IN THE SUPREME COURT OF CANADA

ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA

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

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

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

BETWEEN:

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

Appellants

- and -

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

Respondent

FACTUM OF THE INTERVENOR
ATTORNEY GENERAL OF NOVA SCOTIA

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I N D E X

FACTUM OF THE ATTORNEY GENERAL OF NOVA SCOTIA

INTERVENOR

PART I

STATEMENT OF FACTS

1. The Attorney General of Nova Scotia agrees with the statement of facts contained in the Appellant's Factum.

2. This Intervenor will confine his argument to issues related to the Public Service Employee Relations Act, R.S.A. 1980, c.P-33.

PART II

POINTS IN ISSUE

3. The Intervenor, Attorney General of Nova Scotia, submits that constitutional Questions 1 and 4 set out in the Appellant's Statement of Facts should be answered in the negative.

4. Questions 1 and 4 are 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, section 49, 50, 93 and 94 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 Relation 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?

PART III

ARGUMENT

APPROACH

5. To determine the validity of legislation challenged on the grounds that it denies a right guaranteed by the Charter of Rights, consideration must be given to the purpose of the challenged legislation in light of the Charter of Rights, to the impact of the legislation and finally to the scope of the freedom or right at issue.

R. v. Big M Drug Mart, S.C.C., April 4, 1985 (unreported).

PUBLIC SERVICE EMPLOYEES RELATIONS ACT

A. PURPOSE OF THE LEGISLATION

6. It is submitted that the Public Service Employee Relations Act, R.S.A. 1980, c.P-33, is properly characterized as permissive legislation conferring rights to public sector employees.

7. Crown employment law in Canada is derived from English Law. The historical starting point for purposes of this analysis may be regarded as the basic common law premise that Crown servants hold office "at pleasure", and could therefore be dismissed at any time without notice or cause.

Dunn v. R. (1896) 1 Q.B. 116 (C.A.);
Reilly v. R. [1934] 1 D.L.R. 434 (P.C.).

8. The first steps in Alberta towards development of procedures to deal with individual and group grievances of Crown employees appears to have been taken in 1922 with the establishment of a joint council in that Province.

Provincial Governments as Employers, Hodgetts and Dwivedi, McGill and Queens University Press: Montreal and London, 1974, c.10.

9. The 1922 Joint Council did not have a statutory base and was a consultive body only. The existence of the

Joint Council was given legislative status in 1954 with the enactment of an Act Respecting the Public Service, S.A. 1954, c.86.

10. The Board remained a consultive body in the 1954 legislation. The powers and structure of the Board remained virtually unchanged until the enactment of the Public Service Act (1968) S.A. 1968, c.81. Under this Act the Joint Council was given a mandate to negotiate, by committee, wages and working conditions. Under this legislative scheme, however, where agreement was not reached by the negotiating committee, the employer could unilaterally impose a settlement. It was not until the passage of an Act to Amend the Public Service Act, S.A. 1972, c.80, that ultimate decision making power concerning matters of wage and arbitrable items relating to working conditions were assigned to an arbitration board for final determination.

11. Viewed in its historical context, present public sector employment law in Alberta has progressed considerably from the principle of Crown employment "at pleasure".

12. The Public Service Employee Relations Act does not, it is submitted, have as its purpose a restriction of any fundamental freedoms or rights protected by the Charter. The

legislation confers rights to employees that did not exist at common law.

B. IMPACT OF THE PUBLIC SECTOR EMPLOYEE RELATIONS ACT

13. Sections 49, 50, 93 and 94 of the Public Service Employee Relations Act do make it unlawful for public service employees to strike. Sections 48 and 55 of the Public Service Employee Relations Act do restrict or limit some aspects of collective bargaining.

14. Whether or not the impact or effect of the Public Service Employee Relations Act does offend freedom of association guaranteed by the Charter depends on the scope of that freedom as guaranteed by the Charter.

C. FREEDOM OF ASSOCIATION

15. Both the Appellants and the Respondent in this case would agree that the act of coming together for a common purpose is association. The disagreement between the parties is essentially as to whether or not, when the freedom of association was enshrined in the Charter, there was an intention to guarantee the right of persons to collectively pursue the objects of the association. The

disagreement is essentially as to the scope of the freedom of association. The Intervenor, Attorney General of Nova Scotia, supports the scope of freedom of association put forward by the Respondent, Attorney General of Alberta in this case and accepted by the Alberta Court of Appeal.

(i) Historical Underpinnings

16. Freedom of association, as with most of the fundamental freedoms, is not found as a positive statement of law in Anglo-Canadian jurisprudence. There is virtually a dirth of case law on its nature and extent before 1981 in Canada.

17. Pre-1981 constitutional law cases dealt with the freedom of association as an adjunct to Federal-Provincial jurisdiction. The Courts in these cases were concerned not with the nature and extent of freedom of association but rather with its characterization as a matter of property and civil rights or criminal law.

18. Because of the doctrine of supremacy of Parliament and the fact that the right to associate may be regarded under certain circumstances as a matter of Federal legislative competence (i.e. criminal conspiracy laws), or as

within Provincial legislative competence as a matter of property and civil rights, freedom of association could be abrogated by either legislative body so long as the nature of the legislation in question was consistent with the assigned jurisdiction between the Federal and Provincial Governments contained in the Constitution Act 1867 (the B.N.A. Act).

> Oil, Chemical and Atomic Workers International Union v. Imperial Oil Limited, [1963] S.C.R. 584;
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> Swait v. Board of Trustees of Maritime Transportation Unions (1966), 61 D.L.R. (2d) 317 (Que.Q.B.).

19. Freedom of association is not included in the Bill of Rights (R.S.C. 1970, Appendix III, as amended) as a separate right declared to exist in Canada. Freedom of association is, however, coupled with the right to assembly in section 1(e) of the Bill of Rights.

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,
>
> (e) freedom of assembly and association.

20. After passage of the Bill of Rights, the focus of concern remained the division of legislative power between Federal and Provincial Governments.

> Attorney General Canada v. Dupond (1978), 84 D.L.R. (3d) 420 (S.C.C.).

(ii) Constitutions of Other Nations

21. In determining the scope of a right of freedom guaranteed by the Charter it is appropriate to consider the meaning assigned to the same right guaranteed under the Constitution of other nations.

R. v. Big M (supra) at p.44

22. In this regard, this Intervenor, Attorney General of Nova Scotia, adopts the submissions of the Respondent, the Attorney General of Alberta, made in paragraphs at 51-69 of his factum where constitutions of the United States of America, India, Trinidad and Tobago and Jamaica are reviewed.

23. It is submitted that in no other jurisdiction has the freedom of association been interpreted with a scope so broad so as to protect the right to pursue the objects of the association.

(iii) International Convention Law

24. There is a statutory presumption that Parliament does not legislate in violation of its international

obligations.

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

25. It is submitted that this rule of construction becomes relevant only if in conventions and treaties to which Canada is a party the right to pursue the objects of an association are guaranteed as a part of the right to association.

26. In Re Alberta Union of Provincial Employee and the Crown in the Right of Alberta, the Alberta Queen's Bench was asked to determine whether or not the denial of the right to strike and lockout, and the limit on collective bargaining contained in the Public Service Employee Relations Act (1977) S.A. 1977, c.40, were limitations contrary to Canada's international obligations. From the decision of Chief Justice Sinclair in that case, it is clear that the conventions and cases referred to in the Appellant's (Alberta Union of Public Employees) Factum at paras. 36, 40, 41, 45 & 49 were advanced by the applicants in that case to establish that the right to strike in the public sector was a right provided in conventions and treaties to which Canada is a signatory.

27. After having examined the provisions of these conventions, the Court found that the Public Service

Employee Relations Act (1977) did not contravene any of Canada's international obligations because, although the conventions provided a right of association, none of the conventions in question guaranteed a right to strike to public servants as a part of that freedom.

> Re Alberta Union of Provincial Employees and the Crown in the Right of Alberta (1980), 120 D.L.R. (3d) 590, affirmed (1981) 130 D.L.R. (3d) 191, leave to appeal to the Supreme Court of Canada refused December 7, 1981;
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> See also Dolphin Delivery Ltd. et al. v. Retail Wholesale and Department Store Union, Local 580 et al. (1984), 10 D.L.R. (4th) 198.

(iv) Post 1981 Canadian Cases

28. The majority Canadian courts that have addressed the freedom of association as found in the Charter have defined the scope of that right in accordance with the ordinary meaning of its usage, the right to come together.

> Dolphin Delivery Ltd. v. Retail, Wholesale & Department Store Union, Local 580 et al (1984), 10 D.L.R. (4th) 198, [1984] 3 W.W.R. 482 (B.C.C.A.);

Re Retail, Wholesale & Dept. Stores Union Locals 544, 496, 635 and 955 et al and Government of Saskatchewan et al, (May 11, 1984) 27 A.C.W.S. (2d) 237 (Sask. Q. B.);

Re Halifax Police Officer's Association and City of Halifax et al (1984), 64 N.S.R. (2d) 368 N.S.T.D;

Public Service Alliance of Canada v. The Queen in the Right of Canada (1984), 11 D.L.R. (45th) 387 (F.C.); affirmed (1985), 11 D.L.R. (4th) 337 (F.C.C.A.).

29. The position of the majority of the Canadian courts may be summarized in the words of Mahone, J. in the Re Public Service Alliance of Canada (F.C.C.) case (supra) at p. 391:

> The appellant relied heavily on the "living tree" metaphor (Re Section 24 of the B.N.A. Act; Edwards v. A.-G. Can., [1930] 1 D.L.R. 98 at pp. 106-7 [1930] A.C. 124 at p. 136, [1929] 3 W.W.R. 479) in arguing that the Charter, being a constitutional document, ought to be interpreted more liberally than a statute. I do not question the validity of the thesis and have no doubt that over the years many words and terms used in the Charter will come to embrace ideas not likely to have actually been in the minds of its authors. Perhaps "association" will be among them. However, even the liveliest of living trees takes time to grow - it is a tree, not a weed - and I am not persuaded that the growth during two years can reasonably sustain an interpretation of "association" in any but its ordinary, everyday meaning in 1982, which is, I am confident, precisely what its authors intended. It means the same today.

30. The Ontario Divisional Court did, however, hold that the right to strike was protected as a part of the freedom of association:

Re Service Employees International Union, Local 204 and Broadway Manor Nursing Home et al (1983), 4 D.L.R. (4th) 231.

31. Esson, J.A. (Taggart and Hutcheons concurring on this point) in the Dolphin Delivery case, rejected the Ontario Divisional decision stating at p. 390:

> In none of the judgments does there appear to be any consideration given to the ordinary meaning of "association". It is not clear whether the members of the court considered that freedom of association extends to any form of association other than trade unions but the reasoning implies an assumption that "freedom of association" is a kind of code referring to trade unions, their purposes, objects and means of obtaining their purposes and objects. That assumption cannot be right. 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.

(v) Purpose of Protecting Freedom of Association

32. The Charter of Rights is regarded as a purposive document.

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

R. v. Big M (supra) at p.68..

33. It is submitted that freedom of association was enshrined in our Constituition to preserve, foster and develop the political and philosphic traditions that underlie our system of self-government. Those political and philosophic traditions are themselves enshrined in the Charter as the other fundamental freedoms: freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; freedom of peaceful assembly;. . .

(Canadian Charter of Rights and Freedoms, s.2(a), (b) and (c))

34. Without the right to associate, the other rights guaranteed by the Charter are limited in potential and impact in maintaining our democratic political system and the basic beliefs concerning human worth and dignity that underly it.

35. Insofar as there is a right to associate guaranteed by the Charter of Rights the, it is a right to come together only. The only objects or purposes of an association that are protected are those protected elsewhere in the Charter.

PART IV

SUMMARY

36. Freedom of association guaranteed by s.2(d) of the Charter of Rights and Freedoms does not include a right to pursue the objects of an association. Therefore it is submitted Questions 1 and 4 as stated must be answered in the negative.

REASONABLE LIMITS DEMONSTRABLY JUSTIFIED

37. The Intervenor, Attorney General of Nova Scotia, adopts the submission of the Respondent, Attorney General of Alberta, concerning the application of s.1 of the Charter of Rights set out in paragraphs 90 - 119 if it is determined that the Public Sector Employee Relations Act does deny freedom of association guaranteed by s.2(d) thereof.

PART V

ORDER SOUGHT

38. The Attorney General of Nova Scotia respectfully seeks an order that Questions 1 and 4 should be answered in the negative.

39. All of which is respectfully submitted.

40. Dated at Halifax the 31st day of May, 1985.

ALISON SCOTT

SOLICITOR FOR THE ATTORNEY GENERAL
OF NOVA SCOTIA

LIST OF AUTHORITIES

1. R. v. Big M.Drug Mart, S.C.C., April 4, 1985 (unreported)
2. Dunn v. R. (1896), 1 Q.B. 116 (C.A.)
3. Reilly v. R., [1934] 1 D.L.R. 434 (P.C.)
4. Provincial Governments as Employers, Hodgetts and Dwivedi, McGill and Queens University Press: Montreal and London, 1974.
5. Oil, Chemical and Atomic Workers International Union v. Imperial Oil Limited, [1963] S.C.R. 584
6. Swait v. Board of Trustees of Maritime Transportation Unions (1966), 61 D.L.R. (2d) 317 (Que.Q.B.)
7. Attorney General Canada v. Dupond (1978), 84 D.L.R. (3d) 420 (S.C.C.)
8. Daniels v. White and The Queen, [1968] S.C.R. 517
9. Re: Alberta Union of Provincial Employees and the Crown in the Right of Alberta (1980), 120 D.L.R. (3d) 590 affirmed (1981), 130 D.L.R. (3d) 191 (Alta.C.A.)
10. Dolphin Delivery Limited et al. v. Retail Wholesale and Department Store Union Local 580 (1984), 10 D.L.R. (4th) 198 (B.C.C.A.)
11. Re Retail, Wholesale & Department Store Union Local 544, 496, 635 and 955 et al. and Government of Saskatchewan et al. (May 4, 1984), 27 A.C.W.S. (2d) 237 (Sask.Q.B.)
12. Re: Halifax Police Officer's Association and the City of Halifax et.al. (1984), 64 N.S.R. (2d) 368 (N.S.T.D.)
13. Public Service Alliance of Canada v. The Queen in the Right of Canada (1985), 11 D.L.R. (4th) 337 F.C.T.D. affirmed (1985), 11 D.L.R. (4th) 387 (F.C.C.A.)
14. Re Service Employees International Union, Local 204 & Broadway Manor Nursing Home et.al. (1983), 4 D.L.R. (4th) 231 (Ont.Div.Ct.)
15. Hunter et.al. v. Southham Inc. (1984), 11 D.L.R. (4th) 641 (S.C.C.)