

Court No. 19430

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 834,

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA,
LOCAL 395,

MAURICE HNIDY, DOUG HAROLD, RON OROBKO, RON BOHN,
DEAN SCHENDEL, JOHN KUKURUDZA, ALLAN GOYER, DON
DECK, DOUG LEITE, DAVID KLASSEN, REG COX, GORDON
FAIRBURN, ANDY STARIUALA, LANCE BROWNBRIDGE,

RESPONDENTS
(APPLICANTS)

FACTUM OF THE ATTORNEY GENERAL OF ALBERTA

INTERVENANT

(For the names and addresses of the Solicitors for
the Parties and their respective Ottawa Agents see
inside title page)

IN THE SUPREME COURT OF CANADA

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PART 1
STATEMENT OF FACTS

1. The Attorney General of Alberta adopts the Statement of Facts set out in the Factum of the Appellant.

PART 2

POINTS IN ISSUE

2. The points in issue in this Appeal are set out in questions stated by the Court:

- (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?

3. The position of the Attorney General of Alberta is that the first question should be answered in the negative and the second question, if it is necessary to answer it at all, should be answered in the affirmative.

PART 3
ARGUMENT

4. The Attorney General of Alberta adopts the submissions of the Appellants and will confine its argument to the first question stated by the Court.

5. The Court has adopted a "purposive" approach to interpretation of Charter rights and freedoms.

The meaning of a right or freedom guaranteed by the Charter [is] to be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood, in other words, in light of the interests it was meant to protect.

R. v. Big M Drug Mart Ltd. [1985] 3 W.W.R. 481 (S.C.C.)
at 524 (TAB 1)

6. This purpose is to be determined by reference to:
- (a) the character and larger objects of the Charter itself;
 - (b) the language chosen to articulate the specific right or freedom;
 - (c) the historical origins of the concepts enshrined;
 - (d) where applicable, the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter.

The Character and Larger Objects of the Charter Itself

7. The purpose of the Charter has been held by this Court to be "the unremitting protection of individual rights and liberties" (Big M, TAB 1, p.526). The Court has emphasized that it is the liberty of the individual - a basic feature of our democratic political tradition - that has been protected. It is reasonable to conclude that in guaranteeing freedom of association it is some interest of the individual that the Charter means to protect.

The Language Chosen to Articulate the Specific Right or Freedom

8. The language chosen to articulate the freedom of association is that of Section 2(d) of the Charter.

Everyone has the following fundamental freedoms: . . .
(d) freedom of association.

9. Significant features of that language include:

(a) the first word "Everyone" indicates that it is an individual interest that is protected in Section 2(d).

(b) the word "fundamental" indicates the "centrality of the freedoms enumerated to basic beliefs about human worth and dignity and to a free and democratic political system". (Big M, TAB 1, p.526)

10. Others have ascribed significance to the separate enumerations of "association" and "assembly" and in the use of a noun structure ("of

association") rather than a verb structure ("to associate"). However any interpretation founded on this type of technical subtlety deserves the opprobrious designation "legalistic" and diverts the analysis from its goal.

The Historical Origins of the Concepts Enshrined

11. Useful summaries of the historical origins and development of freedom of association are found in the following works.

C.E. Rice, Freedom of Association, New York, University Press 1962, Chapters I and II (TAB 2)

D. Fellman, Constitutional Right of Association, 1961 Supreme Court Review 74 (TAB 3)

W.O. Douglas, Right of Association, (1963) 63 Columbia Law Review 1361 (TAB 5)

C.E. Wyzanski, Jr., The Open Window and the Open Door (1947) 35 California Law Review 336 (TAB 6)

12. It is observed in these works that, ironically, many of the same philosophers who championed the integrity and dignity of individual liberty considered free association to be dangerous and undesirable.

13. Plato for example ". . . held throughout to the theory that the State is the paramount agency for the satisfaction of the needs of the individual, and that to it the individual owes an undivided loyalty undistracted by partial allegiances."

C.E. Rice, Freedom of Association, (TAB 2, p.3)

14. Hobbes in The Leviathan wrote ". . . all uniting of strength by private man, is if for evill intent unjust; if for intent unknown, dangerous to the Publique."

quoted in Open Door and Open Window, (TAB 6, p.344)

15. The same attitude was reflected in governmental policy regarding free association. For example, French revolutionists dissolved all trade guilds, corporations and unions and punished any association of more than twenty persons not authorized by the government.

Rice, Freedom of Association, (TAB 2, p.16)

16. Among the drafters of the American constitution there were some whose views paralleled this historical attitude. Madison denounced factions or unions of citizens ". . . who are united and actuated by some common impulse or passion, or of interest, adverse to the rights of other citizens, or to the paramount and aggregate interests of the community".

quoted in Rice, Freedom of Association, (TAB 2, p.37)

17. It is not surprising that when the Americans overcame their initial reluctance to adopt a bill of rights at all, the bill they adopted did not explicitly recognize the freedom of association.

18. The reason for this hostility to free association is simple. There is strength in numbers. When governments are in their infancy or are not supported by a large segment of those governed by them, the combined strength of dissenters can constitute a serious threat to the security of that government.

19. Clearly, something has happened in the last 200 years to effect a change of attitude. Present day western societies consider freedom of association to be a fundamental element of individual liberty - a healthy phenomenon.

20. Curiously, the characteristic of association that renders it desirable in the modern western State is the same characteristic that rendered it undesirable in the past - that there is strength in numbers. There has been no change in the character of association. What has changed is the character of the State.

21. The States which recognize and protect freedom of association are those that have adopted democratic popular government. These governments have the support of the majority. Their support is a function of universal suffrage and their character is markedly different from that of the States historically repressive of free association.

22. Enjoying the support of the majority, the modern government is strong and powerful. A practical consequence is the individual exercising freedom of expression finds his voice overwhelmed. It is therefore now recognized that in order that the individual's voice not be completely drowned out some mechanism of amplification is required. The joining of his voice with others meets this requirement.

23. The evolution of the modern democratic state with universal suffrage has therefore fostered recognition of freedom of association as a valuable

element of individual liberty in that it provides a means by which the individual can hope to make the powerful majority hear him.

The Meaning and Purpose of the Other Specific Rights and Freedoms
with which it is Associated within the Text of the Charter

24. Freedom of association is listed with three other fundamental freedoms, freedom of conscience and religion, freedom of expression and freedom of peaceful assembly.

25. This group of freedoms share two obvious characteristics upon which comment has already been made. They are guaranteed to the individual and they are "fundamental".

26. In the Big M case the purpose of protecting freedom of conscience and religion was determined to be to ensure " . . . that every individual [is] free to hold and to manifest whatever beliefs and opinions his or her conscience dictates provided, inter alia only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own" (TAB 1, p.526).

27. Though the "purpose" of protecting freedom of expression has not yet been articulated by the Court, it could not be very much different from that already articulated for freedom of conscience and religion.

28. The purpose of protecting freedom of expression must be to ensure that every individual is free to express whatever beliefs and opinions his or

her conscience dictates provided only that such expression does not injure his or her neighbour or neighbours or their parallel rights to express beliefs and opinions of their own.

29. Just as the religion and expression freedoms protected in Section 2 are complimentary and overlapping, the assembly and association freedoms have purposes which compliment and enhance freedom of religion and expression.

30. Accordingly, the purpose of protecting freedom of assembly is to ensure that the individual voice is not rendered ineffective by laws which limit the opportunity for other individuals to come and hear it.

31. The purpose of protecting freedom of association will similarly be to compliment and enhance the other Section 2 freedoms.

Conclusion

32. The analysis of these aspects of freedom of association results in the following observations:

1. the purpose of the freedom must be to protect some interest of the individual;
2. the interest protected must be basic to the human worth and dignity and to a free and democratic political system;

3. association is valued because it provides a means by which individual voices can be amplified and heard by the powerful majority;
4. the purpose of protecting the freedom is that it enhances and enriches the other fundamental freedoms.

33. These observations compel the conclusion that freedom of association is intended to ensure that the potential strength of the individual is not restricted or impaired by laws which limit the opportunity for other individuals to join their voices with it. If free of such restriction, the joined voices can effectively play a role in influencing the majority, a role which is essential for the proper operation of our democratic political system and the recognition and maintenance of the human worth and dignity of its individual components.

34. It is no part of the purpose of freedom of association to constitutionally protect a right of the association to engage in any particular form of conduct not otherwise constitutionally guaranteed to the individual. Its purpose is to enhance the quality and effectiveness of the protections granted to the individual in Section 2 (a), (b) and (c).

35. Obviously, once joined with others the individuals associated will engage in forms of conduct with a view to the achievement of their goals. But if that conduct is not otherwise constitutionally protected it does not gain constitutional protection simply because it is being engaged in by more than one person at a time. If a government considers such conduct undesirable it must be as competent to restrain it as it would be if the conduct were engaged

in by an individual alone. Such restraint does not deprive the association of potency. Because of Section 2(d) of the Charter, the individuals associated are still able to:

. . . show their numbers, and to lessen the moral authority of the majority and . . . by stimulating competition . . . discover the arguments most likely to make an impression on the majority . . .

Alexis de Tocquville, Democracy in America, ed. Mayer and Lerner, 1966 (Pt 2 c. 4) (TAB 4, p.178)

36. It is submitted therefore that freedom of association does not protect for the individuals associated a right to engage in conduct not constitutionally protected to the individual. As collective bargaining and strike are not activities constitutionally protected for the individual, neither are they constitutionally protected for the association.

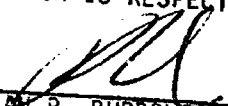
PART 4

NATURE OF ORDER SOUGHT

37. The Attorney General of Alberta respectfully submits that question 1 should be answered in the negative and question 2, if it is necessary to answer it at all, should be answered in the affirmative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Per:


BRIAN R. BURROWS,
Counsel for the Attorney General
for Alberta

850152-1/7

LIST OF AUTHORITIES

<u>TAB</u>	<u>AUTHORITY</u>	<u>PAGE OF REFERENCE IN FACTUM</u>
1.	<u>R. v. Big M Drug Mart Ltd. [1985]</u> <u>3 W.W.R. 481 (S.C.C.) at 524</u>	3,4,8
2.	<u>C.E. Rice, Freedom of Association, New York,</u> <u>University Press 1962, Chapters I and II</u>	5,6
3.	<u>D. Fellman, Constitutional Right of Association,</u> <u>1961 Supreme Court Review 74</u>	5
4.	<u>Alexis de Tocqueville, Democracy in America,</u> <u>ed. Mayer and Lerner, 1966 (Pt 2 c. 4)</u>	11
5.	<u>W.O. Douglas, Right of Association,</u> <u>(1963) 63 Columbia Law Review 1361</u>	5
6.	<u>C.E. Wyzanski, Jr., The Open Window and the</u> <u>Open Door (1947) 35 California Law Review 336</u>	5,6