Court File No. 34948

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

B E T W E E N :

MOUNTED POLICE ASSOCIATION OF ONTARIO /
ASSOCIATION DE LA POLICE MONTÉE DE L'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

- AND -

THE ATTORNEY GENERAL OF CANADA

Respondent

- AND –

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ATTORNEY GENERAL OF SASKATCHEWAN,
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CANADIAN POLICE ASSOCIATION,
CANADIAN LABOUR CONGRESS,
CANADIAN CIVIL LIBERTIES ASSOCIATION,
PUBLIC SERVICE ALLIANCE OF CANADA, and
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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PARTS I and II – OVERVIEW AND POSITION ON THE QUESTIONS IN ISSUE

1. The Canadian Labour Congress ("CLC") confines its submissions to the issue of whether the imposition of the Staff Relations Representative Program ("SRRP") infringes s. 2(d), and otherwise adopts the submissions of the Appellants.

2. Contrary to the approach taken by the Ontario Court of Appeal, in the CLC's view, the s. 2(d) challenge to the SRRP is neither a derivative rights claim, nor a claim against government for affirmative legislative protection. Rather, as set out below, it is the CLC's position that:

a. far from being derivative, the freedom of employees joining together to select their own independent association to represent them in collective bargaining with their employer lies at the core of the freedom of association guarantee (**Part III-A**);

b. not only is this fundamental freedom not derivative in nature, but the challenge to the SRRP is a claim to be free from government or legislative interference in the exercise of this freedom, and is not a claim for positive governmental protection. As such, the test for determining whether s. 2(d) has been infringed is not one of "effective impossibility", but whether the imposition of the SRRP interferes, in a non-trivial way, with the exercise by RCMP members of their fundamental freedom to select their own independent association to represent them in collective bargaining with their employer (**Part III-B**);

c. the imposition of the SRRP interferes with this fundamental, non-derivative freedom (**Part III-C**); and

d. in addition, separate and apart from the interference with the core freedom as set out in (a) to (c) above, s. 2(d) also protects, in a derivative sense, the right of employees to a process of good faith bargaining with their employer. Rather than affirmatively protecting this derivative right, the SRRP makes it impossible for RCMP members to bargain in good faith through the exercise of their fundamental freedom to be represented by their own independent association, and so also infringes their derivative right to good faith bargaining. (**Part III-D**)

PART III- STATEMENT OF ARGUMENT

A. Employees' freedom to select and bargain collectively through their own independent association lies at the core of s. 2(d)'s guarantee of freedom of association, and is not a derivative right

3. The Court of Appeal's reasons suggest that the issue as to whether s. 2(d) guarantees the freedom of employees to be represented in collective bargaining with their employer through their

own independent association has not been directly contemplated in previous cases. The Court concluded that any such "right", if it exists, would only be a "facet of the derivative right to collective bargaining" and is not a fundamental element of freedom of association itself.[1]

4. However, even before its decisions in *Dunmore* and *Health Services* established that s. 2(d) can extend protection to inherently associational activities, this Court recognized that the freedom to select an independent employee organization lies at the core of the freedom of association guarantee. In the *Alberta Reference* and in *Delisle*, this Court held that, as part of its essence (and not in any "derivative" sense), s. 2(d) includes the freedom of employees:

a. "**to work for the establishment of an association**, to belong to an association, to maintain it, and to participate in its lawful activity without penalty or reprisal";[2]

b. "**to be represented by an employee association** in lawful dealings with the employer";[3] and

c. "**to form an independent association and to carry on ... the protected activities ... independently of any statutory regime**", "**to freely set up an independent employee association** which is protected against employer interference in its business ... [and] **which may carry on any lawful activity that its members may carry on individually, including representing their interests**" -- it being a requirement of s. 2(d) that any such association must "be a **genuine employee association that management does not control ... [o]therwise, there would be a violation of s. 2(*d*)**."[4] [emphases added]

5. In addition to establishing that inherently associational activities may be protected by s. 2(d), and that there may be derivative obligations imposed by s. 2(d) that require affirmative legislative protection, *Dunmore* confirmed that s. 2(d) protects employees' freedom to establish their own independent associations in order to make collective representations to their employer

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[1] Reasons of the Court of Appeal, paras. 2, 28, 111, 136, Appellants' Record, Vol. 1, Tab 16, pp. 97, 101, 113, 116.

[2] *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 ["*Alberta Reference*"]. See also *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 SCR 367 ["PIPSC"] per Sopinka J. at pp. 401-403.

[3] *Delisle v. Canada (Deputy Attorney General)* [1999] 2 SCR 989, per L'Heureux Dubé J. at para. 3.

[4] *Delisle, supra,* per Bastarache J. at paras. 33 and 37. The Respondent claims that Justice Bastarache's reference to a "genuine employee association" merely describes what is required under "the trade union certification system", but that is manifestly not correct. Given both the context and his language, Justice Bastarache is stating that, even where employees do not have access to a statutory scheme that may "limit access to mechanisms that facilitate labour relations to one employee organization in particular, and impose certain technical rules on that organization", all employees have, outside of the statutory scheme and as part of the guarantee under s. 2(d), the freedom to "set up an independent employee association which is protected against employer interference..."

through that association.[5] Six years later, *Health Services* reversed the holding in the 1987 *Trilogy*[6] and ruled that s. 2(d) "protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues", "extends to the right of employees to join together in a union to negotiate with employers on workplace issues or terms of employment — a process described broadly as collective bargaining", and to "associate for the purpose of advancing workplace goals through a process of collective bargaining".[7]

6. As the majority of this Court subsequently explained in *Fraser*, the decision in *Health Services* also concluded that, in order to make collective bargaining meaningful, s. 2(d) includes a derivative right to a process of good faith collective bargaining, imposing a corresponding affirmative obligation on employers to listen and consider employee representations in good faith.[8] Critically, it is only the imposition of this duty which is derivative in nature, rooted in the majority's view that, without this derivative right, it would be effectively impossible for employees to engage in a meaningful process of collective bargaining with their employers.[9] Moreover, contrary to the approach taken by the Court of Appeal, throughout the reasons of the majorities in both *Health Services* and *Fraser*, it is clear that the Court also regarded this derivative good faith obligation to be generally applicable, and not a matter to be determined on a case by case basis in each specific workplace.[10]

7. However, apart from this derivative right imposing a good faith bargaining obligation, nothing in *Health Services* or *Fraser* detracts from this Court's consistent recognition that, far from being a means to an end as argued by the Respondent and some government interveners, forming an independent association for the purpose of carrying out lawful associational activities -- including engaging in a process of collective bargaining now found to be constitutionally protected

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[5] *Dunmore v. Ontario (Attorney General)*, [2001] 3 SCR 1016, at paras. 14-15, 17, 20, 24, 30, 37-38, and 67.

[6] *Alberta Reference, supra; Public Service Alliance of Canada v. Canada*, [1987] 1 SCR 424; *Retail, Wholesale and Department Store Union, Locals 544, 496, 635 and 955 v. Saskatchewan*, [1987] 1 SCR 460.

[7] *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 SCR 391, per McLachlin C.J. and LeBel J. at paras. 19, 38 and 87 ["*Health Services*"].

[8] *Ontario (Attorney General) v. Fraser*, [2011] 2 SCR 3, per McLachlin C.J. and LeBel J. at paras. 40-55.

[9] Thus, the only references to a derivative right in the majority's reasons in *Fraser* relate exclusively to the imposition of a good faith obligation: see paras. 46, 54, 66 and 99. See also S. Barrett and E. Poskanzer, "What *Fraser* Means for Labour Rights in Canada", in Faraday et al, *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (Toronto: Irwin Law, 2012), p. 215.

[10] *Fraser, supra*, per McLachlin C.J. and LeBel J. at paras. 54 and 99. See also S. Barrett, "The Supreme Court of Canada's Decision in *Fraser*: Stepping Forward, Backward or Sideways?" (2012) 16 CLELJ 331, pp. 337, 349-351.

in *Health Services* -- is a core, non-derivative component of freedom of association. Indeed, while Justices Rothstein and Charron took issue in *Fraser* with the majority's imposition of an additional derivative obligation on employers to bargain in good faith (and with any corresponding legislative obligation to include a good faith requirement in collective bargaining legislation), they did not take issue with the core (and non-derivative) freedom of employees to join together through an independent association for the purpose of collectively bargaining their terms and conditions of employment with their employer. As Justice Rothstein explicitly recognized, s. 2(d) protects "the freedom of workers to form **self-directed employee associations** in an attempt to improve wages and working conditions."[11] [emphasis added]

8. Nor is there any basis, as the Court of Appeal suggested, for holding that the freedom to form an independent association to represent members in collective bargaining is unworthy of s. 2(d) protection, merely because it is also a fundamental premise of freedom of association under the *Wagner Act* model. In *Health Services* this Court found that s. 2(d) protects collective bargaining even though it is also given statutory protection.[12] This must be at least equally true of employees' antecedent fundamental freedom to select an independent association to represent them in collective bargaining. Indeed, this core freedom is protected by statute precisely because of its fundamental and historical importance to the exercise of freedom of association in the workplace (including the long struggle against employer dominated unions),[13] and because without freely selected, independent associations of workers, the ability to redress the inequality inherent in the employment relationship is fatally impaired.[14]

9. Moreover, under ILO Convention No. 87, Article 8 of the ICESR, and Article 22 of the ICCPR – all of which Canada is bound by -- the freedom of workers to form an independent association of their own choosing for the purpose of pursuing their collective workplace interests

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[11] *Fraser, supra,* per Rothstein J. (concurring), at para. 125, and paras, 144, 270-271. See also S. Barrett and E. Poskanzer, "What *Fraser* Means for Labour Rights in Canada", *supra*, at pp. 217-221 and 223-225.

[12] See *Health Services, supra,* at para. 25: "The statutes they passed did not create the right to bargain collectively. Rather, they afforded it protection. There is nothing in the statutory entrenchment of collective bargaining that detracts from its fundamental nature".

[13] *Dunmore, supra*, at paras. 20 and 37; *Health Services, supra,* at paras. 40-68.

[14] *Health Services, supra,* at paras. 80-86 (see esp. para. 84). See also B. Laskin, "Recent Labour Legislation in Canada (1944) 22 CBR, 776 at pp. 791 to 92: "The principal unfair practice, **the one which goes to the heart of genuine collective bargaining** is that of fostering company or employer dominated unions....Employees must be left to **do their collective bargaining through agencies created and maintained by them without interference or assistance from the employer**" [emphasis added]

through collective bargaining is protected as a core and independent element of freedom of association.[15] As set out in paragraph 55 of the Appellant's factum, this includes full financial, institutional and structural independence from both the employer and government. As such, far from simply being a feature of the Wagner Act model, this freedom has been recognized internationally as lying at the core of the freedom of association guarantee.[16]

B. The challenge to the SRRP is not a positive rights claim for affirmative legislative protection

10. In addition to wrongly characterizing the employees' freedom to select an independent association to represent them as a "derivative right", the Court of Appeal also erred in characterizing the Appellants' challenge to imposition of the SRRP scheme as a claim for positive state protection. The Court of Appeal correctly recognized the difference between the nature of the constitutional challenge brought in *Health Services* (challenge seeking protection against legislative interference with a fundamental freedom) and that brought in *Fraser* (a challenge seeking affirmative legislative protection to enable the exercise of a fundamental freedom).[17] However, it then wrongly viewed the challenge to the SRRP as a claim for positive legislative protection, rather than a claim to be free from negative legislative restrictions in the exercise of a fundamental freedom. Consequently, the Court of Appeal focused on whether the prerequisites for finding a derivative right had been met - a focus which it recognized arises only in a positive rights case.[18]

11. Contrary to the Court of Appeal's approach, the challenge to the SRRP scheme is that the purpose and effect of the *Regulation* imposing the SRRP scheme is to preclude RCMP members from bargaining through their chosen representative, independent association – i.e., a claim to be

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[15] See, for example, *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th revised edition, 2006, paras. 333 to 345. See also paras. 309-332 and 346-494. Indeed, over 75 years ago, and despite the absence of independent protection for freedom of association, the U.S. Supreme Court held that the freedom of employees to self-organize and bargain collectively through their own chosen representative is a fundamental right, which predates and exists independently of statutory recognition and which, given the inequality between individual employers and their employer, is critical to any system of free collective bargaining: See *Amalgamated Utility Workers (C.I.O) v. Consolidated Edison Co. of New York*, 309 U.S. 261 at 263-64, and *National Labour Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 at 33.

[16] This Court has consistently recognized the importance of international law in interpreting the scope and content of s. 2(d). See, for example: *Dunmore, supra,* para. 27; *Health Services, supra*, paras. 69-79; *Fraser, supra,* para. 75.

[17] Reasons of the Court of Appeal, paras. 80 and 89, Appellants' Record, Vol. 1, Tab 16, pp. 108-109, 110.

[18] Reasons of the Court of Appeal, paras. 98-112, Appellants' Record, Vol. 1, Tab 16, pp. 111-113.

free from negative legislative restrictions, not a request for positive legislative protection.[19] In cases where it is claimed that the state has interfered with the exercise of constitutionally protected activity encompassed by a Charter guaranteed freedom, the impossibility test does not apply.

12. As Professor Langille has explained, while the impossibility standard may have a role to play in a case in which the applicants seek affirmative legislative protection (what he calls a "going to bat for/promoting positive rights" case), it should not play any part in a case involving the right to be free of legislative or governmental interference in the exercise of a fundamental freedom (what he calls a "taking a bat to/respect" case):[20]

> The idea that there is a stringent test of impossibility to be deployed here [in a "taking a bat to" case] is very odd if you think about it. It is inconsistent with our basic understanding of the *Charter*. If the government interferes with my freedom of speech – or religion – or any other freedom – the test is not, has not been, and should not be, "has the state made it impossible to exercise the freedom"? The test is, rather, whether the state has interfered with the freedom in a way that cannot pass s. 1 muster under some version of the *Oakes* test.

In a "taking a bat to" case of alleged interference with the exercise of a fundamental freedom, "the test cannot be one with a heavy onus on the citizen. It must rather rest heavily on the state - i.e. the party seeking to limit the freedom." Accordingly, the question the Court of Appeal should have asked was not whether it was effectively impossible for RCMP members to exercise a derivative right, but whether the purpose or effect of the imposed SRRP scheme interferes with RCMP members' freedom to be represented through an independent association if they so choose.

13. The Court of Appeal's failure to recognize the distinction between a negative freedom and a positive rights claim is reflected in its conclusion that insofar as the Appellants "have no constitutional right to demand that RCMP management recognize and negotiate with them, practices that hinder them from doing so cannot rise to the level of constitutional violations."[21] It simply does not follow as a matter of constitutional logic or principle that even where there is no

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[19] S. Barrett and E. Poskanzer, "What *Fraser* Means for Labour Rights in Canada", *supra*, at pp. 195-97

[20] B. Langille, "Why the Right-Freedom Distinction Matters to Labour Lawyers—And to All Canadians", 34 Dalhousie Law Journal 143 (Spring 2011), at 158-64.

[21] Reasons of the Court of Appeal, para. 140, Appellants' Record, Vol. 1, Tab 16, p. 117.

positive obligation on government to affirmatively protect a Charter freedom or a derivative right, the government can impose barriers hindering the exercise of the Charter freedom itself.

C. The imposition of the SRRP interferes with the core freedom of RCMP Members

14. As recognized by the Respondent (see, for example, paras. 38 and 75 of its factum), there is no dispute that the impugned *Regulation* establishes a unitary structure of representation, or that the SRRP lacks structural independence and autonomy. Like the trial judge,[22] the Ontario Court of Appeal explicitly acknowledged that "the SRRP is not institutionally independent".[23] However, both in purpose and effect, imposing the SRRP as the exclusive mechanism for any form of employee representation in the workplace fundamentally undermines the freedom of employees to select their own independent association to represent them for the purpose of collective bargaining in the workplace. The imposition of the former necessarily negates even the possibility of the latter.

15. Indeed, the implication of the Court of Appeal's reasoning is that the state can effectively establish a monolithic representational structure for employees, which excludes any role for independent unions freely chosen by employees, without contravening s. 2(d).[24] As Professor Doorey has pointed out, if upheld, this would mean that "a government is free to impose a non-independent association on workers and to decree that the employer only needs to acknowledge

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[22] Reasons of the Superior Court of Justice, at para. 77: "Section 96 entrenches the SRRP as the sole entity through which members of the RCMP can collectively interact with management in relation to labour relations issues." See also paras. 61 to 65, Appeal Record, Vol. 1, Tab 3, pp. 28-29 and p. 32.

[23] Reasons of the Court of Appeal, para. 128, Appellants' Record, Vol. 1, Tab 16, p. 115. This finding is consistent with that of Justices Iacobucci and Cory in *Delisle,* who described the predecessor of the SRRP as "an employee advisory board created and ultimately controlled by RCMP management": *Delisle, supra,* para. 103. Similarly, as noted by the trial judge, the 2007 *Report of the Brown Task Force* characterized the SRRP as "part of the chain of command of the RCMP organization": Reasons of the Ontario Superior Court, para. 62 Appellants' Record, Vol. 1, Tab 3, p. 28. The Final Report of the SRR *Challenge 2000* Review stated that "as has been observed by various independent writers, most of those who approve of, and support the DSRR system of representation, do so in full acknowledgment of the powerlessness of the members and their SRRs, and with a recognition that the system depends upon the good will of management": Staff Relations Representatives (SRR) *Challenge 2000* Review, p. 17, Respondent's Record, Vol. 1, p. 67. Indeed, the Attorney General of Alberta, in this appeal, describes the SRRP as "embedding indirectly-elected employee representatives in management processes": Factum of the Attorney General of Alberta, paras. 8 and 10.

[24] The Attorney General of Ontario refers to commissioned police officers, government lawyers, and school principals as examples of non-statutory, informal models that "instantiate the constitutional right to a process of collective bargaining" and to Ontario teachers as an example of bargaining agents being statutorily recognized. However, what is common to each of these groups is that they are all employee-formed, arm's length freely-chosen independent associations

that association. As long as the employer goes through the motion of meeting with the state-created, non-independent association, nodding along to the suggestions it makes, there will be no violation of Section 2(d)." As Doorey also observes:[25]

> The OCA effectively breaks the freedom to associate up into its component parts and then treats them all as distinct pieces rather than as a coherent whole. It confirms that Section 2(d) includes a right of workers to form an independent employee association, and to make collective representations to the employer and to have those representations considered in good faith (as per *Fraser*). But the new twist introduced by the OCA is that it need not be the chosen independent association that makes the representations on behalf of the employees. Rather, the state can create a non-independent organization to do the representation part of freedom of association, while the employee-selected, independent union sits by and twiddles its thumbs. ... I actually thought that the SCC meant that the employees had a right to make collective representation through their chosen collective organization.

16. Far from the SRRP providing the same process upheld as constitutional in *Fraser*, as the Respondent suggests in paragraph 41 of its factum, nothing in the impugned legislation in *Fraser* or in the decision itself undermined the principle that s. 2(d) protects the freedom of employees to establish their own independent association for the purpose of engaging in the constitutionally protected process of collective bargaining with their employer.[26] Notably, the impugned legislation in *Fraser* included the right of agricultural workers to join their own employees' association and to make representations through that association to their employer (and, as held by the Court, a derivative right to have such representations considered in good faith).

17. The Court of Appeal found that because RCMP members had formed independent associations, and because of the SRRP and of the legal fund, it was not "effectively impossible for RCMP members to meaningfully exercise their fundamental freedom under s. 2(d)."[27] As set out

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[25] D. Doorey, "Ontario Court of Appeal: State Mandated, Non-Independent Employee Association Not a Violation of Charter", The Law of Work Blog, June 11, 2012, http://lawofwork.ca/?p=5328. Accessed September 8, 2013. See also Reasons of the Superior Court of Justice, at para 57: "the right to form a labour association and the right to a process of collective bargaining are not disconnected rights, and that the latter right is an emanation of the former."

[26] After pointing out that that "by mandating a non-independent association as the only entity that the employer must acknowledge, the statutory model signals to workers and the employer that they have no legal right to make collective representations through their chosen association", Professor Doorey, *supra*, note 24, observes that "the fact that they can still 'join' an independent union that can then be completely ignored by the employer doesn't provide them with even the thin version of freedom of association that agricultural workers can access under the AEPA. As a result, the RCMP officers are unable to exercise the very rights that the SCC said in *Fraser* and *B.C. Health* are protected under Section 2(d)."

[27] Reasons of the Court of Appeal, paras. 121 to 136, Appellants' Record, Vol. 1, Tab 16, pp 114-16.

above, this is the wrong test for determining whether the non-derivative core freedom at issue in this appeal has been breached. Moreover, none of these considerations are responsive to the constitutional claim that the SRRP process precludes collective bargaining through any independent association freely selected by RCMP members. The fact that non-independent entities may carry on other types of activities is no answer to the claim that the SRRP imposes a unitary process which precludes any collective bargaining representation of employees through an independent association of their own choosing.[28]

18. Finally, contrary to the *in terrorem* argument that s. 2(d) protection for the freedom of employees to select their own independent association would imply that majoritarian exclusivity infringes s. 2(d) of the *Charter*, there is no incompatibility between constitutional recognition of the freedom of employees to select their own independent association, and a democratic process for selecting an exclusive bargaining agent. Indeed, the freedom of employees to select their own independent association can serve as the foundation for a variety of bargaining/representation models, including majoritarian exclusivity or a more pluralistic structure.[29] Moreover, while it may not be constitutionally required, exclusivity can, in the Canadian context, be seen to enhance rather than diminish the capacity of employees to meaningfully bargain through a freely chosen independent association. Furthermore, as recognized by Justice Abella in *Fraser*[30], majoritarian exclusivity is justified as "a defining principle of the Canadian labour relations model", one "grounded in common sense and the [historical] pre-1944 experience", and among the "indispensable protection for collective bargaining rights". In this context, the contrast between the SRRP and the Canadian majoritarian exclusive bargaining agency model is analogous to that between a one-party state and a representative democracy.

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[28] See S. Barrett, "The Supreme Court of Canada's Decision in *Fraser*: Stepping Forward, Backward or Sideways?", *supra*, pp. 351-52.

[29] Notably, while unequivocally recognizing that the freedom to select an independent association for collective bargaining purposes is a vital and core element of freedom of association, the ILO has recognized that a process of workers democratically selecting the most representative union to bargain exclusively with the employer is also compatible with protection for the principle of freedom of association in the workplace: see *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO*, 5th revised edition, 2006, at paras. 346-358.

[30] *Fraser, supra* at paras. 343-47. See also Chief Justice Winkler's discussion of the importance of exclusivity as necessary to counteract "employer influence over employee associations, and thus undermin[ing] collective bargaining, as promoting Charter values, and as "key to mitigating the historical inequality between employers and employees, bringing about a more equitable balance of power in the workplace": *Fraser v. Ontario (Attorney General)*, 2008 ONCA 760 (CanLII), at paras. 86 to 93. Indeed, in *Lavigne*, Justice La Forest expressly recognized majoritarian exclusive bargaining agency as "constitutionally unimpeachable": [1991] 2 S.C.R. 211 at pp. 225-26

D. The Derivative Right to a Process of Good Faith Bargaining

19. If this court were to find, as submitted above, that the imposition of the SRRP interferes with the exercise of core constitutional employee freedoms, this would not in itself impose affirmative obligations on the state. However, as this Court found in *Fraser*, s. 2(d) also implies a derivative "right against the state to a process of collective bargaining in good faith" (para. 73). As set out above, a core element of freedom of association must include the freedom of employees to select their own independent, arms-length association to represent them in bargaining with their employer. It necessarily follows that in order to affirmatively protect the derivative right to a process of good faith bargaining, employees must be permitted to engage in that bargaining process in a manner that respects their core constitutional freedom to select their own independent bargaining representative. The SRRP scheme makes this altogether impossible, since it prevents an independent association selected by employees from playing any representational role whatsoever. Moreover, it is difficult to conceive of a process of good faith bargaining where, from the outset, "final decisions rest with management".[31] Thus, by imposing the SRRP, and failing to provide, through legislation or otherwise, affirmative protection for a process of good faith bargaining, the government has also infringed the derivative right to good faith bargaining protected under. 2(d) of the *Charter*.

PARTS IV AND V - COSTS AND DISPOSITION OF LEGAL ISSUES

20. The CLC requests that the appeal be granted, with no order of costs for or against it. The CLC also requests that it be granted leave to present oral argument at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

September 18, 2013

Steven Barrett / Ethan Poskanzer / Vanessa Payne
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[31] See Reasons of the Superior Court of Justice, para. 69. This hardly comports with this Court's conception of the process of collective bargaining: see for example, *Health Services* at para 29:("a procedure through which terms and conditions of employment may be settled by negotiations between an employer and his employees on the basis of a comparative equality of bargaining strength"). Indeed, there was no such one-sided requirement in *Fraser*. Finally, while this appeal does not raise the issue of whether the right to strike is protected as a core element of s. 2(d) or in a derivative sense, in the CLC's view, the freedom to strike (or some effective alternative where it is restricted in essential services) is a critical component of the s. 2(d) guarantee and of meaningful collective bargaining.

PART VI - AUTHORITIES

Cases	Paragraphs in factum
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Delisle v. Canada (Deputy Attorney General) [1999] 2 SCR 989	4, 14
Dunmore v. Ontario (Attorney General), [2001] 3 SCR 1016	4, 5, 8, 9
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Lavigne v. OPSEU, [1991] 2 S.C.R. 211	18
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