File No.: 39021

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF PRINCE EDWARD ISLAND)

BETWEEN:

NOEL AYANGMA

APPLICANT
(Appellant)

AND:

FRENCH LANGUAGE SCHOOL BOARD and
ENGLISH LANGUAGE SCHOOL BOARD

RESPONDENTS
(Respondents)

RESPONDENTS' MEMORANDUM OF ARGUMENT IN RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW & STATEMENT OF FACTS

Overview

1. This case does not raise any jurisprudential issues of national or public importance, nor does the PEI Court of Appeal's decision create any uncertainty in the applicable law.

2. The Applicant seeks leave to appeal to this Court on the discrete issue of whether the PEI Court of Appeal erred in its finding as to whether the PEI Human Rights Commission is a court of competent jurisdiction for the purpose of granting *Charter* remedies.

3. This case lacks the element of national public importance needed to warrant granting leave to appeal. There would be little, if any, precedential or jurisprudential value in reviewing the PEI Court of Appeal's decision in this particular matter.

4. In light of the foregoing, the Respondents submit that this is not an appropriate case for leave to appeal to be granted.

Factual Background

5. On July 21, 2015, the Applicant filed a Statement of Claim against the Respondents. The Statement of Claim alleged that the Applicant was discriminated against by the Defendants in two job competitions, contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

6. The Respondents successfully brought a motion to have the Statement of Claim struck on the basis that it: (i) disclosed no reasonable cause of action; and (ii) was frivolous, vexatious or otherwise an abuse of process (the "First Motion Decision").[1]

7. The PEI Court of Appeal overturned the First Motion Decision and sent the matter back to be reheard due to the insufficiency of reasons provided in the First Motion Decision.[2]

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[1] *Ayangma v. FLSB and ELSB*, 2016 PESC 12, at para 26
[2] *Ayangma v FLSB and ELSB*, 2017 PECA 18

8. On January 8, 2018, the Applicant filed an Amended Statement of Claim.

9. The Respondents successfully brought a second motion to have the Amended Statement of Claim struck on the basis that it did not disclose a reasonable cause of action (the "Second Motion Decision").[3]

10. The Applicant appealed the Second Motion Decision to the PEI Court of Appeal on December 19, 2018. On July 31, 2019, the PEI Court of Appeal allowed the appeal in part and set aside the order of Gormley J. that struck out the Plaintiff's Amended Claim (the "Second Appeal Decision").

11. In preparing for the Second Appeal Decision, the PEI Court of Appeal requested submissions from the parties with respect to the issue of whether or not a PEI Human Rights Panel is a court of competent jurisdiction empowered to deal with *Charter* issues that arise in the course of a human rights proceeding.

12. In concurring reasons, Mitchell JA of the PEI Court of Appeal answered that question in the affirmative, and found that it would be an abuse of process to run two proceedings (one *Charter*-based, one human rights-based) arising out of the same underlying fact scenario in two separate fora.

[3] *Ayangma v. FLSB*, 2018 PESC 43, at para 78

PART II – QUESTIONS IN ISSUE

13. The Applicant frames the issue(s) on this leave application as follows:

    a. Whether *Ayangma v. Eastern School Board*, 2000 PESCAD 12, is still good law in light of subsequent Supreme Court of Canada decisions; and

    b. Did the PEI Court of Appeal err in finding it would be an abuse of process to run concurrent proceedings in two different fora.

14. The Respondents submit that the only issue to be determined on this leave application is whether or not any ground raised by the Applicant with respect to the PEI Court of Appeal's findings raise any issues of public or national importance. The Respondents submit they do not.

15. The Applicant has filed a motion for extension of time. The Respondents take no position in respect of that motion.

PART III – STATEMENT OF ARGUMENT

16. The issues raised in this application do not raise questions of national public importance, nor do they address any legal uncertainty to a degree requiring intervention from this Court.

17. Rather, the Respondents submit that the issues raised by the Applicant in this application show only that he disagrees with the Court of Appeal's findings and seeks to have them re-litigated.

18. The central issue in this matter is specific to Prince Edward Island and the operation and interpretation of its human rights legislation.

19. The Respondents submit that the PEI Court of Appeal did not err in finding as it did that the jurisprudence from this Court has changed the legal landscape in the last 20 years such that the previous decision of the PEI Court of Appeal in *Ayangma v. Eastern School Board,* 2000 PESCAD 12 required re-visitation.

20. In *Ayangma v. Eastern School Board,* 2000 PESCAD 12, the PEI Court of Appeal concluded that it was clear from a review of the Prince Edward Island *Human Rights Act* that, at that time, neither the Human Rights Commission nor a Human Rights Panel had a mandate which extended to *Charter* claims, as there was nothing anywhere in the *Human Rights Act* which explicitly or implicitly gave a Panel any authority to deal with a *Charter* violation claim. The decision concludes:[4]

> It is apparent from the *HRA* the Legislature did not rely on an HRP to decide questions of law even in respect of those matters clearly coming within its sphere (complaints regarding contraventions of the *HRA*) because s.28.3 allows for their referral to the court. Obviously then, there is no basis to support a conclusion that an HRP has the expertise or authority to determine questions of law involving the Charter. **In short, an HRP does not constitute "a court of competent jurisdiction" within the meaning of that phrase as used in s-s.24(1) of the *Charter*** as interpreted by the Supreme Court of Canada in such cases as, *Mills,*

[4] *Ayangma v. Eastern School Board,* 2000 PESCAD 12, at para 9

> *supra*, *Mooring v. Canada (National Parole Board)*, 1996 CanLII 254 (SCC), [1996] 1 S.C.R. 75, and *Weber*, *supra*. [Emphasis added]

21. Since the judgment in *Ayangma v. Eastern School Board,* 2000 PESCAD 12, was released on April 5, 2000, this Court, in a series of decisions, has commented on and reshaped the test for determining whether an administrative tribunal is a "court of competent jurisdiction" under section 24(1) of the *Charter*.

22. In *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, this Court restated and summarized the approach to determining whether an administrative tribunal has the jurisdiction to subject legislative provisions to *Charter* scrutiny. That restatement is paraphrased below as follows:[5]

- Under the tribunal's enabling statute, does the administrative tribunal have jurisdiction, explicit or implied, to decide questions of law arising under a legislative provision? If so, the tribunal is presumed to have the jurisdiction to determine the constitutional validity of that provision under the *Charter.*

- Does the tribunal's enabling statute clearly demonstrate that the legislature intended to exclude the *Charter* from the tribunal's jurisdiction? If so, the presumption in favour of *Charter* jurisdiction is rebutted.

23. Several years later in *R v. Conway*, 2010 SCC 22, the Court again refined and simplified the test for determining whether an administrative tribunal can grant *Charter* remedies generally.

24. In *R v. Conway*, Abella J. commented that in the evolution of the *Charter's* relationship with administrative tribunals, the first wave of relevant cases started in 1986 with *Mills v. The Queen*, [1986] 1 SCR 863 (SCC). In *Mills* it was decided that a court or administrative tribunal was a "court of competent jurisdiction" under section 24(1) of the *Charter* if it had jurisdiction over the person, the subject matter, and the remedy sought.[6]

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[5] *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, at para 2
[6] *R v. Conway*, 2010 SCC 22, at para 22

25. Abella J. continued in *R v. Conway* to trace through the development of jurisprudence which served to "cement the direct relationship between the *Charter*, its remedial provisions and administrative tribunals." *R v. Conway* ultimately concluded as follows:[7]

> In light of this evolution, it seems to me to be no longer helpful to limit the inquiry to whether a court or tribunal is a court of competent jurisdiction only for the purposes of a particular remedy. The question instead should be institutional: Does this particular tribunal have the jurisdiction to grant *Charter* remedies generally? The result of this question will flow from whether the tribunal has the power to decide questions of law. If it does, and if *Charter* jurisdiction has not been excluded by statute, the tribunal will have the jurisdiction to grant *Charter* remedies in relation to *Charter* issues arising in the course of carrying out its statutory mandate (*Cuddy Chicks* trilogy; Martin). A tribunal which has the jurisdiction to grant Charter remedies is a court of competent jurisdiction. The tribunal must then decide, given this jurisdiction, whether it can grant the particular remedy sought based on its statutory mandate. The answer to this question will depend on legislative intent, as discerned from the tribunal's statutory mandate (the *Mills* cases).

26. The conclusion of the SCC in *R v. Conway* was cited again by Abella J. in *Doré v. Barreau de Québec*, 2012 SCC 12, wherein she said that administrative tribunals with the power to decide questions of law have the authority to apply the *Charter* and grant *Charter* remedies that are linked to matters properly before them.[8]

27. In looking at the comments and conclusions of this Court in these cases, it is clear that the test for determining whether an administrative tribunal is a "court of competent jurisdiction" is well-established.

28. The Applicant has not shown, in this case, how the PEI Court of Appeal erred in applying this well-established test to the Prince Edward Island *Human Rights Act* in re-visiting this question almost 20 years after the PEI Court of Appeal's previous decision on the matter.

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[7] *R v. Conway*, 2010 SCC 22, at para 22

[8] *Doré v. Barreau de Québec*, 2012 SCC 12, at para 30

29. Nor has the Applicant provided authority to suggest that the well-established test laid out by this Court has not been applied appropriately or consistently by courts across the country, thus potentially demonstrating a public importance or national interest. Further, there is no suggestion that this Court must provide guidance to lower courts on the issue.

30. The Respondents further submit that the Applicant has not shown that the PEI Court of Appeal erred with respect to its findings regarding the doctrine of abuse of process.

31. In *Toronto (City) V. CUPEI, Local 79*, 2003 SCC 63, the Supreme Court of Canada described the doctrine of abuse of process as one which engages the inherent power of the court to prevent the misuse of its procedure in a way that would bring the administration of justice into disrepute.[9]

32. It was this expression of the doctrine relied upon by Mitchell JA in his finding that that it would be an abuse of process to run two proceedings (one *Charter*-based one human rights-based), arising out of the same underlying fact scenario, in two separate fora.

33. The Applicant has not shown how the PEI Court of Appeal erred in applying this well-established test with respect to the doctrine of abuse of process to the matter before it.

Conclusion

34. The Respondents respectfully submit that none of the issues raised in this leave application are issues which require, comment, direction, or re-visitation by this Court, either generally, or in the unique set of circumstances in this case.

35. As such, the Respondents submit that this is not an appropriate case for leave to appeal to be granted.

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[9] *Toronto (City) V. CUPEI, Local 79*, 2003 SCC 63, at para 37

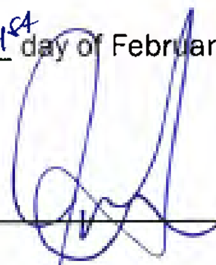
PART IV - SUBMISSIONS REGARDING COSTS

36. The Respondents state that costs should follow the cause and therefore, in accordance with this Court's usual practice, if the Application is dismissed it should be dismissed with costs payable by the Applicant to the Respondents.

PART V - ORDER SOUGHT

37. The Respondents request that the Application for Leave to Appeal be dismissed with costs to the Respondents.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of February, 2020.



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PART VII – STATUTORY AUTHORITY

N/A