

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

ON SEPTEMBER 18, 19, 20, 21, 24 AND DECEMBER 17, 1984.

FACTUM OF THE ATTORNEY GENERAL OF SASKATCHEWAN

INTERVENOR

Serge Kujawa, Q.C.
Acting Deputy Attorney General
15th Floor, City Hall
2476 Victoria Avenue
Regina, Saskatchewan
S4P 3V7

Gowling & Henderson
Barristers & Solicitors
160 Elgin Street
Ottawa, Ontario
K1N 8S3

Ottawa Agents for the
Attorney General of
Saskatchewan

IN THE SUPREME COURT OF CANADA

Names and Addresses of the Solicitors for the
parties and list of intervenors and
their respective Ottawa agents
where applicable

TIMOTHY J. CHRISTIAN

Solicitor for the Appellant,
The Alberta Union of
Provincial Employees

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

Ottawa Agents for the
Solicitors for the Appellant

A. BARRIE C. CHEVERS

Solicitor for the Appellant,
The Alberta International
Fire Fighters Association

ROBERT E. HOUSTON
SOLOWAY, WRIGHT, HOUSTON
GREENBERG, O'GRADY, MORIN
Barristers and Solicitors
170 Metcalfe Street
Ottawa, Ontario

Ottawa Agents for the
Solicitors for the Appellant

SHEILA J. GRECKOL and
JUNE M. ROSS

Solicitors for the Appellant,
The Canadian Union of
Public Employees

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

Ottawa Agents for the Solicitors
for the Appellant

RODERICK A. McLENNAN, Q.C.
NOLAN STEED and BRIAN R.
BURROWS

Solicitors for the
Respondent

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

Ottawa Agents for the Attorney
General of Alberta

R. TASSE, Q.C.
Deputy Attorney General of
Canada
Department of Justice
Kent and Wellington Streets
Ottawa, Ontario

Solicitor for the Intervenant
the Attorney General of Canada

Attorney General of
Ontario, Intervenor

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

Ottawa Agents for the
Attorney General of Ontario

Attorney General of Quebec
Intervenor

NOEL, DECARY, AUBRY
Barristers and Solicitors
111 Champlain
Hull, Quebec

Ottawa Agents for the
Attorney General of Quebec

Attorney General of Nova
Scotia, Intervenor

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

Ottawa Agents for the Attorney
General of Nova Scotia

Attorney General of Prince
Edward Island, Intervenor

BRIAN H. WILSON, Q.C.
Barrister and Solicitor
30 Metcalfe Street
Ottawa, Ontario

Ottawa Agent for the Attorney
General of Prince Edward Island

Attorney General of
British Columbia
Intervenor

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

Ottawa Agents for the
Attorney General of
British Columbia

Attorney General of
Manitoba
Intervenor

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

Ottawa Agents for the
Attorney General of Manitoba

Attorney General of
Saskatchewan
Intervenor

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

Ottawa Agents for the
Attorney General of
Saskatchewan

Attorney General of
Newfoundland
Intervenor

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

Ottawa Agents for the
Attorney General of
Newfoundland

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PART I

STATEMENT OF FACTS

1. The Attorney General of Saskatchewan accepts the
Statements of Facts contained in the Factums of the
Appellants.

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POINTS IN ISSUE

2. The points in issue in this appeal are set out in seven questions stated by this Court:

10 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,
20 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?

30 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
40 Constitution Act, 1982, and if so, in what
particular or particulars, and to what extent?

50 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?

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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?

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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?

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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?

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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:

10 (a) an employee who exercises managerial functions;

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

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

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

40 3. The position of the Attorney General of Saskatchewan is that questions 1 to 7 should be answered in the negative.

PART III

ARGUMENT

A. Questions 1 to 6

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4. The first three questions before this Court concern the prohibition of strikes, and the substitution of compulsory arbitration as the collective bargaining alternative. Questions 4 to 6, which deal with statutory provisions in respect of arbitration proceedings, relate to the manner in which collective bargaining is to be conducted.

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5. The Appellants contend that the legislative provisions in question infringe section 2(d) of the Charter which says:

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2. Everyone has the following fundamental freedoms:

...

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(d) freedom of association.

(1) The Scope of Freedom of Association

6. The Attorney General of Saskatchewan submits that it is unnecessary to consider each impugned provision

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individually because the section 2(d) protection of freedom of association does not include either the right to strike or the right to bargain collectively. This submission is supported by a consideration of (a) Charter interpretation, (b) Canadian judicial authority, (c) international law, and (d) the Constitutions of other countries.

(a) Charter Interpretation

General Principles

7. The Supreme Court of Canada has outlined three basic principles to be applied in interpreting the Charter:

(a) a purposive approach is appropriate in defining the guaranteed rights and freedoms;

(b) a generous and liberal, rather than a legalistic interpretation is appropriate; and

(c) the Charter must "... be placed in its proper linguistic, philosophic and historical contexts".

Her Majesty the Queen v. Big M Drug Mart Ltd., (unreported, April 24, 1985, S.C.C.), at pp. 68-69.

8. It is submitted that, in applying these principles to define the freedom guaranteed under section 2(d) of the Charter, care must be taken to consider the plain meaning of the words and to avoid reading in what is not there.

Public Service Alliance of Canada v. The Queen in Right of Canada et al. (1984), 11 D.L.R. (4th) 337 (F.C.T.D.); affirmed on appeal (1984), 11 D.L.R. (4th) 387 (F.C.A.), at pp. 390-391.

Dolphin Delivery Ltd. v. Retail, Wholesale and Department Store Union, Local 580 et al. (1984), 10 D.L.R. (4th) 198 (B.C. C.A.), at p. 209.

9. An additional caution was voiced by the Alberta Court of Appeal in the case at bar. Kerans J.A. said:

... a court should hesitate to accept an interpretation which would have an extreme effect, as, for example, to automatically make every law subject to review under section 1.

And further:

If we are to avoid legalism, we are also to avoid, at the other extreme, the danger warned against by Zuber J.A. in R. v. Altseimer, 38 O.R. (2d) 783 at 788: "... extravagant interpretations can only trivialize and diminish respect for the Charter ...".

Reasons for Judgment of Kerans J.A.,
Case on Appeal, p. 61.

10. With these principles in mind, it is submitted that the scope of freedom of association as guaranteed by

section 2(d) of the Charter must be carefully defined. In undertaking this task, utilizing a purposive approach, four criteria enumerated by Dickson C.J.C., in the Big M Drug Mart case, supra, provide a helpful framework for analysis. He said, at p. 68:

10 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 Charter 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 the purpose of the other specific rights and freedoms with which it is associated within the text of the Charter.

20 (i) The Charter and the Larger Objects of the Charter

11. The Attorney General of Saskatchewan submits that
30 the rights to strike and to engage in collective bargaining are economic rights.

 See: Public Service Alliance of Canada v. The Queen in Right of Canada et al., supra, (F.C.T.D.), at p. 358.

 Reasons for Judgment of Kerans J.A., Case on Appeal, p. 66.

40 12. It is further submitted that the Charter as a whole, and in particular, section 2 which guarantees certain
50 fundamental freedoms, was not intended to protect economic rights.

13. Reed J., in discussing the Public Sector Compensation Restraint Act, which has the effect of extending the term of specified collective agreements, said:

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

Public Service Alliance of Canada v. The Queen in Right of Canada et al., supra, (F.C.T.D.), at p. 358.

14. Kerans J.A., in the Court below, noted, without further addressing the issue:

Indeed, the entire field of economic association offers difficulty. Why is there a right of association for economic purposes when the Charter apparently offers no other economic rights?

Reasons for Judgment of Kerans J.A., Case on Appeal, p. 65.

15. Rather, it is submitted, the rationale for the entrenchment of the fundamental freedoms under section 2 of the Charter was the enhancement of democratic values, including social, religious, political and egalitarian rights in a pluralistic society. These are the rights around which the entire Charter is framed.

(ii) The Language Whereby the Right to Freedom of Association is Guaranteed

Fundamental Freedom

10 16. It is submitted that the word "fundamental" is critical to the proper interpretation of section 2(d) of the Charter, and that "fundamental freedom" includes a component not found in "freedom" standing alone. Dickson C.J.C., in discussing the designation of the section 2 rights as "fundamental", said:

20 They are the sine qua non of the political tradition underlying the Charter.

Her Majesty the Queen v. Big M Drug Mart Ltd., supra, at p. 72.

30 17. In the Court below, Belzil J.A., in dealing with this issue, said:

40 More than a legal document, the Charter is a political and social "living" constitution. Fundamental freedom should then be defined in that context by reference to political, social, philosophical resources, avoiding the "austerity of tabulated legalism".

Reasons for Judgment of Belzil J.A.,
Case on Appeal, p. 97.

See also: Her Majesty the Queen v. Big M. Drug Mart Ltd., supra, at p. 69.

The learned judge continued at pp. 97-98:

10 In law, liberty is freedom to do whatever is not forbidden by law, and the supremacy of Parliament, or the legislatures, precludes them from binding themselves not to pass laws abrogating liberty, which is the essence of guaranteed rights. A limited measure of this is achieved in the Charter through a difficult amending formula, but the underlying legal principle of Parliamentary supremacy remains.

Fundamental freedom and fundamental human rights are spoken of as the birthright of any human being anywhere in the world because they flow from the fundamental nature of man.

(emphasis mine)

20 See also: Public Service Alliance of Canada v. The Queen in Right of Canada et al., supra, (F.C.T.D.), at p. 355.

18. Indeed, it is submitted that section 2 of the Charter is intended, by recognition of the freedoms
30 enumerated therein, to entrench the cornerstones of our democratic society. It follows that the fundamental freedom guaranteed by section 2(d) requires a "... pre-existing and more or less universal right now merely being confirmed".

40 Reasons for Judgment of Kerans J.A.,
Case on Appeal, at p. 66.

It is submitted that collective bargaining by trade unions cannot be construed as a fundamental or inherent right in the required sense. This submission is further supported
50 by the discussion in paragraphs 19 to 28.

The Evolution of Collective Bargaining

19. Collective bargaining as a lawful activity has evolved and changed over time. For example, in recent decades, the right to strike during the term and concerning the application of a collective agreement has been removed and replaced with schemes for grievance arbitration. It is quite possible that, in the future, collective bargaining will be replaced by some other model of labour management relations. For example, Professor Paul Weiler, in Reconcilable Differences: New Directions in Canadian Labour Law (Toronto: The Carswell Company Limited, 1980), cited the "co-determination" alternative developed in West Germany. At p. 302, he distinguished that system from collective bargaining:

Rather than two distinct organizations, union and employer, warring at the bargaining table, both the employees and the shareholders select representatives on a single board of directors which is supposed to pursue the common goal of the success of the enterprise for the benefit of owner and worker alike.

20. It has been submitted that section 2(d) protects the inherent fundamental freedom of association. To include collective bargaining by a trade union within that guaranteed right would be to entrench the currently accepted means of dealing with labour-management relations. This Court has recognized that:

The Charter is designed and adopted to guide and serve the Canadian community for a long time. Narrow and technical interpretation, if not modulated by a sense of the unknown of the future, can stunt the growth of the law and hence the community it serves.

Skapinker v. Law Society of Upper Canada
(1984), 53 N.R. 169 (S.C.C.), at p. 180.

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21.. Since entrenchment of the right to bargain collectively would freeze what has been a constant and vital evolution of labour relations, it is submitted that such a right cannot appropriately be included within the section 2(d) guarantee of freedom of association. The right to bargain collectively lacks the timeless quality essential to the fundamental freedoms which are protected by section 2.

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22. Indeed, it is submitted that the rights to strike and to engage in collective bargaining are creatures of common law and statute. As such, those rights exist only within the confines of the law. The common reference to these activities as "rights" may lead to confusion unless a clear distinction is made between a statutory or common law right and a constitutionally entrenched Charter right. Collective bargaining, it is submitted, is a right within the context of the former, rather than the latter class.

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See: Reasons for Judgment of Kerans
J.A., Case on Appeal, at pp. 77-78.

23. Professor Paul Weiler, in Reconcilable Differences,
supra, notes at p. 66:

I do not mean to suggest that the right to strike is a fundamental, inalienable, personal right, as many trade unionists assert. The legal right to strike is justified not on account of its intrinsic value, but because of its instrumental role in our larger industrial relations system. We can, and we have, prohibited strikes at many points in the system; for example the administration of the collective agreement, because we have concluded that there are better techniques for performing that task of dispute resolution: grievance arbitration. But so far we have not been able to agree on an acceptable alternative for contract negotiation disputes, and thus the strike continues to be the indispensable lesser evil in that setting.

(emphasis mine)

Achievement of Trade Union Goals

24. The Appellants, relying on Re Service Employees International Union, Local 204 and Broadway Manor Nursing Home et al. (1983), 4 D.L.R. (4th) 231 (Ont. H.C.), argue that collective bargaining is the raison d'etre for forming a trade union and that, if freedom of association does not include the right to bargain collectively, then the right to form the association is meaningless.

25. The Attorney General of Saskatchewan submits that the removal of a legal right to bargain collectively does not render the section 2(d) guarantee to freedom of

association, in a labour context, empty or worthless.
Three examples serve to support this submission. First, in
addition to negotiating a collective agreement (collective
bargaining), a trade union could participate in resolving
employee grievances and in ensuring an appropriate working
environment for its members.

See: Paul Weiler, Reconcilable Differences, supra, at pp. 30-31.

Second, in the case at bar, though the right to strike has
been denied, compulsory arbitration provides a viable
alternative whereby the parties may engage in collective
bargaining. Third, historically, even those employees who
have been denied the rights to strike and to bargain
collectively have formed labour unions and associations.
Speaking with a collective, and therefore, more forceful
voice, such organizations have made recommendations and
representations to management, and have engaged in
consultation and information exchanges with management for
the purpose of improving employment conditions. In fact,

[e]mployee organizations have existed in most
provincial public services for a good many years.
Until recently, however, except in one province,
they have not had the right to participate in the
processes established by law for the determination
of terms and conditions of employment. The
exception was Saskatchewan, where in 1944 the Public
Service became subject to the same labour
legislation that governed employer-employee
relationships in the private sector.

See: Report of the Preparatory Committee on Collective Bargaining in the Public Service, July 1965 (Ottawa: Queen's Printer, 1965), at p. 19. See also, pp. 15-20. (Appendix attached.)

10 26. Further, Esson J.A., in Dolphin Delivery Ltd. v. Retail Wholesale and Department Store Union, Local 580 et al., supra, considered this issue and said, at p. 211:

20 The judgments in the Divisional Court [in the Broadway Manor case] 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 s. 2, in combination with the individual right to vote in s. 3 and the requirement in s. 4 that
30 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.

(emphasis mine)

See also: Collymore v. Attorney General of Trinidad and Tobago, [1970] A.C. 538 (P.C.), at p. 547.

40 27. In fact, freedom of association does not stand alone in the Charter. When linked with the other fundamental freedoms - the right to freedom of expression and freedom

of assembly - and coupled with the right to vote, a solid foundation of rights is forged upon which all free and democratic societies are built. That these rights are powerful instruments in the hands of individuals and the organizations which they form shows that the "bare" right to associate is, nevertheless, not an impotent or empty one.

28. Finally, the argument that freedom of association is rendered meaningless unless it includes the purpose, and means of achieving the objectives, of the association may be analyzed from a different point of view. It is important to remember that the freedom guaranteed by section 2(d) is, at least, a right guaranteed to the individual.

Dolphin Delivery Ltd. v. Retail,
Wholesale and Department Store Union,
Local 580, et al., supra, at p. 207.

Because section 2 guarantees "freedoms", and compulsion is the antithesis of freedom, it is submitted that the vitality and meaning of freedom of association flows from the right of the individual to be free from coercion.

See: Her Majesty the Queen v. Big M
Drug Mart Ltd. et al., supra, at p. 56.

Accordingly, it is submitted that paragraph 2(d) protects the individual's right to choose either to associate, or not to associate. For example, legislation barring

employees from forming associations would constitute a form of coercion against the individual's right to choose, and therefore, infringe the right guaranteed by section 2(d). Similarly, legislation compelling a person to join an employee association would violate that right. (In each such case, the question would be whether the limitation on the right to associate is a reasonable one which can be demonstrably justified under section 1.) Viewed from this perspective, the concern in section 2(d) is with the fundamental right of the individual to be free from compulsion, and it cannot, therefore, be said that the right is empty if the purpose and activities of the association are not encompassed within the meaning of freedom of association.

Drawing Distinctions Between Associations

29. The Attorney General of Saskatchewan submits that section 2(d) of the Charter must be interpreted consistently in its application to all types of associations. In considering this issue, Esson J.A., in Dolphin Delivery Ltd. v. Retail, Wholesale and Department Store Union, Local 580 et al., supra, held, at p. 209:

It is not clear whether the members of the Court [in the Broadway Manor Nursing Home case, supra] 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. (emphasis mine)

30. For the following reasons, it is submitted that this conclusion is correct and that, as a result, collective bargaining is not an element of the guaranteed freedom of association.

31. First, and most importantly, there is no specific language in section 2 which would indicate that trade unions should be treated differently from other associations. It follows that any protection of the purposes and activities of trade unions would apply equally to the purposes and activities of other types of associations. For example, other economic associations, such as corporations, partnerships and joint ventures, have been regulated by a large body of common law and statutory law defining their rights, powers and duties. It is submitted that those rights and powers, whereby a business association carries out its purposes, have not been constitutionally entrenched.

See: Reasons for Judgment of Kerans
J.A., Case on Appeal, at p. 76.

32. It is, of course, true that additional rights may attach to particular types of associations. However, that result would be due not to the characterization of the group as an association, but rather to the operation of guarantees under other provisions of the Charter. For example, a religious group would glean special protections pursuant to both paragraphs 2(a) and (d).

33. Second, if certain rights relating to the goals of trade unions, and the means whereby such goals could be achieved, were entrenched, it would be necessary to determine precisely which union purposes and activities were protected by section 2(d). For example, would only "crucial" or "fundamental" purposes be protected? If the right to bargain collectively was included within freedom of association, would the right to participate in grievance procedures and to act on behalf of employees during the continuance of the collective agreement also be included? Would the right to picket be entrenched? How would "collective bargaining" be defined? Would different rights pertain in different jurisdictions, or would the courts be required to pick and choose a uniform set? Would arbitration or conciliation mechanisms be a sufficient alternative to a right to strike?

34. It is submitted that there is nothing in the language of the Charter which would provide guidance or a rational basis upon which such questions should be answered. To make the kinds of distinctions that would be required if the right to engage in collective bargaining is guaranteed by section 2(d) would result in great uncertainty, particularly in view of the continuous evolution of labour relations techniques.

35. Further, similar questions would arise with respect to the purposes and activities of other types of associations. In essence, to grant constitutional protection to the purposes, and means of achieving the purposes, of associations would, subject to section 1 of the Charter, constitutionally guarantee the power of any association to engage in whatever activity it chose to employ to achieve its objects. It is submitted that such a consequence would not be consistent with the language and intention of section 2(d) of the Charter.

Collective Bargaining as a Procedure

36. The object of collective bargaining is to provide a forum for two opposing parties, the trade union and the employer, to attempt to reach an agreement that is most

beneficial to both sides. Each has an economic weapon available which may be employed for the purpose of forcing the opposition to accept certain terms in the collective agreement. By virtue of the characterization of a trade union as an association, the Appellants argue that the right to withdraw the services of its members is an entrenched constitutional right. However, the right to strike is only one-half of the equation. The employer has the parallel right during collective bargaining to lock out the employees. It cannot be said that the employer's right to lockout is constitutionally entrenched because many employers would lack the necessary connection to an "association". It would be illogical to say that business associations, such as partnerships, engaging in collective bargaining would have a constitutionally protected right to lock out employees, whereas a single proprietor, also engaging in collective bargaining would not be so protected. Such a result would not be consistent with the spirit of the Charter.

37. Accordingly, it is submitted, it would be inappropriate to hold that freedom of association includes the right to bargain collectively (which requires the participation of two parties) when, in fact, only the trade union, and not the employer, would enjoy the resultant constitutionally entrenched protection.

The Language in Other Documents

38. When the Charter was drafted, there existed several international documents guaranteeing freedom of association and making explicit reference to trade unions.

10 See, for example: Article 22 of the
 U.N. International Covenant on Civil and
 Political Rights; Article 8 of the U.N.
 International Covenant on Economic,
 Social and Cultural Rights.

20 It is submitted that the difficulties inherent in omitting
 explicit reference to the rights of trade unions must have
 been known to the drafters of the Charter.

 See: Reasons for Judgment of Kerans
 J.A., Case on Appeal, pp. 70-74.

30 Accordingly, had the intention been to include collective
 bargaining rights of trade unions in section 2(d), it is
 submitted that more specific language would have been used.

Legislative History of Section 2(d) of the Charter

40 39. The Appellants argue that the minutes of the Special
 Joint Committee of the House of Commons and Senate on the
 Constitution of Canada support the contention that "freedom
 of association" includes the freedom to organize and
 bargain collectively.

40. The Attorney General of Saskatchewan submits that such material is not useful in defining the scope of freedom of association. Reed J. noted:

10 It should not be forgotten that statements made in such circumstances have an advocacy character. An attempt is being made to convince the members of the committee of the soundness of the Minister's proposals.

Accordingly, I am not willing, in this case, to give much weight to the Minister's interpretation of the section unless there are other indicia leading to the same conclusion.

20 Public Service Alliance of Canada v. The Queen in Right of Canada et al., supra,
(F.C.T.C.). at p. 351.

See also: Reasons for Judgment of Kerans J.A., Case on Appeal, at p. 69.

(iii) Historical Origins of Freedom of Association

30 41. It is submitted that freedom of association, is a long-standing and well known freedom in the Canadian legal system. Section 1 of the Canadian Bill of Rights, R.S.C. 1970, Appendix III, specifically states:

40 It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination ... the following ... fundamental freedoms, namely,

...

(e) freedom of assembly and association; ...

(emphasis mine)

42. Nonetheless, it is submitted that freedom of association has never been considered to extend to the protection of the right of trade unions to engage in collective bargaining or to strike.

See: Public Service Alliance of Canada v. The Queen in Right of Canada et al., supra, (F.C.T.D.), at pp. 352 and 356.

43. Internationally, freedom of association has been recognized in a variety of human rights documents to which Canada is a signatory, and in the Constitutions of other countries.

See, for example: The Constitution of India.

The Constitution of Trinidad and Tobago.

The European Convention for the Protection of Human Rights and Freedoms, Article 11.

The U.N. Declaration of Human Rights, Articles 20 and 24.

44. Nonetheless, even where rights with respect to trade unions have been specifically mentioned in connection with freedom of association in international documents, there has been a reluctance by the courts to extend the protection to the right to strike or bargain collectively.

See: Public Service Alliance of Canada v. The Queen in Right of Canada et al., supra, (F.C.T.D.), at pp. 352-353.

(b) Canadian Judicial Authority

45. With one exception, Canadian courts have been unwilling to find that the purposes of forming a trade union and the means of achieving those purposes fall within the meaning of freedom of association.

See: Reasons for Judgment of Kerans, J.A., Case on Appeal, p. 85.

Public Service Alliance of Canada v. The Queen in Right of Canada et al., supra, (F.C.A.), at p. 391-392.

Dolphin Delivery Ltd. v. Retail, Wholesale and Department Store Union, Local 580 et al., supra, at p. 209.

Re Prime et al. and Manitoba Labour Board et al. (1983), 3 D.L.R. (4th) 74; appeal allowed on other grounds, (1984), 8 D.L.R. (4th) 641 (Man. C.A.).

Halifax Police Officers and NCOs Association v. The City of Halifax et al. (1984), 64 N.S.R. (2d) 368 (N.S. S.C.).

Re Saskatchewan Government Employees Union et al. and Government of Saskatchewan et al. (1984), 14 D.L.R. (4th) 245 (Sask. Q.B.).

Re Pruden Building Ltd. and Construction and General Workers Union, Local 92 et al. (1984), 13 D.L.R. (4th) 584 (Alta. Q.B.).

46. In only one case, Re Service Employees International Union, Local 204 and Broadway Manor Nursing Home, supra,

has freedom of association been held to protect the right to bargain collectively. On the basis of the submissions in paragraphs 11 to 44, it is respectfully submitted that the decision on that point is incorrect. The Broadway Manor case was specifically not followed by the Courts of Appeal which decided the case at bar, the Dolphin Delivery case, and Public Service Alliance of Canada v. The Queen in Right of Canada et al., supra.

(c) International Law

47. For the following reasons, it is submitted that, except as discussed in paragraphs 38, 43 and 44, a review of international law is not helpful in defining the scope of section 2(d) of the Charter.

48. First, such a review yields inconclusive results, at best.

See: Reasons for Judgment of Kerans J.A., Case on Appeal, at p. 74.

Public Service Alliance of Canada v. The Queen in Right of Canada et al., supra, (F.C.T.D.), at pp. 352-356.

Second, the U.N. Covenant on Economic, Social and Cultural Rights and the International Labour Organization Convention, which specifically mention trade unions:

... go far beyond what is usually considered to be fundamental rights, or what can fairly be said to be encompassed under the rubric "fundamental rights" in the Canadian Charter of Rights and Freedoms.

Public Service Alliance of Canada v. The Queen in Right of Canada et al., supra, (F.C.T.D.), at p. 355.

10 Third, referring with approval to Re Alberta Union of Provincial Employees et al. and the Crown in Right of Alberta (1980), 120 D.L.R. (3d) 590, (Alta. Q.B.); affirmed on appeal (1981), 130 D.L.R. (3d) 191, Reed J. noted that:

20 ... provincial legislation limiting the right to strike and limiting the matters which could be dealt with by an arbitration board did not violate Canada's international obligations under I.L.O. Convention No. 87 or under the International Covenant on Economic, Social and Cultural Rights.

Public Service Alliance of Canada v. The Queen in Right of Canada et al., supra, (F.C.T.D.), at p. 356.

30 See also: Reasons for Judgment of Kerans J.A., Case on Appeal, at p. 74.

Finally, Reed J. held:

40 In any event, the fact that Canada has acceded to international conventions which provide for a right to strike does not mean that the Charter of Rights which was intended to place certain rights above the ordinary laws of the land intended to incorporate all the rights contained in those international conventions.

Public Service Alliance of Canada v. The Queen in Right of Canada et al., supra, (F.C.T.D.), at p. 354.

See also: Reasons for Judgment of Kerans J.A., Case on Appeal, at p. 75.

(d) The Constitutions and Jurisprudence of Other Countries

10 49. There is significant case authority in other democratic societies holding that the constitutional protection of freedom of association does not include protection of a right to engage in collective bargaining.

20 50. For example, in interpreting the constitution of Trinidad and Tobago, the Privy Council, in Collymore v. Attorney General of Trinidad and Tobago, supra, at p. 547, quoted with approval from the judgment in the court below:

In my judgment, then, freedom of association means no more than freedom to enter into consensual arrangements to promote the common interest objects of the associating group.

30 See: Public Service Alliance of Canada v. The Queen in Right of Canada et al., supra, (F.C.A.), at p. 391.

Reasons for Judgment of Kerans J.A.,
Case on Appeal, at p. 73.

40 51. In All India Bank Employees' Association v. The National Industrial Tribunal (1962), 49 A.I.R. 171 (S.C.), the Court held, at p. 181:

50 [E]ven a very liberal interpretation of subclause (c) of clause (1) of Article 19 [which gives a right "to form associations or unions"] cannot lead to the conclusion that the trade unions have a guaranteed right to an effective collective bargaining or to strike, either as part of collective bargaining or otherwise. The right to strike or the right to

declare a lock-out may be controlled or restricted
by appropriate industrial legislation ...

Conclusion

10 52. Based on the foregoing analysis of Charter
interpretation, Canadian judicial authority, international
law, and the Constitutions of other countries, it is
submitted that neither the purposes, nor the means of
achieving the purposes, of a trade union falls within the
20 scope of freedom of association as guaranteed by section
2(d) of the Charter. It follows that questions 1 to 6 as
stated by this Court must be answered in the negative.

(2) Effective Collective Bargaining

30 (a) Compulsory Arbitration

53. If, contrary to the submissions made in Part A(1),
it should be determined that freedom of association
40 includes the means of achieving the purposes of a labour
union, then the Attorney General of Saskatchewan submits
that it would be necessary for the courts to define the
essence of the resultant right. That is, in determining,
in a labour context, whether section 2(d) is infringed, it

would be necessary to decide, pursuant to an analysis under that section, whether the impugned legislation would render ineffective the union's ability to achieve its purposes. It may be, for example, that the right to strike is not crucial to effective collective bargaining if a suitable alternative is available. This would be comparable to the situation referred to, supra, in which what was once felt to be an indispensable tool, the strike, has given way to grievance procedures to resolve disputes during the currency of a collective agreement. Only if it is concluded, under section 2(d) of the Charter, that the legislation in question would prevent effective collective bargaining would it be appropriate to proceed to an analysis under section 1.

54. In the case at bar, it is submitted that the impugned statutory provisions which provide for compulsory arbitration while prohibiting strikes do not violate section 2(d) of the Charter because they do not impair the right of trade unions to engage in effective collective bargaining. In fact, it is submitted that compulsory arbitration is a viable alternative whereby collective bargaining may proceed. Kerans J.A. noted:

The only variations [in the impugned legislation] from the collective bargaining scheme in general use in Alberta are first, that both employer and employee are bound, if collective bargaining fails,

to the terms of a collective agreement written for them by an independent board of arbitrators and second, they are bound by prohibitions against strikes and lockouts. The right to strike is not abolished in vacuo, with the unilateral imposition of wage rates by legislative fiat.

Case on Appeal, pp. 82-83.

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55. The learned judge continued:

I cannot accept that devastating harm to the vital interest of the union or members is here self-evident. On the contrary, there are other forms of action by or for workers which might be available and which might be as effective as or more effective than the right to strike. Compulsory arbitration might be one of them.

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...

It has not been suggested, let alone proved, that the legislative scheme before us in pith and substance intends to or does destroy or render impotent the trade union movement among the public service employees in Alberta. Therefore, even assuming (without deciding) that we ought to extend freedom of association to protect the vitality of the trade union movement, it simply has not been shown that that vitality is at risk under this legislation.

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Case on Appeal, pp. 84-85.

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56. It is submitted that, on this basis, the impugned legislation is distinguishable from that which was considered in both Public Service Alliance of Canada v. Her Majesty the Queen in Right of Canada et al., supra, and Re Service Employees International Union, Local 204 and

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Broadway Manor Nursing Home et al., supra. The effect of the legislation in both those cases was to extend the collective agreement, essentially foreclosing the right to bargain collectively.

10 57. Speaking in very broad terms in the Broadway Manor
case, O'Leary J. said that the right to strike is essential
to the ability of trade unions to effectively bargain
collectively. Nonetheless, it is submitted that this
statement must be read in conjunction with the appropriate
20 legislative background. The learned judge noted, at page
284:

The ability to strike, in the absence of some kind
of binding conciliation or arbitration, is the only
substantial economic weapon available to the
employees.

(emphasis mine)

30 It was on this basis that he found that the right to strike
must be included under the guarantee of freedom of
association.

40 58. A similar distinction may be drawn with respect to
the judgment of Reed J. in the Public Service Alliance case
(see especially p. 348). In fact, on appeal, Mahoney J.A.,
at p. 391, differentiated between the impugned legislation
in the case before him, which dealt with the abrogation of

the right to bargain collectively, and other cases which considered the right to strike and the right to picket as components of collective bargaining.

10 59. In summary, it is submitted that where, as in the case at bar, legislation prohibits strikes, but provides a viable alternative, such as compulsory arbitration, whereby labour and management may engage in effective collective bargaining, the abrogation of the right to strike does not
20 infringe the section 2(d) guarantee of freedom of association.

(b) Legislative Requirements as to the Conduct of Arbitration

30 60. Again, if it is found, contrary to the submission made herein, that freedom of association includes the means of achieving the purposes of a labour union, then it is submitted that the impugned legislation, insofar as it affects the conduct of arbitration, does not violate section 2(d) of the Charter. This submission is based on the
40 premise outlined, supra, that freedom of association is infringed only if the union is prevented from engaging in effective collective bargaining. It is submitted that none of the provisions identified in questions 4 to 6, as set out by this Court, would have that result. A consideration of
50 the relevant provisions of each of the three Acts follows.

The Public Service Employee Relations Act

61. Clauses 48(2)(a), (b) and (c) of the Act concern matters traditionally reserved to the control of management. While it is possible that labour may wish to become involved in these issues, and may, therefore, wish to include in the collective agreement some provision relating to the role of the union in such matters, it is submitted that these would not be issues so crucial that their exclusion would emasculate the collective bargaining process.

62. With respect to clause 48(2)(d) of the Act, the matter of pensions falls under the jurisdiction of the Public Service Pensions Act, R.S.A. 1980, c. P-35.

63. Section 55 of the Act merely specifies, in paragraph (a), factors which must be considered by the arbitration board, and, in paragraph (b), those which may be considered. It is submitted that the enumeration of factors to be "considered" by a board does not place fetters on the effectiveness of arbitration in the collective bargaining process.

Labour Relations Act

64. Section 117.8 is similar to section 55 of the Public Service Employee Relations Act. (See paragraph 63.)

10 Police Officers' Collective Bargaining Act

65. With respect to section 2(2) of the Act, pensions for police, to which this section would apply, would fall under the jurisdiction of the Special Forces Pension Act, R.S.A. 1980, c. S-21.

20 66. Section 15 of the Act is similar to section 55 of the Public Service Employee Relations Act. (See paragraph 63.)

30 67. Accordingly, it is submitted that the impugned provisions do not infringe section 2(d) of the Charter because they do not foreclose or substantially interfere with effective collective bargaining.

40 (3) Section 1 of the Charter

68. If, contrary to the submissions made in Part A(1) and (2), it should be determined that the impugned provisions enumerated in questions 1 to 6, as stated by this Court,

infringe upon freedom of association as guaranteed by section 2(d), then it is submitted that the legislation is justified under section 1 of the Charter. To support this submission, the Attorney General of Saskatchewan adopts the reasons advanced in paragraphs 92 to 115 of the Respondent's factum.

B. Question 7: The Right to Exclude Specified Employees From Collective Bargaining

(1) Freedom of Association

69. It has been submitted in Part A of this factum, that the section 2(d) guarantee of freedom of association does not include the right of a union to engage in collective bargaining. It follows from this premise that there is no constitutional impediment to legislation denying any class of employees the opportunity to bargain collectively. Accordingly, it is submitted that question 7 must be answered in the negative.

(2) Section 1 of the Charter

70. If, contrary to the submissions made in Parts A(1) and B(1) of this factum, it is determined that freedom of

association guarantees the right of trade unions to bargain collectively, then it is submitted that the exclusion, from units for collective bargaining, of classes of employees as designated in question 7 stated by this Court, is justified under section 1 of the Charter. In support of this position, the Attorney General of Saskatchewan adopts the reasons advanced in paragraphs 116 to 118 of the Respondent's factum.

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PART IV

ORDER SOUGHT

10 70. The Attorney General of Saskatchewan respectfully
submits that questions 1 - 7 should be answered in the
negative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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M. C. Crane

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B. G. Welsh
Counsel for the Attorney
General of Saskatchewan

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