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 CANADIAN UNION OF PUBLIC EMPLOYEES,

Appellant,

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

Respondent.

FACTUM OF THE CANADIAN UNION OF PUBLIC EMPLOYEES, APPELLANT

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PART I

STATEMENT OF FACTS

1. The Appellant, Canadian Union of Public Employees, (hereinafter referred to as CUPE) is a trade union under the provisions of the Labour Relations Act, R.S.A. 1980, c.L-1.1 and the Public Service Employee Relations Act, R.S.A. 1980, c.P-33, and has in excess of 5000 members employed in Alberta who are affected by the provisions of the said Acts.

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 CUPE 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 CUPE appeals to this Honourable Court pursuant to s.37 of the Supreme Court Act R.S.C. 1970, c.S-19 from the judgment 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 Constitution 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 sections 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 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 Judicary;

(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 to 3 should be answered "no". The majority were of the opinion that Questions 4 to 6 accordingly required no answer and that 7 should not be answered. Belzil J.A. was of the opinion that Questions 4 to 6 should be answered "no" and Question 7 should be answered "yes".

6. The Appellant CUPE will concern itself with the answers given to Questions 1, 2, 4 and 5 as these questions deal with the legislation which affects its members. The Appellant CUPE is not appealing the Court of Appeal's refusal to answer Question 7.

PART II

POINTS IN ISSUE

7. The points in issue in this appeal are Questions 1, 2, 4 and 5 as set out in Part I.

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

(a) The Public Service Employee Relations Act and the Labour Relations Act are prima facie inconsistent with the guarantee of freedom of association contained in s.2(d) of the Constitution Act, 1982 insofar as they prohibit strikes, and substitute therefore schemes of compulsory arbitration.

(b) 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 and the Labour Relations Act are justified under s.1 of the Constitution Act, 1982.

PART III

ARGUMENT

STAGE I - SCOPE OF FREEDOM OF ASSOCIATION

A. TWO STAGE PROCEDURE

9. Issues under the Canadian Charter of Rights and Freedoms ("Charter") are to be approached in two steps: first, a determination of whether a guaranteed right or freedom has been infringed; and second if there has been such infringement, whether it is justified under s.1 of the Charter.

Re Federal Republic of Germany and Rauca (1983) 145 D.L.R. (3d) 638, at 654 (Ont. C.A.).

10. It is submitted that, at the first stage, the rights and freedoms are interpreted in an absolute sense and not subject to implied or judicially-created limitations. This is particularly so in the case of the fundamental freedoms where no modifying words are found. To do otherwise would be to avoid the clear requirements of s.1.

Re Soenen and Thomas et al (1983) 3 D.L.R. (4th) 658, at 667-69 (Alta. Q.B.);

Re Service Employees' International Union Local 204 and Broadway Manor Nursing Home et al (1984) 4 D.L.R. (4th) 231, at 303-04 (Ont. Div C.); rev'd on other grounds (Ont. C.A., Oct. 22, 1984, unreported).

11. The Alberta Court of Appeal correctly, it is submitted, accepted this proposition and held that at the definitional stage in Charter interpretation, before application of the express balancing power in s.1, the Court should not balance "with a definitional stop... The significance is that in defining a Charter right, the Court need not be troubled by arguments

reciting the mischief which can arise if the right is absolute. Those problems generally are the concern of legislatures and judges only on invocation of s.33 or s.1."

Case on appeal, pp. 59-60.

B. LIBERAL INTERPRETATION

12. The Charter, as a constitutional document, and one which sets forth in a broad and ample style basic human rights and fundamental freedoms, is to be liberally and generously interpreted so as to avoid "the austerity of tabulated legalism." What is called for is a broad purposive analysis.

Hunter et al v. Southam Inc. (1984) 11 D.L.R. (4th) 641, at 649-650 (S.C.C.).

C. FREEDOM OF ASSOCIATION

(1) Ordinary Meaning

13. Black's Law Dictionary, Fifth Edition defines "association" as follows:

"The act of a number of persons in uniting together for some special purpose or business. It is a term of vague meaning used to indicate a collection or organization of persons who have joined together for a certain or common object. Also, the persons so joining; the state of being associated."

14. The verb "associate" is defined as follows:

"Signifies confederacy or union for a particular purpose, good or ill. To join together, as e.g. partners."

15. These definitions demonstrate that an association is not a random grouping of persons, but a group linked for a purpose. Such purpose is an integral part of the meaning of the term. Freedom to combine for a purpose must mean freedom to effect that purpose because the continuing pursuit of the purpose is what maintains the essential character of association. Otherwise, upon the conception of the purpose as a group, the character of association would be spent.

(2) Independent Freedom

16. How do persons associate, link or combine for a purpose? It is submitted that freedom of association embraces combining for a purpose rather than simply gathering with a purpose in mind, for the freedom to congregate or attend meetings and express a purpose would come within the scope of freedom of assembly (s.2(c) of the Charter) and freedom of expression (s.2(b) of the Charter).

17. Further, association is distinct in that it need not necessarily involve physical proximity and it need not necessarily involve group discussion, communication or advocacy. People associate, link or combine for a purpose by taking steps to effect that purpose, beyond those which would be embraced by assembly and expression.

18. Freedom of association is the subject of a separate and express guarantee in s.2(d) of the Charter. As such it is submitted that this freedom must have independent force and meaning apart from the freedoms of assembly and expression. Any other construction would render superfluous the guarantee found in s.2(d) of the Charter, and therefore should not be adopted.

Williams v. Box (1910) 44 S.C.R. 1, at 24;

Barrett v. Winnipeg (1892) 19 S.C.R. 374, at 384-85; rev'd on other grounds [1892] A.C. 445 (P.C.).

19. The Alberta Court of Appeal rejected this argument, stating that no reason was offered "to prefer the view that the structure of the Charter was intended to add something new and not just make explicit that which is elsewhere only implicit." It is respectfully submitted that the Court erred in law in failing to give effect to the presumption that all parts of the Charter are of equal weight and no part of the Charter should be treated as superfluous.

Case on appeal, p. 68.

(3) Fundamental Freedom

20. Apart from meeting together and discussing together, how do persons associate? Sometimes, groups may produce formal indicia of association, such as membership rolls or group names. It is submitted that, while such indicia may be the subject of constitutional protection, the existence of freedom of association itself can scarcely depend upon or be limited to these trappings of associations.

21. It is submitted that the essential nature of association is concerted action directed towards a common purpose. The taking of purposive action as a group is the sole demonstration of the linking, joining or combining that constitutes "associating" and creates an "association". Apart from concerted, purposeful activity the only demonstrations of association are joint assembly and speech, which are separately protected under the Charter, and the mere formal trappings of "association". Freedom

of association must mean more than the first two, if any independent meaning at all is to be assigned to s.2(d), and must mean more than the third, which would be a hollow and meaningless freedom in and of itself.

22. The Alberta Court of Appeal, after holding that the independent guarantee of freedom of association did not necessarily create a substantive guarantee separate from other parts of s.2 of the Charter, found in the alternative that if "something new" were secured it would be only "protected organization" and not "protected action".

Case on appeal, p.68.

23. It is respectfully submitted that the Court erred in law in reaching this conclusion. The wording of s.2(d) does not suggest that a distinction be drawn between activities involved in creating or maintaining an association, and activities of the association that effect the purpose for which the association was created. Such a distinction will inevitably be difficult to define, and may lead to the creation of arbitrary categories of activities. Further, such a distinction, as noted by the Court of Appeal, gives rise to the criticism that a sham freedom is created whereby "we cherish groups but not what they do." It is submitted that such a definition of freedom of association is inconsistent with the requirement for a liberal and purposive interpretation of the Charter.

Case on appeal, p. 64;

Hunter et al v. Southam Inc., supra.

24. It is respectfully submitted that, for the foregoing reasons, the guarantee of "freedom of association" protects the freedom to combine in act and in purpose. It is submitted that the guarantee of freedom of association so construed does not give any particular purpose or activity any more or less constitutional protection than it would have if an individual formed that purpose or performed that act. To the extent that the Alberta Court of Appeal has suggested otherwise, it is respectfully submitted that they have misconstrued the argument. The proposition is simply that to be free to associate, persons must be free to and not prohibited from or penalized for combining in act or purpose.

Case on appeal, p.66.

(4) Absolute Freedom

25. It is submitted that, for the reasons discussed at paragraphs 10 - 11 herein, freedom of association should be defined in an absolute sense, and not subjected to implied limits. Any concerns regarding the mischief which might thereby be caused should be dealt with at the second stage of Charter analysis within the express confines of s.1.

26. Although the Alberta Court of Appeal expressly approved this approach, they further found that due to possible oppression by groups arising out of their collective strength, and due to the unique qualities that groups may possess, the definition of freedom of association proposed by the Appellants should be rejected.

Case on appeal, pp. 59-60, 76-77.

27. It is respectfully submitted that the Court erred in law in failing to properly apply the two-stage analysis called for under the Charter, and in implying limits into the definition of freedom of association due to possible mischief. It is submitted that the characteristics of associations identified by the Court may justify their reasonable regulation in a number of contexts. However, questions as to justification in a particular context or the reasonableness of a particular regulation should be dealt with by a s.1 inquiry.

(5) Purposive Analysis

28. What purpose or policy is served by the definition of freedom of association as freedom to combine in act and in purpose? It is submitted that associations are formed to take actions to implement certain purposes or forward certain interests. "The basic value of this associational action is that it allows an individual to achieve through collective effort what he might not otherwise be able to achieve for himself."

> R. Raggi, An Independent Right to Freedom of Association, 12 Harv. C. Rts. - C.Lib. L.Rev. 1, at 11 (1977).

29. It is submitted that the Charter, in providing an independent freedom of association, has recognized that allowing individuals to combine their efforts for the achievement of common purposes is a fundamental aspect of our democratic society. As Esson, J.A. stated in Dolphin Delivery Ltd. v. Retail, Wholesale and Department Store Union, Local 580 et al. (1984) 10 D.L.R. (4th) 198, at 211 (B.C.C.A.):

> "...the significance of the freedom of association... [is] the fact that large numbers of individuals, acting in concert, can influence events in ways and to an

> extent that would not be possible without association. That is particularly true in the political field. The freedom of association in section 2, in combination with the individual right to vote in section 3 and the requirement in section 4 that elections be held within five years, is a potent combination..." (emphasis added).

30. It is submitted that the value of freedom of association is not limited to the political sphere, and that the Charter does not so limit it. Associations may act in a number of different ways to achieve their purposes. Consumer groups may combine to boycott products. Community groups may join together to build facilities and to organize cultural, recreational or social events. With s.15 of the Charter now in effect, minority interest groups may collectively raise funds to support court challenges to existing laws that affect their members. In every case, where the groups are taking actions not prohibited for individuals, any attacks on the group actions would be attacks on association per se. It is submitted that the government motivation for such legislation should be examined. If the association activity in a particular context is rationally distinguished from the individual activity and if regulation of the association is required to support important government objectives, that is a limit on freedom of association that can be justified under s.1. If the legislation cannot withstand such scrutiny, it is submitted that the right to combine in action and purpose should prevail.

31. The Alberta Court of Appeal rejected the proposition that freedom to associate means that every Canadian is free to do with others that which he is free to do alone. The Court found difficulty with this proposition because of the different meanings of freedom in the two parts of the sentence:

"...counsel, in the first part, intend to say "free" in the sense of a constitutionally protected right; in the second, they mean "free" in the common law sense that we are all free to do that which is not forbidden."

Case on appeal, p. 78.

32. It is submitted, with respect, that these different meanings of freedom should offer no difficulty in understanding or applying the proposition, or in appreciating its value. Black persons are free in Canada to do whatever white persons are free to do. "Free" in the first part of this sentence refers to the constitutionally protected right to equal protection of the law. "Free" in the second part is used in the common law sense. The fact that the latter freedom may be subject to legislative intervention does not remove the constitutional guarantee of the former freedom, nor lessen its significance. That significance in the case of equal protection lies in the entrenched right of minority groups to equal treatment; in the case of associations, it is found in the guarantee that individuals may combine their exertions and thereby realize goals not attainable to them alone. In either case, the Charter is acting to protect persons who lack sufficient political, social or economic power to protect their own interests without this assistance.

33. It is submitted that further support for this approach and conclusion is found by examining the definition of "freedom" from the Concise Oxford Dictionary:

"Personal liberty, non-slavery,...; civil liberty, independence...; liberty of action, right to do,... exemption from defect, disadvantage, burden, duty, etc..."

34. There are two aspects to this definition: a liberty to act; and an exemption from defect or disadvantage imposed due to such action. The second aspect might be described as the "non-discrimination" element of freedom. Applying the definition, freedom of association means not only liberty to associate, but further that persons should not be discriminated against or suffer disadvantage for so associating.

35. It is submitted that to prohibit individuals from doing in association acts which they are free to do as individuals constitutes such discrimination.

36. The Alberta Court of Appeal, in dealing with an issue of freedom of religion, has stated that freedom of religion, at a minimum, requires that government in Canada shall not discriminate among religions. On the same basis, it is submitted, discrimination against all religions or all forms of association would be prohibited. The religious, or individuals who are associated together, are protected from suffering adverse consequences for exercising their freedom.

R. v. Big M. Drug Mart Ltd. (1984) 5 D.L.R. (4th) 121, at 136-39 (Alta. C.A.).

(6) Pre-existing Right

37. It is submitted that in analyzing freedom of association the Court should have regard to the freedom that associations or combinations of workers have enjoyed under the common law and statutory law as it has developed to date. This is so because the freedoms found in s.2 of the Charter comprise a codification of essential, pre-existing and more or less universal rights which are being given new primacy and inviolability by entrenching them in the supreme law of the land. This approach

has been implicitly recognized by this Court in A.G. of Quebec v. Quebec Association of Protestant School Boards et al (1984) 10 D.L.R. (4th) 321, at 331:

> Section 23 of the Charter is not, like other provisions in that constitutional document, of the kind generally found in such charters and declarations of fundamental rights. It is not a codification of essential, pre-existing and more or less universal rights that are being confirmed and perhaps clarified, extended or amended, and which, most importantly, are being given a new primacy and inviolability by their entrenchment in the supreme law of the land. The special provisions of s.23 of the Charter make it a unique set of constitutional provisions, quite peculiar to Canada.

38. It is submitted that there is a natural connection between the freedom of an individual to cease or refuse to work for the purpose of compelling his or her employer to agree to terms and conditions of employment, and the freedom of combinations of workers to do so, and that the development of labour law has recognized this natural connection.

39. It is clear that at common law, absent contractual provisions to the contrary, an individual is free to cease or refuse to work for the purpose of compelling his or her employer to agree to terms and conditions of employment. The connection between this right, and the right of an association of workers to do so has been noted as follows:

> Workmen are admittedly entitled to cease work for any reason, good, bad, or indifferent, and employers are entitled to decline to continue certain workmen in their employment for any reason whether good or bad. To my mind, it would seem to be a very strange consequence that while the workmen can cease work without possibility of legal objection, they cannot in a body or by one or more of themselves or by one of the officials of their union inform the employers of the fact that

> they propose to cease work and of their reasons for doing so, without the risk to the communicant of being sued for using threats or coercion. No legal exception can be taken to the fact of the strike; yet it is sometimes contended that an action will lie for intimating to the employer that in certain circumstances that which the men are entitled to do will be done.

Hodges v. Webb (1920) All E.R. Rep. 447, per Peterson, J. at 457.

40. The right of associations of workers in England and Canada to act in concert for the purpose of compelling an employer to agree to terms and conditions of employment has through a tortuous process been affirmed. It is submitted that it has been in recognition of this fundamental freedom to combine in act and in purpose that the law has developed to recognize that right, and to immunize workers from sanction for so doing.

41. Prior to and during the 18th Century in England, the judiciary and Parliament responded to collective action of wage earners by declaring illegal combinations and agreements that related to wages, hours of work and conditions of employment. Reform legislation beginning in the 1870's gave unions immunity from the misconception that combinations to effect terms of employment were civil and criminal conspiracies at common law. This legislation freed from the law of criminal conspiracy and civil liability conduct that might amount to restraint of trade.

Collective Bargaining in Canada, Carrothers, 1965, Chapter 2, p.11-31;

Criminal Law Amendment Act (1871) 34 and 35 VICT. c.32;

Trade Unions Act (1871) 34 and 35 VICT. c.31;

The Conspiracy and Protection Act, (1875) 38 and 39, VICT. Chapter 86.

42. In 1891, the House of Lords canvassed the common law with respect to conspiracies and trade combinations. The decision makes clear that a combination of workmen, an agreement among them to cease work for higher wages, and a strike in consequence were lawful at common law:

Mogul Steamship Co. v. McGregor, Gow & Co., and others (1891) All E.R. Rep 263.

43. It is submitted that the comments of Bramwell, L.J. (at page 273) are particularly noteworthy:

> I have always said that a combination of workmen, an agreement among them to cease work except for higher wages, and a strike in consequence, was lawful at common law. Perhaps not enforceable inter se, but not indictable; and legislature has now so declared [see Trade Union Act, 1871, s.1]. The enactment is express, that agreements among workmen shall be binding, whether they would or would not but for the Acts have been deemed unlawful as in restraint of trade. Is it supposable that it would have done so in the way it has had the workman's combination been a punishable misdemeanour? Impossible. This seems to me conclusive, that though agreements which fetter the freedom of action in the parties to it may not be enforceable they are not indictable: see also the judgment of FRY, L.J., on this point [see p. 282 post].

44. Also significant are the comments of Hannen, L.J., quoting from Sir William Erle in his treatise on the law relating to Trade Unions (at page 277-278):

> It only remains for me to refer to the argument that an act which might be lawful for one to do becomes criminal or the subject or civil action by anyone injured by it, if done by several combining together. On this point I think the law is accurately stated by SIR WILLIAM ERLE in his treatise on the law relating to TRADE UNIONS. The principle he lays down is equally applicable to combinations other than those of trade unions. He says (p. 23):

> As to combination, each person has a right to choose whether he will labour or not, and also to choose the terms on which he will consent to labour, if labour be his choice. The power of choice in respect of labour and terms which one person may exercise and declare singly many after consultation may exercise jointly, and they may make a simultaneous declaration of their choice, and may lawfully act thereon for the immediate purpose of obtaining the required terms, but they cannot create any mutual obligation having the legal effect of binding each other not to work or not to employ unless upon terms allowed by the combination.

45. The case of Allen v. Flood (1895-9) All E.R. 52 finally affirmed that the principle as enunciated in the Mogul case that combinations of traders have a right to trade without hindrance should apply equally to combinations of workers to further their interests in the manner which seems to them best and most likely to be effectual.

Allen v. Flood (1895-9) All E.R. 52, 83 - 90 (Lord Herschell and 98 - 99 (Lord Shand).

46. Subsequently, this state of the law was again affirmed by statute. The effect of this legislation was to do away with, in the case of trade disputes, the doctrine that, though all of the overt acts are legal, the combination itself may be illegal by reason of its object.

Trade Disputes Act, 1906 6 Edw. c.47

47. Thus acts done in pursuance of an agreement or a combination by two or more persons, in contemplation or furtherance of a trade dispute, were not actionable unless the acts, if done by one person, would be actionable.

Sorrell v. Smith and Others (1925) All E.R. Rep. 1 per Viscount Cave, L.C. at p 5; per Lord Dunedin at p.7-9, and 11-13; per Lord Sumner at p.20; per Lord Buckmaster at p.23;

Crofter Hand Woven Harris Tweed Co., Ltd., and others v. Veitch and Another (1941) 1 All E.R. Rep 142.

48. It is submitted that the law and the Courts have recognized the important right of combinations of workers to do in association that which they were free to do alone in furtherance of employment interests. The English reform legislation has been essentially reproduced in Canadian legislation, and has been interpreted in like fashion.

The Trade Unions Act (1872) 35 VICT. c.30;

Canadian Criminal Law Amendment Act (1872) 35 VICT. c.31;

The Trade Unions Act R.S. 1906 Ch. 125.

49. In 1897, the Supreme Court of Canada considered the status of trade unions, and Girouard J. observed:

> The Imperial Trade Unions Act (3) has been in force since 1871 and even before, in 1855, 1858, 1859 and especially 1869, laws have been enacted to remove partly the restrictions and disabilities of the common law against trade coalitions and promote trade unions. The present legislation of Great Britain, rightly or wrongly, for we have nothing to do with the policy of the law, was conquered by degrees by and through the increasing political influence of the workingmen. The English courts have had, therefore, several occasions to consider these statutes, which have been reproduced in our Canadian statute book; and finally the House of Lords has pronounced on them not only once, but twice; in 1897, in Allen v. Flood (1), and in 1892 in The Mogul Steamship Co. v. McGregor (2), and we have no hesitation in saying that its jurisprudence is binding upon us in a case like the present one.

Perrault v. Gauthier (1898) 28 S.C.C. 241, at p.252.

50. The purpose of the Brotherhood of Locomotive Engineers, as set out in its constitution was considered in Chase v. Starr by the Manitoba Court of Appeal and the Supreme Court of Canada. Both Courts denied that strike action by combination to better the conditions of labour was per se unlawful at common law. The fundamental importance of the actions of such an association was recognized by Duff, J.:

> In considering the fourth ground, it must be remembered the value of such an association must depend very largely upon its capacity to secure satisfactory arrangements in relation to pay and conditions of work, and this in turn must be affected by the capacity of the association to secure strict observance of its undertakings entered into on behalf of its members collectively.
>
> Chase v. Starr [1924] 4 D.L.R. 55, at 61 (S.C.C.); aff'g [1923] 4 D.L.R. 103 (Man. C.A.).

51. Finally, it must be noted that in the case of C.P.R. v. Zambri Locke, J. declared that the right to associate in trade unions and to strike existed in Canadian common law:

> I do not agree with the contention of the respondent that the right to strike is expressly given to employees by s.3 of The Labour Relations Act. That section, saying that every person is free to join a trade union and to participate in its lawful activities, and s.4 giving a similar right to persons to join an employer's organization, are equally meaningless. No statutory permission is necessary to participate in the lawful activities of any organization. Furthermore, it is not the union that strikes but the employees. The statute, however, implicitly recognizes that employees may lawfully strike by restricting that undoubted right during the currency of collective agreements, during the period in which conciliation proceedings are being carried on and for a defined period after an award. Section 57(2) refers in terms to a lawful strike. The objections to the legality of strikes on the ground that

> they are unlawful conspiracies or in restraint of trade which might formerly be made the subject of criminal charges have long since disappeared by reason of the provisions of the Criminal Code, and combinations of workmen for their own reasonable protection as such are expressly declared to be lawful by s.411 of the Criminal Code and the predecessors of that section.
>
> C.P.R. v. Zambri [1962] S.C.R. 609, at 620-21.

52. Thus it is clear that a trade union has long been recognized as a body of persons associated for a common purpose. In the England and in Canada workers have long enjoyed freedom of association as freedom to combine in act and in purpose.

(7) Universal Right

53. The freedom to combine in act and in purpose, particularly in the labour law context, is also recognized internationally. Human rights treaties and other documents invariably make specific reference to trade unions as a form of association to which the guarantee of freedom of association is directed.

> The Universal Declaration of Human Rights, Sections 20 and 23(4).
>
> The International Labour Organization (I.L.O.) Convention Concerning Freedom of Association and Protection of the Right to Organize (Convention 87), Articles, 1, 2, 3, 4, 5, 10, 11.
>
> The International Covenant on Economic, Social and Cultural Rights, Articles 2 and 8.
>
> The International Covenant on Civil and Political Rights, Article 22;
>
> The European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 11.

54. It is respectfully submitted that these international instruments provide guides to interpretation of the Charter.

Where the instruments comprise binding international legal obligations of Canada, as in the case of the Convention 87 and the International Covenants, the rule of construction that Parliament is presumed not to legislate in breach of a treaty or other established rule of international law is called into play.

Daniels v. White and The Queen [1968] S.C.R. 517, at 541.

Mitchell v. A.G. Ontario (1983) 7 C.R.R. 153, at 166 (Ont. H.C.).

55. These principles have been applied in English decisions with regard to the obligations of the United Kingdom pursuant to the European Convention.

Waddington v. Miah [1974] 2 All E.R. 377, at 379 (H.L.);

A.G. v. British Broadcasting Corporation [1980] 3 All E.R. 161, at 177-78 (per Lord Scarman).

56. The Alberta Court of Appeal accepted that the International Covenant on Civil and Political Rights might be open to the interpretation that freedom of association includes the right to strike. However, they further held that as Canada had not undertaken to constitutionally entrench international commitments, such commitments were not of assistance in interpreting the Charter. It is respectfully submitted that the Court erred in law in failing to apply the presumption that domestic law is consistent with international obligations.

57. It is further submitted that international human rights documents which may not constitute legal obligations of Canada, are nonetheless of assistance in interpreting the Charter as they form a part of the international human rights movement that

constitutes the background of the Charter, and should therefore be considered as influences on legislative policy.

Minister of Home Affairs v. Fisher [1973] 3 All E.R. 21, at 27 (P.C.);

R. v. Big M. Drug Mart Ltd., supra, at 147-49.

58. While the Appellant supports a reference to international law in interpreting the Charter, it is submitted that it is nonetheless clear that where the Charter and a particular treaty or convention differ in their express terms, a different approach to interpretation may be required. Reference is made to the interpretation of Convention 87 discussed in the factum of the Appellant Alberta Union of Provincial Employees at paragraphs 35 through 44. It is submitted that the concerns regarding essentiality of workers, described therein, would in a Charter context properly be considered as relevant to s.1 concerns, and not to the interpretation of freedom of association per se.

59. It is submitted that the guarantee of freedom of association in s.2(d) of the Charter comprises a codification of the "essential, pre-existing and more or less universal right" of the individual to combine with others in act and in purpose.

D. INFRINGEMENT OF FREEDOM OF ASSOCIATION

60. Section 117.1 of the Labour Relations Act, R.S.A. 1980, c. L-1.1, as amended, prohibits strikes by, among others, "employees of employers who operate approved hospitals as defined in the Hospitals Act." The penalties for violation of this provision are set out in s. 155 of the Act, and stipulate fines of up to $1,000.00 for employees who are not trade union officers or representatives, and up to $10,000.00 for those who are officers or representatives.

61. "Strike" is defined in s. 1(u) of the Labour Relations Act as follows:

> (u) "strike" includes
>
> (i) a cessation of work,
>
> (ii) a refusal to work, or
>
> (iii) a refusal to continue to work,
>
> by 2 or more employees acting in combination or in concert or in accordance with a common understanding for the purpose of compelling their employer or an employers' organization to agree to terms or conditions or employment or to aid other employees to compel their employer or an employers' organization to accept terms or conditions of employment.

62. Section 93 of the Public Service Employee Relations Act prohibits strikes by persons to whom that Act applies, and further prohibits any person or trade union from causing or attempting to cause strikes among such persons. Penalties like those under the Labour Relations Act are stipulated in s.93.1.

63. "Strike" is defined in s.1(q) of the Public Services Employee Relations Act 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 2 or more persons employed by the same employer acting in combination or in concert or in accordance with a common understanding;

64. It is submitted that, for present purposes, it is not necessary to determine whether either the identified purpose, compelling an agreement as to terms and conditions of employment, or action, ceasing or refusing to work, are or may be the subject of separate constitutional protection. This is because the legislative provisions being considered prohibit directly combining in particular activities for particular purposes - in other words they directly infringe the freedom to associate. The Legislature of the Province of Alberta has chosen not to prohibit these activities and purposes for individuals, but to prohibit combining or associating in them. The Legislature has thereby struck directly at the ability of individuals to collectively pursue a purpose they may lack sufficient power to achieve singly. It is submitted that this legislation attacks associating as such, and should be scrutinized to determine whether or not it is justified under s.1.

E. INTERPRETATIONS UNDER OTHER CONSTITUTIONS

65. It is submitted that two characteristics of the Charter make it unique among constitutional instruments with regard to the protection of freedom of association, and thus greatly limit the assistance that may be obtained from interpretations of this freedom in other constitutions. The first of these characteristics is the express and independent guarantee of freedom of association under the Charter; the second is s.1, which circumscribes the limitations that may be placed on Charter rights and freedoms and therefore impliedly proscribes the judicial creation of other restrictions.

(1) United States of America

The First Amendment of the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,

> or abridging the freedom of speech, or the press, of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

66. Thus there are expressly recognized rights and freedoms relating to religion, speech, press, assembly and petition, but not association. In addition to those express guarantees, the American Courts have developed a number of peripheral rights which secure the specific rights. Freedom of association is such a peripheral right; it has developed to provide full protection to First Amendment rights, and not as a right or freedom with independent meaning.

Griswold v. Conneticut (1965) L.Ed. (2d) 510, at 513-14;

R. Raggi, An Independent Right to Freedom of Association, supra.

67. Thus in the United States, there is no constitutional protection of association, or concerted activity for a common purpose, in and of itself. That is the very fundamental way in which the United States Constitution differs from the Charter. Yet, the American Courts have gone a great distance to interpret the freedom of assembly (and the peripheral right of association) to include protection for certain forms of orderly group activity. Constitutional protection has been given to the right of individuals to combine with others in pursuit of a common goal by lawful means.

N.A.A.C.P. v. Claiborne Hardware Company et al 102 S.Ct 3409 (1982);

N.A.C.C.P. v. Button 371 U.S. 415 (1962).

68. There are far more compelling reasons for such protection to be granted in Canada, having regard to the express and independent inclusion of the freedom of association.

(2) The Collymore Case

69. The Privy Council, when interpreting the meaning of freedom of association under the Constitution of Trinidad and Tobago, was faced with the task of interpreting a constitution which frames rights and freedoms in absolute terms, without any express limitations clause similar to s.1 of the Charter.

Collymore v. Attorney General of Trinidad and Tobago (1969) 2 All E.R. 1207, at 1208-10 (P.C.).

70. Under the Constitution, Parliament could legislate peace, order and good government only subject to the absolutely - expressed guarantees of the Constitution. The patent need for Parliament to exercise control over certain group purposes and activities meant that the guarantees of freedom of association had to be limited by judicial construction. The need for this interpretative approach is negated by the presence of s.1 in the Charter.

Collymore v. Attorney General of Trinidad and Tobago., supra, at 1211 (P.C);

Re Soenen and Thomas et al., supra, at 667-69 (Alta. Q.B.).

F. CHARTER JURISPRUDENCE

71. A number of Canadian cases have considered freedom of association under the Charter in the labour law context.

Re Service Employees' International Union Local 204 and Broadway Manor Nursing Home et al., supra;

Dolphin Delivery Ltd. v. Retail, Wholesale and Department Store Union, Local 580 et al., supra;

Public Service Alliance of Canada v. The Queen in Right of Canada (1984) 11 D.L.R. (4th) 337 (F.C.T.D.), aff'd 11 D.L.R. 387 (F.C.C.A.);

Re Retail, Wholesale & Department Store Union, Locals 544, 496, 635 and 955 et al and Government of Saskatchewan et al. (1984) 12 D.L.R. (4th) 10 (Sask. Q.B.).

72. Only the Broadway Manor case, at the Divisional Court level, defined freedom of association so as to include the right to strike or the right to bargain collectively. It is submitted that the reasoning in the Broadway Manor case is to be preferred to that in the other decisions because:

(1) In the other decisions there has been a failure to distinguish between the two steps in Charter interpretation: first, the definition of rights and freedoms in an absolute sense; and secondly, the consideration of any limitations in terms of the requirements of s.1. This failure has been accompanied by a failure to properly distinguish the Collymore case as it interprets a Constitution without the equivalent of s.1.

Dolphin Delivery Ltd. v. Retail Wholesale and Department Store Union, Local 580 et al., supra, at 211;

Public Services Alliance of Canada v. The Queen in Right of Canada, supra, at 391-92 (F.C.C.A.);

Re Retail, Wholesale and Department Store Union Locals 544, 496, 635 and 939 et al and Government of Saskatchewan et al; supra, at 18-20.

(2) In the Federal Court decision, at the trial level, there was a further failure to appreciate the significance of a independent guarantee of freedom of association, and the resulting need to distinguish American case law.

Public Service Alliance Canada v. Her Majesty the Queen in Right of Canada., supra, at 357-58 (F.C.T.D.).

(3) The other decisions have failed to provide a liberal and purposive interpretation of the Charter. They have suggested a definition of freedom of association that distinguishes between organizational activity and other activities of the association. Such a definition is subject to the criticisms referred to in paragraph 23 herein.

G. CONCLUSION

73. It is respectfully submitted that a prohibition against strikes as a form of concerted activity is a direct restriction on freedom of association, defined as the freedom of individuals to combine together in action and purpose. It is therefore submitted that the prohibition set out in s.117.1 of the Labour Relations Act and s.93 of the Public Service Employee Relations Act, and the corresponding creation of a compulsory arbitration systems in s.117.2 and ss.49 and 50 respectively, constitute prima facie infringements of the Charter and are of no force and effect unless they can be justified under s.1.

STAGE II - REASONABLE LIMITS...DEMONSTRABLY JUSTIFIED IN A FREE AND DEMOCRATIC SOCIETY

A. BURDEN OF PROOF

74. In determining whether a limitation placed upon constitutional rights comes within s.1 of the Charter, the onus or burden of proof rests entirely upon the party asserting the validity of the limit.

Hunter et al v. Southam Inc., supra, at 660.

75. In meeting this burden of proof no presumption of constitutionality or presumption of legislative validity is called into play.

Re Southam Inc. and The Queen (No. 1) (1983) 146 D.L.R. (3d) 408, at 419-20 (Ont. C.A.);

Re Federal Republic of Germany and Rauca, supra, at 658.

B. ELEMENTS OF PROOF

76. It is submitted that in determining whether legislation limiting a fundamental freedom is justified under s.1, the court should consider and assess:

(a) the objective or rational basis of the limitation - the concern here is with the rationality of the legislation, that is to say, whether the purpose is justified;

(b) the extent of the limitation which is to be balanced against its rationality - here the focus is on the proportionality of the legislation, that is to say whether the means are justified.

(1) Rationality

77. As a starting point, it is essential that the government objective be specifically identified. This is required in order that the Court may fulfill its duty to balance "the perceived purpose and objective of the limiting legislation, in light of all relevant considerations, against the freedom or right allegedly infringed".

Re Southam Inc. and The Queen (No. 1), supra, at 425.

(2) Proportionality

78. In determining whether particular legislative means to achieve a specified government objective are reasonable, the concept of proportionality comes into play. The means should involve no more severe a restriction on rights and freedoms than is required to attain the purpose of the law. One test of proportionality may be described as the "alternative means" or "overbreadth" test. Where less restrictive or narrower means are available and would fulfill the government objective in question, a choice of more restrictive or overbroad means would indicate that the limitation is not properly proportionate.

Re Southam Inc. and The Queen (No. 1), supra, at 429-30;

Re Federal Republic of Germany and Rauca, supra, at 659.

79. In determining whether or not legislation meets the test of proportionality, it is important to examine the impact and scope of its particular terms in relation to its purported objectives. Hence, in this case, a positive duty arises on the Government of Alberta to demonstrate that the removal of the right to strike for all public and hospital employees for an indefinite and unlimited period and under all circumstances is demonstrably justifiable in relation to public purposes served by the legislation.

C. STANDARD OF PROOF

80. It is further submitted that there is a substantial burden to positively demonstrate a justification for both the legislative purpose and the means used to effect that purpose. It must be shown that the object is a compelling one, involving some greater public good than mere expediency or convenience. Further, the means used must be necessary to secure that public good.

Singh v. Minister of Immigration (S.C.C., Apr. 4, 1985, unreported, per Wilson J., at 63-65);

R. v. Bryant (1984) 6 O.A.C. 118, at 122-23.

81. In considering the rationality and proportionality of a limitation, assistance may be derived by comparison with laws and practices in other jurisdictions generally regarded as free and democratic societies. However, it is submitted that such a comparison is merely one type of evidence that the Court may consider. In the final analysis, the determination must be made in the local context. It is submitted that where nothing more than a comparison is provided by the Government, that will generally not be sufficient to meet the onus imposed by s.1.

Re Southam Inc. and The Queen (No. 1), supra, at 424-25;

R. v. Videoflicks Ltd. et al. (1984) 5 O.A.C. 1, at 26.

82. It is submitted that it will usually be necessary for the Government to call evidence to show the purpose of a particular piece of legislation and the reasons for the selection of particular legislative means to achieve that purpose. This is clearly the case where the purpose or the reasons for selection of the means are not obvious upon the face of the statute.

R v. Videoflicks Ltd. et al., supra.

R. v. Bryant, supra, at 131-34.

D. APPLICATION TO THIS CASE

83. With regard to the removal of the right to strike and substitution of a compulsory arbitration mechanism as provided in the Labour Relations Act the entire case put forward by the Government of Alberta before the Alberta Court of Appeal to support these steps as reasonable limitations demonstrably justified in a free and democratic society was that they related to essential services which "cannot be subject to interruption". It is submitted that a mere statement of this nature cannot discharge the onus placed upon the government by s.1. The government is in effect asking the Court to accept that a limit is reasonable simply because it says it is, without in any way demonstrating this. To accept this mere statement would subvert the requirement for judicial review of limitations on constitutional rights and freedoms.

Written submissions of the Attorney General of Alberta, p.35.

84. It may be that in certain circumstances a legislative purpose and the propriety of certain means to effect such purpose will be sufficiently obvious or commonly known that a Court could, without any evidence, be able to satisfy itself that a limit meets the requirements of s.1. However, it is respectfully submitted that this is clearly not such a case. The statement that these services "cannot be subject to interruption" begs a number of questions including the following:

(a) The Government failed even to address the issue of what possible connection there would be between the "essentiality" (whatever that means) of a class of

employees and the desirability of limiting the freedom to strike of such employees. It is submitted that there is no such connection. Neither an implied definition of such "essentiality" nor any logical connection between the notion of essentiality and a justifiable limitation is admitted.

(b) The provisions of concern in the Labour Relations Act are the subject of a 1983 amendment. Before that time the Alberta Government relied simply on back-to-work legislation pursuant to the emergency powers contained in the predecessors to ss. 148-50 of the Act or on special legislation. This less restrictive alternative means of dealing with potential problems relating to interruption of services is clearly still available to the government. If these means were or are in any way inadequate, that has not been shown, or even suggested. Where clearly less restrictive means are available, but more restrictive means are employed, it is submitted that the more restrictive means are not reasonable and demonstrably justified, and should be struck down as overbroad.

Alberta Labour Act, S.A. 1973, c.33, ss. 163-65; Orders-in-Council 680/77 and 387/80;

Health Services Continuation Act, S.A. 1980, c.21.

(c) From a survey provided by the Government before the Alberta Court of Appeal it appeared that 6 of the other 9 common law provinces in Canada permit strikes among hospital employees. In light of this comparison, as limited as this comparison is, it is submitted that this

is clearly not the sort of case where the reasonableness of a restriction could be said to be apparent on its face or within common knowledge. The fact that the Alberta Government is in the minority in adopting such an approach reinforces the requirement that it demonstrate to the satisfaction of the Court, by evidence or other information, a rational object and proportional means to effect that object. It is submitted that the Government failed to discharge this onus. It did not advise the Court of Appeal of the purpose of the legislation, or the reason why the Alberta Government chose to restrict strikes among hospital employees while most provinces have seen no need to do this. Further, no evidence or information was provided as to reasons for the selection by the Government of the most restrictive means possible: a complete denial of the right to strike for all times and in all circumstances.

Public Service Collective Bargaining Legislation in Canada, as prepared by Alberta Department of Labour.

85. The Government in its argument before the Court of Appeal further made a bald assertion that employees who do not provide essential services are so closely linked with those who do that it is reasonable that they should also be prohibited from striking. It went on to say that there was no alternative source of supply of workers. There was no evidentiary support provided for these extraordinary claims.

86. With regard to the restrictions contained in the Public Service Employee Relations Act, the Government offered one

further argument: namely, that as public employees it is somehow inappropriate that they should have the right to strike. In support of this argument, reference was made to a number of academic writings relating to economics and labour relations. It is submitted that those writings showed only that:

(a) An academic debate exists as to whether or not collective bargaining, including the right to strike forms an appropriate part of public sector labour relations. No general consensus has been reached in this debate.

(b) The tradition in Canada, as opposed to the United States, has been to accept collective bargaining rights, including the right to strike, in the public sector as they have been in the private sector.

Written submissions of the Attorney General of Alberta, pp.35-36.

87. It is respectfully submitted that the mere existence of an academic debate as to the merits of public sector collective bargaining and strikes cannot suffice to discharge the onus placed upon the Alberta Government in this case. There is nothing positive in the existence of this debate to discharge the burden on the Government to show either that it is acting to effect a rational object, or that it has selected proportional means to do this.

88. It is further submitted that in order to constitute a reasonable limit upon freedom of association, a scheme of compulsory arbitration must be:

(1) available as of right to the parties affected thereby;

(2) equal in scope to matters that would normally be subject to collective bargaining; and

(3) approximate as nearly as possible free collective bargaining, in the sense that it should be an adversarial process free of government interference.

89. It is submitted the Labour Relations Act and the Public Service Employee Relations Act both fail to meet all three of these requirements:

(1) The Labour Relations Act, s.117.3 makes the availability of compulsory arbitration subject to the discretion of the Minister of Labour. The Public Service Employee Relations Act, s.50 gives the Public Service Employee Relations Board the same discretion;

(2) The Public Service Employee Relations Act, in ss.48 and 53, limits the arbitrability of certain items, and provides that the scope of the dispute is defined by the Board. The Labour Relations Act, ss.117.2(3)(a) and 117.6(b) have the same effect as s.53;

(3) The Labour Relations Act, s.117.8 and the Public Service Employee Relations Act, s.55 require the compulsory arbitration board to consider specified criteria defined by the legislation, including any fiscal policies that may be declared from time to time by the Provincial Treasurer, who is not a party to the dispute.

90. It is therefore respectfully submitted that the Government of Alberta has failed to discharge the onus upon it under s.1 of the Charter, and has failed to demonstrably justify as reasonable limitations the strike prohibitions and compulsory arbitration provisions of the Labour Relations Act and the Public Service Employee Relations Act, and that Questions 1, 2, 4 and 5 should be answered "yes".

E. THE QUESTIONS SHOULD NOT BE ANSWERED

91. Alternatively, it is respectfully submitted that the questions, insofar as they require the application of s.1 of the Charter, should not be answered. Where questions referred to this Court can only be examined and properly determined with reference to concrete facts and circumstances, and where the Court has only been given bald, general questions, it ought to decline to answer the questions in the interests of justice.

92. It is submitted that it cannot be in the interests of justice to attempt to pass an opinion which will affect the rights of large groups of employees in Alberta upon the scanty information now before the Court.

Attorney General for Ontario v. The Hamilton Street R.W. Co. [1903] A.C. 529, at 529 (P.C.);

John Deere Plow Company, Ltd. v. T.F. Wharton (1915) A.C. 330, at 338-39, per Viscount Haldane (P.C.);

Re Ontario Medical Act (1906) 13 O.L.R. 501, at 509, per Moss, C.J. (C.A.);

Re Legislative Authority of Parliament to Alter or Replace the Senate (1979) 102 D.L.R. (3d) 1, at 16-17 (S.C.C.);

Re Stony Plain Indian Reserve No. 135 (1981) 130 D.L.R. (3d) 636, at 661-62 (Alta. C.A.).

93. Assuming the legislation under attack is inconsistent with the freedom of association referred to in Section 2(d) of the Charter, the next question for the opinion of the Court is whether such legislation may be justified under s.1, taking into account the factors referred to herein. It is submitted that the factual background necessary for the Court to properly consider and assess these factors is entirely absent.

94. The Government of Alberta has not established an objective or rational basis for prohibiting the right to strike. What is the evil the Government seeks to thwart? To determine this, the Court should be apprised of at least the following:

(i) The degree of organization in the hospital industry;

(ii) The numbers and types of institutions which are hospitals as defined in the Hospitals Act, and the health care services provided by each;

(iii) The component bargaining units, the configuration of each, and the services provided by each;

(iv) The history of strike action by hospital workers in Alberta, which will be markedly different for each of the bargaining units;

(v) Whether or not and to what extent services are interrupted by strike action, which would require specific and separate inquiries with respect to each bargaining unit;

(vi) Information as to the quality of health care which is provided during strike action in the hospital industry;

(vii) Information as to how the hospitals have continued to provide health care in the absence of striking employees.

(viii) The history and impact of strike action, if any, by support staff in educational institutions (which comprise the balance of the members of the Appellant which are affected by the impugned legislation).

95. No evidence was led to support the assertion that any of these employees are "essential". Nor was evidence or argument advanced to make the logical leap that this alleged and unproven "essentiality" of employees justifies a limitation on freedom of association.

96. The rationale put forth by the Government was that public services cannot be interrupted. Apparently to achieve that end, the Government imposed a ban on all strikes by all public and hospital employees, at all times, forever. To determine whether this limitation far exceeds that required to attain the purpose of the law, it is submitted that the Court must examine:

(a) The history of strikes in the hospital industry and affected educational institutions in Alberta and the relationship between the needs thereby illustrated, and the unlimited, indiscriminate sweep of the legislation;

(b) The interplay between the services provided by employees of the various bargaining units, and the proportion of overall staff who have been on strike at any given time;

(c) The nature of the response by the Government to past strikes by hospital workers, and why those responses have proved inadequate. For example, experience in the use of the powers which are now found in Sections 148-150 of the Labour Relations Act (formerly Sections 163-165 of the Alberta Labour Act, 1973) and the use of special legislation should be examined.

97. The evil to be remedied has neither been clearly identified nor proven, therefore it is not possible to clearly measure the remedy. In the context of references, it has long been held to be a dangerous venture to attempt to lay down a series of abstract propositions not having application to any particular case or set of circumstances. The comments of the Lord Chancellor Halsbury, speaking for the Judicial Committee of the Privy Council (which declined to answer five of seven questions submitted) are apt:

> They are questions proper to be considered in concrete cases only; and opinions expressed upon the operation of the sections referred to, and the extent to which they

> are applicable would be worthless for many reasons. They would be worthless as being speculative opinions on hypothetical questions. It would be contrary to principle, inconvenient, and inexpedient, that opinions should be given upon such questions at all. When they arise they must arise in concrete cases, involving private rights; and it would be extremely unwise for any judicial tribunal to attempt beforehand to exhaust all possible cases and facts which might occur to qualify, cut down, and override the operation of the particular words when the concrete case is not before it.
>
> Attorney-General for Ontario v. The Hamilton Street R.W. Co., supra, at 529.

98. Where the Court would be required to make assumptions, postulate facts, and attempt in vacuo to answer reference questions, the Court ought to decline to do so.

> AG for Manitoba v.Manitoba Egg and Poultry Association et al [1971] 4 W.W.R. 705, per Laskin, C.J.C. in dissent (S.C.C.).

99. It is therefore respectfully submitted, in the alternative, that the Court ought to decline to answer whether the limits on freedom of association referred to in Questions 1, 2, 4 and 5 are reasonable limits justifiable under s.1 of the Charter.

PART IV

ORDER SOUGHT

100. It is respectfully submitted that:

(a) This appeal should be allowed;

(b) Questions 1 and 2 should be answered yes, to the extent that the Acts prohibit strikes and substitute compulsory arbitration;

(c) Questions 4 and 5 should be answered yes, to the extent that the Acts deny an effective alternative to resolve collective bargaining disputes.

All of which is respectfully submitted.

Dated at Edmonton, Alberta this 22nd day of April, 1985.

SHEILA GRECKOL

JUNE ROSS

PART V

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