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,
THE CANADIAN UNION OF PUBLIC EMPLOYEES

Appellant,

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA AS REPRESENTED BY THE ATTORNEY GENERAL OF ALBERTA

Respondent.

FACTUM OF THE ATTORNEY GENERAL OF NEWFOUNDLAND, INTERVENER

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PART I

STATEMENT OF FACTS

1. The Lieutenant-Governor in Council of the Province of Alberta referred certain questions (now stated as constitutional questions in this appeal) to the Court of Appeal of Alberta for an advisory opinion pursuant to section 27(1) of The Judicature Act, R.S.A. 1980 C.J-1.

2. On December 17, 1984 the Court of Appeal of Alberta certified its opinion to the Lieutenant-Governor in Council of the Province of Alberta.

3. On appeal to the Supreme Court of Canada, the Honourable Chief Justice of Canada, by Order dated March 11, 1985, stated the constitutional questions in this appeal. The constitutional questions (English version) were stated as follows:

> 1. Are the provisions of the Public Service Employee Relations Act that provide compulsory arbitration as a mechanism for resolution of disputes and prohibit the use of strikes and lockouts, in particular, sections 49, 50, 93 and 94 thereof, inconsistent with the Constitution Act, 1982, and if so, in what particular or particulars, and to what extent?
>
> 2. Are the provisions of the Labour Relations Act that provide compulsory arbitration as a mechanism for resolution of disputes and prohibit the use of strikes and lockouts, in particular, sections 117.1, 117.2 and 117.3 thereof, inconsistent with the Constitution Act, 1982, and if so, in what particular or particulars, and to what extent?

3. Are the provisions of the Police Officers Collective Bargaining Act that provide compulsory arbitration as a mechanism for resolution of disputes and prohibit the use of strikes and lockouts, in particular, section 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 section 48 and 55 thereof, inconsistent with the Constitution Act, 1982, and if so, in what particular or particulars, and to what extent?

5. Are the provisions of the Labour Relations Act that relate to the conduct of arbitration, in particular section 117.8 thereof, inconsistent with the Constitution Act, 1982, and if so, in what particular or particulars, and to what extent?

6. Are the provisions of the Police Officers Collective Bargaining Act that relate to the conduct of arbitration, in particular sections 2(2) and 15 thereof, inconsistent with the Constitution Act, 1982, and if so, in what particular or particulars, and to what extent?

7. Does the Constitution Act, 1982, limit the right of the Crown to exclude any one or more of the following classes of its employees from units for collective bargaining;

(a) an employee who exercises managerial functions;

(b) an employee who is employed in a confidential capacity in matters relating to labour relations;

(c) an employee who is employed in a capacity that is essential to the effective functioning of the Legislature, the Executive or the Judiciary;

(d) an employee whose interests as a member of a unit for collective bargaining could conflict with his duties as an employee?

4. The Attorney General of Newfoundland has filed and served a Notice of Intention to Intervene in this matter.

PART II

POINTS IN ISSUE

5. The Attorney General of Newfoundland's position is that all of the constitutional questions stated by the Chief Justice in this appeal should be answered in the negative.

PART III

ARGUMENT

6. The Attorney General of Newfoundland adopts and supports the arguments advanced on behalf of the Respondent and will attempt to confine its argument to supplementary points.

7. It is submitted that the need for a broad perspective in approaching the Charter, as espoused by this Honourable Court in the Skapinker case and in Southam, must be balanced with the recognition that the Charter's "freedom of association" must serve many purposes. It is submitted that it is necessary to avoid an interpretation of "freedom of association" so intertwined with labour relations concepts that it distorts the overall impact and negates the utility of section 2(d) in other circumstances.

Skapinker v. Law Society of Upper Canada (1984) 53 N.R. 196 (S.C.C.)
Hunter v. Southam (1985) 11 D.L.R. (4th) 641 (S.C.C.)

8. In examining the purpose of the rights contained within the Charter, it is submitted that these rights fall into two distinct categories; those which create a new right with an abrupt departure from pre-existing law, and those which merely codify the previous rights, albeit with a new

inviolability. This distinction has been recognized with respect to section 23 of the Charter.

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

Quebec Association of Protestant School Boards et al v. A.G. Quebec (1984) (S.C.C.) 54 N.R. 196 at 211.

9. It is therefore submitted that where the purpose of the Charter is confirmatory in nature, such as with the freedom of association, one must look to pre-existing law to ascertain the nature of the rights in existence.

10. Further, where a Charter provision is directed at overturning a statutory regime, such as was held in the Quebec Protestant School Boards case, supra at p.217, the statute in question could not be considered a reasonable limit within the meaning of section 1 of the Charter. Conversely, it is submitted that a section of the Charter which is in essence a codification of pre-existing law should not be presumed to prima facie render a statute invalid, which

conforms with the widespread practice of similar statutory enactments throughout Canada.

11. It is submitted that "freedom of association" must be given its broad and general meaning, which is the right to associate. A review of the authorities outlined in the Respondent's factum indicates the right to associate or its corollary right to refuse to associate, does not imply the right to attain all of the objects of that association. Associations exist for all purposes, with differing levels of desirability. The Charter states merely that everyone has the right to associate. Subject to section 1 of the Charter, an association has the right to exist.

12. The right to strike and bargain collectively are the result of legislative action. The ability to strike and maintain intact the employer-employee relationship flows from legislation and not from any inherent feature of freedom of association.

C.P.R. v. Zambri [1962] S.C.R. 609
Per Cartwright, J. at p.617
Per Locke, J. at p.620 ff.

13. It is further submitted that the right to strike is essentially an economic right. It is submitted that the

Charter was not intended to protect such rights. Protection of certain economic rights was considered and rejected during the negotiations leading up to the adoption of the text of the Charter. For example, section 121 of The Constitution Act, 1867 was not expanded, as had been suggested, to provide full protection for the movement of capital and services as well as goods. Protection of property rights was conspicuously left out of the Charter. "Freedom of association" is included in section 2 with other fundamental freedoms - religion, belief, opinion and expression, peaceful assembly - all of which are social and political rights. It is submitted that with this background, section 2(d) should not be interpreted to protect a right to strike.

14. It is submitted that if the framers of the Charter had intended a right to strike to be protected by the Charter, words more specific than "freedom of association" would have been used.

> I do not think it would have been intended in a section of the Charter of Rights and Freedoms dealing with fundamental rights to include a right that is essentially economic in nature without some more express wording indicating this to be the case.

Public Service Alliance of Canada v. Her Majesty the Queen in Right of Canada, (1985) 11 D.L.R. 4th 337 (F.C.T.D.).

15. When Canada incorporated freedom of association in the Charter, it was an act not inconsistent with its treaty obligations, but it does not follow that treaty obligations in all their particulars became constitutionally entrenched.

> "I do not think that the rights that we have agreed upon in international agreements should be reflected in the laws on the Charter of Rights that we will have in Canada."

Mr. Chretien, Minister of Justice - Proceedings of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada (12-11-1980) 3:28.

16. The Appellants place much reliance upon the various international covenants but it is submitted that International Labour Organization Convention No. 87 deals with freedom of association in the narrow and specific context of labour relations and unlike the Charter does not purport to define that freedom for all purposes.

17. It is submitted that I.L.O. Convention No. 87 contains no reference to the right to bargain collectively or strike. These rights have been read into the terms of Article 3 by committees of the International Labour Organization rather than by the International Court of Justice, the tribunal designated by Article 37 of the International Labour Organization Constitution to interpret such Conventions.

Valticos, N. International Labour Law, Kluwer, 1979 p.61ff.

18. The European Court of Human Rights disagrees with the I.L.O. interpretations. Article 11(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which unlike the Charter, expressly protects the right of workers to form and join trade unions for the protection of their interests. However, the European Court has ruled that Article 11(1) does not necessarily comprehend the right to enter into or conclude collective agreements, or the right to strike.

Swedish Engine Drivers' Union v. Sweden 1 E.H.R.R. 617 at 628 para 40.
Schmidt and Dahlstrom v. Sweden 1 E.H.R.R. 632 at 644 para 36.

19. It is noted that Canada is not a signatory to I.L.O. Convention No. 98 (Right to Organize and Collective Bargaining Convention) nor I.L.O. Convention No. 151 (Protection of the Right to Organize and Procedures for Determining Conditions of Employment in the Public Service Convention). It is submitted that since Canada has not ratified Convention No. 98 relating to collective bargaining, it is unlikely that Canada intended to entrench constitutionally the right to bargain collectively (a statutory scheme which varies from province to province) and to strike when Charter section 2(d) was adopted.

NAPE et al v. Her Majesty the Queen in Right of Newfoundland (unreported decision of Supreme Court of Newfoundland, Trial Division, March 11, 1985) at p.35-37.

20. Chief Justice Sinclair in the A.U.P.E. case and Lord Donovan in Collymore both concluded that the international covenants did not support the proposition that the right to strike or other associated activities of a union are included within freedom of association. It is respectfully submitted that more weight should be accorded this interpretation than that of the I.L.O. Committees whose commitment is to the advancement of the goals of the I.L.O.

Re Alberta Union of Provincial Employees and the Crown in Right of Alberta (1981) 120 D.L.R. (3d) 590 (Alta. Q.B.); (1982) 130 D.L.R. (3d) 191 (Alta.C.A.) Leave to Appeal to S.C.C. refused.

Collymore v. Attorney General [1970] A.C. 538.

PART IV

NATURE OF ORDER DESIRED

The Attorney General of Newfoundland respectfully requests that these Appeals be dismissed and the constitutional questions stated by the Chief Justice be answered in the negative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at St. John's, Newfoundland, the 28th day of May, 1985.

Deborah E. Fry

DEBORAH E. FRY
of Counsel for The Attorney
General of Newfoundland

PART V

TABLE OF AUTHORITIES