

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

BETWEEN:

CANADIAN EGG MARKETING AGENCY

**Appellant
(Plaintiff)**

- and -

PINEVIEW POULTRY PRODUCTS LTD.

**Respondent
(Defendant)**

- and -

**THE COMMISSIONER OF THE NORTHWEST TERRITORIES as represented by
THE ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES, COUNCIL OF
CANADIANS and SIERRA LEGAL DEFENCE FUND SOCIETY**

Intervenors

AND BETWEEN:

CANADIAN EGG MARKETING AGENCY

**Appellant
(Plaintiff)**

- and -

FRANK RICHARDSON operating as NORTHERN POULTRY

**Respondent
(Defendant)**

- and -

**THE COMMISSIONER OF THE NORTHWEST TERRITORIES as represented by
THE ATTORNEY GENERAL OF THE NORTHWEST, COUNCIL OF CANADIANS
and SIERRA LEGAL DEFENCE FUND SOCIETY**

Intervenors

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PART I - STATEMENT OF FACTS

1. The Council of Canadians and the Sierra Legal Defence Fund Society, (the "Public Interest Intervenors") take no position on the Statements of Facts filed by the Appellants and the Respondents.

PART II - POINTS IN ISSUE

- 10 2. The submissions of the Public Interest Intervenors will address the following issues:
- 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 sections 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 section 2(d) of the *Canadian*
20 *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.

PART III - ARGUMENT

A. OVERVIEW

3. 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*
30 is to safeguard the human rights of the citizens of Canada, female and male, against undue interference or restriction at the hands of government.

4. 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.

5. 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.

10

6. It is the position of the Public Interest Intervenors that the *Charter* was enacted and is intended to protect the human rights and freedoms of the people of Canada, as humans, and should have no application to business corporations which, unlike humans, are motivated exclusively by purely economic interests.

7. The decision of the N.W.T. Court of Appeal must be overturned, for it threatens to create constitutional protection for freedom to contract and the property and economic rights flowing therefrom, under the guise of freedom of association and mobility rights.

20 8. 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. The potential consequences go far beyond the regulation of interprovincial egg marketing. If s. 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 including, *inter alia*, combines laws, consumer protection
30 laws, environmental laws, labour laws and securities laws.

B. PUBLIC INTEREST STANDING

9. The Honourable Madame Justice Hunt, in the court below, held that "I am satisfied that standing should be granted [to the Respondents] according to the principles concerning public interest standing" in *Borowski* and *Canadian Council of Churches*.

Canadian Egg Marketing Agency v. Pineview Poultry Ltd. (1996), 132 D.L.R. (4th) 274; Case on Appeal, Tab 40, at 1401

10. The principles of public interest standing, developed by this Court in the *Borowski*, *McNeil*, *Thorson*, and *Finlay* decisions and applied in *Canadian Council of Churches* and *Hy*
10 *and Zel's*, if properly interpreted, are simply not relevant to this appeal. The Appellant, the Respondents and the N.W.T. Court of Appeal confuse the issue of whether *a plaintiff* should be granted public interest standing to *bring a case* with the separate and unrelated issues of whether a particular party in a proceeding has the right to raise *Charter* issues, and whether that party is entitled to enjoy the protection of certain *Charter* rights.

Thorson v. Attorney General of Canada, [1975] 1 S.C.R. 138
Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265
Minister of Justice of Canada v. Borowski, [1981] 2 S.C.R. 575
Finlay v. Minister of Finance of Canada, [1986] 2 S.C.R. 607
Canadian Council of Churches v. Canada, [1992] 1 S.C.R. 236
20 *Hy and Zel's Inc. v. Ontario (A.G.)*, [1993] 3 S.C.R. 675

11. The Public Interest Intervenors' position regarding the inapplicability of "public interest standing" in the circumstances of the present case is buttressed by the statement of former Chief Justice Dickson in *R. v. Big M Drug Mart*:

The respondent did not come to court voluntarily as an interested citizen asking for a prerogative declaration that a statute is unconstitutional. If it had been engaged in such "public interest litigation" it would have had to fulfill the status requirements laid down by this court in the trilogy of "standing" cases (*Thorson*, *McNeil*, *Borowski*) [citations omitted] but that was not the reason for its appearance in Court.

30

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

12. The fundamental purpose of public interest standing is to provide access to the courts to parties who lack a traditional legal interest (in the form of a direct economic or property interest or personal injury) and would otherwise be denied the right to commence an action.

Canadian Council of Churches, [1992] 1 S.C.R. 236 at 252-253

13. The established principles governing a court's discretion to grant public interest standing are clear and coherent. The application of the principles of "public interest standing" to the Respondents in the case at bar has the potential to significantly and adversely confuse the law of public interest standing.

14. The relevant "standing" question for purposes of this Appeal is whether the Respondents, as business corporations motivated by purely economic interests, have "standing" to benefit from the protection of s. 2(d) and s. 6(2)(b) of the *Charter*.

10 **C. THE PROPER APPROACH TO INTERPRETING CHARTER RIGHTS**

15. The basic approach to interpreting the *Charter* was explained by this Court in *R. v. Big M Drug Mart Ltd.*:

[T]he proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

20 In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the right enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question. (emphasis added)

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

16. A purposive approach is not synonymous with a generous interpretation of *Charter* rights. In fact, it often speaks to a *narrow* interpretation of the right in question, as has been explained by Professor Hogg:

In the case of most rights, however, the widest possible reading of the right will "overshoot" the purpose of the right, by including behaviour that is outside the purpose and unworthy of constitutional protection. The effect of a purposive approach is normally going to be to narrow the scope of the right.

40 Hogg, P., Constitutional Law of Canada, 3rd ed., (Carswell, 1992), at 814

17. The question to be answered on this appeal is whether business corporations have “an interest falling within the scope” and “according with the purpose” of freedom of association and/or mobility rights.

Whether or not a corporate entity can invoke a *Charter* right will depend on whether it can establish that it has an interest falling within the scope of the guarantee, and one which accords with the purpose of that provision.

R. v. CIP Inc., [1992] 1 S.C.R. 843 at 852

10 **D. THE HISTORY AND INTENT OF THE CHARTER**

18. The modern impetus for the *Charter* lies in the international human rights field, and particularly in the evolving recognition, after World War II, that human rights required greater legal protection. Landmark developments included the *Universal Declaration of Human Rights* (1948) and the *International Covenant on Civil and Political Rights* (adopted by the U.N. in 1966; ratified by Canada in 1976). These international conventions make it clear that rights such as freedom of association are, by their very nature, human rights.

20 Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Whereas it is essential if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law, [emphasis added]

Preamble, *Universal Declaration of Human Rights*, G.A. Res. 217A (III) U.N. Doc. A/810 (1948)

International Covenant on Civil and Political Rights G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966)

30 19. Corporations were consistently denied protection of rights under the *Canadian Bill of Rights* even though it explicitly recognized property rights. As stated by the Federal Court, “It is clear that the term individual does not include bodies corporate. Therefore the corporate plaintiffs have no claim under para. 1(a) of the *Canadian Bill of Rights*.”

Smith, Kline and French Ltd. v. Canada (A.G.), [1986] 1 F.C. 274 at 299 (T.D.), affirmed, [1987] 2 F.C. 359 (C.A.)

R. v. Colgate-Palmolive Ltd. (1971) 8 C.C.C. (2d) 40 (Ont. Co. Ct.)

20. Former Chief Justice Brian Dickson, in a recent article on the *Charter*, concluded that “the *Charter* is the logical culmination of Canadian developments in the field of human rights - it builds on provincial and federal human rights codes and the *Canadian Bill of Rights*.”

Dickson, B., “The *Canadian Charter of Rights and Freedoms*: Context and Evolution” in *The Canadian Charter of Rights and Freedoms*, 3d ed., Eds. Gerald Beaudoin and Errol Mendes (Ottawa: Carswell, 1996), at 19

21. Similarly, Pierre E. Trudeau, then Minister of Justice, initially proposed the *Charter* in 1968, referring to the need to protect “the basic human values of all Canadians” and asserting
10 that “a Constitutional bill of rights would guarantee the fundamental freedoms of the individual” (emphasis added).

Trudeau, P.E., *A Canadian Charter of Human Rights* (Ottawa: Queen’s Printer, 1968)

22. The essential point to be gleaned from this overview of the roots of the *Charter* is that the rights and freedoms entrenched therein are human rights, intended for the protection of human beings. There is no rationale for extending human rights to business corporations.

E. THE CHARTER AND PURELY ECONOMIC INTERESTS

20

23. For the purposes of this Appeal, it is highly significant that the drafters of the *Charter* deliberately excluded property, freedom to contract and economic rights (in marked contrast to the *U.S. Constitution* and the *Canadian Bill of Rights*).

Hogg, P., *Constitutional Law of Canada*, 3rd ed. (Scarborough: Carswell, 1992) at 1023

24. This Court and lower courts have been vigilant in ensuring that the *Charter* guarantees are not manipulated or reconfigured to protect or pursue strictly pecuniary or economic interests, stating plainly that the *Charter* “does not concern itself with economic rights”. The
30 reason for this, as stated by McIntyre, J., is that “the overwhelming preoccupation of the *Charter* 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 412-3
Reference re Sections 193 and 195.1(1)(c) of the Criminal Code, [1990] 1 S.C.R. 1123 at 1171

R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713 at 785-6
Irwin Toy Ltd. v. Quebec (A.G.), [1989] 1 S.C.R. 927 at 1003-4
B.C. Milk Marketing Board v. Aquilini et al (8 April 1997) A950636
(B.C.S.C.) Wong, J. at p. 69, para. 152

The interests in which the plaintiffs claim to have suffered are purely economic and commercial in nature; no question of liberty, freedom or human rights is involved.

10 *Smith, Kline and French v. Canada*, [1987] 2 F.C. 359 at 371 (C.A.)

The mere fact that an impugned legislative provision limits the possibility of commercial activities or agreements is not, in my view, sufficient to show a prima facie interference with the s. 2(d) guarantee of freedom of association.

R. v. Skinner, [1990] 1 S.C.R. 1235 at 1245

25. Despite the intent of the *Charter*, and this Court's jurisprudence, the Respondents advance the novel proposition that both "freedom to contract" and "the common law right of
20 trade" ought to be granted *Charter* protection. The N.W.T. Court of Appeal accepted these arguments, despite overwhelming jurisprudence to the contrary (see previous para.).

Respondent's Factum, para. 64, 80

Canadian Egg Marketing Agency v. Pineview Poultry Ltd. (1996), 132 D.L.R. (4th) 274; Case on Appeal, Tab 40, at 1401

26. The N.W.T. Court of Appeal's reasoning raises the spectre of the so-called *Lochner* era in the United States, when the U.S. Supreme Court used an expansive interpretation of the U.S. Constitution to protect freedom to contract and property rights. The results were disastrous for government regulation aimed at protecting the public from the destructive
30 tendencies of corporations and the free market. Consumer protection laws, minimum wage laws, and worker protection laws were among those struck down.

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

Adair v. United States, 208 U.S. 161 (1908)

Adkins v. Children's Hospital, 261 U.S. 525 (1923)

27. Canadian courts have consistently rejected the *Lochner* approach. In a very recent decision based on facts similar to the case at bar, the Federal Court held that "The [impugned] Act and regulations do restrict [the complainants'] freedom, but it is an unprotected, non-

guaranteed economic freedom, which the *Charter* ignores ... the *Charter* should not - nay, cannot - be used as a shield to protect economic interest". (emphasis in original)

Archibald v. Canada (11 April 1997), Ottawa T-2473-93 (F.C.T.D) at 31
Re Groupe des Eleveurs and Chicken Marketing Agency (1984), 14 D.L.R.
(4th) 151 at 182 (F.C.T.D.)

28. However, Professor Joel Bakan has cautioned that "though [this] Court has explicitly held that the *Charter* does not protect 'purely economic' interests, it (along with lower courts) has construed many economic interests as not purely economic, thus clearing the way
10 for constitutional protection."

Bakan, J., Just Words: Constitutional Rights and Social Wrongs (Toronto: University of Toronto Press, 1997, in press) at 88

29. This Court must be vigilant in refusing to allow parties, such as the Respondents in the case at bar, to secure *Charter* protection for purely economic interests by invoking claims based on freedom to contract or the common law right to trade.

F. BUSINESS CORPORATIONS AND THE CHARTER

20 **1. The Nature and Purpose of Business Corporations**

30. To determine whether a business corporation can enjoy the interest intended to be protected by a Charter right or freedom (and thus be entitled to benefit from the *Charter*), it is necessary to examine the nature and purpose of a business corporation. The following definitions are helpful:

Corporation: "an artificial person or legal entity created by or under the authority of the state"

30 **Business corporation:** "one formed for the purpose of transacting business in the widest sense of that term, including not only trade and commerce, but manufacturing, mining, banking, insurance, transportation and practically every form of commercial or industrial activity where the purpose of the organization is pecuniary profit" (emphasis added)

Black's Law Dictionary, 6th ed., (St. Paul: West Publishing, 1990)

31. A business corporation is aptly described as nothing more than “an artificial entity whose function is economic in nature”.

Petter, A., “The Politics of the *Charter*” [1986] 8 Sup. Ct. L. Rev. 473 at 490-1

32. As creatures of statute, or legal fictions, corporations have only those rights which government deems compatible with the public interest. As stated by L’Heureux-Dube, J.:

While individuals as a rule have full legal capacity by the operation of law alone, artificial persons are creatures of the state and enjoy civil rights and powers only on the approval of statutory authorities.

10

Thomson Newspapers Ltd. v. Canada, [1990] 1 S.C.R. 425 at 589

33. The nature of corporate existence is such that corporations are physically and legally incapable of enjoying or requiring certain freedoms and civil liberties. There is no “history, logic or reason” for granting corporations the protection of the *Charter*.

Wheeling Steel Corporation v. Glander, 337 U.S. 562 (1949), Douglas J., dissenting

20

In my opinion, a corporation - ‘an artificial being, invisible, intangible, and existing only in contemplation of law’ - cannot claim the immunity given by the 4th amendment; for it is not a part of the “people” within the meaning of that Amendment.

Hale v. Henkel, 201 U.S. 43 at 78 (1905)

34. When the nature of corporations is considered in tandem with this Court’s repeated pronouncements that the *Charter* is not intended to protect purely economic interests, it becomes clear that, on basic principles, there is no rationale for extending *Charter* rights to corporations.

30

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 128-129;

Michael Mandel, "Rights, Freedoms and Market Power: Canada's *Charter of Rights* and the New Era of Global Competition" in The New Era of Global Competition, D. Drache and M.S. Gertler, eds. (1991)

35. Differential treatment of corporations and human persons in enjoyment of *Charter* protections is equitably justified, even where the corporation is the means by which a particular human individual engages in an otherwise *Charter*-protected activity. As stated by Lamer C.J. in *Wholesale Travel* in the context of s. 7 of the *Charter*:

10 ...the corporation is in a completely different situation than is an individual...The corporate form of business organization is chosen by individuals because of its numerous advantages (legal and otherwise). Those who cloak themselves in the corporate veil, and who rely on the legal distinction between themselves and the corporate entity when it is to their benefit to do so, should not be allowed to deny this distinction in these circumstances (where the distinction is not to their benefit). (emphasis added)

R. v. Wholesale Travel, [1991] 3 S.C.R. 154 at 182-3
Langille et al v. Toronto-Dominion Bank, [1982] 1 S.C.R. 34 at 39-40

20 **2. Business Corporations and Other *Charter* Rights**

36. Refusing to extend the guarantees of freedom of association and mobility rights to business corporations in this case would be consistent with a number of cases where this Court has refused to extend to business corporations the protection of certain *Charter* rights and freedoms, including:

(a) freedom of conscience and religion, s. 2(a);

R v. Big M Drug Mart, [1985] 1 S.C.R. 295
R. v. Wholesale Travel, [1991] 3 S.C.R. 154
R. v. Edwards Books, [1986] 2 S.C.R. 713

30

(b) the right to life, liberty and security of the person, s. 7.

Irwin Toy Ltd. v. Quebec (A.G.), [1989] 1 S.C.R. 927
Dywidag Systems v. Zutphen Bros., [1990] 1 S.C.R. 705

(c) the right against self-incrimination, s. 11(c); and

R. v. Amway Corp., [1989] 1 S.C.R. 21
Thomson Newspapers v. Canada, [1990] 1 S.C.R. 425

37. This Court has found that the above sections of the *Charter* (ss. 2(a), 7 and 11(c)) protect exclusively human interests, and that business corporations, by their very nature, are: incapable of having a religion; incapable of acting as a witness; and incapable of experiencing life, or of experiencing loss of physical liberty or personal security.

We have already noted that it is nonsensical to speak of a corporation being put in jail. To say that bankruptcy and winding up proceedings engage s. 7 would stretch the meaning of the right to life beyond recognition.

10 [R]ead as a whole, it appears to us that this section [s.7] was intended to confer protection on a singularly human level. A plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the human element involved: only human beings can enjoy these rights.

Irwin Toy v. Quebec (A-G), [1989] 1 S.C.R. 927 at 1003-1004

38. On the other hand, this Court has extended certain *Charter* rights to corporations, including: s. 2(b)--freedom of expression; s. 8--freedom from unreasonable search and seizure; and s. 11(b)--right to a trial within a reasonable period of time. In each of these cases, the
20 corporation's enjoyment of the right is predicated on some kind of perceived human or social value that concurrently demands protection.

39. Nevertheless, numerous commentators have criticized the extension of the *Charter* to protect corporations, arguing that:

30 The judicial tendency to equate the interests of corporations under the *Charter* with those of human beings is an ominous portent. It suggests that rights which were placed in the *Charter* to serve peculiarly human needs will be employed uncritically by the courts to protect purely economic interests. It further suggests that corporations which owe their powers to the state may be able to use the *Charter* so as to deny the state the ability to restrain those powers in the public interest.

Petter, A., "Politics of the *Charter*" [1986] 8 Sup. Ct. L. Rev. 473 at 493

40 There is no principled basis in its stated reasons for holding that the 'privacy', 'expression' or 'speedy trial' interests of a corporation are on a par with humans. Indeed, the Court itself casts doubt on such equivalence by suggesting that *Charter* rights protect inherently human interests--it links privacy to human dignity and self-worth, freedom of expression to human fulfillment and self-actualization, and the right to a speedy trial to emotional and physical harm that may result from delay. It ignores such links, however,

when holding that corporations can have *Charter* rights. Despite its rhetoric to the contrary, the Court ultimately presumes that human and corporate persons are the same

Bakan, J., Just Words: Constitutional Rights and Social Wrongs
(Toronto: University of Toronto Press, 1997, in press) at 91

40. There is a conceptual dissonance between recognizing "the inherent dignity and the inviolable rights of the human person" (*Big M Drug Mart*, p. 353) and proposing to extend *Charter* rights to corporations. Corporations differ from humans in some very fundamental
10 ways--including immortality, limited liability, and their purely economic mission to maximize returns to their shareholders--and thus cannot be treated on an equal footing with humans.

41. Given their predominantly economic interests and their inherent inability to enjoy human rights, business corporations should not be entitled to benefit from the protection of the *Charter* in the absence of a specific Constitutional amendment.

3. The Exception in Big M Drug Mart

42. The general rule in *Charter* cases is that as person can only rely on those rights to
20 which they are entitled to benefit.

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

43. It is evident from the preceding analysis (para. 30 to para. 41) that business corporations are not entitled to benefit from the protection of freedom of association and mobility rights under the *Charter*. That does not, however, dispose of the question of whether the Respondents can raise the *Charter* rights of third parties.

44. This Court has created an exception to the general rule that corporations cannot rely upon *Charter* protections which are unavailable to them. In *R. v. Big M Drug Mart*, this
30 Court stated clearly that a corporation cannot enjoy freedom of religion. However, in the circumstances, because Big M Drug Mart was facing a penal proceeding, this Court allowed the corporation to argue that not even a corporation should be prosecuted under a law which unconstitutionally violates the rights of others.

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

45. This Court has confirmed that the exception established in *R. v. Big M Drug Mart Ltd.* is “obviously not applicable” where no penal proceedings are pending.

Dywidag Systems v. Zutphen Bros., [1990] 1 S.C.R. 705 at 709

46. The case at bar involves a civil lawsuit for damages. The Respondents are not facing penal proceedings and therefore cannot avail themselves of the *Big M Drug Mart Ltd.* exception in order to rely *Charter* rights which are not otherwise available to them.

G. THE RESPONDENTS’ CLAIM TO FREEDOM OF ASSOCIATION

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1. The Purpose and Intent of Protecting Freedom of Association

47. Like many of the human rights protected by the *Charter*, the freedom of association has an extensive history in international human rights law.

Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810 at 71 (1948), Article 20

International Covenant on Civil and Political Rights, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966), Art. 22

20

48. It is the Public Interest Intervenors’ position, supported by statements made by this Court, that freedom of association is a *Charter* guarantee that should be limited to human beings and not extended to business corporations. The interest intended to be protected by the right to freedom of association is uniquely human: the essential contribution of social relationships to the enrichment of individual human experience and life. McIntyre, J., in the *Public Service Reference* stated that:

Freedom of association is one of the most fundamental rights in a free society. The freedom to mingle, live and work with others gives meaning to the lives of individuals and makes organized society possible.

30

Dickson, C.J. held that:

In my view, the “fundamental” nature of freedom of association relates to the central importance to the individual of his or her interaction with fellow human beings. The purpose of the constitutional guarantee of freedom of association is, I believe, to recognize the profoundly social nature of human endeavours and to protect the individual from State-enforced isolation in the pursuit of his or her ends.

Both Dickson, C.J. and McIntyre, J. quote Alexis de Toqueville's famous passage:

The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty.

Re Public Service Employees Relations Act, [1987] 1 S.C.R. 313 at 393, 365 and 395

- 10 49. Other decisions of this Court have confirmed the intrinsically human nature of the interest protected by freedom of association.

The essence of the freedom is the protection of the individual's interest in self-actualization and fulfillment that can be realized only through combination with others.

Lavigne v. OPSEU, [1991] 2 S.C.R. 211 at 317.

50. Consistent with the uniquely human nature of freedom of association, courts have repeatedly held that only individuals are entitled to enjoy the benefits of s. 2(d) of the *Charter*.

20 *Reference Re Public Service Employees Relations Act*, [1987] 1 S.C.R. 313 at 374, 379, 395, 397
Professional Institute of the Public Service of Canada v. N.W.T. (Commissioner), [1990] 2 S.C.R. 367
Archibald et al. v. Canadian Wheat Board (11 April 1997), Ottawa T-2473-93 (F.C.T.D.)

51. Business corporations are simply incapable of possessing the human interests sought to be protected by s. 2(d) of the *Charter*. There is no corporate interest equivalent to the human interest in social interaction and self-actualization gained through association with other
30 humans. The need to protect individuals from "state-imposed isolation" does not exist in the context of business corporations. As a result, the *Charter*'s freedom of association guarantee should not be extended to business corporations.

2. Freedom of Association Does Not Protect Freedom to Contract or Trade

52. It is the Public Interest Intervenors' position that the decision of the N.W.T. Court of Appeal in the case at bar cannot be reconciled with this Court's decisions on the scope of freedom of association in the 1987 Labour Trilogy or the *Professional Institute* case.

53. The decision of the N.W.T.C.A. as to the scope of s. 2(d) of the *Charter* is disconcertingly broad. Trade is characterized as associational in nature and therefore protected by s. 2(d) of the *Charter*. According to Madame Justice Hunt:

The view that s. 2(d) only protects the ability to form an association and not the goals or activities of that association renders completely meaningless the freedom to associate. That is because, as I have already pointed out, it is the association itself that is the activity. In other words, one cannot separate the association from the activity, because they are one and the same. (emphasis in original)

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Canadian Egg Marketing Agency v. Pineview Poultry Ltd. (1996), 132 D.L.R. (4th) 274 at 297; Case on Appeal, Tab 40, at 1419

54. With respect, this Court has rejected the proposition, (in the Labour Trilogy and subsequent cases), that under s. 2(d) freedom of association can be equated with the activity. According to Sopinka J.:

20 [I]t is precisely this sort of claim that has been rejected by the majority of this Court. It is simply no longer open to an association (union or otherwise) to argue that the legislative frustration of its objects is a violation of s. 2(d) if the restriction is not aimed at and does not effect the establishment or existence of the association--unless the association's activity is another *Charter*-protected right, or an activity that may lawfully be performed by an individual. (emphasis in original)

Professional Institute of the Public Service of Canada v. N.W.T. (Commissioner) [1990] 2 S.C.R. 367 at 405

Furthermore, as emphasized by McIntyre, J.:

30 For obvious reasons, the Charter does not give constitutional protection to all activities performed by individuals. There is, for instance, no Charter protection for the ownership of property, for general commercial activity, or for a host of other lawful activities. And yet, if [it] were adopted [to extend s. 2(d) to all acts done in association], these same activities would receive protection if they were performed by a group rather than by an individual. In my view, such a proposition cannot be accepted.

Re Public Service Employee Relations Act, [1987] 1 S.C.R. 313 at 405

40 55. In the Labour Trilogy and *Professional Institute* cases, this Court refused to extend the protection of s. 2(d) of the *Charter* to trade unions for activities such as the right to strike or collective bargaining, although international human rights conventions often include the

right to strike as a specific aspect of freedom of association. It would be inconsistent, unjust and undesirable from a public policy perspective to allow the Respondents to succeed where trade unions have failed, by having their business activities (which are purportedly essential to the purpose of their association) granted constitutional protection.

56. Hunt, C.J. in the Court below, also accepted the Respondents' assertion that freedom to contract is constitutionally protected under the rubric of freedom of association, stating that: "The right put forward here (the right to enter into commercial associations) is not legislatively created but a right arising from the freedom to contract."

10 *Canadian Egg Marketing Agency v. Pineview Poultry Ltd.* (1996), 132 D.L.R. (4th) 274 at 294; Case on Appeal, Tab 40, at 1414

57. The N.W.T. Court of Appeal's suggestion that freedom to contract is protected under s. 2(d) of the *Charter* is untenable. Freedom to contract is a purely economic interest. This Court has rejected the expansion of the *Charter* to cover such purely economic interests. (see para. 23 to para. 29, *supra*)

58. To cloak freedom to contract in the guise of freedom of association is to open a Pandora's box of constitutional problems. All forms of commercial activity, which by their
20 very nature involve two parties (most often a buyer and a seller), would be endowed with constitutional protection from government regulation.

59. Mr. Justice Le Dain, in the *Alberta Reference*, articulated the compelling reasons for rejecting such an approach to the interpretation of s. 2(d) of the *Charter*:

30 In considering the meaning that must be given to freedom of association in s. 2(d) of the *Charter* it is essential to keep in mind that this concept must be applied to a wide range of associations or organizations of a political, religious, social or economic nature, with a wide variety of objects, as well as activity by which the objects may be pursued. It is in this larger perspective, and not simply with regard to the perceived requirements of a trade union, however important they may be, that one must consider the implications of extending a constitutional guarantee, under the concept of freedom of association, to the right to engage in particular activity on the ground that the activity is essential to give an association meaningful existence.

Re Public Service Employees Relations Act [1987] 1 S.C.R. 313 at 390-91

60. The reasoning employed by the N.W.T.C.A. (and supported by the Respondents) has the potential to turn the *Charter* in a new and highly undesirable direction. As a recent article in Reid's Administrative Law reviewing the case at bar stated:

10 The potential implications of the decision are profound. An interpretation of the freedom of association that protects trade expands the role of the *Charter* in protecting commercial activity far beyond anything recognized by the courts to date. Such an interpretation will provide a sharp weapon for attack on a wide range of regulatory systems. Many municipal by-laws, professional governance regulations and securities regulations spring immediately to mind as potential targets.
Shores, "Walking Onto an Unfamiliar Playing Field: Expanding the Freedom of Association to Cover Trade", (1996) 6 R.A.L. 1

61. Freedom of association must not be allowed to become a Trojan horse through which purely economic interests (such as freedom to contract, trade and commercial activity) are brought with the walls of the *Charter*. To do so would "stretch the meaning of the right ... beyond recognition."

H. THE RESPONDENTS' CLAIM TO MOBILITY RIGHTS (S. 6)

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62. Section 6 refers to the mobility rights of a "citizen", a word found elsewhere in the *Charter* only in s. 3, the right to vote, and s. 23, the right to educate children in the minority language. The contexts in which the term 'citizen' appears in the *Charter* lead inexorably to the conclusion that business corporations are not entitled to benefit from mobility rights. This conclusion is reinforced by the reference in s. 6 to "permanent resident", another phrase which is inapplicable to business corporations. Finally, the French version of the *Charter* expresses s. 6(2)(b) as the right "de gagner leur vie dans toute province" (emphasis added) which closes the door of s. 6 to all but human beings.

30 63. Courts have consistently determined that the protection provided by s. 6 is limited to human beings and is not available to 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.); *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.)

64. Commentators have also rejected the suggestion that mobility rights could or should be extended to business corporations. Professor Hogg has stated that:

[T]he extension of mobility rights to corporations would constitute a radical change in the constitutional law respecting corporate recognition outside the province of incorporation, and the courts may be reluctant to take this step in the absence of clearer language in the *Charter*.

10 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 87;
Bernhardt, P., "Mobility Rights: Section 6 of the *Charter* and the Canadian Economic Union" (1987) 12 Queen's L. J. 199 at 236

65. 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.

20

I. CONCLUSION

66. Business corporations are creatures of law, created and operated for purely economic purposes. There is no reason to extend *Charter* protection for either freedom of association or mobility rights to these artificial legal entities. Freedom of association and mobility rights protect interests that are uniquely human, and thus are incapable of being enjoyed by business corporations. The intent of the *Charter*, to protect human rights, and not corporate interests, should be honoured. In the words of Mr. Justice Douglas of the United States Supreme Court:

30

We are dealing with a question of vital concern to the people of the nation. It may be desirable to give corporations this protection from the operation of the legislative process. But that question is not for us. It is for the people. If they want corporations to be treated as humans are treated, if they want to grant corporations this large degree of emancipation from state regulation, they should say so. The Constitution provides a method through which they may do so. We should not do it for them through the guise of interpretation.

Wheeling Steel Corporation v. Glander, 337 U.S. 562 (1949), Douglas J., dissenting

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67. Furthermore, given that purely economic interests and property rights were deliberately excluded from the *Charter*, freedom of association (either independently or in conjunction with other *Charter* rights) must not provide a back door through which these interests can secure constitutional protection.

68. As this Court has recognized:

10 Regulatory measures are the primary mechanisms employed by governments in Canada to implement public policy objectives. What is ultimately at stake in this appeal is the ability of federal and provincial governments to pursue social ends through the enactment of public welfare legislation.

R. v. Wholesale Travel, [1991] 3 S.C.R. 154 at 219-22

69. The *Charter* ought not to be appropriated by business corporations as a means of achieving deregulation, yet that is what the Respondents seek to do, and indeed that is what the N.W.T. Court of Appeal allowed. As Professor Mandel has suggested, "Business has been given some substantial help by the *Charter* in its quest for the minimal state."

20 Michael Mandel, "Rights, Freedoms and Market Power: Canada's *Charter* of Rights and the New Era of Global Competition" in The New Era of Global Competition, D. Drache and M.S. Gertler, eds. (1990), at 137

70. The words of Mr. Justice Seaton of the B.C. Court of Appeal, when faced with a *Charter* challenge similar to the case at bar, are apposite:

Together the arguments challenge regulation of industry. If accepted, they lead to the conclusion that unregulated free enterprise is entrenched in our *Constitution*. That, in the end is what the *Charter* arguments amount to, and I reject them.

30 *Milk Board v. Clearview Dairy Farms Inc.* (1987), 12 B.C.L.R. (2d) 116 at 125 (C.A.)

PART IV - NATURE OF ORDER SOUGHT

71. The Intervenors request an order setting aside the judgment below and allowing the appeal.

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

10 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*?

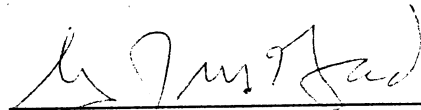
Answer: No.


20 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

this 17th day of May, 1997.


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