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 STATUES OF ALBERTA, 1980 RESPECTIVELY;

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

ON SEPTEMBER 18, 19, 20, 21, 24 AND DECEMBER 17, 1984.

FACTUM OF THE APPELLANT
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PART I
STATEMENT OF FACTS

1. The Appellant, the Alberta International Fire Fighters Association (hereinafter referred to as "The Association") is an umbrella organization comprised of representatives from all local Fire Fighter Associations within the Province of Alberta, and as such represents approximately 2,300 fire fighters employed in Alberta.

2. The Appellant Association is not itself a trade union under the provisions of the Labour Relations Act R.S.A. 1980 c. L-1.1, however each of the local associations which belong to it is a trade union under the provisions of that Act.

3. Under the Act:

"Section 2(3)

All Fire Fighters except the Chief and Deputy Chiefs have the right:

(a) To be members of a trade union and to participate in its lawful activities and;

(b) Bargain collectively with their employer through a bargaining agent;

(4) The bargaining unit for Fire Fighters who bargain collectively shall be the Fire Fighters of the Fire Department of a municipality excluding the Chief and Deputy Chiefs.

4. The definition of "Fire Fighters" provides:

"1(1) In this Act

> m.1) "Fire Fighters" means the employees, including officers and technicians employed by a municipality and assigned exclusively to fire protection and fire prevention duties, notwithstanding that those duties may include the performance of ambulance or rescue services."

Thus the "Fire Fighters" here under consideration are employees of municipalities.

5. Prior to 1983 the Labour Relations system insofar as it related to Fire Fighters employed by municipal employers, was governed by the provisions of the Fire Fighters and Policemen's Labour Relations Act R.S.A. 1980 c. F-11, attached hereto as Appendix i. This legislation prohibited strikes by Fire Fighters and required the resolution of bargaining impasses by means of compulsory arbitration.

6. In 1983 Bill 44, the Labour Statutes Amendment Act, 1983 was enacted repealing the Fire Fighters and Policemen's Labour Relations Act insofar as it related to Fire Fighters employed by municipalities in Alberta, and making them subject to the provisions of the Labour Relations Act of Alberta as amended by Bill 44, and in particular the provisions of Sections 117.1 to 117.94, attached hereto as Appendix ii. These provisions carry forward the prohibition against strikes by Fire Fighters and institute new procedures and requirements for compulsory arbitration.

7. By Order-In-Council 141/84, dated February 29, 1984 the Lieutenant Governor in Council of Alberta referred seven questions to the Alberta Court of Appeal for hearing and consideration.

(Case on Appeal, pages 1 and 2)

By letters dated April 3, 1984 local Fire Fighter Associations received notice of the Reference

(Case on Appeal, page 3)

8. The Fire Fighter Local Associations applied to participate in the Reference through their umbrella organization, the Alberta International Association of Fire Fighters, which Association was joined as a participant in the Reference by the Order of McGillivray, C.J.A., dated May 11, 1984.

(Case on Appeal, pages 4-7)

9. After hearing argument on the Reference September 18, 19, 20 and 24, 1984 the Court of Appeal rendered the Opinion of the Court on December 17, 1984.

(Case on Appeal, pages 52-111)

10. The Appellant, Alberta International Fire Fighters Association appeals to this honourable court pursuant to Section 37 of the Supreme Court Act R.S.C. 1970 c. S-19 from the Opinion of the Court of Appeal of Alberta.

(Case on Appeal, pages 10-13)

11. By Order dated March 11, 1985 the Honourable Chief Justice of Canada stated the Constitutional questions in this

appeal.

(Case on Appeal, pages 28-43)

12. All members of the Alberta Court of Appeal certified that questions one to three should be answered in the negative. The opinion of Mr. Justice Kerans concurred in by the Honourable Chief Justice McGillivray, the Honourable Mr. Justice McDonald and the Honourable Mr. Justice Stevenson was that questions four to six accordingly required no answer, and that question 7 should not be answered. The Honourable Mr. Justice Belzil was of the opinion that questions four to six should be answered in the negative, and that question seven should be answered in the affirmative.

13. The Appellant, Alberta International Fire Fighters Association will address itself in its submissions to questions number two and number five, as these questions deal with the legislation insofar as it effects Fire Fighters.

14. The Appellant, Alberta International Fire Fighters Association is not appealing the refusal of the majority of the Court of Appeal to answer question number seven.

PART II
POINTS IN ISSUE

15. The points in issue in this appeal, insofar as it relates to the Appellant Alberta International Fire Fighters Association, are set out in questions two and five of the Notice of Constitutional Questions as stated by this Court, namely:

> 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 lockouts and strikes, 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?
>
> 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?

16. The Appellant Alberta International Fire Fighters Association, takes the position that: the provisions of Section 117.1 through 117.94 abridge the freedom of association of Fire Fighters; that the Respondent, Attorney General of Alberta has failed to discharge the burden of establishing that the legislation is justified under Section 1 of the Charter of Rights; and that the legislation abridges the equality before the law of Alberta Fire Fighters.

PART III
ARGUMENT

Threshold Issue: Does the Charter guarantee of "freedom of association" encompass collective action?

A. Historical Context

17. In 1960 the Progressive-Conservative government of Prime Minister John Diefenbaker enacted the Canadian Bill of Rights. This document was enacted as an ordinary statute of the federal parliament and was made applicable only to federal laws. It was therefore not an entrenched constitutional document. Moreover, the failure to extend the Bill of Rights to the provinces raised serious questions as to its efficacy. Notwithstanding these limitations, the Bill of Rights, undoubtedly did provide some additional protection for the values which it guaranteed as demonstrated by the judicial decisions which construed and applied it.

18. The patriation of the British North America Act 1867 (renamed the Constitution Act, 1967 by the Constitution Act, 1982) together with the enactment of the Canadian Charter of Rights and Freedoms in 1982 has resulted in an entirely new path for Canadian constitutional law. The purpose of the Constitution Act, 1982, it is submitted, is to define and expressly guarantee certain civil libertarian values which are regarded as so basic that they should receive specific recognition and immunity from state action. The civil liberties identified in the Charter encompass a broad range of values which include political

liberties such as freedom of speech, freedom of religion and freedom of assembly, legal rights relating to freedom arrest, search, seizure of property, imprisonment, self-incrimination and fair trials and treatment, economic liberties such as contract, and egalitarian liberties such as education and employment.

19. It is in this historical context that the Charter of Rights and Freedoms was enacted as part of the Constitution Act, 1982. It is evident from the nature of the document that it was intended as an overriding instrument. This is reflected in the approach which courts have taken to the interpretation and application of the Canadian Charter of Rights and Freedoms.

B. Liberal Construction

20. The rights and freedoms guaranteed by the Charter should receive a broad and liberal construction.

Hunter et al v. Southam
(1984) 11 D.L.R. (4th) 641

C. The Two Stages of Judicial Interpretation

21. The Judicial approach to the interpretation and application of the Charter of Rights and Freedoms is to first determine the scope of the right or freedom at issue before addressing whether any limits which may have been placed on this right or freedom can be justified.

Quebec Association of Protestant School Boards et al v. Attorney General of Quebec et al (#2), (1982)

140 D.L.R. (3d) 33 affirmed by the Quebec Court of Appeal in (1982) 1 D.L.R. (4th) 573

22. McDonald J. held in Re Soenen and Thomas et al (1984) 3 D.L.R. (4th) 658, that the rights and freedoms guaranteed must initially be interpreted in an absolute sense rather than in a relative sense. Otherwise section 1, which articulates the grounds on which the guaranteed rights and freedoms may lawfully be limited, would be redundant.

23. As Kerans, J.A. puts it in the opinion of the majority (p. 6) ". . . the interpretation of the Charter proceeds in two stages, one first defines the right: then one determines whether the proposed limit on the right is permissible."

24. It is submitted that this two step approach to interpretation is the proper approach to the issue here.

D. The Definitional Stage

25. The first step is to assign in an absolute sense a meaning to the phrase "freedom of association". It is useful to deal with the components of the phrase "freedom of association". It is submitted that "freedom" in the absolute sense is not derived from positive law or governmental action but rather from an absence of positive law or governmental action. It follows that "freedom" as used in the absolute sense in the Charter simply means without restriction or constraint.

26. The distinction in the Charter of the words "freedom" and "right" should also be examined. A "right" is a legally

protected interest whereas a "freedom", the absence of constraint, is a much broader concept.

27. What then is the meaning of "association"? It is respectfully submitted that the essence of "association" is mutuality of purpose and action in the sense of producing a result due to joint and concerted action. "Association" can usefully be contrasted with "aggregation". "Aggregation" is the mere adding together of separate contributions, each operating independently of the other, with the result that the elements of the aggregation are incapable of producing a unitary result. On the other hand, "association" implies joint and mutual purpose and action which combine to produce a result.

28. As noted by the majority at p. 10, the Attorney General of Alberta submitted "freedom of association, then may include a coming together but it does not include acting together. It may include the right to organize for a purpose; it does not include action to effect that purpose".

29. The phrase "freedom of association" used in the sense urged by the agent for the Attorney General would mean that freedom of association with respect to a political party would simply enable persons to share a common political identity but would not protect any concerted activity in order to achieve their political goals. With respect to a religion it would mean that adherents to a religion would not be protected in concerted action to promote their beliefs.

30. The freedom to form and join a trade union is meaningless unless it carries with it the freedom to engage in

concerted action for the purposes of the association. The object of associating in the context here is to enable workers to further their economic interests through concerted activity.

31. The Submission of the Attorney General would render "association" as coextensive with "assembly". In this context it is useful to note the difference in treatment as between the Bill of Rights and the Charter. In the Bill of Rights, section 1(e) guarantees "freedom of assembly and association". Under this treatment it might be possible to construe the terms "assembly" and "association" as being synonymous. Under the Charter, however, the treatment is different. Section 2(c) speaks of "freedom of peaceful assembly" and Section 2(d) speaks of "freedom of association". It is submitted that Parliament clearly intended freedom of association to stand as an independent fundamental freedom in its own right. Otherwise it would have been pointless to enumerate the two types of freedom separately.

32. It is important to note that where Parliament intended in the Section 2 freedoms a definitional stop in the sense discussed by Kerans J. it clearly provided for it; it is not all "assembly" that is protected, but only "peaceful assembly".

(a) International Law as an Aid to Interpretation

33. Two of the three judges in the Broadway Manor case (O'Leary J. and Smith J.) made extensive reference to international labour law including international conventions to which Canada is a party. Indeed, substantial emphasis was placed upon Convention No. 87 Concerning Freedom of Association and the

rulings of the International Labour Organization Freedom of Association Committee in terms of determining the scope of freedom of association under the Charter.

34. When approaching the problem of interpreting the meaning of freedom of association under the Charter, regard should be had to the principle that an interpretation ought to be preferred which is consistent with Canada's international legal obligations.

Regina v. Big M. Drug Mart Ltd. (1984)
5 D.L.R. (4) 121 at 149 (Belzil, J.A.)

35. In general terms, from the point of view of interpreting legislative enactments, Parliament is deemed not to legislate in violation of international obligations and the result is that legislation is construed to be consistent with international legal obligations in the absence of a clear intention to do otherwise.

36. The Appellant Alberta International Association of Fire Fighters adopts the submissions of the Appellant Alberta Union of Provincial Employees in this regard (AUPE factum, pages 14-22.)

37. It is submitted the Alberta Court of Appeal erred in holding that the international conventions either did not embrace a right to strike or were not relevant to construction of the meaning of the phrase "freedom of association".

(b) The Common Law Roots of Trade Union Association as an Aid to Interpretation

38. In order to appreciate the aspect of freedom of association which is under consideration here, that is, freedom of association with respect to the pursuit of economic goals, it is useful to examine the historical context of economic association and review the fundamental principles which underlie the industrial relations system in the current Canadian setting. This requires an examination of the evolution of social, economic and legal thinking about the nature and incidents of the employment relationship.

39. The notion that employees could band together under the protection of the law and use their collective economic strength to bargain for improved wages and working conditions is very much a product of the twentieth century. A century ago the typical wage bargain was struck between an individual "servant" and his "master" rather than negotiated between the employer and a union. The legal rules governing this master-servant relationship had developed over centuries and reflected social and economic values which had evolved during the middle ages and the industrial revolution.

40. Prior to 1348 there was almost a total absence of law dealing with the labour contract as such due to the small scale of industrial development. The control the master had over his journeymen or apprentices was shaped primarily by regulations of the numerous guilds. The advent of the "Black Death" and the depopulation that ensued from it resulted in labour scarcity and a shift in bargaining power. These factors set the stage for the

1349 Emergency Ordinance of Labour which was confirmed in 1351 by the Statute of Labour. A central feature of these laws was the introduction of the concept of duty to labour according to fixed and defined standards. They were designed to inhibit the individual bargaining power that the Black Death had released by compelling persons to labour and fixing wages at pre-plague prices and later according to a schedule of wages. These statutes initiated a policy whereby a labour contract and the labour relationship were accorded a different status than that given to other contracts and relationships. The right to employ one's economic bargaining power, otherwise commonly recognized, was denied a labourer seeking to dispose of his labour. In labour contracts a statutory criminal liability was added to the civil liabilities that the common law attached to violation of other types of contracts.

41. This notion of using statutory criminal law to enforce individual contracts of employment persisted for centuries and the legal view of the individual employment contract profoundly affected the evolution of collective bargaining as a form of concerted economic activity. Initially, a strike, a concerted refusal to work, was seen as interference with the sanctity of the individual bargain struck between worker and employer. Persons encouraging workers to break their promise to work or encouraging workers to refuse to make such a promise unless under certain conditions were suppressed by criminal and civil sanctions and the power of the state was mobilized to defend the individual employment contract.

42. The needs of a developing industrial society for a mobile labour force which could be hired, laid off or paid at

fluctuating rates of pay demanded a less rigid and more flexible legal framework. The formal employment contract gradually came to be replaced by a tenuous at-will relationship where the employer was not legally bound to employ his workers for the fixed term of a contract and neither were the workers legally bound to stay at work.

43. Modern trade unionism began to develop towards the end of the 18th century when state regulation of wages, hours and working conditions began to die and began to be replaced by a belief in the economic doctrine of "laissez-faire" capitalism. Individual action became the watchword of 19th century society which asserted that competition on every level of economic activity was the natural order of things and would bring the greatest prosperity. Workers were regarded as individual units of labour which in the logic of the free-enterprise system were to be priced in accordance with laws of supply and demand. When workers combined against an employer they interfered with those laws and introduced an alien element which prevented the employer from competing effectively. The result, of course, was an obvious conflict between trade unionism, its very essence being combined action, and this "laissez-faire" framework of economic activity.

44. By the end of the 19th century, however, the legislative response to labour organization was changing from one of repression to one of tolerance as restraints on the right of association were lifted and the sphere of legitimate union activity was expanded by amendments to the criminal law. By the end of the 19th century the doctrine of criminal conspiracy ceased to be of overriding significance in relation to labour

management disputes and the permissible limits of peaceable picketing began to be expanded.

45. Of course, in the world of trade, competition often resulted in traders combining but in such cases the combination was deemed to be in legitimate pursuit of self-interest and was considered to be simply competition on a broader scale.

Mogul Steamship Co. v. McGregor, Gow & Company
[1892] A.C. 25.

46. Collective trade union activity eventually came to be accepted as legitimate on the same basis but its acceptance was slow in coming. Indeed, the first full acceptance of collective trade union activity in the common law is in the case of:

Crofter Handwoven Harris Tweed Company v. Vetsch
[1942] A.C. 435.

47. In an earlier Canadian case, Hynes v. Fisher (1884) 4 O.R. 60 the existence of legitimate competing interests in labour relations received judicial recognition. At page 70 Chief Justice Wilson puts it this way:

> From the nature of the present difference between the masters and men, the object of each party is to compel the other to yield; the men will not work unless upon certain terms; the masters will not agree to these terms, and desire to get workmen; the men may not get work if other workmen will give the masters their services, the masters, if they get other workmen, will be able to go on with their business, and fulfill their contracts independently of these men. The pressure upon

> the masters is, to stay their business until they yield to the terms of the men. The pressure upon the men is to hire other men in their place unless they will take work upon the terms of the masters. The longer each side can maintain this state of things, the more distressing it will be for the one or the other of them, although perhaps it may be equally distressing to both of them.
>
> If the men will not work and will not allow the masters to get men to work for them, the masters must either give up their business or their contracts. This is the line of warfare so plainly marked out, and so obviously the most effective that can be adopted that it is idle to say it is not followed, nor intended to be followed, by the workmen in such a contest.

48. More recently, in C.P.R. v. Zambri (1962) (2d) 654, Mr. Justice Locke of the Supreme Court of Canada confirmed that the right to associate in trade unions and to strike existed at common law and was not merely a right conferred by statute. As Justice Locke put it, at page 657. "No statutory permission is necessary to participate in the lawful activities of any organization".

49. There is no single public interest with respect to collective bargaining but a series of competing public interests. On the one hand, there is a public interest in the preservation of the right to associate and to act collectively; on the other hand there is the public interest in the continuation of services in the face of a labour-management impasse.

50. The logic of the collective bargaining system is simple. The power of each side to negotiate effectively derives from the

ability to inflict economic damage on the other. The freedom to strike and the possession of the organization and support to do so are of prime importance in the bargaining relationship.

51. Having regard to the ordinary meaning of the phrase "freedom of association" itself, the principles of statutory construction, the meaning and the content of the phrase in international conventions and treaties, and the content and scope of association at common law, it is respectfully submitted that the phrase "freedom of association" includes the freedom to engage in collective economic activity including the concerted withdrawal of labour.

The Secondary Issue: Reasonable Limits Prescribed by Law in a Free and Democratic Society

52. If "freedom of association" as guaranteed by the Charter encompasses collective action, then Section 1 of the Charter permits "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

53. The Alberta Court of Appeal (having decided that the Charter guarantee of "freedom of association" did not encompass collective action) did not consider whether the provisions of The Labour Relations Act here under consideration were "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

A. Historical Context

54. The initial voluntary rejection by Fire Fighters of the

use of the strike sanction was incorporated into provincial legislation in 1953 with the enactment of the Fire Departments Platoon Act. This legislation provided for the compulsory binding arbitration of interest disputes between municipalities and their Fire Fighters. Similar provisions were contained in the 1953 Police Act with respect to collective labour relations between municipalities and their police officers.

55. Since 1953 Fire Fighters and police officers have had legislation containing provisions for arbitration of collective bargaining disputes. In 1970 the enactment of the Firefighters and Police Officers Labour Relations Act merged the Fire Departments Platoon Act and the labour relations provisions of the 1953 Police Act into a single piece of legislation which contained a labour relations code for municipalities and their Fire Fighters and police officers.

56. This Act explicitly prohibited policemen and Fire Fighters from striking and subjected their interest disputes to compulsory, binding arbitration as a terminal step in a collective bargaining dispute impasse.

B. The Essential Services Rationale

57. The rationale behind the compulsory arbitration substitute for strike action is simple. Strike action by particular groups of employees in society can be so devastating to the public interest that another form of dispute resolution should be imposed and economic sanctions prohibited. In theory the compulsory arbitration system is designed to produce the results which would have been achieved in a free collective

bargaining situation where economic sanctions were permissible.

58. The concept of compulsory arbitration is that when either party has the ability to institute compulsory arbitration the effect is much the same as when the union is able to strike and the employer is able to resist the strike.

59. The threat of arbitration as a tool to bring about a negotiated settlement is meaningless unless there exists uncertainty as to what the ultimate result will be. It is only uncertainty and the consequent risk as to the ultimate result which has a coercive effect on the parties and tends to move the parties towards a negotiated settlement. Certainty and compromise in a compulsory arbitration system are rationally inconsistent.

Are the restrictions on the "freedom of association" of Alberta Fire Fighters "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"?

60. It is respectfully submitted that the Charter guarantee of "freedom of association" requires that withdrawal of the freedom to strike must be accompanied by fair and adequate safeguards to protect employees in their economic relations with their employers. It is against this standard that the provisions of Section 117.1 - 117.94 must be considered.

A. Section 117.8: The Statutory Criteria - The Provincial Treasurers Fiscal Policy as a Mechanism of Wage Restraint.

61. Section 117.8 provides:

117.8 To ensure that wages and benefits are fair and reasonable to the employees and employer and are in the best interest of the public, the compulsory board

(a) shall consider, for the period with respect to which the award will apply, the following:

(i) wages and benefits in private and public and unionized and non-unionized employment;

(ii) the continuity and stability of private and public employment, including

(A) employment levels and incidence of layoffs,

(B) incidence of employment at less than normal working hours, and

(C) opportunity for employment;

(iii) any fiscal policies that may be declared from time to time in writing by the Provincial Treasurer for the purposes of this Act; and

(b) may consider, for the period with respect to which the award will apply, the following:

(i) the terms and conditions of employment in similar occupations outside the employer's employment taking into account any geographic, industrial or other variations that the board considers relevant;

(ii) the need to maintain appropriate relationships in terms and conditions of employment between different classification levels within an occupation and between occupations in the employer's employment;

(iii) the need to establish terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered;

(iv) any other factor that it considers relevant to the matter in dispute.

62. In the compulsory arbitration system rules, standards and principles intended to offer aid as criteria in the adjudicative decision-making process must have sufficient clarity to be capable of rational application to the particular dispute. Their dimensions must be clear and they must be capable of consistent measurement. If they are vague and blatantly incapable of consistent application they cannot offer aid in a meaningful way.

63. It is submitted that the only way in which the criteria established in Section 117.8 of the Labour Relations Act can apply is if the "fiscal policy" of the Provincial Treasurer is taken to be etched in stone, operating not on the basis of an adjudication process but on the basis of the dictates of the Provincial Treasurer. Then the adjudicative process cannot be meaningful and will only be a sham and an illusion.

64. It is submitted that the object of these provisions is wage restraint and that is clearly the intention of the legislation. However, in imposing wage restraint the provincial government has singled out Fire Fighters and nurses (and under other legislation, police officers and other public employees). The pith and substance of this legislation is wage restraint and

it is applied unevenly, attacking only public sector employees. This is unlike the Anti-Inflation Act, the federal legislation, which was aimed at both private and public sector employees.

65. It is generally accepted that employers and employees should be on equal footing in terms of their positions in strike situations or at compulsory arbitration where the right to strike is withdrawn. Where arbitration is substituted for the right to strike it is commonly accepted in the international law treaties subscribed to by Canada that the dispute resolution system must be independent, fair and binding. In order for this to be the case, it must be open to both sides, the employer and the union, to attempt to persuade the arbitrator what criteria or guidelines ought to be considered in reaching a resolution in a particular dispute.

66. It should be open to employers in the public sector, as it always has been, to try to persuade the arbitrator that the criteria of ability to pay should be taken into account and applied in a particular dispute. However, it is illegitimate for the Provincial Treasurer, as the paymaster indirectly standing behind municipal employers, to straight jacket the arbitration process by unilaterally fixing the rules relating to the question of ability to pay.

67. What is objectionable about this legislation is that the arbitrator now has no discretion as to whether or not ability to pay is an important or determinative criteria or even a relevant criteria in any particular dispute.

68. There is no way of challenging the Provincial Treasurer's declaration of "fiscal policy".

69. The Government has set up a system whereby the Provincial Treasurer can make a declaration as to fiscal policy for the purposes of specific interest arbitrations. This may or may not be the fiscal policy of the Government across the economy at large. Indeed, it is quite conceivable that the Government could have a hold-the-line or roll-back fiscal policy for interest arbitrations and an expansionist fiscal policy in other areas. The fiscal policy declared by the Government for the purpose of compulsory arbitrations might be totally unnecessary or unreasonable. However, there is no method by which the parties to the compulsory arbitration process can challenge or question the validity of the declared fiscal policy.

70. The factor of comparability has been applied by virtually all arbitrators as the most important criteria in the determination of public sector wages. The following comments are typical:

> Fairness remains an essentially relative concept, and it therefore depends directly upon the identification of fair comparisons if it is to be meaningful; indeed, all of the generally stated pleas for fairness inevitably come around to a comparability study. It appears to me that all attempts to identify a doctrine of fairness must follow this circle and come back eventually to the doctrine of comparability if any meaningful results are to be achieved.
>
> Kenneth Swan, The Search for Meaningful Criteria in Interest Arbitration, 1978.

71. The Provincial Treasurers declaration of "fiscal policy" undermines the adjudicative foundation of the interest arbitration process.

72. The Act requires that arbitration boards consider "any fiscal policies that may be declared from time to time in writing by the Provincial Treasurer for the purposes of this Act". To date there are two fiscal policy statements. The first is dated November 9, 1983 and is attached as Appendix iii. The second is dated July 20, 1984 and is attached as Appendix iv. These fiscal policies do not establish a period of operation. Indeed, the first operated for less than a year. The two policies are a mere eight months apart. It seems that the fiscal policy of the Government can change at the whim of the Provincial Treasurer.

73. These two documents purport to give reasons for the policy declared. The reasons set out appear to have no connection to the policy declared except possibly a suggestion that the Government lacks the ability to pay. If so, what that in effect means is that, by the device of the declaration, the Provincial Treasurer ties the hands of arbitrators by preventing even an inquiry into the merits of an inability to pay position.

74. It is submitted that this wage restraint mechanism offends the obligation of the government to provide fair and adequate safeguards for the protection of the economic interests of Fire Fighters in substitution for the freedom to strike.

B. The Non-Unionized Employment Criteria of Comparison

75. By Section 117.8(a)(i) - set out above - the arbitration board must also consider wages and benefits in private and public, unionized and non-unionized employment.

76. This requirement is a direct attack on the fundamental purpose of trade union association. The whole theory of associating together as a trade union is that by associating together employees are able to negotiate improved terms and conditions of work. The legislation requires, in determining what wages should be awarded to unionized employees, who have sought to improve their collective bargaining power by associating together, that arbitration boards must consider wages and benefits of non-unionized employees. This circumvents the whole purpose of associating together as such comparison is bound to result in lowering the wages of the unionized employees.

C. Final Offer Selection - All or Nothing Arbitration

77. Section 117.7 provides:

> (1) On receipt of a notice under Section 117.6, the compulsory arbitration board shall inquire into the items in dispute and endeavour to effect a settlement.
>
> (2) If the compulsory arbitration board is unable to effect a settlement, it shall consider the position of the parties on each item in dispute and determine what method or combination of methods of arbitration it shall implement to resolve any or all of the items in dispute.

> (3) Without restricting the generality of subsection (2), the method or combination of methods of arbitration determined under that subsection may include the method of arbitration known as "final offer selection".

78. The theory of final offer selection is that one way in which arbitration can be made to act as an incentive to settlement is to force the arbitrator to choose the position of either one side or the other and deny the arbitrator the power to make any award that is intermediate between the two positions. Theoretically, rather than have its position rejected because it is too extreme, each party will moderate its demands and the positions will tend to converge at a mid-point which will become the point of settlement.

79. This is known as all-or-nothing arbitration and it is open to attack on a number of grounds. In the first place, it assumes that a strike would not take place. This, of course, is not the case in conventional collective bargaining circumstances. Moreover, the great danger of such legislation is that it has the very real potential of virtually destroying one party to a dispute because the other party is possibly marginally, at best, more reasonable. Finally, there is the tremendous practical difficulty of deciding which of two positions is more reasonable, particularly when each position consists of a package of specific demands that cannot be compared with each other on an individual basis.

80. For example, what often happens in a labour dispute is that management may be seeking a management's rights clause while labour may be seeking a union security clause. There is no real

basis of weighing the merits of the two positions as part of a package. Management may be taking the position that it will pay a certain monetary package in a particular form which divides wages and fringe benefits. The trade union may be insisting that, although the total monetary figure involved is acceptable, the way in which it is divided up is not.

81. All-or-nothing arbitration cannot be applied satisfactorily to most disputes, even from a theoretical basis, let alone in terms of its practical results. There is no real adjudication involved in all-or-nothing arbitration and no criteria can be applied. Surely such an approach, although it may be acceptable in particular disputes where the parties agree to its use, should not be available at the whim of an arbitrator

D. Union Security and the Employer's Power to Cancel Union Check-off

82. Section 117.94(1) permits an employer to unilaterally cancel the remission of union dues, thereby permitting an employer to financially cripple a trade union whose members go on strike. It provides as follows:

> 117.94(1) If a strike of employees to which this Division applies commences, the employer, notwithstanding any collective agreement or any other provision of this Act, may serve the bargaining agent that represents those employees with a notice of intention to suspend the deduction and remittance of union dues, assessments or other fees payable to the bargaining agent.

(2) A notice of intention under subsection (1) shall specify

(a) the bargaining unit or part of the bargaining unit with respect to which the employer intends to suspend the deduction and remittance of union dues, assessments or other fees, and

(b) a time period of not less than 1 month and not more than 6 months with respect to which the employer intends the suspension to be in effect.

(3) A bargaining agent affected by the notice under subsection (1) may apply to the Board within 72 hours of service of the notice, but not thereafter, for a determination as to whether or not a strike has occurred.

(4) If the bargaining agent does not make an application under subsection (3), the employer may suspend the deduction and remittance of union dues, assessments or other fees in accordance with the notice of intention under subsection (1) at any time after 72 hours from the service of the notice.

(5) If the bargaining agent makes an application under subsection (3), the employer shall not suspend the deduction and remittance of union dues, assessments or other fees unless and until the Board makes a determination under subsection (6)(b) that a strike has occurred.

(6) If the bargaining agent makes an application under subsection (3), the Board may

(a) if it determines that no strike has occurred, cancel the notice of intention under subsection (1), or

(b) if it determines that a strike has occurred, confirm the notice of intention

under subsection (1) and order that the suspension may take place

(i) for the period specified in the notice of intention, or

(ii) for a period of not less than 1 month and not more than 6 months specified by the Board

and thereupon the employer may suspend the deduction and remittance of union dues, assessments and other fees in accordance with the notice of intention.

(7) Unless sooner revoked by the employer, the suspension under subsection (4) or (6) shall continue

(a) until the end of the period specified in the notice of intention under subsection (1), or

(b) if the Board has specified a period under subsection (6), until the end of that period.

(8) Notwithstanding any collective agreement or any other provision of this Act, an employee does not become ineligible for employment with an employer only because he fails to pay union dues, assessments of other fees the deduction and remittance of which have been suspended under this section.

(9) At the end of the suspension period as determined under subsection (7) the employer shall resume the deduction and remittance of union dues, assessments and other fees in accordance with the collective agreement, but nothing in this subsection requires the employer to deduct and remit union dues, assessments and other fees with respect to the suspension period.

> (10) No provision may be made in a collective agreement in substitution for the suspension of the deduction and remittance of union dues, assessments and other fees under this section.

83. The effect of section 117.94 is to give employers sweeping and unilateral powers with respect to suspending the deduction and remittance of union dues subject only to a right of the trade union to apply to the Labour Relations Board after the fact. The "appeal" period is 72 hours of service after the Cancellation Notice, a time in which, if it falls on a weekend followed by a holiday the Labour Relations Board may not even be accessible. The result of a failure to make an application is that the employer can then implement its suspension of the deduction and remittance of union dues, assessments or other fees on its own motion.

84. The essence of this section is to make the employer the judge and jury in a penal sense with respect to an aspect of freedom of association which is crucial to trade unions. The operation of this section of the Labour Relations Act amounts to empowering the employer, by its own unilateral decree, to effectively emasculate the operation of a trade union by depriving it of its financial resources.

85. Union financial security is an important ingredient in the Canadian collective bargaining system. It is intolerable to permit the employer to emasculate the union by cutting off the source of financial support. It is not reasonable or just that the employer should be entitled to unilaterally impose economic capital punishment upon the union.

86. Of course, the possibility of illegal strikes exists in the labour relations system at large. The legislation of most jurisdictions has specifically prohibited trade unions from authorizing or employees from participating in strikes during the currency of a collective agreement. Disputes are to be resolved by arbitration or some other adjudicative measure. Hence a strike during the term of a collective agreement is unlawful and may expose the participants to disciplinary sanctions and quasi-criminal consequences. However, in these circumstances the sanctions are only invoked after determination is made by a Labour Relations Board of the illegality of the concerted activity. In the provisions we are concerned with this is not the case. Under these provisions it is the employer, one of the participants in the very dispute in issue, who arbitrarily, without due process, and without any requirement of a hearing can unilaterally declare that an illegal strike has occurred and impose a penalty on the trade union. This is contrary to all notions of fundamental justice.

87. Section 15 (1) of the Charter, which is now in effect, provides:

> 15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefits of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

These provisions apply only to Nurses and Fire Fighters - no similar law exists in respect of any other class of employees in Alberta. Nurses and Fire Fighters have been singled out for

special treatment and it is submitted that there is absolutely no rational justification for this differential treatment.

88. Most importantly, these sections infringe the fundamental freedom of association guaranteed by section 2(d) of the Charter since they permit the employer to financially emasculate the association and thereby, for all practical purposes, destroy the association itself.

E. Ministerial Discretion as to The Parameters of the Dispute

89. Section 117.6 of the Labour Relations Act requires the Minister to "list the items in dispute to be resolved by the compulsory arbitration board".

90. Under the old legislation it was the parties who established what issues were in dispute and that seems only logical and sensible. Here there is no procedure established whereby a determination can be made as to what issues are in dispute.

91. The danger, of course, is that the section seems to empower the Minister, by means listing the items to be resolved by the compulsory arbitration board, to arbitrarily determine the parameters of the dispute.

F. Ministerial Discretion: Conditions Precedent to Remission to Arbitration

92. With respect to the establishment of a compulsory

arbitration board, previously either party had an absolute right to remit the matter to an arbitration board.

93. Under the new provisions of the Labour Relations Act even if both parties wish to remit the matter to arbitration the establishment of an arbitration board is still dependent upon the discretion of the Minister:

> 117.3 When he receives a request for the establishment of a compulsory arbitration board, the Minister,
>
> (a) if he considers it appropriate, may direct the parties to continue collective bargaining and may prescribe the procedure or conditions under which collective bargaining is to take place, or
>
> (b) if he is satisfied thatcedure or conditions under which collective bargaining is to take place, or
>
> (c) if he is satisfied that the dispute is appropriate to refer to a compulsory arbitration board, may establish a compulsory arbitration board in accordance with this Division.

94. Indeed the new provisions seem to require double mediation. First the parties have to submit to the government-appointed mediator:

> Section 117.2(1) If a dispute affecting an employment to which this Division applies cannot be resolved, either or both parties to the dispute may make a request for the establishment of a compulsory arbitration board to

(a) the mediator, if one has been appointed with respect to the dispute, or

(b) the Director, if no mediator has been appointed with respect to the dispute.

(2) When he receives a request under subsection (1)(b), the Director shall appoint a mediator in accordance with section 84(2) and forward the request for the establishment of a compulsory arbitration board to the mediator.

(3) The mediator shall endeavor to effect a settlement in accordance with section 86 and shall, not later than 14 days after he receives a request under subsection (1) or (2),

(a) list the items in dispute and the items that have been settled by the parties, and

(b) forward the list and the request for the establishment of a compulsory arbitration board to the Minister.

95. Then the Arbitration Board itself is required to "endeavor to effect a settlement" prior to arbitration:

117.7(1) On receipt of a notice under section 117.6, the compulsory arbitration board shall inquire into the items in dispute and endeavor to effect settlement.

This is surely redundant and is bound to cause unnecessary delay, expense and inconvenience at the very least.

Are the Limitations Reasonable?

96. Turning now to a consideration of whether the limitations identified can be shown to be reasonable limits demonstrably justified in a free and democratic society, Mr. Justice Galligan in the Broadway Manor case set out the following tests:

> (1) Is the object of the legislation a reasonable objective in the advancement of the common good?
>
> (2) Is the legislative program reasonably appropriate to the furtherance of the object of the legislation?
>
> (3) Is the infringement reasonably necessary to the success of the legislative program?
>
> (4) Is the infringement too great a price to pay for the presumed benefit to be obtained from the legislation?

Although this is not necessarily exhaustive of all the matters which should properly be considered in this context, it is useful to deal consider the legislation here on the basis of the tests set out by Mr. Justice Galligan.

97. It is respectfully submitted that, to be upheld, limitations on Charter freedoms must be demonstrably justified. See: Dr. Reich v. College of Physicians and Surgeons of Alberta The Attorney General for Alberta in his submission at page 34, argued three tests which should be considered in determining whether limitations on Charter freedoms are demonstrably justified: rationality, proportionality and comparability. With

respect to all three tests, the only argument advanced is the essential services rationale for the prohibition against strikes and lockouts.

98. It is respectfully submitted that in the economic context freedom of association as guaranteed by the Charter includes the freedom to act collectively and with that the freedom to strike. When dealing with an essential service, the danger of allowing the freedom to strike to the members of the association may justify limitations placed upon that freedom pursuant to section 1 of the Charter. This is a fact that Fire Fighters have long recognized and voluntarily accepted. Indeed Alberta Fire Fighters have never engaged in strike action.

99. The previous legislation already prohibited strikes by Fire Fighters. Insofar as Fire Fighters are concerned, it is not the prohibition against strikes as such which of concern: it is the fairness of the system imposed as a substitute for the economic sanction of the strike and the inadequacy of safeguards to protect the economic interests of Fire Fighters.

100. It is submitted that no reasonable justification for the Labour Relations Act provisions affecting Fire Fighters was advanced by the Attorney General of Alberta and it is submitted that the onus rests upon the Attorney General to demonstrate the reasonableness of the limitations identified. It is respectfully submitted that the Attorney General has failed to discharge the onus upon him with regard to the compulsory arbitration provisions of the Labour Relations Act as they relate to Fire Fighters.

101. Thus, while limitations on the freedom to strike guaranteed by the Charter may be imposed, it is also necessary pursuant to the Charter that those limitations be reasonable. The limitations established by division 1.1 of the Labour Relations Act not only are unreasonable but they also violate some of the most basic rights and freedoms which the Charter guarantees. To be reasonable we must have a system which replaces the freedom to lockout and strike with an equally fair, balanced and efficacious system. What has been established by the Labour Relations Act is a system which sets apart two associations, Fire Fighters and Nurses.

102. It is respectfully submitted that these provisions of the Labour Relations Act are not in the public interest. The provisions in question can only lead to disillusionment, dissatisfaction and unrest, a situation which can only harm the community at large.

103. The Minister of Labour, Mr. Young in moving the second reading of Bill 44 to the Legislature addressed the object of the legislation at some length. These comments are reported in Alberta Hansard, May 27, 1983, page 1197 to 1201.

104. It is ironic in the extreme that the stated objective of Mr. Young in introducing the Bill was the goal of treating the parties fairly. On May 31, 1983, at page 1275 of Alberta Hansard, the Minister of Labour contended "we are trying to achieve a basis of equity as between private-sector and public-sector employees" and he continued at the same page:

There are a few principles that should be reflected upon. One of the principles is that it's a fundamental responsibility of this Legislature and of any government to provide a balance between the private-sector and the public-sector employees, whom we, I trust, respect wherever they are. It is fundamental that we try to provide justice to citizens as recipients of public services. The Hon. Member for Vermilion-Viking reflected upon that great difficulty. Those of us who listened to our constituents during campaigning in the last election, who listened during strikes that we've had that interrupted important hospital services, understand very keenly that there is a balance that has to be struck - and we are the ones who must strike it; we are the ones who are responsible - between the privilege and the capability to have a strike as a means of resolving an impasse, which in my view is not a part of a fundamental right. Fundamental rights, as the Hon. Leader of the Opposition should well know, are rights such as freedom of association and freedom of speech.

The ability to bargain collectively - and he may check the ILO documentation. The ILO, in the manner in which it treats collective bargaining, clearly demonstrates that it isn't a fundamental right. It goes further: it is a lower order of ability even that there should be a capacity to have a strike. That is well recognized in the ILO documentation that the Hon. Member for Edmonton Norwood read tonight. [interjections]

Mr. Chairman, the very essence of this Bill that has attracted so much attention to those two basic points: the need that we have to assure the needed services of the population and to be fair to them and, in the second instance, the need to assure that the arbitrators, if they are necessary to resolve an impasse, take into account comparability in its widest and most precise form that we can give it and also the responsibility for

> government fiscal policy. Those are not weighted in terms of the expression in the statute and, therefore, there is a vast area of judgment for the arbitrators or whoever must weigh those matters. In that sense, I think it will be a very great challenge for anyone to show that there is in any way a loss of impartiality, to use the honourable member's expression.

105. As can be seen from the foregoing, the view of the Alberta Minister of Labour was that strikes as a means of resolving a bargaining impasse are not part "of a fundamental right", nor was the "ability to bargain collectively".

106. Since the Minister of Labour does not regard the ability to bargain collectively and to strike as part of a fundamental freedom or right it is not surprising that the amendments adopted by the Legislature failed to reflect any regard for "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

PART IV
ORDER SOUGHT

107. It is respectfully submitted that:

(a) This appeal should be allowed;

(b) Question 2 should be answered in the affirmative to the extent that the Act prohibits strikes and substitutes a system of compulsory arbitration;

(c) Question 5 should be answered in the affirmative to the extent that the Act denies an effective and reasonable alternative to resolve collective bargaining disputes.

All of which is respectfully submitted.

Dated, this 23rd day of April, 1985.

Barrie Chivers

Barrie Chivers
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Fire Fighters Association

LIST OF AUTHORITIES

1. Hunter et al v. Southam (1984) 11 D.L.R. (4th) 641 (Factum, page 7).

2. Quebec Association of Protestant School Boards et al v. Attorney General of Quebec et al (#2), 1982 140 D.L.R. (3d) 33 affirmed by the Quebec Court of Appeal in (1982) 1 D.L.R. (4th) 573 (Factum, page 7).

3. Re Soenen and Thomas et al (1984) 3 D.L.R. (4th) 658 (Factum, page 8).

4. Regina v. Big M. Drug Mart Ltd. (1984) 5 D.L.R. (4) 121 at 149 (Belzil, J.A.) (Factum, page 11).

5. Mogul Steamship Co. v. McGregor, Gow & Company [1982] A.C. 25 (Factum, page 15).

6. Crofter Handwoven Harris Tweed Company v. Vetsch [1942] A.C. 435 (Factum, page 15).

7. Hynes v. Fisher (1884) 4 O.R. 60 (Factum, page 15).

8. C.P.R. v. Zambri (1962) (2d) 654 (Factum, page 16).

9. Broadway Manor (1984) 4 D.L.R. (4th) 231 (Factum, page 35)

10. Dr. Reich v. College of Physicians and Surgeons of Alberta, April 6, 1984 unreported (Factum, page 35)

APPENDIX

NO.	
i	Fire Fighters and Policemen Labour Relations Act
ii	Alberta Labour Relations Act, RSA 1980, Division 1.1, Sections 117.1 - 117.94
iii	Fiscal Policy, November 9, 1983
iv	Fiscal Policy, July 20, 1984