

**IN THE SUPREME COURT OF CANADA**

**ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA**

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

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

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

**BETWEEN:**

**THE ALBERTA UNION OF PROVINCIAL EMPLOYEES,  
THE ALBERTA INTERNATIONAL FIRE FIGHTERS ASSOCIATION,  
and THE CANADIAN UNION OF PUBLIC EMPLOYEES**

**APPELLANTS**

**AND:**

**HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA**

**RESPONDENT**

**FACTUM OF THE ATTORNEY GENERAL  
OF BRITISH COLUMBIA, INTERVENER**

**MINISTRY OF ATTORNEY GENERAL  
Legal Services Branch  
5th Floor, 609 Broughton Street  
Victoria, B.C.  
V8V 1X4**

**BURKE-ROBERTSON, CHADWICK  
& RITCHIE  
Barristers and Solicitors  
130 Albert Street, 18th Floor  
Ottawa, Ontario  
K1P 5G4**

**E. Robert A. Edwards, Q.C.**

**Counsel**

**Ottawa Agents for the Attorney General  
of British Columbia**

**(The names of Solicitors for the Parties and their Ottawa Agents appear on the inside cover).**

**TIMOTHY J. CHRISTIAN**  
437 Law Centre  
University of Alberta  
Edmonton, Alberta  
T6G 2H5

Soloway, Wright, Houston  
and Greenberg  
Barristers and Solicitors  
170 Metcalfe Street  
Ottawa, Ontario

Counsel for the Appellant,  
The Alberta Union of Provincial Employees

Ottawa Agents for the Appellant

Sheila J. Grckol  
**WRIGHT CHIVERS & COMPANY**  
Barristers and Solicitors  
#301, 10328 - 81 Avenue  
Edmonton, Alberta

Soloway, Wright, Houston  
170 Metcalfe Street  
Ottawa, Ontario

Ottawa Agent for the Solicitor  
for the Appellant

June M. Ross  
**WITTEN, BINDER**  
2300, 10025 Jasper Avenue  
Edmonton Alberta

Counsel for the Appellant  
The Canadian Union of Public Employees

A. Barrie C. Chivers  
**WRIGHT CHIVERS & COMPANY**  
Barristers and Solicitors  
#301, 10328 - 81 Avenue  
Edmonton, Alberta

Soloway, Wright, Houston  
170 Metcalfe Street  
Ottawa, Ontario

Counsel for the Appellant  
The Alberta International Fire  
Fights Association

Ottawa Agent for the Solicitor  
for the Appellant

Roderick A. McLennan, Q.C.  
and B.R. Burrows  
**McLENNAN, ROSS**  
600, 12220 Stony Plain Road  
Edmonton, Alberta

Gowling and Henderson  
160 Elgin Street  
Ottawa, Ontario

and

Noland D. Steed  
**DEPARTMENT OF THE ATTORNEY  
GENERAL OF ALBERTA**  
Counsel for the Respondent  
The Attorney General of Alberta

Ottawa Agents for the  
Attorney General of Alberta

## INDEX

	<u>PAGE NO.</u>
PART I	
STATEMENT OF FACTS	1
PART II	
POINTS IN ISSUE	2
PART III	
ARGUMENT	3-10
PART IV	
NATURE OF ORDER SOUGHT	11
LIST OF AUTHORITIES	12-13

**PART I**

**STATEMENT OF FACTS**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47

1.           The Attorney General of British Columbia accepts paragraphs 2-5 of the Facts as stated in the Factum of the Appellant, Alberta Union of Public Employees, as properly setting out the circumstances under which this reference is before the Court.

2.           By Order of this Court, the Attorney General of British Columbia was granted leave to intervene in respect of the Constitutional Questions in issue.

**PART II**  
**POINTS IN ISSUE**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47

3. It is the position of the Attorney General of British Columbia that all of the Constitutional Questions in this appeal should be answered in the negative.

**PART III  
ARGUMENT**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47

4. The Attorney General of British Columbia adopts and supports the submissions of the Respondent.

5. The position of the Appellants is that "freedom of association" in s. 2(d) of the *Charter* prima facie guarantees "everyone" the freedom to form or join a trade union and the concomitant rights to bargain collectively all conditions of employment and to strike in furtherance of collective bargaining.

6. It is the position of the Attorney General of British Columbia that "freedom of association" does not extend to embrace these concomitant rights or freedoms as asserted by the Appellants.

7. The Appellants have referred to nothing which indicates that any other country constitutionally guarantees the rights to bargain collectively or to strike. Indeed, in countries which have constitutional provisions similar to s. 2(d) of the *Charter*, it has been consistently determined that "freedom of association" guarantees no more than the right to form and join a trade union.

**United States of America**

*United Federation of Postal Clerks v. Blount*, 325 Fed. Supp. (1971) (U.S. District Court, District of Columbia)

*Indianapolis Education Association v. Lewallen* 72 L.R.R.M. 2071 (U.S. Court of Appeals)

1 *Hanover Township Federation of Teachers Local 1954 v.*  
2 *Hanover Community School Corporation* 457 F. 2d 456 (1972)  
3 (U.S. Court of Appeals)

4 *Maurice Smith v. Arkansas State Highway Employees Local*  
5 *1315* (1979), 441 U.S. 463 (U.S.S.C.)  
6

7 India  
8

9 *All India Bank Employees Association v. The National*  
10 *Industrial Tribunal* 49 A.I.R. 1962, Supreme Court 171  
11

12 Trinidad and Tobago  
13

14 *Collymore v. Attorney General* [1970] A.C. 538 (Judicial  
15 Committee of the Privy Council)  
16

17 Jamaica  
18

19 *Banton and Others v. Alcoa Minerals of Jamaica* (1971) W.I.R.  
20 275 (S.C. Jamaica)  
21

22  
23 These cases have been extensively canvassed in the Respondent's Factum  
24 at pages 15 - 20, and the Attorney General of British Columbia adopts the  
25 Respondent's submissions in respect of them.  
26  
27  
28  
29  
30

31 8. Further, with the exception of the Ontario Divisional  
32 Court decision in *Re Service Employees International Union Local 204 v.*  
33 *Broadway Manor Nursing Home et al.* (1984) 4 D.L.R. (4th) 231, no  
34 Canadian court has interpreted "freedom of association" as guaranteeing  
35 not only the freedom to form or join a union, but also the concomitant  
36 rights to bargain collectively and to strike.  
37  
38  
39  
40  
41  
42

43 *Dolphin Delivery Ltd. v. Retail, Wholesale and Department*  
44 *Store Union, Local 580 et al.* (1984) 10 D.L.R. (4th) 198  
45 (B.C.C.A.)  
46  
47

1 *Public Service Alliance of Canada v. Her Majesty the Queen in*  
2 *Right of Canada* (1985) 11 D.L.R. (4th) 337 (F.C.T.D.) and 387  
3 (F.C.A.)

4 *Re Prime et al. v. Manitoba Labour Board* (1984) 3 D.L.R. (4th)  
5 74 (M.Q.B.), 8 D.L.R. (4th) 641 (M.C.A.)

6 *Halifax Officers and NCO's Association v. The City of Halifax et*  
7 *al.* (1984) 11 C.R.R. 358 (S.C.N.S.D.T.)

8  
9 *Re Saskatchewan Government Employees Union et al. v.*  
10 *Governor of Saskatchewan et al.* (1985) 14 D.L.R. (4th) 385  
11 (Sask. Q.B.)

12  
13 *Pruden Building Ltd. v. Construction and General Workers*  
14 *Union Local 92 et al.* (1985) 13 D.L.R. (4th) 584 (Alta. Q.B.)

15  
16 *Newfoundland Association of Public Employees et al. v. Her*  
17 *majesty the Queen in Right of Newfoundland* (S.C.  
18 Newfoundland Trial Division, 31 January, 1985, unreported)

19  
20  
21 9. Outside the trade union context, the wider implications  
22 of interpreting "freedom of association" as including not only the freedom  
23 of interpreting "freedom of association" as including not only the freedom  
24 to form and to join an association but also the freedom to pursue the "ends"  
25 of the association through "means" its members may deem efficacious  
26 of the association through "means" its members may deem efficacious  
27 should be readily apparent. Such an interpretation would mean that  
28 should be readily apparent. Such an interpretation would mean that  
29 virtually all concerted action by associations is prima facie protected from  
30 virtually all concerted action by associations is prima facie protected from  
31 governmental constraint under the *Charter*, and that any constraint on  
32 governmental constraint under the *Charter*, and that any constraint on  
33 such action would have to be "demonstrably justified" under s.1 of the  
34 such action would have to be "demonstrably justified" under s.1 of the  
35 *Charter*.

36  
37  
38  
39  
40  
41 10. The Appellants base their proposition that "freedom of  
42 association" in the trade union context must embrace the concomitant  
43 rights to bargain collectively all conditions of employment and to strike in  
44 furtherance of that bargaining on the argument, express or implied, that  
45 furtherance of that bargaining on the argument, express or implied, that  
46  
47



1 without those concomitants "freedom of association" would be  
2 meaningless. This is the rationale which underlies the decision of the  
3 Ontario Divisional Court in *Re Service Employees International Union v.*  
4 *Broadway Manor, supra.*  
5  
6  
7  
8  
9

10 11. It is submitted that the very existence of the Appellants  
11 as "associations" demonstrates the argument to be fallacious. These  
12 associations were formed and have operated, presumably to the benefit of  
13 their members, in a legal regime which limits their scope of collective  
14 bargaining and prohibits them from striking. If, as they argue, these  
15 limitations rendered the associations meaningless, they would either  
16 never have been formed or long since ceased to exist.  
17  
18  
19  
20  
21  
22  
23  
24  
25

26 12. The Appellants further base the proposition that  
27 freedom of association includes the rights to bargain collectively and to  
28 strike on the argument that freedom of association must mean that  
29 individuals are free to do in association that which they could legally do  
30 individually. The short answer to that argument is that collective  
31 bargaining and striking are not, by their very nature, things which  
32 individuals can do. It is true that (outside a governing collective  
33 bargaining regime) any employee is free to haggle with his employer over  
34 terms of employment and withdraw his labour if those terms are not to his  
35 liking, but he is not bargaining collectively or striking if he does so.  
36 Collective bargaining and striking are concerted activities with very  
37 different social and economic impacts from the random actions of  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47

1 individual workers. As a result, all Canadian jurisdictions have  
2 established elaborate legal regimes to regulate the collective bargaining  
3 process and strikes.  
4  
5  
6  
7

8 13. The right to bargain collectively and the right to strike  
9 only have meaning in the context of this elaborate legislative and common  
10 law regime. For example, without provisions like s. 3(3)(d) of the *Labour*  
11 *Code*, R.S.B.C. 1979, c. 212, which provides:  
12  
13  
14

15 "An employer or person acting on his behalf shall not use or  
16 authorize or permit the use of a professional strike breaker or  
17 an organization of professional strike breakers."  
18  
19  
20  
21

22 the right to strike would have little, if any, substance.  
23  
24  
25

26 14. To argue, as the Appellants in effect do, that rights  
27 which can only be effectively exercised within a complex regime of  
28 substantive law are now "fundamental freedoms" and therefore enjoy  
29 constitutional protection under the rubric of "freedom of association",  
30 must necessarily imply that the substantive law which gives meaning to  
31 those rights must also be constitutionally entrenched.  
32  
33  
34  
35  
36  
37

38 "It is no doubt right to apply the rule of liberal construction to  
39 the fundamental freedoms in the *Charter*. But that does not  
40 empower courts to construct edifices of policy without regard to  
41 the plain meaning of the words of the *Charter*.  
42

43 *Dolphin Delivery, supra* at p. 209  
44  
45

46 To entrench the right to bargain collectively and the right to strike would  
47 be to constitutionally entrench, if not to construct, the "policy edifice" of

1 the existing substantive law regime which gives effect to those rights.  
2 Such a result would, it is submitted, go far beyond any plausible  
3 interpretation of the constitutional guarantee of "freedom of association",  
4 since it would mean legislatures could not derogate from those  
5 provisions, like s. 3(3)(d) of the *Labour Code*, which they have put in place  
6 to make collective bargaining and striking effective.  
7  
8  
9  
10  
11  
12  
13

14 15. The Appellants (and primarily the Appellant Alberta  
15 Union of Public Employees) rely on certain international covenants and in  
16 particular, the International Labour Organization *Covenant Concerning*  
17 *Freedom of Association and Freedom of the Right to Organize* (Convention  
18 87) and the derivation by the International Labour Organization  
19 Committee on Freedom of Association of the right to strike from Article 3  
20 of Convention 87 in certain of its decisions, as support for the proposition  
21 that section 2(d) of the *Charter* must have been intended by its draftsmen,  
22 or in any event should now be interpreted by this Court, as comprehending  
23 the "right to strike" since "Parliament is deemed not to legislate in  
24 violation of international obligations".  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37

38 16. This argument too is fallacious. If there were no *Charter*  
39 or if the *Charter* contained no provision guaranteeing "freedom of  
40 association", it could not plausibly be maintained that Parliament, by  
41 failing to include such provision, had legislated "in violation of  
42 international obligations". Similarly, by enacting a "freedom of  
43 association" guarantee as a general constitutional guarantee and not as a  
44  
45  
46  
47

1 reflection of the more specific concept of "freedom of association" in, for  
2 example, Convention 87 which deals only with labour matters,  
3 Parliament cannot be taken to have legislated "in violation of  
4 international obligations".  
5  
6  
7  
8  
9

10 17. The combined effect of these international covenants  
11 and the rule of interpretation upon which the Appellants rely is to  
12 encourage the enactment and interpretation of domestic substantive law  
13 consistent with Canadian international obligations. Neither the  
14 covenants themselves nor the rule of interpretation imposes on Canadian  
15 Legislatures the obligation to take positive steps to bring domestic law  
16 into conformity with these international obligations. Nevertheless, the  
17 essential elements of the Alberta legislation under consideration in this  
18 case have been held not to be inconsistent with international law.  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

29  
30 *A.G. Canada v. A.G. Ontario et al.; Reference Re Weekly Rest in*  
31 *Industrial Undertakings Act, etc. (Labour Conventions Case)*  
32 [1937] 1 D.L.R. 673, A.C. 326, 1 W.W.R. 299  
33

34 *Re Alberta Union of Public Employees et al.* (1980) 120 D.L.R.  
35 (3d) 590 (Alta. Q.B.) [affirmed (1982) 130 D.L.R. (3d) 191]  
36

37 *Public Service Alliance of Canada v. H.M. the Queen in Right of*  
38 *Canada, supra*  
39

40 18. If, as the Alberta courts have held, international law  
41 does not embrace the rights to bargain collectively and to strike, which the  
42 Appellants argue are abrogated by the legislation in question, then it  
43  
44  
45  
46  
47

1 cannot form the basis for an interpretation of "freedom of association"  
2 embracing those concomitant rights.  
3  
4

5  
6 19. It is the submission of the Attorney General of British  
7  
8 Columbia that "freedom of association" guaranteed by s. 2(d) of the  
9  
10 *Charter* does not embrace the concomitant rights to bargain collectively  
11  
12 and to strike and that accordingly, no demonstrable justification of the  
13  
14 reasonability of the limits imposed on collective bargaining and striking  
15  
16 by the Alberta legislation under consideration in this appeal is required  
17  
18 under s. 1 of the *Charter* to sustain its validity.  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47

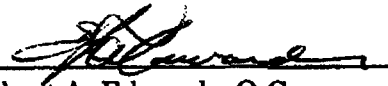
**PART IV**

**NATURE OF ORDER SOUGHT**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47

The Attorney General of British Columbia asks that the appeals be dismissed and the Constitutional Questions before the Court be answered in the negative.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

  
E. Robert A. Edwards, Q.C.  
Counsel for the Attorney General  
of British Columbia

Dated at Victoria, British Columbia  
this 29th day of May, 1985

## LIST OF AUTHORITIES

	<u>PAGE NOS.</u>
<i>All India Bank Employees Association v. The National Industrial Tribunal</i> 49 A.I.R. 1962, Supreme Court 171	4
<i>A.G. Canada v. A.G. Ontario et al.; Reference Re Weekly Rest in Industrial Undertakings Act, etc. (Labour Conventions Case)</i> (1937) 1 D.L.R. 673, A.C. 326, 1 W.W.R. 299	9
<i>Banton and Others v. Alcoa Minerals of Jamaica</i> (1971) W.I.R. 275 (S.C. Jamaica)	4
<i>Collymore v. Attorney General</i> [1970] A.C. 538 (Judicial Committee of the Privy Council)	4
<i>Dolphin Delivery Ltd. v. Retail, Wholesale and Department Store Union, Local 580 et al.</i> (1984) 10 D.L.R. (4th) 198 (B.C.C.A.)	4, 7
<i>Halifax Officers and NCO's Association v. The City of Halifax et al.</i> (1984) 11 C.R.R. 358 (S.C.N.S.D.T.)	5
<i>Hanover Township Federation of Teachers Local 1954 v. Hanover Community School Corporation</i> 457 F. 2d 456 (1972) (U.S. Court of Appeals)	4
<i>Indianapolis Education Association v. Lewallen</i> 72 L.R.R.M. 2071 (U.S. Court of Appeals)	3
<i>Maurice Smith v. Arkansas State Highway Employees Local 1315</i> (1979), 441 U.S. 463 (U.S.S.C.)	4
<i>Newfoundland Association of Public Employees et al. v. Her Majesty the Queen in Right of Newfoundland</i> (S.C. Newfoundland Trial Division, 31 January, 1985, unreported)	5
<i>Pruden Building Ltd. v. Construction and General Workers Union Local 92 et al.</i> (1985) 13 D.L.R. (4th) 584 (Alta. Q.B.)	5
<i>Public Service Alliance of Canada v. Her Majesty the Queen in Right of Canada</i> (1985) 11 D.L.R. (4th) 337 (F.C.T.D.) and 387 (F.C.A.)	5, 9
<i>Re Alberta Union of Public Employees et al.</i> (1980) 120 D.L.R. (3d) 590 (Alta. Q.B.) [affirmed (1982) 130 D.L.R. (3d) 191]	9

<i>Re Prime et al. v. Manitoba Labour Board</i> (1984) 3 D.L.R. (4th) 74 (M.Q.B.), 8 D.L.R. (4th) 641 (M.C.A.)	5
<i>Re Saskatchewan Government Employees Union et al. v. Governor of Saskatchewan et al.</i> (1985) 14 D.L.R. (4th) 385 (Sask. Q.B.)	5
<i>Re Service Employees International Union Local 204 v. Broadway Manor Nursing Home et al.</i> (1984) 4 D.L.R. (4th) 231	4, 6
<i>United Federation of Postal Clerks v. Blount</i> , 325 Fed. Supp. (1971) (U.S. District Court, District of Columbia)	3