No. 21230

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

B E T W E E N:

PROFESSIONAL INSTITUTE OF THE PUBLIC
SERVICE OF CANADA

Appellant

- and -

THE COMMISSIONER OF THE NORTHWEST TERRITORIES

Respondent

- and -

THE NORTHWEST TERRITORIES PUBLIC SERVICE ASSOCIATION

Respondent

- and -

THE ATTORNEY GENERAL OF CANADA
THE ATTORNEY GENERAL OF ONTARIO

Interveners

FACTUM OF THE INTERVENER THE ATTORNEY GENERAL OF CANADA

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PART I

STATEMENT OF FACTS

1. The facts for the purposes of this appeal are stated in the factums of the parties.

PART II

POINTS IN ISSUE

2. By Order of the Chief Justice of Canada dated August 3, 1989, the following constitutional questions were stated:

> "1. Does Section 42(1) of the **Public Service Act** R.S.N.W.T. 1974 c. P-13 as amended, infringe the freedom of association guaranteed by paragraph 2d) of the **Canadian Charter of Rights and Freedoms**?
>
> 2. If the answer to question 1 is in the affirmative, can s. 42(1) of the **Public Service Act** R.S.N.W.T. 1974 c. P-13 as amended be justified under s. 1 of the **Canadian Charter of Rights and Freedoms**?"

It is the position of the Attorney General of Canada that Question 1 should be answered in the negative.

PART III

ARGUMENT

3. Section 42(1) of the *Public Service Act*, R.S.N.W.T. 1974 c. P-13, as amended, provides as follows:

> "42.(1) In sections 42 to 46
>
> (a) 'collective agreement' means an agreement in writing entered into pursuant to this section between the Minister and an employees' association respecting terms and conditions of employment and related matters and shall be deemed to include any award made by an arbitrator;
>
> (b) 'employees' association' means an association of public service employees incorporated by an Act empowering it to bargain collectively."

4. The Appellant does not contend that the purpose of the challenged law is unconstitutional. Indeed, it appears that the only purpose of the law is to extend collective bargaining rights. Instead, the Appellant's complaints are concerned with the effects which it says are produced by s. 42(1)(b).

5. The Appellant initially complains that s. 42(1)(b) requires that an association be incorporated by Act of the Legislative Assembly before it may seek the right to represent employees. This submission caused both of the courts below to struggle with the meaning of the word "incorporated". Neither court seemed to be aware of the principle of statutory interpretation approved by this Court:

> "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[1]

1. *Action Travail des Femmes v. Canadian National Railway Company*, [1987] 1 S.C.R. 1114, per Dickson, C.J.C. at p. 1134, quoting Elmer A. Driedger, "Construction of Statutes" (2d ed.).

6. Read in context, it seems clear enough that the word "incorporated" only contemplates incorporation for the specific purposes of ss. 42 to 46 of the *Public Service Act*, that is, for the purpose of acquiring the statutory rights and obligations related to collective bargaining. Nothing in the statute prevents any association from seeking to acquire the rights and obligations. Indeed, the Appellant has been actively seeking them, without apparent hindrance, since 1982.

7. As the Court of Appeal found, the evidence provides some support for the view that the statute creates a "rough-and-ready version of a certification process".[1] The only evidence put forward by the Appellant in support of its allegations is the fact that a request by it to be empowered to represent certain professional employees was refused. But at no time has the Appellant offered any proof of the degree of support which it enjoys among the employees it claims to represent. In view of that omission, the refusal of "certification" is hardly surprising. There is thus no evidence, let alone "cogent evidence",[2] on which to base the assertion that the statute produces the unconstitutional effects alleged.

1. Reasons for judgment of Kerans, J.A. **Appeal Case**, pp. 138-139.

2. *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, per Cory J. at p. 362 (quoting Dickson C.J.C. in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713).

8. The Appellant further complains that the legislation creates a "statutory monopoly", in that the Legislative Assembly has reserved to itself the authority to grant "certification". Here again, the alleged effects on associational freedom do not

rest upon evidence but rather upon conjecture. The Appellant assumes that the Legislative Assembly will not act fairly in deciding whether or not to empower a particular association to act as the bargaining agent of employees for the purposes of the *Public Service Act*. In particular, since the statute is silent with respect to the circumstances in which employees might change their representative for collective bargaining purposes, the Appellant assumes that the Legislative Assembly would not permit a change to be made.

9. On a plain reading of the statute, however, it seems clear that the Legislative Assembly has reserved to itself an unfettered discretion in respect of all matters pertaining to "certification". Whether, and in what circumstances, an association of employees will be recognized via incorporation for the specific purposes of the Act, either initially or by way of substitution for an existing bargaining agent, is up to the Legislative Assembly. It is not directed by the statute, either expressly or impliedly, to do anything in particular.

10. A statutory discretion is not automatically suspect on constitutional grounds. It is only where the language of a provision, either expressly or by necessary implication, confers a power to infringe the *Charter* that the legislation becomes susceptible to a declaration of invalidity pursuant to s. 52(1) of the *Constitution Act, 1982*. Thus, "Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed".[1]

1. *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, per Lamer J. at p. 1078 (with whom the majority agreed on this point: per Dickson C.J.C. at p. 1048).

11. The silence of the statute here with respect to the matters which concern the Appellant means only that it is

"impossible to interpret [the] legislation conferring [the] discretion as conferring a power to infringe the *Charter*".[1] Accordingly, there is no basis in s. 52(1) of the *Constitution Act, 1982* for a declaration of invalidity. If, of course, it had been established by evidence that the discretion had been exercised in such a way as to impair the associational freedom of individuals, then a remedy under s. 24(1) of the *Charter* would be available to the affected individuals.[2] But that is not the case.

1. *Slaight Communications Inc. v. Davidson*, *supra*.

2. *R. v. Beare*, [1988] 2 S.C.R. 387, per La Forest J. at p. 411; *U.S.A. v. Cotroni*, [1989] 1 S.C.R. 1469, per La Forest J. at pp. 1497-1498; *Crothers v. Simpson Sears Ltd.* (1988), 51 D.L.R. (4th) 529 (Alta. C.A.), per Côté J.A. at p. 543.

12. In the final analysis, the requirement that an employees' association be "incorporated" for the specific purposes of the *Public Service Act* in no way impairs the freedom of individuals "to join with others in lawful, common pursuits and to establish and maintain organizations and associations."[1] The Appellant is entirely free to solicit prospective members and to lobby for the enactment of legislation establishing it as the bargaining agent for a particular bargaining unit. Its claims here seek, in effect, to constitutionalize collective bargaining rights, but as a majority of this Court has recently recognized, such rights are not "fundamental" but are rather the product of modern legislative policy choices which seek to reconcile competing political, social and economic interests.[2]

1. *Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, per McIntyre J. at p. 407.

2. *Ibid.*, per Le Dain J. at p. 391; per McIntyre J. at pp. 417-420.

PART IV

ORDER SOUGHT

13. The Attorney General of Canada submits that Question 1 should be answered in the negative, and that the appeal should be dismissed.

ALL OF WHICH is respectfully submitted.

Graham R. Garton
Of counsel for the Attorney
General of Canada

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PART V

LIST OF AUTHORITIES