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 MANITOBA INTERVENOR

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

IN THE SUPREME COURT OF CANADA

A. BARRIE C. CHIVERS
Wright Chivers & Company
#391, 10328 - 81 Avenue
Edmonton, Alberta

Solicitor for the Appellant
The Alberta International
Fire Fighters Association

SOLOWAY, WRIGHT, HOUSTON,
GREENBERG, O'GRADY, MORIN
Barristers & Solicitors
170 Metcalfe Street
Ottawa, Ontario

Ottawa Agents for the
Appellant, The Alberta
International Fire
Fighters Association

TIMOTHY J. CHRISTIAN

Counsel for the Appellant
The Alberta Union of
Provincial Employees

SOLOWAY, WRIGHT, HOUSTON,
GREENBERG, O'GRADY, MORIN
Barristers & Solicitors
170 Metcalfe Street
Ottawa, Ontario

Ottawa Agents for the
Appellant, The Alberta
Union of Provincial
Employees

SHEILA J. GRECKOL

Counsel for the Appellant,
Thoe Canadian Union of
Public Employees

SOLOWAY, WRIGHT, HOUSTON
GREENBERG, O'GRADY, MORIN
Barristers & Solicitors
170 Metcalfe Street
Ottawa, Ontario

Ottawa Agents for the
Appellant, The Canadian
Union of Public Employees

NOLAN D. STEED
Department of the Attorney
General of Alberta

Counsel for the Respondent
The Attorney General of
Alberta

GOWLING AND HENDERSON
Barristers & Solicitors
160 Elgin Street
Ottawa, Ontario

Ottawa Agents for the
Respondent, The Attorney
General of Alberta

IN THE SUPREME COURT OF CANADA

Names and Addresses of the Solicitors for the Interveners and their respective Ottawa Agents

The Attorney General of Canada	ROGER TASSE, Q.C. Deputy Attorney General of Canada Department of Justice Ottawa, Ontario Solicitor for the Attorney General of Canada
Attorney General of Saskatchewan	MACDONALD, AFFLECK Barristers & Solicitors 100 Sparks Street Ottawa, Ontario Ottawa Agents for the Attorney General of Saskatchewan
Attorney General of Newfoundland	BURKE-ROBERTSON, CHADWICK & RITCHIE Barristers & Solicitors Suite 1800, 130 Albert St. Ottawa, Ontario Ottawa Agents for the Attorney General of Newfoundland
Attorney General of Quebec	NOEL, DECARY, AUBRY Barristers & Solicitors 111 Champlain Hull, Quebec Ottawa Agents for the Attorney General of Quebec

Attorney General of Manitoba	SOLOWAY, WRIGHT, HOUSTON, GREENBERG, O'GRADY, MORIN Barristers & Solicitors 170 Metcalfe Street Ottawa, Ontario Ottawa Agents for the Attorney General of Manitoba
Attorney General of British Columbia	BURKE-ROBERTSON, CHADWICK & RITCHIE Barristers & Solicitors Suite 1800, 130 Albert Street Ottawa, Ontario Ottawa Agents for the Attorney General of British Columbia
Attorney General of Ontario	SOLOWAY, WRIGHT, HOUSTON, GREENBERG, O'GRADY, MORIN Barristers & Solicitors 170 Metcalfe Street Ottawa, Ontario Ottawa Agents for the Attorney General of Ontario
Attorney General of Nova Scotia	BURRITT, GRACE AND NEVILLE 77 Metcalfe Street Suite 500 Ottawa, Ontario Ottawa Agents for the Attorney General of Nova Scotia
Attorney General of Prince Edward Island	BRIAN H. WILSON, Esq., Barrister & Solicitor Room 603, 30 Metcalfe St., Ottawa, Ontario Ottawa Agent for the Attorney General of Prince Edward Island

I N D E X

FACTUM

OF

THE ATTORNEY GENERAL OF MANITOBA, INTERVENOR

PART I

STATEMENT OF FACTS

1. The Attorney General of Manitoba intervenes in this appeal pursuant to the order of the Right Honourable Chief Justice of Canada dated March 11, 1985.

2. The Attorney General of Manitoba adopts the facts as outlined in the Factums of the Appellants.

PART II

POINTS IN ISSUE

3. The Attorney General of Manitoba intervenes in this case to make submission with respect to the questions stated in the order of the Right Honourable Chief Justice of Canada on March 11, 1985 which are:

(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 lockouts and strikes, 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 lockouts and strikes, in particular sections 117.1, 117.2 and 117.3 thereof, inconsistent with the Constitution Act, 1982, and if so, in what particular or particulars, and to what extent?

(3) Are the provisions of the Polic Officers Collective Bargaining Act that provide compulsory arbitration as a mechanism for resolution of disputes and prohibit the use of lockouts and strikes, 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 employer 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 Judiciary;
(d) an employee whose interests as a member of a unit for collective bargaining could conflict with his duties as an employee?

However, the submission of the Attorney General of Manitoba is restricted to the meaning of the phrase "freedom of association" in the Canadian Charter of Rights and Freedoms.

4. The Attorney General of Manitoba intervenes in support of the Appellants, The Alberta Union of Provincial Employees, The Alberta International Firefighters Association and The Canadian Union of Public Employees.

PART III

ARGUMENT

A.

The Charter should receive a liberal interpretation

5. It is respectfully submitted that this Court has recognized that the Charter of Rights and Freedoms must be given a broad, liberal interpretation, in order to give effect to the fundamental rights and freedoms it guarantees.

R. v. Big M Drug Mart Ltd. (S.C.C., April 24, 1985, unreported), per Dickson, C.J.C., at pp.68-69.

> This Court has already, in some measure, set out the basic approach to be taken in interpreting the Charter. In Lawson A.W. Hunter v. Southam Inc. (decision rendered September 17, 1984) this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical

> origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in Southam emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this Court's decision in Law Society of Upper Canada v. Skapinker (1984), 9 D.L.R. (4th) 161, illustrates, be placed in its proper linguistic, philosophic and historical contexts.

Director of Investigation and Research of the Combines Investigation Branch et al v. Southam Inc. (sub nom Hunter v. Southam), [1984] 6 W.W.R. 577 (S.C.C.), at pp. 586-587.

Law Society of Upper Canada v. Skapinker (1984), 9 D.L.R. (4th) 161 (S.C.C.), at pp. 167-170.

6. However, as was recently indicated by the Saskatchewan Court of Appeal in Retail, Wholesale and Department Store Union Locals 544, 635 and 955 et al v. Government of Saskatchewan (Sask. C.A., June 3, 1985, unreported), per Cameron, J.A.; at pp.8-9:

> None of this is to say that the rights and freedoms of the Charter are to be the subject of extravagant or unnatural interpretation. It is only to say they may be interpreted generously, resolving ambiguities in their favour, with a view to giving them full recognition and effect--and without excessive concern for where this liberal construction may

> lead in the light of the power of the legislative branch to limit their exercise under s. 1, or, for that matter to temporarily suspend them for up to five years under s. 33. These powers, often referred to in the literature of the Charter as the "double-override", afford the legislative branch extensive authority to restrict the exercise of the rights and freedoms in issue, a fact which I think has a place in determining the scope of those rights and freedoms.

B. Two Stage Approach to Charter Interpretation

7. When examining the provisions of a statute in order to determine whether its provisions violate the rights and freedoms set out in the Charter, both the purpose and the effect of the statute are relevant. In this respect, in Big M Drug Mart Ltd., supra, the Chief Justice stated, at pp. 51-52:

> In short, I agree with the respondent that the legislation's purpose is the initial test of constitutional validity and its effects are to be considered when the law under review has passed or, at least, has purportedly passed the purpose test. If the legislation fails the purpose test, there is no need to consider further its effects, since it has already been demonstrated to be invalid. Thus, if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity. In short, the effects test will only be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid purpose.

8. It is respectfully submitted that once an analysis of the purpose, and, if necessary, the effect of the statute demonstrates that there is an infringement of the fundamental freedoms set out in s. 2 of the Charter, the onus then shifts to the party seeking to uphold the statute to demonstrate that the infringement is a "reasonable limit" which can be "demonstrably justified in a free and democratic society" (s.1 of the Charter).

10 Hunter v. Southam, supra, per Dickson, J.(as he then was), at 597:

> The phrase "demonstrably justified" puts the onus of justifying a limitation on a right or freedom set out in the Charter on the party seeking to limit.

C. Interpretation of s. 2(d) of the Charter of Rights and Freedoms

9. It is the position of the Attorney General of
20 Manitoba that freedom of association not only protects the right of workers to organize into trade unions, but also protects the right of such an association to carry out its primary function of collective bargaining on behalf of the employees it represents. It is further the position of the Attorney General of Manitoba that the process of collective bargaining includes the right to strike, in that the right to organize and bargain collectively is only an illusion if the right to
30 strike is not encompassed within the meaning of freedom of association.

10. It is respectfully submitted that an examination of the phrase "freedom of association" and the words which make up that phrase is necessary in order to determine the scope of this freedom. This was the approach taken by the Chief Justice in Big M Drug Mart Ltd., supra.

(1) **Meaning of Freedom**

11. In Big M Drug Mart Ltd., supra, the Chief Justice discussed the term "freedom" in the context of s. 2(a) of the Charter at pp. 55-56, where he stated:

> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

It is respectfully submitted that these remarks are equally applicable to the meaning of freedom in s. 2(d).

(2) **Meaning of Association**

12. The 5th edition of Black's Law Dictionary defines "association" at p. 111, as:

> 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.
>
> An unincorporated society; a body of persons united and acting together without a charter, but upon the methods and forms used by incorporating bodies for the prosecution of some common enterprise.

13. The Compact Edition of the Oxford English Dictionary p. 9, defines "association" as follows:

> 1. The Act of combining for a common purpose the condition of such combinations; confederation, leagues;
> 2. A body of persons who have combined to execute a common purpose or advance a common cause;

14. Shorter Oxford English Dictionary, 3d ed., Vol. I, p. 111 defines "association" as follows:

> "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 Sciences, etc."

(3) Meaning of Freedom of Association

(a) Canadian Case Law

15. A number of Canadian cases have considered freedom of association in the labour relations context. Re Service Employees International Union Local 204 v. Broadway Manor Nursing Home et al, (1983), 4 D.L.R. (4th) 231 (Ont. H. C.);

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

Public Service Alliance of Canada v. The Queen in Right of Canada (1984), 11 D.L.R. (4th) 387 (F.C.A.);

Re Retail, Wholesale and Department Store Union, Locals 544, 496, 635 and 955 et al, v. Government of Saskatchewan et al, (Sask. C.A., June 3, 1985, unreported).

16. It is submitted that a generous construction of freedom of association was provided by the Ontario Divisional Court in Re Service Employees International Union, Local 204 v. Broadway Manor Nursing et al, supra, and that this construction is in keeping with the principles set out in Hunter v. Southam, supra. Although each judge delivered separate, concurring reasons, the rational of each is, as noted by Mahoney, J., in Public Service Alliance of Canada, supra, "fairly stated" by O'Leary, J. at pages 443 and 445:

> I am satisfied... that "freedom of association" includes the right of employees to join or form trade unions of their choice, and to bargain collectively.
>
> But is the right to strike included in the expression "freedom of association"? The ability to strike, in the absence of some kind of binding conciliation or arbitration, is the only substantial economic weapon available to employees. The right to organize and bargain collectively is only an illusion if the right to strike does not go with it. The main reason that the right to organize and bargain collectively is assured employees is that they may effectively bargain with their employer. To take away an employee's ability to strike so seriously detracts from the benefits of the right to organize and bargain collectively as to make those rights virtually meaningless. If the right to organize and bargain collectively is to have significant value then the right to strike must also be a right included in the expression "freedom of association", and I conclude that it is.

17. After reviewing the Canadian jurisprudence, a similar approach was adopted by the Saskatchewan Court of Appeal in Retail, Wholesale and Department Store Union, supra. In coming to the conclusion that s. 2(d) included collective bargaining and the right to strike, Cameron, J.A., stated, at p.22:

> What all of this suggests then, is that while the decided cases weigh in favour of the exclusion of the "right to strike" from the constitutional freedom of association, the emerging framework of principles governing Charter interpretation rather

> points to its inclusion, especially if we are to be faithful to the call to give these rights and freedoms a "generous interpretation ... suitable to give to individuals the full measure" of them.

18. In the reasons for judgement of the Federal Court of Appeal in Public Service Alliance of Canada, supra, Mahoney, J., at p. 392, held that:

> The right of freedom of association guaranteed by the Charter is the right to enter into consensual arrangements. It protects neither the objects of the association nor the means of attaining those objects."

19. In the case at bar, the Alberta Court of Appeal also restricted the scope of freedom of association to the act of forming and maintaining groups. Kerans, J. A., speaking on behalf of the majority stated at p. 303:

> Even if I am to accept the "something new" approach, it does not follow that I ought to accept a definition which leaps from protected organization to protected action.

20. It is respectfully submitted that excluding the protection of the objects of the association or the means of attaining those objects from the definition "freedom of association" is not consistent with this Court's decision in Big M Drug Mart Ltd., supra, which holds that the concept of freedom includes the protection of activities (pp. 55, 71).

(b) **Association Is More Than Peaceful Assembly**

21. The Alberta Court of Appeal also artifically restricted the scope of freedom of association by holding that it did not add anything new but simply made express that which was implicit elsewhere. At p. 302, the majority stated:

> No reason is offered why I should prefer the view that the structure of the Charter was intended to add something new and not just to make explicit that which is elsewhere only implicit. Freedom of assembly, for example, is itemized separately but nonetheless remains closely allied to freedom of expression.

22. It is respectfully submitted that freedom of association is an independent right, which was meant to be distinguished from freedom of assembly, and therefore, a separate and distinct construction and interpretation of freedom of association should be given to s. 2(d) of the Charter.

Irwin Cotler, "Freedom of Assembly, Association, Conscience and Religion", in Beaudoin and Tarnopolsky, The Canadian Charter of Rights and Freedoms, (1982), 123, at p. 157 stated:

> What is noteworthy about the Charter protection of freedom of association is its protective status as a distinguishable and independent right, rather than one derived from the other fundamental freedoms, as in U.S. law, or collocated with freedom of assembly, as in the Canadian Bill of Rights. Indeed, the very enactment of freedom of association

> as an entrenched right deserving of independent protection may auger well for the determination of the scope, as well as the validity of the right when tested in the legal process.

23. Further support for Cotlers's interpretation is found when one considers, by contrast, the close connection between assembly and association in the the Proposed Constitutional Resolution of October 1980.

S. 2 of that Proposal read:

> 2. Everyone has the following fundamental freedoms:
> (a) freedom of conscience and religion;
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of information; and
> (c) freedom of peaceful assembly and of association.
> (underlining added)

24. It is important to note that the Chief Justice of the Saskatchewan Court of Appeal recently adopted a similar line of reasoning in coming to the conclusion that freedom of association included the freedom to act in concert. See: Retail Wholesale Department Store Union, supra, per Bayda, C.J.S., at p. 14.

25. It is respectfully submitted that the conclusion of the Alberta Court of Appeal in the case at bar, with respect to the scope of freedom of association is contrary to this Court's judgement in Hunter v. Southam, supra.

(c) **The Collymore Case**

26. Other parties in the case at bar have referred to Collymore et al v. The Attorney General of Trinidad and Tobago, [1970] App. Cas. 538 (P.C.) which was the basis for rejecting a broader interpretation of the freedom of association in Dolphin Delivery, supra, and Public Service Alliance of Canada, supra. In Collymore, supra, the Court considered the meaning of freedom of association in the context of the Trinidad and Tobago (Constitution) Order in Council, 1962 which provided:

> s. 1: It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist without discrimination by reason of race, origin, colour, religion or sex, the following human rights and fundamental freedoms, namely ... (j) freedom of association and assembly...
>
> s. 2 ... no law shall abrogate, abridge or infringe or authorize the abrogation, abridgement or infingement of any of the rights and freedoms hereinbefore recognised and declared ... .

27. In concluding that "freedom of association" could not be equated with freedom to pursue the objects of the association, the Privy Council adopted the statement of Wooding C.J. in the Court below:

> 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.

Collymore v. The Attorney General of Trindad and Tobago, supra, at 547.

28. It is respectfully submitted that this case is not particularly helpful in deciding the issues in the case at bar since the Constitution of Trinidad and Tobago associates freedom of assembly and freedom of association in the same way in which the Bill of Rights and the Proposed Constitutional Resolution of 1980 do.

S.A. de Smith, The New Commonwealth and its Constitution, (1964).

29. Secondly, the Constitution of Trinidad and Tobago contains no express limitation clause similar to s. 1 of the Charter. Therefore, in Collymore, supra, the Privy Council had to interpret the guarantees contained in that Constitution narrowly because there was no recourse to a limitation clause, such as s. 1 of the Charter or s. 13 of the new Constitution of Trinidad and Tobago which came into force in 1976.

A. Blaustein and G. Flanz (eds.), Constitutions of the Counties of the World: Trinidad and Tobago, (1977).

30. The reasoning of Wooding, C.J. was carefully considered by Cameron, J.A. in Retail Wholesale Department Store Union, supra, and rejected on the basis that it dealt with the extent to which a freedom could be exercised rather than the scope of the freedom itself. At p. 10 of his reasons for judgement he stated:

> That we must not "equate freedom of association with freedom to pursue without restrictions the objects of the association" is beyond dispute; but that proposition [referring to Wooding, C.J.'s comments] speaks more to the exercise of the freedom in issue than to its content, and, as such, is of little assistance in determining, as a matter of construction, the scope of that freedom.

In rejecting the interpretation the Privy Council gave to freedom of association in Collymore, supra, he concluded, at p. 12, that:

> Taken to its logical end it leaves freedom of association to include nothing but what Parliament says it includes, which is a complete negation of the notion of a constitutionally entrenched fundamental right.

31. It is respectfully submitted that the narrow interpretive approach adopted in Collymore, supra, is not valid in defining the scope of the freedom protected by subsection 2(d). Section 1 of the Charter specifically deals with the issue of whether a limitation is justified. Therefore, it is respectfully submitted that the scope of the freedom to be protected must first be defined without reference to s. 1.

(d) The Meaning of Freedom of Association Under International Law

(i) The Applicability of International Law

32. It is respectively submitted that in interpreting the scope and extent of the fundamental freedoms guaranteed by the Charter, international law must be considered, including international covenants and treaties to which Canada is a party.

Errol P. Mendes, in "Interpreting the Canadian Charter of Rights and Freedoms: Applying International and European Jurisprudence on the Law and Practice of Fundamental Rights", 1982 Alberta Law Review, Vol. XX, No. 2 383, at pp. 391-392 points out the similiarity between the Charter and the major international human rights instruments:

> The Canadian people and their legislatures opted for a Charter of Rights which is similar to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the European Convention of Human Rights and Fundamental Freedoms. All those fundamental rights Charters have express limitations on the rights enumerated therein. These express limitations reflect the philosophy of the drafters that certain rights can be subject to "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Such limitations, although drafted in an extremely vague fashion, reflect the philosophy of the people and their representatives, not that of an independent judiciary struggling to determine when governmental interests should take priority to individual freedoms and vice versa.

> Therefore, it could be argued that the jurisprudence arising from the International Covenant of Civil and Political Rights and the European Convention of Human Rights and Fundamental Freedoms may be of more relevance in interpreting the Canadian Charter of Rights than American jurisprudence arising from the Americal Bill of Rights. Because the general limitation clause in s. 1 of the Charter is so vague, Canadian Courts will still have to engage in the task of balancing governmental interests against individual freedoms in deciding which should take precedence in any given situation. However, the Canadian Courts have a base from which to start this process, chiefly the provisions in s. 1 of the Charter. The American Courts have no such base from which to develop limitations on rights enumerated in the American Bill of Rights. While Canadian Courts should take notice of how the American judiciary developed limitations on the enumerated rights, notice should also be given to how international tribunals have interpreted express limitation clauses in the international human rights documents discussed above.

Similarily, John Claydon, in "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms", (1982) 4 Supreme Court Law Review, stated at 287:

> "In briefs submitted to the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, and in oral exchanges between witnesses and Committee members, frequent invocation was

> made of international human rights instruments as embodying appropriate standards by which proposed Charter of Rights and Freedoms should be measured. Canada's international human rights obligations served as not only the necessary and pervasive context in which the Charter of Rights was amended and adopted, but also as the direct inspiration for amendments designed to strengthen the human rights protection provided.

33. This approach was recently adopted by the Saskatchewan Court of Appeal in Retail Wholesale and Department Store Union, supra, where Cameron, J.A., considered "these covenants to be material to the definition of freedom of association guaranteed by the Charter" (at p. 23).

(ii) Freedom of Association in the International Labour Law Context

34. It is respectively submitted that freedom of association in the labour law context, has a specific and widely recognized meaning under international law. International covenants and treaties to which Canada is a party, recognize that freedom of association in a labour relations context, includes not only the freedom to unite together for some special purpose, but also, the freedom to act together to achieve those purposes.

These international instruments include: a) Universal Declaration of Human Rights; b) International Covenant of Civil and Political Rights; c) International Covenant of Economic Social and Cultural Rights; d) Conference on Security and Cooperation in Europe, Final Act and e) I.L.O. Convention No. 87 concerning the Freedom of Association and Protection of the Right to Organize.

Universal Declaration of Human Rights

35. The United Nations Universal Declaration of Human Rights, does not constitute a body of ratified obligations formally binding on states, but was promogated by the General Assembly of the United Nations. Its provisions which have been affirmed in a series of other international instruments, provide that "everyone has the right to freedom of peaceful assembly and to freedom of association", "no one may be compelled to belong to an association", and "everyone has the right to form and to join trade unions for the protection of his interests".

Louis, Henken; Richard C. Pugh; Oscar Schachter; and Hans Smit, International Law: Cases and Materials, West Publishing Company: St. Paul, Minnestoa, 1980, at pp. 808-809.

International Covenant on Civil and Political Rights with Optional Protocol

36. The United Nations International Covenant on Civil and Political Rights was acceded to by Canada on May 19, 1976, and has been in force for Canada since August 19, 1976. The relevant provisions of this Covenant are set out in Article 22.

Article 22:

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are perscribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the Armed Forces and of the Police in their exercise of this right.
3. Nothing in this Article shall authorize State parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

International Covenant on Economic, Social, and Cultural Rights.

37. The United Nations International Covenant on Economic, Social and Cultural Rights was acceded to by Canada on May 19, 1976, and has been in force for Canada since August 19, 1976. Article 8 of this Covenant provides:

Article 8

1. The States Parties to the present Covenant undertake to ensure:

(a) the right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interest of national security or public order or for the protection of rights and freedoms of others;

(b) the right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade union organizations;

(c) the right of trade unions to function freely subject to no limitation other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) the right to strike, provided that it is exercised in conformity with the laws of the particular country. (underlining added)

2. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this Article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association F.A. and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

It should be noted that paragraphs 1 (c) and (d) of Article 8 provide in specific terms that activities central to trade unionism are guaranteed, in that the rights to "function freely" and "to strike" are protected.

CONFERENCE ON SECURITY AND COOPERATION IN EUROPE, FINAL ACT

38. The Final Act of the Conference on Security and Cooperation in Europe was agreed to by 35 States including Canada at the Madrid Conference on security and cooperation in Europe. The following clause, agreed to on March 15, 1983 forms part of the Final Document:

> The participating states will ensure the right of workers freely to establish and join trade unions, the right of trade unions freely to exercise their activities and other rights as laid down in relevant international instruments. They note that these rights will be exercised in compliance with the law of the State and in conformity with the States' obligations under international law. They will encourage, as appropriate, direct contacts and communication among such trade unions and their representatives.

It is important to note, that in this international instrument as well as those referred to previously, the right of workers, not only to freely establish trade unions, but also to engage in trade union activities, is protected.

I.L.O. Convention No. 87 Concerning Freedom of Association and Protection of the Right to Organize

39. The Treaty of Versailles signed in 1919 gave specific recognition to the principle of freedom of association for trade union purposes. Article 427 of the Treaty of Versailles indicated that a number of principles seemed to be of "special and urgent

importance". The second principle enunciated was "the right of association for all lawful purposes by the employed as well as by the employers". To achieve this purpose, the contracting states, including Canada, established the International Labour Organization, the constitution of which enshrines the principle of Freedom of Association. The I.L.O. had its headquarters in Canada during World War II. The I.L.O., which was the first permanent international organization concerned with human rights on a world wide scale, became an agency of the United Nations after the second World War. Canada has been a member of the I.L.O. since its inception and of its Governing Body since 1951.

Louis Henken et al, International Law: Cases and Materials, supra, at pp. 1062 and 804:

> The beginnings of an authentic, universal human rights law, can be found in the work of the International Labour Office (now the International Labour Organization), which after the First World War began to promote agreements setting minimum standards of labour and other social conditions (more than 100 such conventions are now in effect). A universal law of human rights to protect a wide range of rights for individuals in their own countries was conceived during the second World War and born in the U.N. Charter.

40. The principles set out in the Constitution of the International Labour Organization have been the subject of further elaboration in International Labour Organization Convention No. 87 concerning the Freedom of Association and Protection of the Right to Organize. Convention No. 87 was adopted by the I.L.O. in 1948. It was ratified by the Government of Canada in 1972, and the Convention entered into force for Canada on March 23, 1972. The relevant provisions of Convention No. 87 are set out below:

Article 1

Each member of the International Labour Organization for which this Convention is in force undertakes to give effect to the following provisions.

Article 2

Workers' and employers', without distinction whatever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization.

Article 3

1. Workers' and employers' organizations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organize their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 4

Workers' and employers' organizations shall not be liable to be dissolved or suspended by administrative authority.

Article 5

Workers' and employers' organizations shall have the right to establish and join federations and confederations and any such organization, federation or confederation shall have the right to affiliate with international organizations of workers and employers.

Article 11

Each member of the International Labour Organization for which this convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organize.

41. The two tribunals which were established by the I.L.O. to interpret I.L.O. conventions are the Committee of Experts whose role is to examine the reports of member governments on the application of conventions and recommendations, and the Freedom of Association committee which examines complaints alleging violation of Freedom of Association.

Michael Bendel, "The International Protection of Trade Union Rights: A Canadian Case Study", (1981) 13 Ottawa Law Review 169, at 177:

> The value of an opinion expressed by the Freedom of Association Committee is essentially a moral one. The Committee has established for itself an enviable record of impartiality and technical expertise. As a result, its conclusions carry considerable moral weight."

M. Forde, "The European Convention on Human Rights and Labour Law" (1983), 31 Am. J. of Comp. Law 301, at 302:

> The decisions of the Freedom of Association Committee comprise a corner stone of the international law on trade union freedom and collective bargaining".

Right to Organize and Form a Trade Union

42. Article 2 of ILO Convention No. 87 guarantees workers the right to establish and joint organizations of their own choosing. The Freedom of Association Committee has emphasized the importance it attaches to the fact that workers should in actual practice be able to form and join organizations of their own choosing in full freedom.

Digest of Decisions of the Freedom of Association Committee of the Governing Body of the ILO, Freedom of Association 2nd ed., International Labour Office, 1976, pp. 10-20.

Right to Collectively Bargain

43. The supervisory tribunals of the International Labour Organization, have consistently held that the right to bargain freely with employers with respect to wages and conditions of employment constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the working conditions of those employees whom the union represents, without legal restrictions.

Digest of Decisions of the Freedom of Association Committee of the Governing Body of the ILO, Freedom of Association, supra, para. 241.

ILO Principles, Standards and Procedures Concerning Freedom of Association, International Labour Office, Geneva, 1978.

Right to Strike

44. The Committee of Experts and the Freedom of Association Committee have interpreted ILO Convention No. 87 to include the right to strike even though this matter is not dealt with explicitly in any ILO convention.

I.L.O. Principles, Standards and Procedures Concerning Freedom of Association, supra, at pp. 16-17:

> Although the Freedom of Association Conventions do not refer specifically to strikes, the I.L.O.'s supervisory bodies have expressed the opinion that the right of workers and their organizations to strike is one of

the essential means through which they may promote and defend their occupational interest.

While recognising the principle of the right to strike, they have considered it admissible for certain temporary restrictions to be imposed on the right of this strike. Such restrictions may consist in a requirement that previous notice be given to the authorities or that the procedures for negotiation, conciliation and arbitration be exhausted before a strike may begin. Strikes may also be prohibited if they are in breach of a collective agreement.

It has also been considered acceptable that in specific cases the law should prohibit strike, especially in the public service and in essential services. Nevertheless, such a prohibition should be accompanied by guarantees to safeguard to the full the interests of the workers concerned, consisting of adequate, impartial and speedy conciliation and arbitration procedures in which the parties concerned can take part at every stage and in which the awards are binding on both parties and are fully and promptly implemented. In the case of essential services, the prohibition of strikes should be confined to services which are essential in the strict sense of the term. It would not be appropriate, for instance, for all publicly owned undertakings to be placed on the same footing as the concerns the restriction of the right to strike, without any distinction being made between those which are truly essential, because their interruptions could cause public hardship to the public, and those which are not essential according to this criterion.

Michael Bendel, The International Protection of Trade Union Rights: A Canadian Case Study", supra, at 187:

> There are undoubtedly some difficult questions that could be asked concerning certain aspects of the interpretation by these organs of Convention No. 87 as it relates to the right to strike. Although the general implication of protection for the right to strike drawn from Articles 3, 8 and 10 of Convention No. 87 appear sound, the various limits to this protection ennunciated by these I.L.O. bodies do not flow logically from the text of the convention. The convention in common with other national and international instruments dealing with fundamental human rights merely recognize these various general principles: the circumstances in which these principles will or will not apply are elaborated upon in a process which is part deductive and part experiential. Having ratified such a convention, a state might object with some ligitimacy to being bound as a matter of international law by whatever obligations the various I.L.O. organs declare to have been created by the convention, particularly if careful examination of the instrument prior to ratification could not have revealed these obligations. However, to view the problem from a different perspective it is unrealistic to expect an instrument dealing with such a subtle concept as freedom of association to spell out in detail the precise limits of the concept. (underlining added)

See also: Digest of Decisions of the Freedom of Association Committee of the Governing Body of the I.L.O., supra, at pp. 109-130.

(iii)Presumption against the violation of international law.

45. Since a presumption exists that Parliament and the provincial legislatures do not intend to exceed their jurisdiction, every statute is to be interpreted, as far as possible, so as not to be inconsistent with the comity of nations or with the established rules of international law.

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

Retail, Wholesale and Department Store Union et al, supra.

R. v. Secretary of State for Home Affairs and Another ex Parte Bahjan Singh, [1975] 2 All E. R. 1081

Maxwell on the Interpretation of Statutes, 12th ed., p. 183

Driedger Construction of Statutes, (1983) (2d) at p. 215.

46. While it may be argued that it is necessary for Canada to incorporate these Covenants directly into the Charter by detailing all of these provisions, a contrary view has been expressed by Mr. Justice W. F. Tarnopolsky, in "A Comparison Between the Canadian Charter of Rights and Freedoms and the International Covenant on Civil and

Political Rights" (1982/1983), 8 Queen's Law Journal 211, at 231, where he states:

> As mentioned at the beginning, nothing in the Covenant, in the International Law, or our own Constitution, requires an exact copy of the Covenant to be included in our Charter. A violation of the Covenant arises from either a law or action which contravenes the standards of the Covenants, or, as under Article 20, which requires prohibition of "propoganda for War" and "advocacy of national, racial or religious hatred", the failure to enact such prohibitory laws. Absence of such provisions from the Charter is not of itself a violation of the Covenant. Absence from the laws is. Thus problems could arise where protections required by the Covenant are not provided for either in the Charter or in ordinary law. Another way in which violation of the Covenant could occur is where Charter provisions are so interpreted as to provide less protection than is required by the Covenant. ....It is for these reasons that Courts should consider the Covenant provisions in construing the scope of the rights and freedoms in the Charter. (underlining added).

47. It is respectfully submitted that the interpretation of these international covenants are particularly relevant for interpreting the Charter, since they also contain express limitation clauses in relation to the rights and freedoms they contain. Therefore, in "Interpreting the Canadian Charter of Rights and Freedoms: Applying

International and European Jurisprudence on the Law and Practice of Fundamental Rights", supra, at p.390 Mendes states:

> There is a strong argument to be made that Canadian Courts should take notice of the provisions of the Internatinal Covenant on Civil and Political Rights and the decisions of the U.N. Human Rights Committee interpreting the Covenant. Such judicial notice should be taken on the basis of the canon of construction which is being used by the Supreme Court of Canada, that domestic courts should interpret domestic legislation in such a way as to conform to Canada's International Treaty obligations and the general principles of international law. The rational for this canon of construction is that Parliament, be it the U.K. Parliament, the Canadian Parliament or the Provincial legislatures, does not intend to legislate in violation of binding treaty law or the customary rules of international law without express words to the contrary or an unimbiguious and conclusive intention to violate such obligations...

In "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms", supra, Claydon summarizes why international Covenants and their interpretation should be considered by Canadian Courts when they are interpreting the Charter. At pp. 293-294 he states:

In principle, the usefulness of these international treaty systems for interpreting the sketchy and high level provisions of the Charter emanates from a number of different types of sources. First, the more detailed textual provisions of the treaties may aid in supplying content to such imprecise concepts as the right to life, freedom of association, and even the right to counsel. Second, the **travaux preparatoires** of the treaties constitute a record of legislative history possibly useful for filling in the gaps and clearing up ambiguities in the treaty texts and hence, by extension, in the Charter. Similar to domestic counterparts (and subject to similar vagaries of interpretation), the components of legislative history include documents prepared by organs of both the executive and legislative branches of the international institution and the records of key legislatiave debates preceeding adoption of the final version of the instrument. Third, there are the authoritative interpretations of the treaties emanating from the agencies charged with their implementation. In the case of the Covenant, this source is composed of the work of the Human Rights Committee in considering reports of states, in making general recommendations and in holding debates on various provisions, and in dealing with individual petitions. ... Fourth, the treaty terms may be supplemented by more detailed specialized treaties and resolutions adopted either before or after the treaty. ...

48. In summary, it is respectively submitted that this Court should give the words freedom of association in the Charter an interpretation which is consistent with Canada's international obligations as evidenced in the Covenants and Treaties discussed above.

CONCLUSION

49. It is the respectfully submitted by the Attorney General of Manitoba that the interpretation given to freedom of association by O'Leary, J. in Broadway Manor, supra, and by the majority of the Saskatchewan Court of Appeal in Retail, Wholesale and Department Store Union, supra, is the proper interpretation of s. 2(d) of the Canadian Charter of Right and Freedoms.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

V. E. TOEWS

V. J. MATTHEWS LEMIEUX

COUNSEL FOR THE ATTORNEY GENERAL OF MANITOBA

LIST OF AUTHORITIES