

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

INTERVENOR

AND BETWEEN:

CANADIAN EGG MARKETING AGENCY

APPELLANT
(PLAINTIFF)

- and -

FRANK RICHARDSON operating as NORTHERN POULTRY

RESPONDENT
(DEFENDANT)

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

INTERVENOR

FACTUM OF THE INTERVENOR THE ATTORNEY GENERAL
OF BRITISH COLUMBIA

MINISTRY OF ATTORNEY GENERAL
LEGAL SERVICES BRANCH
6TH FLOOR, 1001 DOUGLAS STREET
VICTORIA, B.C. V8V 1X4

TELEPHONE: (250) 356-8875
FAX: (250) 356-9154

GEORGE H. COPLEY, Q.C.

COUNSEL FOR THE INTERVENOR
THE ATTORNEY GENERAL OF BRITISH
BRITISH COLUMBIA

BURKE-ROBERTSON
BARRISTERS AND SOLICITORS
70 GLOUCESTER
OTTAWA, ONTARIO K2P 0A2

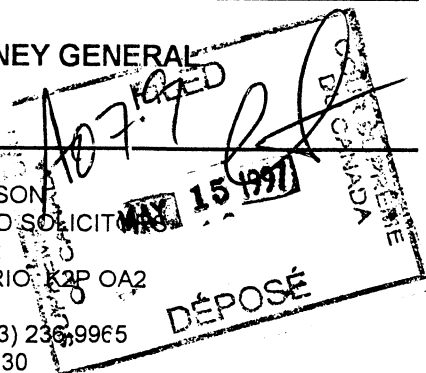
TELEPHONE: (613) 236-9965
FAX: (613) 235-4430

V. JENNIFER MACKINNON

AGENTS FOR THE INTERVENOR THE ATTORNEY
GENERAL OF BRITISH COLUMBIA

(see inside for counsel)

SERVED COPY
SIGNIFICATION



OSLER, HOSKIN & HARCOURT
BARRISTERS AND SOLICITORS
SUITE 1500, 50 O'CONNOR STREET
OTTAWA, ONTARIO K1P 6L2

TELEPHONE: (613) 235-7232
FAX: (613) 235-2867

**FRANCOIS LEMIEUX/DAVID WILSON
COUNSEL FOR THE APPELLANT**

MCLENNAN ROSS
BARRISTERS AND SOLICITORS
600 WEST CHAMBERS
12220 STONY PLAIN ROAD
EDMONTON, ALBERTA T5J 3L2

TELEPHONE: (403) 482-9200
FAX: (403) 482-9100

**GRAHAM MCLENNAN/KATHARINE HURLBURT
COUNSEL FOR THE RESPONDENTS**

DEPARTMENT OF JUSTICE
GOVERNMENT OF THE NORTHWEST
TERRITORIES
YELLOWKNIFE, NWT X1A 2L9

TELEPHONE: (403) 920-8074
FAX: (403) 873-0173

**JAMES G. MCCONNELL
COUNSEL FOR THE INTERVENOR
THE GOVERNMENT OF THE
NORTHWEST TERRITORIES**

GREGORY MCDADE, Q.C./DAVID R. BOYD
SUITE 214, 131 WATER STREET
VANCOUVER, B.C. V6B 1H6

TELEPHONE: (604) 685-5618
FAX: (604) 685-7813

**GREGORY MCDADE, Q.C.
DAVID R. BOYD
COUNSEL FOR THE INTERVENORS
COUNCIL OF CANADIANS AND SIERRA
LEGAL DEFENCE FUND SOCIETY**

GEORGE THOMSON
DEPUTY ATTORNEY GENERAL OF CANADA
DEPARTMENT OF JUSTICE
239 WELLINGTON STREET
OTTAWA, ONTARIO K1A 0H8

TELEPHONE: (613) 957-4871
FAX: (613) 954-1920

**EDWARD SOJONKY
SENIOR GENERAL COUNSEL FOR THE
DEPUTY ATTORNEY GENERAL OF CANADA**

GOWLING, STRATHY & HENDERSON
BARRISTERS AND SOLICITORS
SUITE 2600, 160 ELGIN STREET
OTTAWA, ONTARIO K10 1C3

TELEPHONE: (613) 232-1781
FAX: (613) 563-9869

**HENRY BROWN
AGENTS FOR THE RESPONDENTS**

LANG MICHENER
BARRISTERS AND SOLICITORS
SUITE 300 - 50 O'CONNOR STREET
OTTAWA, ONTARIO K1P 6L2

TELEPHONE: (613) 232-7171
FAX: (613) 231-3191

**EUGENE MEEHAN, Q.C.
AGENTS FOR THE INTERVENOR
THE GOVERNMENT OF THE NORTHWEST
TERRITORIES**

GOWLING, STRATHY & HENDERSON
BARRISTERS AND SOLICITORS
SUITE 2600, 160 ELGIN STREET
OTTAWA, ONTARIO K10 1C3

TELEPHONE: (613) 232-1781
FAX: (613) 563-9869

**HENRY BROWN
AGENTS FOR THE INTERVENORS
COUNCIL OF CANADIANS AND SIERRA
LEGAL DEFENCE FUND SOCIETY**

ATTORNEY GENERAL OF ALBERTA
DIRECTOR, CIVIL LAW DIVISION
DEPARTMENT OF JUSTICE OF ALBERTA
CONSTITUTIONAL LAW BRANCH
4TH FLOOR, 9833-109 STREET
EDMONTON, ALBERTA T5K 2E8

TELEPHONE: (403) 498-3323
FAX: (403) 425-0307

NOLAND D. STEED/JIM BOWRON
COUNSEL FOR THE INTERVENOR, THE
ATTORNEY GENERAL OF ALBERTA

BUREAU DES SUBSTITUTS DE PROCUREUR
GÉNÉRAL
BARRISTERS AND SOLICITORS
PALAIS DE JUSTICE
HULL, QUEBEC J8X 4C1

TELEPHONE: (819) 776-8111
FAX: (819) 772-3986

MARTIN LAMONTAGNE
AGENTS FOR THE ATTORNEY GENERAL
OF QUEBEC

MINISTRY OF ATTORNEY GENERAL OF
ONTARIO
720 BAY STREET
TORONTO, ONTARIO M5G 2K1

TELEPHONE: (416) 326-4453
FAX: (416) 326-4015

LORI STERLING
COUNSEL FOR THE ATTORNEY GENERAL
OF ONTARIO

GOWLING, STRATHY & HENDERSON
BARRISTERS AND SOLICITORS
SUITE 2600, 160 ELGIN STREET
OTTAWA, ONTARIO K1O 1C3

TELEPHONE: (613) 232-1781
FAX: (613) 563-9869

HENRY BROWN
AGENTS FOR THE INTERVENOR
THE ATTORNEY GENERAL OF ALBERTA

BURKE-ROBERTSON
BARRISTERS AND SOLICITORS
70 GLOUCESTER
OTTAWA, ONTARIO K2P OA2

TELEPHONE: (613) 236-9965
FAX: (613) 235-4430

ROBERT HOUSTON
AGENTS FOR THE INTERVENOR THE ATTORNEY
GENERAL OF ONTARIO

TABLE OF CONTENTS

	PAGE
INDEX	
PART 1	1
STATEMENT OF FACTS	1
PART II	2
POINTS IN ISSUE	2
PART III	3
ARGUMENT	3
A. Introduction - Interpretative Principles	3
B. The Impugned Regulatory Provisions do not infringe or deny rights guaranteed by Section 2(d) of the <i>Charter</i> - Freedom of Association	5
C. The Impugned Regulatory Provisions do not violate rights protected under Section 6) of the <i>Charter</i> - Mobility Rights	13
D. If the Impugned Regulatory Provisions violate either Section 2(d) or Section 6 of the <i>Charter</i>, they are reasonable limits demonstrably justified in a free and democratic society under Section 1 of the <i>Charter</i>	18
PART IV	19
NATURE OF ORDER SOUGHT	19
PART V	20
LIST OF AUTHORITIES	20

PART I
STATEMENT OF FACTS

1. 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, 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*?

2. If so, can this infringement be justified under s. 1 of the *Charter*?

2. By Notice of Intervention filed February 21, 1997, the Attorney General of British Columbia has intervened to present argument on the Constitutional Questions.

3. For the purpose of presenting argument on the Constitutional Questions, the Intervenor adopts the statement of facts set out in the Factum of the Appellant, Canadian Egg Marketing Agency, at paragraphs 1 to 37, pages 1 to 15 of its Factum.

PART II
POINTS IN ISSUE

4. The issues in this appeal for the Attorney General of British Columbia are as follows:

(a) Do the impugned regulatory provisions (*Canadian Egg Marketing Proclamation*, C.R.C. 646, as amended, the *Canadian Egg Licensing Regulations*, 1987, 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)) infringe or deny rights and freedoms guaranteed by s. 2(d) and s. 6 of the *Charter*?

(b) If the answer to the first question is yes, is this infringement justified under s. 1 of the *Charter*?

5. The Attorney General of British Columbia takes the position that the first question should be answered in the negative. If it is necessary to answer the second question, then it should be answered in the affirmative.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

**PART III
ARGUMENT**

23
24
25
26
27
28
29
30
31
32
33

A. Introduction - Interpretative Principles

6. In defining the range or scope of a right and freedom under the *Charter* and its relation to other rights, the *Charter* should receive a broad and generous construction consistent with its general purpose. In this context, Dickson J., as he then was, speaking for the majority in *R. v. Big M Drug Mart Ltd.* stated:

“The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*’s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court’s decision in *Law Society of Upper Canada v. Skapinker* [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts.”

R. v. Big M Drug Mart Ltd. [1985] 1 S.C.R. 295 at p. 344.
Black v. Law Society of Alberta [1989] 1 S.C.R. 591 at pp. 612 - 613

7. This case is concerned with commercial and economic rights. At its most fundamental, the issue is whether producers of eggs in a farming operation, be they corporate or natural persons, are entitled to freely market those eggs outside of the province of production and origin into other provinces without regulation, including prohibition, of that inter-provincial marketing by the federal government in exercise of its trade and commerce power under s. 91 of the *Constitution Act, 1867*. The Court of Appeal of the Northwest Territories in this case has said that the *Constitution* by virtue of the right of freedom of association and mobility rights precludes the federal government from prohibiting the inter-provincial marketing of eggs which are produced in a specific province or territory. This conclusion, it is submitted, goes far beyond any previous decisions concerning the delineation

1 of the scope and content of those rights and ignores the guidance from this Court
2 that these rights must be interpreted within the context in which the rights are to
3 be applied. That is, the context of commercial and economic rights:

4 "This jurisprudence reveals that the historical, social and economic context in which a
5 *Charter* claim arises will often be relevant in determining the meaning which ought to
6 be given to *Charter* rights and is critical in determining whether limitations can be
7 justified under s.1".
8

9
10 *Laba v. The Queen* [1994] 3 S.C.R. 965 at p. 1001 per Sopinka J. for
11 the Court on this issue.

12
13 8. Freedom of association is an intensely personal right, as are mobility
14 rights, and they are not shared by corporate entities. Where corporate and
15 commercial or economic interests are concerned, as in this case, there is less of
16 an inclination on the part of the Courts under the rubric of *Charter* protection of
17 rights to find that these interests attract constitutional protection:

18 "We do not, at this moment, choose to pronounce upon whether those economic
19 rights fundamental to human life or survival are to be treated as though they are of
20 the same ilk as corporate-commercial rights. In so stating, we find the second effect
21 of the inclusion of "security of the person" to be that a corporation's economic rights
22 find no constitutional protection in that section".
23

24 *Irwin Toy Ltd. v. Quebec (A.G.)* [1989] 1 S.C.R. 927 at pp. 1003 - 1004,
25 per Dickson C.J.
26

27
28 9. Specifically, as regards freedom of association, McIntyre J. in *Re Public*
29 *Service Employee Relations Act* sounded the following caution:

30 "It follows that while a liberal and not overly legalistic approach should be taken to
31 constitutional interpretation, the *Charter* should not be regarded as an empty vessel to
32 be filled with whatever meaning we might wish from time to time. The interpretation
33 of the *Charter*, as of all constitutional documents, is constrained by the language,
34 structure, and history of the constitutional text, by constitutional tradition, and by the
35 history, traditions, and underlying philosophies of our society."
36

1
2 *Re Public Service Employee Relations Act* [1987] 1 S.C.R. 313 at p.
3 394, per McIntyre J.
4

5 **B. The Impugned Regulatory Provisions do not infringe or deny rights**
6 **guaranteed by Section 2(d) of the *Charter* - Freedom of Association**
7

8 10. The Attorney General of British Columbia adopts the argument of the
9 Appellant on freedom of association at paragraphs 51 to 63, at pages 20 to 24 of
10 its Factum, and adds the following submissions in support of the position that the
11 impugned regulatory provisions do not violate freedom of association.
12

13 11. The Court of Appeal essentially adopted the reasoning of the learned Trial
14 Judge which it summarized:

15
16 "The learned trial judge reasoned that "association is of the very essence of trade, for
17 one cannot trade merely with oneself. The commercial production of eggs implies
18 their eventual consumption, which must involve associations between individual
19 processors, vendors, purchasers and ultimately consumers, not to mention regulators
20 and others in the ordinary course of trade." (p. 30) For these and related reasons, he
21 concluded that the legislation breached s. 2(d)."
22

23 *Case on Appeal*, Vol. VI, p. 001406, lines 20 - 30.
24

25 "Moreover, in the context of this case, the view that s. 2(d) only protects the ability to
26 form an association and not the goals or activities of that association renders
27 completely meaningless the freedom to associate. That is because, as I have already
28 pointed out, it is the association itself that is the activity. In other words, one cannot
29 separate the association from the activity, because they are one and the same. This
30 cannot be said of any of the other "associations" discussed above."
31

32 *Case on Appeal*, Vol. VI, p. 001419, lines 9 - 19.
33

34 12. On freedom of association the Court concluded as follows:

35
36 "For these reasons, and in light of the unusual facts presented here, I am not
37 convinced that the impugned scheme would not fall afoul of freedom of association,
38 as described in categories one and three of McIntyre, J.'s decision in the Public
39 Service Reference. At the least, however, I believe that s. 2(d) has been breached by

1 virtue of the second category, because of my conclusion below that the freedom
2 asserted here relates to another constitutionally protected right.”
3

4 *Case on Appeal*, Vol. VI, p. 001420, lines 21 - 31.
5

6 13. The other constitutionally protected right referred to in the last passage
7 quoted above is mobility rights. Since it will be our submission in the next part of
8 this Factum (paragraphs 29 - 35) that there is no violation of s. 6 of the *Charter*, it
9 is not necessary to address the Court of Appeal's conclusion that s. 2(d) has
10 been breached by virtue of McIntyre J.'s second category in the *Public Service*
11 *Employee Relations Act Reference*. That is, the category of freedom of
12 association whereby persons have a constitutionally protected right to “engage
13 collectively in those activities which are constitutionally protected for each
14 individual.”
15

16 *Re Public Service Employee Relations Act* at p. 400, per McIntyre J.
17

18 14. Thus, for the purposes of this Factum, it is only necessary to address the
19 Court's conclusions with respect to the first and second of McIntyre J.'s
20 categories in the *Public Service Employee Relations Act Reference*. Those
21 categories were:
22

23 (a) A right to associate with others in common pursuits or for certain
24 purposes but neither the objects nor the actions of the group are
25 protected by freedom of association, and
26

27 (b) An individual is entitled to do in concert with others that which he
28 may lawfully do alone, and conversely, that individuals and

1 organizations have no right to do in concert what is unlawful
2 when done individually.

3
4 *Re Public Service Employee Relations Act* at pp. 399 and 401.
5

6 15. Essentially, the Court is saying that because marketing of eggs inter-
7 provincially is both the act of association and the carrying out of the purposes or
8 objects of the association, the two cannot be separated. Thus, freedom of
9 association protects not only the act of association but also the purposes and
10 objects of the association.
11

12 16. With the greatest of respect to the Court of Appeal, its characterization of
13 inter-provincial marketing of eggs as being the association itself, falls more easily
14 within the sixth category identified by McIntyre J. in the *Re Public Service*
15 *Employee Relations Act* rather than the one of the first three categories. The
16 sixth category was described by McIntyre J. as:

17 "...by far the most sweeping, (which) would extend the protection of s. 2(d) of the
18 *Charter* to all acts done in association, subject only to limitations under s. 1 of the
19 *Charter*."
20

21 *Re Public Service Employee Relations Act* at p. 402.
22

23 17. His Lordship said that the position which established the sixth category
24 was suggested by Bayda A.C.J.S. in the *Dairy Workers* case (quoted in the
25 following passage):

26
27 "To summarize, a person asserting the freedom of association under para. 2(d) is free
28 (apart from s. 1 of the *Charter*) to perform in association without governmental
29 interference any act that he is free to perform alone. Where an act by definition is
30 incapable of individual performance, he is free to perform the act in association
31 provided the mental component of the act is not to inflict harm." Such then is the
32 "unregulated area" (to use Professor Ledermor's expression) relative to freedom of

1 association. Such is the "sphere of activity within which the law (has guaranteed) to
2 leave me alone"..." (emphasis in the original).

3
4 *Re Public Service Employee Relations Act* at p. 402.

5
6 18. That is, it is respectfully submitted, precisely what the Court of Appeal is
7 asserting in this case. It is saying that because inter-provincial marketing of eggs
8 is by definition incapable of individual performance, the act of association and the
9 purposes and objects of the association are inseverable and one and the same.
10 Because they are inseverable, freedom of association protected under s. 2(d) of
11 the *Charter* applies.

12
13 19. That is also what the Respondents assert in their Factum:

14
15 "It is not consistent with s. 2(d) of the *Charter* to first create a regulatory
16 limitation on an activity which may only be carried out in association
17 with others, and then make it impossible for certain people (in this case,
18 Northwest Territories egg producers) to fulfill that requirement."
19 (emphasis added)

20
21 *Respondents' Factum*, para. 64 at p. 15.

22
23 "The egg industry is an association of producers, graders, wholesalers,
24 distributors and retailers who participate in the common purpose of
25 gaining a livelihood by marketing eggs."

26
27 *Respondents' Factum*, para. 69 at p. 16.

28
29 20. McIntyre J. expressly and, it may be said emphatically, rejected the sixth
30 approach:

31
32 "The sixth approach, in my opinion, must be rejected as well, for the reasons
33 expressed in respect of the fifth. It would in even more sweeping terms elevate
34 activities to constitutional status merely because they were performed in association.
35 For obvious reasons, the *Charter* does not give constitutional protection to all
36 activities performed by individuals. There is, for instance, no *Charter* protection for
37 the ownership of property, for general commercial activity, or for a host of other lawful

1 activities. And yet, if the sixth approach were adopted, these same activities would
2 receive protection if they were performed by a group rather than by an individual. In
3 my view, such a proposition cannot be accepted. There is simply no justification for
4 according *Charter* protection to an activity merely because it is performed by more
5 than one person".

6
7 *Re Public Service Employee Relations Act* at pp. 405 - 406.

8
9 21. The majority of this Court in *Professional Institute of the Public Service of*
10 *Canada v. Northwest Territories (Commissioner)* adopts McIntyre J.'s rejection of
11 the fifth category in *Re Public Service Employee Relations Act* and, inferentially,
12 has adopted his rejection of the sixth category since it was rejected for the same
13 reasons as the fifth category:

14
15 "Upon considering the various judgments in the Alberta Reference, I have come to
16 the view that four separate propositions concerning the coverage of the s. 2(d)
17 guarantee of freedom of association emerge from the case: first, that s. 2(d) protects
18 the freedom to establish, belong to and maintain an association; second, that s. 2(d)
19 does not protect an activity solely on the ground that the activity is a foundational or
20 essential purpose of an association; third, that s. 2(d) protects the exercise in
21 association of the constitutional rights and freedoms of individuals; and fourth, that s.
22 2(d) protects the exercise in association of the lawful rights of individuals."

23
24 *Professional Institute of the Public Service of Canada v. Northwest*
25 *Territories (Commissioner)* [1990] 2 S.C.R. 367 at pp. 401 - 402, per
26 Sopinka J. for the majority.

27
28 22. Marketing is defined in the *Canadian Egg Marketing Agency Proclamation*,
29 s. 1, in relation to eggs, to include selling and offering for sale. Offering for sale
30 usually requires communication for the purpose of finding a willing buyer of
31 products or services. Restraint on communication for selling of prostitution
32 services was considered in *R. v. Skinner* where it was argued that s. 195.1(1)(c)
33 of the *Criminal Code* which prohibits communications in public for the purpose of
34 prostitution had the effect of violating freedom of association between the

1 prostitute and the prostitute's customer. In this respect, the Chief Justice said:

2
3 "The mere fact that an impugned legislative provision limits the possibility of
4 commercial activities or agreements is not, in my view, sufficient to show a *prima*
5 *facie* interference with s. 2(d) guarantee of freedom of association."

6
7 *R. v. Skinner* [1990] 1 S.C.R. 1235 at p. 1245, per Dickson C.J.

8
9 23. The Court of Appeal has said that marketing of eggs is indivisible from the
10 forming of associations between the marketer and the customer for the purpose of
11 entering into contracts for the purchase and sale of eggs and so, thereby,
12 protected under the freedom of association protected in the *Charter*. What that
13 means, with respect, is that freedom to contract would be protected by the
14 *Charter*. This would ultimately, it is submitted, extend freedom of association to
15 protection of all economic commercial relations which are founded upon an
16 association, contractual or otherwise, between a willing seller and a willing buyer.
17 Each is involved in the arguably associational conduct of buying and selling.
18 However, it is submitted that there is no historical recognition of commerce and
19 contractual relations as being within the constitutionally protected sphere as
20 fundamental rights. The Ontario High Court said in *Arlington Crane*:

21
22 "There is no *Charter*-protected right to freedom of contract. Both employers and
23 employees are however free to form their own association to act as bargaining agents
24 and have them accredited or certified for that purpose if they can do so. The right to
25 make whatever employment contracts they please however is not a constitutional
26 right and may be modified or abrogated by the legislature."

27
28 *Arlington Crane Service Ltd. v. Ontario (Minister of Labour)* (1988) 56
29 D.L.R. (4th) 209 (Ont. H.C.J.) at p. 247, per Henry J.

30
31 *Alex Couture Inc. v. Canada (Attorney General)* (1991) 83 D.L.R. (4th)
32 577 (Que. C.A.) at p. 630.

1 24. Regulated marketing, whether it be eggs, chickens, industrial milk or
2 whatever natural product is being regulated, has historically tended to foster
3 litigation. Indeed, the litigation over production of industrial milk in the Province
4 of British Columbia has been described as a "guerrilla war":

5
6 "Indeed, the particular war being fought by these farmers is only one of a number of
7 guerrilla wars which have been waged with constitutional weapons by opponents of
8 marketing schemes since the first such scheme was, by the *Produce Marketing Act*,
9 S.B.C. 1926 - 27, C. 54, enacted in British Columbia."

10
11 *British Columbia (Milk Board) v. Bari Cheese Ltd.* (1991) 59 B.C.L.R.
12 (2nd) 47 (B.C.C.A.) at p. 57, per Southin J.A.

13
14 25. When the constitutional weapon of freedom of association was wielded by
15 the opponents of the industrial marketing milk regulatory scheme, the argument of
16 the opponents was described thusly:

17
18 "To restrain the marketing of this milk would result in the breaking of the contractual
19 marketing association of Clearview, United Producers and Scardillo which would be to
20 deny to the farmer (Clearview) its freedom to associate for purposes of trade which
21 Mr. Harvey described as an economic right."

22
23 *Milk Board v. Clearview Dairy Farm Inc.* (1986) 69 B.C.L.R. 220
24 (B.C.S.C.) at p. 231, per Toy J.

25
26 26 The reliance on freedom of association in *Milk Board v. Clearview Dairy*, as
27 well as mobility rights and equality rights under the *Charter*, to attack the
28 requirement to have a quota for industrial milk and a licence for its production
29 was rejected by Toy J. On appeal, the Court rejected the *Charter* arguments as
30 well referring only specifically to s. 15 of the *Charter*. However, it is submitted,
31 the Court of Appeal was referring to all of the *Charter* arguments of the dissident
32 milk producers, including freedom of association and mobility rights, when it

1 stated:

2
3 "Finally, Clearview's counsel brought together all the *Charter* arguments and all of the
4 criticisms of the marketing system in an attack on the board's interference with the
5 freedom of Clearview to enter into contracts to sell milk where it sees fit. Together
6 the arguments challenge regulation of industry. If accepted, they lead to the
7 conclusion that unregulated free enterprise is entrenched in our Constitution. That, in
8 the end, is what the *Charter* arguments amount to and I reject them." (emphasis
9 added)

10
11 *Milk Board v. Clearview Dairy Farm Inc.* (1987) 12 B.C.L.R. (2d) 116
12 (B.C.C.A.) at p. 125, per Seaton J.A. for the Court.

13
14 27. With respect, it is submitted that freedom of association is not violated in
15 the circumstances of this case by the requirement of the impugned regulatory
16 provisions that producers of eggs in the Northwest Territories require a federal
17 quota and a federal licence in order to market in other provinces eggs produced
18 in the Northwest Territories. That is so for two reasons.

19
20 28. First, to expand freedom of association to encompass marketing as the
21 buying and selling of eggs would be to extend freedom of association to embrace
22 the sixth category of McIntyre J. in the *Reference Re Public Service Employee*
23 *Relations Act*, which has in fact been rejected by this Court.

24
25 29. Second, such an extension of the meaning of freedom of association would
26 potentially protect all buying and selling activities since, as the Court of Appeal
27 said, buying and selling is the essence of the association and one cannot
28 separate the activity from the association. This would lead to freedom of contract
29 being protected under the *Charter*, as freedom of association, a position which
30 has been rejected by the Courts on a number of occasions and a position which is
31 contrary to the common understanding of the role of commerce and business in
32 our society. Such activities are highly regulated, even prohibited, as a matter of

1 course and have never, it is submitted, attained the dimensions of fundamental
2 human rights.

3
4 30. To strike down the impugned regulatory provisions as infringing or denying
5 the right of freedom of association, would, it is submitted, "overshoot the actual
6 purpose of the right or freedom in question" and ignore the context in which the
7 question arises.

8
9 **C. The Impugned Regulatory Provisions do not violate rights protected**
10 **under Section 6) of the *Charter* - Mobility Rights**

11
12 31. The Attorney General of British Columbia adopts the submissions of the
13 Appellant at paragraphs 64 to 78, at pages 24 to 29 of its Factum on mobility
14 rights and adds the following submissions.

15
16 32. Section 6(2) and 6(3) of the *Charter*, so far as they are relevant, reads as
17 follows:

18 "6(2) Every citizen of Canada and every person who has the status of
19 a permanent resident of Canada has the right

20
21 (a) to move to and take up residence in any province; and

22
23 (b) to pursue the gaining of a livelihood in any province.

24
25 (3) The rights specified in subsection (2) are subject to

26 (a) any laws or practices of general application in force in a
27 province other than those that discriminate among persons
28 primarily on the basis of province of present or previous
29 residence; ..."

30
31
32
33 33. The role of s. 6(3) of the *Charter* has been described as a footnote to s.
34 6(2); it merely qualifies the s. 6(2) right to move to and take up residence in any

1 province and pursue the gaining of a livelihood in that province. The construction
2 of s. 6 has been described as follows:

- 3
4 (a) The principle: the right to pursue the gaining of a livelihood in
5 any province;
6
7 (b) The exception: this right is subject to any laws or practices of a
8 general application in force in that province;
9
10 (c) The exception to the exception: except if the laws discriminate
11 among persons primarily on the basis of the province of
12 residence.

13
14 *Black v. Law Society of Alberta* [1989] 1 S.C.R. 591 at p. 624, per La
15 Forest J. for the majority.

16
17 *Malartic Hygrade Gold Mines Ltd. v. The Queen in Right of Quebec*
18 (1982) 142 D.L.R. (3d) 512 (Que. S.C.) at page 521 per Deschênes
19 C.J.S.C.

20
21 34. The Court of Appeal reasoned as follows with respect to mobility rights:

22
23 "The regulatory system does not prevent egg production in the Northwest Territories,
24 but it does prevent the extra-territorial marketing of eggs produced there. This is
25 sufficient to meet the "disadvantage in pursuing a livelihood" criterion referred to by
26 La Forest J. in *Black*."

27
28 *Case on Appeal*, p. 001428, lines 14 - 20.

29
30 "...it is the *effect* of the legislation that must be scrutinized. Here, the effect obviously
31 discriminates on the basis of residence, even though it may not on its face appear to
32 do so. The system has one effect on those who live in the ten provinces and an
33 entirely different effect on those who live in the Northwest Territories."

34
35 *Case on Appeal*, p. 001429, lines 34 - 40.

36
37 35. With respect, putting aside the statement that the system has one effect on
38 those who live in the ten provinces and an entirely different effect on those who
39 live in the Northwest Territories, the method of analysis is fundamentally flawed.
40 Instead, what should be done by the Court is to read s. 6(2) and s. 6(3)(a)

1 together as defining the mobility right guaranteed by that section. This was
2 summarized in *Black v. Law Society of Alberta*:

3
4 "The cases have raised a further issue, namely, whether a particular claim is
5 protected by the phrase "to pursue the gaining of a livelihood."... "The permanent
6 resident who goes to another province... must comply with the local qualifications of all
7 lawyers or all mechanics..." ... I agree. Section 6(2)(b), in my view, guarantees not
8 simply the right to pursue a livelihood, but more specifically, the right to pursue the
9 livelihood of choice to the extent and subject to the same conditions as residents."

10
11 *Black v. Law Society of Alberta* at pp. 617 - 618, per La Forest J.

12
13 36. There can be no question that a resident of Alberta who either moves to
14 the Northwest Territories or "commutes" to the Northwest Territories in order to
15 carry on the business in the Northwest Territories of production of eggs is subject
16 to a prohibition against inter-provincial marketing of those eggs as set out in the
17 impugned regulatory provisions. In that respect, the Alberta egg producer who
18 moves to the Northwest Territories or who remains an Alberta resident but simply
19 commutes and does business there is in exactly the same position as a resident
20 of the Northwest Territories. There is no distinction between the two and, as a
21 consequence, there is no violation of s. 6 mobility rights. All are subject to the
22 same prohibition contained in the impugned regulatory provisions. Residents and
23 non-residents are treated equally in respect to egg production sought in the
24 Northwest Territories for inter-provincial marketing.

25
26 37. The Court of Appeal seeks to distinguish this case from all other regulatory
27 marketing cases by saying that:

28
29 "A person who produces eggs in the Northwest Territories (in contrast with those who
30 produce eggs in the 10 provinces) is totally denied the opportunity to earn a living, for
31 example, by selling those eggs in Alberta. This is because, unlike an egg producer in
32 one of the provinces, that producer can never, under the current scheme, obtain a

1 quota to market eggs extra-territorially.”

2
3 *Case on Appeal*, p. 001429, lines 12 - 20.

4
5 38. With respect, characterizing the impugned regulatory provisions as a total
6 denial of an opportunity to earn a living through the production and marketing of
7 eggs in the Northwest Territories is incorrect. Residents and non-residents alike
8 can pursue the gaining of a livelihood by producing eggs and marketing them
9 within the Territories. All that the impugned regulatory provisions do is to prohibit
10 resident and non-resident producers of eggs in the Northwest Territories from
11 marketing those eggs in other provinces.

12
13 39. Also, with respect, the distinction between production and regulation which
14 the Court purports to make is a distinction without a difference. All regulation
15 expressly or implicitly implies a prohibition, although the prohibition may be
16 conditional. In *Walker v. Prince Edward Island*, the Court was considering s.
17 14(1) of the *Public Accounting and Auditing Act* which prohibited any person from
18 practicing public accountancy in Prince Edward Island unless that person was a
19 member of the Institute of Public Accountants. Thus, there was a prohibition
20 followed by a conditional permission, the hallmark of regulatory legislation. This
21 prohibition was challenged by several certified general accountants who were not
22 chartered accountants, one of who resided in Prince Edward Island and the other
23 resided in New Brunswick.

24
25
26 *Walker v. Prince Edward Island* (1993) 107 D.L.R. (4th) 69 (PEI
27 S.C.A.D.).

28
29 40. The Court rejected the challenge based on mobility rights in the following

1 terms:

2
3 "The restriction in s. 14(1) (of the *Public Accounting and Auditing Act*) has nothing to
4 do with residency. It subjects all non-members of the Institute to the same restrictions
5 and conditions whether they reside in the province or not."
6

7 *Walker v. Prince Edward Island* at p. 77, per Mitchell J.A. for the Court.
8 Appeal to the Supreme Court of Canada dismissed [1995] 2 S.C.R.
9 407.

10
11 41. Mobility rights *Charter* challenges to regulated marketing of natural
12 products have been consistently rejected.

13
14 *Regina v. Quesnel* (1985) 24 C.C.C. (3d) 78 (Ont. C.A.) at pp. 84 - 86.

15
16 *Re Groupe Des Eleveurs De Volailles De L'Est De L'Ontario and*
17 *Canadian Chicken Marketing Agency* (1984) 14 D.L.R. (4th) 151
18 (FCTD) at pp. 178 - 181.

19
20 *Milk Board v. Clearview Dairy Farm Inc.* at pp. 232 - 241.

21
22 *British Columbia Milk Marketing Board and Canadian Dairy Commission*
23 *v. Luigi Aquilini et al*, Unreported, April 8, 1997 (B.C.S.C.) Vancouver
24 Registry No. A950636, at pp. 61 - 72.

25
26 42. The Respondents argue that the impugned regulatory provisions
27 discriminate on the basis of province of residence:

28
29 "Thus, a law which..discriminates..on the basis of province of residence" is a law
30 which "makes a distinction" or "differentiates" on the basis of province of residence.
31 This is clearly true of the Regulatory Scheme, which denies federal quota to anyone
32 living or carrying on business in the Northwest Territories."
33

34 *Respondents' Factum*, para. 102 at p. 23.

35
36 43. The Respondents' submission appears to equate the carrying on of
37 business in the Northwest Territories with establishing a residence in the

1 Northwest Territories. Non-residents may carry on the business of egg
2 production in the Northwest Territories:

3
4 "There is, however, no doubt that a person can pursue a living in a province without
5 being there personally."

6
7 *Black v. Law Society of Alberta*, at p. 21.
8

9 44. The impugned regulatory provisions do not discriminate (in the sense of
10 making distinctions) on the basis of province or territory of residence. Rather,
11 they discriminate on the basis of province or territory of production of eggs.
12

13 45. Thus, it is submitted that there is no impairment of the mobility rights of the
14 Respondents. That is, they are given the right to pursue a livelihood in the
15 Northwest Territories by producing eggs to the same extent and subject to the
16 same conditions as all other residents of the Northwest Territories.

17
18 **D. If the Impugned Regulatory Provisions violate either Section 2(d) or**
19 **Section 6 of the *Charter*, they are reasonable limits demonstrably**
20 **justified in a free and democratic society under Section 1 of the**
21 ***Charter***

22
23 46. The Attorney General of British Columbia submits that, if the impugned
24 regulatory measures violate either of s. 2(d) or s. 6 of the *Charter*, they are
25 reasonable limits demonstrably justified in a free and democratic society under s.
26 1 of the *Charter*. In this regard, see the submissions of the Appellant at
27 paragraphs 79 to 93, pages 31 to 36 of its Factum.
28

1 PART IV

2
3 NATURE OF ORDER REQUESTED

4
5
6 47. The Attorney General of British Columbia submits that the Constitutional
7 Questions should be answered as follows:

8
9 Question 1: In the negative.

10
11 Question 2: In the affirmative.

12
13
14
15
16 **ALL OF WHICH IS RESPECTFULLY SUBMITTED**

17
18
19
20
21
22
23
24
25
26 
27 **GEORGE H. COPLEY, Q.C.**

28 Counsel for the Intervenor,
29 Attorney General of British Columbia
30

31
32 **DATED** this 12th day of May, 1997
33

PART V

LIST OF AUTHORITIES

	<u>PAGE NO(S)</u>
Alex Couture Inc. v. Canada (Attorney General) (1991) 83 D.L.R. (4th) 577 (Que. C.A.)	10
Arlington Crane Service Ltd. v. Ontario (Minister of Labour) (1988) 56 D.L.R. (4th) 209 (Ont. H.C.)	10
Black v. Law Society of Alberta [1989] 1 S.C.R. 591	3, 14, 15, 18
British Columbia Milk Marketing Board and Canadian Dairy Commission v. Luigi Aquilini et al, Unreported, April 8, 1997 (B.C.S.C.) Vancouver Registry No. A950636	17
British Columbia (Milk Board) v. Bari Cheese Ltd. (1991) 59 B.C.L.R. (2nd) 47 (B.C.C.A.)	11
Irwin Toy Ltd. v. Quebec (A.G.) [1989] 1 S.C.R. 927	4
Laba v. The Queen [1994] 3 S.C.R. 965	4
Malartic Hygrade Gold Mines Ltd. v. The Queen in Right of Quebec (1982) 142 D.L.R. (3d) 512 (Que. S.C.)	14
Milk Board v. Clearview Dairy Farm Inc. (1986) 69 B.C.L.R. 220 (B.C.S.C.)	11
Milk Board v. Clearview Dairy Farm Inc. (1987) 12 B.C.L.R. (2d) 116 (B.C.C.A.)	12, 17
Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner) [1990] 2 S.C.R. 367	9
Re Groupe Des Eleveurs De Volailles De L'Est De L'Ontario and Canadian Chicken Marketing Agency (1984) 14 D.L.R. (4th) 151 (FCTD)	17
Re Public Service Employee Relations Act [1987] 1 S.C.R. 313	4, 5, 6, 7, 8, 9, 12

LIST OF AUTHORITIES

	<u>PAGE NO(S)</u>
R. v. Big M Drug Mart Ltd. [1985] 1 S.C.R. 295	3
Regina v. Quesnel (1985) 24 C.C.C. (3d) 78 (Ont. C.A.)	17
R. v. Skinner [1990] 1 S.C.R. 1235	9, 10
Walker v. Prince Edward Island (1993) 107 D.L.R (4th) 69 (PEI S.C.A.D.)	16, 17

SERVICE ADMITTED
THIS 15 DAY OF
May 1997
Ode Mahin & Hume
AGENT FOR Appellant
Couch

SERVICE ADMITTED
THIS 15th DAY OF
May 1997
Anne Elmer for Eugene Mahan
Larry Michener
AGENT FOR Intervener
NWT Justice

SERVICE ADMITTED
THIS 15th DAY OF
May 1997
A.C. Bulho-Ricketts
AGENT FOR A.G. Ontario

SERVICE ADMITTED
THIS 15th DAY OF
May 1997
AGENT FOR
MARTIN LAMONTAGNE

A.G. Québec

SERVICE ADMITTED
THIS 15 DAY OF
May 1997
AGENT FOR
Kopradich
act. AG
Sikka

SERVICE OF A TRUE COPY HEREOF
SIGNIFICATION DE COPIE CONFORME-

Admitted this 15th day
Accepted le May 1997
of May 1997
de
for Linda Gauthier
pour George Thomson
Deputy Attorney General of Canada
Sous-procureur général du Canada

2:35 p.m.