

CANADA / JUDGMENT

Moysa v. Alberta (Labour Relations Board)

[1989] 1 SCR 1572**COURT**

Supreme Court of Canada

DECIDED

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Moysa v. Alberta (Labour Relations Board) Collection Supreme Court Judgments Date 1989-06-08
Report

[1989] 1 SCR 1572 Case number 20513 Judges Dickson, Robert George Brian; Lamer, Antonio; Wilson, Bertha; L'Heureux-Dubé, Claire; Sopinka, John; Gonthier, Charles Doherty; Cory, Peter deCarteret On appeal from Alberta Subjects Constitutional law Evidence Notes SCC Case Information: 20513 Decision Content Moysa v. Alberta (Labour Relations Board), [1989] 1 S.C.R. 1572 IN THE MATTER of an application for an order in the nature of certiorari; AND IN THE MATTER of a decision issued and dated October 24, 1985, by the Labour Relations Board; AND IN THE MATTER of the Labour Relations Act, R.S.A. 1980, c. L-1.1 as amended; AND IN THE MATTER of the Rules of Court of Alberta. Marilyn Moysa Appellant v. The Labour Relations Board Respondent and The Attorney General of Canada, the Attorney General for Ontario, the Attorney General for Alberta and the Centre for Investigative Journalism Intervenors indexed as: moysa v. alberta (labour relations board) File No.: 20513. 1989: March 20; 1989: June 8. Present: Dickson C.J. and Lamer, Wilson, L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ. on appeal from the court of appeal for alberta Evidence -- Privilege -- Press -- Journalist refusing to testify at a labour relations board hearing -- Journalist claiming privilege against the disclosure of communications from sources -- Whether journalist has a privilege at common law or under the Canadian Charter to refuse to answer questions involving her sources -- Canadian Charter of Rights and Freedoms, s. 2 (b). Constitutional law -- Charter of Rights -- Freedom of the press -- Labour relations board ordering journalist to answer questions involving her sources -- Whether compelling journalist to testify violation of s. 2 (b) of the Canadian Charter of Rights and Freedoms . A week after the appellant, a journalist, wrote an article on the Union organizing campaign at several department stores, the Hudson Bay Co. terminated the employment of six employees. The Union alleged that the employees were fired because of their organizing activities and brought an unfair labour practices claim against the Bay. The appellant was summoned to attend the Labour Relations Board hearing. The Union proposed to ask her whether she had spoken with someone at the Bay and, if so, what the details of the conversation were. The appellant objected to being compelled to testify alleging that she has a right to protect her sources of information on the basis of a

qualified privilege either at common law or under s. 2 (b) of the Canadian Charter of Rights and Freedoms . The Board held that the appellant had no privilege and ordered her to testify. The Alberta Court of Queen's Bench dismissed appellant's application for certiorari to quash the Board's decision and the judgment was affirmed by the Court of Appeal. This Court granted appellant's leave to appeal and, pursuant to Rule 32 of the Supreme Court Rules, the parties submitted the following constitutional questions: (1) Does requiring a journalist witness to disclose communications from a source violate s. 2 (b) of the Charter ? (2) Does requiring a journalist witness to disclose communications to some other person violate s. 2 (b) of the Charter ? and (3) If the answer to either questions 1 or 2 is in the affirmative, can compulsive disclosure be justified under s. 1 of the Charter ? Held: The appeal should be dismissed. Appellant has no privilege to refuse to testify before the Board. Even if a qualified form of testimonial privilege exists in Canada, appellant's claim of privilege in this case must be dismissed as she does not fall within any of the possible tests which establish the conditions necessary to justify a refusal to testify. In any event, the Union was primarily interested in the information that the appellant gave to the Bay's official concerning the organizing campaign. This information would not come within the ambit of any qualified privilege with respect to information received from sources. Despite the importance of ascertaining the extent of the s. 2 (b) rights, the disposition of this appeal does not require that the constitutional questions be answered. The facts of this case do not warrant an answer to these broad and important constitutional questions. To address the questions would require this Court to make pronouncements well beyond the issues presented in the actual appeal. Assuming that the right to gather the news is constitutionally enshrined in s. 2 (b) of the Charter , the appellant has not demonstrated that compelling journalists to testify before bodies such as the Labour Relations Board would detrimentally affect journalists' ability to gather information. No evidence was placed before the Court suggesting that such a direct link exists. Absent any evidence that there is a tie between the impairment of the alleged right to gather information and the requirement that journalists testify before the Labour Relations Board, this Court cannot find that there has been a breach of s. 2 (b) in this case. Cases Cited Referred to: *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Slavutych v. Baker*, [1976] 1 S.C.R. 254; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60; *Skoke-Graham v. The Queen*, [1985] 1 S.C.R. 106; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. Statutes and Regulations Cited Canadian Charter of Rights and Freedoms, s. 2 (b). Labour Relations Act, R.S.A. 1980, c. L-1.1, s. 13 [am. 1983, c. 34, s. 2(6)]. Supreme Court Rules, SOR/83-74, s. 32 [am. SOR/84-821, s. 1; SOR/87-292, s. 2]. Authors Cited Wigmore, John Henry. Evidence in Trials at Common Law, vol. 8. Revised by John T. McNaughton. Boston: Little, Brown & Co., 1961. APPEAL from a judgment of the Alberta Court of Appeal (1987), 52 Alta. L.R. (2d) 193, 78 A.R. 118, 43 D.L.R. (4th) 159, dismissing appellant's appeal from a judgment of MacCallum J. (1986), 45 Alta. L.R. (2d) 37, 71 A.R. 70, 28 D.L.R. (4th) 140, 25 C.R.R. 346, which dismissed appellant's application for certiorari to quash a decision of the Alberta Labour Relations Board. Appeal dismissed. A. H. Lefever and F. S. Kozak, for the appellant. No one appeared for the respondent. Douglas Rutherford, Q.C., for the

intervener the Attorney General of Canada. M. David Lepofsky, for the intervener the Attorney General for Ontario. William Henkel, Q.C., for the intervener the Attorney General for Alberta. Richard G. Dearden, for the intervener the Centre for Investigation Journalism. //Sopinka J.// The judgment of the Court was delivered by SOPINKA J. -- The issue in this case is the right of the appellant, a journalist, to refuse to answer relevant questions in a proceeding before the Alberta Labour Relations Board. The refusal was grounded in part on an alleged right to protect sources of information on the basis of a qualified privilege either at common law or under s. 2 (b) of the Canadian Charter of Rights and Freedoms . The appellant's claim arose in the following manner. In 1985, an organizing drive by Alberta Food and Commercial Workers Union, Local 401, was ongoing at the Hudson Bay Company in St. Albert. On February 23 of that year, an article written by the appellant entitled "Union Eyes Major Stores" was published in the Edmonton Journal. The article referred to the union's organizing efforts at several department stores in the Edmonton and St. Albert area though it did not name the particular stores. Approximately one week later, the Hudson Bay Company terminated the employment of six employees at the St. Albert store. As a result of these firings, allegations of unfair labour practices were directed against the Hudson Bay Company and formed the subject matter of the Labour Relations Board hearing. The Union claimed that the employees were fired due to their organizing activities. The appellant was summoned to attend pursuant to s. 13 of the Labour Relations Act, R.S.A. 1980, c. L-1.1. The Union proposed to ask her under oath whether she had spoken with someone at the Hudson Bay Company before writing the article and, if so, what the details were of that conversation. The appellant objected to being compelled to testify. The Labour Relations Board first determined that it possessed the necessary jurisdiction and power to compel the appellant to be sworn and give oral testimony. As well, the evidence that the appellant might give was determined to be relevant. Then in its decision of October 24, 1985, the Board held that neither the common law nor the Charter protected the appellant from being sworn and from being compelled to answer questions at a Board hearing. In determining that the appellant could not rely upon any common law privilege, the Board considered the appellant's argument that a qualified privilege not to testify might be recognized on the basis of four criteria outlined by Wigmore (8 Wigmore on Evidence, {SS} 2285 (McNaughton rev. 1961)). These four factors were discussed by this Court in *Slavutych v. Baker*, [1976] 1 S.C.R. 254. They are the following (at p. 260):

- (1) The communications must originate in a confidence that they will not be disclosed.
- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

- (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. The Board held that Wigmore's four criteria were not satisfied in this case. The Board was of the view that the element of confidence was not part of the maintenance of a continuing relationship between the appellant and her source and that the injury resulting from disclosure would not be greater than the benefit. The Board then proceeded to consider the alleged right to a qualified privilege for reporters under s. 2 (b) of the Charter . The Board examined the decision of the United States Supreme Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972), which considered whether the guarantee of the freedom of the press under the First Amendment to the American Constitution permits a reporter to refuse to answer questions before a grand jury. White J. for the majority (speaking for four members of the Court) held that the First Amendment accords a reporter no privilege against appearing before a grand jury and answering questions as to either the identity of his or her news sources or information which he or she has received in confidence. In a concurring opinion Powell J. agreed in the result but held that each claim of privilege should be judged on its particular facts by striking a balance between the freedom of the press and the obligation of all citizens to give relevant testimony. The Labour Board was of the opinion that Powell J. had identified two criteria that need be demonstrated before the government could compel a journalist to testify. The perceived evidence must be crucial to whomever seeks it and the evidence also must be relevant. The Board felt that this was the appropriate test under s. 2 (b) of the Charter . However, on the facts presented before the Board, it was held that the evidence sought from the appellant was crucial to the Union's allegation of unfair labour practices and was also relevant. Further, the Board held that if there is a third requirement that the information not be available from an alternative source it, too, had been satisfied. Therefore, the Board concluded that the appellant could be compelled to testify. The appellant filed a notice of motion before the Alberta Court of Queen's Bench for an order in the nature of certiorari, seeking to quash the October 24, 1985 decision of the Labour Relations Board. On May 9, 1986, MacCallum J. dismissed the motion on the grounds that the appellant had no privilege, either under the common law or under s. 2 (b) of the Charter , to refuse to testify before the Board: (1986), 45 Alta. L.R. (2d) 37, 71 A.R. 720, 28 D.L.R. (4th) 140, 25 C.R.R. 346. The appellant's appeal to the Alberta Court of Appeal was dismissed by McLung J.A. who agreed with the reasoning of MacCallum J. that there was no privilege under either the common law or under s. 2 (b) of the Charter : (1987), 52 Alta. L.R. (2d) 193, 78 A.R. 118, 43 D.L.R. (4th) 159. After leave to appeal to this Court was granted on December 3, 1987, [1987] 2 S.C.R. viii, the following constitutional questions were set on March 30, 1988 pursuant to Rule 32 of the Supreme Court Rules:
1. Does requiring a journalist witness to disclose communications from a source violate s. 2 (b) of the Canadian Charter of Rights and Freedoms ?
 2. Does requiring a journalist witness to disclose communications to some other person violate s. 2 (b) of the Canadian Charter of Rights and Freedoms ?

3. If the answer to either questions 1 or 2 is in the affirmative, can compulsive disclosure be justified under s. 1 of the Canadian Charter of Rights and Freedoms ? The appellant does not suggest that there is in Canada an absolute right for journalists to claim a privilege not to testify in relation to matters discussed with journalists' sources. Rather, the appellant contends that she should not have been compelled to testify before the Labour Relations Board because she fell within the scope of a qualified testimonial privilege under either common law principles or s. 2 (b) of the Charter . Even if such a qualified testimonial privilege exists in Canada this appeal must be dismissed as the appellant here does not fall within any of the possible tests which have been proposed as establishing the conditions necessary to justify a refusal to testify. The appellant argued that the four criteria cited by Wigmore and referred to with approval by Spence J. in *Slavutych v. Baker*, supra, at p. 260, provide a guide for the operation of a privilege against the disclosure of communications. The Board examined this submission and held that the injury resulting from disclosure was not greater than the benefit and that the evidence was relevant, proper, and necessary to administer the Labour Relations Act. As well, the Board held that an element of confidence was not part of the continuing relationship between the appellant and the managers at the Hudson Bay Company store in St. Albert. Accordingly, the appellant failed to satisfy several of the necessary criteria propounded by Wigmore. Therefore, even if a qualified form of privilege exists, the appellant's claim on the facts of this case must fail. The Board did not err in dismissing the claim of privilege on this ground. It is also worth noting that the Labour Board suggests that the Union was primarily interested in the information that the appellant gave to the Company officials concerning the organizing efforts. This information would not come within the ambit of any qualified privilege with respect to information received from sources. The appellant also argued that s. 2 (b) of the Charter includes the right of the press to seek and receive as well as impart information. The appellant contends that if journalists are compelled to disclose sources then they will lose access to information as news sources "dry up". This hindrance on the ability of the press to gather information is said to violate s. 2 (b). The discussion of this issue in the courts below resulted in the three constitutional questions being stated. Despite the importance of ascertaining the extent of the s. 2 (b) rights I am of the opinion that the disposition of this appeal does not require that the constitutional questions be answered. The mere existence of constitutional questions does not obligate a response on behalf of this Court. Rule 32 of the Supreme Court Rules which requires that questions be stated where the applicability or operability of provincial or federal legislation is involved is intended to insure that all potentially interested parties are afforded an opportunity to address an issue concerning the constitutionality of a particular practice or law. However, this Court in deciding the merits of an appeal is not necessarily bound by the stated questions. Beetz J., speaking for the Court in *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, held at p. 71: The parties are generally left wide latitude by the Chief Justice or other judges of this Court in formulating the constitutional questions which they submit for approval. However, it does not follow that the Court is bound by these questions, and that it is required to answer them if it may dispose of the appeal without doing so or if it appears that the facts of the case do not provide a basis for such questions.

The questions may not be used as a means of transforming an ordinary proceeding into a reference: *Vadeboncoeur v. Landry*, [1977] 2 S.C.R. 179, at pp. 187-88. The same opinion was expressed by Dickson J. (as he then was) in *Skoke-Graham v. The Queen*, [1985] 1 S.C.R. 106, at p. 121. If the facts of the case do not require that constitutional questions be answered, the Court will ordinarily not do so. This policy of the Court not to deal with abstract questions is of particular importance in constitutional matters. See *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at pp. 363-65. I am of the opinion that the facts of this case do not warrant an answer to these broad and important constitutional questions. To address the questions would require that this Court make pronouncements well beyond the issues presented in the actual appeal. The adjudication of the actual dispute does not require the resolution of the abstract questions of law raised in the constitutional questions. Section 2 (b) of the Charter provides:

2. Everyone has the following fundamental freedoms: . . .
 - (b) Freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; In oral argument counsel for the appellant stated that he was not asserting a special constitutional privilege for members of the press beyond that which is available to everyone generally under the right to freedom of expression. However, it was argued that s. 2 (b) was violated when the appellant was required to testify before the Labour Relations Board and was not permitted by the Board to avail herself of a claim of qualified privilege. The appellant's argument is premised on s. 2 (b) according the same protection to the gathering of news as it extends to the dissemination of news. The appellant contends that the ability to gather news is hindered by the failure to extend testimonial privilege to journalists in situations such as the appellant's. Even if I assume for the moment that the right to gather the news is constitutionally enshrined in s. 2 (b) the appellant has not demonstrated that compelling journalists to testify before bodies such as the Labour Relations Board would detrimentally affect journalists' ability to gather information. No evidence was placed before the Court suggesting that such a direct link exists. While judicial notice may be taken of self-evident facts, I am not convinced that it is indisputable that there is a direct relationship between testimonial compulsion and a "drying-up" of news sources as alleged by the appellant. The burden of proof that there has been a violation of s. 2 (b) rests on the appellant. Absent any evidence that there is a tie between the impairment of the alleged right to gather information and the requirement that journalists testify before the Labour Relations Board, I cannot find that there has been a breach of s. 2 (b) in this case. In addition, the Labour Relations Board held that the relationship between the appellant and the persons she spoke with at the Hudson Bay Company was not one based on confidence. The protection of confidence was neither sought nor given. The Board also held that the evidence was crucial, relevant and was not available from alternative sources. As well, the Board concluded that the appellant would fail in her claim for qualified privilege based on the test proposed by Powell J. in *Branzburg v. Hayes*, supra. Therefore, in my opinion, even if this Court were to adopt Powell J.'s approach to a qualified privilege, on the facts of this case no possible violation of s. 2 (b) has been made out.

Disposition

In these circumstances I am of the opinion that the Board did not err in law in ordering the appellant to answer the questions posed. This does not mean that I necessarily agree that a journalist is entitled to a qualified privilege when asked to testify about sources of information. The record in this case simply does not justify such a conclusion. Furthermore, the factual basis does not raise for determination the constitutional questions which were posed. There are no facts to support the contention that the gathering of information by the media would be threatened in the absence of Charter protection. In the result, the appeal is dismissed with costs. Appeal dismissed with costs. Solicitors for the appellant: Reynolds, Mirth, Richards & Farmer, Edmonton. Solicitor for the intervener the Attorney General of Canada: John C. Tait, Ottawa. Solicitor for the intervener the Attorney General for Ontario: The Attorney General for Ontario, Toronto. Solicitor for the intervener the Attorney General for Alberta: William Henkel, Edmonton. Solicitors for the Centre for Investigative Journalism: Gowling & Henderson, Ottawa.

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