Court File No. 25192

IN THE SUPREME COURT OF CANADA
On Appeal from the Court of Appeal of the Northwest Territories)

BETWEEN:

CANADIAN EGG MARKETING AGENCY

Appellant
(Plaintiff)

- and -

PINEVIEW POULTRY PRODUCTS LTD.

Respondent
(Defendant)

and

THE COMMISSIONER OF THE NORTHWEST TERRITORIES as represented by THE ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES

Intervener

AND BETWEEN:

CANADIAN EGG MARKETING AGENCY

Appellant
(Plaintiff)

- and -

FRANK RICHARDSON operating as NORTHERN POULTRY

Respondent
(Defendant)

and

THE COMMISSIONER OF THE NORTHWEST TERRITORIES as represented by THE ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES

Intervener

FACTUM OF THE APPELLANT, CANADIAN EGG MARKETING AGENCY

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PART I - FACTS

A. Introduction

1. The Appellant, the Canadian Egg Marketing Agency ("CEMA" or the "Agency") is appealing from a Judgment of the Court of Appeal for the Northwest Territories (per Hunt, Bracco and Picard JJ.A.) issued March 27, 1996 (the "Judgment") which upheld a Judgment of the Supreme Court of the Northwest Territories (per de Weerdt J.) issued August 22, 1995 (the "Trial Judgment"). The Court of Appeal upheld the declaration in the Trial Judgment that ss. 2(d) and 6 of the *Charter* were infringed by the Governor in Council's Proclamation establishing the Agency and by certain regulatory provisions administered by the Agency in respect of the interprovincial and export marketing of eggs produced in the Northwest Territories, but reversed a similar declaration at trial based on s. 15 of the *Charter*. The Court of Appeal also sustained the declaration in the Trial Judgment, which the Respondents had not asked for, that the Respondents and any other future egg producers in the Northwest Territories are "constitutionally exempt" from the Agency Proclamation and the Agency-administered regulatory provisions respecting interprovincial and export marketings of eggs produced in the Northwest Territories.

2. As reflected in the impugned provisions attached at Appendix I of the Agency's Factum the Respondents' constitutional attack essentially is directed at the dovetailing relationship of federal and provincial egg marketing quota, and the comprehensive, national nature of those quota controls, as core components of the integrated, cooperative federal-provincial regulatory scheme for eggs.

B. The Parties

3. By a Proclamation of the Governor in Council (the "Proclamation") enacted pursuant to the *Farm Products Agencies Act* R.S.C. 1985 c. F-4 (the "Act") and as contemplated by the 1972 Federal-Provincial Agreement for Eggs (the "Federal-Provincial Agreement"), the Agency was established in 1972 as the federal regulator in the integrated supply management scheme for eggs. The signatories to the

Federal-Provincial Agreement were and are the Ministers of Agriculture and agricultural supervisory boards for Canada and the 10 provinces, and the 10 existing provincial egg boards. Neither the Northwest Territories nor the Yukon Territories were or are signatories to the Federal-Provincial Agreement since in those jurisdictions there had been no commercial egg production and no quota controls on intraprovincial egg marketings when the scheme was established, just as there are no quota controls in those jurisdictions today. There is as yet no commercial egg production in the Yukon Territories.

Canadian Egg Marketing Agency Proclamation, as amended, Authorities, Tab D; Federal-Provincial Agreement, as amended, Authorities, Tabs E and F

4. As provided for in the amended Proclamation, 14 members are now charged with directing the Agency's affairs, consisting of one member appointed by each of the ten provincial egg boards and four members appointed by industry and consumer stakeholder groups. The Agency is statutorily deemed not to be an agent of the Crown and is obliged to conduct its operations on a self-sustaining basis without financial assistance from the federal government. Pursuant to the Act, the operations of the Agency are subject to review by the government-appointed National Farm Products Council (the "Council"), and the Agency's regulations require prior or post approval from Council.

Act, ss. 7, 26 and 27, Authorities, Tab C; Proclamation, as amended, Schedule s. 2 of Part I, Authorities, Tab D; Agreed Statement of Facts, Appeal Case Vol. III, Tab 15, pages 536-537

5. The Respondent, Frank Richardson is a shareholder and the President of a company, 355210 Alberta Ltd., operating under the trade name Northern Poultry ("Northern Poultry") which corporation since 1987 has marketed in intraprovincial and interprovincial trade graded eggs produced at its facilities in Hay River, Northwest Territories. Since commencing egg operations in 1990, the Respondent, Pineview Poultry Products Ltd. ("Pineview"), a corporation established under the laws of the Northwest Territories, has marketed in interprovincial trade substantially all the ungraded eggs produced at its facilities in Hay River.

Agreed Statement of Facts, Appeal Case Vol. III, Tab 15, pages 537 - 540; Reasons for Judgment, Appeal Case Vol. VI, Tab 38, pages 1337, 1339

6. Pineview and Northern Poultry are the only existing commercial egg producers in the Northwest Territories.

Reasons for Judgment, Appeal Case Vol. VI, Tab 40, pages 1434 - 1436

7. The principals of Pineview and Northern Poultry, Gary Villetard and Frank Richardson were directly or indirectly holders of egg quota issued by the Alberta Egg Producers' Board which quota was sold before they promoted corporate egg operations in the Northwest Territories.

Villetard Cross Examination, Appeal Case Vol. I, Tab 14, pages 72-74; Read in of Richardson transcript, Appeal Case Vol. II, Tab 14, pages 243-244

C. The Integrated and Coordinated Regulatory Scheme for Eggs

8. The marketing of eggs in Canada is strictly regulated through a cooperative federal-provincial scheme of interlocking marketing laws and regulations aimed at overcoming the practical limitations of divided jurisdiction over agricultural trade. The scheme is described in greater detail in the Agreed Statement of Facts. (Appeal Case Vol. III, Tab 15, pages 534-556). In upholding the constitutionality of this very same scheme under the *Constitution Act, 1867*, Chief Justice Laskin described its essential purposes and objectives as follows in the *Reference Re The Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198, 1219 (the *"Egg Reference"*):

> This integrated scheme is designed to introduce stability into the egg market on a national level by assuring all producers a producer price for their eggs within their respective quotas, regardless of whether those eggs are sold locally or extraprovincially and regardless of whether they are sold for table consumption or end up in the surplus removal programme. The producers, however, share the cost of this programme, again on a national level, through the levies payable in respect thereof.

9. Reflective of its dovetailing, cooperative nature, for each federal regulatory component relating to the marketing of eggs in interprovincial and export trade (quotas, levies, licensing, pricing) there is a corresponding provincial regulatory

component relating to intraprovincial marketings. However, no such measures have been put into place by the Government of the Northwest Territories with the consequence that the production and intraprovincial marketing of eggs within the Northwest Territories is completely unregulated.

C.1 The Formation and Genesis of the Integrated Quota Allocation System

10. As described in detail by Chief Justice Laskin in the *Egg Reference, supra,* at pages 1214-1219, at the core of this integrated scheme is a coordinated federal-provincial system for the allocation of quota restricting the quantity of eggs permitted to be marketed in local trade and in interprovincial and export trade. The federal quota system mandated by the Proclamation and implemented in 1972 through the *Canadian Egg Marketing Quota Regulations,* as amended (the "*Quota Regulations*"), finds its source in s. 23 of the Act. Section 23 provides as follows:

> 23.(1) A marketing plan, to the extent that it allocates any production or marketing quota to any area of Canada, shall allocate that quota on the basis of the production from that area in relation to the total production of Canada over a period of five years immediately preceding the effective date of the marketing plan.
>
> (2) In allocating additional quotas for anticipated growth of market demand, an agency shall consider the principle of comparative advantage of production.

11. In accordance with s. 23(1) of the Act, the Proclamation provides for the use of historical (5 year average) egg marketing patterns as the foundation for what are known as "base" marketing quota allocations, while according flexibility to make "over base" marketing quota allocations for anticipated growth in market demand.

12. The constitutional validity of s. 23 was upheld on *Charter* grounds at trial and maintained by the Court of Appeal, just as the same section had been upheld under the *Constitution Act, 1867* in the *Egg Reference, supra.* The Court of Appeal also acknowledged s. 23 to be the "source" of the legislative provisions under challenge.

> Reasons for Judgment, Appeal Case Vol. VI, Tab 38, pages 1358-1360, Tab 40, page 1390; Reasons for Order of Chief Justice setting Constitutional Questions, January 15, 1997

13. In accordance with s. 23 of the Act, s. 2 of Part II of the Proclamation stipulates how the Agency is to make the base allocations of quota in an interlocking manner such that the total of federal producer quotas assigned to producers, together with the total of provincial producer quotas and marketings exempt from quota in each province, corresponds to the base quantities in s. 3 of Part II of the Proclamation. Section 4 of Part II of the Proclamation provides the framework for additional (overbase) Agency quota allocations. Subsection 4(2) also provides for below base quota allocation decreases.

Act, s. 23, Authorities, Tab C; Proclamation, as amended, Schedule ss. 2-4 of Part II, Authorities, Tab D

14. Section 23 and the impugned provisions that flow from s. 23 are pivotal elements of the integrated, cooperative federal-provincial response that, as found by the Trial Judge, brought an end to the chaotic market conditions arising out of what were known as the "chicken and egg wars" of the 1960's and early 1970's. At a producer level, this marketplace disorder manifested itself in severe price instability and wide fluctuations in supply. As recognized in a Royal Commission on the subject appointed by the province of Ontario, efforts by provincial commodity boards to restore greater order to the marketplace were unsuccessful and often counterproductive, due to the lack of coordination at a national level. Indeed, at the height of the industry crisis, certain provincial egg regulatory schemes had been held unconstitutional as encroaching on exclusive federal jurisdiction over interprovincial trade.

Attorney General For Manitoba v. Manitoba Egg and Poultry Association, [1971] S.C.R. 689; *Rudy Krall & Sons Ltd. v. Québec Egg for Consumption Producers Federation*, [1972] C.A. 882; Report of the Royal Commission Appointed to Inquire into the Egg Industry in Ontario, Appeal Case Vol. V, Tab 17, pages 964 - 1078; Trial Reasons for Judgment, Appeal Case Vol. VI, Tab 38, page 1372

C.2 Egg Production, Quota Allocation and Quota Requirements

15. Eggs are produced by housed laying hens over 19 weeks of age maintained by egg producers. Flock sizes of quota producers vary considerably, from 1,200 in one

instance to more than 60,000 in another. Average flock sizes range from a low of 6,292 per producer in PEI to 22,309 per producer in Nova Scotia. Hen productivity also varies, but has increased significantly over the years to the point that the average rate of lay in 1996 was 24 dozen egg per laying hens per year for quota producers.

Agreed Statement of Facts, Appeal Case Vol. III, Tab 15

16. The maximum number of hens permitted to be held in signatory provinces without quota by small-scale exempt producers varies according to provincial requirements from 99 to 499. In Alberta, for example, an egg producer with fewer than 300 hens is not required to hold quota. The circumstances of the Respondents cannot be compared to that of small-scale exempt producers by virtue of, among other things, their vastly larger size.

Agreed Statement of Facts, Appeal Case Vol. III, Tab 15, page 548

17. As a result of historical production and marketing patterns on which the quota allocation system was initially based, some provinces market considerably less than they consume and others considerably more. For example, as seen in the Chart below, in 1972 Québec accounted for 27.9% of Canada's population but in accordance with its historical marketing patterns was only entitled to 16.556% of the federal-provincial base quota allocation. Broadly speaking, the total Canadian demand for eggs since the Agency was established has been fairly stable, declining somewhat after 1972 and then gradually increasing to the point that, in 1997, five out of the ten signatory provinces are in a slightly "over base" position, while the remaining five provinces are slightly "under base". Pursuant to the Proclamation and the Federal-Provincial Agreement, New Brunswick, Prince Edward Island and Newfoundland have been exempted from quota allocation decreases.

Federal-Provincial Agreement 1976, Schedule D, Authorities, Tab F; Proclamation, as amended, Schedule ss. 4(2) and 4(3) of Part II, Authorities, Tab D

Province	Base Allocation* (Dozens of Eggs)	Laying Hens (Regulated & Exempt)**	% of Total*	% of 1972 Population***	Current Allocation**** (Dozens of Eggs)
British Columbia	57,250,000	2,787,932	12.005	10.4%	58,533,858
Alberta	41,344,000	2,131,628	8.704	7.6%	40,918,777
Saskatchewan	22,611,000	1,202,388	4.760	4.2%	22,547,221
Manitoba	54,189,000	2,700,686	11.408	4.5%	54,263,991
Ontario	181,267,000	8,671,040	38.161	35.9%	181,682,253
Quebec	78,647,000	3,674,546	16.556	27.9%	79,161,433
New Brunswick	8,683,000	447,530	1.828	2.9%	9,905,516
Nova Scotia	19,504,000	946,900	4.106	3.6%	18,545,897
Prince Edward Island	3,028,000	159,059	0.637	0.5%	2,759,995
Newfoundland	8,477,000	445,641	1.785	2.4%	8,308,524
TOTAL	475,000,000	23,167,350	100.00	100.0	476,627,465

Source:

* Section 3 of Part II of the Proclamation, Authorities Tab D

** Schedule "F" to the 1976 Federal Provincial Agreement, Authorities, Tab F. It should be noted that the productivity per hen has increased significantly since 1972 with the result that the base quota allocations, expressed in laying hens, are now considerably smaller.

*** Exhibit 16, Appeal Case Vol. VI, Tab 30, page 1287

**** Schedule to the *Quota Regulations*, as amended by SOR/97-4

18. The quantity of eggs to be produced and marketed by quota holding producers under the interlocking federal-provincial quota system is arrived at in several stages. To begin with, CEMA estimates the total quantity of eggs required to satisfy the total table market demand in Canada for a 12-month period. After subtracting projected egg imports into Canada mandated by international trade agreements and projected production by small-scale exempt producers, CEMA calculates the allowable amount of quotas for allocation to quota producers. Each provincial board, pursuant to provincially based rules, allots provincial quota. Finally, pursuant to authority granted by the Agency, with the Governor in Council's approval, the provincial boards are required to allot federal quota to those same producers in the same manner as they allot provincial quota. Through the Federal-Provincial Agreement, all the provincial egg

boards have contractually agreed to be responsible for ensuring that producer quotas and the total of all flocks within the province do not exceed permitted levels.

> Currie, In Chief, Appeal Case Vol. I, Tab 14, pages 148-155; Agreed Statement of Facts, Appeal Case Vol. III, Tab 15, pages 547-548

19. The Reasons for Judgment of the Courts below convey the impression that "federal quota" limiting the quantity of eggs that may be marketed by a producer in interprovincial trade operates independently of "provincial quota" limiting the quantity of eggs that may be marketed intraprovincially. This impression is incorrect. The reality is that, consistent with the dovetailing nature of the cooperative system, federal and provincial are integrally connected one to the other. This is evident from s. 6 of the *Quota Regulations*, an impugned provision, which states as follows:

> *Relationship of Federal Quota to Provincial Quota*
>
> 6. Subject to these Regulations, the quantity of eggs that a producer is authorized to market from a province under a federal quota for the period set out to in the schedule shall equal the provincial quota allotted to the producer for that period by the Commodity Board of the province minus the quantity of eggs marketed by the producer in intraprovincial trade in that province in that period.

Indeed, under the Agency's *Quota Regulations*, s. 5(2), the entitlement to an allotment of federal quota is *automatic* for the holder of a provincial quota. This dovetailing aspect of federal and provincial quota enables a quota producer to freely choose whether to market eggs in intraprovincial, interprovincial or export trade.

20. Similarly, it is important to place in context s. 4 of the *Quota Regulations*, which essentially provides that producers (other than small-scale producers exempt from holding quota by provincial laws) cannot market eggs in interprovincial or export trade unless they hold federal quota. This provision is designed to complement the dovetailing federal-provincial quota system described above which in turn reflects the necessity of federal-provincial cooperation and integration in an area of divided jurisdiction. As further discussed below, in the *Egg Reference, supra* at page 1297 Mr. Justice Pigeon described this "practical scheme" as "the only effective means open, apart from conditional regulation."

C.3 Licensing

21. The quota system is buttressed by an interlocking federal-provincial egg licensing system. The Agency's Licensing Regulations, among other things, prohibit licensees from knowingly dealing with eggs in interprovincial trade not marketed under federal quota.

Agreed Statement of Facts, Appeal Case Vol. III, Tab 15, page 550; *Canadian Egg Licensing Regulations 1987*, as amended, Authorities, Tab H; Proclamation, as amended, Schedule s. 9 of Part II, Authorities, Tab D

C.4 Cost of Production Pricing

22. As part of a coordinated federal-provincial pricing mechanism, the Agency calculates the producer price for Grade "A" large eggs based on a cost of production formula monitored by the National Farm Products Council (the "Council"). The cost of production formula is designed to provide efficient producers with their cost of production plus a reasonable rate of return.

Agreed Statement of Facts, Appeal Case Vol. III, Tab 15, page 549

C.5 Industrial Products Program and Levies

23. In the normal course of trade, producers market their ungraded eggs to grading station operators ("graders") who grade, wash, sort, candle and package the eggs and then sell the graded eggs to retailers and wholesalers for table consumption. Such upstream sales by graders are not regulated.

Agreed Statement of Facts, Appeal Case Vol. III, Tab 15, pages 544 - 545

24. Under the Industrial Products Program which the Agency is charged with administering and coordinating, the Agency and/or provincial egg boards buy on a weekly basis from graders eggs not sold by them to the table market at the producer price plus an amount for grading costs and then sells those eggs at U.S. reference prices to domestic processors or for export. Currently, the Agency incurs a shortfall of about 60

cents per dozen eggs on these sales. The Industrial Products Program supports the producer price for eggs throughout Canada.

Agreed Statement of Facts, Appeal Case Vol. III, Tab 15, pages 551 - 552; Currie, In Chief, Appeal Case Vol. I, Tab 14, pages 132-141

25. The substantial costs of administering the federal-provincial regulatory scheme, particularly the Industrial Products Program, are jointly shared by egg producers across the country through a dovetailing system of federal-provincial levies mandated by the Federal-Provincial Agreement. At the time of trial, the levy imposed by the Agency was 14.5 cents per dozen.

Agreed Statement of Facts, Appeal Case Vol. III, Tab 15, page 551; *Canadian Egg Marketing Levies Order* S.O.R./83-843, as amended, ("*Levies Order*") Authorities, Tab K; Proclamation, Schedule s. 10 of Part II, Authorities, Tab D; Federal-Provincial Agreement, Authorities, Tab F

C.6 Import Controls

26. Further price support and market stability is provided by import controls on eggs established by the Governor in Council under the *Export and Import Permits Act* as permitted under international trade agreements to which Canada is a party.

Currie, In Chief, Appeal Case Vol. I, Tab 14, pages 144 - 148

D. Quota Allocation Negotiations With the Northwest Territories

27. As mentioned above, when the integrated federal-provincial system was put into place in 1972, the Northwest Territories had no commercial egg production, no quota system and was not a signatory to the Federal-Provincial Agreement.

28. In 1984 the Government of the Northwest Territories apprised the Agency of a proposal to establish a large quota in Hay River and indicated its desire to enter into the Federal-Provincial Agreement for the purpose of establishing a coordinated egg marketing regime. The Agency was immediately responsive to the initiative of the

Northwest Territories and a year later the signatories to the Federal-Provincial Agreement considered but rejected a 200,000 layer proposal.

Currie, In Chief, Appeal Case Vol. I, Tab 14, pages 157-160, 171-178; Negotiation Documents, Appeal Case Vol. IV, Tab 17, pages 627 - 639, 811 - 826; 1985 Signatories Meeting, Appeal Case Vol. IV, Tab 17, pages 640 - 680; Colford, Cross Examination, Appeal Case Vol. II, Tab 14, page 240

29. The negotiations for the entry of the Northwest Territories are still ongoing. Offers and counter-offers have been made and continue to be made. These negotiations are being conducted on the premise that a quota system will be put into place in the Northwest Territories from which federal quota will automatically flow after the Government of the Northwest Territories establishes an egg board and puts into place territorial quota controls, and consequential amendments are made to certain federal regulatory provisions. The Government of the Northwest Territories has enacted the *Agricultural Products Marketing Act*, S.N.W.T. 1991 (Supp.) c. 115 for this purpose, but that Act has not yet been proclaimed. It will also be necessary for the Territorial government to enact regulations relating to provincial quota, licensing, pricing and levies.

Colford, Cross Examination, Appeal Case Vol. II, Tab 14, pages 228-231; Trial Reasons for Judgment, Appeal Case Vol. VI, Tab 38, pages 1359-1360; Court of Appeal Reasons for Judgment, Appeal Case Vol. VI, Tab 40, pages 1390, 1392; *Agricultural Products Marketing Act*, Authorities, Tab K

30. There have been two main stumbling blocks in arriving at a consensus required for the admission of the Northwest Territories into the Federal-Provincial Agreement. The first stumbling block has been the appropriate level of the quota allocation to the Northwest Territories. At the urging of Respondents, who have sought to establish extremely large egg production facilities, the Government of the Northwest Territories requested quota allocation levels that far exceed the quantity of eggs consumed in the Northwest Territories. Specifically, the initially requested quota allocation based on 200,000 laying hens is substantially higher than, for example, the 1972 base allocation to

Prince Edward Island, which has a long history of egg production and more than double the population of the Northwest Territories.

Currie, In Chief, Appeal Case Vol. I, Tab 14 pages 156-178; Villetard, Cross Examination, Appeal Case Vol. I, Tab 14, page 73; see Chart above at paragraph 17

31. Even the witness for the Government of the Northwest Territories, John Colford, acknowledged in his testimony at trial that the quota allocation initially requested by his government and then rejected by signatories after a federal-provincial meeting was "too high of a number".

10 Colford, In Chief, Appeal Case Vol. I, Tab 14, pages 123, line 7

32. The other stumbling block has been the clandestine interprovincial egg marketing activities carried out by the Respondents, in breach of an informal agreement with the Government of the Northwest Territories to limit production. These activities have spawned a number of legal proceedings, including the present case. In the case of Pineview, these uncontrolled interprovincial egg marketings began after subsidies totalling $559,529.00 were received from the Government of the Northwest Territories and the federal government to assist in the construction of its large poultry production facility in Hay River. Pineview's flock for marketing in interprovincial trade grew from
20 10,000 layers in 1990 to 60,000 layers in 1992. This pattern of conduct led the Federal Court of Appeal, in the related decision *Pineview Poultry Products Ltd.* v. *CEMA* to express displeasure of "allowing the Respondents to continue to break the law as they had done knowingly and wilfully until then".

Pineview Poultry Products Ltd. v. *CEMA* (1993), 151 N.R. 195 at 197 (F.C.A.); *CEMA* v. *Villetard's Eggs Ltd.*, [1995] 2 F.C. 581 (C.A.); Exhibit 15, Pineview Poultry Financial Statement dated February 11, 1993, Appeal Case Vol. VI, Tab 29, page 1280; Villetard Cross Examination, Appeal Case Vol. I, Tab 14, pages 90-91, 94-97; Agreed Statements of Facts, Appeal Case Vol. III, Tab 15, page 554

30 33. In his testimony on behalf of the Government of the Northwest Territories, Mr. Colford candidly acknowledged the chilling effect of the Respondents taking the law into their own hands while federal-provincial negotiations to secure the participation of the Northwest Territories in the Federal-Provincial Agreement were ongoing. His

response to a 1990 proposal that the government-subsidized Pineview should "load up with layers" for extraprovincial marketing before a quota allocation was made to the Northwest Territories, was: "those suggestions were not legal and certainly were not in a position that we would look to as a Government". Nevertheless, that is exactly what Pineview did in 1991 and 1992, shipping roughly $1 million worth of ungraded eggs to an affiliated grading station in Alberta before being caught by the Agency with the aid of a private detective.

Colford, Cross Examination, Appeal Case Vol. II, Tab 14, pages 232-240; Villetard, Cross Examination, Appeal Case Vol. I, Tab 14, pages 87-88, 90-92, 94-96

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E. Overview of the Proceedings

34. In 1992, the Agency brought the present actions in the Northwest Territories seeking, among other things, an interim and permanent injunction to prevent the Respondents from marketing Northwest Territories produced eggs in interprovincial or export trade. The constitutional grounds relied on by the Respondents in defence of the actions were considered by way of a trial of an issue before the Honourable Mr. Justice de Weerdt of the Northwest Territories Supreme Court. The Respondents challenged the constitutionality in its application to the Northwest Territories of s. 23 of the Act, the Proclamation, ss. 4(1)(a), 5(2), 6 and 7(1) of the *Quota Regulations* and ss. 3, 4(1),
20 7(1)(d) and 7 (1)(e) of the *Licensing Regulations*. The Respondents did not challenge the federal levies established under the *Levies Order*.

Notice of Motion, Appeal Case Vol. I, Tab 8, pages 28 to 30

35. In his Reasons for Judgment issued on August 8, 1995 and his Trial Judgment issued on August 22, 1995, de Weerdt J.:

(a) upheld the constitutionality of s. 23 of the Act on *Charter* grounds, finding that s. 23 is "sufficiently ample in scope" to allow for a quota allocation on a basis that "makes fair and adequate provision for the Northwest Territories", and further finding that the Respondents challenge of s. 23 had been abandoned;

(b) rejected the Respondents challenge of the regulatory scheme under s. 121 of the *Constitution Act, 1867*;

(c) granted "public interest" standing to the Respondents in their capacity as defendants in the action notwithstanding that Pineview and Northern Poultry are corporations;

(d) declared that the regulatory provisions at issue violate ss. 2(d), 6 and 15 of the *Charter* and are not saved by s. 1;

(e) invoked s. 24(1) of the *Charter* and s. 52(1) of the *Constitution Act, 1982*, declared the Respondents and all other egg producers in the Northwest Territories to be "constitutionally exempt" from any application of the Agency's Proclamation and the impugned regulatory provisions in respect of the marketing of eggs produced in the Northwest Territories in interprovincial and export trade.

Trial Judgment, Trial Reasons for Judgment, Appeal Case Vol. VI, Tab 39, pages 1384-1387 and Tab 38, pages 1334-1383

36. As discussed in Part III below, the Court of Appeal of the Northwest Territories dismissed the appeal on all grounds other than s. 15 of the *Charter*, in respect of which the Court of Appeal overruled the Trial Judge. The Respondents did not seek to cross appeal, either to the Court of Appeal or to this Court, from the ruling at Trial upholding s. 23 of the Act.

Court of Appeal Judgment and Reasons for Judgment, Appeal Case Vol. VI, Tabs 41, pages 1442-1444, and Tab 40, pages 1388-1441; Reasons for Order by the Chief Justice setting the Constitutional Questions, January 15, 1997

37. The Agency's application for leave to appeal of March 11, 1996 was allowed by the Court on October 3, 1996 and on October 8, 1996 the Agency filed its Notice of appeal. By Order of the Chief Justice dated January 15, 1997 the following constitutional questions were stated:

1. Do the *Canadian Egg Marketing Proclamation*, C.R.C. 646, as amended, the *Canadian Egg Licensing Regulations*, 1987,	*La Proclamation visant l'Office canadien de commercialisation des oeufs*, C.R.C., ch. 646, et ses modifications, le *Règlement de 1987 sur l'octroi de permis visant les oeufs du Canada*, DORS/87-242, et

	SOR/87-242, as amended, ss. 3, 4(1), 7(1)(d), and 7(1)(e), and the *Canadian Egg Marketing Quota Regulations*, SOR/86-8, as amended, ss. 4(1)(a), 5(2), 6 and 7(1), in whole or in part, infringe the rights and freedoms guaranteed by s. 2(d) and s. 6 of the *Canadian Charter of Rights and Freedoms*?	se modifications, art. 3, 4(1), 7(1)d) et 7(1)e), et le *Règlement de 1986 de l'Office canadien de commercialisation des oeufs sur le contingentement*, et ses modifications, DORS/86-8, art. 4(1)a), 5(2), 6 et 7(1), en totalité ou en partie, violent-ils les droits et libertés garantis par l'al. 2d) et l'art. 6 de la *Charte canadienne des droits et libertés*?
10		
	2. If so, can this infringement be justified under s. 1 of the *Charter*?	Dans l'affirmative, cette violation peut-elle être justifiée en vertu de l'article premier de la *Charte*?

PART II - POINTS IN ISSUE

38. The issues in this appeal are as follows:

1. As a preliminary matter, do the Respondents qualify for public interest standing to invoke ss. 2(d) and 6 of the *Charter* as a defence in the proceedings, and for declaratory relief in the nature of a "constitutional exemption"?

20 2. Do the impugned regulatory provisions, in whole or in part, infringe any rights and freedoms guaranteed to the Respondents by ss. 2(d) and 6 of the *Charter*?

3. If the answer to the second question is yes, is this infringement justified under s. 1 of the *Charter*?

4. If the answer to the third question is no, what is the appropriate remedy under the circumstances?

PART III- ARGUMENT

A. Introduction

30 39. The Supreme Court of Canada has held in a number of cases that *Charter* guarantees are to be interpreted in a purposive manner so as to secure for individuals the full benefit of the *Charter's* protection and, at the same time, not overshoot the actual purposes of the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 344. Fidelity to the purposes of a given right or freedom requires

consideration of the practical context in which the *Charter* is invoked: *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, 884-886; *R. v. Généreux*, [1992] 1 S.C.R. 259, 295 - 296. The point was aptly expressed by Mr. Justice La Forest in the s. 6 mobility case, *United States v. Cotroni*, [1989] 1 S.C.R. 1469, 1495 as follows:

> The Constitution must be applied on a realistic basis having regard to the nature of the particular area sought to be regulated and not on an abstract theoretical plane. In interpreting the Constitution, courts must be sensitive to what Frankfurter J. in *McGowan, supra*, at p. 524 calls "the practical living facts" to which a legislature must respond.

40. In the present case, the following "practical living facts" are particularly noteworthy:

- The challenged provisions are pivotal components of an integrated, cooperative federal-provincial scheme;
- The dovetailing and comprehensive character of this scheme of cooperative federalism are essential for the scheme to be legally and partially workable;
- Historically there was no commercial egg production in the Northwest Territories, but despite this fact, allocations can be made to territorial producers in the future;
- The Government of the Northwest Territories has not yet established quota controls with the result that, unlike the 10 provinces, intraprovincial marketings within the Northwest Territories are unregulated;
- The only Northwest Territories egg producers directly affected are corporations;
- The principals of those corporations derived the benefits of holding quota and engaging in egg marketing in the regulated area (Alberta) before promoting corporate egg marketing operations in the Northwest Territories which has no intraprovincial regulatory controls.
- Negotiations with the Government of the Northwest Territories for entry into the National Egg Plan are ongoing and when successful will result in the allotment of federal and provincial quota.

B. The Respondents Lack Standing

41. It is respectfully submitted that the Court of Appeal and Trial Judge fundamentally erred in granting "public interest" standing to the Respondents and in finding them to be eligible to obtain the relief granted in the Judgment.

42. To begin with, public interest standing does not even properly arise in this appeal in view of the Respondents' status as defendants in the actions. The line of decisions by this Court on the public interest standing doctrine make it abundantly clear that the doctrine is aimed at interested citizens or public interest groups seeking as plaintiffs to bring an action for declaratory or other similar relief. The doctrine can have no application to corporations or other private parties who are brought before a court as defendants.

> *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575; *Finlay v. Minister of Finance*, [1986] 2 S.C.R. 607; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236; *Hy & Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675

43. The difference between public interest litigants and defendants in civil or criminal proceedings was noted by Chief Justice Dickson speaking on behalf of the Majority in *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, 313:

> The respondent did not come to court voluntarily as an interested citizen asking for a prerogative declaration that a statute is unconstitutional. If it had been engaged in such "public interest litigation" it would have had to fulfil the status requirement laid down by this Court in the trilogy of "standing" cases (*Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575) but that was not the reason for its appearance in Court.

44. To expand public interest standing to defendants would fundamentally distort the underlying nature and scope of the doctrine and undermine the accepted rules on the ability of corporations to invoke the *Charter* applied in such cases as *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, 1001 - 1004. As Mr. Justice Cory held in *Canadian Council of Churches, supra*, at page 252:

The principles for granting public interest standing set forth by this Court need not and should not be expanded.

45. Moreover, public interest standing is directed at situations in which a public interest litigant claims a breach of rights of others, not merely the litigant's own private interests. As held by Mr. Justice Major speaking for the Majority in *Hy & Zel's, supra*, at page 690, the doctrine applies where "the party does not claim a breach of its own rights under the *Charter* but those of others". This is implicit in the very idea of being a public interest litigant, as opposed to a private litigant. The doctrine cannot, it is submitted, be applied to defendants who claim a breach of their own *Charter* rights but are not otherwise entitled to a remedy.

46. It is particularly anomalous to grant "public interest standing" to corporate businesses not eligible to invoke the *Charter* when, as in this case, the evidence indicates that there are no individuals directly affected by the laws under challenge. (see page 35, lines 4-9,*infra*) The "proper allocation of judicial resources" is achieved under the public interest standing doctrine "by limiting the granting of status to situations in which no directly affected individual might be expected to initiate litigation:" *Canadian Council of Churches, supra*, at page 251. This limitation loses any meaning when there is no actual group of individuals who legally are directly affected at the time of Judgment. Furthermore, as held by Chief Justice Lamer, speaking for the Court on the standing issue in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, 182-3:

> Those who cloak themselves in the corporate veil, and who rely on the legal distinction between themselves and the corporate entity when it is to their benefit to do so, should not be allowed to deny this distinction in these circumstances (where the distinction is not to their benefit).

47. The Respondents cannot have it both ways. Having organized the Pineview and Northern Poultry businesses through corporations, and having relied on the legal distinctions to which these corporations give rise, the Respondents cannot be permitted to effectively deny these distinctions where it is not to their benefit in advancing a claim under the *Charter*.

48. Having disposed of the public interest standing doctrine, the remaining issue is whether private corporate businesses can raise and obtain a remedy from the protection of the freedom of association and personal mobility guarantees in ss. 2(d) and 6 of the *Charter*, respectively. Based on the underlying purpose and the language of those guarantees, the caselaw clearly establishes that corporations cannot invoke ss. 2(d) and 6 of the *Charter*. Indeed, in a related proceeding before the Federal Court Trial Division launched by the Respondents and others prior to the present proceedings, the *Charter* claims of Pineview and 355210 Alberta Ltd. (Northern Poultry) were struck out on standing grounds as disclosing no reasonable cause of action. This ruling was not appealed.

Reference Re Public Service Employee Relations Act (Alta), [1987] 1 S.C.R. 313, 395, 397 (per McIntyre J.); *Professional Institute of the Public Service of Canada v. NWT (Commissioner)*, [1990] 2 S.C.R. 367, 402 (per Sopinka J.); *Parkdale Hotel Ltd. v. Canada (Attorney General)*, [1986] 2 F.C. 514, 534-5 (T.D.); *Pineview Poultry Products Ltd. et al v. Canada and CEMA* (1994), 73 F.T.R. 50, 72-73; See also: *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927, 1001-1003

49. With respect to Richardson, his business was identified in the Agency's Statement of Claim as Northern Poultry. As expressly found by the Trial Judge, Northern Poultry is in fact operated through a corporation, 355210 Alberta Ltd., of which Richardson is a shareholder and the President. Moreover, apart from Pineview, there are no other egg producers in the Northwest Territories. On these facts it was wrong for the Court of Appeal to hypothesize as a ground for according standing to the Respondents, "that individuals *might wish* to engage in commercial egg production in the Northwest Territories". (emphasis added)

Paras 5 and 6, *supra*; *Hy & Zel's Inc. v. Attorney General for Ontario*, [1993] 3 S.C.R. 675, 693, referring to *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, 361-2:

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

50. The courts below also erred in declining the Agency's motion to make the style of cause accord with the facts by substituting 355210 Alberta Ltd. for Frank Richardson.

Witco Chemicals Co., Canada Ltd., v. Town of Oakville, [1975] 1 S.C.R. 273; *Paramount Kenworth Ltd. v. MTF Transportation Ltd. et al.* (1984), 46 O.R. (2d) 368 (Dist. Ct.)

C. Freedom of Association

51. The following are the key points relied on by the Court of Appeal in finding that the impugned provisions contravene the "freedom of association" guarantee in s. 2(d) of the *Charter* (references are to the Court of Appeal's Reasons for Judgment, Appeal Case Vol. VI, Tab 40):

- The marketing of eggs in interprovincial trade is an "associational activity" constitutionally protected by s. 2(d) of the *Charter* (pages 1418, 1420);
- The right put forward here is not legislatively created but derives from freedom to contract (page 1414);
- One can never market eggs by oneself (page 1417);
- The Majority ruling in the *Public Service Reference, supra*, that freedom of association does not extend to an activity merely because it is essential to give an association meaning, should not be applied in this case since the proposed association is "essentially the same as the activity" (page 1413);
- The Majority ruling in the *Public Service Reference, supra*, that s. 2(d) does not extend to activities carried on in association that are illegal to perform individually should not be applied in this case since the activity "can never be lawful for these Respondents while it can always be lawful for producers who live elsewhere" (page 1418); and
- Section 2(d) has been breached by virtue of the second category in the *Public Service Reference* (per McIntyre J.) since "the freedom asserted here relates to another constitutionally protected right, the right to mobility under s. 6 (page 1420).

52. With due respect, both the reasoning and the conclusions of the Court of Appeal on s. 2(d) are fundamentally at odds with the underlying purposes of and the decided cases on the "freedom of association" guarantee.

53. In the *Public Service Reference* and other cases this Honourable Court has been highly aware of the need to put appropriate parameters of the freedom of association guarantee in order to preserve the authority of governments to regulate various activities in the public interest. Mr. Justice Le Dain (Beetz and La Forest JJ. concurring) made the following determination at page 391 in rejecting the contention that freedom of association includes the right of a trade union to strike and bargain collectively:

> The rights for which constitutional protection are sought - the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer - are not fundamental rights or freedoms. They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise. It is surprising that in an area in which this Court has affirmed a principle of judicial restraint in the review of administrative action we should be considering the substitution of our judgment for that of the Legislature by constitutionalizing in general and abstract terms rights which the Legislature has found it necessary to define and qualify in various ways according to the particular field of labour relations involved. [emphasis added]

54. Applying this reasoning, it is submitted that the Court should not constitutionalize in general and abstract terms of "freedom to contract" and "freedom to trade", activities which the federal government has found it necessary to define and qualify in various ways as a component of a comprehensive regulatory scheme.

55. Clear support for the Agency's position is also provided by *Professional Institute of the Public Service of Canada v. NWT (Commissioner)*, [1990] 2 S.C.R. 367, in which the Court applied the *Public Service Reference* in upholding legislation requiring an employee's association to be incorporated by Territorial legislation in order to bargain collectively. The Court rejected the contention, somewhat analogous to the position of the Respondents in the present case, that s. 2(d) was breached by the failure to enact the legislation required to permit the employee association to bargain collectively. Indeed, if anything the legal position of the challengers in *Professional Institute* was stronger

than that of the Respondents in the present case. Whereas the Respondents' ability to market eggs intraprovincially is not affected by the impugned provisions, the legislation in *Professional Institute* substantially compromised the objects, purposes and activities of the employee association.

56. In *Professional Institute* at pages 402 - 403, Mr. Justice Sopinka (generally concurred in by L'Heureux-Dubé and La Forest JJ.) summarized as follows the four main propositions emerging from the *Public Service Reference*:

> ... first, that s. 2(d) protects the freedom to establish, belong to and maintain an association; second, that s. 2(d) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that s. 2(d) protects the exercise in association of the constitutional rights and freedoms of individuals; and fourth, that s. 2(d) protects the exercise in association of the lawful rights of individuals.

57. For the reasons that follow, it is respectfully submitted that the Judgment under appeal runs directly contrary to all four of these propositions. With respect to the first proposition, it distorts and trivializes "freedom of association" to equate it, as the Court of Appeal effectively did, with "freedom to contract" or, as the Trial Judge did, with "trade" in a commercial commodity. In effect, the Court of Appeal and Trial Judge rewrote the *Charter*.

58. A comparably open-ended interpretation of s. 2(d) was properly rejected in *R. v. Skinner*, [1990] 1 S.C.R. 1235 in upholding a prohibition against communications in public for the purposes of prostitution. Even more directly on point is *Milk Board v. Clearview Dairy Farms Inc.* (1986), 69 B.C.L.R. 220, affd. (1987), 12 B.C.L.R. (2d) 116 (C.A.), leave to appeal to S.C.C. refused (1987), 81 N.R. 240n (S.C.C.) in which, on reasoning consistent with that in the *Public Service Reference* and *Skinner*, the British Columbia courts rejected a challenge to a milk marketing scheme said to have prevented "contractual marketing association activities" of non-quota milk producers.

59. The Court of Appeal Judgment flies also in the face of the second proposition enunciated in *Professional Institute, supra*. The Court of Appeal essentially reasoned

that, because the activity of marketing eggs across provincial boundaries is "foundational" or an essential purpose of the so-called "commercial association" formed through that activity, it falls within the protection of section 2(d). The *Public Service Reference*, as applied in *Professional Institute*, precludes such a finding.

60. With respect to the third proposition (i.e.; that s. 2(d) protects the exercise in association of fundamental constitutional rights and freedoms) the business of marketing a commercial commodity within the parameters of a comprehensive regulatory scheme can hardly be elevated to the same plane as, for example, individuals associating to pursue freedom of religion. Moreover, on the facts, the so-called "associational activity" is being carried on not by individuals but through private business corporations. The freedom posited by the Respondents does not merely have an economic component, it is a commercial activity, pure and simple. For these reasons and the reasons set out below, it is wholly inappropriate to seek to enlarge the proper scope of s. 2(d) by reference to the s. 6(2)(b) right of citizens to gain a livelihood, as qualified under s. 6(3)(a).

61. Finally, with respect to the fourth proposition (i.e., that 2(d) protects the exercise in association of activities that are lawful for individuals to carry on), the Judgment is based on the faulty premise that "one can never market eggs by oneself". As a matter of plain common sense, individuals can indeed buy or sell eggs, or individually engage in the various activities related to the marketing of eggs. Moreover, it is apparent that the Court of Appeal construed the concept of "marketing" in abstract terms rather than in the context of the regulatory scheme at issue. "Marketing" is clearly defined for the purposes of the regulatory scheme for eggs in terms that, on their face, are clearly capable of being performed by individuals. Specifically, the Proclamation Schedule,

Part II, s. 1, the *Quota Regulations*, s. 2 and the *Licensing Regulations*, s. 2 all provide the following identical definition of "marketing", in relation to eggs:

> "marketing", in relation to eggs, means selling and offering for sale and buying, pricing, assembling, packing, processing, transporting, storing and reselling, whether in whole or in processed form;

62. It is not because of any collective or associational reasons that interprovincial egg marketing is regulated in the provisions under challenge, but because of the detrimental effects that such activities, if uncontrolled and unplanned, would cause, whether carried out individually or collectively.

> *Public Service Reference, supra*, at page 367 per Dickson C.J., concurred in on this point by Wilson and McIntyre JJ.:
>
> ... if a legislature permits an individual to enjoy an activity which it forecloses to a collectivity, it may properly be inferred that the legislature intended to prohibit the collective activity because of its collective or associational aspect. Conversely, one may infer from a legislative proscription which applies equally to individuals and groups that the purpose of the legislation was a *bona fide* prohibition of a particular activity because of detrimental qualities inhering in the activity (e.g., criminal conduct) and not merely because of the fact that the activity might sometimes be done in association.

63. To uphold the Court of Appeal ruling on s. 2(d) would set a dangerous and far-reaching precedent. As was observed in a legal commentary on the Court of Appeal's s. 2(d) decision:

> The potential implications of the decision are profound. An interpretation of the freedom of association that protects trade expands the role of the Charter in protecting commercial activity far beyond anything recognized by the courts to date. Such an interpretation will provide a sharp weapon for attack on a wide range of regulatory systems. Many municipal by-laws, professional governance regulations and securities regulations spring immediately to mind as potential targets.
>
> Shores, "Walking Onto an Unfamiliar Playing Field: Expanding the Freedom of Association to Cover Trade", (1996) 6 *Reid's Administrative Law* 1

D. Mobility Rights

64. After reviewing the cases, the Court of Appeal concluded that the impugned regulatory provisions infringe the s. 6(2)(b) *Charter* right of a citizen or permanent resident to pursue the gaining of a livelihood in any province. The primary reason given was that "a person who produces eggs in the Northwest Territories (in contrast to

those who produce eggs in the 10 provinces) ... can never under the current scheme obtain a quota to market eggs extra-territorially". Madame Justice Hunt went on to decide, in her words, "whether the breach can be saved under s. 6(3)(a) as "a law of general application" that discriminates on a basis primarily other than province of present or previous residence". The Court of Appeal summarily answered in the negative the question so posed, ruling that the "effect of the legislation obviously discriminates on the basis of residence, even though it may not on its face appear to do so".

Reasons for Judgment, Appeal Case Vol. VI, Tab 40, page 1429

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65. These findings, it is submitted, fail to place the regulatory scheme in its proper context, are at variance with the language and purpose of the s. 6 mobility guarantees and run counter to the decided cases on s. 6 by this and other Courts.

66. It is important at the outset to address the central purpose of s. 6. Speaking for the Majority in *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591, Mr. Justice La Forest traced the roots of s. 6 to the provision developed at the time of Confederation to help secure a national economic union, s. 121 of the *Constitution Act, 1867*. In reference to s. 121, he specifically mentioned *Attorney General for Manitoba v. Manitoba Egg and*
20 *Poultry Association*, [1971] S.C.R. 689, a case that, as noted earlier, arose during the "chicken and egg wars" predating the current scheme as upheld in the *Egg Reference*.

67. The interconnections between mobility rights of individuals under s. 6 and of goods under s. 121 calls for consideration of how in the *Egg Reference* the full Court construed the same scheme that is now under challenge. The Court of Appeal, however, virtually ignored the *Egg Reference*, characterizing it as providing 'little more than useful backdrop".

Reasons for Judgment, Appeal Case Vol. VI, Tab 40, page 1401

68. The complaint of the challengers in the *Egg Reference* was substantially similar to that in the present case. According to the factum of the Appellants in the *Egg Reference*, at page 1267:

> The statute here, by authorizing the Canadian Egg Marketing Agency to limit and control *inter alia* which egg producers may market interprovincially, the number of eggs they may market and the price at which they may sell, effectively prevents the establishment of a single economic unit in Canada with absolute freedom of trade between its constituent parts, which was one of the main purposes of confederation and which is guaranteed by s. 121 of the Constitution. [emphasis added]

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69. Speaking for the full Court on this issue, Chief Justice Laskin made three key findings that are all directly applicable to the present case. First, while assuming that s. 121 governs both federal and provincial legislation, he held that its application may differ as between the two orders of government since what might appear as an improper barrier under provincial law may not have that characteristic at all under a federal statute. The same can be said here.

70. Second, he stressed the need to recognize the integral connections between the orderly marketing restrictions on interprovincial trade and the broader objectives of the
20 comprehensive cooperative regulatory scheme for eggs, holding at page 1268 that:

> A federal regulatory statute which does not directly impose a customs charge but through a price fixing scheme, designed to stabilize the marketing of products in interprovincial trade, seeks through quotas, paying due regard to provincial production experience, to establish orderly marketing in such trade cannot, in my opinion, be in violation of s. 121.

71. Finally, after referring the broad interpretation of s. 121 as prohibiting "trade regulation that in its essence and purpose is related to a provincial boundary", he concluded as follows at page 1268:

> Accepting this view of s. 121, I find nothing in the marketing scheme here that, as a trade
30 regulation, is *in its essence and purpose* related to a provincial boundary. To hold otherwise would mean that a federal marketing statute, referable to interprovincial trade, could not validly take into account patterns of production in the various Provinces in attempting to establish an equitable basis for the flow of trade. [emphasis added]

72. The above findings, and the pragmatic, context-sensitive approach they reflect, are consistent with other cases in which regulatory schemes that allot interprovincial

quota or licences on the basis of historical production patterns have been upheld under s. 6(3)(a) of the *Charter*. One such case is *MacKinnon v. Canada (Fisheries and Oceans)* (1987), 1 F.C. 490 (T.D.) upholding a sector management plan limiting interprovincial fishing licences based on historic fishing patterns. Another is *Re Groupe des Éleveurs and the Chicken Marketing Agency* (1984), 14 D.L.R. (4th) 151, 180 (F.C.T.D.) upholding an interprovincial chicken quota scheme substantially similar to the scheme for eggs at issue. In both cases, the Court stressed that the quotas licences were issued without any particular reference to province of residence. Contrary to the Court of Appeal, the reasoning in these cases is directly on point.

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73. In *Black, supra*, at pages 615 - 616, Mr. Justice La Forest referred with approval to an earlier case, *Malartic Hygrade Gold Mines Ltd. v. The Queen in Right of Quebec* (1982) 142 D.L.R. (3d) 512, 521, which held that s. 6(2)(b) is directed at "preventing provincial prohibitions on the basis of extra-provinciality, i.e., making province of residence a criterion of exclusion" [emphasis added]. Mr. Justice La Forest went on, at pages 617-618, to buttress this point, indicating that s. 6(2)(b) guarantees "more specifically, the right to pursue the livelihood of choice to the extent and subject to the same conditions as residents" [emphasis added] and further that "denying non-residents access to some fields cannot be condoned". It should not be forgotten that the
20 Respondents have established without impediment egg production facilities in the Northwest Territories and have been able to freely market in local trade.

74. The Court of Appeal fundamentally erred when it rejected as "entirely too narrow" the Agency's contention that the gravamen of s. 6(2)(b) is making province of residence a criterion of exclusion, and in holding that *Black* "suggests quite the opposite". The implicit position that the right to gain a livelihood in a province under s. 6(2)(b) should somehow be divorced from the issue of whether province of residence has been made a criterion of exclusion is tantamount, it is submitted, to entrenching a

free standing right to work; a proposition unanimously rejected by this Court in *Skapinker v. Law Society of Upper Canada*, [1984] 1 S.C.R. 357, 378-83.

75. Furthermore, careful consideration must be given to the language of the mobility rights guarantee in s. 6. Just as the concept of "discrimination" has been held in such cases as *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, to operate as an internal qualifier of the equality rights in s. 15(1), so it is with s. 6(2)(b) and s. 6(3)(a). The general right in s. 6(2)(b) to "pursue the gaining of a livelihood in any province" is expressly made subject in s. 6(3)(a) to "any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence". Indeed, the strength of s. 6(3)(a) as a qualifier of the mobility guarantees in s. 6(2)(a) is even greater than the role of discrimination as a qualifier of s. 15(1) equality rights, particularly by virtue of the inclusion of the word "primarily" in s. 6(3)(a).

76. This point was misunderstood by the Court of Appeal, which treated s. 6(3)(a) as a "saving" clause analogous to s. 1, not as an internal qualifier of the right in question. The Court of Appeal even misstated the language of s. 6(3)(a), suggesting it only applies to a law of general application "that discriminates on a basis other than 'province of present or previous residence'". By misconstruing s. 6(3)(a), the Court of Appeal rendered the qualifying scope of that provision almost meaningless.

77. A related problem stems from the contradiction between the Court of Appeal's application of the "discrimination" concept under s. 15(1) as compared to s. 6(3)(a). For the reasons stated above, the language of s. 6 and s. 15 suggests that "discrimination" should have, if anything, a more qualified meaning under s. 6 than under s. 15. The ruling by the Court of Appeal suggests, in sharp contrast, that the meaning of discrimination in s. 6 is completely open-ended.

Reasons for Judgment, Appeal Case Vol. VI, Tab 40, page 1432-1433; *R. v. Turpin*, [1989] 1 S.C.R. 1296; *R. v. S.*, [1990] 2 S.C.R. 254; *Haig et al v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995

78. It is submitted that the discrimination proviso in s. 6(3)(a), properly construed after taking into account how analogous challenges have been regarded in *Turpin, Haig and R. v. S supra,* necessarily leads to the conclusion that the provisions at issue are consistent with s. 6.

D. Section One

79. For the foregoing reasons, the challenged regulatory provisions do not infringe ss. 2(d) and 6 of the *Charter* and thus resort to s. 1 is unnecessary. If, however, the Court decides to consider s. 1, the Agency's position is that the application in the Northwest Territories of the federal egg quota and licensing systems as essential components of the integrated, cooperative federal-provincial regulatory scheme for eggs, is justified under s. 1. It is further submitted that the Court of Appeal applied s. 1 in a rigid and mechanistic fashion, contrary to the flexible, pragmatic and contextual approach mandated by this Honourable Court's jurisprudence beginning with *R. v. Oakes,* [1986] 1 S.C.R. 103.

D.1 Pressing and Substantial Objective

80. To refer to the "limit" in question as "the exclusion of the Northwest Territories" from the quota system (Reasons for Judgment, Appeal Case Vol. VI, Tab 40, page 1434) is a mischaracterization. The essence of the limit is the dovetailing relationship of federal quota with provincial quota in the context of the integrated supply management scheme for eggs and the obligation as part of that scheme to hold federal quota in order to market eggs in the regulated market in interprovincial trade. To date, no allocation of federal quota has yet been made to the Northwest Territories, not due to any exclusionary design of the scheme, but because that jurisdiction does not have a Territorial quota system regulating intraprovincial egg marketings and never produced eggs in the historical period before the integrated, cooperative scheme was agreed to by the federal and provincial signatories.

81. There can be no serious dispute that, as required under the first part of the *Oakes* test, the coordinated objectives of the supply control measures responsible for the limit are of pressing and substantial importance. Those objectives are, essentially, to bring stability to the marketplace for eggs, to enable efficient egg producers to recover their cost of production, and to ensure effective coordination on a national basis in an area of divided jurisdiction. The Trial Judge accepted that the objectives met the first part of the *Oakes* test, while the Court of Appeal recognized that the "overall purpose of the scheme (that is, to bring order to a previously chaotic market) is, beyond question, laudable and legitimate."

10 Reasons for Judgment, Appeal Case Vol. VI, Tab 38, pages 1372 - 1376 and Tab 40, pages 1433-34

82. The necessity of federal-provincial cooperation and integration was expressly recognized by the Supreme Court of Canada in the *Egg Reference, supra*. After referring to cases pointing to the problems with past unilateral regulatory efforts in agriculture at a federal and at a provincial level, Mr. Justice Pigeon stated, at pages 1296 - 1297:

> The consequence is that any workable control scheme has to be effective with respect to all eggs irrespective of intended disposition. In *Reference re The Farm Marketing Act of Ontario*, Rand J. said at p. 214: "...trade regulation by a Province or the Dominion, acting
20 alone, related to local or external trade respectively, before the segregation of products or manufacturers of each class is reached, is impracticable, with the only effective means open, apart from conditional regulation, being that of co-operative action."
> ...
> In my view this is perfectly legitimate, otherwise it would mean that our Constitution makes it impossible by federal-provincial cooperative action to arrive at any practical scheme for the orderly and efficient production and marketing of a commodity which all governments concerned agree requires regulation in both intraprovincial and extraprovincial trade ... I do not overlook the admonition in the *Natural Products Marketing Act* case, at p. 389, that the legislation has to be carefully framed but, when after 40 years a sincere
30 cooperative effort has been accomplished, it would really be unfortunate if this was all brought to nought.
> ...
> I fail to see what objection there can be to overall quotas established by a board thus vested with dual authority, unless it is said that our constitution precludes any businesslike marketing of products in both local and extraprovincial trade except under a federal assumption of power, sometimes which I think is, directly contrary to the basic principle of the *B.N.A. Act*. (emphasis added)

83. It should be emphasized that Mr. Justice Pigeon was not simply referring to the supply management scheme generally, but to the necessary dovetailing, coordinated nature of federal and provincial quota, and the comprehensive character of the quota controls; the very features of the scheme that the Respondents are now attacking.

D.2 Rational Connection

84. The integrated supply control measures under challenge also satisfy the proportionality requirement under s. 1 as articulated in the line of cases since *Oakes, supra*. Beginning with the need to show that the measures are rationally connected to the pressing and substantial objectives, a quota system by its very nature involves allocative choices. The regulatory technique that lies at the heart of these control measures, i.e., the use of historical production/marketing patterns to establish initial dovetailing federal and provincial quota allocations, while providing the flexibility to make overbase allocations, is a rational means of achieving the objectives of this scheme of cooperative federalism.

85. In the *Egg Reference, supra*, at page 1219, Chief Justice Laskin clearly recognized the rationality of these dovetailing federal-provincial quota controls in his description of them as part of "this integrated scheme ... designed to introduce stability into the egg market... by assuring all producers a producer price for their eggs within their respective quotas" regardless of their disposition.

D.3 Minimal Impairment and Effects

86. The "minimal impairment" and the "justification of the effects" components of the proportionality test first enunciated in *Oakes, supra* are closely related and thus will be discussed together. In her discussion of s. 1, Madame Justice Hunt made no mention of the considerable body of jurisprudence since *Oakes* that has markedly relaxed the stringency of the proportionality test, particularly in contexts in which the government is obliged to mediate the claims of competing groups and interests. The

trend began with *R. v. Edward Books*, [1986] 2 S.C.R. 713, in which the Supreme Court of Canada upheld under s. 1 provincial Sunday closing legislation. A flexible, pragmatic approach was also evident in *Irwin Toy v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 in which the Court sustained the constitutionality of a complete prohibition on all advertising directed at children. Chief Justice Dickson articulated at pages 993-994 why flexibility and pragmatism were required in such situations and then reformulated the minimal impairment test by introducing a more accommodating "reasonable basis" concept:

> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.
>
> ...
>
> In the instant case, the Court is called upon to assess competing social science evidence respecting the appropriate means for addressing the problem of children's advertising. The question is whether the government has a reasonable basis, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government's pressing and substantial objective. (emphasis added)

87. The Majority Judgment of La Forest J. (Dickson C.J.C. and Gonthier J. concurring) in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 provides additional guidance on the application of this modified minimum impairment requirement in the context of "broadly based social measures, such as those at issue in the present case." Mr. Justice La Forest stated at page 285 as follows:

> In assessing proportionality and particularly the issue whether there has been a minimal impairment to a constitutionally guaranteed right, it must be remembered that we are concerned here with measures that attempt to strike a balance between the claims of legitimate but competing social values. In the case of broadly based social measures like these, where government seeks to mediate between competing groups, it is by no means easy to determine with precision where the balance is to be struck.

88. After referring to *Irwin Toy*, he stated at page 285:

> The approach taken to these cases have been marked by considerable flexibility having regard to the difficulty of the choices, their impact on different sectors of society and the inherent advantages in a democratic society of the legislature in assessing these matters.

89. Other cases supporting this approach include *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483, at pages 526-27; *R. v. Butler*, [1992] 1 S.C.R. 452, at pages 504-5 and *R. v. Gladstone*, [1996] 2 S.C.R. 723, at page 767.

90. In addition to not addressing these important jurisprudential developments, the Court of Appeal applied a rigid "least drastic means" approach to the minimal impairment requirement that the above cases have emphatically rejected. According to the Court of Appeal, the provisions under challenge fail under s. 1 because:

> There is no evidence to suggest that the only way to achieve orderly marketing in eggs in Canada is through the use of a "historical production" system ...
>
> Reasons for Judgment, Appeal Case Vol. VI, Tab 40, pages 1437 - 38

91. With respect, Madame Justice Hunt asked herself the wrong question. She failed to consider that the historically-based method of initial quota allocations flows from s. 23, a constitutionally upheld provision that provides flexibility for the granting of additional quota. She also failed to address the necessity of federal-provincial cooperation in order to have an orderly marketing system.

92. As held in such cases as *Edward Books*, *Irwin Toy* and *McKinney*, *supra*, it is important to be mindful of the difficult choices that were faced by Parliament and by the signatories to the Federal Provincial Agreement in mandating and authorizing the scheme under challenge.

> Report of the Royal Commission Appointed to Inquire into the Egg Industry in Ontario, Appeal case Vol. V, Tab 17, pages 964-1078; Hansard Excerpts, Appeal Case Vol. IV, Tab 17, pages 860, 904; Proceedings of the Agriculture Committee, Appeal Case Vol. IV, Tab 17, pages 878, 880

93. In approaching the task of assessing the impugned provisions in relation to the proportionality requirement under s. 1, the Agency submits that it is helpful to address the questions set out below.

(a) What is the degree of infringement of the right or freedom in question? In the present case, if there is any infringement, which is not conceded but denied, it is minimal. Specifically:

- The Respondents are free to carry on the business of marketing eggs within the Northwest Territories, where there are no intraprovincial quota controls. It is only to the extent that the Respondents seek to expand beyond the unregulated local market into the regulated interprovincial market that, as non-quota holders, they face restrictions.

10 - The absence of a quota allocation to the Northwest Territories cannot be divorced, legally or factually, from the failure of the GNWT to establish an intraprovincial quota system. To not give proper weight to this reality is to deny the entire purpose and structure of the integrated, cooperative federal-provincial scheme for eggs.

- Furthermore, contrary to what was suggested by the Court of Appeal (Appeal Case Vol. VI, Tab 40, page 1437), it is not enough to simply proclaim the GNWT's *Agricultural Products Marketing Act* in force. Detailed regulations with respect to quota, levies, licensing and pricing still have to be put in place by the Territorial Government. There is no evidence before the Court that these

20 regulations have been drafted, let alone enacted.

- More generally, as recognized in such cases as *Haig*, *Turpin* and *R v. S*, *supra*, great caution is warranted where the *Charter* is used to challenge the differential application of the law through federal-provincial cooperation. The *Charter* is not intended to alter the division of powers.

- In addition, if there is any infringement of *Charter* rights, which is denied, it is a temporary situation that is in the process of being addressed through the good faith federal-provincial negotiations that are actively in progress aimed at bringing the Northwest Territories into the Federal-Provincial Agreement.

- The Respondents are hardly members of a historically disadvantaged "minority group". It must be kept in mind that the principals of Pineview and Northern Poultry were beneficiaries of the very system they are now attacking.
- Given the overriding purpose of the *Charter* to protect individual rather than corporate rights, it is of great significance that the application in the Northwest Territories of the impugned provisions only directly affect two corporate egg producers, since there are no other egg producers and, specifically, no individual producers, in that jurisdiction at this time.

Reasons for Judgment, Appeal Case Vol. VI, Tab 38, pages 1337-1339, and Tab 40, page 1436

- The Courts below assume that the Government of the Northwest Territories will, when a Territorial quota system is in place there, allot the quota to the Respondents. This assumption runs contrary to the legislative sovereignty of the Territorial government in devising a quota system to meet the public interest objectives of NWT residents.

(b) Are there readily available alternatives that would not adversely impact on others dependent on the scheme in question?

- The *Egg Reference, supra* and the Royal Commission Report by Judge Ross (Appeal Case Vol. V, Tab 17, pages 964-1078) both indicate that a system of marketing regulation for a commodity such as eggs that is not coordinated through federal-provincial cooperation and dovetailing is simply not workable.
- Recognizing the practical constraints involved, the historically derived system of initial allocations coupled with the flexibility to make overbase allocations is reasonable.

Report of the Royal Commission Appointed to Inquire into the Egg Industry in Ontario, Appeal Case Vol. V, Tab 17, pages 964-1078

(c) Will it vindicate the values and purposes of the *Charter* to find that the impugned laws do not satisfy the proportionality test?

- To find against the impugned provisions would not vindicate any human rights and will do serious harm to the cooperative federal-provincial scheme for eggs. It would enable the Respondents and any other producers in an unregulated haven to enjoy the benefits of the scheme, particularly price stability and support, without sharing in any of the costs or disciplines of that scheme.
- Moreover, it makes a mockery of the *Charter* to impose what amounts to a constitutional duty of affirmative action owed to a jurisdiction and to corporate producers in that jurisdiction.

E. Remedy

94. The issue of the appropriate remedy is only engaged if there is an infringement of the *Charter* not saved by s. 1 which, for the reasons stated above, has not been established.

95. It is respectfully submitted that the remedy imposed by the courts below, namely, the mandating of untrammelled, uncontrolled and unplanned marketings of Northwest Territories produced eggs in interprovincial trade, is wholly inappropriate. The remedy is disproportionate to the limited nature of the *Charter* infringement, if there is any, and is destructive of the pressing and substantive legislative purposes of ensuring orderly marketing, fair pricing and effective national coordination.

96. The precedent that will be set if such a remedy is upheld will also compromise other supply management schemes that do not allot quota to the Northwest Territories and Yukon Territories.

Canadian Chicken Marketing Agency Proclamation, Authorities, Tab M; Canadian Turkey Marketing Agency Proclamation, Authorities, Tab N; Canadian Broiler Hatching Egg Marketing Agency Proclamation, Authorities, Tab O; Dairy Products Marketing Regulations, Authorities, Tab P.

97. In *Schachter v. Canada*, [1992] 2 S.C.R. 679 this Honourable Court: (a) focussed on the flexibility available in framing an appropriate *Charter* remedy; (b) insisted that an appropriate remedy depends upon various factors, including the context of the impugned legislation, the nature and extent of the violation and the legislative objective embodied in the impugned legislation; (c) established the analytical framework necessary to arrive at an appropriate remedy; and (d) set out the range of remedies available.

98. What is under attack is <u>not</u> that the marketing of eggs should take place without a quota system - yet this is the very effect of the remedy provided by the Courts below. The so-called "constitutional exemption" is tantamount to an entrenchment of "unregulated free enterprise". The British Columbia Court of Appeal has strongly rejected a similar attempt in a *Charter* challenge in the regulation of the milk industry.

> Milk Board v. Clearview Dairy Farms Inc. (1987) 69 B.C.L.R 220, affd. (1987), 12 B.C.L.R. (2d) 116 (C.A.), leave to appeal to S.C.C. refused (1987) 81 N.R. 240n (S.C.C.)

99. Applying the reasoning in *Schachter, supra*, the Appellant respectfully submits that the appropriate remedy in the circumstances, if a *Charter* breach is found, is not to impose a constitutional exemption but to make a limited declaration of invalidity in respect of the unavailability of federal quota and a suspension of that declaration of invalidity. This remedy is the most appropriate and least intrusive, particularly taking into account that: the Respondents did not ask for a constitutional exemption; the government of the Northwest Territories endorses the legislative objectives of the regulatory system; and negotiations for inclusion are ongoing.

> Statement by Counsel, Appeal Case Vol. I, Tab 14, page 186

100. A temporary suspension permits the regulatory framework which is built upon federal-provincial cooperation to remain intact, ensures that injury to regulated producers is minimized and allows orderly arrangements for quota allocation to the Northwest Territories to be put into place.

PART IV - ORDER REQUESTED

For all of the above reasons, the Agency respectfully requests that the appeal be allowed and the Judgment set aside, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa, this 17th day of February, 1997.

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Solicitors to the Appellant

20 NOTICE TO THE RESPONDENT: Pursuant to subsection 44(1) of the *Rules of the Supreme Court of Canada*, this appeal will be inscribed by the Registrar for hearing after the respondent's factum has been filed or on the expiration of the time period set out in paragraph 38(3(b) of the said Rules, as the case may be.

PART V - TABLE OF AUTHORITIES

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