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Interviewer

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PART I - FACTS

1. The Intervener, the Attorney General of Alberta, accepts the facts as outlined in paragraphs 1 to 37 of the Appellant's factum, with the following additions.

2. There are no residency requirements for the obtaining of quota in Alberta (see *Egg Production and Marketing Regulation*, AR 28/93 s. 10(13)) [TAB C Intervener's Book of Authorities]. Therefore there are also no residency requirements for the obtaining of a quota under section 5 (2) of the *Canadian Egg Marketing Agency Quota Regulations* SOR/86-8 as amended [TAB G Joint Book of Authorities]. There also are no residency requirements for the obtaining of a marketing licence in relation to sections 4(1), 7(1)d and 7(1)(e) of the *Canadian Egg Licencing Regulations, 1987, SOR/87-242* as amended [TAB H Joint Book of Authorities].

3. From an analysis of the chart produced at paragraph 17 of the Appellant's factum, it is apparent that Alberta's current allocation of eggs is 425,223 dozens of eggs less than the Base Allocation given in 1972. It is in that context that the fact that all the eggs produced by Pineview Poultry Products Ltd. went to an Alberta Grading Station, Villetard Eggs, to be sold throughout Canada, should be considered.

Villetard Cross-Examination, [Case on Appeal, Vol. 1, TAB 14, pages 94-95]

5 **PART II - POINTS IN ISSUE**

4. The Attorney General of Alberta does not make any representations with respect to the issue of whether or not the impugned legislation violates either section 2(d) or 6 of the *Charter* and, if so, is saved under section 1 of the *Charter* but restricts its submissions to the issue of what remedy would be appropriate if the Court answered the first Constitutional Question in the affirmative and the second Constitutional Question in the negative.

PART III - ARGUMENT

E. Remedy

5. On the assumption that this Court finds that the effect of the impugned legislation violates the *Charter* and is not saved by s. 1, it is submitted that the remedy in this case should be carefully crafted to fulfill the purpose of providing an opportunity for persons producing eggs in the Northwest Territories to choose whether or not to join the supply-management system without rendering the system unworkable. As the impugned legislation makes no reference to location of residence but only to location of production, when this factum refers to Alberta producer or Alberta production, or Northwest Territories producer or Northwest Territories production, it cannot be assumed by that reference to imply anything about the residence of that producer or the person who owns the production facility.

6. The Attorney General of Alberta agrees with the submissions of the Appellant at paragraph 95 of their factum that the remedy granted by the Courts below is not appropriate.

7. The constitutional exemption to all present and future producers of eggs in the Northwest Territories could, it is submitted, be characterized as an attempt by the Court of Appeal to “level the playing field” by allowing eggs produced in the Northwest Territories into the system. That leveling did not occur, however, as eggs produced in the signatory Provinces are subject to the constraints and costs implicit in the supply management system whereas the producers based in the Northwest Territories are not [see Acts and Regulations, TABs A-C of the Intervener’s Book of Authorities]. Therefore, those persons whose production facilities are in Alberta are at a significant disadvantage compared to persons who produce, without being subject to any regulations, in the Northwest Territories.

8. This “constitutional exemption” advantage that the eggs produced in the Northwest Territories now have over eggs produced in Alberta is even more pronounced if *The KPMG Management Consulting Final Report on the Costs and Benefits of N.W.T. Participation in Supply*

5 *Management Systems for Egg, Chicken and Turkey* [Vol. 5, **TAB 18**, at page 1153 Case on
Appeal] is taken into account. That report states that the eggs produced in the N.W.T. have a
significant cost advantage over those produced in Alberta, even assuming a potentially higher
territorial levy and without taking into account the capital expenditure required for an Alberta
producer to expand existing levels of quota or to obtain quota for the first time. That study also
10 assumed that the Northwest Territories producer was part of a regulated system, with the added
management costs of complying with that system.

9. It is submitted, therefore, that this constitutional exemption, if upheld, would create a
regulation free haven from which it appears that a well managed egg production facility(s) could
15 dominate the Canadian, especially Western Canadian, egg market.

10. This fight for market share was, it is submitted, the reason for the "chicken and egg wars"
and the attempt to avoid a repetition of that situation resulted in the supply management scheme
now before the Court.

20 11. It is submitted that if this "constitutional exemption" were to remain in place until a new
arrangement could be worked out to bring the Northwest Territories into the supply management
system it does not seem that it would be to the advantage of Northwest Territories producers to
join the system and thus give up the exemption. The probability of these long negotiations being
25 successfully concluded in these circumstances is, it is submitted, not high.

12. As Lamer, C. J. stated in *Schachter v. Canada*, [1992] 2 S.C.R. 679 [**TAB 41**, Joint Book
of Authorities] (hereinafter referred to as *Schachter*) at page 717 in relation to the appropriate
remedy analysis:

30 Once s. 52 is engaged, three questions must be answered. First,
what is the extent of the inconsistency? Second, can that
inconsistency be dealt with alone, by way of severance or reading
in or are other parts of the legislation inextricably linked to it?
35 Third, should the declaration of invalidity be temporarily
suspended?

5 13. It is submitted that in this case especially it is important to define the extent of the inconsistency as the remedy would be aimed at dealing with one small element of a very complex plan. The area of the impugned legislation that prevents the producer in the Northwest Territories from gaining access to Federal quota is, it is submitted, the Canadian Egg Marketing Agency Proclamation [TAB D, Joint Book of Authorities] specifically *Part I, Schedule*, section 1, and *Part II, The Marketing Plan*, sections 1, 3 and 4, subsections (1) and (4). The Court of Appeal of the Northwest Territories did not appear to wish to change the rules of the supply management system other than those rules which prevented the entry of the Territories, and the Court also acknowledged the problems of assigning a quota to the Territories [pages 1438-9, Case on Appeal Vol. 6]. The Respondents also state in their factum at paragraph 63;

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However, Richardson and Pineview do not complain about the fact that the egg industry is a regulated industry. That is, they do not complain about the requirement for federal quota. The complaint in that it is impossible for them to obtain a federal quota.

Thus, if only the specific sections which are found to have the effect of excluding eggs produced in the Northwest Territories from the supply management system are subject to the ruling of this Court, the rules relating to the operation of the plan in general will not be affected. The question of whether or not producers whose facilities are in the Northwest Territories agree to join the plan will then follow the rules set out in the *Agricultural Products Marketing Act*, Chapter 115 (Supp.), S.N.W.T. 1991, c.35 [TAB L, Joint Book of Authorities], should that *Act* be proclaimed.

14. A more appropriate remedy than the "constitutional exemption" previously discussed is suggested in *Schachter* (supra). In that case Lamer C. J. discusses some of the options available to the Court once legislation has been found to be inconsistent with the values set out in the *Charter*, under heading B on page 705,

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B. Deciding whether Severance or Reading in is Appropriate

10 Having determined what the extent of the inconsistency in, the next question is whether that inconsistency may be dealt with by way of severance, or in some cases reading in, or whether an impugned provision must be struck down in its entirety.

Referring to reading in, the Chief Justice stated later in the same page, under the heading "(i) Remedial Precision";

15 In some cases, the question of how the statute ought to be extended in order to comply with the Constitution cannot be answered with a sufficient degree of precision on the basis of constitutional analysis. In such a case, it is the legislature's role to fill in the gaps, not the courts.
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In this case it is submitted that the legislative intent to maintain control over the interprovincial egg market is clear. It is further submitted that the statute could be extended in such a way as to allow the Northwest Territories to obtain a quota without preventing the legislative control of that market.
25

15. Reading in is appropriate in the circumstances of this case because these circumstances satisfy the criteria set out by Lamer, C. J. at pp. 718-719 in *Schachter* (supra), summarized as (i) the legislative objective is obvious, (ii) the choice of means is unequivocal and (iii) the change would not involve an intrusion into legislative budgetary decisions.
30

16. The Attorney General of Alberta submits that the advisability of the remedy proposed by the Appellant cannot be determined until this Court states which aspect of the impugned legislation violates the *Charter*. Of the criteria listed in *Schachter* (supra) relating to the option of temporarily suspending a declaration of invalidity, the only one which seems to apply to any extent is, from page 719:
35

5 C. the legislation was deemed unconstitutional because of under
inclusiveness rather than overbreadth, and therefore striking down
the legislation would result in the deprivation of benefits from
deserving persons without thereby benefiting the individual whose
rights have been violated.

10 17. In *Schachter* (supra) the rationale of the suspension of invalidity was to allow the
government time to determine whether to cancel or extend the benefits in circumstances where it
was not clear what the government would choose to do, combined with the possibility that the
decision could have a legislative budgetary impact. Here it is submitted that it is clear that the
15 legislative intent, and indeed the intent of the parties to the action, is that the "benefit" of having
a federal quota should not be canceled and it appears that there will be no legislative budgetary
impact. Therefore it is submitted that Lamer C. J.'s statement on page 716 of *Schachter* (supra)
is applicable:

20 A delayed declaration is a serious matter from the point of view of
the enforcement of the *Charter*. A delayed declaration allows a state
of affairs which has been found to violate standards embodied in the
Charter to persist for a time despite the violation. There may be
good pragmatic reasons to allow this in particular cases. However,
25 reading in is much preferable where it is appropriate, since it
immediately reconciles the legislation in question with the
requirements of the *Charter*.

Here, it is submitted, there are no good pragmatic reasons to allow this state of affairs, which it
30 is assumed has been found to violate standards embodied in the *Charter*, to persist, and therefore
it is submitted that reading in, although rare, is, in these circumstances, the more appropriate
remedy.

18. If this Court, after having found that the impugned legislation or its effects violates the
35 *Charter* and is not saved by section 1, orders a remedy that allows the allocation of federal quota
to the Northwest Territories, it becomes important to determine the parameters under which that

5 question is to be dealt with. This element is emphasized by the record which shows that many years of negotiation have failed to resolve that issue.

19. The level of quota that should be allocated to the Northwest Territories is one which, it is submitted, should be left to the parties to negotiate, taking into account the size of the local
10 market and the other factors listed in s. 4 of the *Egg Marketing Proclamation* (supra) . Because the negotiation process has not been fruitful to this point, it is submitted that in order to facilitate these negotiations it would be appropriate in these circumstances to apply the method put forward in *Mark Donald Benner v. The Secretary of State of Canada and The Registrar of Citizenship and The Federal Superannuates National Association* (Supreme Court of Canada) (unreported)
15 February 27, 1997, No. 23811 [TAB D, Intervener's Book of Authorities] (hereinafter referred to as *Benner*), where Iacobucci J., speaking for the Court, stated at page 47, paragraph 105:

20 However, because the parties were jointly unable to specify all the legislative provisions which could be affected by this constitutional challenge, the Court will remain seized of the case in the hope that the parties will now use their best efforts to agree quickly on the precise terms of the order. Following their agreement, the order will be incorporated into these reasons. Should the parties remain
25 unable to agree, future submissions may be required.

20. If this Court determines that the only practical way to remedy the *Charter* violations that it is assumed to have found is to direct that a particular quota is to be allotted to the Northwest Territories, or to set a range within which that quota should be established, the Attorney General of Alberta submits that consideration be given to the fact that the Alberta egg market is the market
30 most likely affected by eggs produced in the Northwest Territories. In particular it is submitted that the allocation which this Court would set for the Northwest Territories should not be significantly different, on a per capita basis, than the quota allocated to Alberta.

PART IV - NATURE OF THE ORDER REQUESTED

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21. On the assumption that this Court finds that the legislation does violate either s. 2(d) or
s. 6 of the *Charter* and is not saved by section 1 it is submitted that the Court restrict such finding
10 to s. 4, subsections (1) and (4) of the *Canadian Egg Marketing Agency Proclamation* (supra), or
such other sections that this Court finds relate directly to the availability of federal quota to eggs
produced in the Northwest Territories, and read into those sections only that which is necessary
to allow for the inclusion of the Northwest Territories and/or any other area of Canada that does
not presently have a quota.

15
22. In the alternative, if this Court should find that the effect of the legislation does violate
either s. 2(d) or s. 6 of the *Charter* and is not saved by section 1, and that the only practical
method of bringing the Northwest Territories into the supply management system is to direct a
level, or range, of quota, it is submitted that any such quota be consistent with the per capita level
20 of quota allocated to Alberta, the Province most directly affected.

23. That if this Court, having found that all or part of the impugned legislation violates the
Charter, finds it more appropriate to accede to the Remedy proposed by the Appellant in
25 paragraph 99 of their materials it is submitted that it will be important to address the concerns of
the Respondent at paragraph 137 of their materials in relation to the affect on their business during
the period of the suspension of the declaration of invalidity.

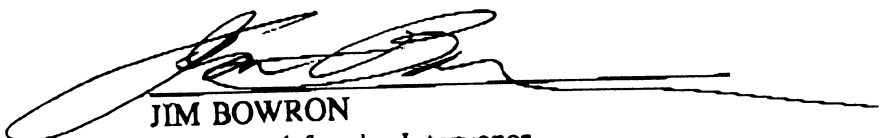
24. If the Court should direct, in response to that concern, that eggs produced in the Northwest
30 Territories may be marketed as if they were marketed pursuant to a federal quota, it is submitted
that the producers of those eggs should not be exempt from the rules and regulations, including
levies, that govern those who produce eggs in the signatory Provinces This restriction of the type
of "constitutional exemption" would cause less prejudice to producers in Alberta than the

5 exemption granted by the Northwest Territories Court of Appeal and should be in effect only until
such time as the legislative defects which resulted in the constitutional violation have been
corrected and the legislation passed but not Proclaimed by the Northwest Territories, or legislation
of similar type, is Proclaimed there.

10 25. If the Court does choose to suspend a declaration of invalidity, as requested by the
Appellant, it is submitted that the supervisory role of the Court referred to in *Brenner* (supra)
earlier in this factum be employed in those circumstances so as to address the concerns of the
Respondent as set out in paragraphs 138-140 of their factum,

15 **ALL OF WHICH IT IS RESPECTFULLY SUBMITTED.**

DATED this 15th day of May, 1997.

20 
JIM BOWRON
of Counsel for the Intervener
the Attorney General of Alberta

Service hereof admitted this
16 day of May 1997
Order Motion & Hearing
Ottawa Agents for Appellant
Counsel

Service hereof admitted this
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Ottawa Agents for
R. B. B. & Co.

Lang Michener
Service hereof admitted this
16th day of May 1997
Anne Elber for Eugene Michener
Ottawa Agents for Interveners
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Service hereof admitted this
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Ottawa Agents for

Reu copie
L. J. J.
97-05-16
Quebec Justice
Quebec Justice

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16 day of May 1997
Howe, Strathy & Henderson
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