

**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, Represented by THE ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES; ATTORNEY GENERAL OF CANADA; ATTORNEY GENERAL OF ALBERTA; ATTORNEY GENERAL OF BRITISH COLUMBIA; ATTORNEY GENERAL OF QUEBEC; ATTORNEY GENERAL OF ONTARIO; SIERRA LEGAL DEFENCE FUND SOCIETY/COUNCIL OF CANADIANS; THE ALBERTA BARLEY COMMISSION**

**Interveners**

**And Between:**

**CANADIAN EGG MARKETING AGENCY**

**Appellant (Plaintiff)**

**- and -**

**FRANK RICHARDSON, Operating as NORTHERN POULTRY**

**Respondent (Defendant)**

**- and -**

**THE COMMISSIONER OF THE NORTHWEST TERRITORIES, Represented by THE ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES; ATTORNEY GENERAL OF CANADA; ATTORNEY GENERAL OF ALBERTA; ATTORNEY GENERAL OF BRITISH COLUMBIA; ATTORNEY GENERAL OF QUEBEC; ATTORNEY GENERAL OF ONTARIO; SIERRA LEGAL DEFENCE FUND SOCIETY/ COUNCIL OF CANADIANS; THE ALBERTA BARLEY COMMISSION**

**Interveners**

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**FACTUM OF THE RESPONDENTS IN REPLY TO  
THE ALBERTA BARLEY COMMISSION**

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## INTRODUCTION

1. This factum is filed in response to the factum of the Alberta Barley Commission (the "Commission"). In particular, comments will be made herein with respect to the Commission's submissions regarding:

- a. the relevance of s. 121 of the *Constitution Act, 1867* (the "1867 Act");
- b. the manner in which the Regulatory Scheme (as that term is defined in the Respondents' factum dated April 21, 1997) infringes s. 2(d) of the *Canadian Charter of Rights and Freedoms* (the "Charter"); and
- c. Charter protection of economic interests.

2. The other issues upon which the Commission has made submissions are:

- a. the meaning of the terms "discriminate" and "general application" in s. 6(3)(a) of the Charter; and
- b. whether s. 1 comes into play if s. 6(3)(a) applies only to provincial laws and practices.

To the extent that these issues have not been discussed in the Respondents' factum dated April 27, 1997, they will be discussed in the Respondents' factum to be filed on March 6, 1998.

**FACTS**

3. The Respondents do not take issue with the facts stated by the Commission except to disagree that *Archibald v. Canada* raises issues similar to those raised on the present appeal.

## ARGUMENT

### A. RELEVANCE OF SECTION 121

4. The Respondents agree with the general tenor of the Commission's submissions with respect to what the latter describes as the "direct relevance" and "interpretive relevance" of s. 121 of the 1867 Act, but wish to make the following two comments on those submissions.

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5. First, there is a relevant case in addition to those reviewed by the Commission. That case is *Reference re Agricultural Products Marketing Act* (the "Egg Reference"). In the Egg Reference, the majority judgment did not refer to s. 121. However, in the dissenting judgement, Laskin C.J. expressly accepted the view of Rand J. in *Murphy v. C.P.R.*, which is relied upon by the Commission, that s. 121 is aimed not only at customs tariffs, but also at trade regulations that in their essence and purpose relate to a provincial boundary.

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

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6. In the Egg Reference, Laskin C.J. held that the *Farm Products Marketing Agencies Act* (as it then was) did not violate s. 121 of the 1867 Act. However, that case concerned the interaction between the federal legislation and its Ontario counterpart, not the exclusion of an entire jurisdiction from the national supply management system for eggs. There was no egg production in the Northwest Territories at the time the Egg Reference was decided and therefore, as the learned trial judge held, no mention in that case of the Northwest Territories in relation to s. 121 or otherwise.

*Reference re Agricultural Products Marketing Act, supra*, at 1268  
Reasons for Judgment of the Honourable Mr. Justice M.M. de Weerd, t,  
Case on Appeal, Vol. VI, Tab 38, p. 1345, line 25

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7. Second, at paragraph 17 of its factum, the Commission says that the issue of whether the Regulatory Scheme violates s. 121 was not before the courts below. In fact, the issue was argued



in the court of first instance, although not considered by the Northwest Territories Court of Appeal.

8. The learned trial judge held that, while the term "Provinces" in s. 121 does not include the Northwest Territories, the Regulatory Scheme violated "the spirit, if not the ancient letter" of s. 121.

Reasons for Judgment of the Honourable Mr. Justice de Weerd, Case on Appeal, Vol. VI, Tab 38, 1360

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9. The issue of whether s. 121 applied to the Northwest Territories was raised by the learned trial judge in the course of the trial. As he acknowledged in his Reasons for Judgment, the point was not fully argued before him.

Reasons for Judgment of the Honourable Mr. Justice de Weerd, Case on Appeal, Vol. VI, Tab 38, p. 1346, line 28

10. The Respondents understand the learned trial judge's reasoning on the above issue to be as follows:

20 a. Section 146 of the 1867 Act provides for the admission to Canada of the Northwestern Territory (as it then was) on Address from the Houses of the Parliament on "such Terms and Conditions as are in the [Address] expressed, and the Queen sees fit to approve".

*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 146 (formerly *British North American Act, 1867*) [Tab A]

30 b. The Address providing for admission of the Northwest Territories is the *Rupert's Land and North-Western Territory Order* of June 23, 1870. This Order does not provide any protection for the Northwest Territories similar to that granted by s. 121 of the 1867 Act.

Schedule (A) to the *Rupert's Land and North-Western Territory Order* of 1870, Statutes of Canada (looseleaf edition), Appendix II, No. 9, at p. 8 [Tab B]

c. Further, the term "provinces" is used elsewhere in the Constitution, particularly in ss. 38(1) and 42(1) of the *Constitution Act, 1982*, in a manner which excludes the territories.

*Constitution Act, 1982*, ss. 38(1), 42(1), being Schedule B of the *Canada Act 1982 (U.K.)*, 1982, c. 11 [Tab D]

d. Therefore, the term "Provinces" in s. 121 of the 1867 Act does not include the Northwest Territories.

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11. The Respondents respectfully submit that the learned trial judge erred in arriving at the above conclusion.

12. First, when the relevant parts of s. 146 are read in their entirety, s. 146 does not support the interpretation given to it by the learned trial judge. The relevant provisions are as follows:

**146** It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, ... on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the Northwestern Territory, or either of them, into the Union, on such terms and conditions in each Case as are in the Addresses, *subject to the Provisions of this Act...*

20

(emphasis added)

The Respondents submit that inclusion of the phrase "subject to the Provisions of this Act" has the effect of incorporating the terms of the 1867 Act, including s. 121, into any Address respecting admission of Rupert's Land or the North-Western Territory into the Union.

*Constitution Act, 1867 (U.K.)*, 30 & 31 Vict., c. 3, s. 146 [Tab A]

30 13. Further support for the proposition that the 1867 Act applies to the Northwest Territories is found in s. 5 of the *Temporary Government of Rupert's Land Act, 1869*, which provided for government of Rupert's Land until the formal admission of those territories into the Union. Section 5 provides:

5. All the Laws in force in Rupert's Land and the North-Western Territory, at the time of their admission into the Union, shall so far as they are consistent with the

"Constitution Act, 1867," - with the terms and conditions of such admission approved of by the Queen under the 146th section thereof, - and with this Act, - remain in force until altered by the Parliament of Canada, or by the Lieutenant Governor under the authority of this Act.

It is clear from this provision that any terms or conditions of admission of a new territory were in addition to those approved by the Queen and, more importantly in the context of this case, in addition to the terms of the 1867 Act.

10                    *Temporary Government of Rupert's Land Act, 1869*, Statutes of Canada (looseleaf edition), Appendix II, No. 7, s. 5 [Tab C]

14.      Finally, it is not surprising that the 1867 Act speaks solely in terms of "Provinces", since the Union created by the 1867 Act was comprised solely of provinces.

*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, ss. 3-8 [Tab A]

15.      Similarly, ss. 38(1) and 42(1) of the *Constitution Act, 1982*, which were also relied upon by the learned trial judge would seem to exclude the Territories. However, this too is not  
20      surprising. As was acknowledged by the learned trial judge, the Northwest Territories, by virtue of s. 16 of the *Northwest Territories Act*, do not have independent legislative authority but rather have limited authority which they may exercise subject to any Act of Parliament. Therefore, the Territories would not be entitled to participate in an amendments to the Constitution.

*Constitution Act, 1982*, ss. 38(1), 42(1), being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [Tab D]

Reasons for Judgment of the Honourable Mr. Justice M. M. de Weerd, Case on Appeal, Vol. VI, p. 1347, line 12

30      16.      Therefore, the 1867 Act, including s. 121, applies to the Northwest Territories.

17.      In any event, the effect of the trial judge's conclusion would be that certain parts of Canada, whether one thinks in terms of citizens or provinces and territories, have lesser constitutional rights than others. This is repugnant to the fundamental nature of a democracy, in which all citizens are equal under the law. The Respondents submit that the better view is that

everyone in Canada, no matter where they live, are entitled to the equal protection of the Constitution of Canada.

18. Therefore, the Respondents respectfully submit that "Provinces" in s. 121 should be interpreted as referring to any kind of political unit which is a member of Confederation, including both provinces and territories.

19. The Respondents' argument as to whether the Regulatory Scheme violates s. 121 will be set out in their factum to be filed on March 6, 1998.

B. CHARTER PROTECTION OF ECONOMIC INTERESTS

20. The Respondents agree with the Commissions's submissions on this point, which are found at paragraphs 40 through 42 of the Commission's factum.

21. In addition, the Respondents submit that dismissing the right they seek to protect as purely economic in nature, and thereby unworthy of Charter protection, ignores the fact that pursuing the gaining of a livelihood is of fundamental importance to human dignity and self-fulfillment and is a basic individual and societal value in a free and democratic society.

22. The importance of the right to pursue a livelihood has been recognized by this Court in a number of cases. For example, in the pre-Charter case of *Winner v. S.M.T.*, a division of powers challenge to the validity of a New Brunswick law which had the effect of preventing an interprovincial bus line from carrying on its business inside the province, Rand J. had this to say:

The first and fundamental accomplishment of the [1867 Act] was the creation of a single political organization of subjects of His Majesty within the geographical area of the Dominion, the basic postulate of which was the institution of a Canadian citizenship. Citizenship is membership in a state; and in the citizen inheres those rights and duties, the correlatives of allegiance and protection, which are basis to that status.

What this implies is that a province cannot, by depriving a Canadian of the means of working, force him to leave it: it cannot divest him of his right or capacity to remain and to engage in work there: that capacity inhering as a constituent element of his citizenship status is beyond nullification by provincial action.

*Winner v. S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887 at 918-19

10 23. The judgment of Rand J. in the *Winner* case was cited with approval by La Forest J. in *Black v. Law Society of Alberta*. La Forest J. stated:

Inhering in citizenship is the right to reside wherever one wishes in the country and to pursue the gaining of a livelihood without regard to provincial boundaries.

This right is guaranteed by s. 6(2)(b) of the Charter and:

20 [l]ike other individual rights guaranteed by the *Charter*, it must be interpreted generously to achieve its purpose to secure to all Canadians and permanent residents the rights that flow from membership or permanent residency in a united country.

*Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591 at 612

24. The importance of work to the members of a free and democratic society was recognized in the context of freedom of association in *Re Public Service Employee Relations Act*. McIntyre J. stated:

The freedom to mingle, live **and work** with others gives meaning and value to the lives of individuals and makes organized society possible.

(emphasis added)

30 *Reference re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 at 393

25. Various provincial legislatures have also recognized work as a fundamental human value, as is evidenced by legislation protecting an individual's right to be free from discrimination and harassment in the workplace.

See, for example, *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980, c. H-11.7, ss. 7, 8; *Human Rights Code*, R.S.O. 1990, c. H.19, ss. 5, 6 [Tab F]

10 26. It is clear that Parliament was of the same view. Parliament not only guaranteed the right to pursue a livelihood in the province of one's choice, but also exempted this guarantee from the scope of the "notwithstanding" or "override" clause contained in s. 33 of the Charter.

*Canadian Charter of Rights and Freedoms*, s. 30, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [Tab E]

20 27. Thus, while pursuit of a livelihood must necessarily have an economic aspect, it is also a fundamental human value in a free and democratic society, and protection of an individual's right to gain a livelihood in the province of his or her choice or in association with others falls well within the scope of the rights and freedoms guaranteed by the Charter.

### C. FREEDOM OF ASSOCIATION

30 28. The Respondents agree with the Commission's comments with respect to the importance of freedom of association, their characterization of the right as purposive, and their assertion that this case involves association not activity, which are found at paragraphs 28 through 35 of the Commission's factum.

29. The Respondents do not agree that the constitutional validity of "CEMA's regulatory monopoly", to use the Commission's words, is at issue on the present appeal. Further, the Respondents do not agree that consideration of this point is necessary to, or even useful for, determination of this appeal.

30. The legal issue to be determined on the present appeal is the narrow one of whether the Respondents' exclusion from a particular regulatory scheme violates the rights guaranteed to them by the Charter. The Respondents do not complain about, in the words of the Commission, being compelled to associate with CEMA or being denied association with CEMA for the purpose of interprovincial marketing of eggs.

31. Thus, the existence of a "regulatory monopoly" with respect to interprovincial marketing of eggs is irrelevant to this appeal.

**RELIEF SOUGHT**

32. The relief sought by the Respondents, which is broader than the relief sought by the Commission, is set out in paragraph 141 of the Respondents' First Factum.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of February, 1998

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## TABLE OF AUTHORITIES

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