

Court No. 21230

**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**

**INTERVENORS**

---

**FACTUM OF THE INTERVENANT  
THE ATTORNEY GENERAL OF ONTARIO**

---

Ministry of the Attorney General  
Constitutional Law and Policy  
7th Floor, 720 Bay Street  
Toronto, Ontario  
M5G 2K1

Tel: (416) 326-4452  
Robert E. Charney  
Counsel for the Intervenant  
The Attorney General of Ontario

TO: Solicitors for the Appellant  
The Professional Institute of  
The Public Service of Canada:  
Ms. Catherine H. MacLean  
c/o Messrs. Nelligan/Power  
Barristers and Solicitors  
66 Slater Street, 19th Floor  
Ottawa, Ontario  
K1P 5H1

Solicitors for the Respondent  
The Commissioner of the  
Northwest Territories:  
Robert A. Kasting, Esq.  
Bernard W. Funston, Esq.  
Department of Justice  
Government of the  
Northwest Territories  
Court House  
Yellowknife, N.W.T.  
X1A 2L9

Ottawa Agent:  
Mr. Michael A. Chambers  
c/o McMaster, Meighen  
Barristers and Solicitors  
300 - 30 Metcalfe Street  
Ottawa, Ontario  
K1P 5L4

Solicitors for the Respondent  
The N.W.T. Public Service Association:  
Mr. Andrew Raven  
c/o Messrs. Soloway, Wright  
Barristers and Solicitors  
99 Metcalfe Street  
Ottawa, Ontario  
K1P 6L7

Intervenors:

John C. Tait, Q.C.  
Deputy Attorney General of Canada  
Per: Ian Donohue, Counsel  
Department of Justice  
Justice Building  
Kent & Wellington Streets  
Ottawa, Ontario  
K1A 0H8

Court No. 21230

**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**

**INTERVENORS**

---

**FACTUM OF THE INTERVENANT  
THE ATTORNEY GENERAL OF ONTARIO**

---

**PART I**

**STATEMENT OF FACTS**

1. The Attorney General of Ontario accepts as correct the facts as set out in the Factum of the Respondent, The Commissioner of the Northwest Territories.

PART II

2. The Constitutional Questions in this appeal are as follows:

- 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 2(d) 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?

3. The Attorney General of Ontario submits that the Questions should be answered as follows:

- 1) No
- 2) Yes

PART IIIARGUMENT

A. General Analysis: The Industrial Relations Context

4. In order to appreciate the nature of the issues raised in this appeal it is important to recognize that the Appellant, the Professional Institute of the Public Service Canada, is seeking to displace the Respondent Northwest Territories Public Service

Association (the 'NWTPSA') as the exclusive bargaining agent for a group of public employees within a bargaining unit. The Appellant challenges not only the right of the NWTPSA to act as the exclusive bargaining agent for all employees in the bargaining unit, but also the appropriateness of the bargaining unit itself. It is apparent from the Appellant's supporting affidavits that the Appellant does not wish to represent all members of the bargaining unit (i.e. all territorial public service employees), but wants to carve out and represent a separate bargaining unit comprised only of nurses.

Case on Appeal, pp. 27-30, Affidavit of Linda J. Sperling

Case on Appeal, pp. 111-114, Affidavit of Iris Craig

Miller v. Commissioner of Northwest Territories [1988]  
4 W.W.R. 456, at p. 461 (N.W.T.S.C.)

5. The concepts of "exclusive bargaining agent" and "bargaining unit" are central features in North American labour law. They are not, however, inevitable features of any industrial relations system, and are not, for example, found in the labour legislation of most European countries.

Paul Weiler, Reconcilable Differences (1980), pp. 124-5

David Beattie, Putting the Charter to Work, (1987), pp. 144-155

6. The power to act as an exclusive bargaining agent grants the union the legally exclusive authority to represent all

employees in an appropriate bargaining unit. That authority gives the union the right to represent and bind all employees in the bargaining unit; not just its own members, but also those employees who belong to other unions or who refuse to belong to any union. The exclusive bargaining agent has the right to negotiate terms and conditions of employment, and neither the employer nor any one employee can deal on an individual basis on these matters. The employer is under a legal obligation to bargain in good faith with the exclusive bargaining agent.

Weiler, Reconcilable Differences, supra

7. The determination of the "appropriate bargaining unit" is necessary to the functioning of an industrial relations system with exclusive bargaining agents. The size of the bargaining unit is often a contentious issue, and a rival union may seek to carve out a special group of employees in a bargaining unit of its own in order to achieve the status of exclusive bargaining agent. Although a smaller bargaining unit may be in the self-interest of highly skilled employees, it is not necessarily in the best interest of all of the workers. As Professor Weiler explains:

There are small, highly-skilled groups who are indispensable to the employer's undertaking... If they have a tradition of hanging together against their employer, they can credibly threaten strike action whose potential damage may make it much cheaper for the employer to pay their demands. But added compensation for that group will not necessarily be paid by the customers or the shareholders. It may well come out of the wage package destined for the larger, but less skilled and less essential, segments of the work force. One vital reason for designating a single union to act as the exclusive bargaining agent for the entire unit of

employees is that it requires all of the workers in the unit, including those workers with special leverage, to pool their total resources so that the bargaining agent can extract the best package possible for distribution across the entire unit, according to priorities largely worked out by the employees themselves.

Weiler, Reconcilable Differences, at p. 126

8. Although certification by a statutory body is the most common way to grant a union the authority of an exclusive bargaining agent, it is not the only means. A second means is to "designate" the union as the exclusive bargaining agent in a regulation. For example, in the Ontario construction industry "employee bargaining agencies" are designated by the Minister of Labour pursuant to s. 139(1)(a) of the Labour Relations Act. The designation of bargaining agents also occurs in the public sector, where the exclusive bargaining agents for many units of Crown employees are designated by regulation.

Re Arlington Crane Service Ltd. v. Minister of Labour  
(1988), 67 O.R. (2d) 225 (H.C. of J.)

Labour Relations Act, R.S.O. 1980, c. 228, s. 139

Crown Employees Collective Bargaining Act, R.S.O. 1980,  
c. 108, s. 2(5) and Reg. 232 R.R.O. 1980, as amended by  
O. Reg. 252/85

Colleges Act, R.S.A. 1980, Chap. C-18, s. 21.2(3)

The Constabulary Act, R.S.Nfld. 1970, c. 58, ss.  
2(a)(ii), 20(3)

9. A third means by which a union can be granted the authority of an exclusive bargaining agent is by statute. The

appointment of "statutory bargaining agents" is common in the public sector. For example, s. 27(3) of the Ontario Public Service Act R.S.O. 1980, c. 418, appoints the Ontario Provincial Police Association as the exclusive bargaining agent to represent members of the Ontario Provincial Police Force in bargaining with the employer. Similarly, the School Board and Teachers Collective Negotiations Act, R.S.O. 1980, c. 464, appoints statutory bargaining agents to represent public school teachers in collective bargaining with school boards. Similar provisions exist in other provinces.

ONTARIO:

Public Service Act, R.S.O. 1980, c. 418, s. 27(3)  
School Board and Teachers Collective Negotiations Act,  
 R.S.O. 1980, c. 464

OTHER PROVINCES:

Colleges Act, R.S.A. 1980, chap. C-18, ss. 21.1, 21.2  
Corrections Act, S.N.S. 1986, chap. 6, s. 7(5)  
Teachers Collective Bargaining Act, S.N.S. 1974, chap. 32, ss. 2(a) and (u), 11, 12  
Civil Service Collective Bargaining Act, S.N.S. 1978, chap. 3, ss. 2(c), 13, 14  
Civil Service Act, R.S.P.E.I. 1974, ss. 2(b), 66  
Civil Service Act, R.S.Q. 1977, chap. F-3, s. 73  
The Education Act, R.S.S. 1978, Cahp. E-0.1, ss 2(p), 230

10. These options are also available with respect to the establishment of the appropriate bargaining unit. Although the



appropriateness of bargaining units in the private sector is generally determined by a statutory body, public sector bargaining units are commonly designated by regulation or determined by statute.

DESIGNATED BARGAINING UNITS:

Crown Employees Collective Bargaining Act, R.S.O. 1980, c. 108, s. 3(2) and Reg. 232 R.R.O. 1980, as amend, O.Reg. 252/85

STATUTORY BARGAINING UNITS:

Colleges Collective Bargaining Act, R.S.O. 1980, c. 74, s. 1(b) and Schedules 1 and 2

Colleges Act, R.S.A. 1980, Chap. C-18, s. 21.1

Public Service Employee Relations Act, R.S.A. 1980, Chap. P-33, s. 18

Civil Service Collective Bargaining Act, S.N.S. 1978, Chap. 3, ss. 2(d), Schedule "A"

The Newfoundland Teacher (Collective Bargaining) Act, S. Nfld. 1973, s. 5(2)

B. Requirement That An Employees' Association Be Incorporated

11. The Appellant argues (at paras. 32-41 of Appellant's Factum) that s. 42(1) of the Public Service Act infringes freedom of association because it requires that an employee association be "incorporated" by an Ordinance empowering it to bargain collectively. This requirement is alleged to interfere with "establishment" of an association. The Attorney General of Ontario rejects this position and submits that the requirement of

"incorporation" does not interfere with the establishment of the association.

12. At common law a trade union was an unincorporated association and, therefore, not a legal entity. As an unincorporated association with no legal status separate from its members, it would not have the capacity to act as an exclusive bargaining agent and sign collective agreements binding on both members and non-members. Accordingly, the common law position of unions has been changed, and unions have acquired juridical status as a result of the provisions of the various labour relations acts throughout Canada.

George W. Adams, Canadian Labour Law (1985), pp. 817-825

The Taff Vale Railway Co. v. The Amalgamated Society of Railway Servants, [1901] A.C. 426(H.L.)

International Brotherhood of Teamsters v. Therien (1960), 22 D.L.R. (2d) 1, [1960] S.C.R. 265, at p. 277

Nipissing Hotel Ltd. v. Hotel & Restaurant Employees Union, [1963] 2 O.R. 169 (H.C. of J.)

International Longshoremen's Association v. Maritime Employers' Association (1978), 89 D.L.R. (3d) 289, at p. 301 (S.C.C.)

13. The requirement in the Public Service Act that an employees association be "incorporated" in order to bargain collectively is no more than a requirement that the association be given the status of a legal entity. In this regard, Northwest Territories public service unions are in no different position than

unions throughout Canada. Whether the union is "incorporated" or "certified", the union is transformed into a legal entity so that it can exercise the rights and perform the obligations of an exclusive bargaining agent under the statute. This legal status does not interfere with the "establishment" of the association, or violate Charter s. 2(d).

14. Since the collective agreement signed by the bargaining agent is binding on all employees in the bargaining unit whether or not they are members of the bargaining agent union, every labour statute in North America imposes conditions on unions which seek to act as exclusive bargaining agents. For example, the Ontario Labour Relations Act requires that union bargaining agents have non-discriminatory membership policies, and fairly represent all of the employees in the bargaining unit whether or not they are members of the union. Although these requirements relate to the membership and policies of the union, they cannot be said to infringe the union's "freedom of association" because they are obligations which the union voluntarily assumes when it seeks the status and rights of an exclusive bargaining agent. The status of "exclusive bargaining agent" presupposes both statutory rights and obligations, and a union has no constitutional right to demand the former without accepting the latter.

Labour Relations Act, ss. 13, 18

C. The Creation Of A Statutory Monopoly in Collective Bargaining

15. The Appellant argues (at paras. 42-59 of Appellant's Factum) that s. 42(1) of the Public Service Act infringes freedom of association because the statutory bargaining agent is the exclusive bargaining agent for employees in the bargaining unit. The Attorney General of Ontario rejects this position and submits that the collective bargaining structure established by the Public Service Act does not infringe the guarantee of freedom of association.

16. In Re Public Service Employee Relations Act, [1987] 1 S.C.R. 313, this Honourable Court held that "the constitutional guarantee of freedom of association in s. 2(d) of the Canadian Charter of Rights and Freedoms does not include, in the case of a trade union, a guarantee of the right to bargain collectively...". The Court further found that "the rights for which constitutional protection are sought - the modern rights to bargain collectively and to strike... are not fundamental rights or freedoms."

The Public Service Employee Relations Act, [1987] 1 S.C.R. 313, at pp. 390-1, per Le Dain J.

17. The rights which the Appellant seeks are the right to carve out a separate bargaining unit for its members and to act as the exclusive bargaining agent for that bargaining unit. But the

concepts of "bargaining unit" and "exclusive bargaining agent" are statutory rights created by the legislature. Since s. 2(d) of the Charter does not guarantee the right to bargain collectively, it clearly does not guarantee the right to be part of a particular bargaining unit or the right to act as (or to be represented by) an exclusive bargaining agent.

18. In Re Public Service Employee Relations Act, the Court defined freedom of association as the freedom to associate with others in common pursuits, the freedom to engage collectively in those activities which are constitutionally protected for each individual, and the freedom of an individual to do in concert with others what he may lawfully do alone. "If the right asserted is not found in the Charter for the individual, it cannot be implied for the group merely by the fact of association....the rights of the individual members of the group cannot be enlarged merely by the fact of association."

Re Public Service Employee Relations Act, supra, at pp. 398-404 (per McIntyre J.)

19. Section 42(1) of the Public Service Act does not limit the freedom of the members of the Appellant union to associate in any of the respects outlined in Mr. Justice McIntyre's judgment. The nursing employees remain free to join the Appellant union, and the union remains free to engage in those activities which are constitutionally protected for each individual, including the

freedom to collectively lobby the government to pass an ordinance giving the nurses a separate bargaining unit and making the Appellant their exclusive bargaining agent.

Minnesota State Board for Community Colleges v. Knight,  
104 S. Ct. 1058, at pp. 1068-9 (1984)

20. Even if freedom of association did include "the freedom to participate in determining conditions of work through collective bargaining" as concluded in the dissenting judgment in Public Service Alliance of Canada v. Canada, [1987] 1 S.C.R. 424, at p. 438, s. 42(1) of the Public Service Act would not infringe s. 2(d) of the Charter. The Act and Ordinances guarantee public employees, including the Appellant's members, the right to participate in determining conditions of work through collective bargaining. There is no evidence, nor is there any allegation, that the collective bargaining structure established by the Public Service Act is either ineffective or unrepresentative of the employees in the bargaining unit. In fact, the Northwest Territories Supreme Court in a related proceeding found that over 80 per cent of employees in the bargaining unit are members of the NWTPSA.

Miller v. Commissioner of Northwest Territories, *supra*,  
at p. 461

21. Under the system of collective bargaining established by North American labour legislation, neither individual employees nor dissenting groups of employees have the right to opt out of the bargaining unit or refuse to be represented by the exclusive

bargaining agent. Similarly, no trade union which is not the exclusive bargaining agent has the right to represent its members in collective bargaining. If effect were given to the Appellant's submission, it would lead to the progressive fragmentation of the union movement and eliminate the advantages of the collective bargaining process.

Weiler, Reconcilable Differences, supra, at pp. 124-126  
Minnesota State Board for Community Colleges v. Knight,  
supra

D. Charter s. 1

22. The Attorney General of Ontario accepts the submission of the Respondent, the Commissioner of the Northwest Territories, with respect to Charter s. 1.

PART IV

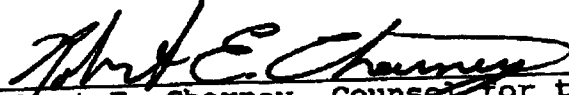
ORDER REQUESTED

It is respectfully submitted that the Constitutional Questions be answered:

- 1) No
- 2) Yes

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Toronto, Ontario, this 6<sup>m</sup> day of February, 1990.

  
Robert E. Charney, Counsel for the  
Attorney General of Ontario



LIST OF TEXTS CITED

	<u>PAGE NO.</u>
George W. Adams, <u>Canadian Labour Law</u> (1985), pp. 817-825	8
David Beattie, <u>Putting the Charter to Work</u> , (1987), pp. 144-155	3
Paul Weiler, <u>Reconcilable Differences</u> (1980), pp. 124-5	3,4,5,13

LIST OF CASES CITED

	<u>PAGE NO.</u>
<u>Re Arlington Crane Service Ltd. v. Minister of Labour</u> (1988), 67 O.R. (2d) 225 (H.C. of J.)	5
<u>International Brotherhood of Teamsters v. Therien</u> (1960), 22 D.L.R. (2d) 1, [1960] S.C.R. 265	8
<u>International Longshoremen's Association v. Maritime Employers' Association</u> (1978), 89 D.L.R. (3d) 289, at p. 301 (S.C.C.)	8
<u>Miller v. Commissioner of Northwest Territories</u> [1988] 4 W.W.R. 456, at p. 461 (N.W.T.S.C.)	3, 12
<u>Minnesota State Board for Community Colleges v. Knight</u> , 104 S. Ct. 1058, at pp. 1068-9 (1984)	12
<u>Nipissing Hotel Ltd. v. Hotel &amp; Restaurant Employees Union</u> , [1963] 2 O.R. 169 (H.C. of J.)	8
<u>Public Service Alliance of Canada v. Canada</u> , [1987] 1 S.C.R. 424	12
<u>Re Public Service Employee Relations Act</u> , [1987] 1 S.C.R. 313	10,11,13
<u>The Taff Vale Railway Co. v. The Amalgamated Society of Railway Servants</u> , [1901] A.C. 426(H.L.)	8

LIST OF STATUTES CITED

	<u>PAGE NO.</u>
<u>Civil Service Act</u> , R.S.P.E.I. 1974, ss. 2(b), 66	6
<u>Civil Service Act</u> , R.S.Q. 1977, chap. F-3, s. 73	6
<u>Civil Service Collective Bargaining Act</u> , S.N.S. 1978, Chap. 3, ss. 2, 13, 14	6, 7
<u>Colleges Act</u> , R.S.A. 1980, Chap. C-18, ss. 21.1, 21,2	5, 6, 7
<u>Colleges Collective Bargaining Act</u> , R.S.O. 1980, c. 74, S. 1(b) and Schedules 1 and 2	7
<u>The Constabulary Act</u> , R.S.Nfld. 1970, c. 58, ss. 2(a)(ii), 20(3)	5
<u>Corrections Act</u> , S.N.S. 1986, chap. 6, s. 7(5)	6
<u>Crown Employees Collective Bargaining Act</u> , R.S.O. 1980, c. 108, ss. 2(5), 3(2) and Reg. 232 R.R.O. 1980, as amended by O. Reg. 252/85	5, 7
<u>The Education Act</u> , R.S.S. 1978, Chap. E-0.1, ss. 2(p), 230	6
<u>Labour Relations Act</u> , R.S.O. 1980, c. 228, s. 13, 18, 139	5, 9
<u>The Newfoundland Teacher (Collective Bargaining) Act</u> , S. Nfld. 1973, s. 5(2)	7
<u>Public Service Act</u> , R.S.O. 1980, c. 418, s. 27(3)	6
<u>Public Service Employee Relations Act</u> , R.S.A. 1980, Chap. P-33, s. 18	7
<u>School Board and Teachers Collective Negotiations Act</u> , R.S.O. 1980, c. 464	6
<u>Teachers Collective Bargaining Act</u> , S.N.S. 1974, Chap. 32, ss. 2(a) and (u), 11, 12	6