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.

FACTUM OF THE ATTORNEY GENERAL OF CANADA INTERVENOR

(FOR A LIST OF THE SOLICITORS AND THEIR OTTAWA AGENTS, PLEASE SEE INSIDE FRONT PAGE)

IN THE SUPREME COURT OF CANADA

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IN THE SUPREME COURT OF CANADA

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I N D E X

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FACTUM OF THE ATTORNEY GENERAL OF CANADA INTERVENOR

PART I

FACTS

1. The Attorney General of Canada appears as an intervenor pursuant to the Order of the Right Honourable The Chief Justice of Canada stating the constitutional questions herein.

PART II

The Position of the Attorney General of Canada With Respect to the Constitutional Questions Stated

2. The Attorney General of Canada supports the judgment of the Court of Appeal of Alberta and says that the majority of that Court was correct to answer questions 1, 2 and 3 in the negative, and to decline to answer questions 4, 5, 6 and 7. Questions 1, 2 and 3 raise essentially the same issue as that raised by the first question in the appeal to this Court in *Public Service Alliance of Canada v. The Queen*, which will be heard immediately before this appeal. The submissions which follow are therefore substantially the same as those in the factum filed by the Attorney General of Canada in that appeal.

PART III

ARGUMENT

Questions 1, 2 and 3

3. This Court has indicated in *Hunter et al. v. Southam Inc.*, (1984) 11 D.L.R. (4th) 641, that in expounding the constitution it will be guided by two principal considerations. As explained by Dickson, J. (as he then was) for the Court, at pp. 650-651, the task of construing the *Canadian Charter of Rights and Freedoms* (hereinafter referred to as "the Charter") requires

(i) a "generous interpretation" of the provision in question, such as was envisaged by the Privy Council in *Minister of Home Affairs et al. v. Fisher et al.*, [1980] A.C. 319, at p. 329, and

(ii) a "purposive analysis", that is, a delineation of the nature of the interests which a particular provision was intended to protect.

See also: *Her Majesty The Queen v. Big M Drug Mart Ltd.*, (unreported, S.C.C., April 24, 1985), per Dickson, J. at pp. 68-69

4. For the reasons which follow, it is the Respondents' submission that neither

(a) a generous interpretation of s.2(d) of the Charter nor

(b) an analysis of its underlying purpose

leads to the conclusion that "freedom of association" contains some implied guarantee of constitutional protection for the means by which a group pursues its goals (such as strike action by a trade union), and that

(c) an examination of the jurisprudence of other jurisdictions fully supports this view.

(a) A Generous Interpretation

5. While the language of s.2(d) of the Charter must, as Lord Wilberforce said in *Fisher, supra,* be construed so as "to give to individuals the full measure of the fundamental rights and freedoms referred to", this is not to say that the courts should refuse to recognize or to give effect to the plain meaning of clear words. Indeed, the Privy Council itself never intended that the *Fisher* doctrine should be

taken to such unprincipled lengths. In *Attorney-General of Fiji v. Director of Public Prosecutions*, [1983] 2 W.L.R. 275 (P.C.), Lord Fraser, after referring to *Fisher*, stated at p. 281:

> "Their Lordships fully accept that a constitution should be dealt with in that way and should receive a generous interpretation. But that does not require the courts, when construing a constitution, to reject the plain ordinary meaning of words. Proper construction of a constitution, or of any other document, would be impossible if the court could not assume that the reader was reasonably intelligent and that he would read with reasonable care."

See also: *Maharaj v. Attorney-General of Trinidad and Tobago (No. 2)*, [1979] A.C. 385 (P.C.), per Lord Diplock at p. 398:

> "What then was the nature of the "redress" [under s.6(1) of the Constitution of Trinidad and Tobago] to which the appellant was entitled? Not being a term of legal art it must be understood as bearing its ordinary meaning, which in the *Shorter Oxford English Dictionary*, 3rd ed. 1944 is given as: 'Reparation of, satisfaction or compensation for, a wrong sustained or the loss resulting from this.'"
>
> (underlining added)

6. Similarly, this Court has recognized that the "plain meaning" of words in the Charter is a matter of primary importance. In *Law Society of Upper Canada v. Skapinker*, (1984) 9 D.L.R. (4th) 161, Estey, J. for the Court at p. 177 considered the significance of the heading

"Mobility Rights" in the interpretation of s.6(2), and concluded:

> For the purpose of examining the meaning of the two clauses of s. 6(2), I conclude that an attempt must be made to bring about a reconciliation of the heading with the section introduced by it. If, however, it becomes apparent that the section when read as a whole is clear and without ambiguity, the heading will not operate to change that clear and unambiguous meaning.

7. In this case the majority of the Alberta Court of Appeal, consistent with the foregoing principles, recognized the requirement for a liberal construction and determined that the words "freedom of association" were capable of being understood in their ordinary, everyday meaning. In this respect the majority obviously agreed with the view taken of s.2(d) by the Court of Appeal for British Columbia in *Dolphin Delivery Ltd. v. Retail, Wholesale and Department Store Union, Local 580 et al.*, (1984) 52 B.C.L.R. 1, and disapproved of the rationale adopted by the Ontario Divisional Court in *Re Service Employees International Union and Broadway Manor Nursing Home*, (1983) 44 O.R. (2d) 392 [appeal allowed on other grounds, (1984) 48 O.R. (2d) 225 (C.A.)] (per Kerans, J.A., Case pp. 60-1, 63-4, 28-9, 32). In *Dolphin Delivery* Esson, J.A. at pp. 11-12 identified the fundamental flaw in the Ontario Divisional Court's reasoning:

> "The basic fallacy in the approach is in having resort to rules of construction without regard to the question whether the words of the Charter create any uncertainty or ambiguity. It is no doubt right to apply the rule of liberal construction

> to the fundamental freedoms in the Charter. But that does not empower courts to construct edifices of policy without regard for the plain meaning of the words of the Charter."

8. As Esson, J.A. went on to explain, at p. 12, the principle recognized in *Minister of Home Affairs et al. v. Fisher et al., supra,* has to be understood in light of the particular circumstances which confronted the Privy Council there:

> "Those considerations were invoked in support of giving to the word 'child' [in s.11(5)(d) of the Constitution of Bermuda] its plain meaning and rejecting the restricted meaning which had sprung up in different contexts. But the point is that the court referred to canons of construction because, as a result of the earlier interpretations, there was a serious issue as to the meaning to be given to the word. Only if there is such an issue is there any reason to consider what is the liberal interpretation."

(Although *Dolphin Delivery* is under appeal, the Appellant abandoned any reliance on s.2(d) of the Charter when that case was argued in this Court.)

9. The relevant definitions of the words "freedom" and "association" as they appear in the *Shorter Oxford English Dictionary,* 3d ed., Vol. I, are:

> Freedom: (p. 748)
> "Exemption from arbitrary control; independence; civil liberty ... The state of being free; ... liberty of action ... The quality of being free from the control of fate or necessity; the power of self-determination."

> Association: (p. 111)
> "The act of associating, or the being associated ...; confederation, league. A body of persons associated for a common purpose; the organization formed to effect their purpose; a society; e.g. the British Association for the Advancement of Science, etc."

10. It is submitted that in its plain meaning "freedom of association" connotes the liberty of like-minded individuals to join together in an organization. Thus understood, s. 2(d) of the Charter guarantees to everyone freedom from governmental interference in the formation and maintenance of a collectivity. The provision does not, on any straightforward reading, speak to the means by which an organization might seek to achieve its goals, although certainly the organization would enjoy collectively all of the other freedoms guaranteed by section 2. Its membership is free to assemble peacefully, and to hold and to advocate its beliefs and opinions through the media or otherwise, as it sees fit.

11. In the jurisprudence that has accumulated to date under s.2(d) only one court - the Ontario Divisional Court in *Broadway Manor, supra* - has concluded that the right to strike is an element of the "freedom of association". Not only is this judgment unique *in* Canada, it is also (as will be discussed under heading (c) below) unique *to* Canada. It is respectfully submitted that quite apart from the Divisional Court's failure to consider the plain meaning of the Charter's words, its conclusion should be rejected because it evinces no awareness of the essential nature of the s.2(d) freedom in its broader dimensions, as was pointed out by Esson, J.A. in *Dolphin Delivery, supra,* at pp. 11 and 14:

> "The freedom must be intended to protect the right of 'everyone' to associate as they please, and to form associations of all kinds, from political parties to hobby clubs. Some will have objects, and will be in favour of means of achieving those objects, which the framers of the Charter cannot have intended to protect. The freedom to associate carries with it no constitutional protection of the purposes of the association, or means of achieving those purposes.
>
> . . .
>
> The judgments in the Divisional Court rest largely upon the view that, unless the right to bargain collectively and the right to strike is guaranteed, the right of association would, for a trade union, have no content, would be something of no value. That is, I suggest, an excessively narrow view of the significance of the freedom of association. It disregards 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; one which must be reckoned with by any government which contemplates legislating to limit the existing rights of trade unions."

12. Similarly, other Canadian courts have declined to infuse s.2(d) with a meaning which its clear words do not convey. In particular, the notion that "freedom of association" implies the entrenchment of the right to strike in the constitution has been rejected in *Halifax Police Officers and NCO's Association v. City of Halifax et*

al., (1984) 64 N.S.R. (2d) 368 (N.S.S.C.); *Retail, Wholesale and Department Store Union et al. v. Government of Saskatchewan et al.*, (1984) 12 D.L.R. (4th) 10 (Sask. Q.B.); and *Public Service Alliance of Canada v. The Queen*, (1984) 11 D.L.R. (4th) 387.

See also: *Re United Headware Union and Biltmore Stetson (Canada) Inc.*, (1983) 43 O.R. (2d) 243 (Ont. C.A.), per Robins, J.A. at p. 256;

Re Prime et al. and Manitoba Labour Board et al., (1983) 3 D.L.R. (4th) 74 (Man. Q.B.), per Kroft, J. at p. 83 [appeal allowed on other grounds (1984) 28 Man. R. (2d) 234 (C.A.); leave to appeal refused November 13, 1984 (S.C.C.)];

Saskatchewan Government Employees' Union et al. v. Government of Saskatchewan et al., (1984) 36 Sask. R. 98 (Q.B.);

Pitts Atlantic Construction Limited v. United Association of Journeymen et al., (1984) 46 Nfld. & P.E.I.R. 211 (Nfld. C.A.);

Pruden Building Limited v. Construction and General Workers' Union et al., [1985] 1 W.W.R. 42 (Alta. Q.B.).

13. The Respondents submit that the scope of s.2(d) of the Charter is readily ascertainable by reference to the plain meaning of the words used therein. In respect of trade unions, s. 2(d) guarantees their freedom to organize, to solicit members, to advocate the common views of the membership and to seek to engage in bargaining with employers on behalf of the employees whom it represents. It does not, on any straightforward reading, arm collectivities

with constitutional weaponry for compelling others to take notice of and to respond to them.

(b) A Purposive Analysis

14. In *Law Society of Upper Canada v. Skapinker, supra,* this Court recognized (at p. 176) that most of the 34 sections of the Charter were of "independent significance", and that the headings which appeared throughout "were systematically and deliberately included as an integral part of the Charter for whatever purpose". This appearance of a system of classification caused the Court, in seeking to arrive at an understanding of the meaning and application of a particular paragraph, to inquire whether that paragraph was logically related to the rest of the section in which it was found and, if so, whether the heading which preceded the section could then be taken as being descriptive of a cognizable category; or whether, on the other hand, the paragraph should properly be regarded as standing alone. So too in the present case, it is submitted, should an inquiry into the purpose of s.2(d) begin with an examination of the paragraph in the context of s.2 as a whole and in relation to the heading "Fundamental Freedoms".

15. The freedoms described in s.2 are those which have long been recognized as "the basic political rights in a free society" (F. R. Scott, "Dominion Jurisdiction Over Human Rights and Fundamental Freedoms", (1949) 27 Can. Bar. Rev. 497, at p. 507). Civil and religious liberty of this kind "is the primary condition of social life, thought and its communication by language", and is "little less vital to man's mind and spirit than breathing is to his physical

existence" (per Rand, J. in *Switzman v. Elbling et al.*, [1957] S.C.R. 285, at p. 306). It is significant for the purposes of this case to note that these fundamental freedoms have traditionally been grouped together as a distinct class, separate from the other rights -- specifically, economic rights such as the right to strike -- which are also included under the broad rubric of "civil liberties". For example, in his comprehensive treatise on the subject Professor Tarnopolsky (as he then was) described the 4 classes of civil liberties as follows:

> "... *political liberties* - traditionally including freedoms of association, assembly, utterance, press or other communications media, conscience, and religion; *economic liberties* - the right to own property, and the right not to be deprived thereof without due compensation, freedom of contract, the right to withhold one's labour, etc.; *legal liberties* - freedom from arbitrary arrest, right to a fair hearing, protection of an independent judiciary, access to counsel, etc.; *egalitarian liberties* or human rights - right to employment, to accommodation, to education, and so on, without discrimination on the basis of race, colour, sex, creed, or economic circumstances."
>
> (underlining added)

W. S. Tarnopolsky, "The Canadian Bill of Rights" (2d ed.), at p. 3

See also: Peter W. Hogg, "Constitutional Law of Canada", (Carswell, 1977), at p. 417;

Bora Laskin, "An Inquiry into the Diefenbaker Bill of Rights", (1959) 37 Can. Bar Rev. 77, at pp. 80-82

16. Professor Laskin (as he then was) in his article supra, *at p. 81, made it abundantly clear that the kinds of* rights asserted by the Appellant in this case do not fall in the "political liberties" category:

> "...it is of some interest to note that the trade unionist who was once the victim of the assertion of *economic liberty* is now relying on a particular version of it to defend *free collective bargaining and his freedom to engage in strikes and picketing.*"
>
> (italics added)

17. The marked distinction between "political liberties" such as those entrenched in s.2, and "economic liberties" such as those claimed by the Appellants, is not a phenomenon peculiar to the Charter:

(i) the Appellant relies on Article 22 of the United Nations *International Covenant on Civil and Political Rights* as a source of support for its inflated view of s.2(d) of the Charter (Appellant's Factum, paragraph 44). The Respondents fully agree that s.2(d), like Article 22 (1) of the *Covenant*, guarantees to everyone "the right to form and join trade unions for the protection of his interests". The point is, however, that when the members of the United Nations sought to recognize *economic*, as opposed to *political*, liberties such as the right of unions "to function freely" and "the right to strike", they did so in clear words and in an entirely separate document, the

International Covenant on Economic, Social and Cultural Rights (compare Article 8 thereof);

(ii) in the same vein, the First Amendment to the Constitution of the United States contains a catalogue of political liberties similar to those in s.2 of the Charter (although, unlike s.2, the First Amendment contains an anti-establishment clause and, since it does not expressly refer to freedom of association, that freedom has been derived by the courts from the freedom of speech). The *economic* right to property is protected elsewhere, under the Fifth and Fourteenth Amendments, and as this Court is aware the efforts made to assert more elaborate economic claims have generally taken place under the aegis of the "due process" clauses in those Amendments;

Curr v. The Queen, [1972] S.C.R. 889, per Laskin, J. at p. 902

(iii) Section 1 of the *Canadian Bill of Rights*, R.S.C. 1970, App. III, recognizes "human rights and fundamental freedoms" and seems to draw a clear line between "rights", which are specified in subs. (a) and (b), and "freedoms", which are dealt with in subs. (c) to (f) inclusive. Professor Laskin, *supra*, at p. 126, in commenting on a draft of the Bill said that "the only reference to

economic liberty is the specification of a right to enjoyment of property". Thus, it would appear that the "fundamental freedoms" of the *Bill of Rights*, like the "Fundamental Freedoms" of the Charter, were not intended to embrace economic concerns such as collective bargaining and the right to strike.

18. In *The Queen v. Big M Drug Mart Ltd.*, *supra*, this Court recognized that the Charter's "Fundamental Freedoms" are the constitutional successors to the traditional "political liberties" discussed above. Indeed, at p. 72, Dickson, J. expressed the view that their designation as "fundamental" flowed from the fact that "they are the *sine qua non* of the political tradition underlying the Charter". In such circumstances, it is submitted, the purpose of s.2(d) should be identified by tracing freedom of association to its historical roots.

19. As described by Professor Tarnopolsky, *supra*, at p. 201, freedom of association is

> "...an outgrowth of the freedoms of speech and assembly, and the much earlier right to petition, (and it) concerns *the right to join in common cause with another or others in the pursuit of lawful objects.*"
>
> (italics added)

In the view of Professor D. A. Schmeiser, it has been "inseparably connected" with the freedoms of speech and press, and it is therefore "unwise if not practically impossible" to discuss these freedoms separately.

D. A. Schmeiser, "Civil Liberties in Canada" (Oxford University Press, 1964), at p. 221.

20. This historical linkage of the freedoms now guaranteed in s.2 of the Charter indicates that the purpose of freedom of association is, as Professor Tarnopolsky and others have suggested, to ensure that the enjoyment of the related fundamental freedoms is not confined to individuals acting in isolation. Such a restriction would, in large measure, render those freedoms illusory, as was recognized in the political context by Chief Justice McRuer in his report on civil rights in Ontario (quoting Sir Arthur Goodhart):

> "The third basic principle (of the English constitution) covers the so-called freedoms of speech, of thought and of assembly. These freedoms are an essential part of any Constitution which provides that the people shall be free to govern themselves, because without them self-government becomes impossible. A totalitarian government, which claims to have absolute and unalterable authority, is acting in a logical manner if it denies to its subjects the right of criticism, because such criticism may affect the authority of those in power. To ask that a totalitarian government should recognise freedom of speech is to ask for the impossible because, by its very nature, such a government must limit the freedom of its subjects. On the other hand, such a system of government as exists under the British Constitution must recognise the necessity for freedom of speech and of association, because if public criticism is forbidden and if men are prevented from acting together in political associations, then it would be impossible to make a change in the government by the free, and more or less intelligent, choice of the people."

Royal Commission Inquiry Into Civil Rights, Part IV, Report Number Two, p. 1489

See also: *Black & Company v. Law Society of Alberta*, (1984) 57 A.R. 1 (Q.B.), per Dea, J. at p. 22.

21. The United States Supreme Court has taken the same view of the purpose underlying the freedom of association that has been derived from the First Amendment:

> "...one can at least imagine a legal system in which only the solitary pursuit of certain ends would be protected from majoritarian control by law -- a system in which the very existence of group activity was thought sufficient to transform otherwise preferred rights into legally cognizable threats to the society as a whole. If the jurisprudence of freedom of association developed by the Supreme Court over the past four decades were to be summarized in a single sentence, it would be this: Ours is not such a system."
>
> Laurence H. Tribe, "American Constitutional Law" (Foundation Press, 1978) at pp. 702-703

22. Thus, as was recognized by Esson, J. A. in *Dolphin Delivery*, *supra* at p. 14, the real significance of freedom of association arises from "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."

23. If, contrary to the foregoing, it is concluded that the purpose of s.2(d) is to provide a constitutional *guarantee* of all the means, legislative or otherwise, by which an association might hope to achieve its objects, the results would be anomolous:

(i) there would be no reason in principle why the same ability to create obligations on third parties should not also extend to the other "inseparably connected" freedoms of s.2. Consequently, it would necessarily follow that "freedom of speech" included the right to employ means aimed at compelling both audition and response;

Compare: *Minnesota State Board for Community Colleges et al. v. Knight et al.*, (1984) 79 L Ed 2d 299 (U.S.S.C.), per O'Connor, J. at pp. 312-313

(ii) there is no rational basis on which it might be assumed that the Charter was intended to have such a freezing effect upon statute law, and particularly recent statute law.

Law Society of Upper Canada v. Skapinker, supra, per Estey, J. at p. 178

(c) Other Jurisprudence

24. Freedom of association is one of the "fundamental freedoms" guaranteed in s.1 of the Constitution of Trinidad and Tobago. In *Collymore et al. v. Attorney-General*, [1970] A.C. 538 (P.C.), it was contended that legislation prohibiting strikes and imposing compulsory arbitration infringed the constitutional guarantee. Lord Donovan for the Privy Council rejected that argument, and at p. 547 approved the opinion of Wooding, C.J. in the court below as to the nature of freedom of association in the trade union context:

> "In my judgment, then, freedom of association means no more than freedom to enter into consensual arrangements to promote the common interest objects of the associating group. The objects may be any of many. They may be religious or social, political or philosophical, economic or professional, educational or cultural, sporting or charitable. But the freedom to associate confers neither right nor licence for a course of conduct or for the commission of acts which in the view of Parliament are inimical to the peace, order and good government of the country."

25. Much the same view has been taken in the United States, where the courts have determined that freedom of association is, by implication, protected under the First Amendment to the Constitution. In *Hanover Township Federation of Teachers et al. v. Hanover Community School Corporation et al.*, (1972) 457 F 2d 456, a teachers' union complained that a school board, in mailing individual contracts of employment to members of the union, had violated a duty to negotiate a master agreement and had evinced an intention to destroy the union, in violation of the First Amendment. The United States Court of Appeals for the Seventh Circuit found no infringement of the Constitution, and Stevens, C.J. stated, at pp. 460-461:

> "...protected 'union activities' include advocacy and persuasion in organizing the union and enlarging its membership, and also in the expression of its views to employees and to tne public. For that reason, the State may not broadly condemn all union activities or discharge its employees simply because they join a union or participate in its activities. It does not follow, however, that all activities of a union or its membership are constutionally protected.

> Thus, the economic activities of a group of persons (whether representing labor or management) who associate together to achieve a common purpose are not protected by the First Amendment. Such activities may be either prohibited or protected as a matter of legislative policy."

26. That decision has been endorsed by the United States Supreme Court, as for example in *Smith et al. v. Arkansas State Highway Employees et al.*, (1979) 441 U.S. 463. There, a State employer refused to consider employee grievances filed by a union rather than directly by an employee. Nevertheless, it was found that the employer's action did not amount to a violation of the First Amendment, and in its *per curiam* opinion the Court, at p. 465, recognized the same linkage between associational and expressive freedom as has been discussed herein under heading (b) above:

> "The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. [authorities omitted]. But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.
>
> In the case before us, there is no claim that the Highway Commission has prohibited its employees from joining together in a union, or from persuading others to do so, or from advocating any particular ideas. There is, in short, no claim of retaliation or discrimination proscribed by the First Amendment."

See also: *Minnesota State Board for Community Colleges et al. v. Knight et al., supra*, per O'Connor, J. at pp. 314-315

27. Accordingly, to the extent that jurisprudence of other jurisdictions is relevant to the interpretation of s.2(d) of the Charter, it fully supports the conclusion reached by the courts below in this case.

28. If, notwithstanding all of the foregoing, this Court should conclude that the words "freedom of association" are shrouded in ambiguity; that they cannot be understood as serving the purpose with which they have been traditionally associated; that they should be taken as entrenching a concept which has heretofore gone unrecognized in other "free and democratic societies"; and that they can only be interpreted by reference to extrinsic aids such as international conventions to which Canada is a signatory, then it is submitted that the net effect of such conventions upon Canadian "freedom of association" is accurately stated in *Re Alberta Union of Provincial Employees et al. v. The Crown in Right of Alberta*, (1980) 120 D.L.R. (3d) 590 (Alta. Q.B.); affirmed, (1981) 130 D.L.R. (3d) 191 (Alta. C.A.); leave to appeal refused [1981] 2 S.C.R. v, wherein it was held that the freedom does not contain as an element the right to strike.

Questions 4, 5, 6 and 7

29. It is respectfully submitted that the Court of Appeal was correct to leave these questions unanswered for the reasons given by Kerans, J.A. (Case pp. 55 and 85-7). In the absence of an evidentiary record the issues raised in

those questions cannot be properly addressed with due regard for the provisions of section 1 of the *Charter*.

Law Society of Upper Canada v. Skapinker, *supra*

The Queen v. Big M Drug Mart Ltd., *supra*

PART IV

ORDER SOUGHT

30. It is respectfully submitted that the appeal herein should be dismissed.

All of which is respectfully submitted.

E. A. BOWIE, Q.C.

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PART V

LIST OF AUTHORITIES

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