No. 23306

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN

INTERNATIONAL LONGSHOREMEN'S and WAREHOUSEMEN'S UNION - Canada Area Locals 500, 502, 503, 504, 505, 506, 508, 515 and 519; EVERY PERSON ORDINARILY EMPLOYED IN LONGSHORING OR RELATED OPERATIONS AT A PORT ON THE WEST COAST OF CANADA AND WHO IS SUBJECT TO THE PROVISIONS OF THE *MAINTENANCE OF PORTS OPERATIONS ACT, 1986*

APPELLANTS
(Plaintiffs)

AND

HER MAJESTY THE QUEEN

RESPONDENT
(Defendant)

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Prince Rupert Grain Handling Operations Act, S.C. 1988, c. 1

Postal Services Continuation Act, 1987, S.C. 1987, c. 40

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Maintenance of Railway Operations Act, S.C. 1987, c. 36

West Coast Ports Operations Act, S.C. 1982, c. 126

Government Services Resumption Act, S.C. 1989, c. 24

Thunder Bay Grain Handling Operations Act, S.C. 1991, c. 31

British Columbia Grain Handling Operations Act, S.C. 1991, c. 25

Canada Labour Code, R.S.C. 1985, c. L-2, preamble

ILO, Official Bulletin, August 31, 1948, Vol. XXXI, No. 1, Convention No. 87

PART I

STATEMENT OF FACTS

1. The Appellants, Locals 500, 502, 503, 504, 505, 506, 508, 515 and 519 of the International Longshoremen's and Warehousemen's Union, Canada Area (the "ILWU"), represent persons ordinarily employed in longshoring or related operations at ports of British Columbia (the "Union Locals"). The Appellants also include every person who is ordinarily employed in longshoring or related operations at a port on the West Coast of Canada and who is subject to the provisions of the *Maintenance of Ports Operations Act* (the "Employees"). The Employees are members of various bargaining units distinguished by different employers and, depending on geographic area, different Union Locals. Each bargaining unit is represented in bargaining by one of the Union Locals. The Union Locals at issue are situated in the ports of Vancouver, New Westminster, Port Alberni, Victoria, Prince Rupert, Chemainus, Port Simpson and Stewart.

Reasons for Judgment of the Honourable Mr. Justice Rouleau dated March 8, 1990, at 1-2 ("Rouleau"); Case on Appeal, Vol. XIII, pp. 2711-2

2. This action originates from a breakdown in negotiations between the British Columbia Maritime Employers' Association ("BCMEA") and the ILWU concerning the renewal and revision of a collective agreement between the parties. The collective agreement expired on December 31, 1985, and applied to over 4,000 union and non-union employees in West Coast ports.

Rouleau at 2; Case on Appeal, Vol. XIII, p. 2712

3. The most contentious bargaining issue related to what is known as the container clause. The BCMEA refused to bargain with respect to other provisions of the collective agreement until the container clause was removed. An impasse was reached.

Evidence in Chief of Don Garcia; Case on Appeal, Vol. I, pp. 62-67

Exhibit A(15); Case on Appeal, Vol. V, pp. 946-51

4. In response to a request to the Canada Labour Relations Board under the *Canada Labour Code*, the Minister of Labour, on May 30, 1986, appointed Conciliation

Commissioner Dalton Larson, who received oral and written submissions from the parties and submitted a report and recommendations to the Minister (the "Larson Report"). The Employees lawfully and democratically rejected its terms. The Larson Report ultimately constituted the major part of the conditions of employment forced on the ILWU and its members by the *Maintenance of Ports Operations Act, 1986* (the "Act").

Rouleau at 3; Case on Appeal, Vol. XIII, p. 2713

Evidence in Chief of Don Garcia; Case on Appeal, Vol. I, pp. 70-72, 76-70

Evidence in Chief of Leonard Raffan; Case on Appeal, Vol. I, pp. 163-164

Exhibit A(3); Case on Appeal, Vol. V, pp. 879-80

Exhibit A(4); Case on Appeal, Vol. V, at p. 881

Exhibit B(2); Case on Appeal, Vol. V, pp. 998-1064

5. Both parties became lawfully entitled to strike or impose a lock-out as of September 16, 1986, but direct negotiations took place on September 25 and October 3, 1986. On October 6, 1986, at 1:00 a.m., the BCMEA implemented a lock-out of the Employees.

Rouleau at 3; Case on Appeal, Vol. XIII, p. 2713

6. On October 6, 1986, the Minister of Labour sent a telex to the BCMEA and ILWU requesting the parties to allow resumption of grain shipments. The ILWU agreed. The BCMEA refused to allow grain shipments only but did agree to lift the lock-out for 30 days to permit further negotiations between the parties to resume. Longshoring operations were restored on October 8, 1986, and negotiations reconvened on October 15, 1986.

Rouleau at 3-4; Case on Appeal, Vol. XIII, pp. 2713-14

Evidence in Chief of Don Garcia; Case on Appeal, Vol. I, pp. 86-94

Exhibit A(5); Case on Appeal, Vol. V, pp. 882-84

Exhibit A(9); Case on Appeal, Vol. V, p. 888

7. On October 29, 1986, the Minister of Labour appointed two mediators pursuant to section 195 of the *Canada Labour Code*. As of November 14, 1986, the parties had failed to negotiate the terms of a new collective agreement. On that day, the Minister met with the BCMEA and ILWU for approximately 20 minutes in an attempt to encourage the resolution of the dispute by negotiation. Both parties were warned by the Minister of imminent back-to-work legislation unless they took immediate steps to resolve the dispute themselves. At 1:00 a.m. on November 15, 1986, the BCMEA reintroduced a lock-out of the Employees.

Rouleau at 4; Case on Appeal, Vol. XIII, p. 2714

Evidence in Chief of Don Garcia; Case on Appeal, Vol. I, p. 96

8. On November 17, 1986, Bill C-24, the *Maintenance of Ports Operations Act, 1986*, was tabled in the House of Commons and was enacted the following day. The Act came into force on November 19, 1986, forcing the individual Appellants to go to work under the terms of the rejected Larson Report on pain of huge fines.

Rouleau at 4; Case on Appeal, Vol. XIII, p. 2714

Maintenance of Ports Operations Act, 1986, S.C. 1986, c. 46, ss. 6 and 13

9. On November 19, 1986, when the Act came into force, the individual Appellants were lawfully going about their private affairs; not working for any longshore employers. They had no obligations under any contract of employment, collective or individual, to go to work; they had no statutory obligations, under the Canada Labour Code or any other federal or provincial legislation to go to work.

10. On November 20 and 21, 1986, under the coercion of the Act, the individual Appellants went to work under the terms of employment imposed upon them by the Act.

Evidence in Chief of Don Garcia; Case on Appeal, Vol. I, pp. 97-99

Evidence of Leonard Raffan; Case on Appeal, Vol. I, pp. 164-166

11. The learned trial Judge held that the Act as a whole does not contravene or violate section 7 or section 2(d) of the *Charter of Rights and Freedoms*.

Rouleau at 16-28; Case on Appeal, Vol. XIII, pp. 2726-38

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "*Charter*"), ss. 2(d), 7

12. However, the learned trial Judge held that section 13 of the Act (the enforcement section) does violate the Applicants' rights under section 7 of the *Charter* and **that section 1 of the *Charter* does not save section 13** of the Act. He stated:

> ... the question which I must ask is whether the defendant has demonstrated as justifiable that the risk of imprisonment of a few innocent plaintiffs is, given the desirability of ending the labour dispute between the parties, a reasonable limit in a free and democratic society. *I do not hesitate to find that this demonstration has not in the least been satisfied. The defendant not only failed to provide any sound evidence of losses or serious economic consequences resulting from previous port stoppages (which lasted anywhere from sixteen to forty-seven days) but did not satisfy me that the work stoppage in this case (which lasted for only five days) caused only [sic] hardship whatsoever.*
>
> [Emphasis added]

Rouleau at 28-34; Case on Appeal, Vol. XIII, pp. 2738-43

13. The learned trial Judge held that section 13 of the Act was inconsistent with section 7 of the *Charter* and of no force or effect.

Rouleau at 34; Case on Appeal, Vol. XIII, pp. 2743-44

14. The Appellants appealed to the Federal Court of Appeal on the following issues: (1) Did the Act as a whole breach section 7 or section 2(d) of the *Charter*; and (2) could section 13 of the Act be severed?

15. The Respondent cross-appealed the following issues: (1) Did section 13 of the Act breach the *Charter*; and (2) if it did breach the *Charter*, was it saved by section 1?

16. The Federal Court of Appeal held that the Act did not violate section 7 or section 2(d) of the *Charter*, and further that section 13 of the Act was a strict liability offence and therefore did not breach the *Charter*. As a result of these findings, the Federal Court of Appeal did not deal with section 1 of the *Charter*.

Reasons for Judgment of Mr. Justice Letourneau ("Letourneau") at 3, 7 and 13; Case on Appeal, Vol. XIII, at 2749, 2753, 2759

PART II

POINTS IN ISSUE

17. The Federal Court of Appeal erred in law in finding that the *Maintenance of Ports Operations Act, 1986* did not violate section 7 of the *Canadian Charter of Rights and Freedoms*.

18. The Federal Court of Appeal erred in law in holding that the *Maintenance of Ports Operations Act, 1986* did not violate section 2(d) of the *Canadian Charter of Rights and Freedoms*.

PART III

ARGUMENT

1 THE FEDERAL COURT OF APPEAL ERRED IN LAW IN FINDING THAT THE *MAINTENANCE OF PORTS OPERATIONS ACT, 1986* DID NOT VIOLATE SECTION 7 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*.

General

19. Section 7 of the *Charter* provides as follows:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

20. Federal and provincial governments, over the last two decades, have become increasingly willing to order people back to work. Such legislation can affect many thousands of people both directly and indirectly. This case seeks to determine the scope and use of the government's powers to order people back to work in light of section 7 of the *Charter*. This has not been done before by the Supreme Court of Canada, and this is the first case of its kind to raise the issue squarely under section 7.

> See, for example:
>
> Exhibit M, Table 68; "Federally Legislated Work Stoppages", Case on Appeal, Vol. XII, p. 2268
>
> and also:
>
> *Educational Programs Continuation Act*, S.B.C. 1993, c. 5.
>
> *Prince Rupert Grain Handling Operations Act*, S.C. 1988, c. 1
>
> *Postal Services Continuation Act, 1991*, S.C. 1991, c. 35
>
> *Government Services Resumption Act*, S.C. 1989, c. 24
>
> *Thunder Bay Grain Handling Operations Act*, S.C. 1991, c. 31
>
> *British Columbia Grain Handling Operations Act*, S.C. 1991, c. 25

21. This Court will be asked **not** to focus on whether the "right to strike" is protected by the *Charter*. This Court has already ruled that it is not. The focus here is whether, in regulating and limiting that right (which regulation is permitted under the *Charter* because the right is not protected), governments can violate individual liberties including freedom of the person, contrary to section 7.

22. The Appellants are challenging a pernicious and authoritarian type of legislation known as *ad hoc* or "back-to-work" legislation. This case does not even concern "back to work" legislation, implying old terms or status quo; it concerns "go to work" legislation, not on old terms but on new and unacceptable terms which have been specifically rejected by those ordered to go to work.

Statement of Facts, paragraphs 5 and 9, *supra*

Exhibit B(2), Case on Appeal, Vol. V, p. 998-1064, in particular pp. 1006, 1009, 1014, 1019, 1024-25, 1028, 1030, 1035-36, 1039, 1040, 1042, 1044, 1061-63.

Maintenance of Ports Operations Act, 1986, s. 6

23. In deciding this case, the Court will have to decide whether or not there is a difference between:

(a) legislating an employment relationship which excludes the right to strike from the outset, and puts in place binding arbitration (permitted under the *Charter*, per this Court); and

(b) legislating a regime (the *Canada Labour Code)* which recognizes and respects that right; waiting until that right is lawfully exercised, and then over-riding that regime by legislating draconian fines against individuals to force them to go to work **on terms that they have rejected and that have not even been arbitrated in binding arbitration.**

24. The Appellants say this second case offends the meanest notions of human liberty. The facts which underlie this case are an affront to human dignity and freedom and constitute a clear infringement of the individual Appellants' right to liberty under section 7 of the *Charter*.

25. Is there a right arbitrarily to **order** a person to work or go to jail, in the absence of **any contractual** or **statutory** obligation on that person's part to work, which our *Charter* is insufficiently framed to prevent or at least curtail?

26. Employment statutes or labour codes are to be left alone under the *Charter*, but should *ad hoc* legislation be left alone, which has the effect of coercing and dictating in a way contrary to all notions of liberty? Our *Charter* should **not** be so interpreted as to permit this dictatorial/authoritarian procedure. Such legislation should be subject to the *Charter* and only saved in circumstances where section 1 of the *Charter* applies.

27. If back to work legislation does not breach section 7, why are the Ministers' speeches introducing these bills in Parliament always crammed with "section 1" justifications? This is a reflection of the fact that society sees it as coercive and wrong, except in the context of emergency, severe hardship, or widespread and lasting damage to the national economy. These are the words invariably used to usher in this type of legislation. Politicians, ministers and their constituents know instinctively, societally, that this kind of heavy-handed intervention is **only** acceptable in our society when justified by section 1 facts. With respect, the Courts in Canada should be willing to recognize these political and social perceptions when interpreting and applying section 7 liberties.

Exhibit C(20), Minister's Speech Introducing the Act in the House of Commons, House of Commons Debates, November 17-18, 1986; Case on Appeal, Vol. VIII, pp. 1599-1641

28. The Government of Canada continues publicly to acknowledge these political and social perceptions in its response to I.L.O. complaints about its *ad hoc* legislation.

See for example:

Exhibit C(22), Government of Canada Response to a Complaint by the Canadian Labour Congress to the International Labour Organization alleging infringement of trade union rights in Canada, re Railway Workers Back-to-Work Legislation (1987), dated November 1988; Case on Appeal, Vol. VIII, pp. 1656-1777

Exhibit C(23), I.L.O. Case No. 1438, Decision re Railway Workers Back-to-Work Legislation (1987), paras. 380, 390, 393 and 402; Case on Appeal, Vol. IX, pp. 1778-1794

29. The *Canada Labour Code* itself acknowledges, in its preamble, I.L.O. commitments to free collective bargaining.

Canada Labour Code, R.S.C. 1985, c. L-2, preamble [Exhibit A(14)]; Case on Appeal, Vol. V, p. 945

I.L.O. Convention No. 87, Concerning Freedom of Association and Protection of the Right to Organize, Official Bulletin, August 31, 1948, Vol. XXXI

30. In this political and social environment, section 7 of the *Charter* should be so interpreted that "go to work" compulsion is only allowed when it can be justified under section 1 of the *Charter*.

Interpretation of the *Charter*

31. The *Charter* is a constitutional document which is intended to provide rights and freedoms. Therefore, it should receive a purposive analysis and should be interpreted generously rather than legalistically.

Southam Inc. v Hunter (1985) 55 N.R. 241 at 247-48 (S.C.C.) ("*Southam*") per Dickson C.J.C.

R. v Big M Drug Mart Ltd. [1985] 1 S.C.R. 295 at 344, per Dickson J. ("*Big M Drug Mart*")

32. A further important element in the framework for interpretation of the *Charter* is the express limitation clause in section 1. This demands a two-stage analysis. First, the rights protected are defined, based on a generous, purposive interpretation. Second, any limit on these rights, based on the need to balance them with competing interests, is assessed under section 1. The process of defining the scope of a fundamental

freedom is distinct from the process of determining whether any limits placed on such freedom can be justified. Rights and freedoms under the *Charter* should be construed in a generous fashion and any limitation which has been introduced to balance and limit competing rights or freedoms must be assessed and justified under section 1.

> *Re Soenen and Thomas et al* (1983) 3 D.L.R. (4th) 658 at 667 (Alta. Q.B.) ("*Soenen*")
>
> *Comite Pour la Republique du Canada v The Queen in Right of Canada* (1987) 76 N.R. 339 at 346-47, 36 D.L.R. (4th) 501 (Fed. C.A.) per MacGuigan J.
>
> *R. v. Beare* [1988] 2 S.C.R. 387 at 401-403 ("*Beare* S.C.C.")
>
> *Southam, supra* at 247-48 per Dickson C.J.C.
>
> *Big M Drug Mart, supra* at 344
>
> The Honourable D.C. McDonald, *Legal Rights in the Canadian Charter of Rights and Freedoms* (1989, 2d ed.) at 7 ("McDonald")

33. The need for care in this regard is especially important when as here, the impugned legislation concerns the rights and freedoms of employees and unions vis-a-vis employers and the general public and aims for a balancing of competing rights and interests.

34. The *Charter* is the "supreme law of Canada" (section 52). As such:

> The rights which are guaranteed by the *Charter* are deserving of the degree of respect to which a supreme law is entitled. These rights are not to be taken lightly. Their interpretation, it can then be argued, must be such as to give them vigor; they ought not to be interpreted so as to eviscerate or enfeeble them, for to do so would not be consonant with the concept of a supreme law.
>
> McDonald, *supra* at 7

See also *Ministry of Home Affairs v Fisher* [1979] 3 All E.R. 21 at 26 (P.C.) per Lord Wilberforce

35. The decision of the Federal Court of Appeal is fundamentally inconsistent with the principles of *Charter* interpretation established by this Court in that:

(a) it does not apply a generous, purposive approach to the definition of rights protected by section 7; and

(b) it applies a *Charter* section 2(d) analysis to the interpretation and application of section 7.

The Trilogy Distinguished

36. In three decisions, the Supreme Court of Canada considered whether or not the freedom to collectively bargain and strike are included within the ambit of freedom of association protected under section 2(d) of the *Charter*. These three cases are: *Reference re Public Service Employee Relations Act (Alberta) ("Alberta Reference")* [1987] 1 S.C.R. 313; *Public Service Alliance of Canada et al v The Queen et al* [1987] 1 S.C.R. 424 *("PSAC")*; and *Government of Saskatchewan et al v The Retail, Wholesale and Department Store Union, Locals 544, 496, 635 and 955 et al ("Saskatchewan Dairy")* [1987] 1 S.C.R. 460 (collectively the "Trilogy").

37. In a fourth decision, *Professional Institute of the Public Service of Canada v Northwest Territories (Commissioner)* [1990] 2 S.C.R. 367 *("PIPSC")* the Supreme Court of Canada further considered section 2(d) in the context of collective bargaining. All four cases focussed entirely on the collective nature of rights under Section 2(d); there were no individual plaintiffs in any of the four cases.

38. The two main cases considered in the Trilogy (the *Alberta Reference* and *PSAC*) concentrated on the right to strike. They concerned civil service type work environments, where permanent legislation put in place binding arbitration in lieu of strike/lockout as a means of resolving contract disputes. The Court concentrated on whether or not there was any inherent right to strike protected under the *Charter*. The third case considered in the Trilogy, the *Saskatchewan Dairy* case, was treated as another

"right to strike" case. The "back to work" aspect of the case was not examined. This is not surprising, **since no section 7 claim was advanced or considered.**

39. The case at bar raises a very different issue, and focuses on different facts. Individuals are lawfully away from the work place according to the *Canada Labour Code*, having conformed to all prerequisites laid out in that legislation. They have no contract, they are not employed in a civil service setting, and they are resisting demands that they work on changed and lesser terms of employment. In these circumstances, the federal government throws aside the *Canada Labour Code* and the principles contained in its preamble, and ignores the "curial deference" usually accorded by the Courts of Canada to the Canada Labour Relations Board exercising its jurisdiction over the dispute. On the grounds of a fearsome economic crisis (proved on the evidence to be utterly unfounded) it assails individuals lawfully staying away from work, with *ad hoc* legislation, applying no other principle than national emergency and quite literally forces these individuals to go to work on terms they have specifically rejected (the Larson Report) on pain of draconian fines leading potentially to jail terms for nonpayment.

Exhibit B(2); Case on Appeal, Vol. V,
pp. 998-1064

40. This is an egregious invasion of the plaintiff's **personal** and **individual** liberty: the liberty not to be forced by emergency or *ad hoc* legislation at odds with the accepted and well considered regime of the *Canada Labour Code*, to go to work in the middle of a lawful work stoppage, in conditions completely unjustified by section 1 of the *Charter*. The draconian fines provided for under the Act target individuals, unlike earlier back to work legislation such as the *West Coast Ports Operations Act, 1982*. The 1982 *Act* provided no **individual** fines or penalties but only **collective** penalties:

> 7(1) On application made on behalf of Her Majesty in right of Canada, the Federal Court -- Trial Division shall make an order **directing any employer or employee organization** named or described in the order that has failed or refused to comply with any provision of this Act forthwith to comply with that provision, and any **employer or employee organization** that fails or refuses to comply with any order made by the Court under this section that is directed to it may be cited and punished by the Court as for other contempts of court.
>
> [emphasis added]

West Coast Ports Operations Act, 1982, S.C. 1982, c. 126, s. 7(1)

Maintenance of Ports Operations Act, 1986, S.C. 1986, c. 46, s. 13

41. The Federal Court of Appeal, with respect, persisted in its failure to recognize the special characteristics and broad meaning of section 7 when it applied essentially the analysis used by the Supreme Court of Canada with respect to section 2(d) collective rights and labour relations legislation, to determine the individual rights protected by section 7.

Letourneau at 8-10; Case on Appeal, Vol. XIII, pp. 2754-56

42. The Federal Court of Appeal thus failed to distinguish this case from the Trilogy, and erred when it so failed.

Erroneous Limitations Placed on Section 7

43. The Federal Court of Appeal also erred when it departed from the accepted approach to section 7 and held that section 7 rights were generally to be confined to interests "that . . . have been traditionally within the domain of the judiciary". Contrary to this approach, section 7 is, in fact, one of the most fundamental and broadest of the rights and freedoms guaranteed under the *Charter*.

Letourneau at 8-9; Case on Appeal, Vol. XIII, pp. 2754-55

Beare S.C.C. at 401-402

R. v Robson (1984) 56 B.C.L.R. 194 ("*Robson* B.C.S.C."), aff'd. (1985) 19 D.L.R. (4th) 112 (B.C.C.A.) ("*Robson* B.C.C.A.")

Morgentaler, Smoling & Scott v The Queen (1985) 22 C.C.C. (3d) 353 at 377 (Ont. C.A.) ("*Morgentaler*, C.A."), rev'd [1988] 1 S.C.R. 30

Re Mia and Medical Services Commission of British Columbia (1985) 17 D.L.R. (4th) 385

(B.C.S.C.) at 411-12, 415, per McEachern C.J.B.C. ("*Re Mia*")

R. v Morgentaler [1988] 1 S.C.R. 30 at 51-53 per Dickson C.J. and at 164-65 per Wilson J. ("*Morgentaler*, S.C.C.")

Wilson and Maxson v Medical Services Commission of B.C. (1988) 30 B.C.L.R. (2d) 1 (C.A.) ("*Wilson and Maxson*") at 18, 21, 25

44. The decision of the Federal Court of Appeal is inconsistent with the British Columbia Court of Appeal decision in *Wilson and Maxson,* and other cases under section 7:

(a) the section 7 liberty which the Court upheld in *Wilson and Maxson* had nothing to do with interests "that are . . . traditionally within the domain of the judiciary", which was the narrowly confined interpretation of section 7 approved by the Federal Court of Appeal;

(b) the section 7 rights of the individual Appellants were interfered with far more profoundly than those of the doctors in the *Wilson and Maxson* case.

Letourneau at 9; Case on Appeal, Vol. XIII, p. 2755

45. The case at bar is a much stronger case than that of *Wilson and Maxson.* The doctors in that case established infringement of their liberty in that they could not obtain a billing number from the government, unless they went to work in outlying areas of the province. The coercion was indirect.

46. The Act operates as if the doctors in *Wilson and Maxson,* as well as not receiving a billing number unless they went to work, say in Cache Creek, *were ordered to report to Cache Creek forthwith, and proceed to work there as a doctor, failing which they would be fined $500 to $1,000 per day for every day of failing to attend and work there.* Such an order, backed up by criminal penalties for failure to obey, clearly infringes section 7 liberties. The coercion is direct.

47. Freedom of movement has been held to be clearly protected by section 7.

Robson B.C.S.C., *supra* at 199

Re Mia, supra at 412-13

Wilson and Maxson, supra at 18

Black v Law Society of Alberta [1989] 1 S.C.R. 591 per La Forest J (S.C.C.) at 618-619, approving *Re Mia*

48. However, the "right to liberty" in section 7 provides for far more than the protection of physical liberty or "freedom from bodily restraint".

Robson B.C.S.C. *supra* at 199; aff'd. *Robson* B.C.C.A. *supra* at 114-15

Beare v R. [1987] 4 W.W.R. 309 at 318-19 (Sask. C.A.) per Bayda C.J.S., rev'd. on appeal [1988] 2 S.C.R. 387 but not on this point

Re Mia, supra at 411-12, 415, per McEachern C.J.S.C.

Morgentaler S.C.C. *supra* at 51-53 per Dickson C.J. and at 164-65 per Wilson J.

49. The fact that the coercion is applied in this case to individuals who have appointed a bargaining agent to bargain for them collectively does nothing to excuse or minimize it, or change its character.

50. Individuals lose some of their individual rights when they opt for employment within a collective bargaining regime. That does not mean, however, that they lose all individual freedoms and become outlawed from all forms of *Charter* protected liberty.

McGavin Toastmaster v Ainscough [1976] 1 S.C.R. 718 at 724-8

Curial Deference is Totally Inappropriate

51. The Court of Appeal erred in law when it applied the policy of curial deference to *ad hoc* legislation such as the Act. It adopted McIntyre and Le Dain J.J.'s equating (in the *Alberta Reference*) judicial review of an administrative action (when administrative tribunals are carrying out their specialized, legislatively prescribed powers) with judicial review of the constitutionality of legislation. This equation, with the greatest of respect, is totally erroneous. The Court's policy of curial deference discouraging interference with decision-making by administrative tribunals has no application in the context of the Court's right and, indeed, duty to review the constitutionality of Parliamentary legislation under the *Charter*.

Letourneau at 9-10; Case on Appeal,
Vol. XIII, pp. 2755-56

Alberta Reference, supra per McIntyre J.
at 232-37; per Le Dain J. at 240

52. Yet, even if the Court considers that curial deference is appropriate when reviewing general labour legislation empowering specialized tribunals to the extent of insulating such legislation from having to conform to the *Charter*, there is a further compelling reason why curial deference is a mistake in a case of this kind.

53. *Ad hoc* legislation is, itself, a whopping example of interference with an administrative tribunal and its creating statute. The Act strikes at the heart of the *Canada Labour Code* and cuts the legs off the Canada Labour Relations Board. Both the Code and the Tribunal are intended and designed to maintain the balance and stability referred to in the *Alberta Reference.* It is wrong to cite decisions upholding the constitutional immunity of such specialized labour legislation and tribunals, to support the constitutional immunity of this ill-considered and clumsy Act.

54. *Ad hoc* legislation such as the Act bears no resemblance to the statutory scheme and balancing of interests found in the *Canada Labour Code*. It is an anomaly with no legitimate foundation, except emergency, section 1 type facts.

55. The Supreme Court of Canada's deference to the integrity of the labour relations system in Canada in this case is best served by declaring the Act to be invalid,

thus re-affirming the *Canada Labour Code*, and the Canada Labour Relations Board, as the appropriate regulatory framework to govern disputes, except when national emergencies genuinely arise.

The Act Violates the Principles of Fundamental Justice

56. Once an infringement or denial of a right to liberty has been established, the Court must decide whether it occurred "in accordance with the principles of fundamental justice". The principles of fundamental justice "are to be found in the *basic tenets and principles not only of our judicial system* but also of the other components of our legal system" (emphasis added).

> *Reference re section 94(2) of the Motor Vehicle Act*, R.S.B.C. 1979, c. 288 [1985] 2 S.C.R. 486 per Lamer J. at 497-504, 512 (*"Motor Vehicle Reference"*)
>
> *Wilson and Maxson, supra* at 27
>
> *Morgentaler*, S.C.C. *supra* per Dickson C.J.C. at 52-53

57. In determining whether the principles of fundamental justice have been contravened, the Court may inquire into both procedural and substantive matters; fundamental justice is not the equivalent of the American concept of due process.

> *Motor Vehicle Reference, supra* per Lamer J. at 491-6, 504
>
> *Morgentaler*, S.C.C. *supra* per Dickson C.J.C. at 52-53

58. Procedural fairness may be described as follows:

> . . . the tribunal which adjudicates upon [a person's] rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case.
>
> *Re Singh and Minister of Employment and Immigration* [1985] 2 S.C.R. 177 (*"Re Singh"*) per Wilson J. at 212-13 citing

Fauteux C.J.C. in *Duke v The Queen* (1972) 28 D.L.R. (3d) 129 at 134

59. Clearly the legislation which proceeded speedily through Parliament resulted in offensive and coercive provisions. If the Court finds that section 7 liberties have been violated thereby, there is no basis for finding that the passage of this legislation was in accordance with the principles described in *Re Singh*.

60. In analyzing whether substantive principles of fundamental justice have been violated, the Court may look at the content of the legislation in question as well as at "other components of our legal system".

Robson B.C.S.C., *supra* at 202-03

61. In *R. v Beare*, La Forest J., considering this question in the context of pre-conviction fingerprinting, looked at "the applicable principles and policies that have animated legislative and judicial practice in this area". He assessed whether or not allowing pre-conviction fingerprinting was consistent with general principles and policies, including the protection of society, individual rights and privacy. The same considerations are applicable in the case at bar.

Beare S.C.C. *supra* at 402-03, per La Forest J.

62. It is contrary to political and social norms, short of genuine national or widespread emergency, for individuals, whether represented by a bargaining agent or not, to be forced to go to work, on terms and conditions of employment which they, individually or collectively, have specifically rejected.

63. Exceptions have been permitted in the civil service and essential service areas, but not elsewhere. Even there, the process includes binding arbitration, rather than unilateral legislative imposition of terms specifically rejected by the victims of the legislation.

64. It is hard to imagine a more fundamental right in a free country, than the right which the Act violates: the right to be a free person, who can choose, subject to any

contractual or settled statutory obligations, where, when, and on what terms he or she will provide labour.

Re Mia, per McEachern, C.J.S.C. at 416

65. For all of these reasons, the Federal Court of Appeal erred in holding that the Act did not contravene Section 7 of the *Charter*, and the Act should be found to be of no force or effect.

THE FEDERAL COURT OF APPEAL ERRED IN LAW IN HOLDING THAT THE ACT DID NOT VIOLATE SECTION 2(D) OF *THE CHARTER OF RIGHTS AND FREEDOMS*

66. Section 2(d) of the *Charter* provides as follows:

> 2. Everyone has the following fundamental freedoms:
>
> . . .
>
> (d) freedom of association

67. This is the first time that an individual's rights under section 2(d) of the *Charter* in the context of labour relations, has been raised squarely in this Court. The issues dealt with in previous cases have all involved the rights of trade unions under section 2(d). This case has a completely different focus; the rights of individuals under section 2(d) in the context of labour relations.

68. It is now recognized that, at the very least, section 2(d) of the *Charter* protects the freedom of individuals to associate and the freedom of individuals to do in association what they can do as individuals. It follows from this that if the liberty of the individual Appellants protected by section 7 is infringed or denied by the Act, then those same individuals must receive the same protection under section 2(d), to enjoy their liberty, in association with each other.

Port Moody, District 43, Police Services Union v Port Moody Police Board (1991) 54 B.C.L.R. (2d) 27 (C.A.)

Regina v Layton (1986) 38 C.C.C. (3d) 550 (Ont. Prov. Ct. (C.D.))

69. The Trilogy and *PIPSC* decisions did not consider this issue, since in none of the four cases was it asserted by the Plaintiffs that **individual** rights or liberties were infringed. It is, therefore, open to this Court to conclude that the *Charter*-protected rights of the Appellants in association under section 2(d) of the *Charter* have been infringed.

70. If the Court finds that section 7 of the *Charter* curtails or restricts the measures governments may adopt against individuals in regulating the right to strike, it would be appropriate to revisit and refine some of the reasoning and policy laid out in the Trilogy, particularly in relation to "go to work" legislation.

71. The provisions of the *Charter*, being part of the organic constitutional law of Canada, are not susceptible of irrevocably binding interpretation and are subject to periodic reinterpretation.

Edward H. Levi, "An Introduction to Legal Reasoning" (1948) 15 U of Chi. L. Rev. 501 at 541-43

72. For these reasons, the Federal Court of Appeal erred in holding that the Act did not contravene section 2(d) of the Charter, and the Act should be found to be of no force or effect.

PART IV

NATURE OF ORDER SOUGHT

73. The Appellants seek an order that:

(a) The judgments of the Courts below be set aside and the following declarations substituted:

(i) that the *Maintenance of Ports Operations Act, 1986* violates section 7 of the *Charter;*

(ii) that the *Maintenance of Ports Operations Act, 1986* violates section 2(d) of the *Charter;*

(iii) that the *Maintenance of Ports Operations Act, 1986* is therefore of no force or effect.

74. Costs of this Appeal and of the proceedings below.

75. Such further orders as to this Honourable Court seem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED: September 27, 1993.

SOLICITORS FOR THE APPELLANTS:

P. Nicholas Glass

Mari A. Worfolk

PART V

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