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Court File No. 25192

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

B E T W E E N :

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; Attorney General of Quebec; Attorney General of Ontario; and the Alberta Barley Commission

Interveners

A N D B E T W E E N:

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; Attorney General of Quebec; Attorney General of Ontario; and the Alberta Barley Commission

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TABLE OF CONTENTS

A. INTRODUCTION

1. This Court has long recognized that the Canadian federal structure requires a "workable balance between diversity and uniformity". Equally well-recognized is the fact that the purpose of s. 6 of the *Charter* is to impact on that balance. What has not been decided to date, however, is the extent to which s. 6 of the *Charter*, as opposed to other provisions in the *Constitution Acts* of 1867 and 1982, is intended to foster a common Canadian market.

Hunt v. *T&N*, [1993] 4 S.C.R. 289, at 296
Black v. *Law Society of Alberta*, [1989] 1 S.C.R. 591, at 608-612
Morguard Investments v. *de Savoye*, [1990] 3 S.C.R. 1077, at 1099

2. The main submission of the Attorney General of Ontario, as set out in the original factum and elaborated on in this supplemental factum, is that s. 6 of the *Charter* is primarily intended to deal with the mobility of labour and individual rights tied to citizenship. What lies at the core of this "individual mobility right" is the ability of non-residents to be treated the same as residents within any province.

3. An alternative conception of s. 6 is that it is intended to be a broad-based right to remove or reduce non-tariff barriers to trade and a basis upon which to homogenize standards, conditions and regulatory schemes across the country. This approach to s. 6, which it is submitted ought to be rejected by this Court, is premised on an "individual free trade" right and the desire to create a *laissez faire* Canadian union. While both conceptions of s. 6 assist in enhancing the common market of Canada, the focus of the right and the degree to which it results in the elimination of trade barriers differ.

4. The essence of the complaint in this appeal is that goods cannot move inter-provincially because of a non-tariff trade barrier, i.e., a quota system. At the time of the initial hearing before this Court, the terms and conditions of the quota were being negotiated between the appropriate institutional bodies and levels of government. Those negotiations are now complete. It is submitted that this complaint relates to the ability of businesses to capture potential economic benefits associated with free trade rather than notions of human dignity associated with citizenship.

5. In its original factum, the Attorney General of Ontario submitted that the individual mobility rights interpretation of s. 6 was supported by purposive and contextual approaches to s. 6. In this factum, the Attorney General submits that this interpretation finds further support having regard to other constitutional provisions. The s. 6 right must be seen as one part of a larger scheme intended to achieve a certain type of economic union, and it would be inappropriate to read s. 6 so as to reduce, eliminate or undermine the function of these other constitutional provisions. This position is based on an analysis of:

i) The history of s. 121 of the *Constitution Act, 1867*;
ii) Section 6(3)(a) of the *Charter*; and
iii) Section 36 of the *Constitution Act, 1982*.

6. With respect to s. 121 of the *Constitution Act, 1867*, it is submitted that the reduction of non-tariff trade barriers such as those challenged by the Appellant in this appeal was discussed during the constitutional negotiations leading up to the enactment of the *Constitution Act, 1982*, in the context of proposed amendments to s. 121. These proposals, however, were ultimately rejected. The Respondents, therefore, seek to obtain through an expansive interpretation of s. 6 that which could not be obtained directly in s. 121.

7. Section 6(3)(a) affirms the proposition that the purpose of s. 6 was not to create an individual free trade right. Section 6(3)(a) is an heuristic tool to interpret s. 6(2) rather than a saving provision for s. 6(2) infringements. The Attorney General submits that s. 6(3)(a) recognizes that as long as legislation is not "intentionally or colourably" aimed at restricting personal mobility on the basis of past or present province of residence, and the effect does not impinge on the "core values" associated with citizenship, there is no violation of s. 6(2).

8. Section 36 of the *Constitution Act, 1982* refers to the "equalization of opportunities for the well-being of Canadians" and "furthering economic development". Significantly, this provision does not provide for a right which can be enforced by the judiciary but is a declaration regarding political aspirations. It reflects the consensus that the judiciary is not well-suited to decide complex economic matters such as the appropriateness or reasonableness of non-tariff trade barriers. In addition, to the

extent that s. 36 affirms that different treatment based on region or province is specifically contemplated in the Constitution, it would be inappropriate to interpret s. 6 so as to always require a s. 1 *Charter* justification for interprovincial federal laws and policies based on place of residence.

9. Last, this Court has asked for submissions on the relationship between s. 6 and s. 1 of the *Charter*. It is submitted that the mere fact that s. 6 contains internal qualifiers is not a sufficient basis to limit the ambit of a s. 1 justification. Indeed, s. 1 takes on heightened importance because there is no possible exercise of an override under s. 33 of the *Charter*.

> T. Singleton, *The Principles of Fundamental Justice, Societal Interests and Section 1 of the Charter*, [1995] 74 Can. Bar. Rev. 446, at 473

10. Under the analysis proposed by the Attorney General for s. 6, there remains a vital role under s. 1 of the *Charter*. For example, s. 1 would likely form the basis of a government justification where a valid regional, social or economic policy intentionally or colourably singled out based on place of residence and was not caught by ss. 6(3)(b) or 6(4) of the *Charter*. As discussed in Part E of this factum, constitutional, democratic and institutional considerations suggest a deferential approach under s. 1 where there is a complex legislative scheme such as exists in this appeal.

B. SECTION 121 OF THE *CONSTITUTION ACT, 1867*

11. The Attorney General will not address the issues of the applicability of s. 121 to the Northwest Territories and this particular marketing scheme. These specific issues are not found in the notice of appeal, the stated constitutional questions or the letter of December 19,1997 from the Registrar of this Court. Instead, the Attorney General will focus on the history of s. 121 as an interpretive aid to s. 6 of the *Charter*.

1) The Current Ambit of Section 121

12. While the wording of s. 121 leaves room for a broad-based prohibition on barriers to trade, this provision has historically been interpreted narrowly to prohibit only customs duties.

Gold Seal v. *Dominion Express Co.*, [1921] 2 S.C.R. 424
Atlantic Smoke Shop v. *Conlon*, [1943] A.C. 550

13. One rationale for this limited ambit was articulated in the 1980 *Federal Discussion Paper On Powers Over The Economy*, as follows: "[It] is explainable in the context of the 1867 *British North America Act* since the framers of that document thought they were conferring on the federal government jurisdiction over all trade and commerce [under s. 91(2)] as well as all economic power necessary for the creation of a highly integrated economic union". In other words, s. 121 was not thought of as a vital provision to ensure a common market given the breadth of Parliament's power to limit barriers to interprovincial trade under the peace, order and good government clause, s. 91(2), s. 91(29) and s. 92(10) of the *Constitution Act, 1867*.

Anne F. Bayefsky, ed., *Canada's Constitution Act, 1982 & Amendments: A Documentary History*, Vol. II, (Toronto: McGraw-Hill Ryerson, 1989), at 610

14. Laskin C.J., speaking for a four judge minority in *Reference re Agricultural Products Marketing Act*, *infra*, has suggested that there is room for a more expansive interpretation of s. 121 which would prohibit a regulatory scheme which, in its purpose and essence, interfered with interprovincial trade even where there were no special charges or levies. Laskin C.J. also found that the egg marketing scheme was not the type of scheme which even an expanded s. 121 should prohibit. The majority, however, did not address this issue.

Reference re Agricultural Products Marketing Act, [1978] 2 S.C.R. 1198, at 1268

15. It is submitted that whether or not this Court wishes to follow Laskin C.J.'s *dicta* should await another appeal where the issue of the ambit of s. 121 is squarely before the Court. For the purposes of this appeal, it is sufficient to note that s. 121 was not generally regarded as an effective tool in reducing interprovincial trade barriers, and this, in turn, was an impetus for constitutional discussions about a new s. 121 which would enhance the Canadian common market.

Bayefsky, *supra*, at 610

2) Constitutional Reform Proposals

16. Academic studies documenting and criticizing non-tariff interprovincial trade barriers such as marketing schemes pre-dated the 1982 constitutional amendment negotiations. These concerns were fully adopted by the federal government in the constitutional forum. In particular, the federal government spearheaded three different proposals aimed at reducing these barriers: i) a *Charter* clause to protect individual mobility rights; ii) an expanded s. 121 to diminish interprovincial trade barriers; and iii) revisions to the division of powers designed to enhance federal powers to limit interprovincial trade barriers. The first of these objectives was at least partially achieved. The second was the subject of extensive discussion but was ultimately rejected. The last objective never went beyond initial proposals.

Bayefsky, *supra*, at 621
R. Howse, *Economic Union, Social Justice and Constitutional Reform: Towards a High but Level Playing Field*, (Toronto: York University Centre for Public Law and Public Policy, 1992) at 61-72

17. In particular, the history of the negotiations reveals that:

i) From the onset, individual mobility rights under s. 6 were dealt with separately from s. 121. Section 6 was intended to respond to a different concern; namely, individual rights tied to autonomy and citizenship. Even here, although there was early consensus on the importance of such a right, its ambit was ultimately circumscribed; and

ii) The specific type of non-tariff trade barrier raised in this appeal was brought to the table by federal and provincial representatives as a concern in the context of negotiations on a new s. 121. As there was no consensus on whether or how to reduce these barriers, however, s. 121 was never amended.

18. As early as 1978, a federal draft individual mobility rights clause was tabled. The purpose of this provision was to remove interprovincial trade barriers associated with differential treatment of individuals in any province based on province of prior residence. In the October 6, 1980 House of Commons debates, the then Minister of Justice, Mr. Jean Chrétien confirmed that 6 is intended to allow citizens to "take up residence and pursue a livelihood without discrimination based on the previous province of residence. In other words, no Canadian should be prevented from seeking a job

anywhere in Canada merely on the grounds that he or she comes from another province". The provinces agreed that this type of individual mobility right should, in principle, be included in the constitutional discussions.

Canada, *House of Commons Debates*, 32nd Parliament , 1st Session at 3286 (October 6, 1980), cited at paragraphs 41, 42, 48 and 49 of the Respondents re-hearing factum
Bayefsky, *supra*, at 539

19. The ambit of the initial federal proposal, however, was repeatedly subject to additional limitations. For example, an explicit constitutional right of non-residents to own property in a province was removed, and new limitations on the right were set out in ss. 6(3)(b) and 6(4) of the *Charter*. A limitation similar to to that found in s. 6(3)(a) was added during the Federal Provincial First Ministers Conference of February 5-6, 1979. The October 6, 1980 draft version of s. 6, which is the same as that ultimately passed, contained an explanatory note to s. 6(3)(a) stating that it was intended to permit situations where the "same general laws are applicable to residents of that province (e.g., laws respecting the payment of taxes and **terms and conditions of employment**)..." [emphasis added]. Thus, s. 6(3)(a) was clearly intended to permit provincial variation in legislation relating to certification, licensing, language, health benefits or pension laws.

Bayefsky, *supra*, at 539, 570-81, 601, 605, 616, 662, 673, 747
P. Hogg, *Constitutional Law of Canada*, Vol. 2, 3rd ed., (Scarborough: Carswell, 1992) (Loose Leaf ed.), at 43-6

20. The above history of s. 6 contrasts with the history of proposed amendments to s. 121. It is submitted that, from the onset, there lacked a consensus on the principle of a judicially enforceable expanded s. 121. The July 9, 1980 federal paper separated out different types of impediments to a complete common market, and referred to commodity trade limitations as one area where there was a need to reduce trade barriers. The federal proposal recommended the removal of non-tariff trade barriers which "unduly" impede the movement of goods unless the barrier could be justified on the basis of "public safety, order, health or morals" or "principles of equalization" or "regional development". At the Continuing Committee of Ministers on the Constitution of July 22-24, 1980, however, none of the provinces endorsed this particular proposal. The federal government, Saskatchewan and Ontario made further proposals intended to eliminate non-tariff trade barriers

during that summer and early fall. None of these proposals, however, ever went forward.

Bayefsky, *supra*, at 586-87, 607-10, 623, 656-57, 659-60, 668, 692

21. What lies at the heart of this appeal is an allegation that the quota allocation used in the egg marketing scheme unduly impedes the movement of goods and is not justified on the basis of public safety, order, health, moral, regional development or equalization. It is a claim which would have fit squarely within the proposed new s. 121. It is, therefore, submitted that what is being sought in this appeal is an expansion of s. 6 to obtain the economic common market which could not be achieved under s. 121.

C. SECTION 6(3)(a) OF THE *CHARTER*

1) The Proper Interpretation of s. 6(3)(a)

22. Section 6(3)(a) supports the normative conception of mobility rights set out in the Attorney General's original factum: the guarantee only protects individual mobility tied to notions of personal autonomy and equal citizenship. Specifically, s. 6(2) will not be violated where, pursuant to s. 6(3)(a), it is found that the impugned laws: i) do not aim at restricting mobility rights either overtly or colourably; and ii) do not impact on the core values which underpin the right. This interpretation finds support in the division of powers case law regarding "laws of general application" and a purposive and contextual approach to the phrase "primarily discriminate" in s. 6(3)(a).

i) Law of General Application

23. The phrase "law of application" has been developed in division of powers cases involving the interaction of provincial legislation and the *Indian Act*. This case law holds that a law will be of general application if it has a uniform territorial reach and does not seek to single out Indians by overtly or colourably attempting to impair their status and capacities. Thus, whether or not a law is one of general application is a question of legislative intent.

24. Where the effect of a provincial law is to impair the "status and capacities" of Indians, it is still considered a "law of general application" but must be referentially incorporated through s. 88 of

the *Indian Act* which provides, *inter alia*, that "all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province" [emphasis added]. This interpretation of the phrase "laws of general application" was clarified by the Supreme Court of Canada in *R.* v. *Dick*, *infra*:

> The tests which Lambert J.A. applied... are perfectly suitable to determine whether the application of the *Wildlife Act* to the appellant would have the effect of regulating him *qua* Indian, with the consequential necessity of a reading down if it did; but, **apart from legislative intent and colourability, they have nothing to do with the question whether the *Wildlife Act* is a law of general application**... If the special impact of the *Wildlife Act* on Indians had been the very result contemplated by the Legislature and pursued by it as a matter of policy, the Act could not be read down because it would be in relation to Indians and clearly *ultra vires*.
>
> The *Wildlife Act* does not differ in this respect from a great many provincial labour laws which are couched in general terms and which, taken literally, would apply to federal works and undertakings. So to apply them however would make them regulate such works and undertakings under some essentially federal aspects. They are accordingly read down so as not to apply to federal works and undertakings... **But it has never been suggested, so far as I know, that, by the same token, those provincial labour laws cease to be laws of general application.** [emphasis added]

R. v. *Dick*, [1985] 2 S.C.R. 309, at 321-326
P. Hogg, *supra*, pp. 27-13 to 27-14
Delgamuukw v. *British Columbia* (1997), 153 D.L.R. (4th) 193, at 270-272
Derrickson v. *Derrickson*, [1986] 1 S.C.R. 285, at 297

25. Applying this approach to the phrase "law of general application" found in s. 6(3)(a) of the *Charter*, a law or practice will be one of general application if it does not have as its intent the restriction of mobility rights. This intent may be overt on the face of the law or practice; alternatively, it may be discerned by examining extrinsic evidence such as Hansard. The effect of the law or practice, however, is relevant only insofar as it may be evidence of a covert or colourable intent.

R. v. *Dick*, *supra*, at 326-327
R. v. *Sutherland*, [1980] 2 S.C.R. 451, at 455

26. It is submitted that this approach is consistent with this Court's decision in *Black* v. *Law Society of Alberta*. This Court held that two rules of the Alberta Law Society could not be saved under s. 6(3)(a) of the *Charter*. Based on an examination of the wording of the rules and the

discussions leading up to their passage, the Court held that the impugned provisions aimed at "prohibiting residents and non-resident members from associating for the practice of law". The rules were found to be discriminatory in their purpose, colourably if not overtly.

Black v. *Law Society of Alberta, supra*, at 625-626

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ii) Primarily Discriminates

27. The insertion of the modifier "primarily" in the phrase "primarily discriminates" indicates that not every law of general application which has the effect of discriminating on the basis of province of residence will have to be justified under s. 1 of the *Charter*. The issue then is how to distinguish between those effects resulting from a law of general application which are captured by s. 6(3)(a) and those which must be justified under s. 1.

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28. It is submitted that the distinction should be drawn on the basis of both the type of mobility interest which is affected and the degree of the impact. In the context of other *Charter* rights which are characterized by an internal qualifier such as ss. 7 and 8 of the *Charter*, this Court has interpreted the scope of the right purposively and contextually, having regard to both the nature of the protected interest which is affected and the degree of the impact.

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

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Godbout v. *Longueuil (City)* (1997), 152 D.L.R. (4th) 577 (S.C.C.), at 619-622 (per La Forest J.)

R. v. *Plant*, [1993] 3 S.C.R. 281, at 293

R. v. *McKinlay Transport*, [1990] 1 S.C.R. 627, at 645-648 (per Wilson J.)

29. Under this interpretation, effects-based infringements of the mobility rights will be saved under s. 6(3)(a) where they do not impact upon the "core values" which the mobility guarantee seeks to protect; namely, individual dignity and respect associated with the rights of citizenship. For instance, a restriction on an individual's ability to physically move to another province or bring assets and goods incidental to the move is a more serious infringement than a restriction on the ability to move product across provincial borders. The former type of infringement engages interests which are at the core of the right in that they are traditionally associated with equality of personal mobility and privacy interests rather than corporate commercial interests.

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Ross v. *New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at 876-879
Godbout v. *Longueuil (City)*, *supra*, at 610-616 (per LaForest J.)
Winner v. *S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887, at 919-920, quoted in *Black* v. *Law Society of Alberta*, *supra*, at 610-611

30. Courts have adopted an analogous approach to assessing the severity of the impact of a law of general application upon a protected group in "interjurisdictional immunity" cases. For example, in the *Indian Act* context, courts ask whether a law of general application impairs the "status and capacities" of Indians, affects their "Indianness", their "core values", or are "at the centre of what they do and who they are". In the context of federal works and undertakings, the courts ask whether the law in question affects a "vital part" of the operation so as to "sterilize" the operation by affecting what makes it specifically of federal jurisdiction.

Delgamuukw v. *British Columbia*, *supra*, at 271
Irwin Toy Ltd. v. *Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at 955, 958
Air Canada v. *Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581, at 609
Winner v. *S.M.T. (Eastern) Ltd.*, *supra*

31. Contrary to the arguments of the Respondents and the Alberta Barley Commission, the scheme does not infringe the "status and capacities" of the principals of a corporation simply because it restricts their ability to run a business. In the context of s. 6, the concept of "status and capacity" does not speak to a right to work or trade in goods; it speaks to the degree of the impact on personal mobility.

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

32. It is further submitted that the impact on the core values protected by the right must be more than trivial or insubstantial before a government will be required to justify the infringement under s. 1 of the *Charter*. The *Charter* does not protect individuals against trivial or insubstantial burdens on the protected interests. In the context of ss. 2(a), 2(b) and 15, this Court has indicated that trivial and insubstantial burdens or legislative distinctions will not violate the guarantees. For example, burdens such as certification or licensing requirements have been deemed to be so minimal an incursion that they are insufficient to violate constitutional rights.

R. v. *Jones*, [1986] 2 S.C.R. 284, at 313-314
R.J.R. MacDonald v. *Canada*, [1995] 3 S.C.R. 199, at 324 (per LaForest J.)

R. v. *Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at 759 (per Dickson C.J.)
R. v. *Nikal*, [1996] 1 S.C.R. 1013, at 1057-1059
R. v. *Hufsky*, [1988] 1 S.C.R. 621, at 637-638
Miron v. *Trudel*, [1995] 2 S.C.R. 418, at 486 (per McLachlin J.)
Andrews v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143, at 168-169

10 ***iii) Applied to the facts of this case***

33. Applying the approach outlined above to the facts of this appeal, it is submitted that there is no violation of s. 6(2) as the egg marketing scheme is a law of general application which does not discriminate primarily on the basis of province of residence. The scheme is a "law of general application" insofar as it applies uniformly across the country, including the Northwest Territories. Contrary to the position of the Intervenor, the Alberta Barley Commission, the issue of disparate effects which might be experienced in different parts of the country through which the law extends
20 is not relevant to the question of whether or not the legislation or policy is a law of general application. It is, however, relevant to the issue of whether or not it primarily discriminates based on place of residence, as discussed below.

Kruger and Manuel v. *The Queen*, [1978] 1 S.C.R. 104, at 110

34. The scheme is also a law of general application in that it was not intended to overtly or colourably restrict the mobility rights of individuals. The objective of the egg marketing scheme is
30 to establish an income stability scheme and the orderly marketing of eggs. This was achieved having regard to the historical production of eggs and an overbase allowance so as to minimally disrupt the industry. As the history of negotiations culminating in the recent agreement between the CEMA and the Northwest Territories illustrates, the purpose of the scheme is not, and has never been, to restrict mobility rights.

Memorandum of Understanding, "Appendix A" to Appellant's Rehearing Factum
Re Groupe des Eleveurs and Chicken Marketing Agency (1984), 14 D.L.R. (4th) 151, at 180
40 (F.T.D.)

35. Last, it is submitted that the egg marketing scheme does not primarily discriminate based on place of residence because it does not impact on the core values which underpin the mobility guarantee. The nature of the mobility interest affected is peripheral to the core values, having regard

to the following:

- the scheme does not discriminate between residents and non-residents within a province. The principals of the Respondent corporation had held quota in Alberta and been treated the same as Alberta residents. It was only when they sold that quota and set up business across the border in the Northwest Territories where no one held a quota, that their complaint arose;

- the scheme affects the mobility of goods (economic mobility) rather than people (personal mobility). The interprovincial movement of persons is not implicated in this case. To the contrary, the evidence suggests that egg production in the Northwest Territories is carried on by corporations and it is these corporations which assert a mobility interest; and

- the scheme did not preclude the possibility of quota allocation to producers in the Northwest Territories because of the ability to allot an over-base quota. Negotiations relating to the terms of entry and the quantum of quota were ongoing at the time this legal challenge was commenced and have since come to fruition.

2) Section 6(3)(a) Applies to Both Federal and Provincial Laws and Practices

36. It is submitted that s. 6(3)(a) should be read so as to provide the federal government with an opportunity to defend laws and policies which have a disproportionate impact on one or more provinces, rather than having to justify them under s. 1 of the *Charter*. This approach to s. 6(3)(a) recognizes both the important federal role in implementing national policy objectives and avoids the anomalous result that individuals would enjoy more protection under s. 6 against federal government action than against provincial government action.

37. This approach also recognizes that the focus of inquiry under the *Charter* should be on the impact of the impugned legislation on the individual. In the *Charter* context, which level of government is responsible for a law that limits an individual's rights is, generally speaking, irrelevant in determining whether there has been an infringement of the guarantee. The sole exceptions to this general principle are the language rights provisions (ss. 16-20) where the restriction is express and there is no room for ambiguity. Absent such an express limitation, it is submitted that s. 6(3)(a) should be interpreted as applying to federal, provincial and territorial governments.

38. Further, any ambiguity regarding the scope of one part of the provision should be resolved so as to interpret the provision consistently. Since the rest of the provision applies to both levels of

government, s. 6(3)(a) should be interpreted as applying to both levels of government. Had the drafters intended to limit the provision to provincial laws and practices, they could have done so by employing the phrase "provincial laws and practices of general application".

Law Society of Upper Canada v. *Skapinker*, *supra* at 379

39. Simply because the phrase "law of general application" typically arises in division of powers cases involving provincial legislation, s. 6(3)(a) should not be interpreted as applying only to provincial laws and practices. As discussed above in paragraphs 23-26, judicial interpretation of the phrase "law of general application" is readily applicable to both federal and provincial laws. As well, the phrase "in force in any province" or "en vigueur dans une province donnée" is not rendered redundant because federal laws and policies can be in force in only some of the provinces at any given time. A federal law may, for example, permit a province to opt out of the federal scheme.

Re Demaere and The Queen (1984), 11 D.L.R. (4th) 193, at 201, (F.C.A.)
R. v. *S.(S.)*, [1990] 2 S.C.R. 254

D. SECTION 36 OF THE *CONSTITUTION ACT, 1982*

40. Section 36 of the *Constitution Act, 1982* addresses "equalization and regional disparities". Section 36(1) sets out the federal and provincial commitment to "promoting equal opportunities for the well-being of Canadians" and "furthering economic development to reduce disparity in opportunities". Section 36(2) sets out the federal commitment to equalization payments to ensure "reasonably comparable levels of public services ... [and] taxation" across the country.

41. Section 36 was never intended to be a legally enforceable individual right to a particular economic opportunity. The provision was developed during the constitutional negotiations in the context of various proposals intended to alter the current division of powers. Further, it is found in Part III, *Equalization and Regional Disparities*, and not Part I, the *Canadian Charter of Rights and Freedoms*. Most important, by its own wording, s. 36 merely expresses political "commitments".

Bayefsky, *supra*, at 565

42. It is submitted that the non-enforceability of s. 36 results from a recognition that decisions

relating to economic matters are best left to a political forum which is accountable and can draw on expert opinions. The technical complexity of any discussion about non-tariff trade barriers is illustrated by a taxonomy of the numerous types of barriers including facially discriminatory barriers, marketing boards, preferential procurement policies, subsidies and divergent standards. Both quantitative and qualitative assessments of these types of economic barriers requires expertise such as is found in the European Commission or expert panels constituted under the dispute settlement provisions of NAFTA.

Canada (Director of Investigation and Research) v. *Southam Inc.*, [1997] 1 S.C.R. 748, at 773-75
R. Howse, *supra*, at 17-29, 81-84, 159-171

43. At the same time, s. 36, while not legally enforceable, does explicitly recognize that an essential part of Canadian federalism involves cross subsidization and regional differentiation. Specifically, s. 36(2) commits Parliament and the federal government to making payments *on a provincial basis*. It is, therefore, submitted that it would be inappropriate to read s. 6 so broadly as to require Parliament to have to always justify the very programs which it is committed to implementing under s. 36.

E. SECTION 1 OF THE *CHARTER*

44. In the original factum, the Attorney General submitted that the egg marketing scheme should be afforded considerable deference under s. 1 of the *Charter* because it reflects the complex balancing necessarily involved in exercises of co-operative federalism. In this supplemental factum, the argument for deference finds further support in constitutional, democratic and institutional considerations.

45. From a constitutional perspective, Parliament is explicitly given the jurisdiction to regulate interprovincial trade and commerce under s. 91(2), the trade and commerce power. As well, Parliament has the ability to regulate interprovincial matters through the peace, order and good government clause. It also regulates industries which are involved in interprovincial matters through

the combined effect of s. 91(29) and s. 92(10) of the *Constitution Act, 1867*. The exercise of these broad powers may often result in different provinces experiencing different effects due to demographic, geographical and economic differences. It is submitted that Parliament should be afforded some deference in the exercise of its interprovincial trade powers as a result of this practical reality.

Morguard Investments Ltd. v. *de Savoie*, *supra*, at 1099

46. From a democratic perspective, because of the interlocking nature of the legislative scheme, the egg marketing arrangement reflects a consensus by both the Legislatures' and Parliament. The fact of Parliament's legislative approval is significant since all persons potentially affected by interprovincial trade barriers are enfranchised in federal elections. In a purely provincial context, residents of one province cannot generally vote in another province as a means to ensure that their economic interests are considered.

Bayefsky, *supra*, at 612

47. As well, from an institutional perspective, national bodies set up by Parliament or the federal government which are responsible for administering national schemes, are an appropriate forum in which to mediate conflicting provincial interests. As the recent agreement between the Northwest Territories and CEMA on the terms of entry and allocation of quota illustrates, fora such as CEMA are well-suited to accommodate competing provincial interests without disruption to the overall efficacy of the complex regulatory economic scheme.

F. CONCLUSION

48. For the reasons set out in its original and supplemental factums, the Attorney General of Ontario submits that there is no violation of s. 6 of the *Charter* in this appeal. The egg marketing scheme neither facially nor colourably intends to discriminate: it is a mechanism to ensure income and price stability and the orderly marketing of eggs. The scheme permits quota to be obtained through either historical production or an overbase allocation. It is submitted that this limitation on the ability to obtain a quota lies outside of the core value underlying s. 6 which is to protect personal mobility rather than economic free trade.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

March 10, 1998

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