

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN)**

BETWEEN:

THE GOVERNMENT OF SASKATCHEWAN, THE HONOURABLE
LORNE J. McLAREN, THE HONOURABLE LORNE H. HEPWORTH
and HIS HONOUR JUDGE ROBERT HARVIE ALLAN

**APPELLANTS
(RESPONDENTS)**

AND:

THE RETAIL, WHOLESALE AND DEPARTMENT STORE UNION,
LOCALS 544, 496, 635 and 955;

THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL
UNION, LOCAL P-241-1, P-241-2, P-241-3, P-241-4 and
P-241-6;

THE DAIRY AND PRODUCE WORKERS, LOCAL 834, AFFILIATED
WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
LOCAL 395;

MAURICE HNIDY, DOUG HAROLD, RON OROBKO, RON BOHN,
DEAN SCHENDEL, JOHN KUKURDZA, ALLAN GOYER, DON DECK,
DOUG LEITE, DAVID KLASSEN, REG COX, GORDON FAIRBURN,
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(APPLICANTS)**

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IN THE SUPREME COURT OF CANADA

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PART ISTATEMENT OF FACTS

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5 1. The Attorney General of British Columbia adopts the
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7 Statement of Facts as found in the Appellant's Statement of
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9 Facts.

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13 2. By order of this Court the Attorney General of
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15 British Columbia was granted leave to Intervene in respect
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17 of the constitutional questions in issue.

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PART II
POINTS IN ISSUE

3. The points in issue are those in the Order of the Chief Justice dated July 1, 1985 (Case on Appeal, p. 30), namely:

- (A) Does The Dairyworkers (Maintenance of Operations) Act, S.S. 1984, c. D-1.1, or any part thereof, infringe or deny freedom of association guaranteed in s. 2(d) of the Canadian Charter of Rights and Freedoms?
- (B) If The Dairyworkers (Maintenance of Operations) Act, S.S. 1984, c. D-1.1, or any part thereof, infringe or deny freedom of association guaranteed in s. 2(d) of the Canadian Charter of Rights and Freedoms, is the Act, or such part, justified by s. 1 of the Canadian Charter of Rights and Freedoms and therefore not inconsistent with the Constitution Act, 1982?

4. The Attorney General of British Columbia respectfully submits that the first question should be answered in the negative and the second, if it need be answered, in the affirmative.

PART IIIARGUMENT

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4 Does The Dairyworkers (Maintenance of Operations)
5 Act, S.S. 1984, c. D-1.1, or any part thereof,
6 infringe or deny freedom of association guaranteed
7 in s. 2(d) of the Canadian Charter of Rights and
8 Freedoms?
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12 5. The Attorney General of British Columbia adopts and
13 supports the submissions of the Appellant.
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18 6. The Attorney General of British Columbia
19 respectfully submits that freedom of association gives
20 everyone the "freedom to unite, to combine, to enter into
21 union, to create and maintain an organization of persons
22 with a common purpose": Dolphin Delivery Ltd. v. Retail
23 Wholesale and Department Store Union, Local 580, Peterson
24 and Alexander, [1984] 3 W.W.R. 481 at 490 (B.C.C.A.).
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34 7. The Attorney General of British Columbia submits
35 that freedom to associate "carries with it no constitutional
36 protection of the purposes of the association, or means of
37 achieving those purposes": Dolphin Delivery Ltd., supra,
38 at 492.
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46 8. Although the Charter does not afford the individual
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1 acting alone any less rights or freedoms than the individual
2 who acts in concert, there may be circumstances where the
3 Charter affords individuals acting in concert less
4 protection than it provides to individuals acting alone.
5 The bounds of freedom are transgressed when one person's
6 conduct interferes with the rights or freedoms of another.
7 Group conduct may be more likely to interfere with the
8 freedom of others than would individual conduct. In
9 response to the suggestion that "whatever course of action
10 X, or Y, or Z may each lawfully pursue when acting without
11 agreement, that course of action X, Y, and Z may all of them
12 lawfully pursue when acting together under an agreement",
13 A.V. Dicey stated:
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"but the right of association may, ... be looked upon as a right to a very special character, in that the exercise thereof may under certain circumstances greatly restrict the freedom of individuals. That this is so is due to the fact, which has received far too little notice from English lawyers, that, whenever men act in concert for a common purpose, they tend to create a body which, from no fiction of law, but from the very nature of things, differs from the individuals of whom it is constituted. Esprit de corps is a real and powerful sentiment which drives men to act either above, or, still more often, below the ordinary moral standard by which they themselves regulate their conduct as individuals. A body, moreover, created by a combination, - a natural corporation, if the expression may be allowed, - whether a political league, a church, or a trade union, by its mere existence limits the freedom of its members, and constantly tends to limit the freedom of outsiders. Its combined powers is

created by some surrender of individual liberty on the part of each of its members, and the society may from this surrender acquire a strength far greater than could be exercised by the whole of its members acting separately; a disciplined regiment of a thousand men, acting under command, is a far more formidable assailant than a thousand men who, even though armed, act without discipline and combination. An association may in this way constantly acquire powers which curtail the freedom of outsiders."

Reference: A.V. Dicey, Law and Public Opinion in England (2nd Ed, 1914) at 153 - 154

9. Even if one accepts, arguendo, the proposition put by the Honourable Chief Justice Bayda in the Court below that a person "is free (apart from s. 1 of the Charter) to perform in association without governmental interference any act that he is free to perform alone" (Case on Appeal, p. 194) this still does not advance the Respondents' position.

10. In the first place an individual can not, alone, strike or collectively bargain. By definition, strikes and collective bargaining can only be performed by individuals acting in concert: (see Arthurs, Carter and Glasbeek, Labour Law and Industrial Relations in Canada, 1984 2nd Ed. at pp. 33 & 35). Therefore the proposition is unhelpful.

1 11. Secondly, if Bayda, C.J. is suggesting that the
2 individual is "free", under the Charter to do something
3 which the Dairyworkers (Maintenance of Operations) Act, (the
4 "Act") denies to the individual acting in association, then
5 His Lordship fails to identify what section of the Charter
6 guarantees such a freedom to the individual. It obviously
7 cannot be s. 2(d), freedom of association. Yet, the
8 Respondents rely only on s. 2(d) of the Charter.
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18 12. Thirdly, if what Bayda, C.J. meant is that the
19 Legislature cannot choose to regulate or prohibit the
20 conduct of a group if it does not choose to regulate or
21 prohibit the same conduct when carried out by an individual,
22 that is not what occurs by the terms of the Act. The Act is
23 as applicable to the employee acting alone as it is to
24 employees acting in concert.
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34 13. Finally, and most importantly, it is incorrect to
35 say that the Legislature with the enactment of this Act
36 deprives the employees acting in association of a right or
37 freedom that an individual has by the common law (or what
38 Bayda, C.J. may have characterized as the "traditional
39 law": Case on Appeal, p. 196.). An individual at common law
40 is free to refuse to work or refuse to continue to work.
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1 Although the individual could not be compelled to work it
2 does not follow that any refusal to work was lawful. An
3 employer is entitled to treat the employee's absence from
4 work as a rescission of his/her contract. That, in turn, may
5 result in the employee being liable in damages. As
6 Cartwright, C.J. stated in C.P.R. Co. v. Zambri, [1962]
7 S.C.R. 609 at 617:

8 "The employee cannot have it both ways; if he is
9 still an employee it is his duty to work, and if
10 he refuses to work he is in breach of the contract
11 of employment and the employer can treat it as at
12 an end."

13 See also: Reference Re (Alberta) Public Service Employee
14 Act (1984), 16 D.L.R. (4th) 359 at 390
15 (Alta. C.A.)

16 14. The Act does not deny to the individuals acting in
17 association what the individual acting alone is free to do.
18 The employees can in association refuse to work and
19 rescind their employment relationship. The Act, in
20 otherwords, does not prevent the employees from quitting,
21 for whatever reason, even en masse. The Act does prohibit
22 an "employee" from participating in a "work stoppage against
23 the employer" and does require "the employees" to "resume
24 the duties of their employment" but this does not mean that
25 the employees can not quit. What the Act does is put the
26 employees to the choice of quitting or resuming the duties

1 of their employment. The Act takes from the employees the
2 comfortable middle ground afforded to them by the Trade
3 Union Act, R.S.S. 1978, c. T-17, where the employees could
4 refuse to work without being in breach of contract or of the
5 law and which gave the employees a right to return to work
6 after the strike: Trade Union Act, R.S.S. 1978, c. T-17,
7 ss. 2(f)(iii), 11(1)(1), 34(1) & 45. The Act denies to the
8 employees some of the statutory protections and rights
9 previously afforded to employees who refuse to work as a
10 means of compelling their employer to negotiate a collective
11 agreement. The Act thus denies to the employees statutory
12 protections and rights consequent upon a refusal to work as
13 a means of effecting the terms and conditon of employment
14 that the individual at common law never had.
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30 15. Neither the Appellant nor the Courts below at any
31 time suggest that the Act prevents the employees from
32 quitting their jobs and thereby refusing to work. Whether
33 the Legislature could do so is a question which need not,
34 and therefore ought not, be answered in this case.
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42 16. The Respondents however, without suggesting that the
43 Act prevents employees from quitting their jobs, either
44 oversimplify the issue or raise an issue that is not
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1 presented by the Act. At paragraph 9 of the Factum the
2 Respondents state that the appeal raises the fundamental
3 question whether "workers in Canada [are] free to withdraw
4 their labour if the terms upon which they work are
5 unsatisfactory ...". At paragraph 65 the Respondents say
6 that the workers "have the right to refuse to work for an
7 employer". At paragraph 69, it is said that workers are
8 "free not to work". The Respondents wonder why the employer
9 has a right to go out of business but the employee has no
10 right to "withdraw their labour" (para. 70 of the
11 Respondents Factum).
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25 17. The issue in this case is not whether employees are
26 free to refuse to work. The issue is whether a worker has a
27 constitutional right to refuse to work with impunity -
28 without being fired, disciplined or subject to damages or
29 civil or criminal liability. The issue is whether a worker
30 who refuses to work has a constitutional right to resume his
31 employment relationship. It is only at paragraph 71 of
32 their Factum that the Respondents begin to address the real
33 issue posed by the Act. The Respondents query why workers
34 do not have the right to "withdraw their labour
35 temporarily". The question implies that workers should
36 unilaterally be able to return to their jobs when it suits
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1 them and do so without repercussion. The Respondents fail
2 to demonstrate that the common law ever gave the worker
3 acting alone or in concert the rights that they submit are
4 afforded to them by the Constitution.
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10 18. In conclusion, therefore, it is submitted the Act
11 simply deprives the dairyworkers of some of the protection
12 and rights that the Legislature (by virtue of the Trade
13 Union Act, R.S.S. 1978, c. T-17) had previously conferred.
14 This cannot be a violation of the dairy workers' "freedom of
15 association". As Dickson, C.J. stated in Big M Drug Mart
16 Ltd. v. The Queen (1985) 58 N.R. 81 at 81 "freedom" is to be
17 "primarily ... characterized ... by the absence of coercion
18 or constraint". Freedom does not depend on legislative
19 action. Nor does it impose obligations on any private
20 party. Bayda, C.J. was correct in his conclusion that
21 freedom, unlike a right, "does not impose a duty": Case on
22 Appeal, p. 185. His Lordship however was, with respect,
23 wrong in concluding that the Act deprived the Respondents of
24 any freedom.
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41 19. It is respectfully submitted, therefore, that the
42 Act does not infringe or deny freedom of association and
43 therefore the first question posed in the Order of the Chief
44 Justice should be answered in the negative.
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1 If The Dairyworkers (Maintenance of Operations)
2 Act, S.S. 1984, c. D-1.1, or any part thereof,
3 infringe or deny freedom of association guaranteed
4 in s. 2(d) of the Canadian Charter of Rights and
5 Freedoms, is the Act, or such part, justified by
6 s. 1 of the Canadian Charter of Rights and Freedoms
7 and therefore not inconsistent with the Constitution
8 Act, 1982?
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12 20. If the submissions of the Attorney General of
13 British Columbia are correct, then it is, of course,
14 unnecessary to resort to s. 1 to justify the enactment of
15 the Act. Should the Court proceed to answer the second
16 question, it is the submission of the Attorney General of
17 British Columbia that the question should be answered in the
18 affirmative for the reasons advanced by the Appellant.
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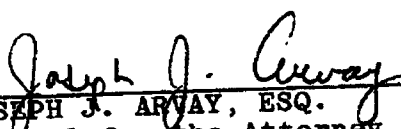
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28 21. To hold that the right to strike and the right to
29 collectively bargain are constitutionally protected under
30 the guarantee of freedom of association would mean that any
31 law which conditioned, qualified or prohibited the right to
32 strike or collectively bargain would have to be justified
33 under s. 1 of the Charter. It is respectfully submitted
34 that this would not only trivialize the guarantee of freedom
35 of association in s. 2(d) of the Charter, but would also
36 shift from the legislature to the courts responsibility for
37 most, if not all, question of labour policy.
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PART IV

NATURE OF ORDER SOUGHT

22. The Attorney General of British Columbia respectfully requests that the appeal be allowed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED


 JOSEPH J. ARVAY, ESQ.
 Counsel for the Attorney General of
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DATED: this 19th day of September, 1985, Victoria, B.C.

LIST OF AUTHORITIES

	<u>PAGE NO.</u>
1	
2	
3	
4	
5	
6	
7	
8 1. <u>Big M Drug Mart Ltd. v. The Queen</u> (1985)	10
9 58 N.R. 81	
10	
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12	
13 3. <u>A.V. Dicey, Law and Opinion in England</u>	5
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15	
16 4. <u>Dolphin Delivery Ltd. v. Retail Wholesale</u>	
17 <u>and Department Store Union, Local 580,</u>	
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21 5. <u>Arthurs, Carter and Glasbeek, Labour Law</u>	
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28	8
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