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; Council of Canadians; Sierra Legal Defence Fund Society; Attorney General of Canada; Attorney General of Alberta; Attorney General of British Columbia; and Attorney General of Quebec

Interveners

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; Council of Canadians; Sierra Legal Defence Fund Society; Attorney General of Canada; Attorney General of Alberta; Attorney General of British Columbia; and Attorney General of Quebec

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FACTUM OF THE INTERVENER, THE ATTORNEY GENERAL OF ONTARIO

PART I - FACTS

1. The Attorney General of Ontario intervenes pursuant to the order of Lamer C.J., dated May 1, 1997. The Attorney General of Ontario accepts the facts as set out in the Appellant's factum.

PART II - THE ISSUES AND THE LAW

2. The position of the Attorney General of Ontario may be summarized as follows:

i) There is no violation of s. 6(2) of the *Canadian Charter of Rights and Freedoms* ["*Charter*"] since there is no restriction on the location of the individual quota holder based on residence. The restriction at issue is on the location of production. In any event, there is no mobility right at issue. The Respondents do not seek to gain a livelihood in another province on the same terms as residents in that province. Instead, they ask this Court for a declaration that, as Northwest Territories egg producers, they are entitled to a Northwest Territories egg export quota.

ii) There is no violation of s. 2(d) since the egg marketing scheme is in the nature of a licensing regime. The only "association" relevant to this appeal is the Canadian Egg Marketing Agency ["CEMA"], which is a body composed of provincial, federal and industry representatives, and not individual egg producers. The Respondents essentially seek a freedom to contract with graders who can market their eggs. This Court, however, has expressly held that there is no free-standing right to commercial activity embodied in s. 2(d) of the *Charter*.

iii) In the alternative, the current egg marketing scheme is justified under s. 1 of the *Charter*. Parliament is entitled to reform legislation one step at a time. Where there is an agreement to include the Northwest Territories in CEMA and ongoing negotiations on the terms of entry of the Northwest Territories, it would be premature for this Court to intervene at this stage.

iv) In any event, the remedy ordered by the lower courts should be reversed. It undermines the viability of a supply management scheme by allowing for a "free-rider"; that is, a party who can export without constraint on the quantum of eggs and without having to pay levies which are used to ensure price stability.

A. SECTION 6(2) OF THE *CHARTER*

3. The Attorney General of Ontario submits that s. 6(2) of the *Charter* applies where legislation: (i) sets eligibility criteria primarily on the basis of the residence of natural persons; and (ii) has the result of treating non-residents of a province worse than residents of the province in which the individual seeks to reside or earn a livelihood. Section 6(2) should not be interpreted as a general right of corporations to trade goods interprovincially nor as a right of non-residents to be treated better than residents in any province or territory.

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4. This approach to s. 6(2) is warranted based on a review of: (i) an effects-based *Charter* analysis; (ii) a contextual approach to s. 6(2); (iii) the constitutional negotiations leading up to s. 6 of the *Charter* and proposed amendments to s. 121 of the *Constitution Act, 1867*; (iv) the plain meaning of s. 6; (v) the interpretive principle that *Charter* provisions should be read consistently; and (vi) the jurisprudence in other jurisdictions.

1) The Purpose and Effect of Legislation

5. The parties to this appeal agree that the *purpose* of the egg supply management scheme is not to exclude the Northwest or Yukon Territories. At the time of the creation of the egg quota
20 scheme in 1972, there was no egg production in either of these Territories. Moreover, using historic egg production as a basis for setting the quota was a reasonable method and minimized disruption to existing producers. Thus, the only issue in this appeal is the *effect* of the egg supply management scheme on the Respondents. This Court has cautioned against finding a discriminatory effect in the absence of a clear factual record and without regard to the entire statutory scheme.

Symes v. *Canada*, [1993] 4 S.C.R. 695, at 764-765

Thibaudeau v. *Minister of National Revenue*, [1995] 2 S.C.R. 627, at 702-703 (per Cory and Iacobucci JJ.)

30 Agreed Statement of Facts, *Case on Appeal*, Vol. III, Tab 15, p. 548, para. 70; p. 553, para. 94

Report of the Royal Commission Appointed to Inquire into the Egg Industry in Ontario, *Case on Appeal*, Vol. V, Tab 17, pp. 1052, 1060

6. This Court has also confirmed that an effects-based analysis requires that the legislative limitation impairs the purpose of the *Charter* right. In the s. 15(1) equality context, this has lead to an enquiry into whether the limitation is linked to historic prejudice, stereotyping or irrelevant personal characteristics. In the s. 2(b) freedom of expression context, this has lead to an enquiry into whether the limitation undermines the purposes of freedom of expression of the pursuit of truth, participation in social and political decision-making, or individual self-fulfilment. Similarly, in the context of s. 6 of the *Charter*, an effects-based analysis requires that this Court examine the values which s. 6 seeks to uphold.

Symes v. *Canada*, *supra*, at 756-757

Irwin Toy Ltd. v. *Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at 976-977

7. It is submitted that the values which s. 6 seeks to uphold are individual dignity and respect associated with the rights of citizenship. Section 6 provides citizens and permanent residents with the ability to move throughout the country and pursue the gaining of a livelihood in a province or territory, "subject to the same condition as residents [in that province or territory]".

Black v. *Law Society of Alberta*, [1989] 1 S.C.R. 591, at 618 (per La Forest J.)

8. This Court and lower courts across the country have confirmed that s. 6 of the *Charter* was not intended to guarantee an individual's free-standing right to work or contract or trade in goods and services. Nor was s. 6 intended to provide a right to a quota from a supply management board or a right to be exempted from a supply management system.

Law Society of Upper Canada v. *Skapinker*, [1984] 1 S.C.R. 357, at 382-383

Archibald v. *Canada Wheat Board*, [1997] F.C.J. No. 394, at paras. 88-110 (T.D.)

Milk Board v. *Clearview Dairy Farm* (1986), 69 B.C.L.R. 220, at 241 (S.C.); affirmed (1987) 12 B.C.L.R. (2d) 116 (C.A.); leave to appeal to the SCC refused [1989] 1 S.C.R. xi

Re Demaere and The Queen (1984), 11 D.L.R. (4th) 193, at 200, 201-202 (F.C.A.)

MacKinnon v. *Canada (Fisheries and Oceans)*, [1987] 1 F.C. 490, at 503-504 (T.D.)

Walker v. *Prince Edward Island* (1993), 107 D.L.R. (4th) 69, at 77 (P.E.I.C.A.); aff'd [1995] 2 S.C.R. 407

Re Groupe des Eleveurs and the Chicken Marketing Agency (1984), 14 D.L.R. (4th) 151 (FCTD), at 180

9. It is submitted that an interpretation of s. 6 which guarantees residents in all provinces the ability to participate in federal supply management schemes will over-shoot the purposes of this section of the *Charter*. Federal states invariably create programs which differentiate amongst the component jurisdictions. Federal supply management schemes and subsidies exist which are applicable in only some provinces in Canada. For example, there is a Western Economic Diversification Office and an Atlantic Canada Opportunities Agency, both of which provide commercial opportunities to individuals in a limited number of provinces.

Western Economic Diversification Act, R.S.C. 1985 (4th Supp.), c. 11, ss. 1-12

Atlantic Canada Opportunities Agency Act, R.S.C. 1985 (4th Supp.), c. 41, Part I, ss. 1-24, as amended

10. This Court has consistently upheld, in division of powers cases, the federal role in regulating the flow of trade interprovincially even where the consequence is different treatment for different provinces. Specifically in the context of egg marketing, it has confirmed that the current interlocking scheme for supply management is not in its "essence and purpose related to provincial boundaries".

Murphy v. *C.P.R.*, [1958] S.C.R. 626, at 642 (per Rand J.)

Reference Re Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198, at 1268 (per Laskin C.J.C.)

2) The Contextual Approach

11. It is submitted that a contextual approach to constitutional analysis suggests that the s. 6 right should be limited to protecting the right of residents and non-residents to be treated similarly *within a province* rather than similarly *across provinces*. This more narrow interpretation is warranted because s. 6 encompasses purely commercial activities and trade in goods and services, matters which do not lie at the core of an individual-rights *Charter*.

12. This Court has confirmed that corporate/commercial interests are not generally protected under the *Charter*. In the context of ss. 7 and 15(1) of the *Charter*, corporations do not have standing to bring an application for a declaration of constitutional invalidity and individuals cannot seek protection of purely economic interests. In the context of s. 2(b) of the *Charter*, alleged constitutional violations of the rights of corporations will be scrutinized in a manner which is more deferential to the legislative will. Similarly in the context of s. 6, it is submitted that because this section includes purely economic interests, it should have a narrower application.

Dywidag Systems International, Canada Ltd. v. *Zutphen Brothers Construction Ltd.*, [1990] 1 S.C.R. 705, at 709

Pearlman v. *Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at 882, 884-885

R. v. *Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at 759

Irwin Toy Ltd. v. *Quebec (Attorney General)*, *supra*, at 1004

Edmonton Journal v. *Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at 1355-1356

Committee for the Commonwealth of Canada v. *Canada*, [1991] 1 S.C.R. 139, at 192-193

13. The potential corporate/commercial nature of claims brought under s. 6 is amply demonstrated by the facts of this appeal. The Appellant Northern Poultry is a corporate body and is owned by a corporate body. The Appellant Pineview is also a corporate body and is owned by a corporate body. The individuals who testified, Villetard and Richardson, are shareholders and directors who appear from the Record to have very limited involvement, if any, in the day-to-day

operation of the company. Importantly, what is desired to be protected is the mobility of goods.

Agreed Statement of Facts, *supra*, pp. 537-540

Read-in of F. Richardson, *Case on Appeal*, Vol. II, Tab 14, p. 250-251

3) History of Section 6 of the *Charter*

14. The constitutional history leading up to s. 6 reveals that:

i) It was largely intended to respond to provincial barriers based on residency which had been permitted under the constitutional division of powers jurisprudence. As noted by Professor Jackman, "it was hoped that [s. 6 proposals from the federal government] would redress what was perceived as the constitutional imbalance created by judicial interpretation of the existing division of powers". As well, constitutional debates concerning the Canadian economic union in the period leading up to the *Charter*, focused on studies which showed increasing provincially-created barriers to trade;

T. Lee & M. Trebilcock, "Economic Mobility and Constitutional Reform" (1987), 37 *University of Toronto Law Journal* 268, at 273, 282

M. Jackman, "Interprovincial Mobility Rights Under the *Charter*" (1985) *University of Toronto Faculty of Law Review* 16, at 22

Black v. *Law Society of Alberta*, *supra*, at 611-612

ii) It was not intended to be a basis upon which the courts should generally balance the cost and benefits of the Canadian economic union, regional diversity and the overall trade in goods and services. To the contrary, the general question of the flow of goods and capital was to be dealt with under an amended s. 121. The proposed amendment to s. 121, however, was rejected at the 1980 Constitutional Conference by nine of the ten provinces who sought to maintain the ability to subsidize or protect provincial industries; and

Lee & Trebilcock, *supra*, at 273-274

iii) It was intended to provide for a narrower individual right to mobility, as demonstrated by the fact that limitations on property rights of individuals based on residence were initially prohibited under s. 6 but this clause was removed after being opposed by several provinces.

Lee & Trebilcock, *supra*, at 282

15. The history of constitutional negotiations reveals that the main thrust of s. 6 was to protect those mobility rights that are most closely tied to the concept of citizenship rather than general arguments based on economic efficiency and the benefits of free trade in goods and services. This history thereby supports an interpretation of s. 6 which limits its ambit to prohibiting legislation which impedes the ability of non-residents either to move to a province or pursue a livelihood on the same terms as residents of that province.

Lee & Trebilcock, *supra*, at 283

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4) The Plain Meaning

16. It is further submitted that this interpretation of s. 6 is warranted given that, on a plain meaning reading, s. 6 is replete with qualifiers to the individual mobility right.

17. Section 6(2) speaks to the rights of "citizens" and "permanent residents" to reside in any province and gain a livelihood. It does not refer to any rights of corporations to reside in any province. "Citizenship" is defined in the federal *Citizenship Act*, R.S.C. 1985, c. C-29, to be confined to natural persons, and not corporations. Equally, "permanent resident" is defined in the *Immigration Act*, R.S.C. 1985, c. I-2, and does not include a corporation. Peter Hogg, in *Constitutional Law of Canada*, [1992] 3rd ed., has suggested that the federal statutory definition should govern.

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Hogg, *supra*, at 34-4 - 34-7

Laskin, "Mobility Rights Under the *Charter*", (1982) 4 *Supreme Court L.R.* 89, at 96

Re Groupe des Eleveurs, *supra*, at 180

18. Section 6(3)(a) of the *Charter* also limits mobility rights where there is a law of general application in force in the province. In these circumstances, a distinction must be "primarily" based on residence. As well, the concept of a "law of general application" typically refers in division of powers cases to provincial legislation. Section 6(3)(b) allows for "reasonable" residency requirements for public social services. Last, s. 6(4) permits outright residency-based

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distinctions in certain circumstances where the province has higher unemployment rates. While these limitations on the s. 6 right are not intended to usurp the role of s. 1 of the *Charter*, they do, nevertheless, indicate that the concept of individual mobility contained in s. 6 has been extensively qualified.

Black v. *Law Society of Alberta*, *supra*, at 624

5) Distinguishing Section 6 From Section 15 of the *Charter*

19. It is submitted that the allegations which gave rise to this appeal have been traditionally associated with cases under s. 15(1) rather than s. 6 of the *Charter*. In *R.* v. *Turpin*, [1989] 1 S.C.R. 1296, and *R.* v. *Sheldon (S.)*, [1990] 2 S.C.R. 254, the Supreme Court of Canada dealt with challenges to federal legislation which permitted residents in one province to have opportunities and benefits which were not available in another province. For example, in *Turpin*, *supra*, an Ontario accused sought to be tried by a jury rather than a single judge: jury trials were available in Alberta but not Ontario. This is similar to the herein appeal in which the Respondent residents of the Northwest Territories seek to have the benefit of a quota which is available in other provinces but not where they reside.

R. v. *Turpin*, *supra*, at 1332-1335

R. v. *Sheldon (S.)*, *supra*, at 284-292

20. In both *R.* v. *Turpin*, *supra*, and *R.* v. *Sheldon (S.)*, *supra*, this Court has limited the ability of an individual to use the place of residence criterion as a valid ground for a s. 15(1) challenge. A unanimous Court concluded in both cases that a distinction based on place of residence is not generally sufficient to find a s. 15(1) violation. In this appeal, the Northwest Territories Court of Appeal found that there was no violation based on s. 15(1) of the *Charter,* and the Respondents have chosen not to appeal this ruling to this Court.

Reasons for Judgment, *Case on Appeal*, Vol. VI, Tab 39, pp. 1430-1433.

21. Section 6 also deals with discrimination based on place of residence. It is submitted that

there should be symmetry and consistency between ss. 6 and 15(1): in both sections, merely different treatment between provinces should not be sufficient to find a *Charter* violation.

22. In the s. 15(1) context, this Court has required evidence of historical disadvantage, stereotyping or prejudice before discrimination based on "analogous grounds" such as place of residence can be demonstrated. In the s. 6 context, it is submitted that evidence of disadvantage suffered by non-residents compared to residents in the province where the non-resident intends to earn a livelihood, should be demonstrated before a violation is found. To adopt a broader interpretation of s. 6 would result in the anomalous situation of provincial differences in the treatment of economic interests being struck down whereas provincial differences in the treatment of individual rights to, for example, a jury trial or alternative measures for a youth offender, being upheld.

R. v. *Turpin, supra*

R. v. *Sheldon (S.), supra*

6) Comparative Jurisdictions

23. Section 92 of the Australian *Constitution Act, 1900*, provides a narrow individual right to move freely throughout Australia. It does not encompass an individual ability to gain a livelihood in any particular state. Section 117 is the main Australian constitutional provision intended to deal with individual mobility rights, and states:

> A subject of the Queen, resident in any State, shall not be subject in any other state to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

24. The Australian High Court has read this provision to apply only to natural persons. In addition, it has interpreted s. 117 as barring the operation of a law "wherever the effect of a law is to subject an interstate resident to a disability or discrimination to which that person would not be subject as an intrastate resident". Thus, s. 117 goes no further than providing non-residents in a province with the same right as residents in that province.

Street v. *Queensland Bar Association* (1989), 168 C.L.R. 461, at 488, 489

Peter Hanks, *Constitutional Law in Australia*, (Butterworths: 1991) at 434-436

25. In Australia, a separate constitutional provision exists, the so-called non-preferential treatment clause, to deal with facts similar to those raised in this appeal. Section 99 states that "the Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preferences to a state or any part thereof over another state or any part thereof". The Australian High Court has held that this provision does not apply to effects-based discrimination or preferences. It is submitted that in the absence of a provision such as s. 99, this Court should not expand s. 6 of the *Charter* to provide for a federal "non-preferential treatment" clause.

P. Hanks, *Constitutional Law in Australia*, *supra*, at 423-428

Elliott v. *Commonwealth* (1935), 54 C.L.R. 657, at 675

26. Article IV, s. 2 of the U.S. Constitution is the American analogue to s. 6 of the *Charter*. It states that "citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states". As confirmed in *Toomer* v. *Witsell*, 334 U.S. 385, at 395 (1948), this provision "is designed to insure to a citizen in State A who ventures into State B the same privileges which the citizens in State B enjoy". It does not require that citizens in two or more states enjoy the same privileges and immunities. In particular, Article IV, s. 2 has been held not to be a barrier to a wheat supply management scheme in which individuals could not obtain the desired quota.

U.S. v. *Stangland*; *U.S.* v. *Monk*, 242 F. 2d 843, at 848 (1957) (U.S. 7th Circuit)

L. Tribe, *American Constitutional Law*, (2d) (Foundation Press: 1988), at 528, citing *Toomer* v. *Witsell*, *supra*

J. Nowak, R. Rotunda, J. Young, *Constitutional Law (3d)*, (West Publishing: 1986), at 288

27. Equally, supply management schemes based on historical production have been held not to violate the American constitutional trade and commerce clause, the due process clause, or the

equal protection clause. To the contrary, U.S. Courts have held that Congress is not "restricted to making uniform rules" nor is it appropriate for a Court to provide relief from the "crudities and inequities of complicated ... economic legislation".

U.S. v. *Stangland, supra*, at 848

Cozart v. *Butz*, 418 F. Supp. 78, at 83 (1976) (U.S.D.C.); aff'd *Cozart* v. *Bergland*, 568 F. 2d 772 (4th Cir. Va. 1978)

Secretary of Agriculture v. *Central Roig Refining Co.*, 70 S.Ct. 403, at 409-410 (1950)

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7) Application of Section 6 Principles to this Appeal

i) The Legislative Distinction is Not Based on Individual Place of Residence

28. What is immediately apparent from the egg marketing scheme is that there is no restriction on the place of residence of potential quota holders in the *Farm Products Agencies Act*, R.S.C. 1985, c. F-4 ["the *Act*"], the *Canadian Egg Marketing Agency Proclamation*, C.R.C. c. 646 ["Proclamation"], or any of the other federal regulations which govern egg marketing. A European company, a Northwest Territories resident or an Ontario resident can hold quota for production in Ontario. What is restricted is the location of the "layers" who produce eggs, and not the residence of individuals or corporate entities who may own the egg production facilities.

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T. Lee & M. Trebilcock, *supra*, at 289

29. Further, there is no evidence on the Record that it is more difficult for Northwest Territories residents or corporations to hold quota in a province. To the contrary, Mr. Richardson, the only individual Northwest Territories resident egg producer who testified, has held quotas in and exported eggs from Alberta.

Evidence of G. Villetard, *Case on Appeal*, Vol. I, Tab 14, p. 72

Read-in of F. Richardson, *supra*, p. 243

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ii) The Distinction is Not Based on Rights of Residents in the Receiving Province

30. In any event, to the extent there is any effect on egg producers in the Northwest Territories, it is that they are not able to hold a quota given to them by the Northwest Territories under the national scheme. It is submitted that this complaint does not raise "mobility" issues nor does it give rise to a situation where non-residents are put in a worse position than residents in a province or territory.

31. This appeal raises facts which are distinguishable from the situation in *Black* v. *Law Society*, wherein an Ontario lawyer sought to be treated the same as an Alberta resident lawyer for work done in Alberta. In those circumstances, this Court concluded that s. 6 was violated because the Ontario lawyer was unable, because of his residency, to practise in a province which allowed qualified residents to practice law. In this appeal, however, the Respondent residents of the Northwest Territories do not seek to produce eggs in another jurisdiction. Moreover, the Respondents seek more than what Northwest Territories residents have access to. The right they seek extends the interpretation of s. 6 beyond that applied in *Black* v. *Law Society of Alberta* to include the ability to gain a livelihood in the Northwest Territories under the same conditions as residents outside the Northwest Territories. It is as if *Black* v. *Law Society of Alberta* involved an Ontario lawyer who wanted to practise law in Alberta without being called to the bar in Alberta.

Black v. *Law Society of Alberta*, *supra*, at 617-618

32. The facts of this appeal are similar to those considered by this Court in *Law Society of Upper Canada* v. *Skapinker*. In that case, the Court did not find a violation of s. 6 because there was no physical mobility element in the challenge by the individual. Section 6 did not apply to a person in Ontario who wishes to practice law in Ontario but could not do so because of legislative restrictions which applied to all Ontario residents. Similarly, it is submitted that Pineview, Northern Poultry and Richardson should not be able to claim a violation of s. 6 because of both federal and Northwest Territories legislative restrictions which operate on all residents in the Northwest Territories.

Law Society of Upper Canada v. *Skapinker*, *supra*, at 382-383

B. SECTION 2(d) OF THE *CHARTER*

33. Section 2(d) has been held to protect: (i) the ability to establish, belong to and maintain an association; and (ii) the exercise, in association, of those lawful and constitutional rights that can be exercised as individuals.

> *Professional Institute of the Public Service of Canada* v. *Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367, at 402-403

10 34. The egg supply management scheme is in the nature of a licensing arrangement: individuals must apply to the state for the ability to engage in a regulated activity. Courts have held, however, that there is no s. 2(d) right to a license or quota. To have held otherwise would have expanded the sphere of s. 2(d) to include most activities engaged in by the modern public welfare state.

> If [a supply management scheme for wheat is] ... an association with the Crown, then so is engaging in any other compulsory relationship with the State, such as obtaining a driver's licence, or a notice of compliance under the *Food and Drugs Act*. Whoever, of his own free will, wishes to drive a vehicle on the public highway, manufacture any drug for human consumption, or produce and sell grain for human consumption must first comply with the law enacted to regulate the activity. Compliance with such a law does not an "association"
20 make.
>
> *Archibald* v. *Canada Wheat Board, supra*, at para. 80
>
> *Re Rio Hotel Ltd. and Liquor Licence Board* (1986), 29 D.L.R. (4th) 662 (N.B.C.A.); aff'd on other grounds, [1987] 2 S.C.R. 59

35. The only "organization" or "association" which exists in this appeal is CEMA, and membership in this association is stipulated by Order-in-Council to include federal, provincial and industry representatives, and not individual egg producers. There is no individual constitutional right to join an intergovernmental organization.

30 *Canadian Egg Marketing Proclamation, supra*, s. 2; as am. SOR 81-713, SOR/96-140

36. The Respondents also claim an associational right to engage in commercial trade with graders who market their eggs. There is, however, no associational right to engage in unfettered commercial activity, as demonstrated by this Court's decisions in *R.* v. *Skinner*, *infra* and *Reference re ss. 193(1) and 195 of the Criminal Code*, *supra*. Chief Justice Lamer in both these decisions held that legislation which restricts the ability of individuals to engage in commercial transactions will not infringe the *Charter*.

R. v. *Skinner*, [1990] 1 S.C.R. 1235, at 1244-1245

Reference re ss. 193(1) and 195 of the Criminal Code, *supra*, at 1162-1180

Alex Couture Inc. v. *Canada (Attorney General)* (1991), 83 D.L.R. (4th) 577, at 638-639 (Que. C.A.); leave to appeal to S.C.C. refused 91 D.L.R. (4th) vii

Milk Board v. *Clearview Dairy Farm* (1986), *supra*, at 231 (S.C.)

Re Rio Hotel, *supra*

37. The Respondents also claim a s. 2(d) freedom of association right based on the fact that they have both a "lawful" and "constitutional" right to export eggs as individuals. While there is a lawful right to market eggs intraprovincially, the Respondents do not seek to engage in this activity. What they seek is the ability to export eggs, an activity which cannot be lawfully engaged in by individual Northwest Territories egg producers.

Re Public Service Employee Relations Act, [1987] 1 S.C.R. 313, at 366-367 (per Dickson C.J.); at 408-409 (per McIntyre J.)

Archibald v. *Canada Wheat Board*, *supra*, at paras. 60-61

38. For the reasons set out above, there is no constitutional right under s. 6 of the *Charter* to export eggs. In the absence of this constitutional right, the Respondents cannot claim an associational right to export eggs. In the event that this Court finds that there is a s. 6 violation in this appeal, there would be no need to deal with s. 2(d) of the *Charter* since the Respondents *qua* individuals would be able to export eggs. This Court has cautioned against dealing with constitutional issues where it is unnecessary to do so.

Cuddy Chicks Ltd. v. *Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5, at 14,19 (per La Forest J.); at 19-20 (per Wilson J.)

R. v. *Swain*, [1991] 1 S.C.R. 944, at 978 (per Lamer C.J.); at 1025 (per Wilson J.)

Baron v. *Canada*, [1993] 1 S.C.R. 416, at 423 (per Sopinka J.)

39. In any event, it is submitted that the Respondents do not seek to establish or belong to an association which exports eggs. The relief they seek in this appeal, and which was granted to them by the lower courts, was an individual right to export eggs in the absence of a requirement that they have a quota. This is, in essence, a request not to be part of CEMA but to be able to nevertheless export eggs. It is submitted that while this Court has recognized a right not to associate where an individual is forced to subscribe to ideas and values, this situation does not arise in the context of a supply management scheme based on levies and quotas.

Lavigne v. *O.P.S.E.U.*, [1991] 2 S.C.R. 211, at 343-345 (per McLachlin J.)

C. SECTION 1 OF THE *CHARTER*

40. If this Court finds a violation of either s. 6 or s. 2(d), then it is submitted that the egg marketing scheme, in light of related governmental negotiations, can be justified under s. 1.

1) Interpretive Principles

41. The appropriate approach to s. 1 is not a fixed, rigid formula but varies according to the circumstances of each case. It is submitted that this appeal has all the hallmarks of a matter to which this Court has extended the utmost deference to the legislative will. This appeal deals with purely economic issues relating to the trade in goods and services. These are rights which lie very much at the periphery of *Charter* protected values.

R. v. *Edwards Books and Art Ltd.*, *supra*, at 772

R. v. *Keegstra*, [1990] 3 S.C.R. 697, at 734-738

42. As well, the particular activity complained of relates to the setting of the quantum of quota and related terms of entry. This, in turn, is dependent on complex economic calculations relating to, *inter alia*, comparative advantage and market supply and demand. These are sociological/ economic considerations which do not generally lie within the realm of judicial expertise.

Irwin Toy Ltd. v. *Quebec (Attorney General)*, *supra*, at 993

McKinney v. *University of Guelph*, [1990] 3 S.C.R. 229, at 314-315

10 43. Where the state is not acting as a "singular antagonist", the proportionality branch of the s. 1 test does not require that the legislation adopt the "least intrusive" measure: the government must only have a "reasonable basis" for acting as it did. As long as the legislature has selected from amongst a "range of permissible options", the minimal impairment requirement has been met. For the reasons set out below, it is submitted that amongst the three options available, the chosen path falls well within that range.

Reference Re ss. 193 and 195 of the Criminal Code, *supra*, at 1199

R. v. *Chaulk*, [1990] 3 S.C.R. 1303, at 1341-1343

RJR-MacDonald Inc. v. *Canada (Attorney General)*, [1994] 1 S.C.R. 311, at 346

20 *Edmonton Journal* v. *Alberta (Attorney General)*, *supra*, at 1355-1356

2) The Objectives of the Scheme

44. The uncontested objectives of the egg marketing scheme are to: (i) provide for an economically rational basis upon which to market eggs; (ii) protect established egg producers by using historical production to set the base quota; and (iii) create a self-regulating consensual body which operates so as to prevent disputes between provinces such as that which erupted over the forty year period preceding the creation of the CEMA.

45. These objectives operate in an environment where consumer demand for eggs had been 30 falling and is, presently, not far from the 1972 total consumption level in spite of an increase in the

population of Canada. In addition to a stagnant level of demand, the quota allocation to approximately half of the provinces is not able to satisfy domestic consumption requirements.

Affidavit of N. Currie, *Appellant's Motion Record on Stay Application*, Tab 2, p. 10, para. 8; Exhibit "A".

46. The Respondents allege that they are not challenging the overall purposes of a supply management scheme but only the exclusion of the Northwest Territories from the scheme and the resulting inability of residents in the Northwest Territories to export eggs. It is submitted that this is a misnomer; the real dispute in this appeal is over the amount of the quota and related terms of entry (e.g. using overbase allocations or a base quota). This is demonstrated by the fact that the Respondents seek to uphold the lower court's order of an exemption from the scheme which allows them to export *at any level of production without restrictions or levies*. The Respondents are not merely asking this Court for a declaration that the Northwest Territories be permitted to enter CEMA.

3) The Means

47. The means chosen by the Appellant to achieve the objectives are to maintain the current scheme pending a negotiated and consensual amendment to this scheme. The negotiations have been two pronged: (i) there is agreement to include the Northwest Territories in the scheme. In this respect, CEMA has canvassed the signatories to the federal/provincial agreement to obtain their consent to admit the Northwest Territories; and (ii) CEMA has agreed to negotiate with the Northwest Territories on the amount of the quota and other terms of entry.

Evidence of N. Currie, *Case on Appeal*, Vol. I, Tab 14, p. 177

48. Apart from a negotiated solution, there are only two other realistic options available to the Respondents to allow them to export eggs. The first, an "exemption" for producers in the Northwest Territories from the export quota system, undermines the fundamental ability of CEMA to regulate the egg market and permits Northwest Territories producers to operate as "free-riders". They are free riders since they can export without any constraint on the quantum of eggs and

without being required to pay the levy required of all producers as part of the price stabilization program.

Affidavit of N. Currie, *supra*, pp. 20-23

Evidence of N. Currie, *supra*, pp. 187-189

49. The other alternative would have been a "unilateral" amendment by the federal Parliament or the signatories to the federal/provincial agreement. Both of these types of amendments could have been done without the participation or consent of the Northwest Territories. This, however, would have been contrary to the political and democratic imperative of ensuring that the Northwest Territories was part of the process that lead to its entry. Moreover, in the absence of legislation in force in the Northwest Territories which would have regulated the domestic egg market, the national scheme could not have operated there. While the Northwest Territories did agree to proclaim the necessary legislation in force, it would only do so once a political agreement had been reached on the terms of entry. Thus, all the parties to the negotiations appeared content to negotiate a deal and then take the necessary legislative steps.

Agreed Statement of Facts, *supra*, p. 553

50. The history of the negotiations from 1984 to the present reveals that CEMA has consistently remained committed to the entry of the Northwest Territories. In 1994, the federal and provincial Ministers of Agriculture and the National Farm Products Marketing Council tabled a joint report recommending that the Northwest Territories be brought into the egg marketing scheme. The negotiations since then have focused on the amount of the Northwest Territories allocation and related terms of entry. The Northwest Territories had stipulated very high quotas until 1992, even by admission of their own representative. Moreover, interruptions in the negotiation process arising from the commencement of a reference by the Northwest Territories, the need for studies to be done on the nature of the domestic egg market and the economic feasibility of egg production in the Northwest Territories and the continued export of eggs by the Respondents, in contravention of the law, have operated as historical impediments to a speedier

resolution. There is no evidence of bad faith bargaining or deliberate attempts to delay negotiations by any of the parties.

Record of Negotiations, *Case on Appeal*, Vol. IV, Tab 17, pp. 793-79; Vol. V, Tab 17, pp. 1094-1146, 1147-1233

Record of Decision, *Case on Appeal*, Vol. VI, Tab 32, p. 1303

Evidence of J. Colford, *Case on Appeal*, Vol. I, Tab 14, pp. 122-123, 128

Affidavit of N. Currie, *supra*, pp. 13-14

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51. The parties continue to negotiate at present. The current offer from CEMA of an overbase allocation of 100,000 of which 40,000 would be placed on the National Exchange and the balance retained by the Northwest Territories appears to be in line with a 1992 offer from the Northwest Territories of an overbase allocation of 60,000. It is also close to the current offer from the Northwest Territories of an overbase allocation of 110,000. It is submitted that there has been a clear narrowing of the gap with respect to both the quantum of the quota and the terms of entry. In these circumstances, the recognized s. 1 principle that legislatures should be allowed to take incremental steps suggests that it would be premature for this Court to bring a halt to this negotiation process.

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Egan v. *Canada*, [1995] 2 S.C.R. 513, at 575

McKinney v. *University of Guelph*, *supra*, at 317

Affidavit of N. Currie, *supra*, pp. 13-14

52. Further, judicial intervention which involves setting the terms of entry including a base quota or an overbase allocation for the Northwest Territories runs the risk of being rejected by CEMA members or the Northwest Territories. This, in turn, raises the spectre of unravelling a consensus-based, interlocking system of supply management which has, to date, been effective in preventing a recurrence of the "egg wars" which preceded the creation of CEMA.

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53. It is, therefore, submitted that given that the alternatives undermine the foundation of a

consensual, supply management system, the current approach being taken by the responsible jurisdictions is reasonable, and negotiations should be allowed to come to fruition. As recently stated by Mr. Justice Muldoon in the context of a challenge to quota setting by the Canada Wheat Board:

> In Canada's free and democratic society, Parliament, with its undoubted power to make laws within the class of subject of trade and commerce, must remain free to fix what is quintessentially a political problem, by freeing or regulating the market virtually as it and the government sees fit.

10 *Archibald* v. *Canada Wheat Board*, *supra*, at para. 194

PART III - ORDER REQUESTED

54. It is submitted that this appeal should be allowed and the decision of the lower court overturned. In the alternative, if this appeal is dismissed, then for the reasons set out in the Appellant's factum, this Court should issue a declaration and then suspend it for a reasonable period of time to permit continued negotiations.

55. In any event, the remedy ordered by the Court of Appeal of a constitutional exemption
20 should be reversed for the reasons discussed in the context of *Charter* s. 1, above. It is also inappropriate to grant a constitutional exemption to the Respondents since all parties recognized that producers do not have a right to hold a quota under the egg marketing supply management scheme. As a result of the interlocking nature of the scheme which is dictated by the division of powers, individual egg producers' rights go no further than the opportunity to apply for a quota from a province or territory which has the discretion to grant or refuse that quota.

30

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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May 16, 1997

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