Court file 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)

FACTUM OF THE RESPONDENT
HER MAJESTY THE QUEEN

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PART I

STATEMENT OF FACT

A. PARTIES

1. The Appellants are union locals of the International Longshoremen's and Warehousemen's Union - Canada Area (I.L.W.U.) and individuals ordinarily employed in longshoring and related operations in Canadian west coast ports. The I.L.W.U. bargains employment contracts with the British Columbia Maritime Employers Association (B.C.M.E.A.).

Agreed Statement of Fact, paras 1-7, *Case on Appeal*, Vol. I, pp. 18-20.

Evidence in Chief of Garcia (I.L.W.U.), *Case on Appeal*, Vol. I, pp. 51, 67-8.

2. The bargaining history of the I.L.W.U. and the B.C.M.E.A. is dismal. Between 1969 and 1984, work stoppages occurred in 5 of their 8 rounds of bargaining. The exceptions were two one-year agreements signed during the period of the *Anti-Inflation Act*, and a one-year extension to the 1982-1984 agreement. In 1972, 1975 and 1982, legislation was required to end the work stoppages by the I.L.W.U. and B.C.M.E.A.

Agreed Statement of Fact, paras. 28-36, *Case on Appeal*, Vol. I, pp. 27-33

Evidence in Chief and Cross-Examination of Garcia (I.L.W.U.), *Case on Appeal*, Vol. I, pp. 44-5, 49-54, 137-8.

B. BACKGROUND TO LEGISLATION AT ISSUE

3. As of September 30, 1985, the I.L.W.U. and the B.C.M.E.A. were on notice that their collective agreement was due to be renegotiated. Negotiation took place at various times between October 4, 1985 and November 15, 1986, but the parties did not agree to a new contract in this 13 1/2 month period.

Agreed Statement of Fact, paras. 10-23, *Case on Appeal*, Vol. I, pp. 21-5.

4. Negotiation was fruitless due to the impasse over the container clause: the B.C.M.E.A. was resolved to get rid of the clause while the I.L.W.U. was equally determined to maintain the clause. Both parties had stated publicly that they would not yield on this issue. As Mr. Garcia, the President of the I.L.W.U., testified, in such circumstances "it was impossible to bargain".

Evidence in Chief and Cross-Examination of Garcia (I.L.W.U.), *Case on Appeal*, Vol. I, pp. 79-80, 139-40

Evidence in Chief of Wilds (B.C.M.E.A.), *Case on Appeal*, Vol. II, pp. 260-2.

Exhibits A-3 (Negotiation Update) and A-10 (I.L.W.U. Bulletin), *Case on Appeal*, Vol. V, pp. 879-80, 889-90

5. The Minister of Labour assisted in the contract negotiations, to the extent that he could, by appointing a conciliation officer (December 20, 1985 - mid April, 1986), a conciliation commissioner (May 30, 1986 - September 8, 1986) and two mediators (October 29, 1986). At each of these stages, the parties had an opportunity to advance their position.

Agreed Statement of Fact, paras. 10-26, *Case on Appeal*, Vol. I, pp. 21-6

Cross-Examination of Garcia (I.L.W.U.), *Case on Appeal*, Vol. I, pp. 145-8

Exhibit B-2 (Report of Conciliation Commissioner), *Case on Appeal*, Vol. V, pp. 998-1064

Exhibit C-17 (Labour Canada telex), *Case on Appeal*, Vol. VIII, pp. 1586-7.

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6. On October 6, 1986, the B.C.M.E.A. locked-out the I.L.W.U. In response, the Minister of Labour sent a telex to the B.C.M.E.A. and I.L.W.U. requesting the parties to allow grain movement. The B.C.M.E.A. refused to allow movement of grain alone, but on October 8, 1986 it agreed to lift the lock-out completely for thirty days.

Agreed Statement of Fact, paras. 19-20, *Case on Appeal*, Vol. I, p. 24

20 Cross-Examination of Garcia (I.L.W.U.), *Case on Appeal*, Vol. I, pp. 140-2

Evidence in Chief of Wilds (B.C.M.E.A.), *Case on Appeal*, Vol. II, pp. 267-9.

Exhibits C-10, C-11, C-12 (Telexes from Minister of Labour), *Case on Appeal*, Vol. VIII, pp. 1577-9

30 Exhibits C-13, C-15, C-16 (Telexes of I.L.W.U. and B.C.M.E.A.), *Case on Appeal*, Vol. VIII, pp. 1580, 1582, 1584

7. The Minister of Labour met personally with Mr. Garcia on October 7, 1986 and with the executives of the I.L.W.U. and the B.C.M.E.A. on November 5, 1986. The

parties were put on notice of the possibility of back to work legislation and had a further opportunity to state their positions at these meetings.

Evidence in Chief and Cross-Examination of Garcia (I.L.W.U.), *Case on Appeal*, Vol. I, pp. 95-6, 147-9.

8. Additionally, the I.L.W.U. put its position to various Members of Parliament, met the New Democratic Party caucus on October 7, 1986 and sent an open letter to all Members of Parliament. The penalty provision of the legislation (s.13) was altered in Committee on November 18, 1986, partially in response to I.L.W.U. submissions prior to its passage.

Cross-Examination of Garcia (I.L.W.U.), *Case on Appeal*, Vol. I, pp. 148-50

Exhibit C-19 (I.L.W.U. Open Letter), *Case on Appeal*, Vol. VIII, pp. 1589-98.

Exhibit C-20, House of Commons Debates, *Case on Appeal*, Vol. VIII, pp. 1599-1651

9. On November 15, 1986 the B.C.M.E.A. reintroduced the lock-out.

Agreed Statement of Fact, para. 24, *Case on Appeal*, Vol. I, p. 26.

10. Although the I.L.W.U. had offered to move grain alone, the B.C.M.E.A. would not cooperate with such a request. In fact, grain was not moved during the lock-outs of October and November, 1986.

Evidence in Chief and Cross-Examination of Garcia (I.L.W.U.), *Case on Appeal*, Vol. I, pp. 58-9, 140-2, 146-50

Evidence in Chief of Wilds (B.C.M.E.A.), *Case on Appeal*, Vol. II, pp. 267-70.

C. TERMS OF LEGISLATION

11. On November 18, 1986 the House of Commons unanimously passed the *Maintenance of Ports Operations Act, 1986 ("MOPOA")*, which came into force on November 19, 1986.

Maintenance of Ports Operations Act, 1986, S.C. 1986 c. 46, *Case on Appeal*, Vol. VI, pp. 1065-75

Agreed Statement of Fact, paras. 25-28, *Case on Appeal*, Vol. I, pp. 26-7

House of Commons Debates, *Case on Appeal*, Vol. VIII, pp. 1599-1651.

12. The *MOPOA* provided as follows:

(a) each company was to resume longshoring and related operations and each person ordinarily employed in longshoring was to return to the duties of longshoring forthwith (s. 3);

(b) the terms of the previous collective agreement were extended to the earlier of December 31, 1988 or the date of a new agreement being entered into by the parties (s.5);

(c) the terms of the collective agreement other than those concerning the container clause were deemed to be amended by the amendments recommended by conciliation commissioner Larson (s. 6); a dispute over the wording of an amendment would be decided by a referee (s. 11);

(d) an industrial inquiry commission was appointed to determine all matters in the collective agreement related to the container clause (s. 7);

(e) during the term of the collective agreement (s. 5) no company would declare or cause a lock-out, no union officer would declare or authorize a strike and no person bound by the agreement would participate in a strike (s. 8);

(f) nothing in the *MOPOA* would limit or restrict the rights of the parties to vary or amend any provision in the agreement (s. 12);

(g) contravention of the *MOPOA* was an offence punishable on summary conviction, for which fines could be levied in the amounts of $500.00 to $1,000.00 for individuals, $10,000.00 to $50,000.00 for union or company officers and $20,000.00 to $100,000.00 for unions or companies for each day on which the offence continued (s. 13(1));

(h) officers of the union or of the employer's association convicted of an offence under the *MOPOA* while acting in a representative capacity could be barred from acting in such capacity for five years immediately following the conviction (s. 13(2) and (3)).

D. IMPACT OF LEGISLATION

13. The *MOPOA* made the recommendations of the Larson report binding with respect to all of the contentious issues between the parties except the container clause.

Evidence in Chief of Garcia (I.L.W.U.), *Case on Appeal*, Vol. I, pp. 102-3.

14. The recommendations of Larson were the following:

(a) the B.C.M.E.A. would increase its contributions under the welfare agreement;

(b) the pension plan would be investigated by the Waterfront Industry Pension Plan Trustees;

(c) employees joining the I.L.W.U. since January 1, 1979 would be protected by the automation protection provisions;

(d) wages increased;

(e) ship gantry crane drivers could relieve each other and act as signalmen;

(f) employers could establish regular work forces as required and bulk terminals could extend shifts up to four hours;

(g) signalmen had to be employed if signals were required on a regular basis.

Exhibit B-7, Larson Report, *Case on Appeal*, Vol. VI, pp. 1108-14.

15. The only function of the I.L.W.U. or its members which the *MOPOA* affected was the elimination of the right to strike or be locked out during this round of bargaining.

Cross-Examination of Garcia (I.L.W.U.), *Case on Appeal*, Vol. I, pp. 135-6.

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16. In fact, the I.L.W.U. and B.C.M.E.A. negotiated various matters after the *MOPOA* was passed and amended their collective agreement on consent pursuant to s. 12 of the *MOPOA*.

Evidence in Chief and Cross-Examination of Garcia (I.L.W.U.), *Case on Appeal*, Vol. I, pp. 105-7, 135-7

Exhibits B-4, B-5, B-6 (Contract Amendments After *MOPOA*), *Case on*
20 *Appeal*, Vol. VI, pp. 1076-1104.

17. Further, the parties made full submissions on the container clause to the Weiler Industrial Inquiry Commission. The decision of Weiler was judicially reviewed by the Federal Court of Appeal and further submissions were received by Weiler consequent on the decision of the Federal Court of Appeal.

Cross-Examination of Garcia (I.L.W.U.), *Case on Appeal*, Vol. I, pp. 150-1.

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Exhibit B-8, (Weiler Report - June 1987), *Case on Appeal*, Vol. VI, pp. 1121-1343

18. During the currency of the *MOPOA* the Appellants continued to be absent from work for reasons unrelated to the labour dispute (vacation, retirement, resignation,

illness...) without any consequence. No one was ever charged, much less fined, under the *MOPOA*.

Cross-Examination of Raffan (I.L.W.U.), *Case on Appeal*, Vol. I, pp. 169-70.

E. ECONOMIC IMPACT OF WEST COAST PORTS WORK STOPPAGE

19. On average, traffic through the west coast ports has increased 250 percent over the past 15 years. In the same period container traffic has risen 600 percent in those ports.

10 Exhibit M, (Tunner Report), *Case on Appeal*, Vol. XII, p. 2244.

20. The ports of Vancouver and Prince Rupert alone account for over 50 percent of the employment, revenue, personal income and tax impacts of the entire Ports Canada system.

Exhibit D, (The Economic Impact of the Ports Canada System) *Case on Appeal*, Vol. IX, pp. 1797-9.

20 21. The continuation of the west coast ports work stoppage in 1986 had the potential to cause serious economic harm to individual employees and businesses across Canada which relied on those ports. Such impacts include job lay-offs, lost revenue and deterioration of Canada's international reputation for reliable product delivery which is critical to the continued operation of many Canadian businesses.

Agreed Statement of Fact, para. 27, *Case on Appeal*, Vol. I, pp. 26-7

Evidence in Chief and Cross-Examination of Hermanson (C.N.), *Case on Appeal*,
30 Vol. II, pp. 196-209, 229-30

Evidence in Chief and Cross-Examination of Arnott (Cansulex), *Case on Appeal*, Vol. II, pp. 276-9, 284-6, 288-91, 303-4, 309-10

Evidence in Chief of Waghorn (Cates), *Case on Appeal*, Vol. II, pp. 318-25

Evidence in Chief of Bayntun (Trans-Pac), *Case on Appeal*, Vol. II, pp. 336-7

Evidence in Chief of Galloway (Esso) *Case on Appeal*, Vol. II, pp. 345-8

Evidence in Chief of Martin, *Case on Appeal*, Vol. III, pp. 379-96

Evidence in Chief of Dechka (Canpotex), *Case on Appeal*, Vol. II, pp. 356-362

Evidence in Chief of Pick (Smokey River Coal), *Case on Appeal*, Vol. III, pp. 451-6

Evidence in Chief of Kossey (Sherritt Gordon), *Case on Appeal*, Vol. III, pp. 470-4

Evidence in Chief of White (C.P.), *Case on Appeal*, Vol. III, pp. 488-92

Evidence in Chief and Re-Examination of Werner (Westcan Alfalfa), *Case on Appeal*, Vol. III, pp. 531-2, 544

Evidence in Chief of Gilson, *Case on Appeal*, Vol. III, pp. 576-8, 584-610

Exhibit C-20, (Minister's Speech), *Case on Appeal*, Vol. VIII, pp. 1603-6

Exhibit D-3 (Martin Report), *Case on Appeal*, Vol. X, pp. 1999-2017

Exhibit D-4, (Gilson Report), *Case on Appeal*, Vol. XI, pp. 2108-41.

22. While some impacts can be recovered after a stoppage, likely at a premium cost, many cannot. This is especially true in the case of container traffic which can easily be diverted to American ports. In such cases, sales and production as well as days of employment are lost forever.

Evidence in Chief and Cross-Examination of Hermanson (C.N.), *Case on Appeal*, Vol. II, pp. 205-10, 216-7

Evidence in Chief of Waghorn (Cates), *Case on Appeal*, Vol. II, pp. 322-6

Evidence in Chief of Galloway (Esso), *Case on Appeal*, Vol. II, p. 347

Evidence in Chief of Pick (Smokey River Coal), *Case on Appeal*, Vol. III, pp. 458

Evidence in Chief and Cross-Examination of Kossey (Sheritt Gordon), *Case on Appeal*, Vol. III, pp. 474-5, 477, 482

Evidence in Chief of White (C.P.), *Case on Appeal*, Vol. III, p. 493

Exhibit M, (Tunner Report), *Case on Appeal*, Vol. XII, pp. 2245, 2249-50.

23. Of equal importance is the negative effect of such disputes on the ability of Canadian producers to compete internationally. The competitive edge of many Canadian companies is their ability to guarantee a dependable supply of their product and thus their ability to ship the product on schedule is critical to their existence.

24. By 1986 the west coast ports of Canada had a poor reputation in world markets for labour relations. The stability of the labour situation was clearly of concern to foreign users and potential users of the ports. Another closure could only reinforce this negative perception to everyone's detriment.

Cross-Examination of Garcia (I.L.W.U.), *Case on Appeal*, Vol. I, pp. 154-8

Evidence in Chief and Cross-Examination of Arnott (Cansulex), *Case on Appeal*, Vol. II, pp. 280-2, 297-301, 310-11

Evidence in Chief and Cross-examination of Bayntun (Trans-pac), *Case on Appeal*, Vol. II, p. 333-4

Evidence in Chief of Dechka (Canpotex), *Case on Appeal*, Vol. II, pp. 358-9

Evidence in Chief of Pick (Smokey River Coal), *Case on Appeal*, Vol. III, p. 443

Evidence in Chief of Werner (Westcan Alfalfa), *Case on Appeal*, Vol. III, pp. 529-32

Evidence in Chief of Gilson, *Case on Appeal*, Vol. III, pp. 571-3

Exhibit D-4 (Gilson Report), *Case on Appeal*, Vol. XI, pp. 2093-4, 2096-2107.

25. The long-term economic impact of a stoppage in any given year will depend on multiple variables such as the state of world markets, technology, delivery schedules, the politics and needs of foreign countries and the like. No one stoppage occurs in an economic environment identical to any other, nor are its impacts identical to those of any other.

Cross-Examination of Tunner, *Case on Appeal*, Vol. V, pp. 841, 853-4, 881

Exhibit M (Tunner Report), *Case on Appeal*, Vol. XII, p. 2264.

26. It is probable that a five day work stoppage such as that which occurred in November, 1986 has a minimal impact on the public well-being. However, every indication was that this work stoppage was not likely to be settled in the near future. There is no doubt that as the stoppage continued, it would have an increasingly wide-spread and detrimental impact on the public.

Exhibit D-3 (Martin Report), *Case on Appeal*, Vol. X, pp. 2010-17

Exhibit D-4, (Gilson Report), *Case on Appeal*, Vol. XI, pp. 2121-41.

PART II

POINTS IN ISSUE

27. The issues raised by this appeal are:

(1) Whether the *MOPOA* breaches section 7 or 2(d) of the *Charter*;

(2) If so, whether such breach is demonstrably justified pursuant to section 1 of the *Charter*.

Order Stating Constitutional Questions,
May 19, 1993, per Lamer C.J.

28. The Respondent submits that the *MOPOA* does not breach section 7 or 2(d) of the *Charter*. In the alternative, if the *MOPOA* breaches either of those sections it is justified pursuant to section 1.

PART III
ARGUMENT

A. SECTION 7 OF THE *CHARTER*

i) Breach of Liberty

29. The purpose of the *MOPOA* was to end the lock-out then in effect, to restore longshoring operations in west coast ports and to provide for settlement of the dispute without further work stoppages.

30. The *MOPOA* did not violate the liberty of individual longshoremen. It did not legislate an absolute obligation to work and did not affect individual cessations of work for reasons other than participation in a strike or lock-out. Thus individual Appellants could and did quit their jobs, retire, take sick leave and otherwise fail to work without violating the *MOPOA*.

31. Nor did the *MOPOA* affect the ability of the Appellants to move throughout Canada, to maintain their union or to bargain collectively.

32. The breach of liberty of which the Appellants complain is the right not to be forced by emergency legislation to work while negotiating a new contract. Essentially this is a purely economic or commercial right. Such rights are not within the ambit of section 7 of the *Charter*, (with the possible exception of economic rights fundamental to human life or survival which are not at stake in this case).

Attorney General of Quebec v. Irwin Toy Ltd., [1989] 1 S.C.R. 927 at 1003-4, per Dickson, Lamer & Wilson JJ.

see also: *Reference Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313, per McIntyre J. at 412

R.V.P. Enterprises Ltd. v. Minister of Consumer and Corporate Affairs (1988), 25 B.C.L.R. (2d) 219 (C.A.) at 225; leave to appeal to S.C.C. refused [1988] 2 S.C.R. ix

Home Orderly Services Ltd. v. Government of Manitoba (1987), 43 D.L.R. (4th) 300 (Man. C.A.); leave to appeal refused [1988] 1 S.C.R. ix

Public Service Alliance of Canada v. The Queen (1984), 11 D.L.R. (4th) 337 (Fed. T.D.) at 368; affirmed without comment on s. 7 (1984), 11 D.L.R. (4th) 387 (Fed. C.A.); [1987] 1 S.C.R. 424

Arlington Crane Service v. Ontario (1988), 67 O.R. (2d) 225 (S.C.) at 288-90, 296-7.

33. The *MOPOA* does not constitute an absolute prohibition on the right to work, but merely regulates the right to strike or lock-out. Specifically it suspends these rights during the currency of the statute. One universal feature of modern labour legislation is the suspension of the right to strike or lock-out during a collective agreement. Such rights are not within the ambit of section 7 of the *Charter*.

Reference Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 per Lamer C.J. at 502-3.

Government of Prince Edward Island v. Walker, #AD-0425, Sept. 24, 1993 (P.E.I.C.A.); leave to appeal to S.C.C. pending.

34. Nor does section 7 guarantee any independent right to work, transact business or enter into contracts.

Henfry Samson Belair Ltd. v. Wedgewood Village (1989), 60 D.L.R. (4th) 43 (B.C.C.A.) at 52, 53; leave to appeal refused [1989] 2 S.C.R. viii

R.V.P. Enterprises Ltd. v. Minister of Consumer and Corporate Affairs, supra

R. v. Edwards Books and Art Limited, [1986] 2 S.C.R. 713 at 786

Arlington Crane Service v. Ontario, supra.

35. The *Wilson* case, relied upon by the Appellants, is "out of step with the overwhelming weight of constitutional case law" and ought not to be applied by this Honourable Court.

see: Lepofsky, M. David *"Wilson v. B.C. Medical Services Commission"*, [1989] 68 C.B.R. 615

see also: Cases cited at paras. 32-34, above.

36. Finally, section 7 of the Charter does not create a constitutional right to strike or bargain collectively. It follows that the deprivation of the right to strike and the requirement to work on terms imposed by the *MOPOA* cannot be contrary to section 7 of the Charter.

Public Service Alliance of Canada v. The Queen, supra, at 368-9; affirmed without comment on s. 7 point (1984), 11 D.L.R. (4th) 387 (Fed C.A.); [1987] 1 S.C.R. 424

Newfoundland Association of Public Employees v. The Queen in Right of Newfoundland (1985), 53 Nfld & P.E.I.R. 1 at 24-5 (Nfld S.C., T.D.)

ii) Fundamental Justice

37. A principle of fundamental justice is a legal principle that is fundamental to our societal notion of justice.

Rodriguez v. Attorney General of Canada, #23476, Sept. 30, 1993 (S.C.C.) per Sopinka J. at 14.

38. The rights to strike and bargain collectively are modern creations of legislation based on a political and economic compromise between organized labour and its employers. They are not legal principles fundamental to our societal notion of justice and the regulation of them does not breach a principle of fundamental justice.

Reference Re Public Service Employee Relations Act, supra, per LeDain J. at 390-1 and McIntyre J. at 411-16

Public Service Alliance of Canada v. The Queen, supra, per LeDain J. at 452-3 and McIntyre J. at 453-4

Government of Saskatchewan v. The Retail, Wholesale and Department Store Union, Locals 544, 496, 635 and 935, [1987] 1 S.C.R. 460 per LeDain J. at 484 and McIntyre J. at 484-5.

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

39. The scope of section 2(d) of the *Charter* is beyond dispute. The guarantee of freedom of association consists of the following:

> ... first that s. 2(d) protects the freedom to establish, belong to and maintain an association; second, that s. 2(d) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that s. 2(d) protects the exercise in association of the constitutional rights and freedoms of individuals; and fourth, that s. 2(d) protects the exercise in association of the lawful rights of individuals.

P.I.P.S.C. v. Northwest Territories (Commissioner), [1990] 2 S.C.R. 367, per Sopinka J. at 402, see 401-4

See also the "labour trilogy": *Reference Re Public Service Employee Relations Act, supra*

Public Service Alliance of Canada v. The Queen, supra

Government of Saskatchewan v. The Retail, Wholesale and Department Store Union, Locals 544, 496, 635 and 935, supra.

40. Freedom of association in section 2(d) of the *Charter* does not protect the right to strike or lock-out or to bargain collectively. As Le Dain, J. stated in *Reference Re Public Service Employee Relations Act*:

> The rights for which constitutional protection is sought - the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer - are not fundamental rights or freedoms. They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise ...
>
> I agree with McIntyre J. that the constitutional guarantee of freedom of association in s. 2(d) of the [*Charter*] does not include, in the case of a trade union, a guarantee of the right to bargain collectively and the right to strike...

Reference Re Public Service Employee Relations Act, supra, per Le Dain J. at 390-1; see also McIntyre J. at 409-10

Public Service Alliance of Canada v. The Queen, supra, per Le Dain J. at 452-3 and McIntyre J. at 453-4

Government of Saskatchewan v. The Retail, Wholesale and Department Store Union, Locals 544, 496, 635 and 955, supra, per Le Dain J. at 484 and McIntyre J. at 484-5.

41. Given this Honourable Court's definition of freedom of association, it is clear that the *MOPOA* does not breach section 2(d) of the *Charter*. The *MOPOA* did not interfere with the Appellants establishing, belonging to or maintaining the I.L.W.U. Nor did it interfere with the Appellants exercise in association of their individual constitutional or lawful rights.

42. The Appellants have not advanced any reasoned basis to reconsider the scope of section 2(d) of the *Charter*. The "labour trilogy" and *P.I.P.S.C.* decisions are very recent (1987 and 1990 respectively) precedents and nothing has changed since their being decided that would warrant their reversal. They represent a reasonable, long-term approach to freedom of association which can accommodate the wide variety of activities protected by that right and is consistent with the view of other democracies of constitutionally guaranteed freedom of association.

Collymore v. Attorney General, [1970] A.C. 538 at 547-8 (J.C.P.C.) [Britain].

Smith v. Arkansas Highway Employees (1979), 441 U.S. 463 at 465 (S.Ct.) [U.S.A.]

Minnesota State Board for Community Colleges v. Knight (1984), 465 U.S. 271, 79 L.Ed. 2d 299 (S.Ct.) at 313 [U.S.A.]

Hanover Township Federation of Teachers v. Hanover Community School Corp. (1972), 457 F. 2d 456 at 460-1 (U.S.C.A. - 7th Circ.). [U.S.A.]

C. INTERACTION OF SECTIONS 2(d) AND 7 OF THE *CHARTER*

43. The Appellants are attempting to do under section 7 what this Honourable Court has said they cannot do under section 2(d): obtain constitutional protection for the right to bargain collectively and strike.

44. Logically the Appellants must succeed or fail on both sections 7 and 2(d): individuals cannot gain *Charter* protection under section 7 for conduct which is not protected when exercised in association. The protection sought under section 7 is exactly the same as the protection which this Honourable Court has held to be unavailable under under section 2(d).

D. SECTION 1 OF THE *CHARTER*

45. Where a section 1 analysis is required, two questions must be addressed to determine whether the limit is reasonable and demonstrably justified in a free and democratic society.

46. The first question is whether the objective which the limitation is designed to serve is sufficiently important to warrant the limitation of a constitutionally protected right or freedom.

Attorney General of Quebec v. Irwin Toy Ltd., *supra*, at 986

Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143 per McIntyre J. at 183-4 and per La Forest J. at 198.

47. The second question is whether the means chosen to attain the objectives are proportionate to the ends. This proportionality test has three components:

(a) there must be a rational connection between the means chosen and the objective;

(b) the provision at issue must impair the right as little as reasonably possible; and

(c) the deleterious effects of the measure must be proportionate to the attainment of the legislative objective.

R. v. Edwards Books and Art Limited, supra, at 768-9.

48. A contextual approach should be applied in assessing the values associated with a free and democratic society.

R. v. Keegstra, [1990] 3 S.C.R. 697 at 736-8.

49. A flexible approach ought to be adopted in applying both the standard of proof and, particularly, the proportionality test. As a result:

> ...the question is whether the government had a reasonable basis for concluding that it impaired the relevant right as little as possible given the government's pressing and substantial objectives.

McKinney v. Board of Governors of University of Guelph, [1990] 3 S.C.R. 229 per La Forest J. at 280-1

Stoffman v. Vancouver General Hospital, [1990] 3 S.C.R. 483 per La Forest J. at 521-2, 526-8.

50. A lower threshold of proof will prevail where a Court is required to determine matters of social policy or to balance claims of competing individuals or groups.

> ...judicial evaluation of the state's interest will differ depending on whether the state is the "singular antagonist" of the person whose rights have been violated, and it usually will be where the violation occurs in the context of the criminal law, or whether it is instead defending legislation or other conduct concerned with "the reconciliation of claims of competing individuals or groups or the distribution of scarce government resources"; see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 994. In the former situation, the courts will be able to determine whether the impugned law or other government conduct is the "least drastic means" for the achievement of the state interest with a considerable measure of certainty, given their familiarity with the values and operation of the criminal justice system and the judicial system generally. As this Court has noted in *Irwin Toy*, however, the same degree of certainty may not be achievable in the latter situation. This should be borne in mind in particular when applying the proportionality and the minimum impairment tests.

Stoffman v. Vancouver General Hospital, supra, per La Forest J. at 521-2, 527-8

See also: *McKinney v. Board of Governors of University of Guelph, supra*, per La Forest J. at 285-7

Andrews v. Law Society of British Columbia, supra, at 198.

51. In the case at bar, the State is neither the singular antagonist nor is the context criminal law.

52. Rather, in this case the I.L.W.U. and the B.C.M.E.A. were antagonists, while the state represented the public interest. The context is a dispute between labour and management over the container clause in a contract. Parliament had to balance the

claims of these employers and employees to regulate their labour relations with the claim of society at large to use public facilities such as ports, and to pursue their own and the nation's economic well-being. This Honourable Court therefore ought to adopt a flexible approach to the application of section 1 in this case.

53. In such a case it is especially important to give Parliament adequate scope to achieve its objectives. The Court should not substitute judicial opinions for legislative ones as to where to draw precise lines in the formulation of legislation. Unless the Court finds Parliament's choice of public policy was unreasonable, it ought not to strike it down or to enter the legislative field and substitute its own views for that of the legislature.

R. v. Edwards Books and Art Limited, supra, at 781-2, 794-5

Attorney General of Quebec v. Irwin Toy Ltd., supra, at 982-3, 989-90

Reference Re Public Service Employees Relations Act, supra, at 420

McKinney v. Board of Governors of University of Guelph, supra, per La Forest J. at 285-6.

Andrews v. Law Society of British Columbia, supra, per McIntyre J. at 191.

E. CASE AT BAR

54. The policy choice Parliament made in enacting the *MOPOA* was a reasonable one, designed to balance the competing interests of the I.L.W.U., the B.C.M.E.A. and the public.

Step One: Legislative Objective

55. The objective of the *MOPOA* was to ensure the continued operation of the west coast ports, thus preserving the jobs, revenue and reputation for reliability of those who depend on the ports for their livelihood. The importance of this to the Canadian public is clearly demonstrated by the evidence (see paragraphs 19 to 26, above).

56. The *MOPOA* also sought to protect those who, while not primarily dependent on ports for a living, would suffer secondary economic impacts as a result of the ports closures.

57. The *MOPOA* prevented potentially millions of dollars of lost revenue which would have resulted from protracted ports closure. Further, it assured the continued reputation for reliable supply of various Canadian businesses. This was critical to the competitive international position and the viability of such companies.

58. All of these considerations, coupled with the virtual certainty of a lengthy work stoppage at the west coast ports in 1986, qualify the *MOPOA* as sufficiently important to override any section 2(d) or 7 *Charter* rights of the Appellants.

Step Two: Proportionality Test

(a) Rational Connection

59. The objectives above are rationally connected to the passage of the *MOPOA*. Without such legislation the work stoppage would have continued and the jobs, revenue and reputation for reliability of countless Canadian employees and companies would be at the mercy of the I.L.W.U. - B.C.M.E.A. dispute.

(b) Minimum Impairment

60. The *MOPOA* was tailored to address the problem at hand in 1986 and nothing less than the provisions found in the *MOPOA* would attain the legislative objectives in this case.

61. For over a year before the enactment of the *MOPOA* the Respondent made multiple efforts to encourage a negotiated settlement and to prevent a ports shutdown while negotiations continued. This included the appointment of mediators and conciliators and the Minister of Labour's personal role in having the October 6, 1986 lock-out lifted. As well, the I.L.W.U. was locked out for a further six days before the legislation was effective. None of these had resolved the dispute.

62. By the time the legislation was passed it was clear that the parties were unable to negotiate a solution or continue working during negotiations. In the circumstances, in particular the deadlock over the container clause and the parties dismal bargaining history, there was every reason to believe they would not negotiate a settlement in a reasonable time. With the parties at such an impasse, Parliament had no choice but to legislate the resumption of work and an end to the lock-out.

63. Finally, the legislation minimally impaired the rights in question. By incorporating the Larson recommendations on all but the container clause, by referring the container clause issue to an industrial inquiry commission, and by permitting the parties to vary any provision on mutual consent, the legislation attempted to give the parties a new contract which was fair to both sides and addressed the outstanding issues between the parties.

(c) Deleterious Effects

64. Any deleterious effects of the *MOPOA* on the Appellants' rights are minimal compared to the harm averted by the legislation. In effect, the *MOPOA* simply required the I.L.W.U. membership to maintain the *status quo* of getting paid (more) for doing their daily work while negotiating a new collective agreement. The B.C.M.E.A. was also required to maintain the *status quo* of carrying on business while negotiating a contract. This effect on the I.L.W.U. and B.C.M.E.A. is to be balanced against the severe loss of jobs, revenue and reputation for reliability in both the short and long term and the potentially permanent losses which the work stoppage would cause to others.

65. In assessing deleterious impacts of the legislation, the Court should put itself in the position of the legislators. At the time of enacting the *MOPOA* Parliament could not know how long the I.L.W.U. - B.C.M.E.A. dispute would last. It did know that the parties were at an impasse in their public dispute over the container clause, that 14 months of negotiation had not resolved the dispute and that the parties had a dismal bargaining history. There clearly was no reason to expect the I.L.W.U. - B.C.M.E.A. dispute to be resolved imminently. It would not have been reasonable for Parliament to wait for serious and widespread consequences to occur before legislating an end to the dispute.

66. Against this background, and being aware of the certain escalation of effects such a stoppage would cause throughout the Canadian economy, the decision to pass the *MOPOA* after 5 days of lock-out was a reasonable one, amply justified under section 1 of the *Charter*.

PART IV
ORDER REQUESTED

67. The Respondent requests that this appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED AT OTTAWA this 17 day of December, 1993.

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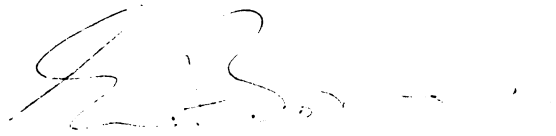
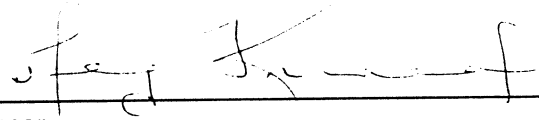


Eric A. Bowie, Q.C.



Meg Kinnear
Of Counsel for the Respondent.

PART V

TABLE OF AUTHORITIES

Pages Referred To

		Pages Referred To
21.	*Hanover Township Federation of Teachers v. Hanover Community School Corp.* (1972), 457 F. 2d 456 (U.S.C.A. - 7th Circ.). [U.S.A.]	20
22.	*Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143	20,22
23.	*R. v. Keegstra*, [1990] 3 S.C.R. 697	21
24.	*McKinney v. Board of Governors of University of Guelph*, [1990] 3 S.C.R. 229	21,22,23
25.	*Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483	21,22