

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 ATTORNEY GENERAL OF
PRINCE EDWARD ISLAND, INTERVENOR

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I N D E X

	<u>Page</u>
PART I - STATEMENT OF FACTS	1
PART II - POINTS IN ISSUE	2
PART III - ARGUMENT	5
PART IV - ORDER SOUGHT	11
TABLE OF AUTHORITIES	12

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PART I

STATEMENT OF FACTS

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The Attorney General of Prince Edward Island, Inter-
venor, is content with the Statement of Facts contained in
the Factums filed by the Appellants.

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PART II

POINTS IN ISSUE

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The points in issue are set out in the form attached to the Order of the Chief Justice of March 11, 1985, and are as follows:

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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?

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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?

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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

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10 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
20 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 par-
ticulars, and to what extent?

30 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?

40 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
50 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:

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(a) an employee who exercises managerial functions;

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

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

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

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PART III

ARGUMENT

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1. It is submitted that the Points in Issue in this case focus on the central question of what scope is to be afforded to the phrase "Freedom of Association", as it appears in subsection 2(d) of the Charter. To what breadth need the freedom be construed in order to render it meaningful, and to what extent need it be restricted in order to avoid undue injury to those whom it adversely affects?

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2. An analogy can be drawn between the manifestations which result from religious beliefs and the manifestations which result from the beliefs or goals formulated by an association. In the case of Her Majesty the Queen v. Big M Drug Mart Ltd. (S.C.C., April 24, 1985 (unreported)), it was stated at page 72:

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The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided inter alia only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.

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10 3. If the foregoing limitation is applied to the matter
of the activities of trade unions, it is submitted that one
consideration must be the impact which a particular activity
will have on the employer.

20 4. It is submitted that the folly of the theory that
there is an absolute right to associate, subject only to such
limits as are demonstrably justified, becomes apparent when
we consider criminal associations and others which are formed
for an improper purpose.

30 5. Assuming that the association takes place for a
legitimate purpose, however, it is submitted that a further
assessment must be conducted as to the extent to which the
freedom of that association is required to be protected.
40 As was stated in the decision of the Privy Council in Collymore
v. Attorney General, [1970] A.C. 538 t p.547:

50 In my judgment, then, freedom
of association means no more
than freedom to enter into con-
sensual arrangements to promote
the common interest objects
of the associating group. ...But
the freedom to associate con-
fers 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 coun-
try.

10 6. It is submitted that the Collymore case correctly
holds that freedom to associate does not carry with it an
absolute right to pursue all of the goals of the association,
and it does not confer a right to adopt a particular means
of attaining the objects of the association, even if those
20 goals are not themselves objectionable.

7. The definition of freedom of association and its
attendant limitations, it is submitted, were properly stated
by the British Columbia Court of Appeal in Dolphin Delivery
30 Ltd. v. Retail Wholesale and Department Store Union, Local
580 et al., (1984) 10 D.L.R.(4th) 198 at p.207, as follows:

40 It is the freedom to unite,
to combine, to enter into union,
to create and maintain an or-
ganization of persons with a
common purpose. One of the
classes of association guar-
anteed by s.2 is undoubtedly
the trade union. Everyone has
the right to join a trade union
and to pursue, with the other
members, the collective inter-
ests of the membership. It
does not follow that the Charter
guarantees the objects and pur-
poses of the union, or the means
50 by which those can be achieved.

8. It is submitted that if the purposes of an associa-
tion and the means of attaining those purposes are not pro-
tected by the Charter, then that is the end of the matter,

10 since the impugned legislation, although it may be imposing
a limitation on the freedom of the employees involved, is
not infringing upon a freedom protected by the Charter.

20 9. If it is a matter of there being no guarantee of
protection of the purposes of an association and the means
of attaining those purposes, but rather a possible eligibil-
ity for protection, then, it is submitted, that what will
be required will be an assessment, in each individual case,
as to whether, on the particular facts, the purpose or means
30 in issue merits the protection of the Charter.

10. Presumably the applicable test, if it is asserted
that a particular freedom flows from a fundamental freedom,
would be quite different from the test to be applied if the
40 fundamental freedom is itself prohibited, and would require
that the onus reside with the party making the assertion.
It is submitted that there is nothing to indicate that such
an extension was ever intended by the legislators of the Charter
and that such an approach should therefore not be adopted
50 by the courts.

11. As to the implications of international conventions,
it is submitted that the limitations which have been inter-

10 nationally recognized as legitimate in relation to the right
to strike, including the matters of conformity with the mu-
nicipal law of particular countries, and restrictions in re-
lation to administration of the state, indicate a recognition
of the desirability, or even the necessity, of limitations.

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12. As to the matter of the obligation by the rest of
society to recognize an association or its goals, it is sub-
mitted that the Charter does not, of itself, create or pro-
tect such an obligation. It may well be that there are ob-
30 ligations to recognize trade unions which have been legisla-
tively created, but that does not enshrine such rights uni-
versally and bring them under the Charter.

13. In the event that it is determined that the impugned
40 legislation conflicts with s.2(d) of the Charter, it is sub-
mitted that the following factors set out by the Respondent
at page 28 of his factum should be considered:

(a) the objective or rational
basis of the limitation (ration-
ality);

50 (b) the extent of the limita-
tion which is to be balanced
against its rationality (pro-
portionality);

(c) the laws and practices
in other jurisdictions gener-
ally regarded as free and demo-
cratic societies (comparison).

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10 14. As has already been indicated, internationally there
has been recognition of the necessity of limitations on the
right to strike, even to the extent that it has been included
in the U.N. Covenant on Economic, Social and Cultural Rights.

20 15. It is submitted that limitations on the right to
strike are demonstrably justified in the public sector be-
cause of the fact that, for the most part, no alternate sup-
pliers of services are available, many of the services pro-
30 vided are necessary services and the harshness of the limita-
tion is softened by the availability of compulsory arbitration
as an alternate means of conflict resolution.

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PART IV

ORDER SOUGHT

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It is respectfully submitted that the constitutional questions stated by the Chief Justice should be answered in the negative and the Appeals herein be dismissed.

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DATED at Charlottetown, Prince Edward Island, the 24th day of May, A.D. 1985.

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All of which is respectfully submitted.


RALPH C. THOMPSON, Counsel
for the Attorney General of
Prince Edward Island

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TABLE OF AUTHORITIES

1. Her Majesty the Queen v. Big M Drug Mart Ltd., (S.C.C. April 24, 1985 (unreported)).
2. Collymore v. Attorney General, [1970] A.C. 538.
3. Dolphin Delivery v. Retail, Wholesale & Department Store Union, Local 580 et al., (1984) 10 D.L.R.(4th) 198.

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