IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN)

BETWEEN:

THE GOVERNMENT OF SASKATCHEWAN, THE HONOURABLE LORNE J. McLAREN, THE HONOURABLE LORNE H. HEPWORTH and HIS HONOUR JUDGE ROBERT HARVIE ALLAN,

APPELLANTS
(RESPONDENTS)

- and -

THE RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, LOCALS 544, 496, 635 and 955,

THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, LOCAL P-241-1, P-241-2, P-241-3, P-241-4 and P-241-6,

THE DAIRY AND PRODUCE WORKERS; LOCAL 834, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 834,

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, LOCAL 395,

MAURICE HNIDY, DOUG HAROLD, RON OROBKO, RON BOHN, DEAN SCHENDEL, JOHN KUKURUDZA, ALLAN GOYER, DON DECK, DOUG LEITE, DAVID KLASSEN, REG COX, GORDON FAIRBURN, ANDY STARIUALA, LANCE BROWNBRIDGE,

RESPONDENTS
(APPLICANTS)

FACTUM OF THE ATTORNEY GENERAL FOR SASKATCHEWAN

JAMES P. TAYLOR
Deputy Attorney General
2476 Victoria Avenue
Regina, Saskatchewan
S4P 3V7
Phone (306)787-5603
Solicitor for the Appellants

MITCHELL TAYLOR ROMANOW CHING
Barristers and Solicitors
1003, 201 - 21st Street East
Saskatoon, Saskatchewan
Phone (306)244-2242
Solicitors for the Respondents

GOWLING & HENDERSON
Barristers and Solicitors
160 Elgin Street
Ottawa, Ontario
K1N 8S3
Phone (613)232-1781
Ottawa Agents

SOLOWAY WRIGHT HOUSTON
GREENBERG O'GRADY & MORIN
170 Metcalfe Street
Ottawa, Ontario
Ottawa Agents for the
Respondents

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

JAMES P. TAYLOR
Deputy Attorney General
2476 Victoria Avenue
Regina, Saskatchewan
S4P 3V7
Phone: (306)787-5603

Solicitors for the Appellants

MITCHELL TAYLOR ROMANOW CHING
Barristers and Solicitors
1003, 201 - 21st Street E.
Saskatoon, Saskatchewan
Phone (306)244-2242
Solicitors for the Respondents

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

Solicitor for the Intervenant the Attorney General of Canada

Attorney General of Ontario, Intervenor

Attorney General of British Columbia
Intervenor

GOWLING & HENDERSON
Barristers and Solicitors
160 Elgin Street
Ottawa, Ontario
K1N 8S3
Phone (613)232-1781

Ottawa Agents

SOLOWAY WRIGHT HOUSTON
GREENBERG O'GRADY & MORIN
170 Metcalfe Street
Ottawa, Ontario
Ottawa Agents for the
Respondents

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

Ottawa Agents for the
Attorney General of Ontario

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 Alberta Intervenor	GOWLING & HENDERSON Barristers & Solicitors 160 Elgin Street Ottawa, Ontario Ottawa Agents for the Attorney General of Alberta
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

INDEX

PART I

STATEMENT OF FACTS

1. The individual Respondents are employees of Palm Dairies Limited (Palm) and Dairy Producers Co-operative Limited (Dairy Producers). The Respondent unions represent employees of those companies. Palm and Dairy Producers own dairies operating in the Province of Saskatchewan.

2. In March of 1984, contract talks were conducted between Palm and Dairy Producers and the Respondent unions. No progress was made towards an agreement.

> See, for example: Affidavit of Clarence Lyons, Case on Appeal, p. 42 at paragraph 6.
>
> Affidavit of Harold Bundschuh, Case on Appeal, p. 56 at paragraph 6.

3. On March 31, 1984 local P-241-2 of the Respondent United Food and Commercial Workers International Union served notice on Palm that strike action would commence at 12:01 a.m. on April 8, 1984, at Palm's Saskatoon plant.

> See: Affidavit of Clarence Lyons, Case on Appeal, p. 48.

4. On April 1, 1984, representatives of Dairy Producers and Palm served lock-out notices, dated March 31, 1984, on the Respondent unions.

See, for example: Affidavit of Clarence Lyons, Case on Appeal, pp. 43-44 at paragraph 11.

Affidavit of Harold Bundschuh, Case on Appeal, p. 57 at paragraph 10.

5. The Dairy Workers (Maintenance of Operations) Act, S.S. 1984, c. D-1.1 was enacted in reaction to these developments. It came into force on April 9, 1984. The effect of the Act was three-fold:

(a) the term of the last collective bargaining agreements between the Respondent unions and the dairies was extended so as to remain in effect until the conclusion of a new agreement in accordance with the Act (sections 3 and 6);

(b) strikes and lock-outs were immediately prohibited (section 7); and

(c) compulsory arbitration was to be imposed upon the dairy industry 15 days after the coming

into force of the Act if the dairies and the Respondent unions had not concluded a collective bargaining agreement by that time (section 8).

6. Pursuant to the Act, the prohibition against strikes and lock-outs came into effect on April 9, 1984. No collective bargaining agreement was in place within 15 days of the coming into force of the Act and, accordingly, compulsory arbitration was imposed. His Honour Judge Robert Harvie Allan, the arbitrator appointed under the Act, commenced the arbitration process.

7. The Respondents then initiated legal proceedings and asked for a declaration that the Act was null and void on the ground that the prohibition against strikes violated their freedom of association as guaranteed by s. 2(d) of the Canadian Charter of Rights and Freedoms. The application was dismissed by Sirois J. of the Court of Queen's Bench by judgment dated May 11, 1984 for the reason that the Act did not violate section 2(d).

See: Reasons for Judgment of Sirois J., Case on Appeal, p.153.

8. The Respondents appealed to the Court of Appeal for Saskatchewan. By judgment dated June 3, 1985, a majority of the Court, Brownridge J.A. dissenting, allowed the appeal and held that the Act violated s. 2(d) of the Charter and that it was not saved by s. 1.

See: Reasons for Judgment of Bayda C.J.S., Cameron and Brownridge JJ.A., Case on Appeal, pp. 179, 210 and 244, respectively.

9. Bayda C.J.S. held that a person asserting the freedom of association under section 2(d) is free to perform in association any act that he is free to perform alone and that where an act by definition is incapable of individual performance, he is free to perform that act in association provided the mental component of the act is not to inflict harm. Bayda C.J.S. found that strikes are intended to compel an employer to agree to terms and conditions of employment, rather than to inflict injury and, consequently are protected by section 2(d). Cameron J.A. acknowledged that decided cases weighed in favour of excluding the so-called "right to strike" from section 2(d) but concluded that strikes are constitutionally protected because the removal of the right to strike would sterilize workers' associations. Brownridge J.A., in dissent, held

that section 2(d) did not affect laws which limit or control strikes or lockouts.

10. Leave to appeal to the Supreme Court of Canada was granted by Order of this Court dated June 25, 1985.

See: Case on Appeal, p. 27.

11. The constitutional questions were stated by Order of Dickson C.J.C., dated June 2, 1985.

See: Case on Appeal, p. 30.

PART II

POINTS IN ISSUE

12. The points in issue in this appeal are set out in the constitutional questions stated by Dickson C.J.C.:

> (1) Does The Dairyworkers (Maintenance of Operations) Act, S.S. 1984, c. D-1.1, or any part thereof, infringe or deny freedom of association guaranteed in s. 2(d) of the Canadian Charter of Rights and Freedoms?
>
> (2) If The Dairyworkers (Maintenance of Operations) Act, S.S. 1984, c. D-1.1, or any part thereof, infringe or deny freedom of association guaranteed in s. 2(d) of the Canadian Charter of Rights and Freedoms, is the Act, or such part, justified by s. 1 of the Canadian Charter of Rights and Freedoms and therefore not inconsistent with the Constitution Act, 1982?

13. The Attorney General of Saskatchewan takes the position that Question 1 should be answered in the negative, and, that if it is necessary to consider Question 2, it should be answered in the affirmative.

PART III

ARGUMENT

14. This appeal raises basic questions about the nature of the fundamental freedom of association guaranteed by section 2(d) of the Canadian Charter of Rights and Freedoms. In particular, it raises the issue of whether the so-called "right to strike" is constitutionally protected and entrenched by section 2(d).

QUESTION 1

Does The Dairyworkers (Maintenance of Operations) Act, S.S. 1984, c. D-1.1, or any part thereof, infringe or deny freedom of association guaranteed in s. 2(d) of the Canadian Charter of Rights and Freedoms?

15. The position of the Attorney General of Saskatchewan is that the majority in the Court below erred in its interpretation of section 2(d) of the Charter. It is submitted that freedom of association does not encompass the right to strike. The Charter does not guarantee the particular means by which associations might seek to achieve their objectives unless those means fall within the scope of independently entrenched freedoms or rights such as speech or assembly.

16. The freedom of association guaranteed by the Charter is concerned with the preservation, protection and enhancement of fundamental political and social freedoms. As such, it is intimately linked and related to the other basic freedoms enshrined in section 2. Section 2 entrenches the freedoms that are essential to our free and democratic system of governance.

17. It is submitted that strikes are no more than means for achieving the objectives of trade unions and their members. It would be completely inappropriate to subsume the right to strike within the fundamental "freedom of association". This conclusion is compelled by a consideration of: (a) the nature of the "right to strike" (b) basic principles of Charter interpretation, (c) the authorities, and (d) the errors inherent in the reasoning of the Court below.

(A) THE "RIGHT TO STRIKE"

18. At common law, the legality of a strike depended on the circumstances; the presence of breach of contract or of a tortious or criminal act would lead to a conclusion of illegality.

> Strikes may be perfectly legal or they may be illegal. It depends on the nature and mode of the concerted cessation of labour.
>
> Russell v. Amalgamated Society of Carpenters and Joiners, [1912] A.C. 421, at p. 435.

If a strike was judged to be illegal, it was enjoinable. Thus, there was no "right" to strike at common law, but only a freedom to do so if the strike was not independently illegal.

19. Labour legislation such as The Trade Union Act, R.S.S. 1978, c. T-17, changed the common law by enabling employees to strike and at the same time maintain their employment status (s. 2(f)(iii)). This enhanced the ability of employees to take action to promote their economic interests. But such legislation also regulates strike activity (i.e. through vote and notice requirements, ss. 11(2)(d), 11(6)), and prohibits striking at specified times (i.e. when a matter is pending before the Labour Relations Board or a board of conciliation, s. 11(2)(b), and during the currency of a collective bargaining agreement, s. 44(2)). When a strike does not comply with the statutory requirements, it is illegal and steps may legitimately be taken to stop it.

20. Thus, it is submitted that there has never been a "right to strike" beyond the freedom to strike that employees had within the constraints of the common law and applicable framework of labour legislation, including legislation such as The Dairy Workers (Maintenance of Operations) Act.

21. - Collective bargaining also exists as a function of statutory schemes. It is by virtue of labour legislation that unions become certified as bargaining agents, are protected from unfair labour practices and are guaranteed that employers will bargain in good faith. The "right" to bargain collectively is a statory right.

See, for example: The Trade Union Act, supra, sections 6 and 11.

22. Having established the nature of the "rights" to strike and to bargain collectively, consideration must be given to the Charter of Rights and Freedoms itself.

(B) PRINCIPLES OF INTERPRETATION

(1) Purposive Interpretation

23. In R. v. Big M. Drug Mart Ltd., [1985] 3 W.W.R. 481, this Court indicated 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. The Chief Justice said, at p. 524:

> 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.

24. In applying these principles care must be taken to avoid extravagant or overly-broad interpretations. As the Chief Justice stated in Big M, supra, at p. 524:

> ... 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.

Similar cautions have been issued by other courts.

> 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.

Reference Re Public Service Employee Relations Act et al., [1985] 2 W.W.R. 289 (Alta. C.A), at p. 298.

25. In this vein, the word "fundamental" is critical to the proper interpretation of section 2(d) of the Charter. This Honourable Court, in discussing the designation of the section 2 freedoms as "fundamental", has said:

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

R. v. Big M Drug Mart Ltd., supra, at p. 526.

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

Reference Re Public Service Employee Relations Act et al., supra, at p. 318.

26. The fundamental political freedoms enumerated in section 2 of the Charter have been historically regarded as separate and distinct from economic rights or freedoms such as the right to strike. Four classes of civil liberties have traditionally been identified:

> ... political liberties - traditionally including freedoms of association, assembly, utterance, press or other communications media, conscience, and religion; economic liberties - the right to own property, and the right not to be deprived thereof without due compensation, freedom of contract, the

> right to withhold one's labour, etc.; legal liberties - freedom from arbitrary arrest, right to a fair hearing, protection of an independent judiciary, access to counsel, etc.; egalitarian liberties or human rights - right to employment, to accommodation, to education, and so on, without discrimination on the basis of race, colour, sex, creed, or economic circumstances."
>
> (emphasis added)

W. S. Tarnopolsky, The Canadian Bill of Rights, 2nd edition (Toronto: The Carswell Company Limited, 1978), at p. 3.

27. Thus, 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.

See also: Reference Re Public Service Employee Relations Act et al., supra, at p. 300.

28. It is submitted that the purpose of section 2 of the Charter is to enshrine and protect fundamental freedoms. The economic right to strike is clearly beyond the limits of these freedoms as they have been traditionally

understood. The "right to strike" and the "right to bargain collectively" are essentially statutory rights. They are not constitutional rights and accordingly should not be subsumed under section 2(d).

(2) Flexible Interpretation

29. . . The second major rule of interpretation which has been promulgated by this Court holds that the Charter must be construed in a manner which will accommodate the future growth and development of the Canadian community. The Court has said:

> 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 unknowns of the future, can stunt the growth of the law and hence the community it serves.
>
> Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357, at p. 366.

30. The inclusion of collective bargaining or strikes within the constitutionally guaranteed freedom of association would simply entrench the currently accepted means of dealing with labour-management relations. This would fail to recognize that mechanisms for resolving

labour disputes have evolved over time and will continue to evolve. Entrenching collective bargaining or the right to strike would freeze the system in its present form.

31. In the future, a consensus may emerge that collective bargaining should be replaced by some other model of labour-management relations. For example, Professor Weiler, in Reconcilable Differences: New Directions in Canadian Labour Law (Toronto: The Carswell Company Limited, 1980), has 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.

32. Professor Weiler has also said:

> 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 added)
>
> Reconcilable Differences, supra. at p. 66.

33. Constitutionally entrenching the right to strike and/or to bargain collective will effectively halt the evolution of our system of labour-management relations.

(C) THE AUTHORITIES

34. There is a broad range of case authority supporting the view that the right to strike is not an element of freedom of association. This authority includes Canadian, American, Privy Council and Indian cases.

35. Many Canadian courts have held that the means of achieving the purposes of a trade union do not fall within the scope of freedom of association. As was stated in Dolphin Delivery Ltd. v. Retail, Wholesale and Department Store Union, Local 580 et al., supra, at p. 209:

> It is not clear whether the members of the Court [in the Broadway Manor Nursing Home case] 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 added)

See also, for example: Reference Re Public Service Employee Relations Act et al., supra, at p. 313.

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

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.).

36. Similar positions have been taken in India. In All India Bank Employees Association v. National Industrial Tribunal (1962), 49 A.I.R. 171 (S.C.), the court held, at p. 181:

> [E]ven a very liberal interpretation of sub-cl. (c) of cl. (1) of Art. 19 [which gives a right to "form associations or unions"] cannot lead to the conclusion that the trade unions have a guaranteed right to 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 ...

37. In Collymore et al. v. Attorney General, [1970] A.C. 538, the Privy Council rejected the contention that legislation prohibiting strikes and imposing compulsory arbitration infringed the fundamental freedom of association guaranteed by section 1 of the Constitution of Trinidad and Tobago.

See: Collymore et al. v. Attorney General, supra, at p. 547.

38. American jurisprudence is to a similar effect. While the right to form labour associations is seen to be constitutionally protected by the First Amendment, no similar protection has been extended with respect to the

right to strike. As the U.S. Court of Appeals for the Seventh Circuit stated in Hanover Township Federation of Teachers et al. v. Hanover Community School Corporation et al. 457 F. 2d 456 (1972), at p. 461:

> ... the economic activities of a group of persons (whether representing labour or management) who associate together to achieve a common purpose are not protected by the First Amendment. Such activities may be either prohibited or protected as a matter of legislative policy.

39. Only two Canadian courts, the Court below and the Divisional Court of Ontario in Re Service Employees International Union, Local 204 and Broadway Manor Nursing Home et al. (1983), 4 D.L.R. (4th) 231, have been of the view that strikes are protected by section 2(d) of the Charter. The Broadway Manor decision was not followed by the Federal Court of Appeal and the British Columbia and Alberta Courts of Appeal.

See, respectively: Public Service Alliance of Canada v. The Queen in Right of Canada et al., supra.

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

Reference Re Public Service Employee Relations Act et al., supra.

It is submitted that The Ontario Divisional Court wrongly decided the section 2(d) issue. It is also respectfully submitted that the approach taken by the Court below is seriously flawed and must be rejected.

(D) THE DECISION IN THE COURT BELOW

(1) Bayda C.J.S.

40. In his reasons for judgment Bayda C.J.S. attempted to formulate a comprehensive definition of the scope of freedom of association. It was his view that a person is free to perform in association any act that he is free to perform alone. It was also said that an act which by definition is incapable of individual performance may be performed in association so long as the mental element of the act is not to inflict harm.

See: Reasons for Judgment of Bayda C.J.S., Case on Appeal, p. 194.

It is respectfully submitted that this formulation of the scope of section 2(d) of the Charter is fatally flawed for a number of reasons.

41. First, Bayda C.J.S. failed to appreciate the fundamental distinction between freedom of association and the freedom of an association. This error flowed from the philosophical contention that "to be is to act" which

seemed to compel his conclusion that "... to guarantee the freedom of association is to confer a right of the freedom to act in association".

See: Reasons for Judgment of Bayda C.J.S., Case on Appeal, pp. 184 and 191.

It is submitted that individuals are free to act in association only if they do so in compliance with the law. The actions of persons acting in association are not constitutionally protected unless they fall into some independently entrenched freedom such as speech or assembly.

42. Second, there are serious difficulties inherent in the application of the second wing of the test enumerated by Bayda C.J.S. A preoccupation with the intention of the association leads to unacceptable conclusions. For instance, under the test, a combine which fixes prices with the intention of benefitting its members could claim the protection of section 2(d) of the Charter. The harm that the combination might cause to competitors and consumers would only be a consequential result of its intention to raise profits; just as the harm caused to employers by a strike might be seen as a mere consequence of the union's intention to improve the conditions of its membership. On the basis of Bayda C.J.S.'s test, the business combination

could therefore invoke section 2(d) of the Charter. Hence, combines would have an entrenched right to fix prices, subject of course to section 1 of the Charter. It is, with respect, submitted that section 2(d) could not have been intended to have that effect.

43. Third, on Bayda C.J.S.'s view of freedom of association, the freedom available to persons claiming protection under section 2(d) would often involve the imposition of an onerous positive duty or obligation on third parties. Collective bargaining, for example, by definition requires the participation of both employees and the employer. Reading collective bargaining into section 2(d) would thus necessarily entail limitations on the liberty of employers, i.e. they would be constitutionally compelled to participate in the bargaining process. This result could not have been intended by the framers of the Charter. As was stated by the U.S. Supreme Court in Smith et al. v. Arkansas State Highway Employees, Local 1315 et al.:

> The public employee surely can associate and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. [Authorities omitted]. But the First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.

Smith et al. v. Arkansas State Highway Employees, Local 1315 et al. 60 L.Ed. (2d) 360 (1979), at p. 363.

44. Fourth, Bayda C.J.S.'s test leads to anomalous situations whereby associations or persons acting in association would enjoy greater rights than persons acting individually. For example, in the employment context an individual acting alone has the right to withdraw his services but he has no legal right to return to his employment at the termination of his work stoppage. On the other hand, when a union goes on a lawful strike, its members do have a legal right to maintain their employment status.

See: The Trade Union Act, supra, sections 2(f)(iii), 11(1)(1) and 34(1).

Thus, Bayda C.J.S., by constitutionally enshrining the statutorily protected right of unionists to reclaim their jobs following a strike, would create an environment where the union can act in ways which are prohibited for individual employees. This incongruity cannot have been intended.

See: Reference Re Public Service Employee Relations Act et al., supra. at p. 301.

45. Fifth, Bayda C.J.S.'s reasons fail to reflect the fact that the collective bargaining process and strikes are carefully defined and regulated by common law and various labour relations statutes. A finding that the "right to strike" is constitutionally entrenched begs the question as to exactly what is constitutionally protected. For example, modern day labour relations statutes prohibit strike activity during the term of a collective agreement. Would the same prohibition exist with respect to the right said to be enshrined in section 2(d)? Would there be a constitutional requirement to give advance notice of a strike? What would be the status of strike-related lock-outs? In short, the inclusion of the right to strike under section 2(d) would involve the Courts in a variety of complex problems with respect to determining which elements of the statutory framework defining the right to st. ke had been elevated to a constitutional status.

46. Sixth, problems of lack of uniformity are created by Bayda C.J.S.'s test which, in effect, elevates statutory rights to a constitutional status. The "right to strike" is presently defined by the common law and the various labour relations statutes across the country. Accordingly, that right could have a meaning which varied among

jurisdictions. The courts would have to distill fundamental or essential characteristics of the right to strike from the laws of Canada and the provinces in order to avoid this problem and to ensure that section 2(d) of the Charter had the same meaning in all jurisdictions. Such an exercise would be extremely problematic.

(2) Cameron J.A

47. In the Court below, Cameron J.A. also held that in the labour relations context section 2(d) includes the right to strike. It is submitted, with respect, that there are three principal errors in the approach taken by Cameron J.A. First, his interpretation was motivated by a view that the Charter should be interpreted "without excessive concern for where [a] liberal construction may lead" because of the existence of sections 1 and 33 of the Charter.

See: Reasons for Judgment of Cameron J.A., Case on Appeal, p. 218.

It is submitted that this interpretive approach is inconsistent with the position of this Court set out in Big M, supra. Rights and freedoms must be interpreted liberally but sections 1 and 33 do not independently inflate their scope.

48. It is further submitted that Cameron J.A. erred by failing to appreciate that workers' freedom to associate does not become empty or meaningless in the absence of guaranteed collective bargaining and strike options. As was explained in Dolphin Delivery:

> The judgments in the Division 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 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 right of trade unions.
>
> (emphasis added)

Dolphin Delivery Ltd. v. Retail Wholesale and Department Store Union, Local 580 et al., supra, at p. 211.

See also: Collymore et al. v. Attorney General, [1970] A.C. 538, at p. 547.

49. It must also be noted in this regard that, with respect to the The Dairy Workers (Maintenance of Operations) Act, an effective and fair dispute resolution

mechanism does exist. The Respondents were given 15 days to attempt to negotiate an agreement with the dairies. Failure to reach an agreement did not have the effect of negating their rights. It merely triggered an arbitration process whereby an independent party, after carefully considering all of the facts, would determine appropriate terms of settlement. The Respondent unions continued to enjoy a position of central importance and influence.

See: Reference Re Public Service Employee Relations Act, supra, at pp. 311-313.

50. Finally, it is submitted that Cameron J.A. erred in his analysis of the significance of international law in determining whether the right to strike falls within the ambit of section 2(d) of the Charter. In this context, several courts have examined the relevant Conventions and found them not to compel or suggest a finding that section 2(d) includes the right to strike.

See: Public Service Alliance of Canada v. The Queen in Right of Canada et al., supra, at pp. 352-356.

Reference Re Public Service Employee Relations Act et al., supra, at pp. 304-307.

IV. Conclusion

51. In summary, it is submitted that Question 1 must be answered in the negative. Strikes are simply mechanisms for advancing the interests of labour associations. They are not included within the ambit of the fundamental freedom of association. The means by which associations seek to advance their objectives are not constitutionally protected unless they happen to fall within the scope of an independently entrenched freedom such as speech or assembly.

QUESTION 2

> If The Dairyworkers (Maintenance of Operations) Act, S.S. 1984, c. D-1.1, or any part thereof, infringe or deny freedom of association guaranteed in s. 2(d) of the Canadian Charter of Rights and Freedoms, is the Act, or such part, justified by s. 1 of the Canadian Charter of Rights and Freedoms and therefore not inconsistent with the Constitution Act, 1982?

52. If this Court determines that The Dairy Workers (Maintenance of Operations) Act does infringe the freedom of association guaranteed by section 2(d), then it is submitted that the Act is justified under section 1 of the Charter. Section 1 says:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

53. It is submitted that, fundamentally, a determination under section 1 of the Charter involves a balancing of three factors: (i) the importance of the Charter right which has been infringed; (ii) the extent of the infringement; (iii) the importance of the government interest asserted in justification of the limitation in issue.

> See: P. W. Hogg, Constitutional Law of Canada, 2nd edition (Toronto: The Carswell Company Limited, 1985), at p. 688.

54. In order to meet the requirements of section 1, a limitation of a guaranteed right must be:

(a) prescribed by law,

(b) reasonable, and

(c) demonstrably justifiable in a free and democratic society.

(A) PRESCRIBED BY LAW

55. The Dairy Workers (Maintenance of Operations) Act is an Act of the provincial Legislature. It is submitted that there is no question that the limitations in it are "prescribed by law".

(B) DEMONSTRABLY JUSTIFIED

56. With respect to whether the reasonableness of a limit is demonstrably justified, it should be noted that section 1 calls for a finding of justification not necessity. It is submitted "justification" is a less onerous requirement than "necessity".

> See: Re Reich and The College of Physicians and Surgeons of Alberta et al. (No. 2) (1984), 8 D.L.R. (4th) 696 (Alta. Q.B.), at pp. 711-712.

Further, as MacKinnon A.C.J.O., said in Re Southam Inc. and The Queen (No. 1) (1983), 3 C.C.C. (3d) 515 (Ont. C.A.), at p. 531:

> In determining whether the limit is justifiable, some help may be derived from considering the legislative approaches taken in similar fields by other acknowledged free and democratic societies.

(C) REASONABLE LIMITS

57. The test for determining whether a limit is reasonable is an objective one. As was explained by Evans C.J. in Re Federal Republic of Germany and Rauca (1982), 141 D.L.R. (3d) 412 (Ont. H.C.), at p. 423:

> The phrase "reasonable limits" in section 1 imports an objective test of validity. It is the judge who must determine whether a "limit" as found in legislation is reasonable or unreasonable. The question is not whether the judge agrees with the limitation but whether he considers that there is a rational basis for it - a basis that would be regarded as being within the bounds of reason by fair-minded people accustomed to the norms of a free and democratic society.

58. Further to this point, Deschenes C.J.S.C. (as he then was), in Quebec Association of Protestant School Boards et al. v. Attorney General of Quebec et al., (No. 2) (1982), 140 D.L.R. (3d) 33 (Que. S.C.), considered the meaning of "reasonable limits" and found, at p. 77:

> 1. A limit is reasonable if it is a proportionate means to attain the purpose of the law;
>
> 2. Proof of the contrary involves proof not only of a wrong, but of a wrong which runs against common sense; and
>
> 3. The courts must not yield to the temptation of too readily substituting their own opinion for that of the legislature.

59. On the basis of the foregoing, it is submitted that three questions should be asked in determining whether a limitation is justified under section 1 of the Charter:

(a) Is the limitation rational?

(b) Is it proportionate?

(c) How does it compare to the laws and practices in other democratic jurisdictions?

60. The Court below was of the opinion that section 1 had not been satisfied. Bayda C.J.S. stated:

> To decide the issue of reasonableness, the decision-maker will need to know the circumstances that bear upon the issue, the circumstances of those who will be detrimentally affected if the limit is imposed, and the circumstances of those who will be detrimentally affected if the limit is not imposed. He will need information from which he can determine the effect and the consequences of imposing the limit and of not imposing it. The decision-maker will also need to know what choices of limits the legislators had when they made their selection. Nothing short of the knowledge of those circumstances and the possession of that information will enable the decision-maker to balance the factors inherent in the circumstances with a view to making a reasoned decision respecting the reasonableness of the limit.
>
> See: Reasons for Judgment of Bayda C.J.S., Case on Appeal, pp. 205-206.

He went on to conclude that:

> ... there was not sufficient material before the Chambers judge to enable him to engage in the balancing process he needed to engage in to arrive at a decision upon the reasonableness of the limit ... [T]he impugned legislation may be reasonable but we have no way of knowing that.

See: Reasons for Judgment of Bayda C.J.S., Case on Appeal, p. 207.

Cameron J.A. arrived at a similar conclusion.

See: Reasons for Judgment of Camerón J.A., Case on Appeal, pp. 241-242.

61. It is submitted that Bayda C.J.S. erred with respect to the questions of what kind of information, and how much of it, was required to enable the Court to make a determination favourable to the Appellants under section 1. Bayda C.J.S. correctly pointed out that the need for evidence with respect to section 1 issues will vary from case to case and that in some situations where the reasonableness of the limit is self-evident, no evidence at all will be required.

See: Reasons for Judgment of Bayda C.J.S., Case on Appeal, p. 208.

However, with respect, it is submitted that the Court below failed to locate the instant matter at the appropriate point on the evidentiary continuum which he described.

This is not the type of case where a substantial record should be generated. It is also submitted that Bayda C.J.S. and Cameron J.A. failed to give proper weight and consideration to the information which was available to the Court.

62. The provisions of The Dairy Workers (Maintenance of Operations) Act must be examined in the context of the nature of the dairy industry and the history of labour-management disputes in that industry.

(1) Nature of the Industry

(a) The dairy business is unique in that the flow of raw milk and the costs of production necessarily continue completely unabated regardless of whether there is an available market for the milk. Moreover, milk is extremely perishable. The serious economic consequences of a strike or other disruption in such an industry are self-evident.

(b) Milk is an important food product.

(2) Labour-Management History

(a) The parties have a long history of acrimonious labour relations which has required prior government intervention in the form of back-to-work legislation.

See: The Maintenance of Operations of Dairy Producers Cooperative Limited and Palm Dairies Limited Act, S.S. 1979-80, c. M-1.1.

Affidavit of Clarence Lyons, Case on Appeal, p. 45, at paragraph 14.

Affidavit of Harold Bundschuh, Case on Appeal, p. 58, at paragraph 13.

(b) Notices to bargain collectively with respect to the dispute here in issue were served on the dairies in January and February of 1984. Negotiations conducted in March were fruitless. Strike notices were served on March 29 indicating that all dairies would be struck on April 1.

See: Affidavit of Clarence Lyons, Case on Appeal, p. 47.

Affidavit of Harold Bundschuh, Case on Appeal, p. 59.

Affidavit of Gordon Fairburn, Case on Appeal, pp. 92-93.

Affidavit of Christopher J. Banting, Case on Appeal, p. 109.

(c) Following a request by the Minister of Labour the notices were withdrawn and a conciliator was supplied by the Department. Negotiations continued unsuccessfully on March 30 and 31. Lock-out notices covering all dairies were served on the Respondent unions on April 1 with a lock-out slated for April 8.

See: Affidavit of Clarence Lyons, Case on Appeal, pp. 42-44, at paragraphs 8-11.

Affidavit of Harold Bundschuh, Case on Appeal, pp. 56-57, at paragraphs 8-10.

Affidavit of Gordon Fairburn, Case on Appeal, p. 88, at paragraphs 9 and 10, p. 89 at paragraph 15.

Affidavit of Christopher J. Banting, Case on Appeal, pp. 105-106, at paragraphs 8-11.

(d) On March 31 U.F.C.W.-Local 241-2 gave notice of its intention to strike Palm's Saskatoon plant on April 8.

See Affidavit of Clarence Lyons, Case on Appeal, p. 43, at paragraph 10.

(e) Further meetings were held with the conciliator

on April 5 and 6 but broke off because of lack of progress. A complete shut-down of the industry was imminent.

See: Affidavit of Clarence Lyons, Case on Appeal, p. 44, at paragraph 12.

Affidavit of Harold Bundschuh, Case on Appeal, p. 57, at paragraph 11.

Affidavit of Gordon Fairburn, Case on Appeal, p. 90, at paragraph 16.

Affidavit of Christopher J. Banting, Case on Appeal, p. 106, at paragraph 12.

63. Union officials have deposed that in their opinion if Dairy Producers and Palm had not locked out their workers, the pick up of milk from farmers would have continued at full capacity.

See, for example: Affidavit of Christopher J. Banting, Case on Appeal, p. 107, at paragraph 13.

Affidavit of Clarence Lyons, Case on Appeal, pp. 44-45, at paragraph 13.

This view presumably was put forward to suggest that no losses would have been suffered by farmers or consumers if the strike had been allowed to go ahead. However, it is submitted that this view ignores the reality that the unions could have broadened the scope of their strike at

any time. Moreover, in fact, Palm and Dairy Producers were going to lock out all employees and completely shut down the industry.

64. In light of the foregoing circumstances, it is submitted that the enactment of the legislation in question was completely rational. Labour relations in the industry were historically acrimonious. Back-to-work legislation had been necessary in the past. Negotiations had failed despite the personal intervention of the Minister of Labour and the work of a government conciliator. A total shut-down was imminent. Legislative intervention was the only means available for preventing industry-wide paralysis and was pursued as a last resort.

65. It is also critical to recognize that The Dairy Workers (Maintenance of Operations) Act was a limited, precise and proportionate response to a particular labour-management dispute:

(a) Even if the Act does interfere with freedom of association, it does not interfere with the core of freedom of association: the freedom of employees to organize, form, join, assist or be represented by the trade union they have freely chosen. It merely

temporarily prohibits the use of one means of advancing union interests.

(b) The Act respects, as much as possible, the collective bargaining process. This respect is evidenced by the fact that the Act was not introduced until the existing collective agreement had expired according to its terms, and after every reasonable effort had been made (with the assistance of the Minister of Labour and a government conciliator) to aid the parties to reach a new collective agreement.

(c) The Act tries to encourage and enhance the bargaining process. This is manifest in several provisions of the Act. Section 8 provides for a 15-day "cooling-off" period, during which collective bargaining can take place. Sections 9 through 11 provide for a binding arbitration procedure only if conciliation and collective bargaining do not produce an agreement. The parties themselves determine the scope of the arbitrator's inquiry, section 10(1). The Act specifically contemplates

that the parties might negotiate a complete settlement of the issues in dispute and thus obviate the need for arbitration, section 10(6). Only those matters left unresolved after negotiation are to be the subject of arbitration, section 10(7).

(d) The Act does not interfere with the ongoing process of collective bargaining which includes the settlement of grievances under a collective agreement and the renewal and revision of the agreement itself.

(e) The Act does not impose specific contract terms. Ultimately, the content of the collective agreement is left to the discretion and judgment of an independent arbitrator. The involvement of the government is strictly limited to the establishment of an alternate system of dispute resolution. The nature of the settlement itself is left in the hands of the employees, the employers and the arbitrator.

(f) The Act interferes as little as possible with the workers' freedom to strike and the employers' freedom to lock out their employees. The

prohibition of strikes and lockouts imposed by the Act has effect only for a limited period of time and affects a precise and limited number of employees, section 13. It is temporary legislation aimed at a particular dispute in a single unique industry.

66. The final factor to be considered in the analysis under section 1 is whether similar legislation has been enacted in other democratic jurisdictions. Throughout Canada, in 1983 and 1984 alone, back-to-work legislation was passed in response to several labour-management disputes. Both the public and private sectors were affected and the legislation was not restricted to workers such as policemen and firemen who are normally considered to provide essential services. Teachers, transit workers and pulp and paper workers were also affected. Thus, The Dairy Workers (Maintenance of Operations) Act is not extraordinary and is consistent with legislation passed in a variety of jurisdictions.

See, for example: Toronto Transit Commission, Gray Coach Lines, Limited and GO Transit Labour Disputes Settlement Act, 1984, S.O. 1984, c. 42.

Colleges of Applied Arts and Technology Labour Dispute Settlement Act, 1984, S.O. 1984, c. 43.

An Act to Ensure the Resumption of Public Transit Service in the Territory of the Communaute Urbaine de Montreal, S.Q. 1983, c. 5.

An Act to Ensure the Resumption of Services in the Schools and Colleges in the Public Sector, S.Q. 1983, c. 1.

Metro Transit Collective Bargaining Assistance Act, S.B.C. 1984, c. 33.

Pulp and Paper Collective Bargaining Assistance Act, S.B.C. 1984, c. 10.

See also: Public Service Act, S.Q. 1983, c. 55, s. 69.

Essential Service Disputes Act, R.S.B.C. 1979, c. 113, s. 8.

67. Thus, it is submitted that it can clearly be held that the limits on freedom of association, if any, imposed by The Dairy Workers (Maintenance of Operations) Act are justified by section 1 of the Charter. It is submitted that because the legislation in issue (a) does not affect core freedoms, (b) is not extraordinary, (c) is temporary, (d) is narrowly and precisely drawn, (e) was enacted after all other avenues of settlement were exhausted, and (f) relates to a unique industry, there is no need for the Court to have before it the very detailed and extensive materials referred to by Bayda C.J.S. As Bayda C.J.S. himself stated:

> ... I sound two cautionary notes. While, as outlined above, the present case, insofar as it relates to the limit under s. 1, calls for evidence to establish certain circumstances, the evidence need not reach into areas of detail or be of such scope as to put the court in a position to resolve the very points of conflict that precipitated the calling of the rotating strike and the lockout. The Court's function under s. 1 of the Charter in a situation like the present one is not to act as an arbitrator of the dispute between the parties to the collective agreement, or as an adjudicator upon the manner in which the dispute should be settled. The function is not to say what law should be enacted in the circumstances but rather whether the particular law that has been enacted should not have been enacted.
>
> See: Reasons for Judgment of Bayda C.J.S., Case on Appeal, p. 207-208.

68. It is respectfully submitted that the information before the Court below clearly established that The Dairy Workers (Maintenance of Operations) Act was enacted in furtherance of a legitimate and substantial governmental objective and that it was rational, proportionate and achieved its aims by impairing freedoms as little as possible. Accordingly, it is submitted that the Act satisfies the requirements of section 1 of the Charter.

PART IV

ORDER SOUGHT

69. The Attorney General of Saskatchewan respectfully requests that this appeal be allowed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

"Robert G. Richards"
Robert G. Richards

B. G. Welsh

Counsel for the Attorney General of Saskatchewan

LIST OF AUTHORITIES

25.	Re Southam Inc. and The Queen (No. 1) (1983), 3 C.C.C. (3d) 515 (Ont. C.A.).	30
26.	Reference Re Public Service Employee Relations Act et al., [1985] 2 W.W.R. 289 (Alta. C.A.).	12, 13 17, 19 23, 27
27.	Russell v. Amalgamated Society of Carpenters and Joiners, [1912] A.C. 421.	9
28.	Smith et al. v. Arkansas State Highway Employees, Local 1315 et al. 60 L.Ed. (2d) 360 (1979).	22, 23
29.	The Maintenance of Operation of Dairy Producers Cooperative Limited and Palm Dairies Limited Act, S.S. 1979-80, c. M-1.1.	35
30.	The Trade Union Act, R.S.S. 1978, c. T-17.	9, 10 23
31.	Toronto Transit Commission, Gray Coach Lines, Limited and GO Transit Labour Disputes Settlement Act, 1984, S.O. 1984, c. 42.	41
32.	W. S.Tarnopolsky, The Canadian Bill of Rights, 2nd edition (Toronto: The Carswell Company Limited, 1978).	13