private actor are of a private contractual or commercial nature, and the Charter does not apply to government when acting in a private or commercial capacity. Furthermore, the Council of Regents takes the position that the Charter does not apply to the collective agreement or any of its terms including the requirement that the Appellant pay union dues. It is also submitted that the combined effect of ss. 51, 52 and 53 of the CCBA and the collective agreement does not invoke the application of the Charter

(B) Costs

10. The normal principles respecting costs apply and the Council of Regents is entitled to its costs both here and before the Court of Appeal.

PART III - ARGUMENT

(A) The Charter does not apply to the act of the Council of Regents in entering into a collective agreement with OPSEU or to the collective agreement itself.

11. Section 32 of the Charter reads as follows:

> "32(1) This Charter applies
>
> (a) to the Parliament and government of Canada in respect to all matters within the authority of Parliament including all matters relating to the Yukon Territory and the Northwest Territories:

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province."

12. The purpose of entrenching constitutionally guaranteed rights and freedoms is to protect against the power of government qua government to unilaterally take actions which could infringe or deny such rights and freedoms. The Charter is concerned, therefore, with the relationship between government and those governed; it is not intended to regulate commercial or contractual conduct between private individuals and government where government is acting in the same capacity as other contractors or commercial enterprises in society.

Reference:

i Retail, Wholesale and Department Store Union, Local 580, et al v. Dolphin Delivery Ltd., [1986] 2. S.C.R. 573, at p. 593;

ii Re Blainey and Ontario Hockey Association (1986), 54 O.R> (2d) 513 (C.A.), lv. to appeal to S.C.C. refused June 26, 1986, at p. 521-23;

iii Re Bhindi and British Columbia Projectionists Local 348 (1986), 20 D.L.R. (4th) 386 (B.C.S.C.), affd. (1986), 29 D.L.R. (4th) 47 (B.C.C.A)., lv. to appeal to S.C.C. refused November 6, 1986;

iv Peg-Win Real Estate Ltd. v. Winnipeg Real Estate Board, [1985]

4 W.W.R. 758 (Man. Q.B.); aff'd. (1986), 27 D.L.R. (4th) 767 (Man. C.A.)

v Hunter et al v. Southam Inc. (1984), 11 D.L.R. (4th) 641 (S.C.C. at p. 650.

13. On the face of section 32, there is a clear indication that the Charter is to apply only to government like or 'governmental' conduct. It must be remembered that the words of section 32 are inherently restrictive by clear constitutional design or purpose. Section 32 clarifies that the Charter is to apply inter alia only to the legislative, executive and administrative branches of government, in respect of **"all matters within the authority of the Legislatures of each province."**

Reference: i Retail, Wholesale and Department Store Union, Local 580, et al v. Dolphin Delivery Ltd., (supra) at 598 - 599;

ii Re Chyz and Appraisal Institute of Canada (1985), 13 C.R.R. 3 (Sask. Q.B.) per Wright J. at p. 12, revd. on non-Charter grounds (1985), 44 Sask. R. 165 (C.A.).

14. Thus, it has been recognized that actions of governmental actors may be governmental insofar as they are public acts arising out of the government's exclusive powers qua government. It has also been recognized that the actions of government may at times

be non-governmental, when those actions are of a private, commercial, contractual or non-public nature. In short, there is a business side to government which parallels business activities in the private sector, to which the Charter does not apply.

Reference: (i) McKinney et al v. University of Guelph et al, (1987), 63 O.R. (2d) 1 (C.A.), at pp. 25-28.

(ii) Rudolph Wolff & Co. Ltd. and Noranda Inc. v. Her Majesty the Queen in the Right of Canada (unreported decision of the Supreme Court of Canada, released March 29, 1990).

15. It is submitted that while the Council of Regents is an agent of the Crown, that does not necessarily mean that all of its actions are within the purview of s. 32 of the Charter. Rather, the process which must be followed is to examine the action complained of to determine if it is governmental by nature.

Reference: McKinney et al v. University of Guelph et al, (supra), at pp. 25-28.

16. Section 2(3) of the CCBA, specifically entrusts to the Council of Regents the "exclusive responsibility for all negotiations on behalf of employers conducted under the Act." However, in carrying out this function, the

Council of Regents is not involved in government action but, rather, is involved in the private action of negotiating terms and conditions of an employment contract with a private actor - the union. It is carrying on the 'business' or private side of government, not the public or governing side. The result of the collective bargaining is not a governmental act, it is a contractually expressed compromise between two parties, one of which happens to be an agent of the government.

17. The Ontario Divisional Court, applying the reasoning of the Ontario Court of Appeal in McKinney, has found that the Charter does not apply to a College or the Collective Agreement by which it is bound.

Reference: Board of Governors of St. Lawrence College v. O.P.S.E.U. et al (unreported decision, April 13, 1988), (Ont. Div. Ct.).

(B) The combined effect of sections 51, 52 and 53 of the CCBA and the collective agreement does not invoke the application of the Charter.

18. It is submitted that the requirement to pay union dues is as a direct result of a voluntarily negotiated

provision in a collective agreement and is not statutorily mandated.

19. Section 53 of the CCBA clearly states that the parties to an agreement may provide for the payment by the employees of dues or contributions to the employee organization. Therefore, an agency shop provision is not mandated; the parties are left to bargain the matter of union dues. The fact that the parties have voluntarily chosen to include a dues deduction provision in their collective bargaining agreement does not encompass the exercise of any statutory power but is simply the result of a private contractual agreement that is not subject to Charter scrutiny.

Reference: Colleges Collective Bargaining Act, R.S.O. 1980, c. 74, s. 51.

20. Section 51 of the CCBA provides that any collective agreement negotiated between the Council of Regents and the union is binding on the parties including the employers and the employees in the bargaining unit. S. 52 simply recognizes the employee organization (in this case OPSEU) as the exclusive bargaining agent for the employees to which the agreement applies.

Reference: Colleges Collective Bargaining Act, R.S.O. 1980, C. 74, ss. 51 and 52.

21. It is submitted that these provisions standing alone or in combination with s. 53 of the CCBA do not make the collective agreement subject to Charter scrutiny. As in other sectors outside the Colleges, Mr. Lavigne and other college employees are free to choose whether they wish to be represented by a trade union. Sections 51 and 52 of the CCBA are similar, if not identical, to equivalent provisions in other labour relations statutes in Canada. Such provisions apply to all employees who choose to be represented by a trade union under a collective bargaining regime in Canada, whether in the public sector or private sector. These provisions make the collective agreement legally binding and provide rights to the union as the exclusive bargaining agent. They do not make the collective agreement law or an act of government.

Reference: Tomen, et al and Federation of Women Teachers' Associations of Ontario, et al (1989), 70 O.R. (2d) 49 (C.A.), at p. 55.

Reference. Arlington Crane Service Ltd, et al and Minister of Labour, et al (1988) 67 O.R. (2d) 225 (H.C.) at p. 277.

CONCLUSION

22. The Council of Regents therefore respectively submits that its activity in entering into the collective agreement does not invoke the scrutiny of the Charter because the Council is acting as a private contractor and not in a government-like capacity. Furthermore the Charter does not apply to the collective agreement and the combined effect of ss. 51, 52 and 53 of the CCBA and the collective agreement do not invite the application of the Charter.

COSTS

23. It is submitted that in the event this Court determines that the position taken by the Council of Regents respecting the application of the Charter to the collective agreement in question is correct, then the Council of Regents will have been entirely successful in its position and should be awarded its costs here and below.

24. It is further submitted that in the event this Court determines that the position taken by the Appellant is correct, then no costs should be awarded for or against the Council of Regents, either here or below, for the reasons stated by the Courts below.

PART IV - ORDER REQUESTED

25. It is respectfully submitted that the Council of Regents is entitled to the following relief:

i. An order declaring that the collective agreement between the Council of Regents and OPSEU is not subject to the Charter;

ii Costs here and below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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**Of counsel for the Respondent,
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PART V - AUTHORITIES

STATUTORY REFERENCES