19234

IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

IN THE MATTER OF A REFERENCE UNDER SECTION 27(1) OF THE JUDICATURE ACT, BEING CHAPTER J-1 OF THE REVISED STATUTES OF ALBERTA, 1980;

AND IN THE MATTER OF THE VALIDITY OF COMPULSORY ARBITRATION PROVISIONS FOUND IN THE PUBLIC SERVICE EMPLOYEE RELATIONS ACT, THE LABOUR RELATIONS ACT, AND THE POLICE OFFICERS COLLECTIVE BARGAINING ACT, BEING CHAPTERS P-33, L-1.1 AND P-12.05 OF THE REVISED STATUTES OF ALBERTA, 1980 RESPECTIVELY;

AND IN THE MATTER OF THE EXCLUSION OF CERTAIN EMPLOYEES FROM UNITS FOR COLLECTIVE BARGAINING.

BETWEEN:

THE ALBERTA UNION OF PROVINCIAL EMPLOYEES,

Appellant,

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA AS REPRESENTED BY THE ATTORNEY GENERAL OF ALBERTA,

Respondent.

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COUR SUPREME DU CANADA

PRODUIT

FACTUM OF THE ALBERTA UNION OF PROVINCIAL EMPLOYEES, APPELLANT

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PART I

THE FACTS

1. The Appellant, Alberta Union of Provincial Employees, (hereinafter referred to as AUPE) is a duly certified trade union pursuant to the Public Service Employee Relations Act, S.A. 1977, c.40 and has some 40,000 members employed by the Crown in Right of Alberta and Crown Agencies in Alberta who are affected by the provisions of the Public Service Employee Relations Act.

2. The Lieutenant-Governor-in-Council of the Province of Alberta referred certain questions (now stated as the constitutional questions in this appeal) to the Court of Appeal of Alberta for an advisory opinion pursuant to s.27(1) of the Judicature Act R.S.A. 1980, c.J-1 and the Appellant AUPE obtained status as an intervenor and made representations to the Court of Appeal.

3. On December 17, 1984 the Court of Appeal of Alberta certified its opinion to the Lieutenant-Governor-in-Council of the Province of Alberta. The Appellant AUPE appeals to this Honourable Court pursuant to s.37 of the Supreme Court Act R.S.C. 1970, c. S-19 from the judgement of the Court of Appeal of Alberta.

4. By Order dated March 11, 1985 the Honourable Chief Justice of Canada stated the constitutional questions in this appeal, gave directions with respect to the service of the same on the Attorneys General of the Provinces, and fixed April 15, 1985 as the deadline for the filing of

interventions. The constitutional questions were stated as follows (English version):

> 1. Are the provisions of the Public Service Employee Relations Act that provide compulsory arbitration as a mechanism for resolution of disputes and prohibit the use of strikes and lockouts, in particular, sections 49, 50, 93 and 94 thereof, inconsistent with the Constituion Act, 1982, and if so, in what particular or particulars, and to what extent?
>
> 2. Are the provisions of the Labour Relations Act that provide compulsory arbitration as a mechanism for resolution of disputes and prohibit the use of strikes and lockouts, in particular, sections 117.1, 117.2 and 117.3 thereof, inconsistent with the Constitution Act, 1982, and if so, in what particular or particulars, and to what extent?
>
> 3. Are the provisions of the Police Officers Collective Bargaining Act that provide compulsory arbitration as a mechanism for resolution of disputes and prohibit the use of strikes and lockouts, in particular, sections 3, 9 and 10 thereof, inconsistent with the Constitution Act, 1982, and if so, in what particular or particulars, and to what extent?
>
> 4. Are the provisions of the Public Service Employee Relations Act that relate to the conduct of arbitration, in particular section 48 and 55 thereof, inconsistent with the Constitution Act, 1982, and if so, in what particular or particulars, and to what extent?
>
> 5. Are the provisions of the Labour Relations Act that relate to the conduct of arbitration, in particular section 117.8 thereof, inconsistent with the Constitution Act, 1982, and if so, in what particular or particulars, and to what extent?
>
> 6. Are the provisions of the Police Officers Collective Bargaining Act Act that relate to the conduct of arbitration, in particular sections 2(2) and 15 thereof, inconsistent with the Constitution Act, 1982, and if so, in what particular or particulars, and to what extent?

7. Does the Constitution Act, 1982, limit the right of the Crown to exclude any one or more of the following classes of its employees from units for collective bargaining;

(a) an employee who exercises managerial functions;

(b) an employee who is employed in a confidential capacity in matters relating to labour relations;

(c) an employee who is employed in a capacity that is essential to the effective functioning of the Legislature, the Executive or the Judiciary;

(d) an employee whose interests as a member of a unit for collective bargaining could conflict with his duties as an employee?

5. All of the members of the Court of Appeal of Alberta were of the opinion that Questions 1-6 ought to be answered "no" and the majority were of the opinion that question 7 ought not to be answered. Belzil J.A. was of the opinion that Question 7 ought to be answered "yes".

6. The Appellant AUPE will concern itself with the answers given to Questions 1, 4 and 7 as these questions deal with the legislation which affects its members.

PART II

POINTS IN ISSUE

7. The points in issue in this appeal are set out in Questions 1, 4 and 7 which were stated by the Court as follows:

> 1. Are the provisions of the Public Service Employee Relations Act that provide compulsory arbitration as a mechanism for resolution of disputes and prohibit the use of strikes and lockouts, in particular, sections 49, 50, 93 and 94 thereof, inconsistent with the Constitution Act, 1982, and if so, in what particular or particulars, and to what extent?
>
> 4. Are the provisions of the Public Service Employee Relations Act that relate to the conduct of arbitration, in particular section 48 and 55 thereof, inconsistent with the Constitution Act, 1982, and if so, in what particular or particulars, and to what extent?
>
> 7. Does the Constitution Act, 1982, limit the right of the Crown to exclude any one or more of the following classes of its employees from units for collective bargaining;
>
> > (a) an employee who exercises managerial functions;
> >
> > (b) an employee who is employed in a confidential capacity in matters relating to labour relations;
> >
> > (c) an employee who is employed in a capacity that is essential to the effective functioning of the Legislature, the Executive or the Judiciary;
> >
> > (d) an employee whose interests as a member of a unit for collective bargaining could conflict with his duties as an employee?

8. The Appellant, AUPE, takes the position that:

(a) The Public Service Employee Relations Act is inconsistent with the guarantee of freedom of association contained in s. 2(d) of the Constitution Act, 1982 insofar as it contains an overly-broad prohibition of the right to strike.

(b) The Public Service Employee Relations Act is inconsistent with the guarantee of freedom of association contained in s. 2(d) of the Constitution Act, 1982 insofar as it limits the subjects which may be referred to impartial arbitration and confers power upon the employer to unilaterally impose terms and conditions of employment.

(c) Question 7 is so vague it ought not to be answered.

(d) The Respondent Crown in Right of Alberta has failed to discharge the burden of establishing that the impugned provisions of the Public Service Employee Relations Act are justified under s.1 of the Constitution Act, 1982.

PART III

ARGUMENT

THE CHARTER SHOULD RECEIVE A PURPOSIVE INTERPRETATION

9. The Charter is a constitutional document and it must, accordingly, receive a large and liberal construction. The narrow lexicon of statutory interpretation is to be rejected in favour of a purposive analysis.

> Southam Inc. v. Hunter (1985) N.R. 241,[1] per Dickson C.J.C. at 247-248.

10. The Charter is a purposive document.

> Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not by itself an authorization for government action.
>
> Southam Inc. v. Hunter (1985) N.R. 241, per Dickson C.J.C. at 248.

11. A purposive interpretation of the Charter must be consistent with the structure of the document. The existence of the express limitation clause in s.1 mandates a two stage procedure of definition and justification. The process of defining the scope of a fundamental freedom is distinct from the process of determining whether any limits placed on such freedoms can be justified. In the absence of an express limitations clause the Courts would be called on to create definitional stops on the scope of rights to prevent conflict between ostensibly absolute rights. In the presence of an express limitations clause the rights are to

be construed in an absolute fashion and any legislation which has been introduced to balance and limit competing rights must be assessed and justified under s.1. A purposive analysis of the relationship between s.1 and the fundamental freedoms thus indicates that the scope of the individual, fundamental freedoms in s.2 is to be defined broadly, free from judicially-created criteria designed to limit the ambit of judicial review of legislation.

Re Soenen and Thomas et al. (1983) 3 D.L.R. (4th) 658[2] at 667-669 per Mcdonald J.:

> Whether Canadian courts are asked to scrutinize legislation, subordinate legislation or administrative discretion exercised by virtue of statutory authority, it seems to me that the rights and freedoms guaranteed by the Charter must, before any application of the limiting part of s.1, be interpreted in an absolute sense that does not involve the application of any judicially-created criterion designed to limit the scope of judicial review. It is only when the limiting part of s.1 is invoked and applied that any issue of balancing of individual interests against those of the collectivity, or any other judicially-created limiting device comes into play. If it were otherwise, that is if the guaranteed rights were themselves relative in their content, s.1 would be redundant. Moreover, the framers of the Charter having taken the care in s.1 to articulate the grounds on which the guaranteed rights and freedoms may lawfully be limited, it would be presumptuous for Canadian judges to develop other grounds on which those rights and freedoms might be limited.(Emphasis added)

THE SCOPE OF FREEDOM OF ASSOCIATION

12. In giving "freedom of association" a purposive

definition it is permissible to resort to dictionaries as well as the following sources:

a. The intention of the drafters of the Charter as disclosed in committee reports;

b. The scope of freedom of association in international law;

c. The interpretation of "freedom of association" by Canadian courts.

The Meaning of "Freedom"

13. Persons are "free" to the extent they may act without constraint. Therefore, s.2(d) guarantees that persons may associate without any constraint (except as may be justified under s.1).

The concept of "freedom" is described as follows in the The Encyclopedia of Philosophy at p. 222:

> It is best to start from a conception of freedom that has been central in the tradition of European individualism and liberalism. According to this conception, freedom refers primarily to a condition characterized by the absence of coercion or constraint imposed by another person; a man is said to be free to the extent that he can choose his own goals or course of conduct, can choose between alternatives available to him, and is not compelled to act as he would not himself choose to act, or prevented from acting as he would otherwise choose to act, by the will of another man, of the state, or of any other authority.[3]

A similar definition may be found in The Concise Oxford Dictionary, [4] at p. 421 where "freedom" is succinctly defined as:

...liberty of action, right to do,...

Black's Law Dictionary,[5] also defines the concept in similar terms at p.338

> The state of being free; liberty; self determination; absence of restraint; the opposite of slavery.

The Meaning of "Association"

14. The Compact Edition of the Oxford English Dictionary, [6] defines "association" as follows:

> ...1. The action of combining together for a common purpose; the condition of such combination; confederation, league;...
>
> 2. A body of persons who have combined to execute a common purpose or advance a common cause;...

The verb "associate" is defined as:

> ...2. To join, combine in action, unite....

15. Based on these definitions, there are two main features of the concept of "association": the element of combination; and the element of common purpose or common action. A mere gathering or joining together of persons does not exhaust the meaning of "association". The persons may also engage in a common purpose or action.

16. Combining the definition of "freedom" with that of "association" leads to this: Persons are not to be restrained from engaging in common purposes or actions. At a minimum, anything which may be done by one person may be done by a combination of persons. The purpose of the guarantee of "freedom of association" is to provide a

constitutional protection allowing persons to do together what they are permitted to do alone. Any act which may be lawfully done by one person may not be prohibited merely because it is to be done by a group of persons--unless the prohibition of the group action can be justified under s.1. The Charter guarantee of freedom of association bites where legislation prohibits actions by groups which may be undertaken by individuals and the question of whether any particular constraint on the freedom can be tolerated under the Charter is an issue to be decided under s.1.

17. The Court of Appeal of Alberta was of the opinion that such an argument, if accepted, would give greater constitutional rights to groups than are enjoyed by individuals and that it would lead to a challenge to all legislation governing group action.

> The argument leads to the conclusion, for example, that a lynch mob has a prima facie right to act! Indeed, all laws regulating group activity--from those dealing with family life to those dealing with local government would be required to pass muster under.s.1.
>
> Case on Appeal p.66

18. With respect, groups would not have greater constitutional protection than individuals. Rather, individuals acting together could not be deprived of the same rights they would have if they acted as individuals instead of acting in concert (provided, of course, that a prohibition of the concerted action could not be justified under s.1.).

19. Therefore, a lynch mob would not have a prima facie right to act. Just as one person could not "lynch" another person, so too a group of persons could not "lynch" another. By banding together as a mob, the individuals in

the mob are not given a constitutional right to carry out an action that would be unlawful if done by one of them, acting alone.

20. On the other hand, if an action could lawfully be done by one person acting alone, the Charter ensures that it could also be done by that person acting with others, provided any prohibition of the group action could not be justified under s.1. The Charter aims to protect the aspect of concerted action by individuals.

21. The Court of Appeal of Alberta artificially restricted the scope of freedom of association to the act of forming and maintaining groups.

> Even if I am to accept the "something new" approach, it does not follow that I ought to accept a definition which leaps from protected organization to protected action.
>
> Case on Appeal p.68

With respect, this is an artificial distinction. The pursuit of common objects in establishing and maintaining an organization is logically indistinguishable from the pursuit of any other common object or purpose. The actions of formation and maintainence are two manifestations of free association. Other common actions in pursuit of common purposes are equally manifestations of free association. Divorcing the actions of formation and maintainence from the actions in pursuit of the other purposes for which the individuals came together is logically insupportable given the encompassing nature of the phrase, "freedom of association".

Freedom of Association Extends to Employees

22. Employees may, pursuant to the guarantee of freedom of association, combine in common purposes or actions (to the extent such purposes or actions are not justifiably limited pursuant to s.1). To this extent employees may organize themselves into trade unions, may engage in collective negotiations with their common employer, and may withdraw their labour services if a satisfactory agreement cannot be negotiated. The collective actions of forming trade unions, negotiating common terms and conditions of employment, and withholding labour services, are the actions of the employees in pursuit of common purposes. The employees are, in the words of the Oxford Dictionary (as cited above), "combined together for a common purpose", or "combined to execute a common purpose or advance a commo.. cause", or "combine[d] in action". In undertaking such a collective action they are exercising their freedom of association.

Freedom of Association is a Distinct, Fundamental Freedom.

23. Freedom of association is a seperate, enumerated, fundamental freedom. As such it must be given a meaning seperate and apart from the other fundamental freedoms. It is more than and different from mere assembly or expression or speech.

24. The Court of Appeal of Alberta was of the opinion that the express inclusion of freedom of association did not add anything new and simply made express that which was implicit elsewhere. [Case on Appeal p.68]

25. With respect, that conclusion is contrary to the

fundamental notion that each word in a document is to be given some meaning. This must be even more true of an entire, seperate, constitutional guarantee. There would be no need to state the "freedom of association" in express terms if it were implicit.

The Intention of the Drafters of the Charter

26. A broad range of extrinsic material may be examined in order to assist in determining the purpose of Charter provisions, including statements made by Cabinet Ministers, and the transcripts of committee proceedings.

> Re Federal Republic of Germany and Rauca (1983) 145 D.L.R. (3d) 638[7], at 658 (Ont. C.A.)
>
> Re British North America Act and the Federal Senate (1980), 30 N.R. 271 (S.C.C.)[8]

27. It is clear from the statement of the Acting Minister of Justice, in the proceedings before the Parliamentary Special Joint Committee of the Senate and House of Commons, that the guarantee of freedom of association was intended to include the freedom to organize and collectively bargain. In responding to a proposal that the words, "the right to organize and collectively bargain" be expressly included in s.2(d), the Honourable Robert Kaplan said:

> Mr. Kaplan: our position on the suggestion that there be specific reference to the freedom to organize and bargain collectively is that that is already covered by the freedom of association that is provided already in the declaration or in the Charter; and that by singling out association for bargaining one might tend to diminish all the other forms of association contemplated--church association; association of fraternal organizations or community organizations.

Canadian Parliamentary Special Joint Committee of the Senate and House of Commons and the Constitution of Canada, Minutes of Proceedings and Evidence, 43:69[9]

28. The Court of Appeal of Alberta held that the Ministerial statement was "equivocal at best"..."singularly unpersuasive"... "of dubious relevance and perhaps not admissable."[Case on Appeal p.69]

29. With respect, the Ministerial statement demonstrates that the Canadian Government was of the view that the freedom to organize and bargain collectively was implicit in the phrase "freedom of association." While it is true that the Canadian Government could not unilaterally will the Constitution Act, 1982 into existence, the views expressed by a Minister of that Government are instructive in arriving at a purposive construction of the phrase: "freedom of association".

The Meaning of Freedom of Association in International Conventional Law

30. Where there are two contending interpretations of a fundamental freedom, the interpretation which ought to be preferred is that which is consistent with Canada's international legal obligations.

31. Support for the view that Parliament is deemed not to legislate in violation of international obligations may be found in several sources.

Maxwell on the Interpretation of Statutes Twelfth Edition 1969[10] at p. 183

Daniels v. White [1968] S.C.R. 517[11] per Pigeon J. at p. 541-542

R. v. Secretary of State for Home Affairs and

another, ex parte Bhajan Singh [1975] 2 All E.R. 1081[12] per Lord Denning M.R. at p. 1083

Re Service Employee's International Union Local 204 and Broadway Manor Nursing Home et al. (1984) 4 D.L.R. (4th) 231 (Ont. Div. Ct.), per O'Leary J. at p. 277-278, and per Smith J. at p. 302-303;

32. The same position has been taken by several academic commentators.

Maxwell Cohen, Q.C., and Anne Bayefsky, "The Canadian Charter of Rights and Freedoms and Public International Law," (1983) 61 Canadian Bar Review 265.[13]

E.P. Mendes, "Interpreting the Canadian Charter of Rights and Freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights," (1982) 59 Alberta Law Review 383[14]

L.C. Green, "The Canadian Charter of Rights and International Law", The Canadian Yearbook of International Law, Vol. XX, 1982[15]

33. The Court of Appeal of Alberta held that even if the international conventions to which Canada has acceded contain a right to strike, there is no reason to assume that any of the international instruments were in the minds of the framers at the time the constitution was drafted. It is equally conceivable, the Court said, that the drafters had in mind the meaning attributed to the phrase "freedom of association" as interpreted by Courts in other countries' constitutions.

This takes me to the principal difficulty I have with this line of reasoning. No reason is offered why this particular instrument, or indeed any other, should be said to have been in the minds of the framers in terms of offering a definition of

"association".

Case on Appeal p.72

34. With respect, this conclusion is directly contrary to the interpretive rule that Parliament is to be deemed not to have legislated in violation of international law without express words. If this rule is applied then it must be inferred that the framers intended to give constitutional force to Canada's international legal obligations and not to the meaning which different words have been given in different constitutional settings. It makes more sense to conclude that in drafting the guarantee of freedom of association greater heed would be paid to international conventions legally binding on Canada than upon interpretations of the Constitutions of India and Trinidad and Tobago.

Freedom of Association Includes the Right to Strike in International Conventional Law

35. International conventions to which Canada is a party permit the right to strike to be withheld from public servants who are agents of the state or who are engaged in essential services. When the right to strike is so limited, an impartial arbitration mechanism must be substituted.

36. The Public Service Employee Relations Act R.S.A. 1980 c.P-33 is inconsistent with the requirements of Canada's international legal obligations to the extent that it denies the right to strike to non essential employees and because, where the right to strike is withdrawn, the Act does not permit arbitration of all the terms and conditions of employment.

I.L.O. Convention 87

37. This Convention, concerning Freedom of Association and Protection of the Right to Organize, was acceded to by Canada on March 23, 1973. Article 3 of the Convention provides:

> 1. Worker's and employer's organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.
>
> 2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

38. The ILO Committee on Freedom of Association and The Fact Finding and Conciliation Commission and the Committee of Experts on the Application of Conventions and Recommendations have all made authoritative determinations as to the meaning of freedom of association pursuant to Convention 87.

N. Valticos, International Labour Law, Kluwer, 1979 at p. 61, 62[16]

> 121. In the course of the years, the quasi-judicial bodies which, as will be explained later, have been set up to supervise the implementation of international labour standards, have had to reach conclusions as to the precise scope and meaning of ILO conventions, as they were requested to assess the extent to which these conventions are implemented. a body of case-law has thus been progressively built up.

39. In numerous decisions spanning a twenty year period the Committee on Freedom of Association has determined that the right to strike derives from Article 3 of Convention 87 and that it is an essential means by which workers can promote and defend their occupational interests. In three cases the

Committee has considered the provisions of the Alberta Public Service Employee Relations Act and has found that the statute does not comply with the guarantee of freedom of association contained in Convention 87. In each case the Governing Body of the I.L.O., of which Canada is a permanent member, has approved the decision of the Committee.

40. In the third decision, Case No. 893, Complaint Presented by the Canadian Labour Congress Against the Government of Canada (Alberta), 1980,[17] the Committee commented on the strike prohibition contained in s.93-95 of the Public Service Employee Relations Act as follows:

> 133. The Committee would therefore recall the fundamental principles it expounded in its original examination of this case which are based on the provisions of Convention No. 87. In particular, it would recall that the right to strike, recognized as deriving from Article 3 of the Convention, is an essential means by which workers may develop and defend their occupational interests. It would also recall that if limitations on the right to strike are to be applied by legislation, a distinction should be made between publicly-owned undertakings which are genuinely essential, i.e. those which supply services whose interruption would endanger the existence or well-being of the whole or part of the population, and those which are not essential in the strict sense of the term.

41. In its second decision, Case No. 893, Complaint Presented by the Canadian Labour Congress and the Canadian Association of University Teachers Against the Government of Canada (1979),[18] the Committee restated the principle of the right to strike. It went on to determine that the provisions which limit the subjects which may be presented to arbitration (s.48(2) of the Public Service Employee Relations Act) are inconsistent with the guarantee of freedom of association contained in Convention 87.

42. The ILO Committee of Experts on the Application of Conventions and Recommendations also reaffirmed the importance of the right to strike in the non-essential public service in its most recent report on freedom of association. At para. 214 the Committee said as follows:[International Labour Conference 69th Session 1983][19]

> In the opinion of the Committee, the principle that the right to strike may be limited or prohibited in the public service or in essential services, whether public, semi-public or private, would become meaningless if the legislation defined the public service or essential services too broadly. As the Committee has already mentioned in previous general surveys, the prohibition should be confined to public servants acting in their capacity as agents of the public authority or to services whose interruption would endanger the life, personal safety or health of the whole or part of the population.

43. The principles concerning the right to strike, espoused by the Committee on Freedom of Association, were also endorsed in the 1966 Report of the Fact Finding and Conciliation Commission on Freedom of Association Concerning Persons Employed in the Public Sector of Japan as follows:[20]

> There is no Convention, recommendation, or other decision of the International labour conference defining the extent of the right to strike in public services, but the Governing Body Committee on Freedom of Association has formulated a series of principles on the matter which has won general acceptance. These principles are essentially:
>
> > (a)that it is not appropriate for all publicly owned undertakings to be treated on the same basis in respect of limitations of the right to strike without distinguishing in the relevant

> legislation between those that are genuinely essential because their interruption may cause serious public hardship and those which are not essential according to this criterion;
>
> (b)that where strikes by workers in essential occupations are restricted or prohibited such restrictions or prohibitions should be accompanied by adequate guarantees to safeguard to the full the interests of the workers thus deprived of an essential means of defending occupational interests;...

44. While the decisions of the various ILO bodies are not binding on Canada, in the sense that they could be enforced, they ought to be accepted as authoritative interpretations of Convention 87 in the absence of a single authority to the contrary. It is not sufficient to merely dismiss the decisions of the ILO bodies--it must be determined that their interpretations of Convention 87 are wrong and that some other interpretation is preferable.

The U.N. Covenant on Economic, Social and Cultural Rights

45. This Covenant was acceded to by Canada by an Order-in-Council dated May 18, 1976. Article 8 of the Covenant guarantees, among other incidents of freedom of association,

> The right to strike provided that it is exercised in conformity with the laws of the particular country.

46. This right is then subject to the following limitation clause:

> 2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

47. The limitation clause is, itself restricted in its

operation by the following non-derogation provision:

> 3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 Concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

48. The effect of the non-derogation clause is to require that the "administration of the state" exception be construed in harmony with the requirements of Convention 87. The construction of the limitation clause cannot derogate from the guarantees provided in Convention 87 as expressed in the decision of the Committee of Experts On the Application of Conventions and Recommendations. (International Labour Conference 69th Session 1983, supra. paragraph 42) Therefore, to be consistent with Convention 87, the "administration of the state" exception must be limited to include only those public servants acting as agents of the public authority or those employed in truly essential services. Article 8 spells out the substantive content of freedom of association, consistent with Convention 87.

<u>The U.N. Covenant on Civil and Political Rights</u>

49. This Covenant was acceded to by Canada by Order-in-Council dated May 18, 1976. Article 22 of the Covenant guarantees the freedom of association. The limitation provision contained in Article 22 is subject to a non-derogation clause identical to that contained in Article 8(2) of the U.N. Covenant on Economic Social and Cultural Rights, and ties in Convention 87. Once again the guarantee of freedom of association is to be construed in light of the determinations made by the tribunals constituted under

Convention 87.

50. The Court of Appeal of Alberta held that the international conventions either did not provide a right to strike, or even if they did, that the existence of the right was irrelevant in construing the Charter.[Case on Appeal p.17-20.]

51. With respect, the only authorities available to the the Court indicate that the conventions have been construed in favour of the Appellant's submission. Further, the interpretive rule cited above in paragraph 31, assists in reaching a principled, purposive, conclusion by requiring that the guarantee of freedom of association be construed consistent with prevailing international human rights covenants which Canada has ratified. It would be anomolous if the Charter were construed so narrowly as to provide fewer rights within Canada than are guaranteed in the international instruments to which Canada is a party.

The Interpretation of "Freedom of Association" by Canadian Courts

51. Since proclamation of the Charter, several courts have had an opportunity to construe s.2(d). None of the cases have dealt with legislation as comprehensive as that before this Court in this appeal. In two cases the legislation in question extended the life of collective agreements for a short time in order to combat inflation. In one case the legislation directed an end to a particular strike and ordered a return to work. In the final case the issue was whether a common law injunction prohibiting secondary picketing was contrary to the Charter. In none of the cases did the courts have to consider permanent legislation denying the right to collectively bargain, limiting the

subjects referable to arbitration, and denying the right to strike.

52. In these cases the courts divided on the question whether the guarantee of freedom of association included the right to engage in collective bargaining, and to take strike action.

53. In Re Service Employee's International Union Local 204 and Broadway Manor Nursing Home et al. (1984) 4 D.L.R. (4th) 231 (Ont. Div. Ct.) all three judges wrote separate judgements concurring with the view that freedom of association included the right to collectively bargain and take strike action.

54. O'Leary J. said at p.284:

> It is beyond question then that employees could engage in lawful strike action at common law. The Supreme Court of Canada found in CPR v Zambri, that the Labour Relations Act, R.S.O. 1960, c. 202 declared the right to strike by enacting that "every person is free to join a trade union of his own choice and to participate in its lawful activities". But is the right to strike included in the expression "freedom of association"? The ability to strike, in the absence of some kind of binding conciliation or arbitration, is the only substantial economic weapon available to employees. The right to organize and bargain collectively is only an illusion if the right to strike does not go with it. The main reason that the right to organize and bargain collectively is assured employees is that they may effectively bargain with their employer. To take away an employee's ability to strike so seriously detracts from the benefits of the right to organize and bargain collectively as to make those rights virtually meaningless. if the right to organize and bargain collectively is to have significant value then the right to strike must also be a right included in the expression "freedom of expression", and I conclude that it is.

55. Galligan J. held as follows at p.248:

> The purpose of an association of workers in a union is clear--it is to advance their common interests. If they are not free to take such lawful steps that they see as reasonable to advance those interests, including bargaining and striking, then as a practical matter their association is a barren and useless thing. I cannot imagine that the Charter was ever intended to guarantee the freedom of association without also guaranteeing the freedom to do that for which the association is intended. I have no hesitation in concluding that in guaranteeing workers' freedom of association the Charter also guarantees at the very least their freedom to organize, to choose their own union, to bargain and to strike.

Galligan J. went on to state at p.256 that:

> I held earlier that the freedom to strike is an essential element of the freedom of association. The freedom to strike is what gives the workers leverage in bargaining with their employers. Labour unions are not social clubs or benevolent societies, although as an adjunct to their primary purpose sometimes they do act as such. Their raison d'etre is to enable workers to have effective economic clout in dealing with their employers. Employees' ultimate and real weapon is their freedom to strike. When that freedom is removed it is my opinion that the workers' freedom of association is more than merely infringed, it is emasculated. While there may be situations where that can be justified and doubtless there are situations where the common good of society as a whole calls for the substitution of freedom to strike with a right to arbitration or some other method of objective dispute resolution, workers' freedom of association is meaningless, empty and devoid of substance if freedom to strike is not part of it.
>
> It is my opinion that the Act's removal of the freedom to strike during the period of time it governs is a serious infringement upon the union members' freedom of association. Therefore, unless it can be justified under section 1 of the Charter, it is the duty of the Court to give relief under section 24. It is necessary to

examine whether this infringement of those workers' freedoms can be justified under section 1 of the Charter.

56. Smith J. held as follows at p.302:

> It follows, and it is trite to say I suppose, that the freedom to associate carries with it the freedom to meet to pursue the lawful objects and activities essential to the association's purposes, being in this instance the well-being, economic and otherwise of its members. The freedom to associate as used in the Charter not being on its face a limited one, includes the freedom to organize, to bargain collectively and as a necessary corollary to strike.

57. The Ontario Court of Appeal reversed this decision on non Charter grounds in a judgement not yet reported, dated October 22, 1984.

58. In Dolphin Delivery Ltd. v. Retail Wholesale and Department Store Union, Local 580 et al. (1984) 52 B.C.L.R. 1 all three justices determined that secondary picketing was an activity not protected under s.2(b) as an exercise of freedom of expression. Two of the justices (Esson J.A., concurred with by Taggart J.A.) decided that secondary picketing was not protected by the guarantee of freedom of association.

59. The appeal in this matter to the Supreme Court of Canada has been argued and judgement has been reserved.

60. In Public Service Alliance of Canada v. Her Majesty the Queen in Right of Canada (unreported, Federal Court, Trial Division, March 21, 1984) Reed J. considered whether an Act extending the life of collective agreements for two years was in violation of s.2(d). Reed J. determined that the guarantee of freedom of association did not protect the right of trade unions to bargain collectively or engage in

strike action.

61. This decision was upheld on appeal and leave to appeal the decision of the Federal Court of Appeal to the Supreme Court of Canada has been granted.

62. In The Retail, Wholesale and Department Store Union Locals 544, 496, 635 and 935 et al. v. The Government of Saskatchewan et al. (1984) 34 Sask. R. 157, Sirois J. considered a challenge to special legislation prohibiting a strike of dairy workers and ordering a return to work. He held that the right to strike was not protected by the guarantee of freedom of association.

63. It is submitted that the judgements of the justices of the Ontario Divisional Court are to be preferred for several reasons.

64. Only the Divisional Court was sensitive to the importance of giving an absolute construction to the guarantee of freedom of association at the definition stage (as is necessary: argued above at paragraph 11).

65. The justices who have determined that freedom of association does not protect the object or purposes of the persons in the association have failed to give due weight to the fact that the definition of association contemplates "combining in action".

66. The justices who have determined that freedom of association does not protect collective bargaining or striking have artificially separated the "objects or purposes or actions" of the "association" qua trade union, from the "objects or purposes or actions" of the individuals who make up the association, and in whom, the freedom of association is vested by the Charter. This artificial

separation has led to a debate about the rights of the trade union per se rather than the rights of the individuals. The trade union is only one manifestation of the freedom of the individuals to combine for a common purpose or action. Collective bargaining is another manifestation of the same right and the concerted withdrawal of labour is a third.

67. To the extent that American decisions are considered, there has been a failure to consider the importance of the absence of an express limitation clause in the American Bill of Rights. Also, due consideration has not been given to the fact that the guarantee of freedom of association is an express, distinct, constitutional right in the Charter, and only a derivative right under the American Bill of Rights.

68. To the extent that judgements concerning the interpretation of freedom of association under other constitutions have been relied upon, due consideration has not been given to the differences between the Charter of Rights and those other documents.

69. The comments of the British Columbia Court of Appeal in Dolphin Delivery Ltd. v. Retail Wholesale and Department Store Union, Local 580 et al. (supra. para. 52) concerning the right to strike can be distinguished because the Court was dealing with the activity of picketing--not collective bargaining or striking. Since the right to picket falls within freedom of expression, it was not necessary to consider the scope of freedom of association.

The Public Service Employee Relations Act Limits Freedom of Association

70. The Public Service Employee Relations Act R.S.A. 1980, c. P-33 limits the freedom of association in two ways that are in issue in this appeal:

(a) it denies employees the right to strike;

(b) it limits the matters that may be referred to impartial arbitration.

The Right to Strike is Denied

71. "Strike" is defined in s. 1(q) of the Public Service Employee Relations Act R.S.A. 1980, c. P-33 as follows:

> (q) "Strike" includes
>
> (i) a cessation of work,
>
> (ii) a refusal to work,
>
> (iii) a refusal to continue to work, or
>
> (iv) a concerted activity designed to restrict production or service,
>
> by two or more persons employed by the same employer acting in combination or in concert or in accordance with a common understanding.

72. Strikes are prohibited in s.93 of the Public Service Employee Relations Act R.S.A. 1980, c. P-33 as follows:

> 93(1) No person or trade union shall cause or attempt to cause a strike by the persons to whom this Act applies.
>
> (2) No person to whom this Act applies shall strike or consent to a strike.

73. These sections limit the freedom of individuals to "combine in action". Persons covered by the Act may not collectively withdraw their labour services. Even though individuals may do any of the acts specified in s.1(q)(i),(ii),or (iii), (i.e. cease working or refuse to work or refuse to continue to work), these actions may not be undertaken by two or more persons acting in concert.

What is prohibited is acting in association with others. The freedom of association of such persons is thus limited, and the reasonableness of the limit must be demonstrably justified pursuant to s.1.

The Denial of the Right to Strike Has Not Been Justified

74. The onus of justifying a limitation on a right or freedom set out in the Charter falls upon the party seeking to uphold the limit.

> Southam Inc. v. Hunter (1985) N.R. 241, per Dickson C.J.C.

75. In order to justify denying persons one of their fundamental freedoms it must be demonstrated that the sacrifice of individual rights is necessary for the public good. The state cannot simply limit fundamental freedoms for reasons of expediency. There must be a compelling reason why the interests of the state should override the freedoms of individuals.

> Singh v. Minister of Immigration (Unreported, Suupreme Court of Canada, April 4, 1985)[21]
>
> R. v. Bryant (1985) 6 O.A.C. 118 at p.123[22]

76. The Public Service Employee Relations Act R.S.A. 1980 c. P-33 does not distinguish between those persons whose functions are essential for the welfare of the community and those whose functions are not essential. It simply denies the freedom of association to a broad range of persons based on the nature of their employer rather than the nature of the functions they perform.

77. The Court of appeal of Alberta did not find it necessary to determine whether the strike prohibition was justified under s.1. Before the Court of Appeal of Alberta the

Attorney General advanced three justifications for denying the right to strike to persons covered by the Public Service Employee Relations Act R.S.A. 1980 c. P-33. These were:

> a. While they do not all provide essential services they are so closely linked to those providing essential services as to make it reasonable that they should be treated in the same way. [p. 35 Written Submission of the Attorney General]
>
> b. Though some of the services may be non-essential there is no alternative supply for the services. [p. 35 Written Submission of the Attorney General]
>
> c. Since the employer is the government, employees are in a special position to place more pressure on the government than other citizens can. [p.35-36 Written Submission of the Attorney General]

78. The purported rationale is not sufficient justification for the denial of the right to strike for several reasons.

79. There is no evidence of the close links between essential and non essential persons, and certainly no evidence that the withdrawal of labour services by the non essential persons would adversely affect the provision of essential services. The Attorney General must do more than merely assert the existence of this relationship in order to demonstrably justify the limit. A vast number of different functions are performed by persons covered by the Public Service Employee Relations Act R.S.A. 1980 c. P-33. [Official Pay Plan; and "Organization of the Government of Alberta"][23] It cannot be successfully contended that they must all be denied the right to strike so that essential services can be provided.

80. There is no evidence that there is no alternative source of supply for the services provided by the employees

affected. It is almost certainly wrong, given the vast range of job functions performed. For example, the employees of the Provincial Treasury Branches, Jubilee Auditoriums and Alberta Home Mortgage Corporation do not provide services which cannot be obtained elsewhere. Moreover, even though there may be no alternative source of supply for many services provided in the private sector, this rationale has not been relied upon to deny private sector employees the right to strike.

81. If there are essential services provided by persons employed pursuant to the Public Service Employee Relations Act R.S.A. 1980 c. P-33, and these services are interrupted, and the community has no alternative source of supply of these services, the particular employees may be ordered back to work. Alternatively, employees performing truly essential functions may be denied the right to strike and be required to submit differences to compulsory arbitration. Only such a selective approach can be justified. The wholesale denial of the right to strike is unjustifiably broad. A limit must be proportionate to the end which it is designed to meet. The limit must not be overly broad.

> Although there is a rational basis for the exclusion of the public from hearings under the Juvenile Delinquents Act, I do not think an absolute ban in all cases is a reasonable limit on the right of access to the courts, subsumed under the guaranteed freedom of expression, including freedom of the press. The net which s.12(1) casts is too wide for the purpose which it serves. Society loses more than it protects by the all-embracing nature of the section.
>
> Re Southam Inc. and The Queen (No. 1) [1983] 3 C.C.C. (3d) 515[24]

82. While it is true that strikes of public employees place

economic and political pressures upon government employers, it is also true that government employers retain the power to make a legislative response. This authority is denied to private sector employers. Therefore, a government employer is more, rather than less powerful than a private sector employer, and better, rather than less well equipped to respond to strikes.

83. The legislation adopted by the Alberta government is inconsistent with the rationale advanced to justify it. If it is true that governments are more vulnerable to employee pressure than private sector employers, and a legislative denial of the right to strike is necessary to defend government employers, then the same rationale should apply to all public sector employers and not just the provincial government. In fact the rationale is not consistently applied. The employees of municipalities and school boards are not denied the right to strike, even though municipal politicians and school board members are more exposed to local pressure than provincial politicians. A limit on a Charter freedom cannot be considered rational if the application of the limit is inconsistent with the avowed rationale.

84. Other government employers in Canada have not resorted to the wholesale denial of the right to strike of public servants. Only two other governments, Ontario and Nova Scotia have adopted the Alberta approach of an across-the-board prohibition of public service strikes. All other governments have adopted less drastic means to ensure that essential public services will be provided. In four jurisdictions, B.C., Saskatchewan, Manitoba and P.E.I., there is no express limitation on the right of public servants to strike. In the remaining four jurisdictions, New Brunswick, Newfoundland, Quebec and the federal public

service, all public servants except those engaged in essential services, are entitled to strike. [Survey of Legislation][25] A Charter right may be limited, it may not be denied. The Attorney General of Quebec v. Quebec Association of Protestant School Board et al. (Unreported, Supreme Court of Canada, July 26, 1984)[26]

85. The fact that these other governments have elected to meet the same ends by less intrusive prohibitions undermines the rationale advanced by the Alberta government. If the governmental object can be attained by less broad means, an overly-broad legislative instrument cannot be justified. Under the Charter a provincial government cannot defend its legislative package by simply pointing to the fact that it has legislative authority in the subject matter. It must also demonstrate that it has adopted the narrowest limit consistent with its ends. Since other provinces and the federal government have adopted less restrictive legislation, the Province of Alberta must point to some local conditions that justify the blanket denial of the right of public servants to strike. There is no such evidence before the Court. The means chosen by the Government must be shown to be preferable to some other means of attaining the same object.

> Dr. Reich and College of Physicians and Surgeons of Alberta (April 6, 1984) Unreported, per McDonald J. at 26-27.[27]

86. The authorities cited by the Attorney General were equivocal on the desirability of denying the right to strike to public employees. They indicate that there is a considerable amount of disagreement among commentators and certainly do not uniformly support the contentions of the Attorney General. Actual harm or a real likelihood of harm

to society must be demonstrated before a limit can be justified.

> Care must be taken to ensure that the freedom of expression, as guaranteed by s.2 of the Charter, is not arbitrarily or unjustifiably limited. Fears or concerns of mischief that may occur are not adequate reasons for imposing a limitation. There should be actual demonstration of harm or a real likelihood of harm to a society value before a limitation can be said to be justified. National Citizens' Coalition Inc. v. Attorney-General for Canada Unreported, June 25,1984, per Medhurst J. at 24.[28]

87. The international obligations which Canada has undertaken emphasize the importance of narrowly limiting the right to strike. Only those public employees who perform services which are truly essential may be denied this incident of freedom of association.

The Limitation of Arbitral Items

88. Section 48(2) of the Public Service Employee Relations Act R.S.A. 1980, c. P-33 limits the subject matters which may be referred to arbitration as follows:

> 48(1) An arbitration board may only consider, and an arbitral award may only deal with, those matters that may be included in a collective agreement.
>
> (2) Notwithstanding subsection (1), none of the following matters may be referred to an arbitration board and provisions in respect of the following matters shall not be contained in the arbitral award of an arbitration board:
>
> (a) the organization of work, the assignment of duties and the determination of the number of employees of an employer;
>
> (b) the systems of job evaluation and the allocation of individual jobs and positions within the systems;

(c) selection, appointment, promotion, training or transfer;

(d) pensions.

89. The Public Service Employee Relations Board has jurisdiction to determine whether any particular bargaining demand comes within the list of non-arbitral items set out in s.48(2) and hence whether any particular item may be forwarded to arbitration. When a particular matter is determined to fall within the list of non-arbitral matters, the employer gains the right to make a unilateral decision whether to grant the demand or not. The right of the employees to engage in collective bargaining is curtailed to the extent that the Act confers upon the employer the unilateral right to determine terms and conditions of employment. On these matters employer-fiat is the rule. This provision limits the freedom of the employees to combine in the action of collective bargaining, and thus limits their freedom of association. The limit must be demonstrably justified under s.1. As discussed above in paragraph 41, the ILO Committee on Freedom of Association has determined that s.48(2) is contrary to the provisions of Convention 87.

<u>The Limitation of Arbitral Items Has Not Been Justified</u>

90. The Court of Appeal of Alberta held that it was not necessary to examine the justification advanced in support of the legislation. Before the Court of Appeal of Alberta the Attorney General advanced the following justifications for limiting the subjects that may be referred to arbitration:

> a. The matters are traditionally ones that are not the subject of collective agreements. [p. 38, Written Submission of the Attorney General]

b. The subjects are matters concerning the direction of work that management must have in its absolute control. [p. 38, Written Submission of the Attorney General]

c. It is difficult to conceive of the subjects in s.48(2) being of great concern to the employees as a collectivity. [p. 39, Written Submission of the Attorney General]

91. The purported rationale is not sufficient justification for the denial of the right to proceed to arbitration, and the conferral of power upon the employer to unilaterally set terms and conditions of employment covered by s.48.

92. The matters covered by s. 48 are all subject to collective bargaining and final arbitration or strikes for persons not covered by the Public Service Employee Relations Act R.S.A. 1980, c. P-33.

93. The matters covered by s.48 go far beyond the direction of work and are of vital interest to all the employees in the bargaining unit. Thousands of employees are vulnerable to unilateral changes in such vital terms of employment as the hours of work of office workers and the scheduling pattern for shift workers. In a series of decisions, the Public Service Employee Relations Board, while purporting to narrowly construe the subjects that are exempt from arbitration, has severely limited the scope of collective bargaining of public servants. Some examples of the bargaining demands which have been held to be non-arbitral and, therefore, within the unilateral power of the employer are:

a. that the "normal hours of work" schedule be defined to fall between certain hours on weekdays

AUPE v. The Crown in Right of Alberta, November 24, 1982[29]

b. that the existing schedule of hours of work be continued in the new collective agreement

AUPE v. Crown in Right of Alberta, November 12, 1982[30]

c. that a minimum of twelve hours be allowed off between shifts and that there should be no split shifts

AUPE v. ALCB, March 16, 1983[31]

d. that shifts be scheduled so that employees receive two days off in every seven calendar days and and that these two days off be Saturday and Sunday every second week.

AUPE v. The Crown in Right of Alberta, November 12, 1982[32]

e. that employees be given three consecutive days off, Saturday, Sunday and Monday every three weeks

AUPE v. ALCB, March 16, 1983[33]

f. that equal pay be paid for work of equal value

AUPE v. The Crown in Right of Alberta, November 12, 1982[34]

94. All of these matters may be the subject of collective bargaining in the private sector.

QUESTION 7 SHOULD NOT BE ANSWERED

95. The Majority of the Court of Appeal of Alberta determined that Question 7 ought not to be answered because it was purely hypothetical in the absence of any facts.

> In the end it is impossible to offer any meaningful answer to the question and respectfully I decline to offer any further answer.(p.34)

96. With respect, the Appellant submits that the Court of Appeal was correct to decline to answer Question 7.

PART IV

ORDER SOUGHT

97. It is respectfully submitted that:

a. this appeal should be allowed;

b. Question 1 should be answered: yes, to the extent that the Act contains an overly broad prohibition of the right to strike.

c. Question 4 should be answered: yes, to the extent that the Act denies the right to collectively bargain by making certain disputed terms and conditions of employment subject to unilateral employer determination.

d. Question 7 should be answered: no answer.

All of which is respectfully submitted.

Dated at Edmonton, the 16th day of April, 1985.

Timothy J. Christian

Timothy J. Christian,
Counsel for the Appellant,
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