Court File 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,

A N D:

THE COMMISSIONER OF THE NORTHWEST TERRITORIES,

Respondent,

A N D:

THE NORTHWEST TERRITORIES PUBLIC SERVICE ASSOCIATION,

Respondent.

MEMORANDUM OF POINTS OF ARGUMENT SUBMITTED ON BEHALF OF THE RESPONDENT, THE NORTHWEST TERRITORIES PUBLIC SERVICE ASSOCIATION

Ms. Catherine H. MacLean
c/o Messrs. Nelligan/Power
Barristers and Solicitors
66 Slater Street, 19th Fl.
Ottawa, Ontario
K1P 5H1

Solicitors for the Appellant
The Professional Institute of the Public Service of Canada

Mr. Robert A. Kasting
Legal Division
Department of Justice
Government of the Northwest Territories - Court House
Yellowknife, N.W.T.
X1A 2L9

Solicitors for the Respondent
The Commissioner of the Northwest Territories

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

Ottawa Agents for
The Commissioner of the
Northwest Territories

Mr. Andrew J. Raven
c/o Soloway, Wright
Barristers and Solicitors
99 Metcalfe Street
Ottawa, Ontario K1P 6L7

Solicitors for the Respondent
N.W.T. Public Service Association

John C. Tait, Q.C.
Deputy Attorney General
of Canada
Per: Ian Donohue
Counsel, Legal Services
Department of Justice
Justice Building
239 Wellington Street
Ottawa, Ontario K1A 0H8

Intervenor

The Honourable Ian Scott
Attorney General of Ontario
11th Floor
720 Bay Street
Toronto, Ontario M5G 2K1

Intervenor

Mr. Robert E. Houston, Q.C.
c/o Soloway, Wright
Barristers and Solicitors
99 Metcalfe Street
Ottawa, Ontario K1P 6L7

Ottawa Agents for the Intervenor,
The Attorney General of Ontario

INDEX

		Page No.
PART I	STATEMENT OF FACTS	1
PART II	POINTS IN ISSUE	8
PART III	ARGUMENT	9
PART IV	ORDER SOUGHT	24
PART V	LIST OF AUTHORITIES	25

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,

A N D:

THE COMMISSIONER OF THE NORTHWEST TERRITORIES,

Respondent,

A N D:

THE NORTHWEST TERRITORIES
PUBLIC SERVICE ASSOCIATION,

I spondent.

MEMORANDUM OF POINTS OF ARGUMENT
SUBMITTED ON BEHALF OF THE RESPONDENT,
THE NORTHWEST TERRITORIES PUBLIC SERVICE ASSOCIATION

PART I

STATEMENT OF FACTS

In 1967, employees who had formerly been employed by the Federal Government in certain public service positions in the Northwest Territories were transferred by that government to the employ of the Government of the Northwest Territories. While employed by the Federal Government, these employees had been represented for collective bargaining purposes by the Public Service Alliance of Canada (P.S.A.C.). Teachers transferred to the employ of the Government of the Northwest Territories had

been represented by the Northwest Territories Teachers'
Association, an affiliate of the P.S.A.C.

Affidavit of Darm Crook, paragraphs 2-4
Case on Appeal, pp. 33-34

2. There was, in 1967, no legislative mechanism in
existence in the Northwest Territories within which the Teachers'
Association, P.S.A.C, or any other employees' association, could
bargain collectively and enter into binding collective agreements
on behalf of territorial public servants.

Exhibit "G" to the Affidavit of Darm Crook
Case on Appeal, p. 46

3. A majority of the transferred employees other than the
teachers formed an association called the Northwest Territories
Government Employees' Association, the predecessor of the
Northwest Territories Public Service Association (N.W.T.P.S.A.).

Affidavit of Darm Crook, paragraph 6
Case on Appeal, pp. 34-35

4. In response to representations made by the P.S.A.C.,
the territorial government enacted legislation which provided a
framework within which public service collective bargaining could
take place. This legislation was the <u>Public Service Act</u> (now
R.S.N.W.T. 1974, c. P-13, as amended). It provides that the
Government may enter into a binding collective agreement with an

employees' association "incorporated by" legislation empowering it to bargain collectively.

Public Service Act, ss. 42-46

5. The N.W.T.P.S.A. was "incorporated" in 1969 pursuant to the Northwest Territories Public Service Association Ordinance, R.O.N.W.T., c. N-2. After passage of the enabling legislation, a process of negotiation similar to the certification process in other Canadian labour relations schemes ensued. The N.W.T.P.S.A. presented evidence to the Commissioner of the Northwest Territories that it represented a majority of the employees of the Government of the Northwest Territories. The government thereupon voluntarily recognized the N.W.T.P.S.A. as bargaining agent for its employees, entered into collective bargaining with the N.W.T.P.S.A., and the parties negotiated a collective agreement.

Affidavit of Darm Crook, paragraph 8
Case on Appeal, pp. 36-37

6. Since 1967, the Government of the Northwest Territories has continued to receive, by devolution, jurisdiction akin to provincial jurisdiction. With devolution, the Federal Government has continued to transfer employees to the employ of the Government of the Northwest Territories. Such employees are eligible for membership in the N.W.T.P.S.A. and to be represented by the N.W.T.P.S.A. for collective bargaining purposes.

Northwest Territories Public Service Association Act, s. 3

7. In 1986, 32 nurses employed by the Federal Government in the Baffin Zone of the Northwest Territories were notified that responsibility for health care programs in the Baffin Zone would be transferred to the Government of the Northwest Territories, and that their employment by the Federal Government would accordingly cease effective September 1, 1986. The nurses were further notified that they would be offered employment in substantially the same positions with the Government of the Northwest Territories, commencing the same day.

Affidavit of Linda Sperling, paragraph 4
Case on Appeal, p. 28

8. While employed by the Federal Government, these nurses were part of a larger group of Federal Government professional employees represented for collective bargaining purposes by the Appellant, Professional Institute of the Public Service of Canada (P.I.P.S.). Upon commencement of their employment by the Government of the Northwest Territories, the nurses, like other territorial public servants, became eligible for membership in the N.W.T.P.S.A., the recognized bargaining agent for all non-excluded territorial public servants.

Affidavit of Linda Sperling, paragraph 10
Case on Appeal, p. 29

9. P.I.P.S. approached the Government of the Northwest Territories with a view to gaining collective bargaining status under the Northwest Territories Public Service Act. The Government declined to consider enacting a statute "incorporating" P.I.P.S. for the purpose of collective bargaining

on behalf of the transferred nurses in the absence of any evidence that a majority of these nurses supported P.I.P.S. or wished to be represented by that association in collective bargaining with the Government.

> Affidavit of Herb Hunt, paragraphs 5-11
> Case on Appeal, pp. 95-96

10. P.I.P.S. commenced these proceedings by Originating Notice of Motion dated June 12, 1986, claiming that s. 42(1) of the Public Service Act and s. 3 of the Northwest Territories Public Service Association Act are inconsistent with s. 2(d) of the Canadian Charter of Rights and Freedoms. The N.W.T.P.S.A. obtained standing as a party Respondent on August 6, 1986.

> Originating Notice
> Case on Appeal, pp. 1-2
>
> Order dated August 6, 1986
> Case on Appeal, pp. 5-6

11. A preliminary motion by the N.W.T.P.S.A. challenging P.I.P.S.' standing to bring the proceedings was dismissed on May 4, 1987.

> Reasons for Judgment of Mr. Justice
> T. David Marshall rendered May 4, 1987
> Case on Appeal, pp. 118-122

12. The P.I.P.S. motion came on for hearing before the Honourable Mr. Justice T. David Marshall of the Supreme Court of the Northwest Territories. Judgment was rendered September 16,

1987 declaring that s. 42(1) of the <u>Public Service Act</u> is inconsistent with s. 2(d) of the Charter.

> Reasons for Judgment of Mr. Justice
> T. David Marshall rendered September 16, 1987
> Case on Appeal, pp. 123-133

13. The Judgment of Marshall J. was appealed by the Commissioner of the Northwest Territories to the Court of Appeal for the Northwest Territories. On July 27, 1988, the Court of Appeal for the Northwest Territories allowed the Commissioner's appeal. The Judgment of Marshall J. was set aside and subsection 42(1)(b) of the <u>Public Service Act</u> R.S.N.W.T. 1974, c. P-13, was declared to be valid.

> Judgment rendered July 27, 1988,
> Northwest Territories Court of Appeal
> Case on Appeal, pp. 152B-152C

14. On the issue of the Appellant's standing to embark upon its Charter challenge of subsection 42(1) of the <u>Public Service Act</u>, the Court of Appeal concluded as follows:

> The argument is that it has no freedom of association to assert. This may or may not be so, but the Institute has a clear and substantial interest in the assertion of the freedom of association of the employees of the Territorial government: it was the certified bargaining agent for a group of nurses employed by Canada before their transfer in bulk to the employ of the Territorial government by agreement between the two governments, and it therefore has an

> interest in achieving a law that at least gives it a chance to bargain for them (and others) in their new employment. In any event, it is not clear to me that the order on the preliminary motion has been appealed.
>
> Reasons for Judgment of Kerans, J.A.
> Case on Appeal, p. 137

15. In addressing the merits of the Appellant's Charter challenge, the Court of Appeal concluded as follows:

> In the result, the adequacy or not, in s. 1 terms, of this legislative "scheme" for certification does not arise because there is no constitutional right to a fair certification process as an aspect of freedom of association. On the other hand, the requirement that the proposed bargaining agent be incorporated by the Council might bear on freedom of association. moreover, the limit is acknowledged to be unnecessary and capricious and the result of legislative oversight, so that it could not be sustained on invocation of s.1. Therefore, the prospect of striking down looms unless the interpretive approach discussed at the outset can save it. I would interpret it to include the words "or recognized" after the word "incorporated." I would then allow the appeal and declare the law to be valid as interpreted.
>
> Reasons for Judgment of Kerans, J.A.
> Case on Appeal, p. 151

16. On June 8, 1989, the Appellant obtained leave to appeal to the Supreme Court of Canada from the Judgment of the Northwest Territories Court of Appeal rendered July 27, 1988.

> Order of the Supreme Court of Canada
> dated June 8, 1989
> Case on Appeal, p. 23

PART II
POINTS IN ISSUE

17. With respect to the issue identified at paragraph 28 of the Appellant's factum, it is the position of the Respondent, Northwest Territories Public Service Association that:

(1) the N.W.T. Court of Appeal was correct when it construed the term "incorporated" in subsection 42(1)(b) of the Public Service Act as meaning "recognized"; and

(2) the constitutional right to freedom of association is a right which inheres in the individual only. As such, and in the circumstances of this case, the Appellant has no rights which have been infringed by subsection 42(1) of the Public Service Act.

18. This Respondent takes no position respecting the issue identified at paragraph 29 of the Appellant's factum.

PART III
ARGUMENT

STANDING

19. The legislative scheme providing for collective bargaining on behalf of Northwest Territories public servants is unusual, when compared with other collective bargaining regimes in Canada. Unlike most labour relations statutes, the Public Service Act, while providing a broad general framework for collective bargaining, does not establish a comprehensive system governing, inter alia, determination of the appropriate bargaining unit, assessment of evidence of representation, certification and decertification of the bargaining agent, and penalties for unfair labour practices. Most importantly, the Public Service Act does not establish a specialized tribunal independent of the government employer to oversee the collective bargaining system.

20. The N.W.T.P.S.A. does not take the position that the existing legislation providing for public service collective bargaining in the Northwest Territories is adequate or appropriate. However, it submits that this legislation does not raise questions of Charter violations capable of enforcement by [illegible]. .P.S.

21. Section 42(1) of the Public Service Act provides:

> In sections 42 to 46
>
> (a) "collective agreement" means an agreement in writing entered into pursuant to this section between the Commissioner 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 Ordinance empowering it to bargain collectively.

22. Section 3 of the <u>Northwest Territories Public Service Association Act</u> provides:

> (1) Except as provided in subsection (2), every person who is an employee within the meaning of the Public Service Act is eligible for membership in the Association.
>
> (2) A person who is employed by the Government of the Northwest Territories
>
> (a) as a teacher,
>
> (b) as a medical practitioner within the meaning of the Medical Profession Act,
>
> (c) as a dentist within the meaning of the Dental Profession Act, or
>
> (d) in a capacity that, in the opinion of the Minister, is managerial or confidential,
>
> is not eligible for membership in the Association.

23. These proceedings were initially commenced by P.I.P.S. in reliance upon s. 24(1) of the Charter, which provides for application to the courts for a remedy by anyone "whose rights and freedoms, as guaranteed by this Charter, have been infringed

or denied". Prior to the hearing, counsel for P.I.P.S. informed the court and the parties that its reliance on s. 24(1) was in error, and that its application was brought pursuant to s. 52(1) of the Charter, which provides that:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

24. It is submitted that P.I.P.S. lacks standing to seek a declaration that the right to freedom of association as set out in s. 2(d) of the Charter is infringed by s. 42(1) of the Public Service Act and s. 3 of the Northwest Territories Public Service Association Act.

25. As MacIntyre J. put it in Reference Re Compulsory Arbitration ("the Alberta Reference"), the "starting point" in the consideration of a section of the Charter is "an inquiry into the purpose or value of the right in issue". He went on to say:

> While freedom of association like most other fundamental rights has no single purpose or value, at its core rests a rather simple proposition: the attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and cooperation of others. "Man, as Aristotle observed, is a 'social animal, formed by nature for living with others', associating with his fellows both to satisfy his desire for social intercourse and to realize commons purposes." ... This thought was echoed in the familiar words of Alexis de Tocqueville:

> "The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them."
>
> ....
>
> In considering the constitutional position of freedom of association, it must be recognized that while it advances many group interests and, of course, cannot be exercised alone, it is nonetheless a freedom belonging to the individual and not to the group formed through its exercise.... The group or organization is simply a device adopted by individuals to achieve a fuller realization of individual rights and aspirations. People, by merely combining together, cannot create an entity which has greater constitutional rights and freedoms than they, as individuals, possess. Freedom of association cannot therefore vest independent rights in the group.
>
> (underlining added)
>
> Reference Re Compulsory Arbitration, [1987] 1 S.C.R. 313, at 395-397
> See also Reasons for Judgment of Dickson, C.J., at 334, 364 and 365
>
> See also O.P.S.E.U. v. Lavigne (1989), 67 O.R. (2d) 536 Ont. C.A. at 559-561

26. It is clear, therefore, that freedom of association is a right "which inheres in the individual" and, as such, is not a right which can be asserted by the group formed through its exercise. In the context of the present case, the Appellant has no legitimate claim in its own right under subsection 2(d) of the Charter. The record in this case confirms that the Appellant's Charter challenge is tied fundamentally to the Appellant's belief

that its pursuit of bargaining agent status falls within the scope of protection afforded by the freedom of association provisions of the Charter. It is submitted on behalf of the N.W.T.P.S.A., that the issue as to the rights which the Appellant may have to pursue particular activities as a bargaining agent, is separate from the issue of the rights individual employees may have to associate with each other.

> O.P.S.E.U. v. Lavigne, supra.
> at p. 560

27. Moreover, while in some cases, a person or organization whose own rights are not infringed by legislation may attack the constitutionality of that legislation, it is submitted that having regard for the accepted tests, P.I.P.S. cannot show that it has proper status to enforce the rights of others in this case.

28. The "general rule" of standing was stated clearly by Laskin C.J. in Minister of Justice v. Borowski:

> I start with the proposition that, as a general rule, it is not open to a person, simply because he is a citizen and a taxpayer ... to invoke the jurisdiction of a competent Court to obtain a ruling on the interpretation or application of legislation, or on its validity, when that person is not either directly affected by the legislation or is not threatened by sanctions for an alleged violation of the legislation. Mere distaste has never been a ground upon which to seek the assistance of a Court.... [T]he

> prevailing policy is that a challenge must show some special interest in the operation of the legislation beyond the general interest that is common to all members of the relevant society.

> Minister of Justice v. Borowski,
> [1981] 2 S.C.R. 575, at 578-579

29. In subsequent cases, this general rule has been affirmed and it has been accepted that in order to obtain standing, an individual without the requisite special interest must demonstrate that the case meets one of the recognized tests for an exception to the general rule. The applicant must show that the issues he raises are justiciable and significant and that, in the circumstances, there is no other practicable way in which the issues could be tested by the courts.

> Thorson v. A-G of Canada,
> [1975]1 S.C.R. 138, at 143-152
>
> Nova Scotia Board of Censors v. McNeil,
> [1976] 2 S.C.R. 265, at 269-271
>
> Finlay v. Minister of Finance of Canada et al.,
> [1986] 2 S.C.R. 607, at 607-624

30. The legislation in question does not affect P.I.P.S. as an entity as to qualify it for standing to challenge the legislation on constitutional grounds. It is true that P.I.P.S. represented the nurses in question prior to their transfer to the employ of the Government of the Northwest Territories, and that

it is no longer entitled to do so. However, that relationship was interrupted by virtue of the transfer of employment and because the nurses in question ceased to be employed by the employer with whom P.I.P.S. had a collective bargaining relationship -- not by virtue of the challenged provisions of the Public Service Act or the Northwest Territories Public Service Association Act.

31. It is also relevant, under the test cited in the Finlay case, to consider the effect the relief sought would have, if granted, on P.I.P.S.' rights. It is submitted that a declaration in the terms sought will not confer any advantage on P.I.P.S. The impugned section of the Public Service Act is merely a definition section. Removal of that section will leave the Northwest Territories public service collective bargaining regime as it currently exists in place, with only one change -- the sections as judicially amended will fail to define who the parties to collective bargaining may be, and what a collective agreement as referred to in that legislation is. The net effect will be to impair the workings of the legislation, and thereby the rights of all territorial employees to bargain collectively. Such a result will not enhance their right of freedom of association.

Finlay, supra., at p. 619

32. At best, from P.I.P.S.' perspective, a declaration of invalidity of s. 42(1) would simply perpetuate the status quo. As it now exists, the Public Service Act is essentially a formal system of voluntary recognition. Because the Act does not create a tribunal to rule on questions such as whether a particular association has the support of a majority of workers in a unit,

an association is "certified" by statute on an ad hoc basis where the Government of the Northwest Territories is satisfied that it represents a majority of the affected employees. If s. 42(1) of the Public Service Act is struck down, the Government will not be entitled to bargain collectively otherwise than through voluntary recognition. No new mechanism will exist pursuant to which P.I.P.S can better its current position.

33. Furthermore, if this Honourable Court should grant a declaration that s. 3 of the Northwest Territories Public Service Association Act is unconstitutional, the effect will be to remove the statutory right of Government employees to belong to the N.W.T.P.S.A. This in itself may directly infringe those employees' rights to freedom to associate in the N.W.T.P.S.A. but, leaving that aside, such a declaration could not possibly assist P.I.P.S., directly or otherwise, in any relevant way.

34. In the result, it is submitted that neither the legislation as it now exists, nor as it would exist should the Court grant a declaration in the terms sought, has any effect on P.I.P.S.' rights or obligations. P.I.P.S. therefore lacks the special or direct interest which would entitle it to standing to attack it under the "general rule".

35. It is further submitted that the present application is not a case in which the Court should grant P.I.P.S. standing under the tests outlined by the Supreme Court of Canada in the Borowski case.

36. The legislation under attack in this case is not like the legislation in the four major standing decisions. In each of Thorson, McNeil, Borowski and Finlay, the legislation in question

either did not affect the rights of any one individual, or did not affect the rights of any person who would as a result be motivated to bring the challenge himself. In other words, if the Court in those cases had denied standing to the plaintiffs, there was no other reasonable and effective manner in which the serious constitutional questions raised by the plaintiffs in those cases could be brought before the courts, and the legislation would thereby have been insulated from judicial review.

37. In this case, there are hundreds of individuals who are directly affected by the challenged Acts. If P.I.P.S.' arguments are correct, all Northwest Territories public service employees and not just the 32 transferred nurses are in the same position vis-a-vis this legislation. Furthermore, unlike the doctors performing abortions cited in the Borowski decision, who had the benefit of a defence to criminal charges under the challenged provisions, these individuals are, if the legislation does infringe their freedom of association, negatively affected thereby. There is no barrier, in theory or in practice, to a challenge on Charter grounds by any of these individuals.

38. It is submitted in any event, that in the absence of any evidence that the nurses P.I.P.S. claims to represent in fact support P.I.P.S. or its challenge, the Court should refuse to grant standing to P.I.P.S. In these circumstances, it is submitted that P.I.P.S. is indeed an officious litigant, seeking to obtain political advantage for itself by enforcing the rights of others.

39. In the absence of a right of freedom of association in the Applicant, it is submitted that the Court should refuse to grant standing. R. v. Big M Drug Mart does not stand for the

proposition that a body incapable of enjoying the rights in issue is entitled, simply by relying on s. 52 rather than s. 24(1) of the Charter, to standing to enforce such rights. Rather, that case merely affirms that a person or body prosecuted pursuant to an Act has standing to launch a collateral attack on the legislation in its own defence. Such a person is undoubtedly directly affected by the legislation and has standing under the "general rule".

> R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at 312-314
>
> R. v. Wholesale Travel Group Inc. (1989), 70 O.R. (2d) 545 at 558 (Ont. C.A.)

40. In other Charter cases where the applicant has sought declaratory relief relating to the rights of others, the courts have been appropriately wary of permitting Charter challenges to proceed. In Smith, Kline & French Laboratories Ltd. v. A-G of Canada, Strayer J. was faced with an application for a declaration that provisions of the Patent Act were inconsistent with s. 15 of the Charter. The applicants were two corporations and several individuals employed by them. Strayer J. noted that the corporations were incapable of enjoying the right relied on, and added:

> I do not accept the contention by the plaintiffs that by virtue of the decision of the Supreme Court of Canada in R. v. Big M Drug Mart Ltd. ... the corporate plaintiffs have standing to raise the issue of s. 15 in declaratory action. The Big M decision is distinguishable because in that case the corporation was being prosecuted and there could be no question of its standing, as an accused, to raise any defence available to it including the invalidity of the Lord's Day

> Act under which it was charged. This was so even if the basis for invalidity was unlawful interference with the freedom of conscience of individuals. In the present case, the remedy being sought is a declaration and here the corporations which allege invalidity are plaintiffs which must establish their standing to seek the remedy in question. The judicial policy which militates against unlimited standing to raise constitutional issues is based in part on concerns as to potential burdens on the courts of officious litigation by persons having no real direct grievance, and in part on concerns about lack of a specific factual context where the would-be plaintiff is not actually in a position to complain of a specific denial of his rights. While the latter concern in a situation such as the present is not really relevant and might form the basis for the exercise of discretion by a court in favour of granting standing to the corporate plaintiffs where no other possibility existed for judicial review, in the present case, the better view appears to me to be that the individual plaintiffs should be recognized as having standing because only they have rights that are potentially violated under s. 15.
>
> Smith, Kline & French Laboratories Ltd. v. A-G of Canada (1985), 24 D.L.R. (4th) 321 (F.C.T.D.), at 366, affirmed on other grounds (1986), 12 C.P.R. (3d) 385 (F.C.A.)

THE COURT OF APPEAL'S INTERPRETATION OF SUBSECTION 42(1)(b) OF THE PUBLIC SERVICE ACT

41. In order for the Northwest Territories Court of Appeal to address the Charter issues raised by the Appellant, it was incumbent upon the Court to first rule upon the proper

interpretation of the provision of the statute under attack. This provision defines "employees' association" as follows:

> S. 42(1)(b):
>
> employees' association" means association of public service employees incorporated by an Ordinance [now Act] empowering it to bargain collectively

42. Subsection 42(1)(b) has application to the collective bargaining scheme established by the Public Service Act through the application of subsection 43(1) thereof which provides:

> S. 43.(1)
>
> An employees' association on behalf of its members or the Commissioner may, by written notice, require the other party to commence bargaining collectively with a view to the conclusion, renewal or revision of a collective agreement.

43. In addressing the issue of interpretation raised by subsection 42(1)(b), Kerans J.A. concluded as follows:

> The necessary first question, then, is whether this Court should accept the interpretation of s. 42(1)(b) suggested for the Commissioner. Words in a statute should be given a contextual and purposive interpretation. See R. v. Paré (1988), 80 N.R. 272. In my view, the correct standard for statutory interpretation is that words must be given a meaning harmonious with the legislative scheme or purpose. See R. v. Jurtik (1985), 38 Alta L.R. (2d) 142 (C.A.)

> and R. v. Jackson (Alta C.A. published March 22, 1988). The limit on that rule, however, must be that the interpretation be one that the words can reasonably bear.
>
> The word "empower" in the section can certainly bear the meaning "to license or certify". I accept the interpretation contended for by the Commissioner, and find that a certification scheme of sorts is in place for public service employees. As a result I will in a moment consider whether indeed there is any constitutional right to select a new bargaining agent.
>
> Case on Appeal, p. 141

44. It is respectfully submitted on behalf of the Respondent N.W.T.P.S.A. that the interpretation given by the Court of Appeal to subsection 42(1)(b) is not only rational and consistent having regard to the general legislative context, but is also in accord with the historical evidence surrounding the enactment. There can be no question, indeed it is virtually admitted by the Appellant, that the intent and purpose of the challenged provisions contained in Sections 42 and 43 of the Act were to provide for the establishment of a collective bargaining regime, one of the incidents of which was the empowering of a bargaining agent to compel the employer to negotiate terms and conditions of employment. See, for example, the letter from Government Leader Sibbeston to Appellant President Craig in which Mr. Sibbeston indicates that "these needs are being met through the Associations certified through the existing legislation enacted by my government". (Exhibit "C" to the Affidavit of H. Hunt, Case on Appeal, p. 99)

45. Following, and in view of, the findings by the Court of Appeal respecting the intent and purpose of subsection 42(1)(b) of the Act, the Court encountered what it described as "difficulty" with the legislator's use of the term "incorporated". As noted by Kerans J.A.:

> My present difficulty is with the word "incorporated", which, as the learned trial judge said, denotes an act of creation rather than the mere recognition.

46. On the basis of the overall context of the legislation and having regard for its earlier ruling, Kerans J.A. resolved the Court's difficulty over the meaning of the term "incorporated" by concluding that the term should be interpreted as meaning "recognized". It is the position of the Northwest Territories Public Service Association that, by interpreting the term "incorporated" as "recognized", the Court has given proper sense to the intent of the legislator and has, additionally, ensured that the section cannot be read as purporting to vest in the Government of the Northwest Territories the power to control the structure or mode of organization of an employee organization.

47. It is interesting that the Appellant complains that the provisions of subsection 42(1)(b) offend its purported rights to freedom of association and yet, the Appellant criticizes the Court of Appeal for applying an interpretation of this provision which would remove from the Government of the Northwest Territories any power to regulate or control the manner in which an employee organization is created. As noted by the Court of Appeal, the Appellant "in large measure .... has effectively

won". The present proceedings make it clear that the concern of the Appellant is <u>not</u> with respect to any potential power in the Government of the Northwest Territories to control the structure of its organization but, rather, with respect to certain perceived legislated road blocks which the Appellant has encountered in its efforts to gain collective bargaining rights.

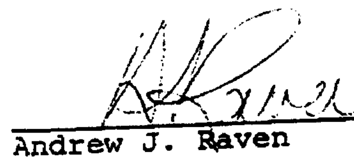
PART IV

ORDER REQUESTED

48. The Respondent, Northwest Territories Public Service Association requests that this appeal be dismissed with costs.

All of which is respectfully submitted.

DATED at **OTTAWA** this 8th day of February, 1990.



Andrew J. Raven

Of Counsel for the Respondent,
Northwest Territories Public
Service Association

PART V

LIST OF AUTHORITIES

Northwest Territories Public Service Act, R.S.N.W.T. 1974 c. P-13

Northwest Territories Public Service Association Act, R.O.N.W.T., c. N-2

Reference Re Compulsory Arbitration, [1987] 1 S.C.R. 313

O.P.S.E.U. v. Lavigne (1989), 67 O.R. (2d) 536 (Ont. C.A.)

Minister of Justice v. Borowski, [1981] 2 S.C.R. 575

Thorson v. A-G of Canada, [1975] 1 S.C.R. 138

Nova Scotia Board of Censors v. McNeil, [1976] 2 S.C.R. 265

Finlay v. Minister of Finance of Canada et al. [1986] 2 S.C.R. 607

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

R. v. Wholesale Travel Group Inc. (1989), 70 O.R. (2d) 545 (Ont. C.A.)

Smith, Kline & French Laboratories Ltd. v. A-G of Canada (1985), 24 D.L.R. (4th) 321 (F.C.T.D.)