File No. 34948

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE ONTARIO COURT OF APPEAL)

BETWEEN:

MOUNTED POLICE ASSOCIATION OF ONTARIO

and

B.C. MOUNTED POLICE PROFESSIONAL ASSOCIATION, ON THEIR OWN BEHALF AND ON BEHALF OF ALL MEMBERS AND EMPLOYEES OF THE ROYAL CANADIAN MOUNTED POLICE

APPELLANTS
(Respondents / Cross-Appellants)

- and -

ATTORNEY GENERAL OF CANADA

RESPONDENT
(Appellant / Cross-Respondent)

- and -

ATTORNEY GENERAL OF ONTARIO

and

ATTORNEY GENERAL OF SASKATCHEWAN

and

ATTORNEY GENERAL OF ALBERTA

and

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RESPONDENT'S FACTUM

PART I – STATEMENT OF FACTS

A. OVERVIEW

1. The Staff Relations Representation Program (SRRP) is a legislated labour relations scheme that provides a meaningful process for RCMP members to act in association presenting collective representations on workplace issues to management, which considers those representations in good faith. This process satisfies the right found by this Court to be included in the guarantee of freedom of association under s. 2(d) of the *Charter*. The constitutionality and success of the process is illustrated by the factual findings of the application judge that RCMP management listens carefully and with an open mind to the representations of the elected representatives of RCMP members.

2. The appellant associations seek relief from this Court that would eliminate the SRRP and replace it with the *Public Service Labour Relations Act* ("*PSLRA*"), an adversarial model of labour relations from which RCMP members are presently excluded. This Court's decision in *Delisle* remains a complete answer to the latter relief. It is for Parliament or the Executive to choose what labour relations model if any, should apply to Canada's national police force. Within that choice, RCMP members have a constitutional right to a meaningful process.

3. The appellant associations argue that freedom of association is effectively impossible in this workplace unless the employer engages in the appellants' definition of collective bargaining. This argument fails to properly characterize the constitutional process this Court recognizes in s. 2(d), and to properly apply this Court's recent jurisprudence. A constitutional process must allow for the meaningful pursuit of workplace goals, but otherwise is not required to include the features of any particular statutory process such as the adversarial one mandated in labour relations schemes modelled after American legislation (commonly referred to as "collective bargaining", but very different from the constitutional process described by this Court).

4. RCMP members elect representatives every two or three years under the SRRP. Those representatives are required to represent the interests of all members with respect to staff relations matters. They can be removed by a non-confidence vote of the other elected representatives. The government is directly bound by the *Charter*, and therefore cannot improperly interfere with the administration of the SRRP. The representatives of RCMP members are therefore able to provide management with the members' independent perspective in the collaborative scheme.

5. This Court's jurisprudence does not require an employer to "collectively bargain" with every association chosen by employees. Even the statutory labour relations model sought by the appellants only allows the employer to bargain with one association. In this case the SRRP does the same thing, providing a single process that satisfies the s. 2(d) right. In the alternative, if this Court's recent recognition of a derivative right to collective bargaining in freedom of association now means that every employee association has a separate right to collectively bargain with an employer, then this Court should reconsider its jurisprudence. Such a result makes unconstitutional most labour relations schemes in Canada.

B. SUMMARY OF THE FACTS

6. The adjudicative facts relating to the structure and operation of the SRRP were found by the application judge, and are unchallenged by the appellants.

7. In 1974, RCMP Commissioner Nadon first proposed a staff relations representative program to member representatives from RCMP Divisions across Canada. With the exception of "C" Division [Quebec], RCMP members of every Division voted "overwhelmingly" to accept the proposal.[1]

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[1] Reasons for Judgment of the Ontario Superior Court of Justice dated April 6, 2009, per MacDonnell J. (SCJ Reasons) para. 23, **Appellants' Record ("AR"), Vol. I, Tab 3, p. 20**; Affidavit of Ken Legge, (Legge Affidavit) Ex. E, *SRR Challenge 2000 Review, Final Report*, p. 11, **Respondent's Record ("RR"), Vol. I, Tab 3, p. 61**

8. In December 1989, the status of this program (between 1974 and 2002 called the Division Staff Relations Representative Program) was formalized through an amendment to the *Royal Canadian Mounted Police Regulation*[2] (*Regulation*) which provides in s. 96:

96 (1) The Force shall have a Division Staff Relations Representative Program to provide for representation of the interests of all members with respect to staff relations matters. (2) The Division Staff Relations Representative Program shall be carried out by the division staff relations representatives of the members of the divisions and zones who elect them.	96 (1) La Gendarmerie établit un programme de représentants divisionnaires des relations fonctionnelles qui a pour objet d'assurer la représentation des membres en matière de relations fonctionnelles. (2) Le programme de représentants divisionnaires des relations fonctionnelles est mis en application par les représentants divisionnaires des relations fonctionnelles qu'élisent les membres des divisions et des secteurs.

9. The work of the SRRP is carried out by Staff Relations Representatives (SRRs). SRRs are democratically elected every two to three years[3] by RCMP members pursuant to s. 96(2) of the *Regulation.*[4] Between elections, SRRs can be removed through a non-confidence vote by the other elected SRRs.[5]

10. The SRRs are free to retain independent counsel and to challenge the conduct of RCMP management and the Crown as is reflected in recent litigation.[6]

11. The *Regulatory Impact Analysis Statement* for the amendment explained that the SRRP would provide RCMP members with a mechanism to have their problems and concerns brought directly to the senior management of the RCMP. It further explained that through the *Regulation*, the SRRs would have direct access to all levels of management and

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2 1988 (SOR/88-361)
3 Legge Affidavit, para. 35, **AR, Vol. XI, Tab 67, p. 398**
4 SCJ Reasons, para. 15, **AR, Vol. I, Tab 3, p. 18**
5 Legge Affidavit**,** Ex. H, **RR, Vol. II, p. 12**
6 *Attorney General of Canada v. Meredith and Roach*, 2013, FCA 112, para. 14, **Respondent's Authorities ("RA"), Tab 1, pp. 6-7,** *Gorman v. AG of Canada*, Court File Number T-1876-12 (Federal Court), para. 5, **RA, Tab 7, p. 83**

participate in the policy-making of the RCMP through regular meetings and consultation with senior management.[7]

12. In 2002, following an extensive review of its processes, SRRs adopted a constitution for the SRRP which provides that its primary purpose is "'to promote mutually beneficial relations between Force management and the wider membership' and that the SRRP 'will be recognized as the system and program of choice for management-employee relations for members of the RCMP'".[8]

13. On October 28, 2002, an agreement between the RCMP Commissioner and the SRRP provided that "management at all appropriate levels will… recognize the role of the SRRP, respond to proposals and requests from SRRs … in a timely fashion [and] provide rationale for major decisions." The agreement also provided that "management and the *Staff Relations Representative Program* will consult on specific human resource initiatives and national policy center committees in a timely and meaningful fashion [and that] although final decisions rest with management, consultation will promote an active participatory regime…."[9]

14. The SRRP is organized divisionally and regionally to align with the management configuration of the RCMP. The National Caucus of 34 elected SRRs elects a National Executive Committee (NEC) comprised of one SRR from each of the RCMP's five regions (as they were then known), and two full time SRRs without regional affiliation.[10]

15. The two full time SRRs elected to the NEC attend all meetings of the RCMP's Senior Management Team which meets three times a year to identify and consider the key issues

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7 SCJ Reasons, para. 25, **AR, Vol. I, Tab 3, p. 20**
8 SCJ Reasons, para. 29, **AR, Vol. I, Tab 3, p. 21**
9 SCJ Reasons, para. 16, **AR, Vol. I, Tab 3, p. 18**; Legge Affidavit, Ex. F, Agreement Between the Commissioner and the SRRP, [clauses 11 and 24], **RR, Vol. I, Tab 3, pp. 186, 188**
10 SCJ Reasons, para. 17, **AR, Vol. I, Tab 3, p. 18**

in policing and law enforcement confronting the RCMP over a three to five year horizon.[11]

16. Two SRRs also sit on the RCMP Pay Council (the Pay Council). Established in May 1996, the Pay Council "provides a modern and efficient alternative to the traditional collective bargaining model set out in the *Public Service Labour Relations Act.*" The Pay Council is comprised of the two SRRs, two representatives of management and an impartial chair. The Pay Council's recommendations are presented to the Commissioner and if they are accepted by the Commissioner and supported by the Minister of Public Safety, they form the basis of a Treasury Board submission. The Treasury Board has ultimate authority in the Government of Canada to establish pay and allowances for RCMP members.[12]

17. The appellant associations advised that for 2008, MPAO and BCMPPA together had 890 paid-up members.[13] As of April 2008, there were 20,922 RCMP members in Canada.[14]

i. Decisions of the Courts Below

(a) Ontario Superior Court of Justice

18. After reviewing the organization and status of the SRRP, Justice MacDonnell found that there was extensive collaboration between the SRRs and RCMP management:

> *I accept that the collaboration that occurs between the SRRs and management is extensive and that it is carried out in good faith by everyone involved.*[15]

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11 SCJ Reasons, para. 18, **AR, Vol. I, Tab 3, p. 8**

12 SCJ Reasons, para. 19, **AR, Vol. I, Tab 3, p. 18**; the second chair allocated to the SRRP on the Pay Council is presently occupied by an external consultant hired by SRRs

13 Answers on Written Examination for Discovery of Tony Cannavino, p. 3, Q.5, **RR, Vol. VI, Tab 19, p. 135**

14 Affidavit of Lisa Minarovich, Ex. A, (total on-strength 26, 292 – 5,370 public servants, equals 20,922) **RR, Vol. IV, Tab 12, pp. 54-55**

15 SCJ Reasons, para. 31, **AR, Vol. I, Tab 3, p. 22**

> *For the present purposes, I accept that RCMP management listens carefully and with an open mind to the views of the SRRs in the consultative process established by the SRRP. It may also be, as the respondent submits, that the SRRP and Pay Council processes have significantly advanced the working conditions of members of the RCMP.*[16]

19. The application judge acknowledged contrary evidence filed by the appellants asserting substantive failings in the SRRP system, but concluded that the issue in the application was not the substantive outcome achieved by the SRRP, but whether the nature of the SRRP process breached the members' *Charter* guarantee of freedom of association.[17]

20. The application judge concluded that the SRRP substantially interfered with freedom of association for two reasons: i) the SRRP is not an independent association formed or chosen by the members of the RCMP; and ii) the interaction between the SRRP and management cannot reasonably be described as a process of collective bargaining.[18]

21. On the issue of the independence of the SRRP, the application judge cited the dissenting judgment of Justices Iacobucci and Cory in *Delisle,* describing the SRRP as: "an employee advisory board created and ultimately controlled by RCMP management".[19] MacDonnell J. acknowledged that RCMP members gave strong support (except in Quebec) to the creation of the SRRP in 1974, but stated that there was no evidence that the members were given the choice of dealing with management through an independent association.[20]

22. On the issue of whether the SRRP provides a process of collective bargaining, the application judge concluded that the SRRPs' interaction with management was restricted to a process of consultation, notwithstanding his finding of extensive good faith collaboration between the two parties.[21] Though he found that the SRRP promotes

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16 SCJ Reasons, para. 68, **AR, Vol. I, Tab 3, pp. 29-30**
17 SCJ Reasons, para. 68, **AR, Vol. I, Tab 3, p. 30**
18 SCJ Reasons, para. 60, **AR, Vol. I, Tab 3, p. 28**
19 SCJ Reasons, para. 61, **AR, Vol. I, Tab 3, p. 28**; *Delisle v. Canada (Attorney General)*, [1999] 2 SCR 989; 1999 CarswellQue 2840 (S.C.C.) para. 103, Appellants' Authorities ("**AA**"), **Vol. I, Tab 7, p. 160**
20 SCJ Reasons, para. 63, **AR, Vol. I, Tab 3, p. 28**
21 SCJ Reasons, paras. 31, 68, **AR, Vol. I, Tab 3, pp. 22, 29-30**

"an active participatory regime", the application judge emphasized that final decisions rest with management.[22]

23. Applying the then binding jurisprudence of the Ontario Court of Appeal in *Fraser*, MacDonnell J. observed:

> *It would be unfair to liken the approach taken by the employers in Fraser, who barely listened to the representation of workers, to the approach of RCMP management in relation to the SRRP. I accept that unlike the employers in Fraser, RCMP management listens carefully and with an open mind to the views expressed by the SRRs. However, the fact remains that in relation to resolving differences of opinion with management, what members of the RCMP are able to do through the SRRP is not materially different from what the agricultural workers were able to do under the scheme held to be unconstitutional in Fraser.*[23] [Emphasis added]

24. MacDonnell J. concluded that the SRRP denies RCMP members freedom of association for the purpose of collectively bargaining in relation to workplace issues.[24] He further found that the RCMP members' inability to engage in a process of collective bargaining is not caused by their exclusion from the *PSLRA* under s. 2(1)(d) of that *Act*. That exclusion does not deny associational freedoms, but merely prevents RCMP members from being brought under a statutory scheme considered unsuitable for their situation. However he concluded that s. 96 of the *Regulation* does breach the *Charter* by entrenching "the SRRP as the sole entity through which members of the RCMP can collectively interact with management in relation to labour relations issues."[25]

25. MacDonnell J. determined that the *prima facie* breach of s. 2(d) of the *Charter* by s. 96 of the *Regulation* could not be justified under s. 1, given the following findings:

- The pressing and substantial purpose of the SRRP is: "a separate legislative and regulatory regime to maintain and enhance public confidence in the neutrality,

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22 SCJ Reasons, para. 31, **AR, Vol. I, Tab 3, p. 22**
23 SCJ Reasons, para. 73, **AR, Vol. I, Tab 3, p. 31**
24 SCJ Reasons, para. 75, **AR, Vol. I, Tab 3, p. 31**
25 SCJ Reasons, para. 77, **AR, Vol. I, Tab 3, p. 32**

stability and reliability of the RCMP by providing a police force that is independent and objective".[26]

- The creation of a separate labour relations regime, based on consultation and co-operation, and free of unionism and collective bargaining, is rationally connected to the goal of ensuring a stable, reliable and neutral police force.[27]

- The SRRP failed to meet the minimal impairment branch of the proportionality analysis. Citing the Court of Appeal judgment in *Fraser*, he concluded: "requiring employees to deal with management under a regime that has the hallmarks of collective bargaining but no actual collective bargaining is not a minimal impairment of the freedom to collectively bargain."[28]

(b) Ontario Court of Appeal

26. Following the decision of MacDonnell J., this Court overturned the appellate decision in *Fraser*, and determined the *Agricultural Employee Protection Act* (*AEPA*) to be constitutional. The AEPA is the same statutory scheme that MacDonnell J. found lacking compared to the SRRP. Following the change in jurisprudence, in this case the Ontario Court of Appeal applied this Court's decision in *Fraser* and unanimously overturned the application decision.

27. Juriansz J.A. writing for the court, defined two novel issues raised by the appeal: i) whether the right to collective bargaining under s. 2(d) guarantees workers the right to be represented by an association of their own choosing; and ii) whether collective bargaining under s. 2(d) requires that the vehicle for dealing with workers' collective concerns be structurally independent of management.[29] The appeal court also emphasized that the appellants were seeking positive measures to enable them to exercise their

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26 SCJ Reasons, paras. 82-83, **AR, Vol. I, Tab 3, pp. 32-33**
27 SCJ Reasons, para. 90, **AR, Vol. I, Tab 3, p. 34**
28 SCJ Reasons, paras. 99-100, **AR, Vol. I, Tab 3, p. 36**
29 Reasons for Decision of the Court of Appeal for Ontario, dated June 1, 2012, per Juriansz J.A. (OCA Decision), para. 2, **AR, Vol. I, Tab 16, p. 97**

freedom of association – "a positive obligation on the employer to recognize and 'collectively bargain' with them".[30]

28. The appellate court gave a detailed description of the "Wagner model" of labour relations, noting that it pervades judicial thought relating to labour relations, despite this Court's jurisprudence that s. 2(d) does not guarantee any particular labour relations model:

a. The Wagner model is named after New York Senator Robert F. Wagner, who sponsored the *National Labour Relations Act* (*NLRA*) enacted by the United States Congress in 1935. The *NLRA*, which is also known as the "*Wagner Act*", is the template for most legislated labour regimes in North America.

b. The Wagner model is a legislated labour regime of collective bargaining with several distinctive features. A single, exclusive bargaining agent is recognized for employees in a "bargaining unit" through a certification application to an independent labour board. To protect employees engaged in collective activities from employer interference or reprisal, employers are prohibited from using "unfair labour practices". Employers are required to recognize and bargain in good faith with the employees' bargaining agent, who in turn must bargain in good faith with the employer.

c. "Majoritarianism/exclusivity" is a fundamental principle of the Wagner model: the association supported by the majority of employees in the bargaining unit has the exclusive right to bargain on behalf of all employees in the unit. In a Wagner labour relations regime, an association that represents a minority of the employees, as much as 49 per cent of them, has no right to collectively bargain with the employer. Once a bargaining agent is certified by the relevant labour board, no other association of employees has any officially recognized status. An uncertified association has no right to bargain on behalf of workers, or so much as meet with employers to discuss the views of the workers they claim to represent. Even

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[30] OCA Decision, para. 112, **AR, Vol. I, Tab 16, p. 113**

individual employees cannot negotiate their own terms and conditions of employment but must deal with the employer through the certified union.

d. It is an important feature of the Wagner model that the employees' bargaining representative be structurally autonomous and independent of the employer.

e. While the Wagner model is widely acclaimed and credited with extending "freedom of association" and "collective bargaining" to approximately 30 per cent of the Canadian workforce, it is not without its detractors. Two academics write that the Wagner model is one of regulated and delimited adversarialism, and that it prohibits minority unions from representing their members in violation of international law.[31]

29. The appeal court interpreted this Court's majority decision in *Fraser* to provide that the constitutional right to "collective bargaining" protects only the right to make collective representations and to have those collective representations considered in good faith. This constitutionally protected "collective bargaining" is much narrower than the adversarial "collective bargaining" process between an institutionally independent union and an employer inherent in the Wagner model regimes.[32]

30. The appeal court quoted this Court's majority decision in *Fraser* that s. 2(d) protects a right to collective bargaining in a derivative sense. It is only when a law or government action makes it effectively impossible for employees to pursue collective goals that there is a positive obligation on a legislator to enact a meaningful process.[33] Thus, in *Fraser*, the question asked by the majority of this Court was: "did the process in the *Agricultural Employees Protection Act* make good faith resolution of workplace issues between employees and their employer *effectively impossible*".

31. The appeal court also rejected the appellants' argument that the constitutional right to a meaningful process accrues to every association created by employees. It observed that if this were so, the majoritarian/exclusivity provided in Wagner-based labour relations legislation would be *prima facie* unconstitutional. Minority unions under that adversarial

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31 OCA Decision, paras. 23-32, **AR, Vol. I, Tab 16, pp. 100-101**
32 OCA Decision, para. 119, **AR, Vol. I, Tab 16, p. 114**
33 OCA Decision, para. 92, **AR, Vol. I, Tab 16, pp. 110-111**

legislative scheme are denied any right of negotiation. "Had the Supreme Court intended to de-constitutionalize the predominant form of collective bargaining in Canada, it would have done so unambiguously".[34] Instead, the appellate court interpreted this Court's test to be: is it effectively impossible for all employees in a workplace to meaningfully exercise their guaranteed s. 2(d) freedom?[35]

32. The appeal court concluded that it was not effectively impossible for RCMP members to meaningfully exercise their fundamental freedom of association for three reasons:

a. The demonstrated ability of RCMP members to form voluntary associations sets them apart from relatively disempowered agricultural workers. Their exclusion from the Wagner-based *PSLRA* does not discourage them from associating in light of their relative status, their financial resources, and their access to constitutional protection.[36]

b. The SRRP was found by the application judge to provide extensive good faith collaboration between the elected member representatives (SRRs) and management. On this factual finding it is not impossible for RCMP members to associate to pursue collective goals.[37]

c. The Legal Fund is a not-for profit corporation under the *Canada Corporations Act*, R.S.C. 1970. C. C-32. It was established to help RCMP members with various employment related issues arising under RCMP policies and directives.[38] It illustrates the ability of RCMP members to form and maintain a robust association that complements and supports the SRRP, through the provision of independent legal advice on employment related issues.[39]

33. As a result of these three factors, the appeal court concluded that there is no obligation on the government to take positive action to facilitate the RCMP members'

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34 OCA Decision, paras. 115-118**, AR, Vol. I, Tab 16, p. 114**
35 OCA Decision, para. 120, **AR, Vol I, Tab 16, p. 114**
36 OCA Decision, paras. 123-126, **AR, Vol. I, Tab 16, pp. 114-115**
37 OCA Decision, paras. 128-131, **AR, Vol. I, Tab 16, p. 115**
38 OCA Decision, para. 12, **AR, Vol. I, Tab 16, p. 99**
39 OCA Decision, paras. 132-134, **AR, Vol. I, Tab 16, p. 116**

s. 2(d)-protected freedom, and the government does not need to recognize and "negotiate" with the appellants in order to make meaningful freedom of association possible for the approximately 890 members represented by these associations.[40]

34. The appellate court also rejected the appellants' cross-appeal that the exclusion of RCMP members from the *PSLRA* found in s. 2(1)(d) of that *Act* is a breach of freedom of association, saying:

> *As it is not effectively impossible for RCMP members to associate collectively to achieve workplace goals, there is no positive obligation on the government to include them in the labour regime set out in the PSLRA. Moreover, the Supreme Court has already addressed the constitutionality of the RCMP members' exclusion from the PSSRA, the predecessor to the PSLRA, in Delisle.*[41]

PART II – POINTS IN ISSUE

35. The Chief Justice has stated the following constitutional questions:

a. Does s. 96 of the *Royal Canadian Mounted Police Regulations,* 1988, SOR/88-361, infringe s. 2(d) of the *Canadian Charter of Rights and Freedoms*?

b. If so is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

c. Does paragraph (d) of the definition of "employee" at s. 2(1)(d) of the *Public Service Labour Relations Act,* S.C. 2003, c. 22 infringe s. 2(d) of the *Canadian Charter of Rights and Freedoms*?

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40 OCA Decision, paras. 135-136, **AR, Vol. I, Tab 16, p. 116**
41 OCA Decision, para. 142, **AR, Vol. I, Tab 16, p. 117**

d. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

36. The Attorney General of Canada submits that questions (a) and (c) should be answered no, and (b) and (d) should be answered yes. Neither the *Regulation,* nor s. 2(1)(d) of the PSLRA infringe s. 2(d) of the *Charter*, and if either is a *prima facie* breach of that freedom, the breach is justified under s. 1.

PART III – ARGUMENT

A. ISSUE 1: DOES THE *REGULATION* INFRINGE FREEDOM OF ASSOCIATION?

37. The SRRP provides a meaningful process in which the workplace goals of RCMP members are presented to management by their elected representatives, and are considered in good faith by the employer. This process satisfies the right provided by the *Charter's* guarantee of freedom of association. Though this Court's jurisprudence has called this right to a meaningful process "collective bargaining", it is different from the modern statutory sense of that phrase.

38. The SRRs are required to represent the interests of all RCMP members within the collaborative labour relations scheme. The *Charter* applies directly to management preventing any improper interference with the administration of the SRRP. Under this unitary process it is possible for RCMP members to act collectively to pursue workplace issues in a meaningful and therefore constitutional way.

i. Constitutional "Collective Bargaining" Requires Only a Meaningful Process

39. In *Health Services,* this Court found that freedom of association protects the ability of employees to engage, in association, in collective bargaining on fundamental workplace

issues. It was determined that the right to a process of collective bargaining means that employees have the right to unite, to present demands to the employer collectively and to engage in discussions in an attempt to achieve workplace-related goals.[42] The constitutionally protected collective bargaining right is limited. It does not guarantee access to any particular statutory regime. It does not require any particular model of labour relations, nor any specific bargaining method. It does not ensure any particular substantive or economic outcome.[43]

40. In *Fraser*, the majority decision of this Court clarified that the constitutional right to collective bargaining was very different from the complex statutory process of negotiation that is also described in the Wagner-based model as "collective bargaining". In the labour relations context, s. 2(d) guarantees only a meaningful process: "meaningful exercise of the right to free association in the workplace context requires good faith consideration of employee representations."[44] The constitutional right of workers is to "a process that allows employees to make representations and have them considered in good faith by employers, who in turn must engage in a process of meaningful discussion".[45] The majority decision reiterates that the constitutional right to a meaningful process does not guarantee a particular model of collective bargaining or a particular outcome.[46]

41. In this case, the appellants argue that the collaborative, non-adversarial SRRP is not a meaningful process of collective bargaining. Yet the structure of the process provides exactly what is described to be constitutional in *Fraser*. Both courts below found that the process allows RCMP members to communicate their workplace goals and issues through their elected representatives, the SRRs, to RCMP management, which listens to the representations in good faith.[47] Management provides the SRRs with its rationale for any

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42 *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27; 2007 CarswellBC 1289 (S.C.C.) paras 19, 88, **AA, Vol. II, Tab 11, pp. 21, 35**

43 *Health Services, ibid*, paras. 19, 91, **AA, Vol. II, Tab 11, pp. 21, 36**

44 *Fraser v. Ontario (Attorney General)*, 2011 SCC 20, 2011 CarswellOnt 2695 (S.C.C.), para. 106, para 42, **AA, Vol. I, Tab 10, pp. 335, 325**

45 *Ibid*, paras. 43, 54, 90, **AA, Vol. I, Tab 10, pp. 325, 327, 332**

46 *Ibid,* paras. 45-47, **AA, Vol. I, Tab 10, p. 326**

47 SCJ Reasons, para. 68, **AR, Vol. I, Tab 3, pp. 29-30**

major decision.[48] The ability of the SRRs to represent the interests of RCMP members is demonstrated by their involvement in cases such as *Meredith*[49] and *Gorman.*[50] The provided process is meaningful, and the test for constitutionality is met: it is possible "for workers to act collectively to pursue workplace issues in a meaningful way."[51]

42. The appellants argue that the Pay Council demonstrates how the SRRP fails to provide the constitutional right to a meaningful process. They state: "SRRs may be kept informed of issues, attend management meetings and be permitted to consult, as claimed, but the SRRP operating at its best allows only for a process of consultation, not a process of negotiation."[52] However, that consultation, combined with the implied duty of good faith consideration by management is exactly what the majority in *Fraser* found to be constitutionally required by s. 2(d).[53]

ii. <u>The SRRP Provides Meaningful Representation of Members' Interests</u>

43. A government employer can choose a collaborative model of labour relations that ensures representation of employee interests free of any improper management interference. The SRRP does so by:

a. Providing for the election of member representatives freely chosen by RCMP members every two to three years;[54]

b. Requiring those representatives to represent the interests of all members;[55]

c. Giving the SRRP autonomy over its budget and structure, and encouraging regular review and improvement of its processes;[56]

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48 See para. 13 above
49 *AG of Canada v. Meredith and Roach*, 2013, FCA 112, para. 14, **RA, Tab 1, pp. 6-7**
50 *Gorman v. AG of Canada*, Court File Number T-1876-12 (Federal Court), para. 5, **RA, Tab 7, p. 83**
51 *Fraser, supra,* para. 98, **AA, Vol. I, Tab 10, pp. 333-334**
52 Appellants' factum, para. 77
53 The Pay Council is described at paragraph 16 above
54 Legge Affidavit, **AR, Vol. XI, Tab 67, para. 35, p. 398**
55 Legge Affidavit, Ex. G, RCMP SRRP Constitution, Clause 1, **RR, Vol. I, Tab 3, p. 208**

d. Providing a process for removal of SRRs by a vote of non-confidence by the other SRRs;[57] and

e. The knowledge that the *Charter* prevents RCMP management from improperly interfering with the administration of the SRRP.

44. This Court's decision in *Fraser* makes clear that the procedural right guaranteed in s. 2(d) does not have to follow any particular labour relations model or bargaining method. The question of whether there is a violation of s. 2(d) is not determined based on a set of abstract preconditions. Instead, a court must make a contextual and fact-based assessment of the particular workplace to determine first if workers are able to associate, and then whether they have access to a meaningful process that allows representations concerning their collective workplace interests to be considered in good faith.

45. The *Regulation* provides that "the Force shall have a Division Staff Relations Representation Program to provide for the representation of all members", and the SRRs "shall" carry out the SRRP. Further, the SRRs' constitution provides that the duties of the SRRs include providing information, guidance and support to RCMP members and representing RCMP members' interests in negotiations with the management of the RCMP.[58]

46. The *Charter's* direct application to the government under s. 32 is an essential contextual factor in this case. The government employer cannot exert improper influence on SRRs without being in breach of its *Charter* obligations. Any such theoretical behaviour could be remedied by the courts.

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56 Legge Affidavit, paras. 10, 13, 15, 16, 19-21, 23, **AR, Vol. XI, Tab 67**, **pp. 389, 391-392**, Ex. E, Challenge 2000 Report, p. 21, "Establishment of Business Case in Support of a Program Review", **RR, Vol. I, Tab 3, p. 71**; Ex. F, Agreement between the Commissioner of the RCMP and the SRRP, October 28, 2002, clause 12, **RR, Vol. I, Tab 3, p. 186**

57 Legge Affidavit, Ex. H, Policy re: SRR Program, Part XVI of the RCMP Administration Manual, clause 1.1, (Removal from office: "by unanimous vote of the subrepres. in a div, zone or designated area unanimously declare by secret ballot their non confidence in an SRR") **RR, Vol. II, p. 12**

58 OCA Decision, para. 16, **AR, Vol. 1, Tab 16, p. 99**; see also paras. 11-13 above

47. Thus the structure of the SRRP and the government's *Charter* obligation not to improperly interfere in its administration mean that the SRRs are able to fairly represent RCMP members' interests to management.

48. The appellants' argue that only an institutionally independent association can provide an employee's s. 2(d) right to a meaningful process. This ignores this Court's jurisprudence and assumes that the *Charter* freedom constitutionalizes the Wagner-based model.

49. This Court has recognized that a Wagner-based model of labour relations may require an institutionally independent employee association to engage in the highly regulated process of negotiation provided for by that model.[59] That labour relations process is premised on conflict. It normally works best if employees are represented by an independent association.

50. The Ontario Court of Appeal properly observed that the prevalence of Wagner-based labour relations models in North America creates underlying assumptions about labour relations that are based on our experience with that modern statutory scheme. This is particularly so with the Wagner-model's requirement of institutional independence. In her dissent in *Fraser*, Justice Abella describes how the "company union" was used in pre-1944 labour relations to undercut the credibility of independent unions at the bargaining table, thereby defeating the interests of employees.[60] Similarly, in *Delisle*, Justice Bastarache is very clear that it is "under the trade union certification system" that there is an obvious need for independence from management.[61] The need for such independence relates to collective bargaining to achieve collective agreements - benchmarks of the Wagner-model of labour relations.

51. However, in the context of a government employer, a constitutionally sound process does not require either an institutionally independent association, or a conflict-based system of negotiation. Instead, representatives freely chosen by employees can fairly represent their

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59 *Delisle, supra,* para. 37, **AA, Vol. I, Tab 7, p. 143**
60 *Fraser*, *supra,* paras. 346-347, **RA, Tab 3, p. 69**
61 *Delisle*, *supra*, para. 37, **AA, Vol. I, Tab 7, p. 143**

interests to an employer that considers those representations in good faith in a meaningful collaborative system. The SRRP provides this process, and was found by the application judge to work.

52. Institutional independence is only one of several means to the necessary end that employees have a right to an associational process which ensures that their interests are communicated to, and are considered by the employer in good faith.

iii. Only One Meaningful Process is Required by Freedom of Association

53. The appellants argue that any "employee organization chosen by employees for the purpose of collective bargaining with the employer is presumptively entitled to bargain for its members."[62] They argue that this is part of the constitutional right to collective bargaining, and is a fundamental aspect of democracy.[63]

54. The appellate court below properly found that this proposition could not be true without making presumptively unconstitutional the majoritarianism/exclusivity of the prevalent Wagner-based model of labour relations. Under that model, the state (either through legislation or through the decree of a labour relations board, an emanation of the executive branch of government) designates a unit of employees that is appropriate for collective bargaining. A bargaining agent becomes the exclusive representative of all employees in the unit when it demonstrates the requisite degree of majority support in that unit (whether through evidence of membership cards or a vote of employees) – or, in some jurisdictions, when an employer voluntarily recognizes the union. All other minority unions are then excluded from any negotiation with management. This, despite the possible wishes of the minority union members that their chosen association conduct negotiations on their behalf. Employees do not have any choice about whether or not they

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62 Appellants' factum, para. 66
63 Appellants' factum, para. 59

are represented. Instead, the certified bargaining agent under the Wagner-based scheme is under a statutory duty to fairly represent all workers in the bargaining unit.[64]

55. The Ontario Court of Appeal was correct to conclude that this Court's decision in *Health Services* could not have intended to presumptively de-constitutionalize the Wagner-based model of labour relations by giving "collective bargaining" rights to every association chosen by employees, whatever the size, and however appropriate for bargaining. Each worker is free to choose to associate as they see fit, but in the labour context the derivative right is to a single meaningful process in which the collective representations of all workers are considered by management in good faith.

56. The SRRP provides RCMP members with a great deal of choice. Every two or three years RCMP members directly elect their representative SRRs. Those SRRs decide how they will carry out their obligations to represent the members who elected them. The SRRP manages its own budget.[65] It makes continual efforts to ensure that it is effective and relevant in its work. Most notably in 2000, it implemented changes to increase its self-governance and autonomy, and improved the consultative process with management.[66] Further, all but the Quebec RCMP members freely chose the SRRP in 1974, even if that choice did not include a Wagner-based model, to which they had no presumptive right.

57. While the SRRP provides much employee choice, choice of association does not impact the meaningfulness of the process in either the SRRP or the Wagner-based model.

58. Employees who are not members of the majority union under Wagner-based schemes, and the appellants under the SRRP are nevertheless able to consolidate and communicate their members' workplace goals to their representatives. The duty of fair representation in both schemes allows the labour relations purpose of those associations to be achieved.

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64 See paragraph 28 above, see also R. Basu, *Revolution and Aftermath*, pp. 178-181, **RA, Tab 9, pp. 134-137**

65 Legge affidavit, para. 19, **AR, Vol. XI, Tab 68, p. 393**

66 *Ibid*, paras. 10, 11, **AR, Vol. XI, pp. 389-390**

iv. Collective Bargaining as a Derivative Right

59. The applicable test in this case is whether the effect of the *Regulation* (and the exclusion of RCMP members from the *PSLRA*) makes it effectively impossible for RCMP members to act collectively to pursue workplace goals. In a workplace setting, such an effect is a breach of freedom of association.[67]

60. Citing *Criminal Lawyers Association* (*CLA*), the majority in *Fraser* further states: "it is in this derivative sense that s. 2(d) protects a right to collective bargaining".[68] In *CLA*, the right to access government information (under the s. 2(b) freedom of expression) was held to be "a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government."[69]

61. This Court's analogy can be interpreted generally, or by specifically applying the *CLA* use of the phrase "derivative right". The general interpretation is that the "meaningful process" right derives from the exercise of free association in the workplace context. All workers have a right to a meaningful process within their guaranteed freedom of association, because without such a process their acting in association becomes pointless.

62. Under the specific application of the *CLA*, the constitutional right to a meaningful process (collective bargaining as defined by this Court) does not exist as part of freedom of association in a workplace setting, unless it becomes effectively impossible for the workers to act collectively to achieve workplace goals without it.

63. The Ontario Court of Appeal applied the specific interpretation of "derivative right" in this case. Regardless of which interpretation is correct, the conclusions of the appellate court support a finding of no violation in this case.

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67 *Fraser, supra,* para. 46, **AA, Vol. I, Tab 10, p. 326**
68 *Ibid*, para. 66, **AA, Vol. I, Tab 10, p. 329**
69 *Criminal Lawyers' Assn v. Ontario,* 2010 SCC 23, 2010 CarswellOnt 3964 (S.C.C.), para. 30, **AA, Vol. I, Tab 4, p. 73**

64. First, the appellate court accepted as accurate the factual conclusion of the application judge that: "RCMP management listens carefully and with an open mind to the views of the SRRs in the consultative process established by the SRRP."[70] From this the Court then properly concludes that "it is not impossible for the RCMP members to associate to achieve collective goals".[71] However, this is a finding that the *Regulation* has provided RCMP members with a meaningful process, not that such a process is unnecessary.

65. Second, after concluding that RCMP members have no derivative right to "collective bargaining" (because the process mandated by the *Regulation* allows them to associate to achieve collective goals) the appellate court then concludes that "there is no constitutional obligation on the government to take positive action to facilitate the exercise of the RCMP members' s. 2(d)-protected freedom".[72] However, in this case the government had already chosen to take positive action by enacting the *Regulation.* Therefore, on the facts of this case, it is the *Regulation* that provides the single meaningful process.

v. In the Alternative, *Health Services* Should be Overruled

66. For the foregoing reasons, this appeal should be dismissed based on an application of this Court's jurisprudence to the specific facts and context of this matter.

67. However, the appellants ask this Court to interpret its decisions in *Health Services* and *Fraser* to impose a constitutional requirement on the government to engage in a meaningful process with every association created by employees. Such an interpretation would render the *PSLRA* and every Wagner-based labour relations statute presumptively unconstitutional, along with s. 96 of the *Regulation*.

68. The only basis for this proposition appears to be the following quote from the majority decision in *Fraser*:

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70 OCA Decision, para. 130, **AR, Vol. I, Tab 16, p. 115**
71 OCA Decision, para.131, **AR, Vol. I, Tab 16, p. 115**
72 *Ibid,* para.135, **AR, Vol. I, Tab 16, p. 116**

> *As discussed above, the right of an employee's association to make representations to the employer and have its views considered in good faith is a derivative right under s. 2(d) of the Charter, necessary to meaningful exercise of the right to free association.*[73]

69. To the extent that this quote implies that the right to collective bargaining derives from the core of freedom of association – that is, the ability to form and join employee associations – it cannot be right in light of traditional labour relations in Canada. Wagner-based legislation does not confer a right of collective bargaining on every association chosen by employees in a workplace. Instead, as mentioned above, the statutory right to 'collective bargaining' attaches not to a freely formed association of employees, but to a grouping of employees designated either by a statute or by decree of a state agent, namely a labour relations board. The determination of whether a grouping of employees is appropriate for collective bargaining is based on labour relations policy considerations that include but are not limited to employee preference.[74] Indeed, as mentioned above, freely formed associations of subclasses of employees in the bargaining unit are prohibited from negotiating with the employer under the Wagner-based system. Absent a finding that Wagner-based legislation is presumptively unconstitutional, collective bargaining cannot be a derivation of the core freedom to form and join workers' associations.

70. The appellants propose an unsatisfactory means to square this circle by suggesting that in the absence of legislation imposing majoritarian exclusivity, freely formed associations of workers should "be recognized" by the employer for the purpose of collective bargaining. Aside from being inconsistent with the majority finding in *Fraser* that majoritarian exclusivity is not part of the s. 2(d) protection, this novel approach would provide differently defined constitutional freedoms – one for those who are subject to such legislation and one for those who are not. On this view, *legislative* infringement of the

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73 *Fraser, supra,* para. 99, **AA, Vol. I, Tab 10, p. 334**

74 R. Basu, *Revolution and Aftermath*, pp. 178-181, **RA, Tab 9, pp. 134-137**; *Confédération des Syndicats Nationaux c. Québec (Procureur général)*, 2011 CarswellQue 15782, (Q.C.C.A) paras. 90-94, **RA, Tab 2, pp. 46-47**

ability of a freely formed association to collectively bargain would, curiously, become constitutional rather than unconstitutional.

71. If this Court's majority decision in *Fraser* is now interpreted to make unconstitutional these unitary processes, such as the SRRP and *PSLRA,* imposing on governments the constitutional obligation to undertake a process of collective bargaining with every association that employees chose to join, then the Attorney General submits in the alternative that this Court should overturn its decision in *Health Services.* Consistency, coherence and predictability in the law are best achieved by a step back rather than a further expansion of what is encompassed by freedom of association.

72. This debate was fully joined between the majority judgment in *Fraser* and the concurring judgment of Justices Rothstein and Charron. That concurring judgment, while agreeing in the result found by the majority, urged reconsideration of *Health Services* conferral of constitutional status on collective bargaining.

73. The concurring judgment pointed to five reasons that the decision in *Health Services* erred in concluding that collective bargaining, including an obligation on employers to bargain in good faith, is protected by s. 2(d):

a. First, the decision in *Health Services* was premised on the recognition of rights of the group separate and apart from the rights of the individuals making up the group. As such, the decision departed from previous jurisprudence which consistently pointed to the purpose of s. 2(d) as the protection of individual rights rather than the protection of group rights. As a result, *Health Services* erred in further enhancing the objects and goals of associations rather than an individual's freedom to associate.[75]

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[75] *Fraser, supra,* paras. 144, 152-156, 159, 178-180, **RA, Tab 3, pp. 49, 51-52, 53, 54-55**

b. Second, by imposing a duty on employers to bargain in good faith, *Health Services* imposed obligations on third parties, thereby transforming the freedom protected in s. 2(d) into a positive right.[76]

c. Third, in conducting a purposive interpretation of s. 2(d), rather than focusing on the purpose behind the protection of freedom of association, the Court in *Health Services* focused on the purpose of the activity undertaken by the group accessing the freedom. In doing so the Court erred in assessing the relative value of a given association and thereby privileging certain associations over others.[77]

d. Fourth, contrary to the pronouncements of this Court that freedom of association does not protect any particular outcome in labour negotiations, the Court in *Health Services* erred by in fact protecting the outcome of collective bargaining in addition to the process. In doing so, the Court elevated collective agreements above statutes.[78]

e. Fifth, although traditionally this Court has afforded deference to the legislative branch in the field of labour relations, the Court in *Health Services* justified a lesser degree of deference on the basis that a right to collective bargaining was a pre-statutory feature of Canadian labour law, and is supported by Canada's international law obligations. However, a duty to bargain in good faith arose primarily out of Wagner-model legislation. Prior to the introduction of the *Wagner Act* in the United States, the duty to bargain in good faith was not a fundamental precept of collective bargaining, nor is it a necessary component of labour relations regimes in many parts of the world. Furthermore, in as far as international conventions support a right to collective bargaining, they conceive of collective bargaining as a voluntary negotiation and not an imposition of a duty to bargain in good faith.[79]

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76 *Fraser, supra,* paras. 188-190, **RA, Tab 3, p. 56**
77 *Fraser, supra,* paras. 203-215, **RA, Tab 3, pp. 57-60**
78 *Fraser, supra,* paras. 216-218, **RA, Tab 3, pp. 60-61**
79 *Fraser, supra,* paras. 219-221, 226-229, 234-244, 247-250, **RA, Tab 3, pp. 61, 62-63, 64-66, 67-68**

74. In addition to these five points, the concurring judgment also pointed out that a constitutional requirement to provide a process to each and every association created would be entirely unworkable, and enactment of any unitary process would then have to be justified under s. 1 of the *Charter*.[80]

75. If *Fraser* must be interpreted to provide that a unitary process is unconstitutional it would support the last concern noted by the concurring judgment in *Fraser*. It would also illustrate how unworkable s. 2(d) of the *Charter* becomes when the objectives of associations rather than associations themselves receive constitutional protection. When seen in that light, the concurring judgment provides a compelling basis for overturning the decision in *Health Services* that freedom of association includes a right to "collective bargaining".

B. ISSUE 3: THE EXCLUSION OF RCMP MEMBERS FROM THE *PSLRA* DOES NOT VIOLATE FREEDOM OF ASSOCIATION

76. The fact that RCMP members are excluded from the definition of "employee" for the purposes of the *PSLRA*, and therefore are not included in that Wagner-based model of labour relations, does not violate freedom of association. As there is only a right to a meaningful process to pursue workplace goals, and not a right to any particular labour relations model, there can be no right to be included in this particular legislative regime.

77. This Court's previous finding that the purpose of the exclusion of RCMP members from the *PSLRA* does not violate the freedom of association is not altered by the recognition of a right to a meaningful process to pursue workplace goals.

78. Furthermore, RCMP members are not facing the type of exceptional circumstances which can found a claim to a positive right to a protective legislative regime. Nevertheless, in 1989, a legislative labour relations scheme was provided in the *Regulation* and even if this Court should find the SRRP deficient in some way, Parliament or the Executive

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80 *Fraser*, *supra*, para.145, **RA, Tab 3, p. 50**

branch of government has to choose what solution provides the constitutional right to a meaningful process.

i. The purpose of excluding RCMP members from the *PSLRA* does not violate freedom of association

79. In *Delisle,* this Court found the purpose of the exclusion of RCMP members from the *Public Service Staff Relations Act* (*PSSRA*) to be "simply to not grant them any status under the *PSSRA* – trade union representation and all it entails".[81] This Court then went on to find that such a purpose does not violate the freedom of association. As the appellants acknowledge,[82] the exclusion under the *PSSRA* was virtually identical to the exclusion under the *PSLRA* which they challenge.

80. The fact that since *Delisle,* this Court has recognised a right derivative to the freedom to associate – a right to a meaningful process to pursue workplace goals – does not impact this Court's prior determination of the purpose of the challenged legislation. The purpose of legislation is determined by the meaning of the provision itself, in its legislative context,[83] and the legislative context of the *PSLRA* is the same as the legislative context of the *PSSRA* in *Delisle.*

81. As this Court pointed out in *Delisle,* the meaning of the definition of "employee" in the *PSSRA* (and in the *PSLRA*) could not be any clearer.[84] Both statutes are intended to "govern labour relations in the public sector under a regime of collective bargaining and trade union representation of workers".[85] Parliament intended to exclude RCMP members from the 250-plus provisions of this complex adversarial Wagner-based model of labour relations. At the time of the *Delisle* decision, the SRRP had been created by *Regulation*. This is one tool available to the government employer to satisfy the derivative right to a meaningful process that this Court recognized in *Health Services* and *Fraser*.

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81 *Delisle, supra,* para. 22, **AA, Vol. I, Tab 7, p. 139**
82 Appellants' factum, para. 104
83 *Delisle, supra,* paras.16-20, **AA, Vol. I, Tab 7, pp. 137-138**
84 *Delisle, supra,* para.16, **AA, Vol. I, Tab 7, pp. 137-138**
85 *Ibid,* para. 20, **AA, Vol. I, Tab 7, pp. 138-139**

82. There is no basis on which this Court need revisit its finding that Parliament's purpose in excluding RCMP members from legislation which governs labour relations for the majority of federal employees does not violate freedom of association.

ii. RCMP Members do not have a Right to Protective Labour Relations Legislation

83. The appellants are not entitled to a protective legislative labour relations regime, as they do not meet the three criteria set out in *Dunmore*.

(a) RCMP Members do not have a Right to Protective Labour Relations Legislation

84. Contrary to their submissions, the appellants seek a specific labour relations scheme rather than a fundamental *Charter* guarantee. This is reflected by the fact that they do not simply seek to challenge the SRRP, but go further and seek inclusion in the Wagner-based *PSLRA*. This is the specific labour relations scheme they seek.

85. Absent the collaborative SRRP, which in any event provides for all constitutionally protected aspects of collective bargaining, the associational rights of the appellants would still be protected by direct application of the *Charter* to their government employer. In light of this, to request access to a complex legislative scheme, which provides much more than constitutionally protected rights, is to seek access to a particular labour relations regime and not to a fundamental *Charter* guarantee.

(b) Exclusion from the PSLRA does not Substantially Interfere with Freedom of Association

86. As pointed out by this Court in *Dunmore,* the appellants do not suffer any of the impediments experienced by seasonal farm workers attempting to join labour associations. The appellants are educated, empowered, and organised. Furthermore, the appellants are provided with a meaningful process allowing them to pursue their workplace goals. This Court was very clear in *Health Services* and *Fraser* that a

meaningful process does not require the Wagner-based system which the appellants seek.[86]

87. The appellants have proven their ability to successfully create a number of employee associations and as government employees the *Charter* is directly applicable to their relationship with their employer. As a result, even in the absence of the SRRP, exclusion from the *PSLRA* does not itself interfere with their freedom to associate in any significant way.

88. Furthermore, as the application judge found, it is not RCMP members' exclusion from the *PSLRA* which causes their inability to collectively bargain in the manner that they seek. That exclusion simply prevents RCMP members from access to a particular labour relations scheme.

(c) Exclusion from the PSLRA does not orchestrate, encourage or sustain a violation of freedom of association

89. Given that exclusion from the *PSLRA* does not substantially interfere with the appellants' freedom of association, this third criterion is not met. The appellants' complaints focus on direct government action which, even in the absence of a protective legislative scheme, could be addressed through the direct application of the *Charter*. Access to the *PSLRA* would not provide any additional protection in relation to those rights which are enshrined in the *Charter*.

90. Despite the fact that RCMP members do not face the kind of exceptional circumstances which can create a right to a protective labour relations scheme, Canada has chosen to provide such a scheme in the form of the SRRP. If this process is found not to allow meaningful pursuit of workplace goals, it is for Parliament or the Executive to provide the remedy. This does not mean that Parliament must act positively to provide inclusion in the Wagner-based *PSLRA*.

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[86] See paras. 39-40 above

C. ISSUES 2, 4: SHOULD THE COURT FIND THAT THE PROVISIONS INFRINGE THE *CHARTER*, THIS CAN BE JUSTIFIED UNDER SECTION 1

i. Any breach by the *Regulation* or s.2(1)d *PSLRA* is justified under s.1

91. Should the SRRP scheme violate s. 2(d), it is an infringement that can be justified under s. 1 of the *Charter*.

(a) Pressing and Substantial Objective

92. RCMP members were excluded from the *PSLRA*, and were provided with the SRRP in order to maintain and enhance public confidence in the neutrality, stability and reliability of the RCMP by providing a police force that is independent and objective. This pressing and substantial purpose was accepted by the application judge. MacDonnell J. noted that the appellants "conceded [this objective], and did not "seriously dispute" its pressing and substantial nature".[87]

93. The first stage of the s. 1 analysis is not an evidentiary contest: "(T)he proper question at this stage of the analysis is whether the Attorney General *has asserted* a pressing and substantial objective."[88] In *Harper*, Chief Justice McLachlin and Justice Major note that a "theoretical objective asserted as pressing and substantial is sufficient for purposes of the s.1 justification analysis".[89]

(b) The Distinction is Rationally Connected to the Purpose

94. The application judge further determined that "the creation of a separate labour relations regime, based on consultation and co-operation, and free of unionism and [*Wagner Act*] collective bargaining, is rationally connected to the goal of ensuring a reliable and neutral

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87 SCJ Reasons, para. 83, **AR**, **Vol. I, Tab 3, p. 33**

88 *Harper v. Canada (Attorney General),* 2004 SCC 33, 2004 CarswellAlta 646, (S.C.C.), para. 25, **RA, Tab 4, p. 72**

89 *Ibid,* para. 26, **RA, Tab 4, p. 72**; *R. v. Bryan*, 2007 SCC 12, 2007 CarswellBC 533(S.C.C.), para. 32, **RA, Tab 6, p. 80**

national police force. That is, it "may promote… the objective sought", and "it [is] possible to argue that the means may help to bring about the objective…"[90]

95. The *PSLRA* provides a traditional labour relations scheme where an institutionally "independent" association represents employees for the purpose of collective bargaining. Tactics such as work stoppages are utilized to impose costs of disagreement on the parties. The scheme is inherently adversarial, and may exacerbate differences between the interests of management and employees. This in turn may erode employee-employer trust and make cooperative approaches and solutions to workplace issues impossible.[91]

96. In policing, a high level of employee-management trust and alignment of interests are vital to the effective delivery of police services to the citizenry. This is particularly so given the real possibility of circumstances where the RCMP could be the only provider of a particular police service in a specific area or region of the country. In such circumstances, the possibility of a strike or other form of conflict imposes disproportionate direct costs on the citizenry.[92]

97. The rationale that the exclusion of the RCMP from Wagner type collective bargaining provides stability is not theoretical, but is borne out by experience. The RCMP has never been subject to labour action by its members, nor experienced the withdrawal of police services or militancy often associated with unionized police forces. Nor have they been subject to work to rule or job actions such as utilized in recent years by the unionized municipal forces of Hamilton and Toronto, tactics familiar to the associations.[93]

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90 SCJ Reasons, para. 90, **AR, Vol. I, Tab 3, p. 34**

91 Affidavit of Richard Chaykowski, *(*Chaykowski Affidavit*),* Ex. B, p. 25, **AR, Vol. XI, Tab 67B, p. 3529**

92 Chaykowski Affidavit, *supra,* Ex. B, p. 26, **AR, Vol. XI, Tab 67B, p. 3530**

93 Transcript of the Cross-examination of Patrick Mehain, President of the BCMPA, Secretary of the Mounted Police Professional Association of Canada, May 1, 2008, p. 27, lines 1-12**, RR, Vol. IV, Tab 10, p. 2**; Transcript of the Cross-examination of Roland Woods, May 2, 2008, p. 32, lines 3-20**, RR, Vol. VI, Tab 18, p. 131;** Transcript of the Cross-examination of Royce Mills (Mills Transcript) p. 13, lines 13-25, p. 14 lines 1-22, **RR, Vol. V, Tab 15, pp. 113-114**; Ex. 1 to Mills Transcript, Ottawa Citizen article, "Toronto Police march in labour dispute", Thursday, November 3, 2005, **RR, Vol. V, Tab 15, p. 115**

98. These job actions occur notwithstanding the fact that every police collective bargaining statutory regime in Canada, except Saskatchewan, does not permit strikes. In fact, Ontario associations admitted they would possibly use the work to rule tactic in negotiations.[94]

99. A further concern is that members could experience a perceived conflict between their legal obligations and duties under provincial policing acts, the performance of the common law duties of police, and their loyalty or obligations to their union. This concern is dismissed by the appellants as being outdated, but has occurred with municipal police officers and Sûreté du Québec police officers who, in the past, have engaged in illegal strikes.[95] Moreover, while the MPAO and the BCMPPA state they do not want to have the right to strike, the Québec Association has been notably silent on this issue.

100. In any case, regardless of the association members' statements regarding not seeking the right to strike, RCMP members would have the right to strike if they became bound by the provisions of the *PSLRA*, subject only to any essential services agreement being reached.

101. Further, as police unions become involved in public controversy, like those in which the associations have participated, these activities challenge the public's conception of the neutrality of the police force.[96] This can contribute to deterioration in public confidence and respect and cause a consequent decline in the quality of police-community relations and cooperation.

102. It is members of the Canadian public whose individual security could be vulnerable if, because of job action, they were not able to rely upon the national police force in the face

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94 Lynk Affidavit, **AR, Vol. IX, Tab 66**, Ex. E, p. 6351; Ex. 1 to Mehain Transcript, "Service Star", Fall-Winter 2007, p. 15**, RR, Vol. IV, Tab 10, p. 17**; Transcript of the Cross-examination of Royce Mills (Mills Transcript), p. 13, lines 13-25, p. 14, lines 1-22**, RR, Vol. V, Tab 15, pp. 113-114**; Ex. 1 to Mills Transcript, Ottawa Citizen article, "Toronto Police march in labour dispute", Thursday, November 3, 2005, **RR, Vol. V, Tab 15, p. 115**

95 Chaykowski Affidavit, *supra,* Ex. B, p. 19, **AR, Vol. XI, p. 3517;** Lynk Affidavit, Ex. E, **AR, Vol. IX, Tab 66, p. 6355**

96 Affidavit of Daniel Petre, paras. 4, 5, **AR, Vol. IV, Tab 33, p. 33**

of national security incidents or emergency situations. This is why international conventions to which Canada is a signatory exempt police forces from their provisions.[97]

103. Convention 87, "Freedom of Association and Protection of the Right to Organise Convention, 1948", expressly exempts police and armed forces from provisions governing collective bargaining, leaving that policy choice to be made by domestic legislatures. Article 9 of this Convention states:

> *The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.*[98]

104. As was the case in *Harper*, logic and reason, combined with available evidence[99] establish that the exclusion of the RCMP members from s. 2 of the *PSLRA* and the provision of an alternate labour relations scheme is rationally connected to the goal of providing a neutral, stable and reliable national police force that maintains the public confidence.

(c) Minimal Impairment

105. The RCMP system of labour relations is minimally impairing. It provides a meaningful process of collective bargaining through the Pay Council, and the SRRP. The current RCMP model of labour-management relations is a viable and effective alternative mechanism for the determination of wages and benefits, for improving working conditions, and for providing industrial justice.[100]

106. Moreover, this system has continually improved over time. At the time of *Delisle,* the SRRP was not formalized through a separate constitution or agreement with management.

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97 "*ILO Convention 87*, Freedom of Association and Protection of the Right to Organise Convention 1948, Article 9" **AA, Vol. III, Tab 25, p. 293**

98 *Ibid***,** also more generally on the applicability of these Conventions to Canadian domestic law, see Langille, Brian A. and Oliphant, Benjamin J., *From the Frying Pan to the Fire: Fraser and the Shift from International Law to International "Thought" in Charter Cases,* **RA, Tab 8**

99 *Harper, supra,* paras. 79, 104, 106, **RA, Tab 4, pp. 73-75**

100 Chaykowski Affidavit, *supra,* Ex. B, p. 46, **AR, Vol. XI, Tab 67B, p. 3550**

Today, the SRRP has its own constitution and has concluded an agreement with management. The RCMP has also taken considerable strides in recent years to make the RCMP's system of industrial justice more efficient and effective.[101]

107. The Brown Task Force report concluded in December 2007, that the SRRP was the proper vehicle for conducting labour relations at the RCMP. It reached this conclusion after a comprehensive 5-month investigation and consultation process, where it heard submissions from thousands of interested parties across the country, the majority of who want the SRRP.[102]

108. Even in cases where the courts may conceive an alternative which might better tailor the objective to the infringement, the respondent need only demonstrate that the challenged measures fall within a range of reasonable alternatives.[103]

109. This Court recognizes that "minimally impairing" legislation does not have to duplicate the legislative choices of Provinces on the same subject matter. To the contrary, this Court acknowledges that different legislative responses are part of the "Canadian constitutional experience":

> *In general, differences between legislative approaches to similar problems are part of the very fabric of the Canadian constitutional experience. Provincial differences must be factored into any proper analysis of the concept of minimal impairment, when assessing the validity of provincial legislation. Our Court in the Quebec Secession Reference (Reference re Secession of Quebec, [1998] 2 S.C.R. 217, at paras. 55-60), acknowledged again the foundational nature of the principle of federalism in Canada. In a system of divided legislative authority, where the members of the federation differ in their cultural and historical experiences, the principle of federalism means that the application of the Charter in fields of provincial jurisdiction does not*

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101 Affidavit of Louise Morel, paras.18, 19, 21, 23, pp. 7-9, **RR, Vol. I, Tab 2, pp. 8-10**

102 Affidavit of Tony Cannavino, Ex. F, "Report on the Task Force on Governance and Cultural Change in the RCMP" (Brown Task Force Report) - purpose was to examine governance and cultural change at the RCMP **pp. x, 33, AR, Vol. VII, Tab F, pp. 5423, 5458**

103 *RJR-MacDonald Inc. v. Canada (Attorney General),* 1995 CarswellQue 119 (S.C.C.), para. 160, **AA, Vol. III, Tab 20, p. 10**

> *amount to a call for legislative uniformity. It expresses shared values, which may be achieved differently, in different settings.*[104]

110. Based on the foregoing, the SRRP is clearly within the "range of reasonable alternatives", described by this Court in *RJR Macdonald.*[105] Any impairment of the members s. 2(d) rights is minimal.

111. The application judge had difficulty deciding whether the SRRP was minimally impairing.[106] He ultimately decided that it was not, because: a) he did not believe that the RCMP's wider jurisdiction and status as Canada's national police force, distinguished it from other police forces; and b) the SRRP provided no process of collective bargaining as he understood that phrase.

112. The RCMP's wider jurisdiction is qualitatively different from other police forces in Canada because in the event of an unlawful strike or other debilitating job action by those police forces, or other security-related workers such as prison guards, it could ultimately be left to the RCMP to provide policing services to the public affected by those events.[107]

113. As to collective bargaining, even if the SRRP falls short of this Court's subsequent clarification of what constitutes the constitutional right of collective bargaining, what is provided by the SRRP means any impairment of the right is minimal.

(d) Proportionality between deleterious and salutary effects

114. The salutary effects of the SRRP far outweigh any deleterious effects.

115. The SRRP prevents job action, such as work to rule, that affects the delivery of service in many ways. For example members on a work to rule campaign could suffer "blue flu"

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104 *R. v. Advance Cutting & Coring Ltd.* 2001 SCC 70*,* 2001 CarswellQue 2199 (S.C.C.), para. 275, **AA, Vol. II, Tab 19**, **pp. 408-409**; *Québec (Attorney General) v. A*, 2013 SCC 5, 2013 CarswellQue 114, (S.C.C.) para. 440, **RA, Tab 5, pp. 77-78**

105 *RJR*, *supra,* para. 160, **AA, Vol. III, Tab 20, p. 10**

106 SCJ Reasons, paras. 91-99, **AR, Vol. I, Tab 3, pp. 34-36**

107 Affidavit of Fraser MacAuley, Ex. A, p. 1, **RR, Vol. III, Tab 8, p. 178**

resulting in increased absenteeism; they can refuse to act as replacement workers; or can reduce the amount of work completed. Any of these job actions would affect the ability of the RCMP to respond quickly and restore order in the case of a municipal, regional or national emergency**.**

116. As the SRR process is also consultative and cooperative it focuses on integrative solutions to reconciling the interests of the parties in ways that do not risk imposing costs of disagreement on the citizens, the employees, or the employer.[108] This is in contrast to the traditional model of police unionism that is inherently adversarial and conflictual:

> *"An emphasis in the preceding account… has been the clear-cut, often bitter adversarial character of relations in municipal forces. Observers of the RCMP, both municipal association spokesmen, management, and RCMP Members themselves, suggested that the crowning advantage of the DSRR has been the avoidance of such a polarization."* [109]

117. These salutary effects outweigh any deleterious effects which may exist. The appellants argue that the provision of the SRRP and/or the exclusion from the definition of employee in s. 2(1)(d) of the *PSLRA* has resulted in "crisis conditions". This appears to be a reference to excerpts from RCMP commissioned reports, which note an increase in workloads; inconsistent delivery of human resources programs and policies; members' reported mistrust of management, and negative impact on members' health.[110]

118. While the RCMP may face these issues, mechanisms exist to address these concerns. Similar issues also face unionized police forces, as association member Daniel Petre admitted.[111] To characterize these issues as the deleterious results of a non-unionized workplace (implying that they would not exist in a unionized environment) is simply without merit. There is no evidence of a causal connection between imposition of the SRRP and these issues. As freedom of association does not guarantee any particular

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108 Chaykowski Affidavit, *supra,* Ex. B, pp. 43-44 **AR, Vol. XI, Tab 67B, pp. 3547-3548**

109 *Ibid.,* p. 3548; Lynk Affidavit, *supra,* Ex. E, **AR, Vol. IX, Tab 66**E**, p. 6369**

110 Appellants' factum, paras. 21, 99

111 Transcript of Cross-examination of Daniel Petre, May 1, 2008, p. 14, lines 17-25, p. 15, lines 1-10; **RR, Vol. V, Tab 16, pp. 132-133**

outcome in labour relations, the appropriate deleterious effects to take into consideration in this part of the analysis are whatever *process*, if any, this Court finds to be lacking from the SRRP scheme.

119. The characteristics of the SRR program demonstrate that any lack of process is minimal:

a) the SRRP provides a meaningful process of consultation between the SRRs and management through which issues are resolved in a non-confrontational environment;[112]

b) SRRs inform their constituents of issues arising at every level of the Force and communicate their views and inputs upward through the program organization;[113]

c) SRRs also provide information, guidance and support to RCMP members on a number of issues such as, but not limited to, duties and responsibilities, working conditions, learning and development, pay and allowances, discipline, promotions, and grievances;[114]

d) SRRs speak frankly and critically regarding areas needing improvement in the RCMP, such as discipline, dispute resolution, performance evaluation and the internal promotion process and RCMP culture, as they did with the Brown Task Force;[115]

e) Individual SRRs are nominated and elected directly by RCMP members;[116] and

f) The SRRs are an independent voice from management, and administer and control their own budget and expenditures.[117]

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112 Legge Affidavit, paras. 6, 16-18, 24, 25, 29, **AR, Vol. XI, Tab 68, pp. 54, 55, 58, 60, 62**

113 Legge Affidavit, para. 25, **AR, Vol. XI, Tab 68, p. 60**

114 Legge Affidavit, para. 32; **AR, Vol. XI, Tab 68, p. 63**; Ex. G, clause 13, p. 7/12; **RR, Vol. I, Tab 3, p. 213**; Ex. K, p. 11, clause 9, **RR, Vol. II, p. 135**

115 Answers to Undertakings on the Cross-examination of Ken Legge, Ex. A and Ex. B – SRRP Representations to Brown Task Force, Oct. 9, 2007 and Oct. 30, 2007 respectively, **RR, Vol. VI, Tab 20, pp. 138-153, 154-171**

116 Legge Affidavit, Ex. F, p. 1, clause 3(a)(i), **RR, Vol. I, Tab 3, p. 184**

120. Even the appellants' expert Professor Lynk admitted that a unionized workplace is not the best workplace in all situations. Where a workplace can be organized in a fair fashion, meaning "where employees have an effective voice to be able to influence workplace changes and how it impacts upon them" – a union may not be needed.[118]

121. Moreover unlike the agricultural workers in *Dunmore* and *Fraser*, RCMP members benefit from, and are protected under, several pieces of federal legislation. These include the *RCMP Act* and *Regulations;* the *Royal Canadian Mounted Police Superannuation Act;* the *Canadian Human Rights Act;* Part II of the *Canadian Labour Code*, the *Employment Equity Act*, and the *Public Servants Disclosure Protection Act.*

122. As a result, any lack of process to engage in labour relations is minimal. The alleged deleterious effects related to outcomes are either unproven, or at least not proven to result from the lack of a Wagner-based labour relations scheme. To the extent that the SRRP lacks any process required by s. 2(d), any such deleterious effect is far outweighed by the salutary effects of the SRRP. As the application judge found: "the collaboration that occurs between the SRRs and management is extensive and … is carried out in good faith by everyone involved."[119]

PART IV – COSTS

123. The Attorney General disputes the appellants' argument that they are a public interest litigant, and requests his costs on this appeal.

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117 Legge Affidavit, para. 23, **AR, Vol. XI, Tab 68, p. 60,** Ex. F**,** Clause 12**, RR, Vol. I, Tab 3, p. 184**

118 Transcript of Cross-examination of Michael Lynk, p. 12, lines 6-23, **RR, Vol. VI, Tab 17, p. 12**

119 SCJ Reasons, para. 31, **AR, Vol. I, Tab 3, p. 22**

PART V – NATURE OF ORDER SOUGHT

124. The Attorney General seeks an order answering the constitutional questions (a) and (c): "no", and questions (b) and (d): "yes", and dismissing this appeal with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Toronto, July 9, 2013

Peter Southey

Donnaree Nygard

Kathryn Hucal

Counsel for the Respondent,
Attorney General of Canada

PART VI – ALPHABETICAL TABLE OF AUTHORITIES

Secondary Sources **Paragraph(s)**

PART VII – STATUTES, REGULATIONS, RULES

APPENDIX "A" – STATUTES RELIED ON

CANADA

CONSOLIDATION

CODIFICATION

Royal Canadian Mounted Police Regulations, 1988

Règlement de la Gendarmerie royale du Canada (1988)

SOR/88-361

DORS/88-361

Current to June 10, 2013

À jour au 10 juin 2013

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

93. (1) Prior to a loan being made to a member from the Benefit Trust Fund, the member shall undertake to repay the loan by means of monthly deductions from the member's pay in such amounts and for such periods as the advisory committee may approve.

(2) Where a member to whom a loan is made from the Benefit Trust Fund is discharged from the Force, the total unpaid balance of the loan is payable and shall be a charge against any money owing to the member by Her Majesty in right of Canada.

(3) Where a member to whom a loan is made from the Benefit Trust Fund is unable to repay the unpaid balance of the loan, the Commissioner or the Commissioner's delegate, on the recommendation of the advisory committee, may approve the conversion of the loan to a grant.

94. (1) Withdrawals from the Benefit Trust Fund for the purposes set out in section 92 shall, if the amount thereof

(*a*) does not exceed $10,000, be authorized by the advisory committee;

(*b*) exceeds $10,000 but is not more than $50,000, be authorized by the Commissioner; or

(*c*) exceeds $50,000, be authorized by the Minister.

(2) Notwithstanding subsection (1), the Commissioner or the Commissioner's delegate may authorize withdrawals from the Benefit Trust Fund of any amount in respect of payments made in error to the Fund.

95. Requisitions for cheques on the Benefit Trust Fund shall be signed by such officers as the Minister may from time to time authorize and be countersigned by such members as the Commissioner may designate.

DIVISION STAFF RELATIONS REPRESENTATIVE PROGRAM

96. (1) The Force shall have a Division Staff Relations Representative Program to provide for representation of the interests of all members with respect to staff relations matters.

93. (1) Avant qu'un prêt soit consenti à un membre sur la Caisse fiduciaire de bienfaisance, celui-ci doit s'engager à le rembourser par retenues mensuelles sur sa solde, aux montants et pour la période approuvés par le comité consultatif.

(2) Si le membre à qui un prêt a été consenti sur la Caisse fiduciaire de bienfaisance est renvoyé de la Gendarmerie, le solde total du prêt qu'il lui reste à payer est exigible et est prélevé sur toute somme due au membre par Sa Majesté du chef du Canada.

(3) Si le membre à qui un prêt a été consenti sur la Caisse fiduciaire de bienfaisance est incapable d'en rembourser le solde impayé, le Commissaire ou son délégataire peut approuver la conversion du prêt en subvention.

94. (1) Tout retrait effectué sur la Caisse fiduciaire de bienfaisance aux fins mentionnées à l'article 92 est autorisé :

a) par le comité consultatif, s'il ne dépasse pas 10 000 $;

b) par le Commissaire, s'il dépasse 10 000 $ sans être supérieur à 50 000 $;

c) par le ministre, s'il dépasse 50 000 $.

(2) Nonobstant le paragraphe (1), le Commissaire ou son délégataire peut autoriser tout retrait sur la Caisse fiduciaire de bienfaisance qui vise à annuler un dépôt qui y a été fait par erreur.

95. Les demandes de chèques devant être tirés sur la Caisse fiduciaire de bienfaisance sont signées par les officiers autorisés par le ministre et contresignées par les membres désignés par le Commissaire.

PROGRAMME DE REPRÉSENTANTS DIVISIONNAIRES DES RELATIONS FONCTIONNELLES

96. (1) La Gendarmerie établit un programme de représentants divisionnaires des relations fonctionnelles qui a pour objet d'assurer la représentation des membres en matière de relations fonctionnelles.

(2) The Division Staff Relations Representative Program shall be carried out by the division staff relations representatives of the members of the divisions and zones who elect them.

(3) [Repealed, SOR/98-262, s. 6]

SOR/89-581, s. 1; SOR/94-219, s. 33; SOR/98-262, s. 6.

(2) Le programme de représentants divisionnaires des relations fonctionnelles est mis en application par les représentants divisionnaires des relations fonctionnelles qu'élisent les membres des divisions et des secteurs.

(3) [Abrogé, DORS/98-262, art. 6]

DORS/89-581, art. 1; DORS/94-219, art. 33; DORS/98-262, art. 6.

FORENSIC LABORATORIES

97. (1) The Force shall maintain forensic laboratories for the purposes of providing scientific and technical assistance to law enforcement agencies.

(2) The terms and conditions of access to the services of the forensic laboratories referred to in subsection (1) by law enforcement agencies shall be approved by the Commissioner.

(3) For the purposes of subsections (1) and (2), law enforcement agencies include federal and provincial government departments and agencies, and courts of criminal jurisdiction.

(4) The provision of scientific and technical services to foreign law enforcement agencies shall be approved by the Commissioner.

SOR/94-219, s. 34.

LABORATOIRES JUDICIAIRES

97. (1) La Gendarmerie maintient des laboratoires judiciaires afin de fournir de l'aide scientifique et technique aux organismes chargés de l'exécution de la loi.

(2) Les conditions et modalités que doivent respecter les organismes chargés de l'exécution de la loi pour obtenir les services des laboratoires judiciaires visés au paragraphe (1) sont soumises à l'approbation du commissaire.

(3) Pour l'application des paragraphes (1) et (2), sont compris parmi les organismes chargés de l'exécution de la loi les ministères et organismes des gouvernements fédéral et provinciaux ainsi que les tribunaux de juridiction criminelle.

(4) La fourniture de services scientifiques et techniques aux organismes étrangers chargés de l'exécution de la loi est soumise à l'approbation du commissaire.

DORS/94-219, art. 34.

OFFICER APPOINTMENT AND PROMOTIONS

98. Standards and procedures for a recommendation by the Commissioner to the Governor in Council for the appointment or promotion of an officer shall be approved by the Commissioner.

SOR/94-219, s. 34.

NOMINATION ET PROMOTION DES OFFICIERS

98. Le commissaire approuve les normes et les procédures applicables aux recommandations qu'il soumet au gouverneur en conseil en vue de la nomination ou de la promotion d'un officier.

DORS/94-219, art. 34.