

**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. and
FRANK RICHARDSON operating as NORTHERN POULTRY**

**Respondents
(Defendants)**

- and -

**THE COMMISSIONER OF THE NORTHWEST TERRITORIES as represented
by THE ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES;
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COUNCIL OF CANADIANS; SIERRA LEGAL DEFENCE FUND SOCIETY;
and ALBERTA BARLEY COMMISSION**

Intervenors

**REHEARING FACTUM OF THE PUBLIC INTEREST INTERVENORS,
COUNCIL OF CANADIANS AND
SIERRA LEGAL DEFENCE FUND SOCIETY**

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PART I - STATEMENT OF FACTS

1. Argument on this Appeal was originally heard on May 30, 1997.
2. Since that time, there has been a development which has implications for the outcome of this Appeal. On October 27, 1997, the Government of Canada and the Government of the Northwest Territories signed a Memorandum of Understanding in which they agreed that Canada would provide the Northwest Territories with a quota of
10 2,725,500 dozen eggs (115,000 birds).
3. On December 12, 1997, this Court ordered a rehearing of this Appeal. On December 19, 1997, this Court wrote to all counsel setting out particular issues to be addressed at the rehearing.

PART II - POINTS IN ISSUE

4. The following issues were addressed by the Council of Canadians and the Sierra Legal Defence Fund Society (the "Public Interest Intervenors") in their original Factum of May 17, 1997:

- (a) the established principles governing public interest standing were confused by the court below and, if properly interpreted, are not raised by this case;
- (b) both freedom of association and mobility rights, guaranteed by s.s 2(d) and 6 of the *Charter* respectively are human rights that are intended to protect and benefit human beings, not artificial legal entities such as business corporations; and
- (c) the scope of constitutional protection offered by s. 2(d) of the *Canadian Charter of Rights and Freedoms* does not extend and should not be extended, either by itself or in combination with s. 6 of the *Charter*, to protect trade, commercial activity, freedom of contract or any other purely economic interest.

These arguments will not be repeated in this Rehearing Factum.

20 5. In addition, the following issues are raised for the purposes of this re-hearing:

- (a) the relevance, if any, of s. 121 of the *Constitution Act, 1867*;
- (b) whether s. 6(3) of the *Canadian Charter of Rights and Freedoms* is restricted only to provincial laws or practice and does not include federal legislation;
- (c) if s. 6(3) applies only to provincial laws or practice, whether an argument under s. 1 of the *Charter* should be made; and
- (d) whether the issues raised on this appeal are now moot.

PART III - ARGUMENT

A. Overview Of The Public Interest Intervenors' Position On The Issues In The Appeal

6. The position of the public interest intervenors is that neither the freedom of association guarantee in s. 2(d) nor the mobility rights in s. 6 of the *Charter* are infringed by the impugned egg marketing regulations.

10 7. Yet the history of the *Charter* since its introduction in 1982 has been one of repeated attempts to secure, through the courts, *de facto* amendments to the *Charter* so as to bring economic and property interests within its purview. This Appeal, which involves an attempt by business corporations to gain constitutional protection for freedom of contract and freedom of trade, represents perhaps the most far-reaching attempt to date.

8. The *Canadian Charter of Rights and Freedoms* represents the highest form of legal recognition and protection for human rights in our society. The *raison d'être* for the *Charter* is to safeguard the human rights of the citizens of Canada, female and male,
20 against undue interference or restriction at the hands of government.

9. Although not explicitly excluded from the *Charter*, business corporations were excluded in one compelling sense. Property rights and other purely economic interests were deliberately excluded from the *Charter*, in favour of civil, political, and democratic rights.

Re Public Service Employees Relations Act, [1987] 1 S.C.R. 313 at 412-3
Reference re Sections 193 and 195.1(1)(c) of the Criminal Code, [1990] 1
S.C.R. 1123 at 1171

30 10. It is essential that the decision of the Northwest Territories Court of Appeal be overturned for it threatens to constitutionalize freedom of contract as well as the

property and economic rights flowing therefrom under the guise of freedom of association and mobility rights.

11. The Public Interest Intervenors are gravely concerned by the potential ramifications of this case upon government's ability to protect the public interest through the enactment and enforcement of legislation to regulate the marketplace and business corporations. The decision of the N.W.T. Court of Appeal, if upheld, could have far-reaching negative consequences for government's ability to regulate commercial activity and could mark the beginning of the Canadian equivalent of the *Lochner* era.

10 The potential consequences go far beyond the regulation of interprovincial egg marketing. If section 2(d) is extended to grant constitutional protection to trade, freedom of contract or other forms of commercial activity and purely economic interests, a broad array of government regulation could be made susceptible to *Charter* challenge include, *inter alia*, combines laws, consumer protection laws, environmental laws, labour laws and securities laws.

B. Issues Raised For The Purposes Of This Rehearing

20 (i) The Relevance of Section 121 of the *Constitution Act*

12. The Public Interest Intervenors take no position on the relevance of s. 121 of the *Constitution Act, 1867*.

(ii) Section 6 of the *Canadian Charter of Rights and Freedoms*

13. In a letter dated December 19, 1997, this Court posed two questions about s. 6(3) of the *Canadian Charter of Rights and Freedoms*, namely:

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

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

14. The framing of these questions suggests that this Court is of the opinion that the impugned egg marketing regulations may infringe the mobility rights set forth in s. 6(2)(b) of the *Charter*. Unless there was a perceived infringement of s. 6(2)(b), there would be no need to analyze the limitations in s. 6(3) or justification under s. 1.

10 15. However, it is the position of the Public Interest Intervenors that the Respondents cannot avail themselves of any remedy based on s. 6(2)(b) of the *Charter* for the following reasons:

(a) The mobility rights protected by s. 6 are not infringed by the impugned egg marketing regulations;

(b) The Respondents are precluded from benefitting in their own right from s. 6 of the *Charter* because s. 6 explicitly refers to “citizens” and “permanent residents”--terms which, by definition, exclude corporations; and

20 (c) The Respondents are precluded from enjoying a derivative benefit based on infringement of the rights of “citizens” and “permanent residents” because the *Big M Drug Mart* exception to the general rule that parties can only rely on rights to which they are entitled to benefit does not apply in this case (given the language of s. 6 of the *Charter*).

The Impugned Regulations Do Not Infringe Mobility Rights

16. This Court has addressed the scope of s. 6 of the *Charter* and imposed two important limitations. First, s. 6 does not protect an independent or free-standing right to work
30 or trade in goods and services. Second, it is a right qualified by a mobility element--an

essential element lacking in the case at bar. This case concerns inter-provincial movement of goods (i.e. eggs), not persons or workers.

[Section] 6 does not establish a separate and distinct right to work divorced from the mobility provisions in which it is found. The two rights (in para. (a) and para. (b)) both relate to movement into another province, either for the taking up of residence, or to work without establishing residence.

- 10 *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357 at 382
 Re Groupe des Eleveurs and Chicken Marketing Agency (1984), 14
 D.L.R. (4th) 151 at 179-80

17. The impugned egg marketing Regulations do not discriminate on the basis of residence - they apply equally to both residents and non-residents of the Northwest Territories. Finding an infringement of s.6 in the present case would stretch the meaning and intent of s.6 beyond recognition.

Mobility Rights Are Limited To Natural Persons

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18. Section 6 mobility rights only protect “citizens” and “permanent residents”, terms which, by definition, exclude business corporations.

Citizenship Act, R.S.C. 1985, c. C-29

Immigration Act, R.S.C. 1985, c. I-2

19. For example, refugee claimants, who enjoy the protection of other sections of the *Charter* (e.g. s.7, *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177), are excluded from s. 6. Therefore s. 6(2)(b) could not be successfully invoked by a refugee claimant seeking a constitutional remedy because only citizens and
- 30 permanent residents are entitled to s. 6 mobility rights.

20. The constitutional guarantees that enable humans “to move and take up residence in any province” and “to pursue the gaining of a livelihood in any province”, were not entrenched for the purpose of protecting a corporation’s right to trade throughout

Canada. Rather the freedom to move, reside and gain a living where a person desires in his or her country is a profoundly human freedom exercised for varied human reasons such as seeking an education, being near loved ones or raising a family. It is for the purpose of protecting these quintessentially human values that mobility rights are entrenched in the *Charter*.

21. To allow business corporations to enjoy the mobility rights protected by s. 6 of the *Charter* would be repugnant to the “purposive approach” that grounds *Charter* interpretation.

10 *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 344

22. Both courts and commentators have consistently rejected the suggestion that mobility rights could or should be extended to business corporations.

B.C. Milk Marketing Board et al v. Aquilini et al (8 April 1997) A950636 (B.C.S.C.) Wong, J. at p. 69, para. 152;
Pineview Poultry Products Ltd. v. Canada and CEMA (1994),
 73 F.T.R. 50 at 72 (T.D.);
 20 *Parkdale Hotel Ltd. v. Attorney General of Canada et al*, [1986]
 2 F.C. 514 at 534-5 (T.D.);
Re Groupe Des Eleveurs and Chicken Marketing Agency (1984),
 14 D.L.R. (4th) 151 at 180 (F.C.T.D.);

Hogg, P., *Constitutional Law of Canada*, 3rd ed. (Scarborough: Carswell, 1992) at p. 835;

Gibson, D., *The Law of the Charter: General Principles* (Toronto: Carswell, 1986) at p. 87;

30 Bernhardt, P., “Mobility Rights: Section 6 of the *Charter* and the Canadian Economic Union” (1987) 12 *Queens L.J.* 199 at 236

23. This case is significantly different from other cases where corporations have been able to rely on certain provisions of the *Charter*. All of the cases where corporations have been successful in asserting *Charter* rights have been cases where the rights or freedoms are guaranteed to “everyone” or “any person”. Corporations have never been successful in asserting rights under sections of the *Charter* where rights or freedoms are guaranteed to “every citizen” (ss. 3, 6, 23) or “every individual” (s. 15).

24. A common sense reading of s. 6, (given its plain words, intrinsically human purpose and the constitutional context) demonstrates that only human beings can enjoy these mobility rights.

The Danger In Broadening The Exception In *Big M Drug Mart*

25. The general rule in *Charter* cases is that a party can only rely on those rights to which they are entitled to benefit.

Irwin Toy Ltd. v. Quebec (A.G.), [1989] 1 S.C.R. 927

26. In *R. v. Big M Drug Mart*, this Court created an exception to the general rule for circumstances where a defendant is facing a penal proceeding. In these circumstances, this Court accepted a corporation's argument that no party should be prosecuted under a law which unconstitutionally violates the rights of others. Thus a corporation could not be convicted under a law that violated a human's *Charter* guarantee of freedom of religion.

R. v. Big M Drug Mart, [1985] 1 S.C.R. 295 at 313

27. The *Big M Drug Mart* exception does not apply in this case for two reasons:

- (i) this is a civil action, not a prosecution; and
- (ii) in the alternative, the impugned legislative scheme is only invalidated "to the extent of the inconsistency" which is only insofar as the rights of citizens and permanent residents are infringed.

28. In civil litigation where no penal proceedings are pending, this Court has held that the exception established in *R. v. Big M Drug Mart Ltd.* is "obviously not applicable".

Dywidag Systems v. Zutphen Bros., [1990] 1 S.C.R. 705 at 709
Irwin Toy Ltd. v. Quebec, [1989] 1 S.C.R. 927 at 1004

29. The case at bar involves civil litigation where no penal proceedings are pending and therefore the *Big M Drug Mart* exception is "obviously not applicable".

30. In the alternative, should this Court choose to greatly extend the previously limited *Big M Drug Mart* exception to all defendants in civil litigation, regardless of whether penal proceedings are pending, the Respondents remain unable to secure a remedy based on the *Charter* because of s. 52 of the *Constitution Act, 1982*.

31. The *Constitution* only invalidates legislation “to the extent of the inconsistency” with the provisions of the *Constitution*.

10 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.

Constitution Act, 1982

32. Where the *Charter* provides that a right applies to “everyone”, as is true of ss. 2(a) and 7 which were at issue in *Big M Drug Mart* and *Wholesale Travel*, then the remedy for inconsistency with the *Charter* is that the law in question applies to no one, including corporations.

20 *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295
 R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154

33. It is essential to note that, for purposes of s. 52, not every section of the *Charter* should be treated in the same way as ss. 2(a) and 7. Mobility rights, unlike many other *Charter* rights, are not enjoyed by “everyone”. The s. 6 mobility rights apply only to a subset of natural persons--“citizens” and “permanent residents”--a subset which is markedly narrower than “everyone”.

30 34. Where, as in s. 6, the *Charter* provides that a right applies to citizens and permanent residents, then the s. 52 remedy for inconsistency is that the law is “of no force or effect” vis-à-vis these specified persons. Since there is no inconsistency between the law and the provisions of the Constitution vis-à-vis other persons such as refugee claimants, illegal immigrants and corporations, s. 52 allows the law to remain in force

for these other persons. To suggest otherwise would be to deprive the precise language of s. 6 of any meaning.

35. This case is distinct from *Wholesale Travel* in that what is required is an examination of the language of the Charter rather than the impugned statutory provision in determining whether a corporation could be entitled to benefit from a finding of unconstitutionality vis-à-vis a natural person.

10 36. If the *Big M Drug Mart* exception is widened to include all situations where corporations are defendants, then corporations can be expected to deliberately provoke regulatory action in order to facilitate a *Charter* challenge. The narrow exception referred to in *Big M Drug Mart*, *Wholesale Travel* and *Irwin Toy* will effectively be obliterated, allowing corporations to use the *Charter* freely to further their purely economic interests through judicially decreed deregulation. Surely this is not the purpose or the intent of the *Charter*, whose “overwhelming preoccupation” is “with individual, political and democratic rights with conspicuous inattention to property and economic rights”.

Re Public Service Employees Relations Act, [1987] 1 S.C.R. 313 at 413.

20 (iii) Mootness

37. As noted earlier, the Governments of Canada and the Northwest Territories signed a Memorandum of Understanding on October 27, 1997 in which they agreed to a quota of eggs for the Northwest Territories. The signing of the Memorandum of Understanding raises the issue of mootness.

38. This litigation arose because the Governments of Canada and the Northwest Territories could not reach an agreement on an egg quota for the Northwest Territories. Despite the lack of a quota, the Respondents (egg producers in the

Northwest Territories) were engaging in interprovincial and export trade in eggs. This provoked litigation by the Appellants (the Canadian Egg Marketing Agency).

39. The Memorandum of Understanding signed by the Governments of the Northwest Territories and Canada agreeing to an egg quota for the Northwest Territories appears to obviate the need for this Court to rule on the difficult constitutional issues raised by the anomalous and unusual facts of this case.

40. To use the language of this Court in *Borowski*, there is no longer a “live controversy” between the two parties. That is to say, “the substratum of the litigation has disappeared”.

Borowski v. Attorney General for Canada, [1989] 1 S.C.R. 342 at 357

C. Conclusion--Upholding The Purpose And Intent Of The Charter

41. Using either s. 2(d) or s. 6(2)(b) of the *Charter* to remedy a perceived injustice in this case is like pounding a square peg into a round hole. Such a strained interpretation requires effectively rewriting the *Charter* to include purely economic interests, with potentially severe negative consequences for governments’ ability to regulate.

Lochner v. New York, 198 U.S. 45 (1905)

42. The words of the late Mr. Justice Sopinka aptly summarize the position of the Public Interest Intervenors regarding the application of the *Charter* in this case:

A claim for protection of its business operations by a profit-seeking, artificial entity would seem to be very near to a claim for a purely economic right....

Limiting economic rights to those claimed by natural persons appears also to be in keeping with the origins of our uniquely Canadian *Charter of Rights and Freedoms*.” [emphasis in original]

Sopinka, J., “The Charter of Rights and Corporations” in The Cambridge Lectures 1989, F.E. McArdle, ed. (1990) at pp. 128-129

PART IV - NATURE OF THE ORDER SOUGHT

43. The Public Interest Intervenors request an order setting aside the judgment below and allowing the appeal.

44. The constitutional questions stated by Order of the Chief Justice dated January 15, 1997 should be answered as follows:

(a) Do the *Canadian Egg Marketing Proclamation*, C.R.C. 646, as amended, the
Canadian Egg Licensing Regulations, 1987 SOR/87-242, as amended, ss.
 3,4(1), 7(1)(d) and 7(1)(e), and the *Canadian Egg Marketing Quota
 Regulations*, SOR/86-8, as amended, ss. 4(1)(a), 5(2), 6 and 7(1), in whole or
 in part, infringe the rights and freedoms guaranteed by s. 2(d) and s. 6 of the
Canadian Charter of Rights and Freedoms?

Answer: No.

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

Answer: The question need not be answered.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Vancouver, B.C., this 12th day of March, 1998.


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