SC CV 95 032

CV 04167
CV 04168

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN: (CV 04167)

CANADIAN EGG MARKETING AGENCY

Plaintiff

- and -

FRANK RICHARDSON operating as NORTHERN POULTRY

Defendant

- and -

THE COMMISSIONER OF THE NORTHWEST TERRITORIES as represented by THE ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES

Intervener

AND BETWEEN: (CV 04168)

CANADIAN EGG MARKETING AGENCY

Plaintiff

- and -

PINEVIEW POULTRY PRODUCTS LTD.

Defendant

- and -

THE COMMISSIONER OF THE NORTHWEST TERRITORIES as represented by THE ATTORNEY GENERAL OF THE NORTHWEST TERRITORIES

Intervener

Application for a judicial declaration pursuant to s.24(1) of the *Canadian Charter of Rights and Freedoms* in reference to a regulatory scheme under the *Farm Products Agencies Act*, granted.

Heard at Yellowknife on 27 February to 3 March 1995

Judgment filed: 4 August 1995

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M. M. de WEERDT

Counsel for the Applicants (Defendants): R. Graham McLennan, Esq. and Ms. Katherine L. Hurlburt

Counsel for the Respondent (Plaintiff): François Lemieux, Q.C. Keith Groves, Esq. and David K. Wilson, Esq.

Counsel for the Intervenor: James G. McConnell, Esq.

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REASONS FOR JUDGMENT

1 A constitutional challenge is raised by the defendants in these two actions, namely Frank Richardson operating as Northern Poultry ("Richardson") and Pineview Poultry Products Ltd. ("Pineview"). The challenge made is that the regulatory scheme for egg marketing under the *Farm Products Agencies Act,* formerly the *Farm Products Marketing Agencies Act,* R.S.C. 1985, c. F-4 (am.

1993, c.3), to the extent that it purports to govern extra-territorial egg marketing in Canada from the Northwest Territories, is constitutionally invalid and inoperative since it violates rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*, more particularly s. 2(d), s.6(2)(b) and s.15(1) of the Charter, as well as s.121 of the *Constitution Act, 1867.*

2 The Commissioner of the Northwest Territories ("the Commissioner"), represented by the Attorney General of the Northwest Territories, has been joined in each of these two actions as an intervener supporting the defendants' challenge. The Commissioner however has restricted his support to grounds resting on violations of s.6(2)(b) and s.15(1) of the Charter, and s.121 of the 1867 Act, without placing reliance on s.2(d) of the Charter.

3 The plaintiff Canadian Egg Marketing Agency ("CEMA") administers the regulatory scheme under challenge and takes the position that the scheme is constitutionally valid.

4 Notice having been duly given to the Attorney General of Canada with reference to the defendants' constitutional challenge, pursuant to s.59(2) of the *Judicature Act*, R.S.N.W.T. 1988, c. J-1, and the Attorney General of Canada having informed the Court that he does not wish to intervene in the matter, the challenge is properly before the Court subject only to legal standing.

I. The Central Issue

5 The scheme under challenge is described by CEMA, in its written submissions, as "quite complex". And this is made apparent by the "federal-provincial co-operative action and interlocking legislation and regulations" which CEMA argues is "necessary to arrive at a practical and effective scheme for the orderly and efficient marketing of eggs which all governments agree, because of divided constitutional jurisdiction, requires regulation by Parliament in interprovincial and export trade and by the provinces in intraprovincial trade".

6 In saying that "all governments agree" to this, I understand that CEMA acknowledges nonetheless that the Commissioner objects strongly to the exclusion from the scheme of all extra-territorial participation by primary producers in the Northwest Territories, even though the Commissioner has no objection in principle to a scheme which would include such participation.

7 CEMA contends that the present scheme does not exclude extra-territorial participation by primary producers in the Northwest Territories. It is on this basis that CEMA argues that there is no substance to the present challenge.

II. Legal Standing

8 CEMA invites the Court to hold that the defendants lack the necessary legal standing to advance their challenge on grounds under the Charter, since Richardson carries on his business (when operating) through one or more

corporations and Pineview is itself a corporation. The rights and freedoms which these defendants say are violated by the regulatory scheme cannot be claimed by corporations on their own behalf.

9 Stressing the distinction between an individual, on one hand, and a corporation on the other, CEMA quotes the following passage from the reasons for judgment of Lamer C.J. (dissenting on other grounds but speaking for the court on the issue of legal standing) in *R. v. Wholesale Travel Group Inc.*, (1991) 3 S.C.R. 154, 67 C.C.C. (3d) 193, 8 C.R. (4th) 145, 84 D.L.R. (4th) 161, 38 C.P.R. (3d) 451, 49 O.A.C. 161, 7 C.R.R. (2d) 136, 130 N.R.1, at p.210 (C.C.C.):

> ...the corporation is in a completely different situation than is an individual. While it might be argued that in closely held corporations, where there are only two or three shareholders who themselves manage the company, the stigma which attaches to the corporation will carry over to those individuals and will, therefore, affect human interests, it is my view that this consideration should not alter the analysis. The corporate form of business organization is chosen by individuals because of its numerous advantages (legal and otherwise). Those who cloak themselves in the corporate veil, and who rely on the legal distinction between themselves and the corporate entity when it is to their benefit to do so, should not be allowed to deny this distinction in these circumstances (where the distinction is not to their benefit).

10 This passage states the relevant law most admirably, it seems to me. And I am consequently unpersuaded by the defendants' submission that this is an appropriate case in which to "pierce the corporate veil", so as to consider the

interests of the individuals who own Pineview's shares (or are otherwise directly, or indirectly, affected by its fortunes) as if these interests were, in effect, those of the corporate entity. And the same is to be said in reference to the numbered companies through which Richardson has held property used in his egg production business at Hay River in the Northwest Territories and has conducted certain operations of that business there or elsewhere. On the view which I take of the legal standing of the defendants Richardson and Pineview, there is no need to consider this aspect of the situation further.

11 CEMA's submission appears to ignore, however, the *ratio decidendi* of the *Wholesale Travel* case. It was held in that case that a corporation is not precluded from asserting the rights of individuals guaranteed by s.1 and s.7 of the Charter, where the corporation challenges a legislative provision violating such rights, and where the provision in question is equally applicable to individuals and to corporations. Granted, the court was careful to reserve on the question where "an *under-inclusive* statutory provision (e.g. one which confers a benefit to some but not to others) is found to violate Charter rights". That, of course, is an arguable approach to a conceptual classification of the situation in the present case.

12 It is to be noticed that the defendants chose not to argue their challenge on the ground that s.7 of the Charter is violated by the regulatory scheme. This is therefore not a case on all fours with that of *Wholesale Travel*.

Nor is this a case where the defendants are in jeopardy of conviction, as in that case. At most, the prosecution which they might face under the *Farm Products Agencies Act*, in respect of any infringement of the regulatory scheme, is purely prospective and hypothetical so far as the evidence before the Court reveals. Here, the defendants base their challenge on claims of contraventions of individual human rights and freedoms other than those declared by s.7. But, as in the *Wholesale Travel* case, there is no good reason to deny Pineview, as a corporate defendant, the legal standing to assert those rights and freedoms where, as here, their statutory contravention equally affects, or may affect, both individual and corporate egg producers in the Northwest Territories.

13 In reaching this conclusion, the allegedly under-inclusive character of the impugned scheme has not been ignored. But it is important to recognize that, if the scheme is under-inclusive, then it is so with equal reference to individuals as well as corporations engaged in extra-territorial marketing of eggs produced in the Northwest Territories. It is not a case where a corporation seeks to assert a right or freedom which is denied only to corporations.

14 Nor is the claim that individual human rights and freedoms are at issue one that is lacking any air of reality. The history of the present litigation, and of related litigation in the Federal Court, provides more than ample evidence that individual (as well as corporate) claims to challenge the regulatory scheme on constitutional grounds are at issue here, and have been before the courts now for

a decade. See, for example, *Canadian Egg Marketing Agency v. Richardson*, (1993) N.W.T.R. 75, (1993) 2 W.W.R. 453, 13 C.P.C. (3d) 13 (S.C.) and *Pineview Poultry, et al v. Canada and Canadian Egg Marketing Agency* (1994), 73 F.T.R. 50. In the first of these matters, CEMA sought interim injunctive relief against Richardson as an individual egg producer in the Northwest Territories allegedly engaged in illicit extra-territorial egg marketing contrary to the scheme. And CEMA has, as yet, taken no step to discontinue its action (seeking permanent injunctive relief) against Richardson as such a producer.

15 Rather than dispose of the legal standing issue on the basis of estoppel, as I am urged by the defendants to do, it seems to me that the better course is to do so simply on the merits of the matter, rendering it unnecessary to consider the estoppel arguments for and against. And the same may be said regarding the arguments over whether counsel had reached agreement prior to the hearing of this matter to the effect that legal standing is not in dispute. Assuming without deciding that CEMA is not estopped from advancing its claim that the defendants lack legal standing and should therefore be denied such standing in reference to the Charter challenge; and assuming likewise that there was no agreement to proceed without need to argue the legal standing issue, I am nevertheless satisfied that there is no basis in law to deny the defendants such standing in this case on the ground that Pineview is a corporation and Richardson has conducted his operations using one or more corporations for that purpose.

16 Likewise, in exercising the discretion of the Court to grant legal standing to the defendants, I find no merit in the argument advanced on behalf of CEMA to the effect that the Attorney General of the Northwest Territories should be the sole party seeking to assert the defendants' claims of unconstitutionality under the Charter in reference to the regulatory scheme. The intervention in this matter of the Attorney General of the Northwest Territories, or the institution of separate proceedings by him on behalf of the general public, is rendered unnecessary by the present intervention of the Commissioner in that behalf as represented by the Attorney General of the Northwest Territories. That intervention strongly bolsters the defendants' claim to legal standing in this instance, if only in the exercise of the Court's discretion: *Allman v. N.W.T. (Commr.)*, (1983) N.W.T.R. 32, 44 A.R. 170, 144 D.L.R. (3d) 467 (S.C.), affirmed (1984) N.W.T.R. 65, 50 A.R. 161, 8 D.L.R. 230, leave to appeal to S.C.C. refused (1984) N.W.T.R. xxxix, 53 A.R. 160, 55 N.R. 394.

17 On all the material filed, and on the whole of the evidence before the Court, there is a serious issue to be tried as to the constitutional validity of the regulatory scheme in reference to s.23 of the *Farm Products Agencies Act*. Furthermore, the defendants have a genuine interest in the subject matter at issue and are directly affected thereby. And, in the circumstances, there is no other reasonable and effective manner in which the issue may be determined by a court

than to proceed as the defendants are doing. Given these criteria, I am persuaded that the defendants should be granted legal standing to challenge the constitutional validity of the regulatory scheme, including s.23 of the *Farm Products Agencies Act*. See the authorities cited in *Allman v. N.W.T. (Commr.)(supra)*. And see *Canadian Council of Churches v. Canada*, (1992) 1 S.C.R. 236, 88 D.L.R. (4th) 193, 5 C.P.C. (3d) 20, 2 Admin L. R. (2d) 229, 16 Imm. L. R. (2d) 161, 8 C.R.R. (2d) 145, 49 F.T.R. 160, 132 N.R. 241.

18 The defendants are therefore each granted that standing.

III. The Ontario Egg Marketing Reference, 1976-78

19 The regulatory scheme here under challenge is virtually identical with the scheme held (with minor exceptions of no significance in the present instance) to fall within the federal-provincial apportionment of constitutional powers declared in sections 91, 92 and 95 of the *Constitution Act, 1867*, when the scheme came for consideration before the courts in 1976 and subsequently, on a reference made by the Attorney General of Ontario: *Reference Re Agricultural Products Marketing Act and Two Other Acts*, [1978] 2 S.C.R. 1198, 84 D.L.R. (3d) 257. One of the two other Acts encompassed by the reference was the *Farm Products Marketing Agencies Act*, now the *Farm Products Agencies Act*.

20 All the judges who delivered opinions in the *Reference* both in the

Ontario Court of Appeal and in the Supreme Court of Canada, were agreed as to that outcome. And no question as to this aspect of the constitutionality of the *Farm Products Agencies Act* arises here. The *Reference* having been concluded before the *Constitution Act, 1982* came into force, the constitutionality of the *Farm Products Agencies Act* with regard to the 1982 Act has yet to be definitively determined.

21 The majority (5:4) opinion delivered by Pigeon J. in the Supreme Court of Canada in the *Reference* makes no mention of s.121 of the 1867 Act. However, Laskin C.J.C., on behalf of the minority, considered it and quoted from *Murphy v. C.P.R.*, [1958] S.C.R. 626, 15 D.L.R. (2d) 145 at p.153, where Rand J. (in a minority of 1:4 concurring as to the result) had this to say:

> I take s.121, apart from Customs duties, to be aimed against trade regulation which is designed to place fetters upon or raise impediments to or otherwise restrict or limit the free flow of commerce across the Dominion as if provincial boundaries did not exist. That it does not create a level of trade activity divested of all regulation I have no doubt; what is preserved is a free flow of trade regulated in subsidiary features which are or have come to be looked upon as incidents of trade. What is forbidden is a trade regulation that in its essence and purpose is related to a provincial boundary.

22 Section 121 of the 1867 Act reads as follows:

> 121. All Articles of Growth, Produce or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

23 Rand J., in *Murphy v. C.P.R.*, had earlier observed, at p.150 (D.L.R.):

> "Free", in s.121, means without impediment related to the traversing of a provincial boundary.

24 Moreover, a few lines above, he had expressed it as his view that:

> Apart from matters of purely local and private concern, this country is one economic unit; in freedom of movement its business interests are in an extra-provincial dimension, and among other things, are deeply involved in trade and commerce between and beyond Provinces.

25 Neither in the *Reference* nor in *Murphy v. C.P.R.* was any mention made of the Territories in relation to s.121 of the 1867 Act or otherwise. And the position of the Territories, as being other than "Provinces" in the full constitutional sense evidently intended by s.121, was therefore not considered in these cases. That sense of the term "Provinces" clearly differs from the statutory definition of "province" to be found, for purposes of federal legislation generally, in s.35(1) of the *Interpretation Act*, R.S.C. 1985, c. I-21, this definition being however inapplicable to the 1867 Act. The Term "Provinces" in s.121 of that Act is instead to be understood in the same sense as "province" in s.38(1) of the *Constitution Act, 1982*, where it is clearly intended to exclude the Territories. The contrary is the case where s.35(1) of the *Interpretation Act* applies, the definition there being inclusive of the Territories.

26 If, as the foregoing analysis suggests, the Northwest Territories are

not *ex facie* one of the "Provinces" mentioned in s.121 of the 1867 Act, then even if the "living tree" doctrine could now make them so (for they were not admitted into Confederation until later), one must be careful not to ignore the use of that term elsewhere in the *Constitution Acts, 1867 to 1982* and more particularly, today, in s.38(1) and s.42(1) of the 1982 Act providing for the incorporation of the Territories, or parts thereof, into existing provinces or the creation of completely new provinces from out of the Territories.

27 Nevertheless, there appears to be a great deal of intrinsic merit in the generalisation made by Rand J. in *Murphy v. C.P.R.*, to the effect that Canada "is one economic unit", whether on the basis of s.121 alone or on the basis of s.121 combined with s.146 of the 1867 Act, as elaborated in the joint parliamentary address referred to in s.146: see Appendix A to the *Rupert's Land and North-Western Territory Order* of 1870, R.S.C. 1985, Appendix II, No. 9 at p.8; and see also the *Adjacent Territories Order* of 1880, *ibid* No. 14.

28 In all fairness, the meaning of the term "Province" in s.121 of the 1867 Act was not argued before me. The submissions made on all sides appeared instead to assume that this term has the meaning given by s.35(1) of the federal *Interpretation Act*, so as to include both the Northwest Territories and Yukon. However, in that I am obliged to take judicial notice of the entirety of the Constitution, and thus interpret s.121 in its full context, I have thought it necessary to outline the foregoing by way of brief analysis.

29 At all events, I do not understand counsel for CEMA to contest the accuracy of Rand J.'s characterisation of Canada as "one economic unit" (inclusive of the Territories, one may assume, which are after all even more overwhelmingly subject to federal legislation of general application than are the ten Provinces: see the opening words of s.16 of the *Northwest Territories Act*, R.S.C. 1985, c. N-27, and of s.17 of the *Yukon Act*, R.S.C. 1985, c. Y-2). On the contrary, CEMA's position (in my understanding of it) is that the scheme which it administers under the *Farm Products Agencies Act* is based upon that characterisation and, furthermore, that the scheme is not "designed to place fetters upon or raise impediments to or otherwise restrict the free flow of commerce across the Dominion, as if provincial boundaries did not exist", to adopt the language of Rand J. in *Murphy v. C.P.R.*

IV. The Regulatory Scheme

30 Counsel for CEMA has invited the Court to give particular attention to certain passages from the opinion of Laskin C.J.C. in the *Reference*. The first of these refers to s.24 of the *Farm Products Marketing Agencies Act*, which today is s.23 of the *Farm Products Agencies Act* reading as follows:

> 23. (1) A marketing plan, to the extent that it allocates any production or marketing quota to any area in Canada, shall allocate that quote on the basis of the production from that area in relation to the total production of Canada over a period of five years

immediately preceding the effective date of the marketing plan.

(2) In allocating quotas for anticipated growth of market demand, an Agency shall consider the principle of comparative advantage.

31 With respect to this provision, Laskin C.J.C. had this to say:

> I do not find that constitutional infirmity can be based on s.24 which refers to allocation of production or marketing quotas without limitation to interprovincial and export trade. No doubt, this expression of quota allocations had in view federal-provincial co-operation in marketing, but, apart from that (and I have already said that such co-operation cannot increase legislative power, however it may make exercise of existing powers more effective), **I do not think Parliament is precluded from allocating quotas on an industry-wide basis if it relates them to its regulatory control in relation to interprovincial and export trade. I do not agree, therefore, that there is here an unconstitutional control of supply**. (emphasis by counsel)

32 It will of course be appreciated that Laskin C.J.C. was here explaining his rejection of submissions made by counsel on the *Reference* to the effect that the scheme infringed the 1867 provisions which distribute constitutional powers between Canada and the ten Provinces. And, furthermore, he was doing so without reference to the position of the Territories, which are not referred to in s.121 of the 1867 Act and were not separately represented on the *Reference*. It may be noticed, furthermore, that he chose his words very carefully, speaking of "**regulatory control** in relation to interprovincial and export trade" (my emphasis)

and not of the effective total denial (by regulatory preclusion) of any Territorial participation in such trade, which is what the challengers of the scheme claim has occurred to date in relation to marketing the production of eggs from the Territories.

33 Laskin C.J.C. is further quoted by counsel for CEMA, where he said this, at p.1265 of his *Reference* opinion:

> Considerable emphasis was placed by the appellants on ss. 2, 3 and 4 of the marketing plan as involving control of supply. I see nothing constitutionally wrong if a federal plan, related to interprovincial and export trade, bases its regulation in those respects on a consideration of production quotas in the various Provinces. **It must be remembered that the establishment of similar provincial quotas for interprovincial trade and for local trade as a result of the federal-provincial agreement was geared in part to provision for delegation of authority to provincial boards. Federal legislative authority which, when exercised, has a reactive effect on local production does not on that account become invalid if it is properly related to objects within federal competence that is so here.** (emphasis by counsel)

34 The marketing plan of which Laskin C.J.C. writes in the foregoing passage is of course the plan set out in Part II of the *Canadian Egg Marketing Agency Proclamation*, C.R.C., c.646, which reads in part as follows:

> 2. (1) The Agency shall, by order or regulation, establish a quota system by which quotas are assigned to all members of classes of egg producers in each province to whom quotas are assigned by the appropriate Board or Commodity Board.

(2) The Agency, in establishing a quota system shall assign quotas in such manner that the number of dozens of eggs produced in a province and authorized to be marketed in interprovincial and export trade in the year 1973, when taken together with the number of dozens of eggs produced in the province and authorised to be marketed in intraprovincial trade in the same year, pursuant to quotas assigned by the appropriate Board or Commodity Board, and the number of dozens of eggs produced in the province and anticipated to be marketed in the same year, other than as authorised by a quota assigned by the Agency or by the appropriate Board or Commodity Board, will equal the number of dozens of eggs set out in section 3 of this Plan for the province.

3. For the purposes of subsection 2(2) of this Plan, the number of dozens of eggs set out in this section for a province is the number of dozens set out in Column II of an item of the following table in respect of the province set out in Column I of that item, such number of dozens representing the percentage set out in Column III of that item.

TABLE

	Column I	Column II	Column III	
1.	British Columbia	57,250,000	12.055	per cent
2.	Alberta	41,344,000	8.704	" "
3.	Saskatchewan	22,611,000	4.760	" "
4.	Manitoba	54,189,000	11.408	" "
5.	Ontario	181,267,000	38.161	" "
6.	Quebec	78,647,000	16.556	" "
7.	New Brunswick	8,683,000	1.828	" "
8.	Nova Scotia	19,504,000	4.106	" "
9.	Prince Edward Island	3,028,000	0.637	" "
10.	Newfoundland	8,477,000	1.785	" "

4. (1) No order shall be made where the effect thereof would be to increase the aggregate of

(a) the number of dozens of eggs produced in a province and authorized by quotas assigned by the Agency and by the appropriate Board or Commodity Board to be marketed in intraprovincial, interprovincial and export trade, and

(b) the number of dozens of eggs produced in a province and anticipated to be marketed in intraprovincial, interprovincial and export trade other than as authorized by quotas assigned by the Agency and by the appropriate Board or Commodity Board

to a number that exceeds, on a yearly basis, the number of dozens of eggs set out in section 3 of this Plan for the province unless the Agency has taken into account

(c) the principle of comparative advantage of production;

(d) any variation in the size of the market for eggs;

(e) any failures by egg producers in any province or provinces to market the number of dozens of eggs authorised to be marketed;

(f) the feasibility of increased production in each province to be marketed; and

(g) comparative transportation costs to market areas from alternative sources of production.

(2) No order or regulation shall be made where the effect thereof would be to decrease the aggregate of

(a) the number of dozens of eggs produced in the Province of New Brunswick, Prince Edward Island or Newfoundland and authorized by quotas assigned by the Agency and by the appropriate Board or Commodity Board to be marketed in intraprovincial, interprovincial and export trade, and

(b) the number of dozens of eggs produced in the Province of New Brunswick, Prince Edward Island or

Newfoundland and anticipated to be marketed in intraprovincial, interprovincial and export trade other than as authorized by quotas assigned by the Agency and by the appropriate Board or Commodity Board.

(3) No order or regulation shall be made where the effect thereof would be to decrease the aggregate of

(a) the number of dozens of eggs produced in a province and authorized by quotas assigned by the Agency and by the appropriate Board or Commodity Board to be marketed in intraprovincial, interprovincial and export trade, and

(b) the number of dozens of eggs produced in a province and anticipated to be marketed in intraprovincial, interprovincial and export trade other than as authorized by quotas assigned by the Agency and by the appropriate Board or Commodity Board,

to a number that, on a yearly basis, is less than the number of dozens of eggs set out in section 3 of this Plan for the province unless at the same time the number of dozens of eggs produced in each of the provinces, other than the Provinces of New Brunswick, Prince Edward Island and Newfoundland, and so authorized to be marketed in intraprovincial, interprovincial and export trade is decreased proportionately.

(4) No order or regulation shall be made pursuant to subsection (1) or (3) unless the Agency is satisfied that the market for eggs has changed significantly.

35 It bears repetition at this point, perhaps, that the term "province" in the proclamation includes the Northwest Territories and Yukon, in the absence of any contrary indication, as defined in s.35(1) of the federal *Interpretation Act*; but it is noteworthy that neither the Northwest Territories nor Yukon Territory is mentioned in the table forming part of s.3 of the plan. At the time the

proclamation was issued in 1972, there was no significant production of eggs in either of the Territories.

36 The consequence of this absence of egg production in the Territories within five years prior to issuance of the proclamation in 1972 is that there is no basis upon which a quota can lawfully be allocated to the Northwest Territories or Yukon Territory, or any part thereof, under the marketing plan since that is precluded by the plain language of s.23(1) of the *Farm Products Agencies Act* (quoted above at paragraph 30). I accept the submission made on behalf of the challengers of the scheme that s.23(2) does not alter this, since any allocations which may be made under that subsection are nevertheless restricted to the scope provided by s.23(1).

37 It is therefore the position taken by the challengers that the scheme fails, in respect of the Northwest Territories, to meet the important qualification made by Laskin C.J.C. (as quoted in paragraph 31 above) that the allocation of production or marketing quotas must be "without limitation to interprovincial and export trade" (if the term "interprovincial" is given the larger meaning envisaged by s.35(1) of the federal *Interpretation Act* so as to include both provincial-territorial" and "territorial-provincial" trade). The expression "regulatory control", in the further words of qualification added by Laskin C.J.C. towards the end of that passage, is necessarily to be understood in its immediate context so as to distinguish "regulation" from "prohibition" and preclude the complete exclusion of

any productive area of Canada (as "one economic unit") from participation in the plan.

38 It is apparent, for that matter, that the factual basis for the *Reference* did not extend to any specific consideration of the situation of the Territories in relation to the scheme. When Laskin C.J.C. said (as quoted in paragraph 33 above) that "I see nothing constitutionally wrong if a federal plan, related to interprovincial and export trade, bases its regulation in these respects on a consideration of production quotas in the various Provinces", his beginning that last word with a capital letter makes this all too plain. He either did not address his mind to the Territorial situation, for which there was then no production or quota in existence; or, if he did, then he at least did not purport to say that the plan could validly exclude Territorial participation based on the past absence of such a quota. There is nothing to suggest that he held the "objects within federal competence", to which he referred in the concluding sentence in that passage, to include the placing of fetters upon, the raising of impediments to, or the restriction otherwise of "the free flow of commerce across the Dominion as if provincial boundaries did not exist", to again paraphrase Rand J. in *Murphy v. C.P.R.*

39 CEMA does not, as I understand, take issue with this interpretation of the opinion of Laskin C.J.C. in the *Reference*. It contends instead that the marketing plan is sufficiently capable of change, and that the legislative scheme now allows this, to enable a production or marketing quota for eggs to be

allocated to the Northwest Territories. That being so, it is CEMA's position that the *Farm Products Agencies Act* does not offend s.121 of the 1867 Act (even if "Province" in that section should include the Territories) nor does it violate any right or freedom guaranteed by the *Canadian Charter of Rights and Freedoms* in the *Constitution Act, 1982*. No issue is before me as to whether the scheme is unconstitutional on the grounds considered in the *Reference*, other than as to s.121 of the 1867 Act.

40 CEMA points to sections 4(1) and 4(3) of the marketing plan set out in Part II of the proclamation as enabling it to increase or decrease the aggregate of federal quota allocated to producers under s.3 of the plan. And it submits that, in doing so, it is not restricted to the criteria mentioned in s.4(1), although it is obliged to take those criteria always into account. Any order or regulation made by CEMA must however comply also with s.4(4), which requires CEMA to be satisfied that the size of the market for eggs has changed significantly.

41 An obvious difficulty with these submissions on behalf of CEMA is that there is no mention whatsoever of the Northwest Territories in the table now set out in s.3 of the marketing plan. As a result, there is nothing in that table capable of being either increased or decreased with reference to these Territories; instead, what is required is the allocation of an initial quota to the Northwest Territories, which can then be included in the table and form part of s.3. Another difficulty, which is less obviously apparent, is that the Northwest Territories as yet

have no institution or body capable of functioning as a "Board or Commodity Board" within the meaning of the marketing plan. To date, the legislation which would provide for such a board, namely the *Agricultural Products Marketing Act*, R.S.N.W.T. 1988, Supp. c. 115, remains unproclaimed and has no force as law. Nor is any such board for the Northwest Territories mentioned in the definition of "Board" in s.1 of the marketing plan.

42 Similar difficulties arise in reference to CEMA's reliance on the *Canadian Egg Marketing Agency Quota Regulations 1986*, SOR/86-8, as amended by SOR/86-411, SOR/87-303, SOR 91/248, SOR/91-699, SOR/92-193, SOR/92-336, SOR/92-748, and SOR 93/582. There is as yet no mention of any "Commodity Board" for the Northwest Territories in the definition of that term in s.2 of these Regulations. And, as in the marketing plan, there is no mention, in the Schedule to the Regulations, of the allocation of any federal quota to the Northwest Territories. Given these very significant omissions, it is plain that the effect of the Regulations is to prohibit Northwest Territories producers from marketing their eggs in interprovincial or export trade. This can be seen from s.3, 4 and 5 of the Regulations, as follows (noting that s.23(3) of the Act, where mentioned in para. 4(c) below, is a reference today to s.22(3) of the Act):

> 3. (1) Subject to subsection (2), these Regulations apply to the marketing of eggs in interprovincial and export trade.
> (2) These Regulations do not apply to eggs that are placed in an incubator for hatching.

Federal Quota Prohibitions

4. (1) No producer shall market eggs in interprovincial or export trade

(a) unless a federal quota has been allotted to the producer, on behalf of the Agency, by the Commodity Board of the province in which the producer's egg production facilities are located;

(b) in excess of the federal quota referred to in paragraph (a); and

(c) contrary to any subsisting rule of the Commodity Board referred to in paragraph (a) that the Commodity Board has been authorized by the Agency pursuant to subsection 23(3) of the Act, to apply in performing on behalf of the Agency the function of allotting and administering federal quotas.

(2) Subsection (1) does not apply to eggs marketed under quota exemptions referred to in subsection 7(2).

Entitlement to a Federal Quota

5. (1) Subject to subsection (2), a producer is not entitled to be allotted a federal quota unless, immediately before the coming into force of these Regulations,

(a) the producer had a provincial quota that was allotted to him by the Commodity Board of the province in which the producer's egg production facilities are located; and

(b) the producer is entitled to a federal quota pursuant to the *Canada Egg Marketing Agency Quota Regulations*, C.R.C., c.656.

(2) After the coming into force of these Regulations, a producer is entitled to be allotted a federal quota if, pursuant to the rules of the Commodity Board of the province in which the producer's egg production facilities are located, the producer is allotted a provincial quota.

43 For a producer such as either of the defendants now before this Court, who is unable to shelter under the specific exemptions described in s.7(2), the effect of sections 3, 4 and 5 of Regulations is that of a complete prohibition of entry from the Northwest Territories into the interprovincial and export trade in eggs in Canada. This conclusion is reinforced, if that should be felt necessary, by s.6 of the Regulations (as amended by SOR/86-411):

> 6. Subject to these Regulations, the quantity of eggs that a producer is authorized to market from a province under a federal quota for the period set out in the schedule shall equal the provincial quota allotted to the producer for that period by the Commodity Board of the province minus the quantity of eggs marketed by the producer in intraprovincial trade in that province during that period.

44 Again, there being as yet no Commodity Board for the Northwest Territories, there is thus no present basis for the allocation of any federal quota to egg producers in the Northwest Territories pursuant to either the Regulations or, as already mentioned, the marketing plan.

45 Is there nevertheless a basis in the *Farm Products Agencies Act* for the enactment of new measures amending the marketing plan and the Regulations so as to surmount the challenge which is now made to the regulatory scheme as a whole, as it impinges on producers seeking to participate in the interprovincial and export trade in eggs in Canada, on the basis of their production in the Northwest Territories? Or is it the Act itself which ostensibly creates an

insurmountable legal barrier, at the provincial-territorial boundaries, against any such participation?

46 This question brings us back to s.23 of the *Farm Products Agencies Act* (quoted in paragraph 30 above) which restricts the allocation of "any production or marketing quota to any area in Canada" so that the quota is allocated "on the basis of production from that area in relation to the total production of Canada over a period of five years immediately preceding the date of the marketing plan".

47 No difficulty appears to have been encountered back in 1972 in applying s.23 to the ten provinces, their boards and producers. There being at the time no production of eggs in the Territories, no allocation of quota was then necessary with reference to them. Today, two decades and more later, the original marketing plan is evidently now out-of-date by its omission to provide for the participation of producers in the Northwest Territories. There is nothing in the Act, however, which has so far been drawn to my attention, preventing the amendment now of CEMA's proclamation so as to make good this omission. And while I understand CEMA to submit that it can in effect itself amend the marketing plan by making an "overbase allocation of federal quota" to the Northwest Territories, presumably at the same time amending the Regulations to that end, without need to amend its proclamation for that purpose, the important point here is not so much how that can best be done but whether the Act, as it stands,

enables it to be done.

48 In my view, s.23 of the *Farm Products Agencies Act* is sufficiently ample in scope to enable the "effective date of the marketing plan" to be advanced, by a suitable amendment to CEMA's proclamation, from 1972 to the present, so as to introduce what is in effect a new marketing plan to the extent that it then makes fair and adequate provision for the Northwest Territories on the basis set forth in s.23 of the Act. To that extent, I find myself in agreement with CEMA's submission that the Act provides for the inclusion of "any area of Canada" such as the Northwest Territories (or any part thereof) within the scheme. It remains to add, however, that the existing scheme (under the present proclamation, and, as set out further in the present Regulations) will require radical amendment so as to expressly provide for such inclusion if the scheme (as amended) is no longer to be seen as violating the spirit, if not the ancient letter, of s.121 of the 1867 Act, bearing in mind s.146 of that Act (a point, as already mentioned, not considered in the *Reference*).

49 To sum up, while CEMA has in recent years sought to bring the Northwest Territories within the existing scheme on the basis of the present proclamation, and the Commissioner's representatives have engaged in lengthy negotiations with CEMA towards the realisation of this goal, there is no legislative basis in the *Farm Products Agencies Act* for achievement of the goal without prior issuance of an amending proclamation to enable CEMA to allocate an appropriate

federal quota to the Northwest Territories. As the scheme now stands, it necessarily excludes the Northwest Territories from allocation of any such quota and hence from participation in both interprovincial (i.e. territorial-provincial) and export trade in eggs in Canada.

V. The Charter

1. Freedom of Association: s.2(d)

50 The defendants, but not the Commissioner, rely on s.2(d) of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, which states:

> 2. Everyone has the following fundamental freedoms:
>
> (d) freedom of association.

51 The defendants submit that the regulatory scheme infringes this provision of the Charter in two ways. First, they say that the scheme prevents them from associating with egg graders, wholesalers and retailers in the provinces for purposes of gaining a livelihood. Secondly, they argue that the scheme constitutes a "closed shop" to which they cannot be admitted. In either case, they submit that the infringement results from the unavailability of a federal quota for the production and marketing of eggs from the Northwest Territories. Furthermore, it is part of the scheme that a federal licence is required to engage

in interprovincial trade in eggs produced in Canada. And holders of such licences are prohibited, by s.7(1) of the *Canadian Egg Licensing Regulations, 1987*, from knowingly engaging in the marketing of eggs in interprovincial trade except with a person who also holds such a licence and where the eggs in question have been produced under a federal quota allotted under the *Canadian Egg Marketing Agency Quota Regulations, 1986*. And so they say that this additional requirement results in a further ground of infringement of each defendant's freedom of association as declared in s.2(d) of the Charter, since neither defendant holds such a licence and has not been granted any part of the necessary federal quota.

52 On the basis of my analysis of the regulatory scheme, and my conclusions thereon already outlined, I shall consider these submissions as being necessarily confined to the proclamation and its implementing Regulations and Orders since these, in my view, do not reflect adversely upon the constitutionality of the *Farm Products Agencies Act* itself.

53 It is now trite to say, but I remind myself, that the Charter should receive a broad and generous construction consistent with its character and general purpose: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641 at p.649. As held in that case, the proper approach to the understanding of the rights and freedoms guaranteed by the Charter is a purposive one so as to give due effect to the interests which are thereby intended to be protected. And, as Dickson C.J.C. held, for the majority (5:1) in *R. v. Big*

M Drug Mart Ltd., [1985] 1 S.C.R. 295, 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321 at pp.359-60:

> In my view, this analysis is to be undertaken, and the purpose of the right or freedom is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and, where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the Charter's protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the Charter was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker* (1984), 11 C.C.C. (3d) 481, 9 D.L.R. (4th) 161, (1984) 1 S.C.R. 357 illustrates, be placed in its proper linguistic, philosophic and historical contexts.

54 Association is of the very essence of trade, for one cannot trade merely with oneself. The commercial production of eggs implies their eventual consumption, which must involve associations between individual producers, processors, vendors, purchasers and ultimately consumers, not to mention regulators and others in the ordinary course of the trade. This is just as true of interprovincial (or territorial-provincial) trade as of intraprovincial (or local) trade or the export trade in eggs. While it is one thing to regulate such trade, as the *Farm Products Agencies Act* intends on a Canada-wide basis, it is altogether another

and quite different thing to purportedly conduct a scheme under the Act which in effect must (and does) prohibit all southbound trade in eggs from the Territories to the remaining two-thirds of Canada, without any exemption or qualification whatsoever.

55 CEMA argues that the defendants are suggesting that the legislative requirement to abide by the regulatory provisions of the supply management system is a violation of their freedom of association; and that this suggestion is to "make a mockery of the right contained in s.2(d)", quoting from *Lavigne v. OPSEU*, [1991] S.C.R. 211 at p.260. Ingenious though it is, this argument chooses to ignore the fact that Lavigne sought only to escape from the associations which were being imposed upon him, whereas in the present case the defendants are being denied all opportunity to enter into any interprovincial or export trade in eggs in Canada, and hence are being denied the associations implicit in that trade which they seek to enjoy. Far from attempting to escape from the associations regulated under the supply management system, the defendants have persisted in their attempts to enter into such associations. That system, administered by CEMA, in effect purports to exclude all commercial egg supply, on whatever terms, across the provincial boundaries from the Territories. In doing so, it is patently the system and not the defendants, which makes a mockery of the fundamental freedom declared by s.2(d) of the Charter.

2. Livelihood And Mobility Rights: s.6(2)(b)

56 Section 6 of the Charter reads as follows:

> 6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
>
> (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
> (a) to move to and take up residence in any province; and
> (b) to pursue the gaining of a livelihood in any province.
>
> (3) The rights specified in subsection (2) are subject to
> (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
> (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.
>
> (4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

57 It is common ground that only s.6(2)(b) and s.6(3)(a) require consideration here. I have however quoted s.6 in full to enable these provisions to be read in their immediate Charter context.

8 On the evidence before the Court I find that the defendant Richardson

has been a resident of Alberta and has also resided in the Northwest Territories at those times when he has been actively engaged in the production of eggs at Hay River in the Northwest Territories in the name of Northern Poultry since 1984. Pat Martel, the Chief of the Hay River Dene Band, is a lifelong resident of Hay River in the Northwest Territories and has been, from time to time, a director of Pineview. The shareholders of Pineview, a Northwest Territories corporation, have at all times been Dene Gha Holdings Corporation (51%) of Hay River, Northwest Territories, and Alberta Eggs Ltd. (49%) of Edmonton, Alberta. Pineview carried on the business of producing and marketing eggs from its plant at Hay River in the Northwest Territories from 1990 to 1992. Pineview ceased production of eggs at Hay River late in 1992. I infer that this occurred as a result of steps which had been taken by CEMA to prevent eggs produced in the Northwest Territories from being graded and marketed in the provinces.

59 I accept the submission made on behalf of the defendants to the effect that a citizen or permanent resident of Canada need not move physically into the province of that person's choice in order to bring s.6(2)(b) of the Charter into play. It is enough if that person's right to gain a livelihood there is wrongfully denied: *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, 11 C.C.C. (3d) 481, 9 D.L.R. (4th) 161, 20 Admin. L.R.1, 8 C.R.R. 193, 3 O.A.C. 321, 53 N.R. 169; *Black v. Law Society of Alberta*, [1986] 3 W.W.R. 590, 20 Admin. L.R. 140, 27 D.L.R. (4th) 527, 10 C.R.R. 117, 44 Alta. L.R. (2d) 1, 68

A.R. 259 *sub nom. Black & Co. v. Law Soc. of Alta.* (C.A.); affirmed (on other grounds), [1989] 1 S.C.R. 591, (1989) 93 NR 266, 96 A.R. 352, [1989] 4 W.W.R. 1, 66 Alta. L.R. (2d) 97, 58 D.L.R. (4th) 317, 38 C.R.R. 193.

60 It is therefore immaterial, in my view, that the defendant Richardson has not made the Northwest Territories his sole or even principal place of residence. What is material is that neither he nor Pat Martel, nor anyone else who moves to or takes up residence in the Northwest Territories, to gain a livelihood by egg production there for marketing both there and elsewhere in Canada, can pursue that livelihood so long as the present regulatory scheme administered by CEMA remains unchanged, unless relief can be granted pursuant to the *Constitution Act, 1982* or, as I have suggested, the scheme is radically amended to include egg production from the Northwest Territories.

61 Paragraph 6(3)(a) of the Charter is not, in my view, a barrier to the relief sought in this connection since the regulatory scheme does indeed discriminate among persons engaged in egg production (or seeking to do so) "on the basis of present or previous residence". Whether one is now resident in the Northwest Territories or one seeks to move there from elsewhere in Canada, the CEMA regime in force today in effect prohibits one from engaging, in the Northwest Territories, in gaining a livelihood as an egg producer entitled to participate in the larger Canadian market, whereas the regime does not have that effect in the provinces. And it must be remembered that s.30 of the *Constitution*

Act, 1982 specifically includes the Territories in the meaning of "province" for purposes of the Charter, though not more generally.

62 The non-proclamation by the Commissioner of the *Agricultural Products Marketing Act* of the Northwest Territories, which might be seen to render ineffective the present regulatory scheme administered by CEMA to the extent that there is as yet no "Board or Commodity Board" for these Territories which could operate in the Territories on the same basis as the equivalent provincial boards, is not in my view to be held against the challengers in this case. On the view which I feel compelled to take of s.23 of the federal *Farm Products Agencies Act*, it is premature to proclaim the Northwest Territories legislation in force until CEMA's proclamation is amended to provide appropriately for inclusion of the Northwest Territories, or at least the part of it which includes Hay River, in the regulatory scheme.

63 I therefore see no impediment, by reason of the non-proclamation of the Northwest Territories legislation, to finding in favour of the Commissioner, as well as the defendants Richardson and Pineview, with reference to their joint challenge to the regulatory scheme, that the scheme violates s.6 of the Charter, subject of course to consideration of s.1 of the Charter, which will follow.

3. Discrimination and Equality Rights: s.15

64 Discrimination is a distinction, whether intentional or not, which is based on any personal characteristic and which imposes a burden or disadvantage upon an individual or group, or which denies or limits access to opportunities, benefits or advantages available to other members of society. And, in order to qualify as prohibited under the Charter, the discrimination must be based on a ground mentioned in s.15(1) of the Charter, or on an analogous ground: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1, (1989) 2 W.W.R. 289, 25 C.C.E.L. 255, 36 C.R.R. 193, 34 B.C.L.R. (2d) 273, 10 C.H.R.R. D/5719, 91 N.R. 255.

65 In *R. v. Turpin*, [1989] 1 S.C.R. 1296, 48 C.C.C. (3d) 8, 69 C.R. (3d) 97, 39 C.R.R. 306, 34 O.A.C. 115, 96 N.R. 115, it was held by a unanimous court (7:0) that equal application of the criminal law throughout Canada is not a fundamental principle under s.15(1) of the Charter, to that extent overruling *R. v. Emile*, [1988] N.W.T.R. 196, 42 C.C.C. (3d) 408, 65 C.R. (3d) 135, (1958) 5 W.W.R. 481 (C.A.); *R. v. Punch*, [1985] N.W.T.R. 373, 22 C.C.C. (3d) 289, 48 C.R. (3d) 374, 18 C.R.R. 74, (1986) 1 W.W.R. 592, (1986) 2 C.N.L.R. 114 (S.C.); and *R. v. Bailey* (1985), 17 C.R.R. 1 (Y.T.S.C.). However Wilson J., on behalf of the court, left the operation of s.15(1) open to consideration on a case by case basis, saying at p.1333:

> I would not wish to suggest that a person's province of residence or place of trial could not in some circumstances be a personal characteristic of the individual or group capable of constituting a ground of discrimination, I simply say that it is not so here.

66 Wilson J. added, at p.1334:

> In my view s.15 mandates a case by case analysis as was undertaken by this Court in *Andrews* to determine 1) whether the distinction created by the impugned legislation results in a violation of one of the equality rights and, if so, 2) whether that distinction is discriminatory in its purpose or effect.

67 In this case the defendants claim to be members of a disadvantaged class or group comprising all those engaging or willing and able to engage in egg production in the Northwest Territories, in order to gain a livelihood, who are prohibited under the regulatory scheme administered by CEMA from entering into interprovincial and export trade in eggs in Canada, across the provincial-territorial boundaries.

68 It was held in *R. v. Emile* that it is not necessary to find more than a geographical disparity between the law applicable in the Territories and that which applies elsewhere in order to find discrimination, if that disparity creates a distinction of the kind mentioned in the *Andrews* case. By contrast, the ruling in *R. v. Punch* rests on a finding of discrimination based on the aboriginal ethnicity of the majority of the population of the Northwest Territories and not simply on the

geographical legal disparity, a point not mentioned by the court in *R. v. Turpin*. (It is not without interest that Parliament repealed, in 1992, the provisions held to be unconstitutional, on grounds of s.15(1) Charter discrimination, in *R. v. Emile*, *R. v. Punch* and *R. v. Bailey*, notwithstanding the intervening decision in *R. v. Turpin*.)

69 The case by case approach to claims of s.15(1) Charter discrimination has been reaffirmed by the Supreme Court of Canada in *R. v. S.(S.)*, [1990] S.C.R. 254, 57 C.C.C. (3d) 115, 77 C.R. (3d) 273. It is therefore pertinent to note that in *Rafael v. Allison*, [1988] 1 W.W.R. 570 (Alta. Q.B.) Wachowich J. (as he then was) held that s.13 of the *Interest Act*, R.S.C. 1970, c. I-18, was violative of s.15(1) of the Charter on purely geographical legal grounds of discrimination.

70 Applying what was discussed in *R. v. Turpin* with respect to the determination of whether a class or group falls into a category analogous to those specifically mentioned in s.15(1) of the Charter, so as to take into account not only the legal context of the regulatory scheme under challenge but also the place of that class or group in the entire social, political and legal fabric of our society, I find that egg producers in the Northwest Territories who have attempted to pioneer a place for themselves (and of course their financial backers, the Hay River Dene Band and Government of the Northwest Territories) in the overall Canadian egg market, have suffered (and are still subject to) discrimination of the kind contemplated by s.15(1) of the Charter, by virtue of the regulatory denial of their

rights to equality under the law, namely the *Farm Products Agencies Act*, no matter how innocent the intentions of CEMA and its officials may be or may have been in that respect. It is the discriminatory effect and not any discriminatory intention that is of concern in this case.

4. Justification: s.1

71 There is no dispute as to the historical background to the *Farm Products Agencies Act* and the regulatory scheme under challenge. As summarised by counsel for CEMA in their written submissions (paragraph 104):

> The disorder in the Canadian marketplace in the 1960's and early 1970's and the "chicken and egg wars" between certain provinces which this disorder spawned, is widely known. At a producer level, this disorder manifested itself in severe instability in prices and wide fluctuations in supply. Efforts by provincial commodity boards to restore greater order to the marketplace were unsuccessful, and in many cases counterproductive, due to the lack of co-ordination at a national level. In the time frame preceding the enactment of the Act and the establishment of the Agency, Canadian egg producers were in a state of disorder.

72 It is not necessary for any elaborate justification to be offered for the deliberate omission of the Northwest Territories from the regulatory scheme at the time of its inauguration in 1972. There was, as already mentioned, simply no egg production then in or from these Territories; nor was there any imminent likelihood then of any such production coming into being. Counsel for CEMA have quoted

at length from the federal Hansard of 1970 and the Report of the (Ontario) Royal Commission prepared by His Honour Judge F.J.W. Ross, released in April 1972. I shall refrain from repeating all the quoted material here, though I have of course taken it into consideration. I shall merely mention excerpts:

1. The Ross Report (CEMA's submissions, para. 108):

> There are two practical methods for allocating quotas initially:
>
> (1) Using production or marketings in a specified quota-setting period in the recent past as a base;
>
> (2) Using present production capacity as a base.
>
> Each of these methods has certain advantages and shortcomings; neither is clearly superior. Using recent marketings has the advantage that it indicates actual contributions to egg supply by each producer, but would be unfair to those who erected new facilities recently or to those whose marketings during this quota-setting period for a variety of good reasons were below normal.
>
> Basing the initial quota allocation on present production capacity has the advantage that it reflects investments in fixed assets, but difficulties arise in connection with measuring adequacy and capacity in the case of egg production where facilities that differ widely in capacity are utilized. There is the additional difficulty in connection with facilities, whether adequate or not, which have not been used for several years. Finally, this method discriminates against superior flock managers who regularly obtain an above average rate of egg production per hen capacity.
>
> To reach a decision on this issue, it is necessary to keep in mind that the objective of the initial quota allocation is to establish a basis for distributing the benefits of the marketing program equitably among producers. The

method used must ensure that no producer can obtain a quota which is far in excess of his actual participation in the industry, whether based on sales or facilities.

2. Commons Debates, December 30, 1971 (CEMA's submissions, para. 110, in part):

(a) Stanley Knowles, page 10874 (in part):

The purpose of this amendment is to include what we regard as a very desirable provision in Bill C-176. If this amendment is carried, as I hope and believe it will be, it would provide that before any marketing agency which is established under this legislation can set up supply management plans or set quotas it must consider the distribution of production over the preceding five years. In other words, the purpose of this amendment is to have regard to historic rights, particularly of the prairie provinces, and we feel that this amendment has been worded in such a way that it protects those rights without taking away rights from any other section of the country.

(b) John Burton, page 10876 (in part):

It represents an acceptable approach to marketing plans. I think that some of the provisions we are enacting must be developed within the framework of changes and adjustments that are taking place within Canadian society. The fact is that in recent years we have experienced significant shifts in the pattern of Canadian population distribution.

Certain parts of Canada, particularly Ontario, the lower St. Lawrence region and immediate Vancouver area have become rapid growth regions. We have not experienced the same degree of population growth in the prairie provinces and the maritime provinces.

73 These excerpts, for what they may reveal without quoting their full context, reflect the evident intention to give effect to a Canada-wide system of

marketing of farm products which would eliminate or minimise the chaotic situation previously prevailing. And while the *Farm Products Marketing Act* would appear to embody and accomplish that objective, as a result of the co-operative support of the various provinces, the question nevertheless remains as to whether the egg marketing plan proclaimed under the Act in 1972 is now adequate to allow for inclusion of any participation today in the larger Canadian Market, by producers in the Territories, in accordance with the intended Canada-wide scope of the Act. In my respectful view, it is not. The present egg marketing plan is to that extent out of harmony with the comprehensive nation-wide purposes sought to be given effect by the Act. And, more to the point here, the scheme also violates the rights and freedoms of egg producers in the Northwest Territories, contrary to ss. 2, 6 and 15 of the Charter, quite apart from any consideration of ss. 121 and 146 of the 1867 Act.

74 Contrary to the position taken by CEMA to the effect that the instant challenge is not confined to the present regulatory scheme and is, instead, addressed to the *Farm Products Agencies Act* and the entire concept of supply management in relation to agricultural products in Canada, I see the challenge as being instead confined to the scheme alone, as presently defined in the proclamation and other instruments promulgated under the Act, and not as extending to the Act itself or to the concept and policy which it embodies. It is

only this much more modest challenge, as I understand, that is advanced here by the parties in opposition to CEMA.

75 On that basis, I do not see that there is any need to consider whether the *Farm Products Agencies Act*, itself, is designed to meet objectives which are "pressing and substantial in a free and democratic society". That is not in dispute here. What is at issue is whether the present regulatory scheme created under the Act can be justified as meeting those objectives in accordance with s.1 of the Charter and as interpreted by the courts to date.

76 In considering this question, one must ask whether the scheme today is proportional and appropriate to meet the national objectives which it is intended to serve, whatever the situation may have been in 1972. And, in particular, one must ask if the scheme today is fair and not arbitrary, carefully designed to achieve those objectives and rationally connected to them. As the means to reach those objectives, the scheme should impair the Charter rights and freedoms relied upon by the challengers as little as possible; and there must be a due proportionality between the effects of the scheme, both salutary and deleterious on the one hand, and the abridgement by the scheme of those rights and freedoms on the other hand: *R. v. Oakes*, [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 26 D.L.R. (4th) 200, 19 C.R.R. 308, 14 O.A.C. 335, 65 N.R. 87; *Dagenais v. C.B.C.*, [1994] S.C.J. No. 104.

77 It is not, as I understand the submissions of counsel for CEMA, that CEMA seeks the indefinite continuation of the exclusion of the Territories from the scheme. That exclusion is recognized as being long out of date now, and hence both arbitrary and unfair in principle. The negotiations which have taken place between CEMA and the Commissioner's representatives over the past decade have focussed instead only on the terms upon which the Northwest Territories might be included in the scheme. And it does not therefore seem to be seriously in dispute that the scheme must be altered so as to be more appropriately designed to achieve the objectives of the Act by inclusion of the Northwest Territories. At present, it plainly cannot be said that the scheme is carefully designed to achieve those objectives with reference to the Territories, whose complete exclusion from it is no longer rationally defensible. As it stands, the scheme does not impair the rights and freedoms relied upon by the challengers as little as possible; and the effects of the scheme, in so far as they are either salutary or deleterious, are outweighed by the scheme's abridgement of those rights and freedoms in relation to the Northwest Territories.

78 It is not in contention, furthermore, that even if a federal allocation of two million dozen eggs **per annum** were made to the Northwest Territories, based on present productive capacity, this would yield only about half that for marketing outside the Territories or less than a quarter of one **per cent** of Canada's total egg production. Egg production from the Northwest Territories, even at its peak

(before CEMA took steps to halt movement of that production outside the Northwest Territories), has never attained that level.

79 Furthermore, without repeating what I have already said about the disharmony (if not *ultra vires*) of the scheme in terms of the Act, to which it purports to give Canada-wide effect, I respectfully adopt what was said by Russell J. (as she then was) in *Vriend v. Alberta* (1994), 18 Alta. L.R. (3d) 286 (Q.B.) at p.305:

> A legislative limitation which controverts the very principle it purports to embody is not a legitimate exercise of the legislative power for the attainment of a desirable social objective which would warrant overriding constitutionally protected rights.

80 In conclusion, CEMA is unable to justify the several violations of the rights and freedoms relied upon by the challengers, pursuant to s.1 of the Charter.

VI. Remedies

81 As counsel for the defendants have mentioned (at paragraphs 73 to 75, inclusive, of their submissions), there appear to be several alternative approaches which could be taken to include the Northwest Territories within an amended regulatory scheme administered by CEMA, in replacement of the scheme impugned in this case. None of these alternatives includes the Court's imposition of any level of quota allocation in respect of the Northwest Territories. I agree

with counsel for CEMA, at least at this phase, that the last-mentioned approach is to be avoided.

82 Having concluded that the regulatory scheme violates ss. 2, 6 and 15 of the Charter, and that the scheme is not "saved" by s.1, I turn to s.24(1) of the Charter, which reads as follows:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

83 In their notice of motion, the defendants have asked only for a judicial declaration that the *Canadian Egg Marketing Proclamation*, C.R.C. 646, as amended; the *Canadian Egg Licensing Regulations, 1987*, SOR/87-242, ss. 3, 4(1), 7(1)(d) and 7(1)(e); and the *Canadian Egg Marketing Quota Regulations*, SOR/86/8, ss. 4(1)(a), 5(2), 6 and 7(1), together and individually, violate the rights and freedoms guaranteed by the Charter. And although the defendants have also there asked for a similar declaration in respect of s.23 of the *Farm Products Agencies Act*, this was not pursued at the hearing, on their behalf; and I take that request for relief to have therefore been abandoned.

84 In their written submissions, counsel for the defendants have, however, invited the Court to grant the requested relief expressly in accordance with s.52 of the *Constitution Act, 1982*, which states:

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes
(a) The *Canada Act 1982*, including this Act;
(b) the Acts and orders referred to in the schedule; and
(c) any amendment to any act or order referred to in paragraph (a) or (b).

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

85 Of the alternatives open to the Court, as set forth in the judgment of the Supreme Court of Canada in *Schacter v. Canada*, [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1, 10 C.R.R. (2d) 1, 92 C.L.L.C. 14,036, 139 N.R.1, it is clearly preferable in the circumstances of this case to declare a constitutional exemption of egg producers in the Northwest Territories from the regulatory scheme as it presently stands, to the extent of their production in the Northwest Territories, rather than to declare the scheme inoperative as a whole.

86 Such a declaration is clearer and less likely to be misunderstood, furthermore, than the more complex formulation required in order that the proclamation and regulations in question be interpreted by "reading in" or "reading down" their several provisions to achieve the same result.

87 The impugned provisions of the proclamation and regulations being inconsistent with the provisions of ss. 1, 2, 6 and 15 of the Charter, and thus of the Constitution, in relation to the Northwest Territories, they are without force or effect to the extent of the inconsistency.

VII. Disposition

88 An order shall therefore issue declaring that the proclamation and regulations referred to in paragraph 83 above violate the rights and freedoms guaranteed by ss. 1, 2, 6 and 15 of the Charter and that, pursuant to s.24(1) of the Charter and s.52 of the *Constitution Act, 1982*, the defendants and all other egg producers in the Northwest Territories are accordingly constitutionally exempt from any application of the proclamation and of those regulations in respect of the production of eggs in the Northwest Territories and the marketing of eggs produced in the Northwest Territories in interprovincial and export trade in Canada.

89 Costs were not spoken to but may be addressed, if necessary, on appointment for that purpose.

90 By way of postscript, let me express my appreciation for the industry of counsel and for the clarity and completeness of their several submissions, the

scope of which (as well as of the material placed before the Court) is by no means adequately reflected in these reasons.

M.M. de Weerdt
J.S.C.

Yellowknife, Northwest Territories
August 4, 1995

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CV 04
CV 04

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN: (CV 041

CANADIAN EGG MARKETING AGENCY
Plai

- and -

FRANK RICHARDSON operating as
NORTHERN POULTRY
Defend

- and -

**THE COMMISSIONER OF THE NORTHWE
TERRITORIES** as represented by **THE ATTOR
GENERAL OF THE NORTHWEST TERRITORIES**
Interv

AND BETWEEN: (CV 041

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REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE M.M. de WEERDT