Court File No. 25926

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL
FOR THE PROVINCE OF QUEBEC)

B E T W E E N:

GAÉTAN DELISLE

Appellant

- and -

THE ATTORNEY GENERAL OF CANADA

Respondent

A062
I03

FACTUM OF THE INTERVENER ONTARIO TEACHERS' FEDERATION

SACK GOLDBLATT MITCHELL
20 Dundas Street West
Suite 1130, P.O. Box 180
Toronto, Ontario
M5G 2G8

HOWARD GOLDBLATT
VANESSA PAYNE

Tel: (416) 977-6070
Fax: (416) 591-7333

Solicitors for the Intervener
Ontario Teachers' Federation

BURKE-ROBERTSON
70 Gloucester Street
Ottawa, Ontario
K2P 0A2

ROBERT E. HOUSTON, Q.C.

Tel: (613) 236-9665
Fax: (613) 235-4430

Ottawa Agents for the Intervener
Ontario Teachers' Federation

Michel Larammour
The Registrar of the Supreme Court of Canada
The Supreme Court of Canada
The Supreme Court of Canada Building
Ottawa, Ontario
K1A 0J1

fax: (613) 996-9138

MR. JAMES R.K. DUGGAN
Avocats - Attorneys
1253 McGill College Avenue
Suite 365
Montreal, Quebec
H3B 2Y5

tel: (514) 871-2844
fax: (514) 866-1901
Solicitors for the Applicant

RAVEN, JEWITT & ALLEN
220 Laurier Avenue West
Suite 1600
Ottawa, Ontario
K1P 5Z9

James Grant Cameron
tel: (613) 567-2901
fax: (613) 567-2921
Ottawa Agents for the Applicant

COTÉ & OUELLET
Complexe Guy-Favreau
200 René-Lévesque Blvd. West
East Tower - 5th Floor
Montreal, Quebec
H2Z 1X4

Raymond Piché
tel: (514) 283-5553
fax: (514) 283-3856
Solicitors for the Respondent

GREY, CASGRAIN
3410, Peel Street
Suite 2102
Montreal, Quebec
H3A 1W8

Julius H. Grey
tel: (514) 288-6180
fax: (514) 288-8908
Solicitors for the Intervener,
Canadian Police Association

GOWLING, STRATHY & HENDERSON
160, Elgin Street
Suite 2600
Ottawa, Ontario
K1P 1C3

Henry S. Brown, Q.C.
tel: (613) 786-1030
fax: (613) 563-9869
Ottawa Agents for the Intervener,
Canadian Police Association

RAVEN, ALLEN, CAMERON & BALLANTYNE
1600 - 220 Laurier Avenue West
Ottawa, Ontario
K1P 5Z9

Andrew Raven/David Yazbeck
tel: (613) 567-2901
fax: (613) 567-2021
Solicitors for the Intervener,
Public Service Alliance of Canada

INDEX

Court File No. 25926

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL
FOR THE PROVINCE OF QUEBEC)

B E T W E E N:

GAÉTAN DELISLE

Appellant

- and -

THE ATTORNEY GENERAL OF CANADA

Respondent

FACTUM OF THE INTERVENER ONTARIO TEACHERS' FEDERATION

SACK GOLDBLATT MITCHELL
20 Dundas Street West
Suite 1130, P.O. Box 180
Toronto, Ontario
M5G 2G8

HOWARD GOLDBLATT
VANESSA PAYNE

Tel: (416) 977-6070
Fax: (416) 591-7333

Solicitors for the Intervener
Ontario Teachers' Federation

BURKE-ROBERTSON
70 Gloucester Street
Ottawa, Ontario
K2P 0A2

ROBERT E. HOUSTON, Q.C.

Tel: (613) 236-9665
Fax: (613) 235-4430

Ottawa Agents for the Intervener
Ontario Teachers' Federation

PART I - STATEMENT OF FACTS

1. The Ontario Teachers' Federation (the "OTF") accepts the facts set out in the Appellant's factum.

2. The OTF is a professional organization originally established in 1944, which represents all teachers employed in Ontario public and separate schools. As of December 31, 1997, the OTF, together with five provincial affiliates and their locals, represented over 126,000 teachers in the province of Ontario, including almost 9,000 principals and vice-principals.

Affidavit of Susan Langley, *OTF Intervention Motion Record*, p. 7, para. 3

3. Since the inception of collective bargaining for teachers, principals and vice-principals have bargained together with teachers and have been included in the same bargaining units as teachers. However, in the fall of 1997, the government of Ontario passed the *Education Quality Improvement Act, 1997* ("Bill 160"), which excluded principals and vice-principals from full membership in the OTF and its provincial affiliates, removed them from the existing teacher bargaining units, and prevented them from engaging in collective bargaining or receiving the protections available under Ontario labour relations legislation. The OTF and other applicants are challenging these provisions of Bill 160 in the courts.

Affidavit of Susan Langley, *OTF Intervention Motion Record*, pp 7-8, paras 9-10

Ontario Teachers Federation et al v. Ontario (Attorney General), [1998] O.J. No. 1104

4. This appeal raises constitutional issues of significant importance relating to the scope of the guarantees of rights and freedoms under sections 2(b), 2(d) and 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). Given the recent legislative exclusion of principals and vice-principals from access to collective bargaining in Ontario, the OTF has a significant interest in the issues raised by this appeal and, in particular, in this Court's determination of the scope of the guarantee of freedom of association where there has been a complete exclusion of specific categories of employees from access to collective bargaining, and with respect to the

application of other rights and freedoms guaranteed by the *Charter* in the labour relations context.

PART II - POINTS IN ISSUE

5. The OTF accepts the points in issue as set out in the Appellant's factum.

PART III - THE LAW

A. FREEDOM OF ASSOCIATION

(i) Relevant Principles of Interpretation

6. From the outset, this Court has consistently held that, in interpreting the scope and content of the rights and freedoms guaranteed contained in the *Charter*, a generous and liberal approach is to be adopted, having regard to the underlying purposes of the specific rights and freedoms in question and the interests which the right or freedom is designed to protect.

Hunter and Southam Inc., [1984] 2 S.C.R. 145

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

7. In determining whether legislative provisions breach the *Charter,* the Court will look both to the purpose and the effect of the provisions. A discriminatory purpose may be evident on the face of the legislation, based on its legislative history, or by its operative effect. Moreover, both the intended and actual effects of legislation are relevant to determining legislative purpose. Furthermore, in examining the effect of legislation, this Court has recognized that legislation which may not directly attack constitutionally protected activity may nonetheless have the effect of burdening or restricting the exercise of activity which is constitutionally protected, and has been willing to look to the practical effect of legislation on the exercise of constitutionally protected rights and freedoms in the actual context in which the legislation operates.

R. v. Big M Drug Mart Ltd., supra, per Dickson, C.J.C. at pp. 331-333

R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, per Dickson, C.J.C. at p. 752

R. v. Morgentaler, [1988] 1 S.C.R. 30, per Dickson C.J.C. at pp 57-63 and per Beetz, J. at pp 91-106

(ii) Interference in Joining and Participating in Trade Unions

8. This Court has recognized that, at a minimum, freedom of association includes the right to form and belong to an association, to maintain an association, and to participate in its lawful activities. Thus, legislation or governmental action which, in its ***purpose*** or ***effect***, interferes with or restricts the ability of individuals to choose to form, join and maintain membership in associations, and to fully participate in lawful associational activities (hereafter generally referred to as "joining" activity), constitutes an infringement of section 2(d) of the *Charter*.

Reference re Public Service Employee Relations Act (Alberta), [1987] 1 S.C.R. 313 (hereafter the "*Alberta Reference*"), per LeDain J. at pp 390-391

Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner), [1990] 2 S.C.R. 367 (hereafter the "*PIPSC* case"), per Sopinka J. at pp 401-402

9. It is submitted that both the purpose and effect of the complete exclusion of particular groups of employees, including RCMP members, from access to the protection and benefits of collective bargaining legislation which in general is comprehensively applied to other groups of employees, constrains the freedom of individuals to freely and independently decide whether or not to join a union for the purpose of representing their interests.

10. Whether or not there is an affirmative obligation on Government to enact protections in order to safeguard the fundamental guarantee of freedom of association, it is submitted that, where Government has established a comprehensive labour relations regime designed to safeguard the rights of employees to freely choose whether to join a trade union, and then determines to exclude particular classes of individuals from the benefits and protection of such legislation, the purpose and effect of such exclusion necessarily is to make it less likely that excluded individuals will

exercise the freedom to join a trade union. In this connection, the history of collective bargaining and unionization in Canada demonstrates that, without collective bargaining legislation, the right to decide freely whether or not to join a trade union is severely impeded. In this context, exclusion from the basic structure of collective bargaining which has been legislatively in place across Canada for over 50 years has the effect of interfering with protected associational activity. In this respect, it is submitted that legislatively excluding groups of employees from the regime which protects them against employer interference and reprisals in choosing whether to join an organization to protect their workplace interests interferes with, burdens and thereby makes it less likely that excluded employees will be able to freely exercise their right to join.

J. Gagnon and J. Webber, "Report on the Development of Canadian Collective Bargaining Law and Administration", *Appellant's Record*, Exhibit R-9, volume 3, pp 492-493

H. Arthurs et al., *Labour Law and Industrial Relations In Canada*, 4th ed. (Markham:Butterworths, 1993), at pp 196-199

11. In this respect, it is submitted that, where the state has enacted a comprehensive code to protect and facilitate the freedom of association of employees, the state cannot then impose obstacles to the exercise of such rights. Total exclusion from the protection of collective bargaining legislation constitutes encouragement by the state of actions by employers which inhibit or interfere with the right to join a trade union. In this connection, this Court has recognized that exclusion from the benefit and protection of social legislation sends a powerful message to society as a whole that the interests of the unprotected group are less deserving of concern and respect. Thus, in the case of collective bargaining legislation, the exclusion of groups of workers from such legislation sends the message that such workers are not worthy of the membership-related benefits and protection of the legislation, renders such groups more vulnerable as a result of exercising their freedom to join and participate in such organizations and discourages membership in trade unions.

Vriend v. Alberta, [1998] S.C.J. No. 29, per Cory J. at paras. 99 to 103

12. In prior cases where this Court has considered the interpretation and application

of section 2(d) of the *Charter* in the labour relations context, all of the affected employees were covered by a collective bargaining regime. The challenge in those cases was to a particular temporary alteration of the scheme (i.e. wage controls in *PSAC v. Canada* and back to work legislation in *RWDSU v. Saskatchewan*), or to a particular feature of the labour relations scheme (i.e. the mechanism for choice of bargaining agent in the *PIPSC* case and the method of resolving collective bargaining impasses in the *Alberta Reference*). In none of those cases was it alleged that either the purpose or effect of the legislative measure was to interfere with employee choice in deciding whether to join or participate in the activities of a trade union. On the other hand, the legislative and governmental action at issue in this case effectively excludes employees from the benefits and protections of the entire legislative scheme, and does so on a permanent basis, thereby impeding their ability to belong to, maintain and participate in associations of their own choosing.

PSAC v. Canada, [1987] 1 S.C.R. 424 (hereafter the "*PSAC* case")

RWDSU v. Saskatchewan, [1987] 1 S.C.R. 460 (hereafter the "*Saskatchewan Dairy Workers* case")

13. Thus, while Justice Sopinka stated in the *PIPSC* case that "restrictions on the *activity* of collective bargaining do not ***normally*** affect the ability of individuals to form or join unions" [bold added], in that case all employees were protected under collective bargaining legislation, which provided them with protection from unfair labour practices committed by employers and access to the general collective bargaining provisions of the legislation. Indeed, when Justice Sopinka stated in the *PIPSC* case that, based on the trilogy, "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 section 2(d)", he immediately and explicitly qualified his statement with the proviso that this is the case so long as "the restriction is not aimed at and does not affect the establishment or existence of the association" (p. 405). Thus, on the authority of *PIPSC*, where the aim or effect of the legislative measure impacts the joining or forming an association, section 2(d) will be infringed.

14. Moreover, while this Court has rejected the proposition that an associational activity should be constitutionally protected merely because it is essential to an association's purpose, the Court has not considered whether section 2(d) is breached where legislative measures which restrict access to collective bargaining rights generally afforded to others has the effect of restricting the constitutionally protected activity of joining, maintaining and participating in associations. Thus, for example, in the *Alberta Reference* case, it was not alleged that the legislative replacement of the right to strike with an interest arbitration scheme either in purpose or effect interfered with the formation of or membership in the Association. Nor was it alleged that the temporary restrictions on the right to strike in *PSAC* or the *Saskatchewan Dairy Workers* cases would have any effect on the decision by employees as to whether they should join a trade union. *In PIPSC* , there was no evidence that any employee's decision to join a union had been affected by the determination not to recognize the union in question; indeed, as Justice Sopinka pointed out at page 395, there was not even any evidence that the affected employees wished to belong to the applicant union. Furthermore, the legislation in question in *PIPSC* did not withhold protection against unfair labour practices or deny the employees concerned the benefits of the collective bargaining legislation afforded others.

15. It is submitted, however, that the effect of a blanket exclusion will affect both the willingness and ability of employees to form, join and participate in any trade union association.

16. In *PIPSC*, Justice Sopinka likened the state's decision to recognize a particular trade union to the granting of voluntary recognition, an alternative scheme for groups of employees to form, join and select associations to represent them for the purpose of bargaining with their employers. However, it is submitted that the complete exclusion of employees from collective bargaining legislation is precisely the type of restriction which this Court has suggested will implicate freedom of association concerns in the labour relations context, i.e. the ability of individuals to freely form or join trade unions.

PIPSC, supra, per Sopinka J., at p. 406

17. In *Dunmore v. Ontario (Attorney General)* (1997), 37 O.R. (3d) 287 (Ont. Gen. Div.), which the Respondent relies on in paragraph 68 of its factum, the court held that there was no breach of the right to join a trade union as a result of the repeal of the legislative provision giving agricultural workers access to collective bargaining legislation, on the basis that the applicants were seeking to apply the *Charter* to private action. In the view of the Court, there was no legal provision specifically prohibiting agricultural workers from forming or joining of unions, there was no state action. It is submitted, however, that in *Dunmore*, repeal of the inclusion of agricultural employees under collective bargaining legislation was itself state action , as is the exclusion of RCMP members from access to federal collective bargaining legislation. Once state action is present, as it clearly is in the case of deliberate legislative exclusion, the court must then consider whether the purpose or effect of the state action constitutes a breach of constitutionally protected rights and freedoms.

18. In this connection, it is submitted that the decision of this Court in *Vriend* makes it clear that the effect of a legislative exclusion from a comprehensive code constitutes governmental action to which the *Charter* applies. In this respect, it is submitted that, just as the exclusion from a comprehensive code safeguarding individuals against discrimination implicates equality rights, denial of access to a comprehensive code protecting associational rights in the labour relations context constitutes state action impacting upon and infringing associational rights.

Vriend v. Alberta, supra, per Cory J. at paras. 59-64

(iii) <u>Denial of the Right to Bargain in Association</u>

(a) Effect of Supreme Court of Canada Decisions

19. While this Court has held that section 2(d) of the *Charter* does not protect a right to strike or certain elements of a collective bargaining regime, the question of whether section 2(d) protects the basic right of individuals to engage in bargaining activity on a

collective basis where they are not prohibited from bargaining individually, and of whether the complete exclusion from collective bargaining legislation violates section 2(d) has neither been fully addressed in, nor has arisen in any case before this Court.

1) The 1987 Trilogy

20. In the trilogy of Supreme Court of Canada decisions on freedom of association, three of the six judges (Dickson, C.J.C., Wilson J., and McIntyre J.) held that elements of collective bargaining could be protected by section 2(d) of the *Charter*. Former Chief Justice Dickson and Justice Wilson held that both the right to strike and the right to bargain should be protected by section 2(d). For his part, Justice McIntyre, in *PSAC*, explicitly stated that his reasons did not "preclude the possibility that other aspects of collective bargaining [i.e. other than strike action] may receive Charter protection under the guarantee of freedom of association."

> *P.S.A.C. v. Canada, supra,* per Dickson C.J.C. (dissenting in part) at pp 437-438, per McIntyre, J. at p. 453, and per Wilson J. (dissenting) at p. 455
>
> *Alberta Reference, supra*, per Dickson, C.J.C. (dissenting) at pp 359-371
>
> *RWDSU v. Saskatchewan, supra*, per Dickson C.J.C. at p. 475 and Wilson J. (dissenting) at p. 485

21. Justice McIntyre adopted a view of freedom of association which would ensure that an individual is entitled to do in concert with others that which he or she may lawfully do alone. On this view, constitutional protection attaches to all group activities which can lawfully be performed by an individual, whether or not that individual has the constitutional right to perform those activities. As Justice McIntyre stated in the *Alberta Reference, supra,* at p. 408:

> "the Legislature...would be constitutionally bound to treat groups and individuals alike. A simple example illustrates this point: golf is a lawful but not constitutionally protected activity. Under the third approach, the Legislature could prohibit golf entirely. However, the Legislature could not constitutionally provide that golf could be played in pairs but in no greater number, for this would infringe the *Charter* guarantee of freedom of association."

22. Thus, assuming individuals are not prohibited from golfing, if the Legislature places restrictions on playing golf in concert (on Justice McIntyre's example, by preventing an individual from golfing with others, or by limiting the number of individuals with whom one can play golf), this would run afoul of freedom of association. As submitted below, this same approach, when applied to bargaining, would extend section 2(d) protection to collective bargaining where bargaining is not prohibited for the individual.

23. According to Justice McIntyre, interpreting freedom of association to protect the collective pursuit of activity which is lawful when pursued individually would achieve the underlying objective of section 2(d), namely, "guaranteeing the freedom of individuals to unite in organizations of their choice for the pursuit of objects of their choice..." While Chief Justice Dickson and Justice Wilson took a more expansive view of section 2(d), it is clear from their reasons that at least three of the six judges in the trilogy embraced the view that freedom of association protects the right of individuals to choose to do in association with others that which they are lawfully permitted to do as individuals.

Alberta Reference, supra, per McIntyre J. at p. 409

2) The 1991 *PIPSC* Decision

24. Four years after the trilogy, this Court issued its decision in *PIPSC,* which involved the issue of whether employees covered by a collective bargaining regime had the constitutional right to choose a particular bargaining agent. Four judges (Dickson C.J.C., L'Heureux-Dubé J., Sopinka J. and La Forest J.) held that the right to choose a particular bargaining agent for employees covered under a collective bargaining regime was not protected by section 2(d). The three dissenting members of the Court (in reasons written by Cory J., and concurred in by Wilson J. and Gonthier J.) held that certain elements of collective bargaining for employees included under such a regime, in particular the choice of bargaining agent, were constitutionally protected by section 2(d). However, as set out below, it is submitted that the reasons of the four

majority judges left open the question as to whether a blanket exclusion from collective bargaining may infringe the guarantee of freedom of association.

25. In this respect, Justice Sopinka, in his reasons, agreed with Justices McIntyre, Dickson and Wilson in the trilogy that section 2(d) of the *Charter* protects the exercise in association of the lawful rights of individuals. According to Justice Sopinka, this approach to freedom of association is intended to guard against, i.e provide protection from, "an attack...aimed against the 'collective or associational aspect' of the activity" (p. 403). Applying this test in the specific context of the *PIPSC* case, Justice Sopinka held that engaging in collective bargaining "is not an individual legal right ***in circumstances in which a collective bargaining regime has been implemented***" [emphasis added], since where individuals are governed by a collective bargaining regime, they do not have the right to bargain individually (p. 404). However, as submitted in paragraphs 30 to 37 below, the basis for Justice Sopinka's holding that there was no infringement in *PIPSC* does not apply in a situation where no collective bargaining regime has been implemented. Indeed, the logic and rationale of his approach would dictate that section 2(d) protects a right to bargain collectively where bargaining is not prohibited on an individual basis.[1]

26. In his reasons in *PIPSC*, Chief Justice Dickson, who as noted above had dissented in the 1987 trilogy, held, *inter alia*, that because the *PIPSC* case involved "an inter-union struggle for the status of exclusive bargaining agent", and because the right claimed was a group right adhering to the trade union (as opposed to an individual right to freedom of association), it followed that the right to choose a particular bargaining agent was not protected by section 2(d). Similarly, in her reasons, Justice L'Heureux-Dubé held that there was no infringement of section 2(d), on the basis of her view that the trilogy had decided that the entitlement of a particular association to become a

---

[1]The decision of the Ontario Court (General Division) in *Dunmore v. Ontario (Attorney General), supra*, did not directly consider whether collective bargaining activity could ever be protected by s 2(d). The applicants in that case conceded that the right to engage in collective bargaining could not be protected by section 2(d) of the *Charter*.

bargaining agent, and to retain that status, was not protected by section 2(d).

PIPSC, supra, per Dickson C.J.C. at pp 373-374, and per L'Heureux-Dubé J. at p. 392

27. It is submitted that neither the reasoning of Chief Justice Dickson nor that of Justice L'Heureux-Dubé in any way precludes a finding that the complete exclusion of a group of employees from the protection of labour relations legislation or access to collective bargaining rights infringes the guarantee of freedom of association. In this regard, the case at bar:

(a) does not involve "an inter-union struggle for the status of exclusive bargaining agent";

(b) is not a group right adhering to the trade union, but an individual right not to be excluded from any meaningful access to collective bargaining under legislative benefits and protections made available to most other employees; and

(c) the impugned provisions do not simply affect or determine how bargaining agents are chosen, but rather affect or determine the prior, fundamental associational interest in access to collective bargaining rights, representation and protection.

28. Thus, it is the position of the OTF that, contrary to the position advanced by the Respondent, this Court has not held that freedom of association can never protect the freedom to bargain collectively, or that collective bargaining is an activity and that activities can never be protected under section 2(d). Rather, it is submitted that this Court's jurisprudence supports the position that section 2(d) will protect group activities, at least to the extent that freedom of association protects the right to carry out in concert activity which is lawful if carried out individually.

29. Furthermore, this Court's decisions on freedom of association do not determine whether the complete denial to individuals of any access to collective bargaining rights constitutes an infringement of section 2(d), particularly where the impugned measures deny employees any meaningful access to collective bargaining rights and collective

agreement protections made available generally to workers throughout Canada (including, on the facts of this case, police officers in other jurisdictions). In this respect, as set out more fully below, it is submitted that the specific approaches to freedom of association set out in *PIPSC* and the trilogy support the view that the complete denial of access to collective bargaining rights (as opposed to certain aspects or elements of the statutory collective bargaining relationship applicable to employees covered by the legislation) can constitute an infringement of section 2(d).

(b) Denial of Right to Bargain in Concert With Other Employees

30. As this Court held in *PIPSC*, bargaining in concert for working conditions is not an individual legal right ***in circumstances in which a collective bargaining regime has been implemented,*** i.e. where individual bargaining by the employees has been prohibited. As a result, the freedom of association of employees in *PIPSC* in relation to collective bargaining was not infringed, since they were included in a legislative scheme which made individual bargaining unlawful.

31. However, where employees have been completely excluded from access to a legislative collective bargaining scheme, those employees have the common law legal right to bargain their working conditions. In the absence of the statutory restrictions on collective individual bargaining, which are an integral feature of collective bargaining legislation, there is no restriction on the legal right of such individuals to bargain their working conditions.

32. Generally speaking, the law approves of and protects bargains made by individuals. If individuals have the right to bargain individually with respect to the terms and conditions of contractual arrangements, then freedom of association extends constitutional protection to engaging in such activity collectively. The fact that modern collective bargaining legislation does not allow individual bargaining **once a collective bargaining regime has been established for individual employees** does not alter the fact that, in the absence of coverage under any such collective bargaining regime,

individual bargaining is permitted. Therefore, it is submitted that, absent a collective bargaining regime which prohibits individual bargaining, section 2(d) of the *Charter* extends constitutional protection to employees to undertake in association with others bargaining activity that they are legally permitted to pursue as individuals.

33. It is submitted that, by establishing a scheme for collective bargaining for most other employees, but then excluding certain groups of employees, legislative collective bargaining exclusions interfere with the ability of excluded employees to do collectively that which they can lawfully do alone. Legislative collective bargaining exclusions deny employees access to the statutory collective bargaining regime and structure, thereby precluding them from the chosen legislative scheme for engaging in collective bargaining. It is submitted that such legislative exclusions from collective bargaining have the effect of interfering with the ability of excluded employees to pursue in association that which they can do individually, i.e. bargain their working conditions and enter into binding agreements.

34. As a result, unlike the employees in *PIPSC*, who would not have been entitled to bargain individually, groups of employees who are excluded from access to collective bargaining legislation are restricted in their ability to do collectively with others that which is perfectly permissible on an individual basis: bargaining terms and conditions of employment.

35. Thus, by restricting the "collective exercise" by employees of "an activity legally permitted to individuals", the impugned restrictions on excluded employees acting in concert with each other or with other employees are aimed at "the collective or associational aspect of the activity". As such, the impugned provisions infringe section 2(d) of the *Charter*, since both their purpose and effect is to restrict the ability of such excluded employees to associate with other employees in collectively carrying out the bargaining activities they are lawfully entitled to pursue as individuals.

PIPSC, supra, per Sopinka J., at p. 403

36. In the *PIPSC* case, the affected employees' capacity to engage in collective bargaining was not similarly adversely affected, since they were not excluded from the legislative collective bargaining scheme. The freedom of association issue in that case was whether the employees had a right to select their own bargaining agent in their own separate bargaining unit. By contrast, RCMP members are completely excluded from any statutory scheme under which they can be collectively represented by a bargaining agent and engage in collective bargaining. It is submitted that the legislative exclusion of RCMP members has the effect of significantly diminishing the capacity of RCMP members to engage in such collective activity, activity which is lawful when carried out individually.

37. The Respondent submits that the Appellant is actually asserting a section 2(d) right to have a union certified under collective bargaining legislation, and a section 2(d) right that a certified union can insist that an employer bargain in good faith. According to the Respondent, since these specific elements of a collective bargaining system are not protected by section 2(d), exclusion from coverage under these provisions cannot constitute an infringement of section 2(d). However, it is the position of the OTF that while section 2(d) does not necessarily protect specific elements of the collective bargaining system, it does extend to the freedom to join and to collectively bargain, and that the exclusion from the comprehensive scheme the legislature itself has established for most other employees interferes with this protected associational activity.

38. Similarly, the Sunday closing legislation at issue in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 did not directly prohibit protected religious activity, but rather prohibited doing business on Sunday. The holding that s. 2(a) of the *Charter* was infringed by that legislation was based on the finding that the effect of the prohibition was to impose on Jewish retailers a financial deterrent from choosing to engage in constitutionally protected religious activity under the *Charter's* guarantee of freedom of religion. Applying the *Edwards Books* analysis here, it is submitted that, insofar as the

legislative exclusion significantly deters employees from engaging in collective bargaining, the effect of the legislative exclusion is to deter excluded individuals from making the associational choice that freedom of association guarantees them the right to make, i.e. choosing to form or join a trade union, and to engage in collective bargaining.

See Elliot, "Developments in Constitutional Law: The 1989-90 Term" in (1991) 2 *S.C.L.R.* (2d), at 115-117

(c) Denial of Associational Benefit Based on Group Membership

39. It is submitted that another component of the guarantee of freedom of association is that, where legislation confers a benefit on the basis of the exercise of associational rights (at a minimum, the joining together of individuals), the guarantee of freedom of association will be infringed if the legislation denies that same benefit to a particular grouping of individuals who choose to join together in the exercise their freedom of association.

Hills v. Canada, [1988] 1 S.C.R. 513, per L'Heureux-Dubé J. at pp 558-559

40. In this respect, employees included under collective bargaining legislation who choose to become members of trade unions are afforded various rights and benefits under that legislation, including protection from unfair labour practices, and access to various collective bargaining provisions. However, where employees excluded from the legislation participate in that same constitutionally protected joining activity, they are denied access to those protections and benefits despite the fact that they have exercised the same fundamental associational rights.

41. In *Canadian Egg Marketing Agency v. Richardson* (presently on appeal to this Court), the Northwest Territories Court of Appeal considered legislation prohibiting egg producers in the Northwest Territories from entering into the "essentially associational activity of selling eggs interprovincially". While the Court of Appeal ultimately rested its decision on a breach of mobility rights, it suggested that the impugned scheme was inconsistent with the guarantee of freedom of association, since it denied benefits on

the basis of the characteristics (in that case, geographic) of the individuals seeking to associate to carry out lawful activities.

Canadian Egg Marketing Agency v. Richardson (1996), 132 D.L.R. (4th) 274 (NWTCA), at pp. 289-297, leave to appeal to Supreme Court of Canada granted October 3, 1996

42. Similarly, it is submitted that provisions excluding employees from access to collective bargaining infringe freedom of association to the extent that they prohibit excluded employees, who join together, from obtaining access to the "essentially associational" benefits of statutory collective bargaining granted to most other employees who choose to associate together.

B. FREEDOM OF EXPRESSION

43. This Court has held that section 2(b) of the *Charter* is infringed where legislation or government action has as its ***purpose*** the restriction of protected expressive activity, or where the ***effect*** of the law is to restrict protected expressive activity in a manner which undermines the principles and values underlying freedom of expression, including the seeking and attaining of truth, the fostering and encouragement of participation in social and political decision-making, and the cultivation of diversity in forms of individual self-fulfillment and human flourishing.

Irwin Toy Ltd. v. Quebec (Attorney-General), [1989] 1S.C.R. 927, at pp 973-977

Ontario (Attorney General) v. Dieleman (1994), 20 O.R. (2d) 229 (Ont. Gen. Div.), at p. 288

44. This Court has also taken an expansive view of the protection provided by section 2(b), holding that any activity or communication intended to convey a meaning will be protected, provided that it is not violent in nature. Thus, protected activity has been held to include picketing, meetings and demonstrations. Furthermore, even activity or communication which is otherwise unlawful is still constitutionally protected under section 2(b) to the extent it is intended to convey meaning. The jurisprudence is best summarized by Professor Hogg, as follows:

> "Is there any activity that is *not* expression under the Court's definition? The answer is not much, because 'most human activity combines expressive and physical elements'; what is excluded is that which is 'purely physical and does not convey or attempt to convey meaning'." [emphasis in original]

P. Hogg, *Constitutional Law of Canada*, Loose-leaf edition (Scarborough: Carswell, 1997), p. 40-9

Ontario (Attorney General) v. Dieleman, supra, at pp. 289:

> "...the cases have given an expansive meaning to the term 'expression', including hate propaganda as in *R. v. Keegstra, supra*; commerical advertising as in *Rocket v. Royal College of Dental Surgeons, supra, Ford v. Quebec (Attorney General), supra*, and *Quebec (Attorney General) v. Irwin Toy Ltd.*, supra; picketing as in *R.W.D.S.U. v. Dolphin Delivery, supra*, and *B.C.G.E.U. v. British Columbia (Attorney General)*, supra; portable placards, advertising leaflets and magazines as in *Committee for the Commonwealth of Canada v. Canada, supra*; the selling and renting of 'hardcore' videotapes and magazines as well as sexual paraphernalia as in *R. v. Butler, supra*; solicitation by prostitutes as in *Reference re ss, 193 and 195.1(1)(c) of the Criminal Code, supra*; lies such as the assertion that the Holocaust is a myth as in *R. v. Zundel, supra*; and commercial posters placed in hydro poles as in *Ramsden v. Peterborough (City), supra*."

Irwin Toy Ltd. , supra, at p. 969

RWDSU, Local 580 v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, per McIntyre, J. at p. 588

Reference re ss. 193 and 195.1(1)(c) of Criminal Code (Man.), [1990] 1 S.C.R. 1123, per Lamer J. at pp 1180-1186

R v. Keegstra, [1990] 3 S.C.R. 697, per Dickson C.J.C., at pp 730-734 and per McLachlin, J. (dissenting), at pp 829-832

R. v. Zundel, [1992] 2 S.C.R. 731, per McLachlin, J., at pp 752-759

Libman v. Quebec (Attorney General), [1997] 3 S.C.R. 569, at p. 591-592:

> "The Court favours a very broad interpretation of freedom of expression in order to extend the guarantee under the Canadian *Charter* to as many expressive activities as possible. Unless the expression is communicated in a manner that excludes the protection, such as violence, the Court recognizes that any activity or communication that conveys or attempts to convey meaning is covered by the guarantee of s. 2(b) of the Canadian *Charter*..."

45. It is submitted that, where employees engage together in collective bargaining, an important element of the activity is articulating and conveying to the employer and, in many cases, to the broader community, the views and position of the employees with respect to their terms and conditions of employment. Indeed, to the extent that freedom of expression extends to advertising, hate propaganda and pornography, because of their expressive content, there can be no question that collective bargaining also contains expressive elements warranting section 2(b) protection. Indeed, this Court has recognized that picketing activity, one of the mechanisms through which employees collectively make their bargaining position known, also constitutes expressive activity.

See cases cited in paragraph 44 above

46. Moreover, it is submitted that, given that employees are permitted to individually express their views about workplace issues, restrictions on the ability of those same employees to express their views about workplace issues on a collective basis also constitute a breach of freedom of association, to the extent that freedom of association includes the exercise in concert of constitutionally protected activity.

47. It is submitted that the purpose of excluding groups of employees from access to collective bargaining legislation is to restrict and suppress their ability to express themselves in concert through the vehicle of collective bargaining. Given the historic role and importance of collective bargaining legislation in safeguarding and promoting the ability of employees to collectively express themselves in the workplace, it is submitted that the deliberate exclusion of certain occupational groups from this comprehensive legislative scheme signals an intentional desire to muzzle the ability of certain employees to engage in such expressive activity.

48. Further, it is submitted that the effect of the exclusion of particular groups of employees from collective bargaining legislation is to interfere with the ability of employees to collectively convey their position on workplace matters, thereby

restricting expressive activity. For example, employees are excluded from protection against unfair labour practices committed by employers, and from any access to the collective bargaining machinery made available to most other employees. This exclusion has a chilling effect on the capacity of excluded employees to collectively convey their position on and concerns about workplace-related issues. Moreover, this interference in collective employee expressive activity undermines the values of freedom of expression, including truth-seeking (by permitting employees to speak in a collective voice about their perspective on workplace issues); community participation (in this case the community of the workplace), and individual self-fulfillment.

10

49. The Respondent seeks to characterize the Appellant's section 2(b) claim as one which attempts to impose an obligation on government to provide a particular platform for expression. In paragraph 94 of its factum, the Respondent relies upon the decision of this Court in *Haig v. Canada* as authority for the broad proposition that government may, in all circumstances, deny some individuals access to an expressive vehicle where it has provided or facilitated access to others, without infringing the guarantee of freedom of expression. However, it is the position of the OTF that:

(a) the majority judgment in *Haig* simply establishes that government may choose the geographic area within which it seeks to consult its citizens
20 through a referendum and that the exclusion of citizens residing outside of that geographic area does not restrict their expressive activity, since the referendum was not intended to canvass their views;

(b) as the majority judgment in *Haig* emphasized, "while s. 2(b) does not include the right to any particular means of expression, where a government chooses to provide one, it must do so in a fashion that is consistent with the Constitution"

(c) *Haig* does not preclude a freedom of expression claim where the purpose
30 or effect of legislative exclusion from an expressive "platform" is to diminish or impede the ability of individuals to express themselves; and

(d) *Haig* was not concerned with circumstances where legislative restrictions

> were aimed at or tied to the type or form of speech (collective bargaining), the identity of the speaker (excluded categories of employees), or the affect which the speech might have on others. It is submitted that to deny access to expressive activity on these grounds when access is afforded to others does constitute an infringement of section 2(b).
> *Haig v. Canada*, [1993] 2 S.C.R. 995 at p. 1041

50. Finally, it is submitted that the issue as to whether a particular activity is protected by a specific *Charter* right or freedom, and whether legislation or governmental action interferes with that activity, is separate and distinct from whether another *Charter* right or freedom protects that activity and whether legislative action or governmental action infringes that other right or freedom. Thus, for example, whether or not this Court, in analyzing freedom of association, accepts the OTF's submission that collective bargaining is protected associational activity, the Court must independently determine whether collective bargaining is protected expressional activity under section 2(b) of the *Charter*. Each claim must be independently determined having regard to the underlying nature and purpose of the guarantee in question and whether the purpose or effect of the legislative or governmental action at issue restricts that right or freedom. The fact that a particular activity may or may not be protected by section 2(d)'s guarantee of freedom of association or by section 2(a)'s guarantee of freedom of religion is neither determinative of nor even relevant in determining whether there has been an infringement of section 2(b)'s guarantee of freedom of expression.[2]

C. SECTION ONE OF THE *CHARTER*

(i) General Principles

51. In assessing the constitutionality of an impugned legislative provision under

---

[2] For an alternative approach, see *Ontario Teachers' Federation et al v. Ontario (Attorney General)*, [1998] O.J. No 1104 at paragraph 38, where Justice Southey held, *inter alia*, that a withdrawal of services as part of a political protest could not be protected under section 2(b) of the Charter simply because a right to strike had not been protected under other provisions of the Charter.

section 1 of the *Charter*, "[t]he court must be guided by the values and principles essential to a free and democratic society...", which include respect for the inherent dignity of every individual, commitment to social justice and equality, and accommodation of diversity in society.

R. v. Oakes, [1986] 1 S.C.R. 103, per Dickson, C.J. C. at p. 136

52. In order to satisfy its onus under section 1 of the *Charter*, the Respondent:

> "must show that the violative law is 'demonstrably justified'. The choice of the word 'demonstrably' is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of ***demonstration***."[emphasis in original]

RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 per McLachlin, J. at pp 328-329

53. This Court has emphasized that any analysis under section 1must pay close attention to context. It is submitted that, given that the decision to exclude workers from protection under labour relations legislation affects interest of critical importance to participation in decision-making, democratic values and international law obligation and norms, there is a particularly heavy onus on the Respondent to justify the infringement.

Thomson Newspapers Co. (c.o.b. Globe and Mail) v. Canada (Attorney General), [1998] S.C.J. No. 44, per Bastarache, J. at paras. 87-95

54. The Respondent takes the position that this is a case in which it is appropriate to defer to the Legislature on the basis that the legislation in question involves a balancing of competing interests. In addition to the submissions contained in paragraphs 33-37 of PSAC's factum, it is the submission of the OTF that :

(a) Whatever deference is appropriate in applying section 1 in the labour relations context where the legislation involves a balancing of the interests of organized labour with the interests of employers, any such deference is entirely inappropriate where the labour relations scheme entirely excludes employees from that balance, where the effect of the exclusion is to disadvantage rather then to protect the interests of vulnerable groups, and where there is no issue of allocating scarce government resources among competing social groups or interests;

(b) This Court has increasingly recognized that deferring to legislative choices conflicts with its constitutional role requiring it to ensure compliance with constitutional guarantees. As a result, even in those cases where a measure of deference has been accorded to the legislature in a particular context, the Court has made it plain that this does not eliminate the need to demonstrate that the requirements of section 1 have been met, through cogent and concrete evidence, and not simply by an assertion of pressing and substantial concerns or of proportionality between means and objectives. This is particularly the case in considering whether legislative exclusions from collective bargaining can be justified, since the evidence establishes that other jurisdictions have included the same class of employees which are excluded under the impugned provisions;

RJR-Macdonald, supra, para 136

Vriend v. Alberta, supra, per Cory, J. at paras 56-57 and per Iacobucci, J. at paras. 130-142

Thomson Newspapers Ltd. (c.o.b. Globe and Mail), supra, at paras 87-95

Eldridge v. British Columbia (Attorney General), [1987] 3 S.C.R. 624, per La Forest at paras 84-86

(ii) <u>No Legitimate or "Pressing and Substantial" Legislative Objective</u>

55. The first step in any section 1 analysis involves an assessment of the legislative objective of the impugned provision. The Respondent must lead evidence that the concerns underlying the legislative objective are sufficiently pressing and substantial so as to warrant overriding a constitutionally guaranteed right.

R v. Oakes, supra, per Dickson, C.J.C. at p. 138

R v. Ladoucer, [1990] 1 S.C.R. 1257, at pp 1278 to 1282

56. To the extent that this Court finds that the purpose of the exclusion is to prevent RCMP members from joining together collectively to bargain with their employer, it is submitted that, as this objective is not constitutionally permissible, it cannot be considered to be pressing and substantial, or even legitimate, under section 1. In the result, the impugned amendments cannot survive even the first branch of the section 1

test.

R v. Big M Drug Mart, supra, per Dickson J., at pp 352-353 and per Wilson J. at pp 361-362

McKinney v. University of Guelph, [1990] 3 S.C.R. 229, per La Forest, J. at pp 302-303

57. Furthermore, it is submitted that the concerns underlying any legitimate governmental objective in excluding RCMP members from access to collective bargaining legislation can hardly be accepted as pressing and substantial, given that in all other Canadian jurisdictions the rights of police to engage in collective bargaining have been respected by including police under a collective bargaining regime.

(iii) The Proportionality Requirement

58. The OTF submits that, even if the objective of the impugned provisions relates to concerns which have been demonstrated to be pressing and substantial, total exclusion from access to collective bargaining protections and benefits fails to meet the proportionality test under section 1 of the *Charter*.

(a) Rational Connection

59. The OTF adopts the submissions of the Appellant and the Interveners with respect to the absence of a rational connection between the legislative objectives and the complete exclusion of employees from access to collective bargaining. The professed objectives of neutrality and preventing unlawful strikes have no relationship whatsoever to the exclusion of one group of employees from all of the rights and protections contained in labour relations legislation, such as the protection against unfair labour practices for employees who seek to join a union or participate in its lawful activities, the right to democratically select a bargaining agent, and the duty imposed upon parties to bargain in good faith.

Public Service Staff Relations Act, R.S.C. 1985, c. P-35, as amended, sections 8(2), 35, 36 and 51

(b) Minimal Impairment/Reasonable Alternatives

60. In addition to the submissions of the Appellant and Interveners, it is submitted

that, in order to demonstrate that the complete exclusion from any access to collective bargaining legislation meets the minimal impairment requirement, the Respondent faces a particularly heavy onus, especially since collective bargaining rights are enjoyed by most other employees in the federal jurisdiction and by the same class of employee in other Canadian jurisdictions. Further, it is submitted that there is insufficient evidence as to whether reasonable alternatives were considered and why such alternatives, if considered, were rejected. For example, to the extent that the Respondent's concerns center around the possible interruption of services as a result of a strike, legislative examples of labour relations schemes which curtail or prohibit the right to strike, and which substitute other dispute resolution mechanisms, have been developed for occupational groups as varied as firefighters, hospital workers, and civil servants with little or no evidence that such schemes have any of the deleterious effects claimed by the Respondent.

RJR Macdonald, supra, per McLachlin J., at pp 167-168

Vriend v. Alberta, supra, per Iacobucci, J. at pp 126-127

A.W.R. Carrothers et al., *Collective Bargaining Law in Canada*, 2nd edition (Toronto: Butterworths, 1986), pp. 173-182

61. Indeed, labour relations boards throughout North America have been established as expert bodies to determine whether particular classes of employees should be denied collective bargaining rights as a result of a conflict of interest (eg. the exercise of managerial authority or other factors). It is submitted that the Respondent could have achieved its professed objective by allowing an expert tribunal to determine, on the basis of concrete evidence adduced before it, whether, as a result of their functions, it is necessary to completely deny RCMP members access to collective bargaining protections and benefits.

G. Adams, *Canada Labour Law*, second edition (Aurora: Canada Law Book, 1997), at pp. 612-619

A.W.R. Carrothers et al., *supra*, at pp. 162-163

(iv) Deleterious Effects

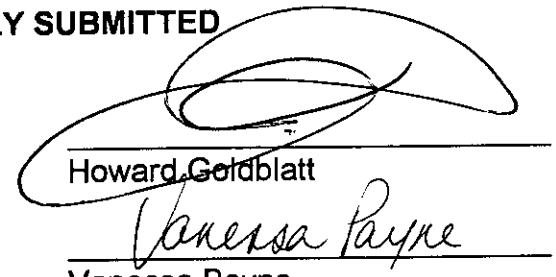
62. Finally, it is submitted that the deleterious effects of the impugned legislation, which constitute a complete denial of fundamental rights and benefits, far outweigh any salutary effects advanced by the limiting measures. In this regard, the exclusion from the protection and benefits of collective bargaining legislation, rights which have been repeatedly recognized as being of fundamental importance in a free and democratic society in redressing the balance between the power of employers and more vulnerable workers, including the denial of protection against employer action and interference in the forming and joining of a trade union, outweigh any interests advanced by such an outright exclusion, which in any event could be sufficiently accommodated through other measures.

PART IV - REMEDY REQUESTED

63. The Intervener OTF requests that the Appeal be allowed on the terms requested by the Appellant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

July 7, 1998



Howard Goldblatt

Vanessa Payne

SACK GOLDBLATT MITCHELL
Barristers and Solicitors
20 Dundas Street West
Suite 1130
Toronto, Ontario
M5G 2G8

Tel: (416) 979-6400
Fax: (416) 591-7333

Counsel for the Intervener
Ontario Teachers' Federation

PART V - AUTHORITIES

Books/Articles

Court File No. 25926

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF QUEBEC)

B E T W E E N:

GAÉTAN DELISLE

Appellant

- and -

THE ATTORNEY GENERAL OF CANADA

Respondent

FACTUM OF THE INTERVENER ONTARIO TEACHERS' FEDERATION

SERVICE ADMITTED
THIS 8 DAY OF
July 1998
Hawkins, Strathy & Henderson
AGENT FOR Ont. Can. Police Assoc.

SERVICE ADMITTED
THIS 8th DAY OF
July 1998
Raven, Allen, Cameron & Ballantyne
AGENT FOR Appellant + counsel for Inter. PSAC.

SERVICE OF A TRUE COPY HEREOF
SIGNIFICATION DE COPIE CONFORME

Admitted the 8th day
Acceptée le jour
of July 19 98
de
Linda Gauthier
for
pour **Morris Rosenberg**
Deputy Attorney General of Canada
Sous-procureur général du Canada

2:45 p.m.

SACK GOLDBLATT MITCHELL
20 Dundas Street West
Suite 1130, P.O. Box 180
Toronto, Ontario
M5G 2G8

HOWARD GOLDBLATT
VANESSA PAYNE

Tel: (416) 977-6070
Fax: (416) 591-7333
Solicitors for the Intervener
Ontario Teachers' Federation