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 -

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INTERVENORS

AND BETWEEN:

CANADIAN EGG MARKETING AGENCY

APPELLANT
(PLAINTIFF)

- and -

FRANK RICHARDSON operating as NORTHERN POULTRY

RESPONDENT
(DEFENDANT)

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PART I
STATEMENT OF FACTS

1. By Order dated December 12, 1997, the Court directed a rehearing of this appeal which had been heard on May 30,1997. Subsequently, by a letter from the Registrar dated December 19, 1997, the Court indicated that it wished to hear further argument on the following points at the rehearing:

(1) The relevance, if any, of s. 121 of the *Constitution Act, 1867*;

(2) Whether s. 6(3) of the *Canadian Charter or Rights and Freedoms* is restricted only to provincial laws or practice and does not include federal legislation; and

(3) If s. 6(3) applies only to provincial laws or practice, whether an argument under s. 1 of the *Charter* should be made.

2. For the purpose of presenting argument on the rehearing, the Intervenor, the Attorney General of British Columbia, adopts the Statement of Facts set out in the Rehearing Factum of the Appellant, Canadian Egg Marketing Agency at pages 1 to 4, paragraphs 1 to 6.

PART II
POINTS IN ISSUE

3. The points to be addressed at the rehearing are outlined above at paragraph 1.

4. The Intervenor's position with respect to these points is as follows:

(1) Section 121 of the *Constitution Act, 1867*, has no direct application in the circumstances of this case and is of relevance, if at all, in explaining the general context in which s. 6 of the *Charter* was enacted;

(2) Section 6(3) of the *Charter* applies equally to provincial and federal laws or practices; and

(3) Because of the answer to the second issue above, it is not necessary to address this issue. However, if the Court accepts that s. 6(3) applies only to provincial laws or practices, then an argument under s. 1 of the *Charter* can be made to the effect that the impugned federal laws are reasonable limits demonstrably justified in a free and democratic society.

PART III
ARGUMENT

A. Section 121 of the *Constitution Act, 1867*, has no direct application in the circumstances of this case and is of relevance, if at all, in explaining the general context in which s. 6 of the *Charter* was enacted

5. The Intervenor adopts the submissions of the Appellant in its Rehearing Factum at paragraphs 14 to 24, pages 8 to 11, and adds the following submissions.

6. The Alberta Barley Commission states its position with respect to s. 121 of the *Constitution Act, 1867*, at paragraph 16 of its Factum:

> "It is ABC's position that the time is ripe for this Court to re-consider previous interpretations of s. 121, and to accord it a generous construction consonant with the free trade spirit that motivated its adoption in 1867, and prevails again in the 1990's. If this Court were to do so, it is submitted that, both the impediments to interprovincial egg marketing complained about by the Respondents in the present appeal and the Canadian Wheat Board's grain marketing monopoly which ABC has challenged in *Archibald* would be seen to be unconstitutional violations of s. 121."

7. As well, the Respondents in their Factum at paragraph 10 say that they agree with the comments of the Alberta Barley Commission respecting the "direct" and "interpretive" relevance of s. 121.

8. The Respondents go on to submit that the regulatory scheme as they call it violates s. 121 because it "creates an absolute impediment to the free flow of eggs across one or more provincial boundaries." (at paragraph 17). The decision of this Court in the *Egg Reference* is distinguished by the Respondents on the basis that in that case the Court was not considering the situation with respect to the Northwest Territories egg producers whose situation is very different because they are excluded from the system. That is, they cannot obtain a federal quota for the eggs and therefore

cannot sell their eggs outside the Northwest Territories (Respondents' Factum, at paragraphs 18 and 19).

Reference Re Agricultural Products Marketing Act [1978] 2 S.C.R. 1198.

9. Section 121 states:

> "All articles of the growth, produce or manufacture of any of the provinces shall, from and after the union, be admitted free into each of the other provinces."

10. There is no question, and the Respondents and the Alberta Barley Commission do not appear to submit to the contrary, that s. 121 as interpreted in the *Gold Seal* case has no application to the case presently before the Court. Mignault J. stated the principle (at page 470, concurred in by Duff J. at page 456 and Anglin J. at page 466):

> "I think that, like the enactment I have just quoted, the object of section 121 was not to decree that all articles of the growth, produce or manufacture of any of the provinces should be admitted into the others, but merely to secure that they should be admitted "free," that is to say without any tax or duty imposed as a condition of their admission. The essential word here is "free" and what is prohibited is the levying of custom duties or other charges of a like nature in matters of interprovincial trade."

Gold Seal Ltd. v. Dominion Express Co. (1921) 62 S.C.R. 424.

11.. The *Gold Seal* judgment was agreed with by the Privy Council in *Atlantic Smoke Shops v. Conlon* [1943] A.C. 550 (per Viscount Simon at page 569). As well, a majority of the Supreme Court of Canada agreed with Locke J. in *Murphy v. C.P.R.*, who adopted the *Gold Seal* and *Atlantic Smoke Shops* interpretation of s. 121.

Atlantic Smoke Shops Ltd. v. Conlon et al. [1943] A.C. 550.
Murphy v. C.P.R. [1958] S.C.R. 626, at page 634.

12. However, it is suggested by the Respondents and the Alberta Barley Commission that a concurring minority judgment by Mr. Justice Rand in *Murphy* gives an interpretation of s. 121 which should be adopted:

> "I take section 121, apart from customs duties, to be aimed against trade regulation which is designed to place fetters upon or raise impediments to or otherwise restrict or limit the free flow of commerce across the Dominion as if provincial boundaries did not exist. That it does not create a level of activity divested of all regulation I have no doubt;

> what is preserved is a free flow of trade regulated in subsidiary features which are or have come to be looked upon as incidents of trade. What is forbidden is a trade regulation that in its essence and purposes is related to a provincial boundary."
>
> *Murphy v. C.P.R.* per Rand J. at page 642.

13. It is true that Laskin C.J.C. in the *Egg Reference* appeared to accept the broader view of s. 121 articulated by Rand J. in *Murphy.*

> "Accepting this view of section 121, I find nothing in the marketing scheme here that, as a trade regulation, *is in its essence and purpose* related to a provincial boundary. To hold otherwise would mean that a federal marketing statute, referable to intraprovincial trade, could not validly take into account patterns of production in the various provinces in attempting to establish an equitable basis for the flow of trade. I find here no design of punitive regulation directed against or in favour of any province."
>
> *Reference Re Agricultural Products Marketing Act* at page 1268.

14. First of all, with respect, this was a concurring minority judgment and, it is submitted, it was not intended to overrule the previous jurisprudence on the extent and meaning of s. 121. Rather, what the Chief Justice appears to be saying is that even if he takes the broadest view of s. 121 that is available, the egg marketing scheme being considered in the *Egg Reference* does not violate that section. That is an entirely different matter than saying that the earlier jurisprudence with respect to s. 121 is overruled.

15. In concluding that the egg marketing scheme and, in particular the federal legislation does not violate s. 121, the Chief Justice stated:

> "A federal regulatory statute which does not directly impose a customs charge but through a price fixing scheme, designed to stabilize the marketing of products in interprovincial trade, seeks through quotas, paying due regard to provincial production experience, to establish orderly marketing and such trade cannot, in my opinion, be in violation of section 121." (emphasis added)
>
> *Reference Re Agricultural Products Marketing Act* at page 1268.

16. In our submission, the above cited passage is a complete answer to any attempt by the Respondents to distinguish the *Egg Reference*. CEMA in this case had due regard to provincial production experience in the Northwest Territories which prior to the establishment of the initial quotas for the regulatory scheme was non-existent and

so created an orderly marketing system which assigned no quota to producers in the Northwest Territories.

17. The fact that producers in the Northwest Territories have no quota while producers in other provinces do have quota, in our submission, is a distinction without a difference. In all of the provinces since federal quota is limited there are potentially a number of producers who will not be able to obtain quota for marketing their products in interprovincial trade. The only difference between the Northwest Territories and other provinces is that because of the production experience in the former jurisdiction the proportion of producers without such quota is much greater.

18. Laskin C.J. observes in the *Egg Reference*, without making any specific finding, that the application of s. 121 may be different according to whether it is provincial or federal legislation that is involved because what may amount to a tariff or customs duty under a provincial regulatory statute may not have that character at all under a federal regulatory statute. Any differential application of s. 121 would be based upon the federal trade and commerce power:

> "it must be remembered too that the federal trade and commerce power also operates as a brake on provincial legislation which may seek to protect its producers or manufacturers against entry of goods from other provinces."
>
> *Reference Re Agricultural Products Marketing Act* I at page 1267.

19. It is submitted that the concerns expressed by Mr. Justice Rand in *Murphy v. C.P.R.* and the Chief Justice in the *Egg Reference* concerning the need for limitations on provincial action in respect of interprovincial marketing of natural products have been alleviated by subsequent decisions of the Courts with respect to the scope of the federal trade and commerce power. It has been held that the province cannot use its legislative authority over local production of natural products to implement an extra-provincial marketing scheme:

> "The arguments seek to recharacterize the scheme as a control on production. While production is *prima facie* a matter within provincial legislative competence, this undoubted provincial power cannot be used for the purpose of supporting an extra-

> provincial marketing scheme. If this were possible there would be no room for federal power."
>
> *British Columbia (Milk Marketing Board) v. Bari Cheese* [1997] 2 W.W.R. 342 (B.C.C.A.) at page 356.

20. Thus, it is submitted, that an expansive interpretation of s. 121, represented by Rand J.'s judgment in *Murphy*, is no longer necessary because of the interpretation that the Courts have given to the federal trade and commerce power over interprovincial marketing. That power serves as Laskin C.J. termed it as "a brake on provincial legislation."

21. The provinces must, however, be left some room to maneuver with respect to their ability to legislate concerning property and civil rights and things of a local and private nature. Subsequent to *Murphy v. C.P.R.*, this Court held that provinces could "affect" interprovincial trade when exercising their authority under heads of s. 92 so long as the laws which were implemented were not made "in relation to" the regulation of trade and commerce. The need for this flexibility was also recognized by the Ontario Court of Appeal in the *Agricultural Products Marketing Act*:

> "It is inevitable, what with licence fees, tax, quality standards, quotas, etc., that to some extent the flow of trade between the Provinces is interfered with. In my view, that type of legislative activity is not the concern of s. 121."
>
> *Reference Re Agricultural Products Marketing Act* (1977) 16 O.R. (2d) 451 (Ont. C.A.) at page 477, per MacKinnon J.A.
>
> *Carnation Company v. The Quebec Agricultural Marketing Board* [1967] 2 S.C.R. 238 at page 252.

22. The Alberta Barley Commission at paragraph 10 of its Factum presents an excerpt from the 1865 "Confederation Debates" quoting one of the principal Fathers of Confederation, Alexander Galt, as follows:

> "...hostile tariffs have interfered with the free interchange of the products of the labor of all the colonies..."

23. It is the hostile tariffs that the Fathers of Confederation had in mind in enacting s. 121 rather than some more pervasive regulatory scheme set up under the

federal trade and commerce power, as is found today in the various natural products marketing schemes involving extensive federal/provincial cooperation and interlocking legislation.

24. The purpose of the integrated marketing scheme was to introduce stability into the egg market on a national level by assuring all producers a price for their eggs within their respective quotas, regardless of whether those eggs are sold locally or extra-provincially and regardless of whether they are sold for table consumption or end up in the surplus removal program. This is a proper exercise of the federal trade and commerce power governing interprovincial trade. It is submitted that the Fathers of Confederation would not have intended to put in place a "free market" provision in the *Constitution* that would override the federal provincial trade and commerce power and so ensure that the federal government was not capable of bringing what was termed "economic stability to a chaotic market".

> *Reference Re Agricultural Products Marketing Act* per Laskin, C.J.C. at page 1219.
>
> *Reference Re Agricultural Products Marketing Act* per MacKinnon J.A. at pages 461 and 463.

25. Thus, it is submitted that s. 121 has no direct application in the circumstances of this case.

26. The Alberta Barley Commission suggests in its Factum that s. 121 has "interpretive relevance" (paragraphs 18 to 21). That is, it can be used as an aid to the interpretation of the meaning of s. 6(2) of the *Charter*

27. With respect, this submission can go no further than the passage from La Forest J.'s judgment in *Black v. Law Society of Alberta* cited by the Commission in its Factum. That passage simply provides a context in *Black* for a discussion of the scope and effect of s. 6(2)(b) by examining the history of the protection of interprovincial mobility in Canada. That is all the reference in *Black* to s. 121 was intended to fulfill. It

cannot, and in our submission should not, be determinative of any interpretation to be given to s. 6(2)(b) unless the words in that section can independently bear that meaning.

B. Section 6(3) of the *Charter* applies equally to provincial and federal laws or practices

28. The Intervenor adopts the submissions of the Appellant, Canadian Egg Marketing Agency, in its Rehearing Factum at paragraphs 25 to 39, pages 11 to 16, and adds the following submissions.

29. Section 32 of the *Charter* makes it clear that the *Charter* applies equally to both the government of Canada and to the governments of the provinces:

> "32(1) The Charter applies
>
> (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> (b) to the legislature and the government of each province in respect of all matters within the authority of the legislature of each province."

30. The laws of each level of government, federal and provincial, are subject to the *Constitution* in the same manner and to the same extent:

> "52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

31. All throughout the *Constitution*, especially the *Constitution Act, 1867*, and the *Canadian Charter of Rights and Freedoms* where there is an intent that the *Constitution* apply to only one level of government or another or to specific provinces, the *Constitution* makes that distinction explicitly and expressly. Thus, it is submitted, that if

s. 6(3)(a) is to apply only to provincial laws, that intention must either be express or must be found to exist by necessary implication in a clear and unequivocal fashion.

> For express mention of Parliament and the legislatures of the province or Government of Canada and government of the province see the following sections of the *Charter*: 3, 4, 5, 16(1), 16(2), 16(3), 16.1(1). 16.1(2), 17(1), 17(2), 18(1), 18(2), 19(1), 19(2), 20(1), 20(2), 30 and 33(1).

32. There are no express words in s. 6(3)(a) that would limit its application to provincial laws only.

33. The Respondents submit that the wording of s. 6(3)(a) contains an "express limitation on the applicability of that section. The limitation is contained in the phrase "laws of general application in force in the province"." (Respondents' Factum, paragraph 23).

34. If the drafters of the *Charter* had intended that s. 6(3)(a) should only apply to provincial legislation, it would have been simple to expressly so state by replacing the phrase "laws of general application in force in a province" with the explicit and express phrase "provincial laws of general application in force". This was not done. In our submission this is clear evidence that it was not intended that s. 6(3)(a) be restricted to provincial laws.

35. The Respondents' argument is based on several decisions of this Court which have held that s. 87 of the *Indian Act* does not apply to federal statutes because that section contains the phrase "all laws of general application from time to time in force in any province are applicable to (Indians)."

36. In *R. v. George* which considered the meaning of s. 87 of the *Indian Act*, Martland J. speaking for the majority said:

> "The incorporation in the section of the words italicized to me makes it clear that when the section refers to "laws of general application from time to time in force in any province" it did not include in that expression the statute law of Canada...This would be a rather unusual provision, particularly in view of the fact that it did not require any express

provision in the *Indian Act* to make Indians subject to the provisions of federal statutes."

Regina v. George [1966] S.C.R. 267 at pages 280 to 281.

37. That is, Indians were already subject to federal laws of general application in force in any province since they were under the exclusive jurisdiction of the Parliament of Canada by virtue of s. 91(24) of the *British North American Act, 1867*. It would have been redundant to include federal laws within the reference in s. 87 to "all laws of general application from time to time in force in any province." That is, in our submission, why the Court decided that phrase only applied to provincial laws. As well, besides being redundant, including federal laws within the phrase "laws of general application" would mean that those laws would be subject to the terms of any treaty or other act of Parliament, other than the Indian Act - an unusual provision., as Martland J. observed.

38. Thus, it is submitted that *Regina v. George* is distinguishable and is not authority for the proposition that whenever a constitutional instrument uses the phrase "laws of general application in force in a province", it is intended to apply only to provincial laws and not federal laws.

39. When interpreting s. 6(3)(a), it is not only proper but necessary for the Court to take into account the context in determining the scope and effect of that provision;

"A discussion of the scope and effect of s. 6(2)(b) in the context of this case is enhanced by a brief review of the history of protection of interprovincial mobility in Canada."

Black v. Law Society of Alberta [1989] 1 S.C.R. 591 at page 608, per La Forest J.

Laba v. Canada [1994] 3 S.C.R. 965 at pages 1000 to 1001.

40. It is an essential feature of the historical and legal context that the federal government in exercising its powers under s. 91 of the *Constitution Act, 1867*, has always had the authority to pass laws which have a different effect in different

jurisdictions in order to respond to local conditions within the various provinces. The Court has consistently upheld federal statutes with differential geographic application.

> See City of *Fredericton v. The Queen* (1880) 3 S.C.R. 505.
> *R. v. Burnshine* [1975] 1 S.C.R. 693.
> *R. v. Cornell* [1988] 1 S.C.R. 461.
> *R. v. Turpin* [1989] 1 S.C.R. 1296.
> *R. v. S. (*S.) [1990] 2 S.C.R. 254.

41. This principle was applied in *R. v. Canmarket Lifestyles Products*:

> "In Canada before the *Charter*, we have had, both in federal and provincial jurisdictions, a practice of solving many social problems by local option. This has proved particularly useful in connection with morals offences where there is often in a country so diverse as ours sharp differences of view as to the wisdom of suppressing particular acts. It has also proved useful where what is sought to be prohibited is not so much a particular act as acts which are unregulated or uncontrolled."
>
> *R. v. CLP Canmarket Lifestyles Products* [1988] 2 W.W.R. 170 (Man. C.A.) at page 174, per O'Sullivan J.A.

42. Differential geographical impact of federal law does not mean that the law ceases to be a law of general application. In City of *Fredericton v. The Queen*, Ritchie C.J. for himself and for Fournier J., implicitly concurred in by Taschereau and Gwynne J.J. stated:

> "It has likewise been urged that the Act affects only particular districts, that it is not general legislation, and therefore is *ultra vires*. I am entirely unable to appreciate this objection. If the subject matter dealt with comes within the classes of subjects assigned to the Parliament of Canada, I can find in the Act no restriction which prevents the Dominion Parliament from passing a law affecting one part of the Dominion and not another, if Parliament, in its wisdom, thinks the legislation applicable to and desirable in one part and not in the other. But this is a general law applicable to the whole Dominion, though it may not be brought into active operation throughout the whole Dominion." (emphasis added)
>
> City of *Fredericton v. The Queen* at page 530.

43. Section 23 of the *Farm Products Agencies Act* provides that a marketing plan established under that *Act* shall allocate quota for production of eggs on the basis of production from a given area compared to all Canadian production over a period of five years immediately preceding the effective date of the marketing plan. This is the

central focus of the Respondents' complaint. That is, because the Northwest Territories did not have any history of production, unlike other provinces it was not allocated quota at the time that the regulatory scheme was adopted.

44. But, in our submission, that differential impact does not make s. 23 other than a law of general application. Section 23 is a law of general application in the sense in which that term is used in *City of Fredericton v. The Queen*. It simply has a differential geographical impact throughout Canada just as did the *Canada Temperance Act* considered in *City of Fredericton v. The Queen*, the *Competition Act* considered in *R. v. CLP Canmarket Lifestyles Products*, the provisions for jury trial in *R. v. Turpin*, non-uniform application of roadside impaired driving testing in *R. v. Cornell*, indeterminate sentences for young offenders under the *Prisons and Reformatories Act* in *R. v. Burnshine*, and the presence or absence of alternative measures in the province considered in *R. v. S. (*S.) All of those laws were laws of general application passed by the federal government and in force in one province or several provinces but not in others.

45. Thus, it is submitted, that a federal law that has differential geographical application is still a law of general application in force in a province. It remains so for the purposes of s. 6(3)(a), and that section, therefore, applies to both to federal and provincial legislation.

C. Because of the answer to the second issue above, it is not necessary to address this issue. However, if the Court accepts that s. 6(3) applies only to provincial laws or practices, then an argument under s. 1 of the *Charter* can be made to the effect that the impugned federal laws are reasonable limits demonstrably justified in a free and democratic society

46. If the court accepts the submission on the previous issue, it is not necessary to go on and consider this issue. However, if the Court does not agree with that submission, then it is the position of the Intervenor that s. 1 applies to s. 6 of the *Charter* no matter how it is interpreted. That is, if s. 6(3)(a) of the *Charter* does not

apply to federal laws, violation of rights guaranteed by s. 6(2)(b) can still be a reasonable limit demonstrably justified in a free and democratic society and the federal government or CEMA may defend the law on that basis, if they choose to do so.

47. This is made clear by La Forest J. on behalf of the Court in *Black v. Law Society of Alberta* as follows:

> "Section 6(2) is subject to both s. 6(3) and s. 1."
>
> *Black v. Law Society of Alberta* at page 624.

PART IV

ORDER REQUESTED

48. As already noted in the Intervenor's Factum on the hearing of the appeal, the Intervenor submits that the Constitutional Questions should be answered as follows:

Question 1: In the negative.

Question 2: In the affirmative.

49. On the Rehearing Application it is submitted that the response to the issues before the Court should be as follows:

(1) Section 121 of the *Constitution Act, 1867*, has no application in the circumstances of this case;

(2) Section 6(3) of the *Charter* applies both to provincial and federal laws or practices; and

(3) If s. 6(3) applies only to provincial laws or practices, then an argument under s. 1 of the *Charter* can be made.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

GEORGE H. COPLEY, Q.C.
Counsel for the Intervenor,
Attorney General of British Columbia

DATED this 11th day of March, 1998,

PART V

LIST OF AUTHORITIES

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