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:

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Appellant

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ALBERTA

Respondent

FACTUM OF THE INTERVENANT THE ATTORNEY GENERAL OF ONTARIO

(For the names and addresses of the Solicitors for the Parties and their respective Ottawa Agents see inside title page.)

TIMOTHY J. CHRISTIAN
Barrister and Solicitor
University of Alberta
437 Law Centre
Edmonton, Alberta T6G 2H5

Counsel for the Appellant,
The Alberta Union of Provincial
Employees

A. BARRIE C. CHIVERS
Wright Chivers & Company
Barristers and Solicitors
Suite 301
10328 - 81 Avenue
Edmonton, Alberta T6E 1X2

Counsel for the Appellant,
The Alberta International
Firefighters Association

SHEILA J. GRECKOL
Wright Chivers & Company
Barristers and Solicitors
Suite 301
10328 - 81 Avenue
Edmonton, Alberta T6E 1X2

and

JUNE M. ROSS
Witten Binder
Barristers and Solicitors
Suite 2300
10025 Jasper Avenue
Edmonton, Alberta T5J 1T1

Counsel for the Appellant,
The Canadian Union of Public
Employees

SOLOWAY, WRIGHT, HOUSTON,
GREENBERG, O'GRADY, MORIN
Barristers and Solicitors
170 Metcalfe Street
Ottawa, Ontario K2P 1P3

Ottawa Agents for the
Solicitors for the Appellant

NOLAN D. STEED
Department of the Attorney
General of Alberta
9833 - 109 Street
Edmonton, Alberta T5K 2E8

and

RODERICK A. McLENNAN, Q.C.
McLennan Ross
Barristers and Solicitors
Suite 600
12220 Stony Plain Road
Edmonton, Alberta T5N 3Y4

Counsel for the Respondent

GOWLING & HENDERSON
Barristers and Solicitors
160 Elgin Street
Ottawa, Ontario K1N 8S3

Ottawa Agents for the
Solicitor for the Respondent,
The Attorney General of Alberta

E. N. HUGHES, Q.C.
Deputy Attorney General
of British Columbia
Victoria, British Columbia

Solicitor for the Attorney
General of British Columbia

BURKE-ROBERTSON, CHADWICK
& RITCHIE
Barristers and Solicitors
Suite 1800
130 Albert Street
Ottawa, Ontario K1P 5G4

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

RICHARD F. GOSSE, Q.C.
Deputy Attorney General
of Saskatchewan
Regina, Saskatchewan

Solicitor for the Attorney
General of Saskatchewan

MACDONALD, AFFLECK
Barristers and Solicitors
100 Sparks Street
Ottawa, Ontario K1P 5B7

Ottawa Agents for the Solicitor
for the Attorney General of
Saskatchewan

TANNER ELTON
Deputy Attorney General
of Manitoba
Winnipeg, Manitoba

Solicitor for the Attorney
General of Manitoba

SOLOWAY, WRIGHT, HOUSTON,
GREENBERG, O'GRADY, MORIN
Barristers and Solicitors
170 Metcalfe Street
Ottawa, Ontario K2P 1P3

Ottawa Agents for the Solicitor
for the Attorney General of
Manitoba

ARCHIE CAMPBELL, Q.C.
Deputy Attorney General
of Ontario
Toronto, Ontario

Solicitor for the Attorney
General of Ontario

SOLOWAY, WRIGHT, HOUSTON,
GREENBERG, O'GRADY, MORIN
Barristers and Solicitors
170 Metcalfe Street
Ottawa, Ontario K2P 1P3

Ottawa Agents for the Solicitor
for the Attorney General of
Ontario

DANIEL JACOBY
Deputy Attorney General
of Quebec
Ste. Foy, Quebec

Solicitor for the Attorney
General of Quebec

NOEL, DECARY, AUBRY & ASSOCIATES
Barristers and Solicitors
95 Victoria Street
Hull, Quebec J8X 2A3

Ottawa Agents for the Solicitor
for the Attorney General of
Quebec

RONALD G. PENNEY
Deputy Attorney General
of Newfoundland
St. John's, Newfoundland

Solicitor for the Attorney
General of Newfoundland

BURKE-ROBERTSON, CHADWICK
& RITCHIE
Barristers and Solicitors
Suite 1800
130 Albert Street
Ottawa, Ontario K1P 5G4

Ottawa Agents for the Solicitor
for the Attorney General of
Newfoundland

GORDON F. GREGORY, Q.C.
Deputy Attorney General
of New Brunswick
Fredericton, New Brunswick

Solicitor for the Attorney
General of New Brunswick

GOWLING & HENDERSON
Barristers and Solicitors
160 Elgin Street
Ottawa, Ontario K1N 8S3

Ottawa Agents for the Solicitor
for the Attorney General of
New Brunswick

GORDON F. COLES, Q.C.
Deputy Attorney General
of Nova Scotia
Halifax, Nova Scotia

Solicitor for the Attorney
General of Nova Scotia

BURRITT, GRACE & NEVILLE
Barristers and Solicitors
Suite 500
77 Metcalfe Street
Ottawa, Ontario K1P 5L6

Ottawa Agents for the Solicitor
for the Attorney General of
Nova Scotia

ARTHUR J. CURRIE
Deputy Attorney General
of Prince Edward Island
Charlottetown, Prince Edward
Island

Solicitor for the Attorney
General of Prince Edward Island

B. H. WILSON, Q.C.
Barrister and Solicitor
Suite 408
151 Sparks Street
Ottawa, Ontario K1P 5E3

Ottawa Agents for the Solicitor
for the Attorney General of
Prince Edward Island

ROGER TASSÉ, Q.C.
Deputy Minister of Justice and
Deputy Attorney General
of Canada
Department of Justice
West Memorial Building
344 Wellington Street
Ottawa, Ontario K1A 0H8

Solicitor for the Attorney
General of Canada

I N D E X

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PART I

STATEMENT OF FACTS

1. By Notice of Intention To Intervene dated April 12th, 1985, the Attorney General of Ontario intervened in this appeal.

2. The Attorney General of Ontario makes no submissions as to the facts.

PART II

POINTS IN ISSUE

3. The points in issue in this appeal are set out in the seven questions stated in the Order of March 11, 1985, by The Right Honourable, the Chief Justice of Canada as follows (English version):

> 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 Police 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 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 Ontario supports the position of the Respondent that all of the constitutional

questions stated in this appeal should be answered in the negative.

5. The Attorney General of Ontario limits his submissions to the issues raised by the first three questions [the meaning of freedom of association in Charter section 2(d)] and question 7 (the effect of Charter section 1).

PART III

ARGUMENT

Questions 1, 2, and 3

6. The issue raised by questions 1, 2, and 3 and the central issue in this appeal is that of the meaning and content of freedom of association in Charter section 2(d).

7. It is the position of the Attorney General of Ontario that in its plain and ordinary meaning, freedom of association means the freedom of everyone to join, combine, or organize together for a common purpose, but does not include the freedom to affect the rights of others outside the association. Freedom of association is in itself a meaningful and potent right. It is the outgrowth of and the necessary concomitant to the other fundamental freedoms in Charter section 2, and the only associational activities which are constitutionally protected are those which are for the purpose of realizing the fundamental freedoms otherwise secured by the Constitution.

8. In the Big M Drug Mart case it was held by this Honourable Court, reaffirming its view expressed earlier in Lawson A. W. Hunter v. Southam Inc., that:

> The meaning of a right or freedom guaranteed by the Charter [is] to be ascertained by an analysis of the purpose of such a guarantee; it [is] 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, . . . be placed in its proper linguistic, philosophic and historical contexts.
>
> Her Majesty the Queen v. Big M Drug Mart Ltd. S.C.C. April 24, 1985, Unreported. Per Dickson C.J. at pp. 68-69.

9. It is respectfully submitted that the Appellant overshoots the purpose of the guarantee in asserting that freedom of association in Charter section 2(d) must include, not merely the right to join a trade union, but the right of a trade union to pursue its main purpose -- collective bargaining backed up by the right to strike.

A Potent Right

10. A distinguishing characteristic of a despotic regime is that only officially-sanctioned associations are permitted.

> Opponents of new ideas therefore launch their first and strongest attacks against the right of people to unite in groups to discuss such ideas and to carry out joint actions. When freedom of association is

> under attack, few people will dare to assemble together, and it takes rare courage for an individual, standing alone, to exercise his freedom to speak, write, read, or petition on behalf of dissenting views.
>
> Ginger, A. F., The Law, The Supreme Court And The People's Rights at p. 107.

11. This same point is made by Professor Tribe:

> What the Court has recognized as implicit in the first amendment, and therefore in the liberty secured by the fourteenth, is a right to join with others to pursue goals independently protected by the first amendment -- such as political advocacy, litigation (regarded as a form of advocacy), or religious worship. But it would be a mistake to suppose that "freedom of association" therefore adds nothing whatever to rights otherwise protected. For 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.
>
> Tribe, L. H., American Constitutional Law (1978) at pp. 702-703.

12. Freedom of association is the sister right to freedom of expression and freedom of peaceful assembly which are also found in Charter section 2. All three freedoms share the common core purpose of facilitating a free market of ideas, a free interchange of views, and unfettered debate on

topics of public interest in order to ensure that our society is truly free and democratic.

13. Section 1(e) of the Canadian Bill of Rights recognizes and declares the existence of "freedom of assembly and association".

> Freedom of association, which can be said to be an outgrowth of the freedoms of speech and assembly, and the much earlier right to petition, concerns the right to join in common cause with another or others in the pursuit of lawful objects.
>
> . . .
>
> . . . an assemblage or an association may be for political, religious, economic, or social purposes.
>
> Tarnopolsky, W. S., The Canadian Bill Of Rights (2nd, Revised Ed.) at p.201.

14. It is submitted that viewed in this light, freedom of association is a potent guarantee. Constitutional protection against laws and practices which would deny or impair this freedom reinforces significantly the other fundamental freedoms in Charter section 2.

Purpose of the Fundamental Freedoms

15. The fundamental freedoms and the democratic rights in the Charter provide additional constitutional underpinning to our system of parliamentary democracy. The Constitution Act as a whole provides the framework for our basic institutions of government and establishes the ground rules under which those institutions are to operate. It is through that process and those institutions that power is assigned.

16. Thus, one person may associate with one or more persons for any legal purpose. That is the essence of freedom of association, but that does not include the freedom to affect the rights of others outside that association. The rights of others can be so affected only as permitted by law or, stated another way, when the power to do so has been granted by law.

17. The significance of the difference between the fact of association and the use to which the resulting association is put is highlighted in the writing of Professor Carrothers:

> The history of the development of freedom of association of workmen involves some fundamental misunderstandings of the common law, a confusion of the fact of association with divergent characterizations of the use to which the resulting association is put . . .
>
> A trade union is an association of individual workmen having at common law, no legal existence separate from its members. Without more it is indistinguishable from other unincorporated associations, such as benefit societies (a function of unions in their early days, and a continuing characteristic of some modern labour organizations), fraternal orders, athletic associations and community groups. However, the modern trade union has two essential and distinguishing characteristics. First, in the pursuit of the interests of its members -- principally economic interests, but to an important degree also social, political and psychological interests -- it comes into conflict with competing interests. As a consequence the law is called upon to resolve the conflict, and over the years it has varied its solution. Second, with the adoption by parliament and provincial legislatures of the policy of state-controlled collective bargaining -- a policy which is the fruition of the labours of the trade union movement itself -- unions have been elevated to a role and a station in the

> life of Canadian society which thrust upon them a status of a fifth estate. (Underlining added)
>
> Carrothers, A.W.R., Collective Bargaining Law In Canada, Butterworths, 1965 at pp. 11-12.

18. Professor Carrothers states that "the paramount institution of the law in Canada through which the conduct of competing interests in industrial relations is limited is parliament and the provincial legislatures".

> Carrothers, A. W. R., supra at p. 6.

19. Over the years the law "has varied its solutions" through an evolutionary process. That evolutionary process may be seen as a continuum in which through the political process the so-called "three freedoms" of labour were gradually accommodated within the framework of Canadian law: (1) uniting into labour associations, (2) engaging the employer in negotiation with the union, and (3) invoking economic sanctions.

> But it is not enough to account only for the three freedoms of employees. The fact that the history of collective bargaining has been a record of wearing down the resistance of the law to employee activity does not destroy the fact that these interests still contend with others; nor does it impair the claim of other interests to protection. Freedoms are not absolute: they cannot be, and coexist.
>
> Carrothers, A. W. R., supra at p. 5.

20. Professor Carrothers identified the interests in conflict with employee freedom of association as:

- Freedom of entrepreneurial action;
- Freedom of choice and action of the individual employee, whose individualism may be subordinated to or at variance with the collective will of the group;
- The interest of strangers to the collective bargaining relationship who by their contiguity to the conflict may be prejudiced both by the use of economic sanctions and by the terms of the collective agreement;
- The public interest which at once claims as part of itself the policy of collective bargaining, yet may stand to lose by its methods and its results.

21. Thus, the law has defined the limits, for example, of the extent to which the economic sanction of strike action may be employed, by prohibiting the use of strikes to gain union recognition and substituting therefore a certification process; by prohibiting the use of strikes to settle disputes over the application and interpretation of the terms of collective agreements and substituting therefore binding arbitration; and by prohibiting strikes in some cases for the purpose of achieving collective agreements and providing substitute procedures.

22. The case of public sector labour relations illustrates this evolutionary process and the particularly complex balancing required because of the strength of competing interests in that context. Labour relations law in the public sector has tended over time towards assimilation to the labour relations law applicable to the private sector in Canada. However, it is submitted, distinct differences persist, the most notable of which is the treatment of the right to strike.

> Public sector labour relations may be examined -- and some would say can only be examined -- in light of considerations different from those applicable to the

private sector.

> Simmons and Swan, Labour Relations Law in the Public Sector, Industrial Relations Centre, Queen's University, Kingston, 1982 at p. 1.

> One method of dispute resolution is to let the parties battle it out using the economic weapons of strike and lockout. Even in the private sector this process is rigidly controlled and subject to occasional legislative intervention on an ad hoc basis. In the public service both strikes and lockouts have traditionally been prohibited, but in a number of Canadian jurisdictions this is no longer the case. Where public service strikes are permitted, however, they are subject to limitations.
>
> Simmons and Swan, supra at p. 233.

23. The rationale for this distinctive treatment of the right to strike in public sector labour relations law is one of public policy.

> The paradigm case in the public sector is a municipality with an elected board of aldermen, and an elected mayor who bargains (through others) with unions representing the employees of the city. He bargains also, of course, with other permanent and ad hoc interest groups making claims upon government (business groups, save-the-park committees, neighbourhood groups, etc.). Indeed, the decisions that are made may be thought of roughly as a result of interactions and accommodations among these interest groups, as influenced by perceptions about the attitudes of the electorate, and by the goals and programs of the mayor and his aldermanic board.
>
> . . .

But there is trouble even in the house of theory if collective bargaining in the public sector means what it does in the private. The trouble is that if unions are able to withhold labour -- to strike -- as well as to employ the usual methods of political pressure, they may possess a disproportionate share of effective power in the process of decision. Collective bargaining would then be so effective a pressure as to skew the results of the "'normal' American political process".

One should straightway make plain that the strike issue is not simply the essentiality of public services as contrasted with services or products produced in the private sector. This is only half of the issue, and in the past the half truth has beclouded the analysis. The services performed by a private transit authority are neither less nor more essential to the public than those that would be performed if the transit authority were owned by a municipality. A railroad or a dock strike may be much more damaging to a community than "job action" by teachers. This is not to say that governmental services are not essential. They are, both because the demand for them is inelastic and because their disruption may seriously injure a city's economy and occasionally the physical welfare of its citizens. Nevertheless, essentiality of governmental services is only a necessary part of, rather than a complete answer to the question: What is wrong with strikes in public employment?

What is wrong with strikes in public employment is that because they disrupt essential services, a large part of a mayor's political constituency will press for a quick end to the strike with little concern for the cost of settlement. The problem is that because market restraints are attenuated and because public employee strikes cause inconvenience to voters, such strikes too often succeed. Since other interest groups with conflicting

> claims on municipal government do not, as a general proposition, have anything approaching the effectiveness of this union technique -- or at least cannot maintain this relative degree of power over the long run -- they are put at a significant competitive disadvantage in the political process. Where this is the case, it must be said that the political process has been radically altered. And because of the deceptive simplicity of the analogy to collective bargaining in the private sector, the alteration may take place without anyone realizing what has happened.
>
> Therefore, while the purpose and effect of strikes by public employees may seem in the beginning merely designed to establish collective bargaining or to "catch up" with wages and fringe benefits in the private sector, in the long run strikes must be seen as a means to redistribute income, or, put another way, to gain a subsidy for union members, not through the employment of the usual types of political pressure, but through the employment of what might appropriately be called political force.
>
> Wellington, H. H. and Winter, R. K., The Limits of Collective Bargaining in Public Employment, (1969) 78 Yale L.J. 1107 at pp. 1119, 1123-1124.

24. The same policy rationale is reflected in three reports examining labour law in Ontario and are quoted extensively in Simmons and Swan, supra, at pp. 235ff.

> The Honourable Ivan C. Rand, Report of the Royal Commission of Inquiry into Labour Disputes (August, 1968).
>
> Judge W. Little, Collective Bargaining in the Ontario Government Service: Report of the Special Advisor (Ontario, May, 1969).

Professional Consultation and the Determination of Compensation for Ontario Teachers: The Report of the Committee of Inquiry (Judge R. W. Reville, Chairman) June, 1972.

25. Only since 1967 has resort to strike action been an option under the federal Public Service Staff Relations Act. Saskatchewan and Quebec are two jurisdictions which, together with the federal government, have granted the right to strike in most areas of the public sector. Prince Edward Island, Ontario, and Alberta have prohibited the right to strike in most areas of the public sector. Other provinces occupy the middle between the ends of the spectrum.

Essential Service Dispute Legislation In Canada, Research Bulletin, 1982, Nova Scotia Department of Labour and Manpower, at p. 32.

26. It is respectfully submitted that Canada, as a society, is experimenting with different models of dispute resolution in labour relations. There is still a strong commitment to the public policy rationale that the right to strike in the public sector is inimical to the public welfare, and that the adoption of the Charter was not intended to put an end to the debate and experimentation peremptorily.

Weiler, Paul C., New Horizons for Canadian Labour Law, 1980 Meredith Memorial Lectures -- Federal and Provincial Labour Law, at pp. 6-7.

Heenan, Roy L., Current Issues in Canadian Labour Law, 1980 Meredith Memorial Lectures, supra, at pp. 16-20.

27. To sum up on this point, it is respectfully submitted that freedom of association has a strong nexus with and is a critical component of free speech as a fundamental political right. The purpose of Charter section 2 is, inter

alia, to reinforce the rights of individuals and organizations to participate in the process of government in our parliamentary democracy. Of necessity the Charter protects a penumbra of associational activity for that purpose. Charter section 2 does not assign powers nor does it guarantee the freedom to pursue activities intended to achieve the purely economic objectives of any association.

28. The Appellant relies heavily upon the reasoning in the Broadway Manor case in which the Ontario Divisional Court held that freedom of association includes not only the right to associate but also the right to take steps necessary to attain the objectives of the association.

> Service Employees International Union, Local 204 v. Broadway Manor Nursing Home et al. (1984), 4 D.L.R. (4th) 231 (Ont. Div. Ct.); (1984) 13 D.L.R. (4th) 220 (Ont. C.A.).

29. It is respectfully submitted that the conclusion of the Divisional Court was in error. Not only is there insufficient authority to support the Divisional Court's inflated interpretation of freedom of association, but there is substantial authority to support the plain and ordinary meaning of that freedom.

The Pre-Charter Law

30. The pre-Charter situation is summed up this way by Professor Cotler:

> Apart from limited statutory protection as a right associated conjunctively with freedom of assembly in s. 1(e) of the Canadian Bill of Rights, and in s. 3 of the Quebec Charter of Human Rights and Freedoms, freedom of association found no

sustaining reference or express protection as a fundamental freedom in Canadian jurisprudence.

> Cotler, I., Freedom of Assembly, Association, Conscience and Religion in The Canadian Charter of Rights and Freedoms (Tarnopolsky and Beaudoin, Carswell 1982) at p. 157.

31. There is no suggestion in the cases cited by Professor Cotler dealing with freedom of association that that freedom encompasses activities of the association:

> Smith and Rhuland Ltd. v. R., [1953] 2 S.C.R. 95.
>
> Oil, Chemical and Atomic Workers v. Imperial Oil Ltd., [1963] S.C.R. 584.

32. The same is true where section 1(e) of the Canadian Bill of Rights which recognizes "freedom of assembly and association" was invoked.

> Swait v. Board of Trustees of Maritime Transportation Unions (1966), 61 D.L.R. (2d) 317 (Que. C.A.).

33. Certain sections of the Ontario Labour Relations Act, R.S.O. 1980, c. 228, have enhanced the common law freedom of association or the right to organize by providing statutory support for that right.

> Section 3 recognizes the right of a person to join a trade union and to participate in its lawful activities.
>
> Section 66 makes it illegal for an employer to dismiss or otherwise discriminate against a person for joining a trade union.

34. In Ontario, freedom of association or the right to organize does not include the right to bargain. A trade union has a right to organize but that organization does not have the right to bargain without complying with the Labour Relations Act. Freedom of association ends at the right to organize and does not include the right to bargain which is a right conferred by statute law.

35. A trade union may apply to the Ontario Labour Relations Board for certification as bargaining agent for a unit of employees referred to as a "bargaining unit". If the O.L.R.B. determines that the trade union has majority support amongst the employees of the bargaining unit, it is under a duty to certify the trade union as bargaining agent.

Labour Relations Act, section 7.

36. Once the trade union is certified, it must give notice to bargain to the employer for whose employees it has been certified so that the union and employer may bargain with a view to making a collective agreement.

Labour Relations Act, section 14.

37. The employer and the trade union are under an obligation to bargain in good faith and make every reasonable effort to make a collective agreement. The same duty to bargain in good faith obtains where renewals of the collective agreement are negotiated. There was no such affirmative duty to bargain in good faith on the employer at common law.

Labour Relations Act, sections 15 and 54.

38. As for the right to strike as a claimed lawful activity of an association, it is primarily governed now by

labour relations statutes. At common law a strike might be lawful or unlawful.

> It is against this common law background in the era before the passage of compulsory collective bargaining statutes that the civil liability for strikes must be understood in the post-statute era. This much at least appears from the dicta in the cases: absent a nominate tort (e.g. assault, procuring breach, defamation), absent a criminal act, absent an intent to injure, strikes might lawfully be waged or threatened in furtherance of some legitimate economic interest. Those interests sometimes considered legitimate included higher wages, a union shop, the nonemployment of persons with whom the union did not wish to work, and assistance to fellow-unionists engaged in some legitimate dispute. Political strikes were beyond the pale, as were gratuitous demonstrations of force, or strikes calculated to injure an employer in the carrying on of his business, by interfering with his contracts with employees or customers, or jurisdictional strikes. These categories of lawfulness and unlawfulness obviously overlap and lose their meaning.
>
> Arthurs, H. W., Tort Liability For Strikes In Canada (1960) 38 Can. Bar Rev. 346 at p. 349.

However, the manifest purpose of strike action is not the permanent severance of the industrial relationship between labour and management, but the stepping up of bargaining pressure by its suspension. "Strikes . . ., as an industrial von Clausewitz might say, are negotiations conducted by other means".

But the concepts of the common law do not allow of a strike notice that would merely suspend the legal relationship. Effective notice terminating the contract of employment may be given by one side only

> at common law, but to suspend the employment contract the common law requires that both contracting parties must agree; in other words, while a terminating notice may be unilateral, suspension of a contract must be consensual. At common law, therefore, while suspension of the employment relationship is theoretically conceivable, it is scarcely practicable in the context of strike action.
>
> Cyril Grunfeld, Modern Trade Union Law, London, Sweet & Maxwell, 1966.

39. Furthermore, as noted by Cartwright J. in C.P.R. v. Zambri, a cessation of work in breach of a subsisting contract of employment is an illegal strike at common law.

> There is the highest authority for the proposition that a strike which would otherwise be lawful at common law becomes unlawful if the cessation of work is a breach of contract.
>
> C.P.R. v. Zambri, [1962] S.C.R. 609 at p. 617.

40. The concomitant of the employee's right to strike at common law is the employer's right to treat the employment relationship as at an end.

> C.P.R. v. Zambri, supra at p. 617.

41. The right to strike and the protection which it enjoys at law are the result of legislative action. The ability to strike and to maintain intact the employer-employee relationship during the course of the strike flows from legislation and not from any notion that strike action is an inherent feature of freedom of association.

C.P.R. v. Zambri, supra.
Per Cartwright J. at p. 617.
Per Locke J. at pp. 620-621.

42. It is submitted that no consideration was given to the meaning of the expression "right to strike" when the Divisional Court held that freedom of association necessarily includes that right. If there were no labour relations legislation in Ontario, the only right to strike which could enjoy protection under freedom of association as defined by the Divisional Court would be the common law right to strike.

Legislative History of Charter Section 2(d)

43. The Attorney General of Ontario respectfully submits that, at best, the Proceedings of the Special Joint Committee of the Senate and House of Commons on the Constitution (Minutes of Proceedings) are ambiguous, contradictory, and incomplete on the meaning of "freedom of association". For example, statements by Mr. Robinson and Mr. Kaplan, Acting Minister of Justice, suggest strongly that "freedom of association" was not intended to protect the right to strike and tend to nullify statements to the contrary by other witnesses.

Mr. Robinson, Minutes of Proceedings
(22-1-1981) 43:69.

Mr. Kaplan, Minutes of Proceedings
(22-1-1981) 43:69-70.

Post-Charter Court Decisions

44. With the sole exception of the Broadway Manor decision, Canadian courts have rejected the interpretation of

Charter section 2(d) advanced by the Appellant.

Reference may be made to the following:

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

Reference re The Public Service Employee Relations Act (Alberta) (1981), 120 D.L.R. (3d) 590 (Alta. Q.B.). Affirmed by Alberta Court of Appeal December 17, 1984 - unreported.

Saskatchewan Government Employees Union et al. v. Government of Saskatchewan et al. (1985), 14 D.L.R. (4th) 245 (Sask. Q.B.).

Newfoundland Association of Public Employees et al. v. Her Majesty the Queen in Right of Newfoundland. Unreported decision of Goodridge J. (Nfld. Sup. Ct.) released January 31, 1985.

45. In Dolphin Delivery two of the three learned Justices specifically disagreed with the reasoning in Broadway Manor.

> Per Esson and Taggart JJ.A. in Dolphin Delivery, supra at pp.208 and 209

46. The Attorney General of Ontario respectfully adopts as the correct view, the following statement by Reed J. in the Federal Court Trial Division in the case at bar:

> In my view the clause "freedom of association" guarantees to trade unions the right to join together, to pool economic resources, to solicit other members, to choose their own internal organizational structures, to advocate to their employees and the public at large their views and not to suffer any prejudice or coercion by the employer or state because of such union activities. But it does not include the economic right to strike.

Public Service Alliance of Canada v. Her Majesty the Queen in Right of Canada et al. (1985), 11 D.L.R. (4th) 337 at p. 358. Affirmed (F.C.A.) at p. 387.

Constitutions Of Other Countries

47. It is submitted that it is relevant and useful to examine freedom of association as a protected value in the constitutions of other countries. Compared to the protection of freedom of association through international agreements or covenants which can be renounced, a constitutionally entrenched freedom is a much more permanent and stable commitment.

(a) The U.S.A.

48. Freedom of association is a protected right under the First and Fourteenth Amendments of the Constitution of the United States of America. Under that Constitution, the right to join together is protected but not the activities of an association unless the activity is independently protected elsewhere in the Constitution.

Tribe, L. H., American Constitutional Law, supra at pp. 701-703.

49. U.S. courts have left no doubt about the absence of constitutional protection for the right of public employees to strike. Where legislation prohibited strikes by postal clerks it was held that:

> Given the fact that there is no constitutional right to strike, it is not irrational or arbitrary for the Government to condition employment on a promise not to withhold labour collectively, and to prohibit strikes by those in public

> employment, whether because of the prerogatives of the sovereign, some sense of higher obligation associated with public service, to assure the continuing functioning of the Government without interruption, to protect public health and safety or for other reasons.
>
> . . .
>
> Furthermore, it should be pointed out that the fact that public employees may not strike does not interfere with their rights which are fundamental and constitutionally protected. The right to organize collectively and to select representatives for the purposes of engaging in collective bargaining is such a fundamental right.
>
> . . .
>
> There certainly is no compelling reason to imply the existence of the right to strike from the right to associate and to bargain collectively.
>
> United Federation of Postal Clerks v. Blount 325 F. Supp. 879 (1971) at pp. 883-884.

50. In Beauboeuf v. Delgado College 303 F. Supp. 861 (1969) and Confederation of Police v. City of Chicago 529 F. 2d. 89 (1976) it was held that blanket denials of collective bargaining rights did not violate either First Amendment rights or the Fourteenth Amendment rights of due process and equal protection. Similarly in Alaniz v. City of San Antonio 80 L.R.R.M. 2983 (1971) it was held that although there is a constitutionally-protected right to organize enjoyed by public employees, this right has never been extended to include the right to bargain collectively.

51. One of the strongest stands taken was in Indianapolis Educational Association v. Lewallen 72 L.R.R.M.

2071 (1969) where the court held:

> There is no question that the right of teachers to associate for the purpose of collective bargaining is a right protected by the First and Fourteenth Amendments to the Constitution.
>
> . . .
>
> The gravamen of the complaint goes to the failure on the part of the defendants-appellants to bargain collectively with an exclusive bargaining agent. Such duty, when imposed, is imposed by statute. The refusal of the defendants-appellants to bargain in good faith does not equal a constitutional violation of plaintiffs-appellees' positive rights of association, free speech, petition, equal protection or due process.

(b) India

52. Freedom of association is protected under the terms of the Constitution of the Republic of India in Part III thereof, "Fundamental Rights":

> Right to Freedom
>
> Article 19
>
> 1. All citizens shall have the right:
>
> (c) to form associations or unions;
>
> 4. Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty or integrity of India or, of public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

53. In the All India Bank case in 1962, a union challenged the validity of legislation which kept certain information about Bank assets from being considered in the labour arbitration process. The union reasoned that without this information the arbitration process and the ability of the union to fulfill its function were both frustrated. The argument made by the union is like the argument made by the Respondents in the case at bar:

> It is not the contention of any of the learned Counsel that the right of workmen to form unions or associations which is the right guaranteed by sub-cl. (c) of Cl. (1) of Art. 19 on its literal meaning has been denied by the impugned legislation. The argument, however, was that it would not be a proper construction of the content of this guaranteed freedom to read the text literally but that the freedom should be so understood as to cover not merely a right to form a union in the sense of getting their union registered so as to function as a union i.e., of placing no impediments or restrictions on their freedom which could not be justified as dictated by public order or morality but that it extended to confer upon unions so formed a right to effectively function as an instrument for agitating and negotiating and by collective bargaining secure, uphold or enforce the demands of workmen in respect of their wages, prospects or conditions of work. It was further submitted that unless the guaranteed right comprehended these, the right to form a union would be almost illusory. (Emphasis added.)
>
> All India Bank Employees Association v. The National Industrial Tribunal (1962) 49 A.I.R. 171 (Supreme Court) at p. 178.

54. As is the case under the U.S. Constitution, the Court in the All India Bank case found that the right to associate guarantees the right to form associations, but not

the achievement of the purposes of the association. The Court held that it would not be logical to afford constitutional protection to conduct of an association which would not be so protected if exercised by individuals. "As the stream can rise no higher than the source, associations of citizens cannot lay claim to rights not open to citizens, or claim freedom from restrictions to which the citizens composing it are subject".

All India Bank case, supra, at pp. 179-180.

55. The Supreme Court of India distinguished between a fair and liberal interpretation of the Constitution and an inflated and unwarranted interpretation at page 180:

> It is one thing to interpret each of the freedoms guaranteed by the several Articles in Part III in a fair and liberal sense, it is quite another to read each guaranteed right as involving or including concomitant rights necessary to achieve the object which might be supposed to underlie the grant of each of those rights. For that construction would, by a series of ever expanding concentric circles in the shape of rights concomitant to concomitant rights and so on, lead to an almost grotesque result.

Reference may be made as well to Roghubar v. Union of India (1962) 49 A.I.R. 263 (Freedom of association does not include the right to strike.)

(c) Trinidad and Tobago

56. In Collymore et al. v. Attorney General, the Privy Council had under consideration The Industrial Stabilisation Act, 1965 which substituted compulsory arbitration for strikes and lockouts. As in the All India Bank case and in the case at bar, the argument by the union in Collymore was that freedom of

association "must be construed in such a way that it confers rights of substance" and that "the freedom means more than the mere right of individuals to form them".

> Collymore et al. v. Attorney General [1970], A.C. 538.

57. The Constitution of Trinidad and Tobago states as follows:

> 1. It is hereby recognized 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;
>
> 2. Subject to the provisions of sections 3, 4 and 5 of the Constitution, no law shall abrogate, abridge or infringe or authorise the abrogation, abridgement or infringement of any of the rights and freedoms herein-before recognized and declared . . .

58. The Privy Council rejected the proposition that freedom of association includes the freedom to bargain collectively and the freedom to strike. It agreed with the Court below which had held that:

> . . . 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

> of association 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. (Emphasis added.)
>
> Collymore, supra, at p. 547.

59. In the Dolphin Delivery Ltd. case, the British Columbia Court of Appeal specifically adopted the above statement from Collymore:

> I agree with that reasoning. 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.
>
> Dolphin Delivery Ltd., supra at p. 10.

International Law

60. The Appellant invokes Article 22 of the International Covenant on Civil and Political Rights as an aid to construing Charter section 2 (d). Article 22 refers to

I.L.O. Convention No. 87 of 1948.

61. In order to determine the effect, if any, of international instruments on the construction of the Charter, those instruments must be examined.

I.L.O. Convention No. 87

62. I.L.O. Convention No. 87 deals with freedom of association in the narrow and specific context of labour relations and, unlike Charter section 2(d), does not purport to define that freedom for all purposes.

63. In order to understand the significance of Convention No. 87 it must be examined in context. In this century and, in particular, in the years since the end of World War II, freedom of association for labour relations purposes has been included in a number of international instruments.

> Amos J. Peaslee, International Governmental Organizations -- Constitutional Documents, 1974 at pages 990 ff.

64. The post-World War II instruments include the following:

1. The United Nations Universal Declaration of Human Rights;

2. The U.N. International Convention on Civil and Political Rights;

3. The U.N. Covenant on Economic, Social and Cultural Rights; and

4. The European Convention for the Protection of Human Rights and

Fundamental Freedoms.

65. Articles 20 and 23(4) of the U.N. Universal Declaration of Human Rights provide as follows:

> 20(1) Everyone has the right to freedom of peaceful assembly and association.
>
> (2) No one may be compelled to belong to an association.
>
> 23(4) Everyone has the right to form and to join trade unions for the protection of his interests.

66. Canada adhered to the U.N. International Covenant on Civil and Political Rights in 1976. Article 22 provides that:

> 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 prescribed 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 States 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 manner as to prejudice, the guarantees provided for in that Convention.

Freedom of association with others is specified as a right and includes "the right to form and join trade unions for the protection of his interests".

67. It is submitted that Article 22 does not include the right to carry on any specific activity of the association; nor are any of the states parties to the Covenant obliged to guarantee to workers the right to bargain collectively or the right to strike.

68. Also in 1976, Canada became a party to the U.N. International Covenant on Economic, Social and Cultural Rights.

69. The right to strike mentioned in section 1(d) of Article 8 of this Covenant is a limited right, one that is to be exercised "in conformity with the laws of the particular country". The right to strike is not presented as an essential element of freedom of association.

70. The European Convention for the Protection of Human Rights and Fundamental Freedoms provides in Article 11 that:

> (1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
>
> (2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health and morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the

state.

Canada is not a party to the European Convention.

71. In 1948, the International Labour Organization adopted the Freedom of Association and Protection of the Right to Organise Convention (No. 87); in 1949, it adopted the Right to Organise and Collective Bargaining Convention (No. 98); and in 1951, the Governing Body of the I.L.O. established a Committee on Freedom of Association.

> What distinguished the 1948 and 1949 Conventions from all of these previous instruments was that they were the first to give substantive content to the concepts of freedom of association and the right to organise.
>
> Bendel, M. "The International Protection of Trade Union Rights: A Canadian Case Study" (1981) 13 Ottawa L. Rev. 169, 172.

Canada is not a signatory to Convention No. 98.

72. Finally, Convention No. 151, a Convention Concerning Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service was adopted by the I.L.O. in 1978 and came into force in 1981. Canada is not a signatory.

73. The relevant provisions of Convention No. 87 are Articles 1, 2, 3, 4, 5, 10 and 11.

74. Under Article 3 of Convention No. 87, organizations have the following rights:

- to draw up their constitutions and rules
- to elect representatives
- to organize their administration and activities
- to formulate their programmes.

There is no reference to the rights to bargain collectively or to strike. These rights have been read into the terms of Article 3 by committees of the I.L.O. rather than by the International Court of Justice, the tribunal designated by the I.L.O. Constitution to interpret such Conventions.

> The interpretive function of the Committee is not based on any explicit authority, but it derives logically from its mandate and the nature of its task. As the Committee itself put it, "the Committee's terms of reference do not require it to give interpretation of Conventions, competence to do so being vested in the International Court of Justice by Article 37 of the Constitution..."
>
> . . .
>
> Faced with a wide variety of situations, the Committee, while relying at the outset on the general standards laid down in the I.L.O. Conventions concerning freedom of association, was gradually led to frame principles defining more closely and in some respects supplementing and even extending those expressly embodied in the Conventions. (Emphasis added.)
>
> Valticos, N., International Labour Law, Kluwer, 1979 at pp. 61, 62 in relation to the Committee of Experts and the Freedom of Association Committee respectively.

Reference may be made as well to Bendel, M., The International Protection of Trade Union Rights: A Canadian Case Study [1981], 13 Ottawa L. Rev. 169 at pp. 175-176.

75. The I.L.O. has published the following views:

> 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 interests. (Emphasis added.)
>
> I.L.O. Principles, Standards And Procedures Concerning Freedom Of Association, Geneva, 1978, at p. 16.

76. The European Court of Human Rights disagrees with the I.L.O. reasoning. As noted above Article 11(1) of the European Convention, unlike the Charter, expressly protects the right of workers to form and to join trade unions for the protection of their interests. The European Court has ruled that Article 11(1) does not necessarily comprehend the right to enter into or conclude collective agreements (Swedish Engine Drivers' Union v. Sweden 1 E.H.R.R. 617 at p. 628, para. 40), the right to be consulted by the employer (National Union of Belgian Police v. Belgium 1 E.H.R.R. 578 at pp. 590-1, para. 38), or the right to strike (Schmidt and Dahlstrom v. Sweden 1 E.H.R.R. 632 at p. 644, para. 36). The Court ruled that none of the rights claimed is essential in itself to the protection of workers' interests and that states must be free to devise the means whereby that goal is to be achieved.

77. Canada is not a signatory to I.L.O. Conventions Nos. 98 and 151. I.L.O. Convention No. 98, unlike Convention No. 87, requires a specific commitment by states-parties to encourage development of "machinery" for voluntary negotiation of labour-management collective agreements.

> The question of ratification of Convention No. 98 has been under consideration for a long time. It was felt, however, that as long as certain categories of professional workers and agricultural workers are excluded in some jurisdictions from collective bargaining legislation Canada was not in a position to ratify this Convention.
>
> Kaplansky, K., Canada And The International Labour Organization, Labour Canada, 1980 at p. 93.

78. It is unlikely, therefore, that Canada intended to constitutionalize the right to bargain collectively and to strike when Charter section 2(d) was adopted. In the Swedish Engine Drivers' case, Sweden argued that when it adopted the European Convention:

> "it is unlikely that [the] States [Parties] were prepared, in respect of such delicate and controversial matters as industrial relations, to submit themselves to international judicial supervision by the Court and the Commission, while there was still so much restraint and reserve to the undertakings of the same States under the I.L.O. Convention No. 98".
>
> Forde, M., The European Convention on Human Rights and Labour Law (1983) 31 Am. J. of Comp. Law 301 at p. 314.

79. It is submitted that the interpretation of Convention No. 87 by judicial bodies such as the Alberta Court of Queen's Bench, the Alberta Court of Appeal, and the Judicial Committee of the Privy Council should be accorded more weight than the interpretation 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 et al. and The Crown In Right of Alberta (1981), 120

D.L.R. (3d) 590 (Alta. Q.B.).

Affirmed (1982), 130 D.L.R. (3d) 191 (Alta. C.A.).

Leave to appeal to S.C.C. refused December 7, 1981.

Collymore et al. v. Attorney General [1970], A.C. 538.

80. Chief Justice Sinclair in the A.U.P.E. case and Lord Donovan in Collymore both concluded that the international documents invoked do not support the proposition that the right to strike or other activities of a union are included within freedom of association.

81. It is respectfully submitted that a careful reading of the international instruments, the rulings of the competent international courts and tribunals, and the rulings of courts of law in Canada and elsewhere all support the proposition that freedom of association does not comprehend protection for all of the activities of any particular association.

Ontario Statutes

82. The following Ontario statutes remove the right to strike or lockout and impose compulsory interest arbitration instead:

Hospital Labour Disputes Arbitration Act, R.S.O. 1980, c. 205, ss. 4, 11.

Crown Employees Collective Bargaining Act, R.S.O. 1980, c. 108, ss. 10, 19, 27.

Police Act, R.S.O. 1980, c. 381, ss. 32, 33.

Fire Departments Act, R.S.O. 1980, c. 164, ss. 6, 7.

Question 7

83. Question 7 assumes that any restriction on the right of employees to be members of a collective bargaining unit is a prima facie infringement of Charter section 2(d). The onus is then on the proponent of such a restriction to justify it under Charter section 1.

84. It is respectfully sumitted by the Attorney General of Ontario that the well-known and sound policy reason for excluding employees who exercised managerial functions or who are employed in a confidential capacity in matters relating to labour relations, obviates the need for evidence to establish this restriction as a reasonable limit under Charter section 1.

> The explanation for this management exemption is not hard to find. The point of the statute is to foster collective bargaining between employers and unions. True bargaining requires an arm's length relationship between the two sides, each of which is organized in a manner which will best achieve its interests. For the more efficient operation of the enterprise, the employer establishes a hierarchy in which some people at the top have the authority to direct the efforts of those nearer the bottom. To achieve countervailing power to that of the employer, employees organize themselves into unions in which the bargaining power of all is shared and exercised in the way the majority directs. Somewhere in between these competing groups are those in management -- on the one hand an employee equally dependent on the enterprise for his livelihood, but on the other hand wielding substantial power over the working life of those employees under

> him. The British Columbia Legislature, following the path of all other labour legislation in North America, has decided that in the tug of these two competing forces, management must be assigned to the side of the employer.
>
> The Corporation of the District of Burnaby v. Canadian Union of Public Employees, Local 23 (1974) 1 Can. L.R.B.R. 1 per P.C. Weiler, Chairman, at p. 3.

Ontario Legislation

85. The following collective bargaining statutes exclude managerial personnel or persons employed in a confidential capacity in matters relating to labour relations:

> Labour Relations Act, R.S.O. 1980, c. 228, s. 1(3)(b).
>
> Crown Employees Collective Bargaining Act, R.S.O. 1980, c. 108, s. 1(1)(f)(iii) and s. 1(1)(l).
>
> Colleges Collective Bargaining Act, R.S.O. 1980, c. 74, s. 1(1) and Schedule 1.
>
> School Boards and Teachers Collective Negotiations Act, R.S.O. 1980, c. 464, s. 1(h), (k), (l), (m), (n).

PART IV

ORDER SOUGHT

86. The Attorney General of Ontario submits that all seven questions should be answered in the negative and that this appeal should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Blenus Wright, Q.C.

John Cavarzan, Q.C.
Counsel for the Intervenant,
The Attorney General of Ontario

LIST OF AUTHORITIES

		Page and Para. No. in Factum
12.	C.P.R. v. Zambri, [1962] S.C.R. 609	p. 20, paras. 39, 40, 41
13.	Crown Employees Collective Bargaining Act, R.S.O. 1980, c. 108, ss. 10, 19, 27, ss. 1(1)(f)(iii), 1(1)(l)	p. 37, para. 82 p. 39, para. 85
14.	Dolphin Delivery Ltd. v. Retail, Wholesale & Department Store Union, Local 580 et al. (1984), 10 D.L.R. (4th) 198 (B.C.C.A.)	p. 21, para. 44 p. 22, para. 45 p. 29, para. 59
15.	Essential Service Disputes Legislation In Canada, Research Bulletin, 1982, Nova Scotia Department of Labour and Manpower	p. 15, para. 25
16.	Fire Departments Act, R.S.O. 1980, c. 164, ss. 6, 7	p. 37, para. 82
17.	Forde, M., The European Convention of Human Rights and Labour Law (1983) 31 Am. J. of Comp. Law 301	p. 36, para. 78
18.	Ginger, A.F., The Law, The Supreme Court and The People's Rights at p. 107	p. 6, para. 10
19.	Grunfeld, Cyril, Modern Trade Union Law, London, Sweet & Maxwell, 1966	p. 18, para. 38
20.	Heenan, Roy L., Current Issues in Canadian Labour Law, 1980 Meredith Memorial Lectures -- Federal & Provincial Labour Law	p. 15, para. 26
21.	Her Majesty the Queen v. Big M Drug Mart Ltd., S.C.C. April 24, 1985, unreported	p. 5, para. 8
22.	Hospital Labour Disputes Arbitration Act, R.S.O. 1980, c. 205, ss. 4, 11	p. 37, para. 82
23.	I.L.O. Principles, Standards and Procedures Concerning Freedom of Association, Geneva, 1978	p. 35, para. 75

		Page and Para. No. in Factum
24.	Indianapolis Educational Association v. Lewallen 72 L.R.R.M. 2071 (1969)	p. 24, para. 51
25.	Mr. Kaplan, Minutes of Proceedings 43:69-70	p. 21, para. 43
26.	Kaplansky, K., Canada and The International Labour Organization, Labour Canada, 1980	p. 35, para. 77
27.	Labour Relations Act, R.S.O. 1980, c. 228, ss. 3, 7, 14, 15, 54, 66	p. 17, para. 33 p. 18, paras. 34-37 p. 39, para. 85
28.	Judge W. Little, Collective Bargaining in the Ontario Government Service: Report of the Special Advisor (Ontario, May 1969)	p. 14, para. 24
29.	National Union of Belgian Police v. Belgium 1 E.H.R.R. 578	p. 35, para. 76
30.	Newfoundland Association of Public Employees et al. v. Her Majesty the Queen in Right of Newfoundland. Unreported decision of Goodridge J. (Nfld. Sup. Ct.) released January 31, 1985	p. 22, para. 44
31.	Oil, Chemical & Atomic Workers v. Imperial Oil Ltd., [1963] S.C.R. 584	p. 17, para. 31
32.	Peaslee, Amos J., International Governmental Organizations -- Constitutional Documents, 1974	p. 30, para. 63
33.	Police Act, R.S.O. 1980, c. 381, ss. 32, 33	p. 37, para. 82
34.	Professional Consultation and the Determination of Compensation for Ontario Teachers: The Report of the Committee of Inquiry (Judge R. W. Reville, Chairman) June, 1972	p. 14, para. 24
35.	Public Service Alliance of Canada v. Her Majesty the Queen in Right of Canada et al. (1985), 11 D.L.R. (4th) 337	p. 22, para. 46

		Page and Para. No. in Factum
36.	The Honourable Ivan C. Rand, Report of the Royal Commission of Inquiry into Labour Disputes (August, 1968)	p. 14, para. 24
37.	Re Alberta Union of Provincial Employees et al. and The Crown in Right of Alberta (1981), 120 D.L.R. (3d) 590 (Alta. Q.B.). Affirmed (1982), 130 D.L.R. (3d) 191 (Alta. C.A.)	p. 36, para. 79 p. 37, para. 80
38.	Reference re The Public Service Employee Relations Act (Alberta) (1981), 120 D.L.R. (3d) 590 (Alta. Q.B.). Affirmed by Alberta Court of Appeal December 17, 1984 -- unreported	p. 22, para. 44
39.	Mr. Robinson, Minutes of Proceedings (22-1-1981) 43:69	p. 21, para. 43
40.	Roghubar v. Union of India (1962) 49 A.I.R. 263	p. 27, para. 55
41.	Saskatchewan Government Employees Union et al. v. Government of Saskatchewan et al. (1985), 14 D.L.R. (4th) 245 (Sask. Q.B.)	p. 22, para. 44
42.	Schmidt and Dahlstrom v. Sweden 1 E.H.R.R. 632	p. 35, para. 76
43.	School Boards and Teachers Collective Negotiations Act, R.S.O. 1980, c. 464, s. 1(h), (k), (l), (m), (n)	p. 39, para. 85
44.	Service Employees International Union, Local 204 v. Broadway Manor Nursing Home et al. (1984), 4 D.L.R. (4th) 231 (Ont. Div. Ct.); (1984), 13 D.L.R. (4th) 220 (Ont. C.A.)	p. 16, para. 28