SCC FILE NO. 34948

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

BETWEEN:

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 –

ATTORNEY GENERAL OF ALBERTA, ATTORNEY GENERAL OF SASKATCHEWAN, ATTORNEY GENERAL OF ONTARIO and ATTORNEY GENERAL OF BRITISH COLUMBIA

INTERVENERS

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A. Overview

1. This Court has said that freedom of association includes the right to engage in a process of collective bargaining, however that right will not be meaningful unless it is carried out by an actual employee association which is independent of the employer and chosen by the workers. These minimum criteria must be understood as forming part of the *Charter* freedom, and it is a right that has been denied to RCMP members.

2. The Ontario Court of Appeal held that s.96(1) of the *RCMP Regulation*[1] (the "*Regulation*"), is constitutionally valid even though it imposes an internal program of communication between RCMP employees and management known as the Staff Relations Representation Program ("SRRP") and prevents RCMP employees from collective bargaining through an independent association chosen by them. The Appellants, both employee-formed associations of RCMP members (the "Associations"), challenge that conclusion.

3. The SRRP is the exclusive means through which RCMP management will discuss employment issues. RCMP members are excluded from the *Public Service Labour Relations Act* ("*PSLRA*"), the federal public sector labour relations regime, and therefore cannot use that framework to facilitate bargaining.[2] Confined to a system without independent, employee-selected representation or collective bargaining, the Associations brought this *Charter* challenge.

4. Although the *Regulation* was declared unconstitutional by the Superior Court, the Appeal Court held that RCMP members do not have a right to engage in a process of collective bargaining as part of freedom of association. That Court also held that freedom of association does not guarantee "workers the right to be represented in their relationship with their employer by an association of their own choosing", through a "vehicle . . . structurally independent of management."3

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[1] *Royal Canadian Mounted Police Regulations*, 1988 (SOR/88-361)
[2] *Public Service Labour Relations Act*, S.C. 2003, c. 22, s. 2
[3] Reasons for Decision of the Ontario Court of Appeal, June 1, 2012, ("Appeal Reasons") para 2, Appeal Record ("AR"), Vol 1, Tab 16, Page 97

5. The Associations submit that the Court of Appeal erred in interpreting the scope of freedom of association and consequently the validity of the *Regulation*. This Court has said, in both *Health Services* and *Fraser*, that in the labour context, freedom of association includes the right to engage in a meaningful process of collective bargaining.[4] Employees must be entitled to form or select an independent employee association for that purpose. Legislation which substantially interferes with this right is presumptively unconstitutional.

6. The majority of this Court in *Fraser* referred to collective bargaining as a derivative right, meaning a right derived from the freedom of association and necessary to its meaningful exercise in the workplace context. The Court of Appeal interpreted this Court's reference to collective bargaining being a derivative right to mean that the right must be demonstrated to be necessary on a case by case basis. The Court then held that RCMP members "at large" could act in association with others to pursue common objectives and goals, relying significantly on the SRRP, therefore it was not necessary to grant RCMP members the derivative right to bargain collectively.

7. The Court of Appeal's decision permits the government employer to impose an internal process of communication in order to avoid recognizing and bargaining with an independent employee association. The government had argued that the SRRP provided a constitutionally adequate form of collective bargaining, but the Court of Appeal took that argument even further, deciding that the SRRP prevented the need for collective bargaining altogether. The end result is the same: the SRRP serves to block collective bargaining through an independent association.

8. The Court of Appeal's creation and application of its derivative right "necessity test" divorces the exercise of freedom of association from the association itself, allowing the government employer to manipulate conditions to avoid collective bargaining. Yet, collective bargaining is part of the fundamental freedom of association, as determined by this Court in *Health Services*, and reinforced in *Fraser*. This right cannot be abrogated in favour of an employer's process of internal communication, nor does such a program satisfy that right. By imposing an internal process of communication through the *Regulation* as the only means by

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[4] *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 CarswellBC 1289, (S.C.C.) ("*Health Services*"), Appellants Book of Authorities ("AA"), Tab 11; *Fraser v. Ontario (Attorney General)*, 2011 CarswellOnt 2695 (S.C.C.) ("*Fraser*"), AA Tab 10

which RCMP management will communicate on labour relations matters, and excluding members from the *PSLRA*, the government has prevented RCMP members from exercising their s. 2(d) *Charter* rights.

B. The Position of the Appellant Associations

9. The Associations are independent, member-formed, non-profit employee organizations which advocate for the right to a process of collective bargaining for RCMP members through an independent, member-selected association.[5] The Associations sought declarations that the *Regulation* and the exclusion of members from the *PSLRA* constitute legislative impediments that, in purpose and effect, prevent collective bargaining through an independent member-selected association, and therefore infringe associational freedoms. The Associations succeeded on the first point in the Superior Court, but that decision was overturned on appeal.

10. The Associations are not recognized by RCMP management, and never have been.[6] RCMP management has steadfastly maintained that employee relations will be conducted exclusively through the SRRP imposed under the *Regulation*, which was created in response to labour unrest, and for the purpose of *avoiding* unionization and collective bargaining.[7]

C. A History of Anti-Unionism in the RCMP and the Imposition of the SRRP

11. The government has consistently sought to ensure the non-union status of the RCMP beginning with the 1918 Order-in-Council promising "instant dismissal" for any RCMP member associating with a union, to legislation adopted in 1945 which prohibited RCMP members from membership within a union, to the modern day approach of explicit exclusion from the *PSLRA* and the imposition of the SRRP through the *Regulation*.[8] One of the SRRP's primary functions has been to maintain the non-union status of the Force.[9]

12. The *Regulation* provides: "The Force shall have a Division Staff Relations Representative Program to provide for representation of the interests of all members with respect

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[5] Reasons for Decision of Justice MacDonnell dated April 6, 2009, ("MacDonnell Reasons"), para 2, AR Vol 1, Tab 3, Page 15
[6] MacDonnell Reasons, para 2, AR Vol 1, Tab 3, Page 15; Affidavit of Dan Petre, sworn August 29, 2005 ("Petre Affidavit"), Exhibit "H" email, AR Vol 4, Tab 33H, Page 73
[7] MacDonnell Reasons, paras 23-24, 62 AR Vol 1, Tab 3, Page 20; Affidavit of Michael Lynk, sworn April 24, 2008 ("Lynk Affidavit"), paras 73, 80, AR Vol 8, Tab 66, Pages 126, 128-129
[8] MacDonnell Reasons, paras 20-22, AR Vol 1, Tab 3, Page 19; Lynk Affidavit, paras 13-43, AR Vol 8, Tab 66, Pages 105-116
[9] MacDonnell Reasons, para 62, Vol 1, Tab 3, Page 28; Lynk Affidavit, para 76, AR Vol 8, Tab 66, Page 127

to staff relations matters."[10] The SRRP is a department within the RCMP which carries out a non-adversarial program of communication on certain labour-related issues, with Staff Relations Representatives ("SRRs") providing advice and guidance to members.[11] The Regulatory Impact Statement accompanying the publication of the *Regulation* states:

> *This program is co-ordinated and monitored at R.C.M.P. Headquarters. It is also subject to biannual reviews at R.C.M.P. Divisions with reports to the Commissioner from the Internal Communications Officer.*[12]

13. The SRRP is not institutionally independent, but rather part of the employer organization. The SRRs require the permission of the Commissioner to review the SRRP.[13] The SRRP cannot retain external counsel; as part of the RCMP it is represented by the Department of Justice.[14] The SRRP lacks financial independence, receiving the funding the Force decides to provide.[15]

14. The SRRs themselves are not independent of the Force but rather are paid employees, who have their performance assessed by the commanding officers of the divisions in which they serve, and who "have become part of the chain of command of the RCMP organization" and "cannot be expected to be credible with employees when they sit at the management table".[16] Moreover, SRRs may choose not to assist members, and cannot be compelled to act unless ordered by a commanding officer.[17] SRRs have been expressly prohibited from engaging in activities that "promote alternate programs in conflict with the non-union status" of the SRRP, and the Associations' leaders have been barred from acting as SRRs.[18] In the words of the government's SRR witness describing his job as an SRR:

> *[W]e all fall under management of the RCMP. We're employees. We are paid by the, by the RCMP to do a job and our job at this particular time in life is to be a Divisional Rep.*[19] *[emphasis added]*

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[10] *Royal Canadian Mounted Police Regulations*, 1988 (SOR/88-361)
[11] Lynk Affidavit, paras 120-121, AR Vol 8, Tab 66, Pages 142-143; MacDonnell Reasons, para 16, AR Vol 1, Tab 3, Page 18
[12] MacDonnell Reasons, para 25, AR Vol 1, Tab 3, Page 20; Affidavit of Ken Legge sworn January 25, 2007 ("Legge Affidavit"), Exhibit "A", *Regulation* page 2, AR Vol 11, Tab 68A, Page 76
[13] Lynk Affidavit, para 78, AR Vol 8, Tab 66, Page 128
[14] Cross examination transcript of Ken Legge taken May 15, 2008 on his affidavit sworn January 25, 2007 ("Legge Transcript"), AR Vol 16, Tab 73, pp. 45-46, qq. 126-127
[15] Lynk Affidavit, para 84, AR Vol 8, Tab 66, Page 131
[16] Affidavit of Calvin Lawrence, sworn April 7, 2005, para 40, AR Vol 4, Tab 41, Pages 181-181; Lynk Affidavit, para 121, AR Vol 8, Tab 66, Page 143; MacDonnell Reasons, paras 62, 72, AR Vol 1, Tab 3, Pages 28, 31
[17] Legge Transcript, AR Vol 16, Tab 73, pp. 31, q 72
[18] Lynk Affidavit, paras 76-77, AR Vol 8, Tab 66, Pages 127-128; Affidavit of Royce Mills, sworn February 2, 2007, paras 3-11, AR Vol 5, Tab 56, Pages 185-186.
[19] Legge Transcript, AR Vol 16, Tab 73, pp. 31, q 72

15. Although the government has argued that the SRRP provides a "constitutionally adequate" form of collective bargaining, their labour expert describes the SRRP as an *alternative* to unionization and collective bargaining.[20] The government's own evidence suggests that the SRRP's process is limited, and is not a form of collective bargaining:

> *The members of the RCMP have no right to bargain at all, much less collectively. They receive what the [Treasury] Board giveth and soldier on.*[21]

> *…RCMP members are not permitted by law to engage in collective bargaining… Members of the RCMP are, therefore, vulnerable and completely dependent upon the fairness of the employer in setting terms and conditions of employment.*[22]

> *Under the* Public Service Labour Relations Act*, members of the RCMP are prohibited from collective bargaining.*[23]

16. The SRRs themselves have expressed frustration with their inability to effect change through the existing process on matters such as discipline, promotions, and policies relating to member safety.[24] A lack of accountability within the senior ranks and the unchallenged authority of the Commissioner have been a source of distress for the SRR caucus for a number of years, but proposals intended to help address these problems have been rejected and ignored.[25]

17. And yet, the SRRP is the only labour relations process recognized and permitted by management.[26] In refusing to allow the Associations to disseminate their information in the workplace, the RCMP has told its members:

> *The issue here is not censorship of information. It is all about soliciting you as Members to join an Association that has no ability to represent you. The Force,*

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[20] Affidavit of Richard Chaykowski sworn February 1, 2007 ("Chaykowski Affidavit"), Exhibit "B" Report, pages 35-36, AR Vol 11, Tab 67B, Pages 41-42
[21] Affidavit of Fred Drummie sworn January 25, 2007 ("Drummie Affidavit"), Exhibit "H", *2005 Pay Council Report*, page 4, AR Vol 12, Tab 69H, Page 5
[22] Drummie Affidavit, Exhibit "H", *2005 Pay Council Report*, page 25, AR Vol 12, Tab 69H, Page 26
[23] Drummie Affidavit, Exhibit "C", RCMP website, AR Vol 11, Tab 69C, Page 91
[24] Answers to Undertakings given on Examination of Ken Legge, Presentations to the Task Force – SRR Caucus, October 9, 2007 ("U/T - SRR First Presentation"), *Discipline* pages 5-6 of 16, AR Vol 14, Tab 71A, Pages 57-58; Answers to Undertakings given on Examination of Ken Legge, Presentations to the Task Force – SRR Caucus, October 30, 2007, *Promotions Process*, page 2, AR Vol 14, Tab 71B, Page 71; Legge Transcript, AR Vol 16, Tab 73, pp 33, q 76, pp 50, qq 141; pp 51, qq 145-148; pp 52, qq 149; pp 71, qq 204-205; pp 86, qq 253-254, pp 91, qq269-271
[25] U/T - SRR First Presentation, page 3, 8-10, 15 of 16, AR Vol 14, Tab 71A, Pages 55, 60-62, 76
[26] Lynk Affidavit, para 80, AR Vol 8, Tab 66, Pages 128-129; MacDonnell Reasons, para 29, AR Vol 1, Tab 3, Page 21

> *for over 30 years, has recognized only one labor* (sic) *relations model, your SRR Program.*[27]

18. RCMP members are in a bind: "Using the SRR Program, RCMP management has been able to channel member concerns into a system which is largely ineffective.... [Y]ou cannot fight the exclusivity of the SRR Program from within it, and yet there is no platform of recognition to fight from outside it."[28] Surveys on member satisfaction with the SRRP support this conclusion: Only 34% of members at the constable rank considered the SRRP effective, 25% of civilian members thought so, and only 24% of women surveyed thought it was effective.[29]

19. The government's witness, Professor Richard Chaykowski, examined the SRRP and concluded in his report that the SRRP was "viable and effective". However, he acknowledged that he relied on the absence of wildcat strikes and the existence of human resource policies without knowing whether they produced effective outcomes.[30] He had not read the work of Professor Linda Duxbury and the Brown Task Force, discussed below, which outline critical problems within the Force.[31]

20. Importantly, Professor Chaykowski was unable to provide any other example where an "association" represented employees but was not independent of management.[32] Even the "work council", which is a forum for labour relations used in some European countries, exists alongside the independent employee association, not in place of it.[33] Professor Chaykowski also agreed that employees should be able to choose their labour relations model within the workplace.[34] He has opined that employees have an interest in the determination of the workplace governance system and in their right to participate in it.[35] This is particularly so in hierarchical organizations

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[27] Petre Affidavit, para 21, AR Vol 4, Tab 33, Page 21
[28] Petre Affidavit, para 25, AR Vol 4, Tab 33, Page 40
[29] Affidavit of Janne Dunnion, sworn May 11, 2006, Exhibit "I-4", *Pollara Report*, pages 6-7, 45, AR Vol 3, Tab 28 I-4, Pages 65-66, 104
[30] Cross examination transcript of Richard Chaykowski taken May 15, 2008 ("Chaykowski Transcript"), AR Vol 15, Tab 72, p. 160, qq. 512-513; p. 164, qq. 525-527, p. 172, qq. 548-549, p. 179, q. 573
[31] Chaykowski Transcript, AR Vol 15, Tab 72, pp. 180-181, qq. 575-578, pp. 195-197, qq. 611-615
[32] Chaykowski Transcript, AR Vol 15, Tab 72, pp 28-31, qq 93-101
[33] Chaykowski Transcript, AR Vol 15, Tab 72, p. 132, qq. 426-428, and p.130, q. 422-423; Chaykowski Affidavit, Exhibit "B" Report, pages 31-32, AR Vol 11, Tab 67B, Pages 37-38
[34] Chaykowski Transcript, AR Vol 15, Tab 72, pp 71, qq 228-230
[35] Answers to Undertakings, Richard Chaykowski's report dated October 2002, The Impact of Bill 29 on Unions and the well-being, Rights of Women and Minority Employees in the B.C. Health Sector ("Chaykowski's BC Health Services Report"), page 14, AR Vol 14, Tab 70, Page 42

where there is a distinct power imbalance; therefore, he has noted, there is no justification for weakening unions, including in the public sector.[36]

D. The Members' Experience in the Workplace

21. The RCMP workplace has been studied for many years by Professor Duxbury and her reports have been submitted to RCMP management and SRRs.[37] The organization was also recently studied by the government-appointed Brown Task Force. The reports from these sources make damning observations about the RCMP workplace:

a. Unacceptable vacancy rates are the norm, often in the 25-30% range, resulting in impossible demands being placed on remaining members.[38] Members are paying a price in their own health and safety, as the force is "*exploiting their commitment to Canadians to provide exemplary policing services.*"[39]

b. "*Workloads in the RCMP have increased substantially over time. The RCMP has not addressed the workload issues observed in 2001, 2002 and 2004.*"[40] Paid overtime is much less common than unpaid overtime, and those who worked unpaid overtime donated approximately 3 days per month to the RCMP, while those doing supplemental work at home, virtually everyone, donated another 6 hours per week.[41]

c. *"The RCMP also has developed concepts entitled "voluntary overtime" and "voluntary on-call"*, but *"the reality is that members in fact must volunteer for these extra duties*."[42]

d. Across the Force and at all levels decisions are made and human resource policies are applied without regard for the impact on the members affected, and in a manner inconsistent with modern human resources practices.[43] Performance evaluations are

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[36] Chaykowski's BC Health Services Report, page 14, AR Vol 14, Tab 70, Page 42
[37] Legge Transcript, AR Vol 16, Tab 73, qq. 102-103, pp. 39; Answers to Undertakings given during the examination of Ken Legge, The RCMP Yesterday, Today and Tomorrow: An Independent Report Concerning Workplace Issues at the Royal Canadian Mounted Police, by Dr. Linda Duxbury ("Duxbury Report"), page 5, AR Vol 14, Tab 71C, Page 92
[38] Affidavit of Tony Cannavino, Exhibit "F" Report of the Task Force on Governance and Cultural Change in the RCMP, December 14, 2007 ("Task Force Report"), pages vii, 23, AR Vol 7, Tab 64-F, Pages 13, 40
[39] Task Force Report, pages 23-26, AR Vol 7, Tab 64-F, Pages 40-43
[40] Duxbury Report, p. 143, AR Vol 14, Tab 71C, Page 230
[41] Duxbury Report, p. 52, AR Vol 14, Tab 71C, Page 139
[42] Task Force Report, p. 27, AR Vol 7, Tab 64F, Page 44
[43] Task Force Report, p. 2, AR Vol 7, Tab 64F, Page 19

rarely completed and recorded, and the promotion system is viewed almost universally as ineffective, unfair and opaque.[44]

e. The Force fails to meet the needs of members injured and disabled on the job.[45] Approximately 30% of all newly approved disability pension applications are for psychiatric conditions, chiefly PTSD and anxiety. "Off duty sick" leave and prescription drug use have increased over time, both of which are indicators of problems in the work environment and culture of the Force.[46]

f. There have been at least five studies aimed at improving the problems plaguing the discipline system but meaningful changes have yet to be effected.[47]

g. There are approximately 2000 temporary workers within the RCMP. This category of worker was intended for those hired for short term projects. However, this category has been abused, with individuals remaining in "temporary" limbo for five or more years without the certainty of full time employment or the privileges of other members, and with only limited benefits.[48]

h. The RCMP culture is described as one of "control", and of "fear and intimidation." Those in a position of command are able to use their authority to intimidate others.[49]

i. A disturbingly high number of members do not feel respected or trusted by their employer and, in turn, do not trust the organization. Almost half of the front line employees do not feel the organization makes an effort to ensure their safety, is concerned with their health, safety and wellbeing, or treats them fairly, or with respect and trust.[50]

E. Police Associations and Other Police Forces

22. There are now approximately 254 unionized police forces in Canada, and the duties and responsibilities of those other forces are acknowledged in the 1996 *Sims Commission* report on

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[44] Task Force Report, pp. 38-39, AR Vol 7, Tab 64F, Pages 56-57
[45] Task Force Report, p. 28, AR Vol 7, Tab 64F, Page 45
[46] Duxbury Report, pp. 77-78, AR Vol 14, Tab 71C, Pages 164-165
[47] Task Force Report, p. 30, AR Vol 7, Tab 64F, Page 47
[48] Task Force Report, p. 34, AR Vol 7, Tab 64F, Page 52
[49] Task Force Report, p. 41, AR Vol 7, Tab 64F, Page 59
[50] Duxbury Report, pp. 6, 13, AR Vol 14, Tab 71C, Pages 93, 100

labour relations to be largely indistinguishable from those of the RCMP.[51] That same report concluded that members could be granted access to collective bargaining without denying the need for operational control and without jeopardizing the public interest.[52]

23. Although the government has cited a 1980 report on police unions by Professor Dennis Forcese to the effect that negotiations between associations and management can give rise to conflict, Professor Forcese himself does not find this problematic. He notes: "[I]t is not a destructive consequence to have police administrators obliged to plan, explain, and genuinely lead and manage rather than simply command", concluding, "Police unions have quite simply been invaluable for the working police officer."[53]

24. Notwithstanding the positive contributions of police associations, and the fact that collective bargaining is the norm for police services in Canada and abroad, the RCMP has never asked members whether they want an independent association or collective bargaining.[54] It has simply been prohibited.

F. The Decision of the Ontario Superior Court on the Application

25. Justice MacDonnell found that the *Regulation* violated s.2(d) of the *Charter* because it substantially interfered with the freedom of members of the RCMP to engage in a process of collective bargaining. He rejected the government's argument that the SRRP was a constitutionally adequate form of collective bargaining on the grounds that the SRRP is not an independent association formed or chosen by the members, and because the interaction between the SRRP and management could not be described as a process of collective bargaining.[55]

26. On the issue of the right of employees to choose an independent association for the purposes of engaging in collective bargaining, Justice MacDonnell stated:

> *If the submission of the respondent is that a collective bargaining process in which employees are not permitted to be represented by an association of their own choosing is constitutionally acceptable, I reject it. The Supreme Court of Canada was clear in* Health Services & Support-Facilities Subsector Bargaining Assn. *that what is protected under ss. 2(d) is "the capacity of*

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[51] Lynk Affidavit, para 41, AR Vol 8, Tab 66, Page 115
[52] Lynk Affidavit, para 42, AR Vol 8, Tab 66, Pages 115-116
[53] Lynk Affidavit, paras 48-49, AR Vol 8, Tab 66, Pages 117-118
[54] MacDonnell Reasons, para 64, AR Vol 1, Tab 3, Page 29
[55] MacDonnell Reasons, paras 60, AR Vol 1, Tab 3, Page 28

> *members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues." The majority stated that "[this] means that employees have the right to unite, to present demands to... employers collectively and to engage in discussions in an attempt to achieve workplace-related goals." The majority also referred to Justice Bastarache's observation, in* Dunmore, *that "the law must recognize that certain union activities [such as] making collective representations to an employer... may be central to freedom of association even though they are inconceivable on the individual level". In my view, those passages make it clear that 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.*[56]

27. Justice MacDonnell held that the SRRP is not an "independent association" and that while changes have been made to the SRRP over time, they "cannot realistically be considered to have transformed the SRRP from a program created by management to avoid unionization into an independent association constituted for the purpose of collective bargaining."[57]

28. Observing that RCMP members had never been given the opportunity to choose whether to conduct labour relations through the SRRP or through an independent employee-selected association, Justice MacDonnell noted that "[a]greeing to populate a structure created by management for labour relations cannot reasonably be construed as a choice not to conduct labour relations through an association of the members' own making."[58]

29. Justice MacDonnell found that the SRRP did not provide a process of collective bargaining, and concluded that the SRRP not only substantially interfered with the process of collective bargaining, but that it *completely precluded it*.[59] The *Regulation* could not be saved under s.1 of the *Charter*, and was declared unconstitutional. Justice MacDonnell held that the *Regulation* was the source of RCMP members' inability to exercise their associational rights, not the exclusion of members of the RCMP from the *PSLRA*.

G. The Decision of the Court of Appeal

30. The Court of Appeal reversed Justice MacDonnell's decision, finding that RCMP members do not have a right to engage in a process of collective bargaining as it is a derivative right not triggered in this case. That Court held that "*a positive obligation to engage in good*

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[56] MacDonnell Reasons, para 57, AR Vol 1, Tab 3, Page 27
[57] MacDonnell Reasons, paras 61-63, AR Vol 1, Tab 3, Page 28
[58] MacDonnell Reasons, para 63, AR Vol 1, Tab 3, Page 28
[59] MacDonnell Reasons, para 74, AR Vol 1, Tab 3, Page 31

faith collective bargaining will only be imposed on an employer when it is effectively impossible for the workers to act collectively to achieve workplace goals."[60] Finding that an entitlement to the derivative right to bargain must be determined on a case by case basis, the Court created a test:

> *A government employer is obligated to engage in "collective bargaining" under s. 2(d) only when the employees are able to claim the derivative right under s. 2(d). They are able to claim that derivative right upon showing that the exercise of the fundamental freedom of association is "effectively impossible". Only where the "core protection of s. 2(d)… to act in association with others to pursue common objectives and goals" (*Fraser*, at para. 25) cannot be meaningfully exercised does the derivative right arise. As s. 2(d) does not constitutionalize minority unions, the test of "effective impossibility" is applied to the workers at large, and not to any particular combination of workers.*[61]

31. Based upon this test, the Court concluded that it was not effectively impossible for RCMP members to meaningfully exercise their freedom of association. Members are able to form voluntary associations, and while those associations are not recognized, there is also the SRRP which provides a consultative process between SRRs and management, and an organization to fund legal matters for members.[62] Significantly for the Court of Appeal, the SRRP constitutes a process of collaboration between employees and management which establishes that it is not effectively impossible for RCMP members to associate to achieve workplace goals.[63] On this basis, the Court of Appeal held that RCMP members had no right to bargain collectively, and therefore that the issue of the SRRP's lack of independence from the employer was immaterial:

> *The constitutional right to form an independent association for the purpose of collective bargaining, if it exists, would be a facet of the derivative right to collective bargaining and does not arise in this case.*[64]

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[60] Appeal Reasons, para 111, AR Vol 1, Tab 16, Page 113
[61] Appeal Reasons, para 120, AR Vol 1, Tab 16, Page 114
[62] Appeal Reasons, paras 121, 122, 128 and 132, AR Vol 1, Tab 16, Page 114
[63] Appeal Reasons, paras 128 and 131, AR Vol 1, Tab 16, Page 115
[64] Appeal Reasons, para 136, AR Vol 1, Tab 16, Page 116

PART II - STATEMENT OF QUESTIONS IN ISSUE

32. 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*?

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*?

33. The Associations submit that the *Regulation*, and the *PSLRA* exclusion, each alone, or alternatively considered together, infringe s.2(d) of the *Charter* and cannot be saved under s.1.

PART III - STATEMENT OF ARGUMENT

A. Issue 1: Does the *Regulation* infringe Freedom of Association?

34. The Court of Appeal held that the SRRP does not violate the freedom of association because there is no right to engage in a process of collective bargaining at all, much less through an independent association selected by the employees. The Associations challenge this conclusion, and argue that:

a. freedom of association in the labour context includes the right to engage in a process of collective bargaining, without caveat. Although this right has been described as "derivative" that does not mean that it is not part of the protected scope of freedom of association;

b. employees have the right to form or select their own association independent of their employer, for the purposes of engaging in a process of collective bargaining; and

c. because the SRRP is the only means accepted by RCMP management for communicating on labour relations matters and it does not satisfy members' freedom of association rights, it is an unconstitutional impediment to the members' exercise of freedom of association.

(i) Freedom of Association includes the Right to a Process of Collective Bargaining

35. This case was decided on the basis of the Court of Appeal's interpretation that collective bargaining is a derivative right, understood to mean that it may only be claimed if an applicant in a given case can demonstrate a need because of an inability to exercise what that Court considered to be the "core" of freedom of association. The Associations submit that this Court's decisions offer no basis for imposing such a test, that it would not make sense to impose a test, and moreover, that the test imposed by the Court of Appeal is unrelated to the freedom under consideration.

36. Both *Fraser* and *Health Services* recognized a right to a process of collective bargaining as forming a vital component of freedom of association for employees without imposing any fact-specific test to determine whether that right existed in each case. The issue of necessity has already been determined. The language used by this Court in those decisions refers to the right to engage in a process of collective bargaining as part of the freedom of association in labour cases, *without caveat.* For example:

> *We conclude that s. 2(d) of the* Charter *protects the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues.*[65]

And:

> *Section 2(d), interpreted purposively and in light of Canada's values and commitments, protects associational collective activity in furtherance of workplace goals. The right is not merely a paper right, but a right to a process that permits meaningful pursuit of those goals. The claimants had a right to pursue workplace goals and collective bargaining activities related to those goals.*[66]

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[65] *Health Services*, para 19. See also paras 2, 40, 79. AA Tab 11
[66] *Fraser*, para 35. See also para 40, AA Tab 10

37. The Court of Appeal created a necessity test, relying upon the *Fraser* majority's reference to collective bargaining being a "derivative right", citing *Criminal Lawyers' Association* ("*CLA*").[67] In *CLA*, this Court considered whether the government had a positive obligation to disclose documents as part of the freedom of expression, determining that disclosure may be a derivative right to the freedom of expression if necessary to ensure the exercise of that freedom. However, the right to collective bargaining is a derivative right which this Court *has already determined to be necessary* in the labour context:

> *As discussed above, the right of an employees' 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.*[68] *[emphasis added]*

And:

> *The protection for collective bargaining in the sense affirmed in Health Services is quite simply a necessary condition of meaningful association in the workplace context.*[69] *[emphasis added]*

38. Asking whether meaningful association can be achieved *without* collective bargaining is contrary to the approach taken by this Court in *Health Services* and *Fraser*, both of which made it clear that collective bargaining is a *necessary condition* to meaningful association. In asking the question, the Court of Appeal overlooked the fundamental premise of *Health Services* and *Fraser.* There do not appear to be any other post-*Fraser* cases which have questioned the inclusion of collective bargaining as part of the freedom to associate.[70]

39. For the Court of Appeal, the determination in *Delisle*, a 1999 decision of this Court dealing with RCMP members' freedom of association, was sufficient to decide this case against the Associations: "In my view this is enough to dispose of this issue: the Supreme Court has already decided that it is not effectively impossible for RCMP members to exercise their

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[67] Appeal Reasons, para 104 AR Vol 1, Tab 16, Page 112, citing *Criminal Lawyers' Assn. v. Ontario (Ministry of Public Safety & Security)*, 2010 CarswellOnt 3964 (S.C.C.) AA Tab 4
[68] *Fraser*, para 99. AA Tab 10
[69] *Fraser*, para 43 AA Tab 10
[70] See for example, *Federal Government Dockyard Trades & Labour Council v. Canada (Attorney General)*, 2011 CarswellBC 2362 (Sup. Ct.) *("Federal Dockyard")* AA Tab 9*; Association of Justice Counsel v. A.G. (Canada)*, 2012 CarswellOnt 9600 (C.A.) AA Tab 1; *L'Ecuyer v. Cote*, 2013 CarswellQue 2032 (Sup. Ct.) ("L'Ecuyer"), AA Tab 15; and *Meredith v. Canada (Attorney General)*, 2013 CarswellNat 1114 ("*Meredith*") AA Tab 17.

fundamental freedom of association guaranteed by s. 2(d) of the *Charter*."[71] However, when *Delisle* was decided collective bargaining was not recognized as part of the freedom of association, and therefore does not address the issue before this Court.

40. The result of imposing the necessity test is the designation of "have" and "have-not" employment groups, the logic for which is unclear. Why should workers capable of forming associations, but who are refused recognition for collective bargaining, be denied the right to bargain while workers who need assistance in forming associations enjoy it? A similar observation was made by the British Columbia Supreme Court in *Federal Government Dockyard and Trades v. Attorney General*, a recent case dealing with the implications to freedom of association arising from legislated restraints on government spending that affected collective agreements. That court noted that it was inappropriate to determine whether a violation occurred based upon the actual consequences of an alleged infringement, since this would lead to the paradoxical result in which the same state action may or may not be unconstitutional depending upon the resilience of the union in dealing with the interference.[72]

41. The imposition of a case by case necessity test would result in conditions of uncertainty, with different *Charter* rights for different individuals or workplaces, or possibly different determinations with respect to the same workplace over time. These outcomes are contrary to the foundational principles of equality within the *Charter*. Such a test would also allow employers to create conditions to manipulate the availability of *Charter* rights, which exacerbates both the vulnerability of employees and the power imbalance inherent in the employment relationship.

42. The Court of Appeal identified this as a positive rights case because the Associations seek to engage in collective bargaining, which the Court held would impose a positive obligation on the employer.[73] The Associations seek the removal of the SRRP, a legislatively imposed impediment to collective bargaining through a freely chosen, independent association. As the only employee relations mechanism that the RCMP management will permit, the SRRP blocks

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[71] Appeal Reasons, para 127, AR Vol 1, Tab 16, Page 115, citing *Delisle c. Canada (Attorney General*), 1999 CarswellQue 2840 (S.C.C.) ("*Delisle*") AA Tab 7
[72] *Federal Dockyard*, para 198, AA Tab 9
[73] Appeal Reasons, para 111 AR Vol 1, Tab 16, Page 113

the path to the meaningful exercise of freedom of association by RCMP members. Put simply, the Associations want the SRRP to get out of the way. This is not a "positive rights" request.

43. Seeking protection for collective bargaining is no more a claim for a "positive" right here than it was in *Health Services*. That the right itself will require an employer to engage in negotiation, whether because the employer is government and subject to the *Charter* directly, or an employer is subject to a legislatively imposed scheme, is the intended result of including a process of collective bargaining within freedom of association. That fact has been clearly acknowledged by the majority in *Fraser*:

> *It may also be observed that* Health Services *does not impose constitutional duties on private employers, but on governments as employers and parliaments and legislatures as law makers, in accordance with s. 32 of the Charter. Rather, the majority held that individuals have a right against the state to a process of collective bargaining in good faith, and that this right requires the state to impose statutory obligations on employers.*[74]

44. Whether or not seeking collective bargaining rights can be termed a demand for positive rights is beside the point, since it provides no basis upon which to distinguish *Health Services* and *Fraser* and impose a necessity test on RCMP members.

45. In applying the necessity test in this case, the Court of Appeal relied upon the existence of the Associations, the SRRP and an association which funds legal cases to support its conclusion that workers at large could act collectively to achieve workplace goals and therefore were not entitled to a process of collective bargaining. These factors, alone or taken together, do not support the conclusion that RCMP employees, including Association members, should not enjoy the right to collective bargaining.

46. Reliance on the fact that RCMP members had formed their own associations ignores the reality that those associations are precluded, by the imposition of the SRRP, and the inability to access the *PSLRA*, from engaging in bargaining for their members. The Associations are not even recognized by RCMP management, which has specifically pointed out to members the powerlessness of the Associations for that reason. The fact of the existence of the Associations cannot contribute to a conclusion that workers can act collectively to achieve workplace goals.

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[74] *Fraser*, para 73, AA Tab 10

47. The existence of the SRRP is likewise a false measure of freedom of association in the RCMP workplace, since it is a program of communication within and part of the RCMP, not an association formed or joined by members. It cannot capture or represent the collective interests and goals of the members of the Associations or the workforce at large, nor is that its role. The SRRP is not an association – in *Wagner Act* parlance, it is an unfair labour practice, a method imposed to defeat associational rights.

48. Similarly, the existence of a legal insurance fund provides no basis for denying RCMP employees the right to collective bargaining. SRRs created the organization, known as the Legal Fund, for the purpose of funding legal counsel for members with employment-related legal problems not covered by existing policies and directives. The Legal Fund is governed by SRRs, and while regular and civilian members are invited to support the Legal Fund and pay "a share of the actions", only SRRs are permitted on the Board of Directors, given notice of meetings or allowed to vote. Non-SRRs have no role in the operation or governance of the Legal Fund.[75] The existence of this organization, which does not attempt to engage in collective bargaining, and which would not be allowed to do so, does not support the conclusion that RCMP members do not need the right to engage in collective bargaining, and therefore should not have it.

49. Conceptualizing and measuring associational rights based upon the workforce at large, without reference to an actual association joined or chosen by employees, trivializes the act of associating. The freedom to associate was protected by the *Charter* because of its importance to self-actualization and democracy:

> *The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears ... almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.*[76]

50. This Court has said, and said again, that collective bargaining is a necessary part of freedom of association. There is no basis to deny RCMP members this right.

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[75] Peter Merrifield Affidavit sworn August 2, 2007, Exhibit "B" Legal Fund By-Laws, pages 1-8, AR Vol 6, Tab 59B, Pages 37-45

[76] *Lavigne v. OPSEU*, 1991 CarswellOnt 1038 (S.C.C.) ("Lavigne"), para 233, La Forest J. citing Alexis de Tocqueville, *Democracy In America*, AA Tab 14

(ii) Freedom of Association includes the Right to Choose an Association Independent from the Employer for the Purposes of Collective Bargaining

51. The Court of Appeal held that associational independence and employee choice may be aspects of the derivative right to bargain collectively but that they are not aspects of the fundamental freedom of association itself. Further, it held that RCMP employees have the right to act in association to pursue common goals, but that this right has been satisfied by, among other things, the communications undertaken through the SRRP. In so finding, the Court effectively concluded that "associational" activity can be carried out by a program which is not an association, not chosen by employees, and not independent of management, in satisfaction of employees' *Charter* rights. The Associations submit that this conclusion is fundamentally flawed, and that freedom of association must and does include the right to engage in a process of collective bargaining through an independent association chosen by the employees.

The Association Must Be Independent

52. Although independence and choice of association are part of the traditional *Wagner Act* model of labour relations, they are also essential to freedom of association protected under the *Charter*. Having noted that it is an important feature of the *Wagner Act* model that the employees' bargaining representative be structurally autonomous and independent of the employer, the Court of Appeal stated:

> *[The applications judge] brought to bear values from the Wagner model. His conception of the constitutionally required attributes of an employee association would preclude models of employee relations that bring employees into the decision making structures in a non-adversarial, collaborative fashion."*[77]

53. In so stating, the Court of Appeal lost focus on the freedom of association and instead seemed to be seeking to preserve options for non-associational labour relations models, a point unrelated to the freedom to associate. In any event, there is nothing preventing an independent employee association from engaging with an employer in different ways, including through a non-adversarial, collaborative structure such as a work council. However, such a communications structure is not, and cannot, displace an employee association, and it has no place in an analysis under s.2(d) of the *Charter*.

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[77] Appeal Reasons, paras 28, 139, AR Vol 1, Tab 16, Pages 101, 116-117

54. As a matter of principle, independence from management is not an optional characteristic for an association engaged to represent members in workplace matters. Independence from the employer is essential to ascertain the true employee voice and make representation meaningful. As Justice Bastarache noted in *Delisle:*

> *Since this Court's decision in* P.I.P.S. v. Northwest Territories (Commissioner), *supra, it is clear that under the trade union certification system, the government may limit access to mechanisms that facilitate labour relations to one employee organization in particular, and impose certain technical rules on that organization. It goes without saying that it must, however, be a genuine employee association that management does not control. Otherwise, there would be a violation of s. 2(d).*[78] *[emphasis added]*

55. Convention 87 on the *Freedom of Association and Protection of the Right to Organise* ("Convention 87"), which was endorsed by the majority in *Health Services* and *Fraser*, specifies that employees have the right to form or join organizations of their own choosing, draw up their own constitutions and rules, elect their representatives in full freedom, organize their administration and activities, formulate their programs and establish or join with other federations or confederations of employees.[79] Implicit within that convention is the requirement that the association be independent. The International Labour Organization's Committee on Freedom of Association has described independence as a condition to being a bargaining representative:

> *Participation in collective bargaining and in signing the resulting agreements necessarily implies independence of the signatories from the employer or employers' organizations, as well as from the authorities. It is only when their independence is established that trade union organizations may have access to bargaining.*[80]

56. Independence requires not only structural independence, but also freedom from employer influence. Structural independence means an autonomous association capable of operating freely without reference to the employer. Without structural independence, there is no separation between the employer and the employees, and thus no way that two distinct parties can negotiate

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[78] *Delisle*, para 37, AA Tab 7
[79] International Labour Organization (ILO), *Freedom of Association and Protection of the Right to Organise Convention*, C87, 9 July 1948, C87, available at: http://www.unhcr.org/refworld/docid/425bc1914.htmlC87 ("Convention 87"), Articles 2, 3, 5. AA Tab 25, *Fraser*, para 94, AA Tab 10, *Health Services*, para 75, AA Tab 11
[80] *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Geneva, International Labour Office, Fifth (Revised) Edition, 2006, para 966. ("ILO Digest"), AA Tab 24

workplace matters. There can be no bargaining with a single party at the table. More importantly, without structural independence there is no entity to capture and develop the collective interests of employees as distinct from their individual interests or the interests of the employer.

57. Structural independence alone is not sufficient. A free and independent union movement is necessary to ensure that the union can work towards the advancement of workers.[81] Among other things, this requires financial independence from public authorities and employers.[82] The association must also be free to operate in the interests of the employees, without being subject to the inappropriate influence or discretion of the employer or government. The SRRP does not even aim for this goal, since SRRs are charged with promoting mutually beneficial relations and operational efficiency in a non-adversarial manner.[83]

58. The importance of an employee association being independent from the RCMP is implicitly acknowledged by the government in its submission that the SRRP's purpose is to prevent the divided loyalties it fears from unionism.[84] There can be no fear of divided loyalty when the SRRP and the employer are one and the same, just as there can be no mobilization of employee will, or challenge to the inherent power imbalance in the employment relationship. The SRRP cannot act independently. Having the SRRP imposed upon them as the sole means of communication on labour matters, the employees are effectively confined, while the benefits identified with true, independent association are unattainable.

The Association Must Be Chosen by the Employees

59. The denial of choice of an employee association for representation in workplace matters is undemocratic. As Saskatchewan Superior Court Justice Ball, a former Chair of the Saskatchewan Labour Relations Board, noted recently, "the assessment of the freely expressed wishes of the majority concerning a bargaining representative" is a rudimentary aspect of freedom of association, and one not necessarily derived from the *Wagner Act* model but rather

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[81] *Resolutions and Various Texts adopted by the International Labour Conference at its 35th Session* (Geneva, June 1952), Resolution concerning the Independence of the Trade Union Movement, AA Tab 27
[82] *ILO Digest*, paras 466-467, AA Tab 24
[83] Lynk Affidavit, para 80(b), AR Vol 8, Tab 66, Pages 128-129
[84] MacDonnell Reasons, para 82, AR Vol 1, Tab 3, Pages 32-33

found in "[a]ny system that does not operate by Government decree (that is, any system with constitutional protections for freedom of association)." [85]

60. The importance of choice was discussed in an early *Charter* case, *S.E.I.U., Local 204 v. Broadway Manor Nursing Home*, in three concurring opinions of the Ontario Divisional Court, each of which held that freedom of association included the right to choose one's bargaining agent and to bargain collectively.[86] Galligan J. observed, "It is hard to imagine a more fundamental aspect of freedom of association than freedom to choose one's union."[87]

61. Although this Court did not recognize collective bargaining as part of freedom of association until the *Health Services* decision, the significance of choice has been considered in different contexts. In *PIPSC v. Northwest Territories (Commissioner)* this Court considered legislation which had the effect of limiting workers' choice of bargaining representative to those which the Northwest Territorial government chose to incorporate.[88] Four separate opinions constituting the majority of the Court held that because there was no constitutional right to bargain collectively, choice of a bargaining agent could not be protected. Cory J., writing for Wilson and Gonthier JJ. dissented, and emphasized the fundamental importance of choice, noting:

> *Whenever people labour to earn their daily bread, the right to associate will be of tremendous significance. Wages and working conditions will always be of vital importance to an employee. It follows that for an employee the right to choose the group or association that will negotiate on his or her behalf with regard to those wages and working conditions is of fundamental importance. The association will play a very significant role in almost every aspect of the employee's life at work, acting as advisor, as spokesperson in negotiations, and as a shield against wrongful acts of the employer. If collective bargaining is to function properly, employees must have confidence in their representative. That confidence will be lost if the individual employee is unable to choose the association.*[89]

62. Cory J. would have protected employee choice under the *Charter*, stating:

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[85] *Saskatchewan v Saskatchewan Federation of Labour*, 2012 CarswellSask 64 (Sup. Ct.), para 263. AA Tab 21A, overturned on appeal on the issue of whether a right to strike is part of freedom of association, 2013 SKCA 43, AA Tab 21B.
[86] *S.E.I.U., Local 204 v. Broadway Manor Nursing Home*, 1983 CarswellOnt 873 (Div. Ct.) ("Broadway Manor"), aff'd on other grounds, 1984 CarswellOnt 829 (C.A.). AA Tab 22
[87] *Broadway Manor*, para 70. AA Tab 22
[88] *PIPSC v. Northwest Territories (Commissioner)*, 1990 CarswellNWT 48 (S.C.C.) ("PIPSC"). AA Tab 18
[89] *PIPSC*, Cory J., para 69. AA Tab 18

> *The right of the individual employee to join the association of his or her choice seems to me to be of fundamental importance. It not only enables the individual to better participate in the democratic process by acting through a group, but it permits the individuals to act in concert to seek fairness in wage settlements and working conditions. At the very least, the forming or changing of an entity to undertake collective bargaining is entitled to the protection of the Charter right of freedom of association.*[90] *[emphasis added]*

63. In a subsequent decision, *R v. Advance Cutting & Coring Ltd*., the majority of this Court confirmed that freedom of association includes the right not to associate.[91] At issue was labour relations legislation designed for the Quebec construction industry which required workers to join one of five unions. Bastarache J., writing for McLachlin, Major and Binnie JJ., examined the meaning of union participation and employee choice, noting "[S]ociety cannot expect meaningful contribution from groups or organizations that are not truly representative of their membership's convictions and free choice."[92] Unions are a potent force in public debate, but they must be constituted democratically to conform to s.2(d).[93] This is so because it is the ability to choose which association to join, participate in, or support that helps ensure that the association remains responsive to employee wishes. This is the only way for employees to ensure that their interests, the interests that they formed or joined the collective to protect or advance, are being properly represented.[94]

64. As noted, *Convention 87* specifies that employees have the right to form or join organizations *of their own choosing.*[95] The ILO's Committee on Freedom of Association has opined that the free exercise of the right to establish and join unions implies the free choice of the structure and composition of the unions, as well as individual of representatives.[96] Further, favouring or discriminating against associations constitutes an impermissible interference with

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[90] *PIPSC*, Cory J., para 72. AA Tab 18
[91] *R v. Advance Cutting & Coring Ltd.*, 2001 CarswellQue 2199 (S.C.C.). ("Advance Cutting") AA Tab 19
[92] *Advance Cutting*, para 15, quoting La Forest J. in *Lavigne*. AA Tab 19
[93] *Advance Cutting*, Bastarache J. dissent, para 27. AA Tab 19
[94] See Wilson J. in *Lavigne* para 82 citing the European Human Rights Commission in *Young, James and Webster v. United Kingdom* for the following: *"... a worker must be able to choose the union which in his opinion best protects his interests, and if he considers that none of the existing trade unions does so effectively, to form together with others a new one*." AA Tab 14
[95] Convention 87, Article 2. AA Tab 25
[96] ILO Digest, paras 333, 984. AA Tab 24

the freedom since it may impact employee choice and, therefore, undermine the democratic process and the social and economic value of the associations.[97]

65. The Court of Appeal has severed the link between the association and its collective activities, relying on the SRRP to provide the "collective action to achieve workplace goals". Resort to the SRRP as a means of "collective action" ignores the choice the members of the Associations have made in joining together to form the Associations for the purpose of, among other things, engaging in collective bargaining *through their Associations*. It also disregards the value to the employees of selecting an association and, within it, together defining that association's collective agenda, as an exercise in self-determination and democracy.

66. The Court of Appeal expressed the concern that recognizing employee choice would essentially mean that the *Wagner Act* model of majoritarian exclusivity would be unconstitutional, however employees under that model do exercise choice in the same way that voters exercise choice in our electoral system. Majoritarian exclusivity under the *Wagner Act* gives the most representative association exclusive bargaining rights, in exchange for which the organization takes on the duty of fair representation for all employees. That organization must be independent of the employer and the employees retain control in the sense that they can decertify the organization as its bargaining agent. In the absence of a statutory framework requiring majoritarian exclusivity, employee organizations should be recognized by the employer for the purposes of collective bargaining, since the employee organization chosen by employees for the purposes of collective bargaining with the employer is presumptively entitled to bargain for its members.

67. There is no point in recognizing a right to engage in collective bargaining as a constitutional right if that function can be carried out without reference to the will and choice of the employees. As Professor David Doorey has pointed out, there is no difference between the SRRP and the Chinese model of labour relations, where "the state creates the only union allowed."[98] This cannot satisfy the *Charter*.

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[97] ILO Digest, paras 339, 466-467. AA Tab 24

[98] Professor David Doorey, *Ontario Court of Appeal: State Mandated, Non-Independent Employee Association Not a Violation of Charter*, at http://www.yorku.ca/ddoorey/lawblog/?p=5328. AA Tab 26

The Association Must Bargain

68. Both *Health Services* and *Fraser* established that what is protected under the *Charter* is the right to associate *for the purpose* of bargaining collectively.[99] The nexus between the association and bargaining must be maintained. As Justice MacDonnell noted in rejecting the SRRP as a proxy for associational activity, "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."[100]

69. The following passage from the majority in *Fraser* shows that what was intended to be protected is bargaining through the chosen employee association, since it is the fact of membership in the association which gives rise to the right to bargain:

> *Rothstein J. also emphasizes that "[i]ndividuals who are not members of an association ... have no constitutional right to oblige their employers to bargain" (paras. 179 and 187). In our view, this outcome is not anomalous. It follows logically from the fact that collective bargaining is a derivative right, a "necessary precondition" to the meaningful exercise of the constitutional guarantee of freedom of association: see CLA, at para. 30. Where there is no reliance on freedom of association, there is no derivative right to require employers to bargain.*[101]

70. The connection between workers associating and the association taking action for that collective recognizes that the chosen collective freely develops its own agenda, as noted by the majority in *Fraser*:

> *[C]ertain activities are, when performed by a group, "qualitatively different" from those activities performed solely by an individual. He recognized that "trade unions develop needs and priorities that are distinct from those of their members individually". As a result "certain collective activities must be recognized if the freedom to form and maintain an association is to have any meaning" (*Dunmore*, at para. 17).*[102]

71. The Court of Appeal asked whether RCMP employees "at large" could act in association to pursue common goals, rather than looking at any actual association of employees.[103] By

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[99] *Health Services*, para 87, AA Tab 11; *Fraser*, para 28, AA Tab 10
[100] MacDonnell Reasons, para 57, AR Vol 1, Tab 3, Page 27
[101] *Fraser*, para 66, AA Tab 10
[102] *Fraser*, paras 30, 63, AA Tab 10
[103] Appeal Reasons, para 120, AR Vol 1, Tab 16, Pages 114

divorcing the collective action from the employee association itself, and looking instead to the entirety of the workforce, the Court of Appeal has lost sight of the nature of the right under consideration – *the freedom to associate*. Employees can form an association, but according to the Court of Appeal, the right to pursue collective goals can be severed from the association and grafted onto a non-entity, namely the entire workforce, in satisfaction of association members' *Charter* rights. Measuring the satisfaction of the freedom to associate by what the entire workforce might be capable of doing *without* the association ignores the significance of the association itself and the employees' goals in forming or joining it.

(iii) The SRRP violates members' Freedom of Association

72. The freedom of association will be violated if the purpose or effect of the state law or action is to *substantially interfere* with the activity of collective bargaining.[104] Although the government has argued that the SRRP satisfies RCMP members' associational rights by providing a process of collective bargaining, the SRRP actually constitutes an unlawful impediment.

The SRRP does not satisfy RCMP employees' Right to a Process of Collective Bargaining

73. The SRRP is not an association, nor is it independent of the employer or chosen by the employees, which are necessary components of collective bargaining as part of the freedom of association. Further, the process of communication it undertakes cannot be considered bargaining.

74. Even if the structure and nature of the SRRP were unobjectionable, the process of communication it carries out does not constitute a process of collective bargaining. Guidance on the content of the process of collective bargaining has been provided in this Court's *Fraser* and *Health Services* decisions:

> *Collective bargaining is the procedure through which the views of the workers are made known, expressed through representatives chosen by them, not through representatives selected or nominated or approved by employers. More than that, it is a procedure through which terms and conditions of*

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[104] *Health Services*, para 112, AA Tab 11; *Fraser* para 33, AA Tab 10; *Dunmore v. Ontario (Attorney General)*, 2001 CarswellOnt 4434 (S.C.C.) ("*Dunmore")* para 13, AA Tab 8.

> *employment may be settled by negotiations between an employer and his employees on the basis of a comparative equality of bargaining strength.*[105]

And:

> *If s. 2(d) merely protected the right to act collectively and to make collective representations, the legislation at issue in that case would have been constitutional. The legislation in that case violated s.2(d) since it undermined the ability of workers to engage in meaningful collective bargaining, which the majority defined as good faith negotiations (para 90.)*[106]

75. The *Fraser* majority stated that "the principle that employers and trade unions should negotiate in good faith and endeavour to reach an agreement" was "precisely the general principle that *Health Services* endorses."[107] This is neither attempted or achieved by the SRRP. As found by the Superior Court, the limited process of consultation offered under the SRRP does not constitute collective bargaining.

76. Consideration of the Pay Council process is instructive. Treasury Board sets compensation for RCMP members. The SRRs may participate *with* RCMP management in a process of creating submissions for approval by the Commissioner, which may then be delivered to the Minister and ultimately to the Treasury Board, but SRRs do not engage the Treasury Board directly.[108] As the Federal Court of Appeal noted in a recent challenge to expenditure restraint legislation:

> *The Treasury Board, the ultimate decision maker, was not obligated to consult with either the Pay Council or the Staff Relations Representatives if it disagreed with the non-binding recommendation.*[109]

77. 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. SRRP communications occur under the debilitating reality that the

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[105] *Health Services*, para 29, See also para 90. AA Tab 11
[106] *Fraser*, para 50. See also paras 37 and 41. AA Tab 10
[107] *Fraser*, para 95. AA Tab 10
[108] MacDonnell Reasons, para 19 AR Vol 1, Tab 3, Pages 18-19
[109] In this case SRRs challenged the loss of pay increases that followed from the Pay Council process due to the effect of expenditure restraint legislation. The Court explicitly noted that it was not considering the constitutionality of the SRRP put at issue in this case, and then went on to find that the legislation was not a substantial interference, in part because there was no direct bargaining between the Pay Council and Treasury Board. *Meredith*, para 91, AA Tab 17

Commissioner has the final say. Until the determination in *Health Services*, nobody sought to describe this structure as a process of collective bargaining.

The SRRP Stands in the Way of Collective Bargaining

78. Legislation will violate the *Charter* if it substantially interferes with the right to engage in a process of collective bargaining. In *Fraser*, the majority asked whether the legislation at issue "makes meaningful association to achieve workplace goals effectively impossible."[110] In *Health Services* the majority queried whether "the process of voluntary, good faith collective bargaining between employees and the employer has been, or is likely to be, significantly and adversely impacted", considering the importance of the matter affected to the process of collective bargaining, and the manner in which the measure impacts on the collective right to good faith negotiation and consultation.[111]

79. No matter how the question is posed, the result is the same. The SRRP constitutes a complete barrier to collective bargaining, making the process effectively impossible. The SRRP does not merely undermine some aspect of the process, or remove some issues from negotiation. It stands as an *absolute bar* to the entire process of collective bargaining. Relying on the *Regulation*, the government has refused to recognize the Associations or engage in any dialogue on labour relations matters outside the SRRP. The refusal to engage in a process of collective bargaining fully undermines the entirety of this aspect of freedom of association. The effect of the *Regulation* could not be more profound – it operates just as it was intended, which is to prohibit members from engaging in collective bargaining with the employer. As such, the Superior Court Justice was correct in concluding that the *Regulation* not only substantially interferes with the process of collective bargaining, but it actually precludes it, and thus violates the freedom of association.

B. Issue Two: Can the *Regulation* be saved under s.1 of the *Charter*?

80. The government bears the burden of justifying the *Charter* violation under the *Oakes* test, and must lead evidence suitable to the nature of the case and its context.[112] The government

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[110] *Fraser*, para 98, AA Tab 10
[111] *Health Services*, paras 92-93, AA Tab 11
[112] *Libman v. Quebec (Attorney General)*, 1997 CarswellQue 851 (S.C.C.), para 39, AA Tab 16; *Dunmore*, para 49, AA Tab 8; *RJR–MacDonald Inc. v. Canada (Attorney General)*, 1995 CarswellQue 119 (S.C.C.) ("*RJR-MacDonald*"), paras 134, 136, AA

must show a pressing and substantial objective, a rational connection between that objective and the means chosen by the law to achieve it, that the law impairs the right as little as possible, and that there is proportionality between the salutary and deleterious effects of the law.[113] The Superior Court held that the government's attempts to justify the *Regulation* foundered on the minimal impairment criteria.

81. Contextual factors that may be considered in relation to the impugned provision include the nature of the harm addressed, the vulnerability of the group protected, ameliorative measures considered to address the harm and the nature and importance of the infringed activity.[114] Such factors do not diminish the standard of proof that is required, but may allow the government to meet that standard in different ways.[115] None of these factors supports a position of deference to the government in this case.

82. Most importantly, the alleged harm arising from RCMP members engaging in collective bargaining is capable of proof. For decades, collective bargaining has been the norm in police forces across Canada, therefore to the extent that there is "harm" of any kind associated with police engaging in collective bargaining, it is capable of being captured, measured, reported and put into evidence in a manner befitting the seriousness of the government seeking to limit constitutional freedoms. Such evidence does not exist.

83. Neither the government nor the public served by the police force are 'vulnerable'. While the government suggests that collective bargaining could result in divided loyalties and instability within the force, that assertion is unconvincing given the widespread practice of collective bargaining in policing. Moreover, to the extent this question has been addressed by the RCMP, a former Commissioner has acknowledged that a union within the force would be manageable.[116]

Tab 20; *Thomson Newspapers Co. v. Canada (Attorney General)*, 1998 CarswellOnt 1981 (S.C.C.), ("*Thomson Newspapers*"), para 88, AA Tab 23

[113] *Health Services*, para 138, AA Tab 11; *Canada (Attorney General) v. JTI-MacDonald Corp*, 2007 CarswellQue 5573 (S.C.C.) ("*JTI-MacDonald*"), para 36, AA Tab 3

[114] *Health Services*, para 138, AA Tab 11, *Dunmore*, paras 57-58, AA Tab 8

[115] *Thomson Newspapers*, para 88, AA Tab 23; *RJR MacDonald*, para 137, AA Tab 20

[116] Affidavit of Gaetan Delisle sworn December 18, 2007 ("Delisle Affidavit"), Exhibit "W", Deposition of Commissioner Inkster, pages 318-319, AR Vol 8, Tab 65W, Pages 84-87

84. The *Regulation* denies absolutely the right of RCMP members to engage in collective bargaining through an independent employee association, rendering almost pointless the act of associating in the workplace. This denial undermines the core value of the freedom of association. This is not a case of conflicting rights which must be balanced. The context of this case does not warrant the granting of any form of deference to the government in attempting to demonstrate that its violation of RCMP members' freedoms is reasonable.

(i) Pressing and Substantial Objective

85. The government has argued that the purpose of the *Regulation* is to enhance public confidence in the stability, neutrality and reliability of the RCMP. This purpose may qualify as pressing and substantial, although the Associations submit that it is not appropriate to define the purpose broadly, and without reference to the right denied.

86. The objective that is relevant to the s.1 analysis is the objective of the infringing measure, which should be stated with reference to the infringement.[117] For example, in a freedom of expression case relating to banning tobacco advertising, the objective was stated as "to prevent people in Canada from being persuaded by advertising and promotion to use tobacco products".[118] In this case, the objective is more appropriately stated: to prevent RCMP members from collective bargaining through an independent employee association to avoid the risk that it could create divided loyalties and then undermine the stability, reliability and neutrality of the police force. When so stated, the government fails the pressing and substantial objective test.

(ii) Rational Connection

87. The government "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic", based on scientific or other evidence, on the balance of probabilities.[119] That connection is missing here. Given that virtually all other Canadian police forces engage in collective bargaining through independent employee associations, as do many police forces around the world, the government should be able to point to evidence to show that these forces are less stable, reliable and neutral than the RCMP, which

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[117] *JTI-MacDonald*, para 38, AA Tab 3; *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CarswellQue 115 (S.C.C.), para 49, AA Tab 13

[118] *RJR–MacDonald*, para 144, AA Tab 20

[119] *RJR-MacDonald*, paras 153-154, AA Tab 20; *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 CarswellAlta 1094 (S.C.C.) ("*Hutterian Brethren*"), para 48, AA Tab 12; *L'Ecuyer*, para 114, AA Tab 15

has withheld that right from its employees. There is no evidence to support the theory that withholding associational rights enhances a police force's stability, reliability or neutrality, or otherwise compromises the operational effectiveness of the force.

88. The argument that associations create divided loyalties which undermine operational effectiveness is outdated, arising from a time when the labour movement was under public suspicion and experience with unions, including in a policing context, was limited. It is widely accepted today that police associations contribute to professionalism – they do not undermine it.[120] Queen's University Professor Richard Jackson's study of police associations observes that associations are regarded as legitimate players in the institution of policing and have been a positive force for change. The associations:

> *are much more a legitimate partner with management in the institution of policing than are unions in other industries or sectors. They have made significant contributions to policing and they have achieved remarkable improvements to the wages and working conditions of their members, more than almost any other group in the labour force since 1967. By and large, labour-management relations in the police sector are comparatively good and public respect for the police high.*[121]

89. The theory that preventing collective bargaining through an independent association will prevent labour unrest is dubious. Justices Cory and Iacobucci expressed similar skepticism in *Delisle*, observing that actively suppressing employees' associational activity is just as likely to cause the type of problem sought to be avoided and must therefore fail the rational connection test.[122] According members dignity through acknowledging and respecting their associational rights, and thus providing them with effective outlets for addressing employment issues, will ensure, rather than undermine, a positive working relationship and therefore enhance labour stability.

90. The government's theory of harm from association and collective bargaining is groundless. The government has not offered any evidence to support the theory that recognizing associational rights would make the force less stable or reliable, nor has it put forward the views of any of its current members to express a subjective fear of harm. While the threshold for

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[120] Lynk Affidavit, para 46, AR Vol 8, Tab 66, Pages 117
[121] Lynk Affidavit, para 52, Vol 8, Tab 66, Pages 119
[122] *Delisle*, paras 123-125, AA Tab 7

establishing this aspect of the *Oakes* test may be low, the Associations maintain that the government's theory must be plausible, and supported by evidence, given Canada's decades of experience with unionized police forces.

(iii) Minimal Impairment

91. To satisfy the test for minimal impairment, the government must demonstrate that it has considered other options, and selected the option that encroaches minimally on the *Charter* freedom. While the government is not held to an absolute standard, it must have made some effort to consider alternatives with a view to limiting freedoms as little as possible, and it must demonstrate that it has done so by providing evidence to the court.[123] In this case, the government has made no attempt to minimally impair RCMP employees' rights.

92. It is clear that no alternatives to the SRRP were considered at the time the *Regulation* was passed. The Regulatory Impact Analysis Statement accompanying the adoption of the *Regulation* provides the following, under the heading "Alternatives Considered":

> *An alternative considered was the continuation of the Division Staff Relations Representative Program in its present form established by way of policy directive. This alternative was rejected as it was felt the importance of the program for members required legislative recognition.*[124]

93. The government has adopted the most severe action, namely that of completely barring members' rights to collective bargaining. There is no evidence that the government considered any alternatives with a view to limiting its infringement. Indeed, it is clear that the government's course was set as early as its 1918 Order-in-Council, and has not varied since, regardless of the public acceptance of unions in policing, or the passage of the *Charter*.

94. The government has argued that the SRRP should be considered as part of the government's effort towards minimal impairment, but in so arguing entirely misconstrues the obligation under this test. The SRRP does not represent a compromise towards recognition of freedom of association. It is, and was conceived to be, the government's preferred *alternative* to recognition of those rights. The evidence is that the SRRP was implemented to avoid having to engage with member associations and bargain with them. By creating the SRRP, the government

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[123] *Health Services*, para 151, 156, AA Tab 11; *RJR MacDonald*, paras 128 and 163, AA Tab 20; *Hutterian Brethren*, paras 53-54, AA Tab 12

[124] Legge Affidavit, Exhibit "A", *Regulation* page 2, AR Vol 11, Tab 68A, Page 76

has not attempted to recognize some aspects of the freedom of association. The nature of the SRRP as a management created, funded and controlled program within the RCMP takes it outside of the spectrum of associational rights entirely. It was constructed to be, and it operates as, a complete barrier to the enjoyment of those rights, and thus does not minimally impair them.

(iv) Proportionality

95. Insofar as the benefits of the *Regulation* are to be weighed against its deleterious effects, the Associations submit there are no benefits attributable to the SRRP and the denial of member freedoms. The government has argued that the SRRP's non-adversarial, collaborative approach avoids the possibility of job action which could affect service delivery, or impair the ability of the force to respond to an emergency, but there is no evidence to support this theory. The Associations submit that there are no salutary effects that "actually result" from the government's objective that can be measured against the harmful effects on the *Charter* right.[125]

96. The government has argued that the presence of police associations could result in conflict in employee-employer relations which is avoided by the non-adversarial, collaborative approach of the SRRP. Even if this were true, conflict is not problematic in and of itself – it can arise naturally out of the different positions held by employer and employee in the employment relationship. Denying conflict a voice by refusing to engage in collective bargaining does not rid the relationship of conflict, nor does allowing conflicting positions to be negotiated in collective bargaining impair the operation of policing.

97. In considering proportionality, it is important to understand what the process of collective bargaining means to its participants, so that the negative impact of the denial of that freedom can be appreciated. The negative impacts of the violation of the freedom of association must be considered in terms of *Charter* values, such as liberty, human dignity, equality, autonomy and the enhancement of democracy.[126] In this case, the complete denial of the *Charter* right to engage in a process of collective bargaining undermines all of these *Charter* values.

98. The process of collective bargaining is not simply one of many ways to achieve an outcome. Rather, it is a process which in and of itself provides positive outcomes for employees

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[125] *Dagenais v. Canadian broadcasting Corp.*, 1994 CarswellOnt 112 (S.C.C.), para 96, AA Tab 6; *Thomson Newspapers*, para 125, AA Tab 23; *Hutterian Brethren*, para 150, AA Tab 12

[126] *Hutterian Brethren*, para 88, AA Tab 12; *Thomson Newspapers*, para 125, AA Tab 23

who are engaged in it. The majority of this Court in *Health Services* noted the intrinsic value to the *process* of collective bargaining as an exercise in self-government, as well as the important impact on employee dignity:

> *The right to bargain collectively with an employer enhances the human dignity, liberty and autonomy of workers by giving them the opportunity to influence the establishment of workplace rules and thereby gain some control over a major aspect of their lives, namely their work.* [127]

Moreover:

> *Collective bargaining also enhances the Charter value of equality. One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees.*[128]

99. When the government puts forward the SRRP and offers it up as adequate substitute on the theory that it provides acceptable outcomes, it fails to account for the importance of the *process* of bargaining. Members also lose the opportunity to achieve the workplace *outcomes they desire*. The government has defended the SRRP on the basis that it is "viable and effective", meaning that it produces what the government considers to be acceptable outcomes. This position stands in stark contrast to the evidence describing the crisis conditions within the force, and the impact on its members. RCMP management takes advantage of the professionalism, loyalty and commitment of members, and does so with full knowledge of the damage it is causing to members' quality of life, and physical and mental health. The damage is real. Not only is the SRRP incapable of addressing these serious issues, but it prevents *bona fide* employee associations from attempting to do so.

100. While we cannot know that an independent association and collective bargaining will result in better outcomes for members, since members have never been permitted to exercise their associational rights, we can look to the experience of the unionized police forces in Canada. The evidence shows that police associations engaged in collective bargaining have provided significant benefits to police officers, including improvements in health and safety, training, and, most importantly, working conditions.[129] These are some of the most serious issues facing

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[127] *Health Services*, para 82, AA Tab 11
[128] *Health Services*, para 84, AA Tab 11
[129] Lynk Affidavit, paras 46, 50-53, AR Vol 8, Tab 66, Pages 117-119

RCMP members, who are being denied the ability to work together to address these matters as they see fit. The loss to employees arising from the denial of the *Charter* right is measured against no apparent gain to the government in denying their rights. There is no proportionality whatsoever.

(v) Conclusion on the Oakes Test

101. We have moved a century beyond the time when the labour movement was under suspicion. The evolution to recognition and ultimately respect for that movement has recently been marked by this Court's acknowledgment that freedom of association includes the right to engage in a process of collective bargaining. That process is an important part of our collective freedoms, and the Associations ask this court to allow the men and women of the RCMP to access that process by removing the barrier that is the *Regulation* because it cannot be sustained as a reasonable limit in a free and democratic society.

C. Issue Three: Does the Exclusion of RCMP Employees from the *PSLRA* Violate Freedom of Association?

(i) The Legislation

102. The *PSLRA* applies to members of the federal public service, but excludes members of the RCMP. The exclusion is accomplished through the definition of "employee" found within the *PSLRA* at s.2(1): "employee", except in Part 2, means a person employed in the public service, other than:

> *(d) a person who is a member or special constable of the Royal Canadian Mounted Police or who is employed by that force under terms and conditions substantially the same as those of one of its members;*[130]

103. The *PSLRA* provides a framework for other federal employees to join and participate in employee associations, certify an employee association as a bargaining agent, engage in collective bargaining, and remedy difficulties arising from collective bargaining, through mediation, conciliation and arbitration.[131] Additionally, the *PSLRA* safeguards against certifying bargaining agents that have been influenced by the employer, and unfair labour practices by the

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[130] *PSLRA*, s 2(d)
[131] *PSLRA*, ss. 5, 54, 106, 108, 136, 161

employer or employee organization.[132] If RCMP members had recourse to the *PSLRA* regime, they would have the means to require the government to engage in collective bargaining with an independent employee organization, as well as to protest the SRRP as an unfair labour practice.

104. This Court has considered the issue of exclusion of RCMP members from the former public service labour relations statute in *Delisle*. While the *PSLRA* exclusion is essentially identical, the scope of freedom of association has now been recognized to include the right to engage in a process of collective bargaining. The deliberate exclusion of RCMP members from the *PSLRA* must now be revisited to determine whether that exclusion has, in either purpose or effect, substantially interfered with collective bargaining.[133]

(ii) Does the PSLRA Exclusion Substantially Interfere with Collective Bargaining?

The Purpose of the *PSLRA* Exclusion

105. The purpose of the exclusion of RCMP members from the then-applicable federal labour relations regime was considered in *Delisle*. The minority of this Court in *Delisle* concluded that the provision to exclude RCMP members from the *Public Service Staff Relations Act* was one of the "rare cases" in which Parliament's purpose in enacting the legislation infringed the *Charter*, stating:

> *All indications are that Parliament's purpose in enacting the impugned para. (e) was to ensure that individual RCMP members remained vulnerable to management interference with their association activities, in order to prevent the undesireable consequences which it was feared would result from RCMP labour associations. Parliament is not entitled to premise a legislative choice on the perceived "mischief" of employees associating together for a common purpose, subject of course to s. 1. Under s. 2(d), freedom of association is infringed by any law whose purpose is anti-associational.*[134]

106. Although the majority in *Delisle* disagreed, finding instead that the purpose of the exclusion was "*simply to not grant them any status under the PSSRA – trade union representation and all it entails...*", this conclusion must be reconsidered in light of the inclusion of collective bargaining within freedom of association.[135] The innocuous phrasing of not granting RCMP members any status under the statutory regime must be understood as a

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[132] *PSLRA*, s. 66(1), 186-189
[133] *Health Services*, para 112, AA Tab 11; *Fraser* para 33, AA Tab 10; *Dunmore* para 13, AA Tab 8.
[134] *Delisle*, para 80, AA Tab 7
[135] *Delisle*, para 22, AA Tab 7

distinction *not* to permit "*trade union representation and all it entails*", namely, collective bargaining for members of the RCMP. Indeed, that is the interpretation offered by a former Commissioner of the RCMP when writing to the Solicitor General of Canada:

> *There is no enabling legislation which allows members to collectively bargain and we must infer that Parliament has not intended that members of the Force have that right.*[136]

107. The intention to prevent collective bargaining is also implicitly acknowledged by the government when it argues that it seeks to prevent the risk of divided loyalties and conflict that it claims could come with unionization and collective bargaining.[137] That is an anti-associational purpose. From the 1918 Order-in-Council prohibiting unionization on pain of dismissal to the 1945 regulation prohibiting becoming a union member, to the exclusion from the federal public service labour relations legislation, the government has been consistent in its approach: RCMP members are prohibited from collective bargaining through an independent association.[138] The government's purpose was to prevent members from engaging in collective bargaining through an independent association, and the government achieved that objective.

The Effect of the *PSLRA* Exclusion

108. Consideration of the effect of the *PSLRA* exclusion is animated by three factors which were explored in *Dunmore*:

a. is the claim of under-inclusion founded in a fundamental *Charter* guarantee, rather than a specific regime?;

b. is there a proper evidentiary foundation to show that exclusion from the regime permits a substantial interference with activity protected by the *Charter*?; and

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[136] Delisle Affidavit, Exhibit "D", April 17, 1980 letter from Commissioner Simmonds to the Solicitor General of Canada, AR Vol 7, Tab 65D, Pages 122-123

[137] This point is discussed in the decision of Justices Cory and Iacobucci in *Delisle* at paras 95-101, noting "that the impugned provision of the *PSSRA* was enacted with the purpose of curtailing the formation of RCMP member associations in order to prevent the problem of divided loyalty. The respondent has thus effectively conceded that the provision possesses a constitutionally invalid purpose.", para 99, AA Tab 7

[138] MacDonnell Reasons, paras 20-22, AR Vol 1, Tab 3, Page 19; See also Delisle Affidavit, paras 21 and 23, AR Vol 7, Tab 65, Pages 106-107, in 1980 the RCMP Commissioner confirmed that members "cannot belong to an association, organization or union", and in 1989 the Attorney General said "[M]embers of the RCMP do not have the right to unionize".

c. can the state be held accountable in the sense that absence from the statute substantially orchestrates, encourages or sustains the violation of the fundamental freedom?[139]

109. In challenging the *PSLRA* exclusion, the Associations are not seeking to constitutionalize a particular statutory regime. The Associations seek access to the *PSLRA* as a means to require the government to recognize members' rights to associate and bargain collectively. This is not a case of seeking the regime to make bargaining easier or faster or more predictable, but rather merely to obtain the means to bargain at all. The effect of denying RCMP members status under the *PSLRA* (or any enabling legislation) is to prevent them from accessing the tools to facilitate collective bargaining, and thus enjoy this *Charter* right. The exclusion from the *PSLRA* is designed to, and does, disadvantage RCMP members in exercising their associational freedoms guaranteed under the *Charter*.

110. This case is similar to *Dunmore*, in which the majority of this Court observed, "[W]hile the inevitable effect of allowing this appeal may be to extend a statutory regime to agricultural workers, depending on the legislative response to this decision, the appellants are not seeking a constitutional 'right' to inclusion in the *LRA*."[140] The *PSLRA* is the statutory equivalent to the *LRA* in *Dunmore*.

111. As noted in *Dunmore*, evidence must show that without the regime, in this case the *PSLRA*, members are substantially incapable of exercising their constitutional rights.[141] The fact of this incapability has been demonstrated. The exclusion from the *PSLRA* has prevented members from accessing the means to ensure recognition and, therefore, respect for their associational rights. Similar conclusions have been reached in two recent cases, *L'Ecuyer v. Cote* and *C.U.P.E. v. New Brunswick*, both involving the exclusion of groups of workers from legislative regimes.[142]

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[139] *Dunmore*, paras 24-26, AA Tab 8; *Baier v Alberta*, 2007 CarswellAlta 853 (S.C.C.), para 27, AA Tab 2
[140] *Dunmore*, para 36, AA Tab 8
[141] *Dunmore*, para 39, AA Tab 8
[142] See *L'Ecuyer* in which seasonal farm workers were excluded from the labour relations legislation by virtue of the requirement to have 3 or more employees continuously employed, AA Tab 15; and *C.U.P.E. v. New Brunswick*, 2009 CarswellNW 257 (Q.B.), in which provincial government casual workers were excluded from the legislation, AA Tab 5.

112. Finally, the government is responsible for members' inability to exercise their associational freedoms. Absence from the *PSLRA* sustains the government's longstanding position that RCMP members are not entitled to associate and bargain collectively, and de-legitimizes the very existence of the Associations. Like *Dunmore*, the failure to extend the statutory protections results in an under-inclusiveness that substantially orchestrates, encourages and sustains the violations of the freedom to associate. Unlike *Dunmore*, the government is directly responsible, since it has created more than a chilling effect.[143] It has actually interpreted the exclusion as a basis for denying members' rights. Not only has the government excluded RCMP members from the *PSLRA*, but it has told members that they do not have the right to bargain collectively and that the Associations are illegitimate insofar as they have no ability to represent members.

113. The *PSLRA* exclusion is intended to, and does, act to deny RCMP members the ability to engage in a process of collective bargaining. Without the basic tools of the *PSLRA*, RCMP members are unable to enjoy their right to engage in collective bargaining. While the *PSLRA* offers various protections, most fundamentally it offers a process for obtaining recognition from the employer, with a path to collective bargaining. RCMP members require access to statutory measures to enable them to enjoy their fundamental rights because the government has been otherwise unwilling to recognize those rights.

114. While *Dunmore* speaks of the need for government to protect workers from private employers, the reality is that in this case it is the *government* which has orchestrated and perpetuated a violation of its own employees' *Charter* rights. There is no basis to make a distinction in favour of the government, and to deny the need for statutory protections to instantiate the freedom of association where it is the government as employer acting to undermine *Charter* rights. Rather, the government's willingness to deny *Charter* rights makes it all the more necessary to ensure that its employees have an accessible means to ensure the exercise of their rights.

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[143] *Dunmore*, paras 45, 46, AA Tab 8

D. Issue Four: Can the *PSLRA* Exclusion be saved under s.1 of the *Charter*?

115. The government has relied upon the same "purpose" in defence of both the *Regulation* and the *PSLRA* exclusion, therefore the Associations rely upon the s.1 submissions made in relation to the *Regulation.* In addition, the s.1 analysis undertaken by Justices Cory and Iacobucci in *Delisle* is instructive. They found that the contextual factors did not favour the exercise of deference to the legislature, observing that the "social and moral value of the activity suppressed by the impugned legislation in this case is very high."[144] Justification of the infringement failed on minimal impairment, in which they said:

> *The exclusion of RCMP members from the PSSRA's basic associational protections has few, if any, demonstrable salutary effects which could not be achieved by a lesser exclusion. Its negative effects, on both a symbolic level and a practical level, are severe and cut to the core of the Charter's s. 2(d) protection.*[145]

E. The Combined Effect of the *PSLRA* Exclusion and the SRRP

116. The *Regulation* and the *PSLRA* exclusion together embody the government's policy of preventing RCMP members from engaging in collective bargaining through an independent association. Each provision alone constitutes an unconstitutional impediment to the exercise of associational rights but, taken together, there can be no doubt that the effect is to make it impossible for members to bargain collectively. The Associations ask this court to consider the effect of the two provisions working in concert against the rights of members – both of which are designed by and for the government as a means to ensure that its own employees cannot enjoy their associational freedoms. If this Court is not satisfied that each of the *Regulation* and the *PSLRA* exclusion, on their own, constitute impermissible legislative impediments to the exercise of freedom of association, then the combined effect is sufficient to warrant a declaration of invalidity.

F. Conclusion

117. If freedom of association is to have any meaning in the labour context, this Court must maintain the position the majority took in *Health Services*, and reiterated in *Fraser*: collective

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[144] *Delisle*, paras 128, 132, AA Tab 7
[145] *Delisle*, para 148, AA Tab 7

bargaining is a necessary part of the freedom to associate. The exercise of this freedom requires a *bona fide* independent association of employees, chosen or formed by them, to capture and represent their interests to the employer. The exercise of this freedom is not facilitated by the SRRP, but rather prevented by it. The Associations, and members of the RCMP, have no ability to compel recognition of their rights and fight the imposition of the SRRP, because they have been excluded from the statutory regime intended to instantiate associational freedoms. The result is a substantial interference in the right to engage in a process of collective bargaining as part of freedom of association which cannot be justified.

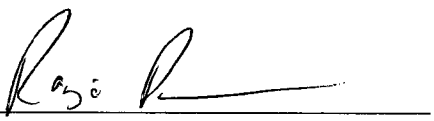
PART IV - COSTS

118. The Associations submit they are public interest litigants[146] and respectfully request their costs on this appeal and in the courts below.

PART V - ORDER SOUGHT

119. The Associations seek an order allowing the appeal with costs throughout.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of May, 2013.



for: Laura C. Young
Lawyer for the Associations

[146] The public interest nature of the litigants and this litigation is discussed in the Court of Appeal's decision denying costs, AR Vol 1, Tab 18, Pages 123-126.

PART VI - TABLE OF AUTHORITIES

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11.	*Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 CarswellBC 1289, (S.C.C.)	5, 8, 26, 36, 37, 38, 43, 44, 55, 61, 68, 72, 74, 75, 77, 78, 80, 81, 91, 98, 117

12.	*Hutterian Brethren of Wilson Colony v. Alberta*, 2009 CarswellAlta 1094 (S.C.C.)	87, 91, 95, 97
13.	*Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CarswellQue 115 (S.C.C.)	86
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20.	*RJR–MacDonald Inc. v. Canada (Attorney General)*, 1995 CarswellQue 119 (S.C.C.)	80, 81, 86, 87, 91
21.	*Saskatchewan v Saskatchewan Federation of Labour*, 2012 CarswellSask 64 (Sup. Ct.) (Tab A), appeal allowed 2013 SKCA 43, (Tab B)	59
22.	*S.E.I.U., Local 204 v. Broadway Manor Nursing Home*, 1983 CarswellOnt 873 (Div. Ct.)	60
23.	*Thomson Newspapers Co. v. Canada (Attorney General)*, 1998 CarswellOnt 1981 (S.C.C.)	80, 81, 95, 97

Books, Articles and Conventions

24.	*Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Geneva, International Labour Office, Fifth (Revised) Edition, 2006	55, 57, 64

25.	International Labour Organization (ILO), *Freedom of Association and Protection of the Right to Organise Convention*, C87, 9 July 1948, C87, available at: http://www.unhcr.org/refworld/docid/425bc1914.htmlC87	55, 64
26.	*Ontario Court of Appeal: State Mandated, Non-Independent Employee Association Not a Violation of Charter*, Blog by Professor David Doorey, at http://www.yorku.ca/ddoorey/lawblog/?p=5328	67
27.	*Resolutions and Various Texts adopted by the International Labour Conference at its 35th Session* (Geneva, June 1952), Resolution concerning the Independence of the Trade Union Movement	57

PART VII - RELEVANT STATUTES

1.	*Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11*	s.1, 2(d), 24(1), 52(1)
2.	*Public Service Labour Relations Act,* S.C. 2003, c. 22, s. 2	s.2(d), 5, 54, 66(1), 106, 108, 136, 161, 186-189
3.	*Royal Canadian Mounted Police Regulations,* 1988 (SOR/88-361)	s. 96

Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Enacted as Schedule B to the Canada Act 1982, (U.K.) 1982, c. 11

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

S.2 Everyone has the following fundamental freedoms:

d) freedom of association.

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

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

* * *

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

2. Chacun a les libertés fondamentales suivantes :

d) liberté d'association.

24. (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.

52. (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.

Public Service Labour Relations Act (2003, c. 22, s. 2)

Preamble

Recognizing that

the public service labour-management regime must operate in a context where protection of the public interest is paramount;

effective labour-management relations represent a cornerstone of good human resource management and that collaborative efforts between the parties, through communication and sustained dialogue, improve the ability of the public service to serve and protect the public interest;

collective bargaining ensures the expression of diverse views for the purpose of establishing terms and conditions of employment;

the Government of Canada is committed to fair, credible and efficient resolution of matters arising in respect of terms and conditions of employment;

the Government of Canada recognizes that public service bargaining agents represent the interests of employees in collective bargaining and participate in the resolution of workplace issues and rights disputes;

commitment from the employer and bargaining agents to mutual respect and harmonious labour-management relations is essential to a productive and effective public service;

S.2 (1) The following definitions apply in this Act:

"employee" , except in Part 2, means a person employed in the public service, other than

(*a*) a person appointed by the Governor in Council under an Act of Parliament to a statutory position described in that Act;

(*b*) a person locally engaged outside Canada;

(*c*) a person not ordinarily required to work more than one third of the normal period for persons doing similar work;

(*d*) a person who is a member or special constable of the Royal Canadian Mounted Police or who is employed by that force under terms and conditions substantially the same as those of one of its members;

(*e*) a person employed in the Canadian Security Intelligence Service who does not perform duties of a clerical or secretarial nature;

(*f*) a person employed on a casual basis;

(*g*) a person employed on a term basis, unless the term of employment is for a period of three months or more or the person has been so employed for a period of three months or more;

(*h*) a person employed by the Board;

(*i*) a person who occupies a managerial or confidential position; or

(*j*) a person who is employed under a program designated by the employer as a student employment program.

S.5 Every employee is free to join the employee organization of his or her choice and to participate in its lawful activities.

S.54 Subject to section 55, an employee organization that seeks to be certified as bargaining agent for a group of employees that it considers constitutes a unit appropriate for collective bargaining may apply to the Board, in accordance with the regulations, for certification as bargaining agent for the proposed bargaining unit. The Board must notify the employer of the application without delay.

S.66 (1) The Board may not certify an employee organization as a bargaining agent if it is of the opinion that the employer, or a person acting on behalf of the employer, has participated or is participating in the formation or administration of the employee organization in a manner that impairs its fitness to represent the interests of the employees in the bargaining unit for which it is proposed to be certified.

S.106 After the notice to bargain collectively is given, the bargaining agent and the employer must, without delay, and in any case within 20 days after the notice is given unless the parties otherwise agree,

(a) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith; and

(b) make every reasonable effort to enter into a collective agreement.

S.108 (1) The Chairperson may at any time, if requested to do so or on his or her own initiative, appoint a mediator to confer with the parties to a dispute and to endeavour to assist them in settling the dispute by any means that the mediator considers appropriate, including mediation, facilitation and fact-finding, subject to any direction that the Chairperson may give.

Recommendations

(2) At the request of the parties or the Chairperson, the mediator may make recommendations for settlement of the dispute.

S.136 (1) Either party may, by notice in writing to the Chairperson, request arbitration in respect of any term or condition of employment that may be included in an arbitral award.

When request may be made

(2) The request may be made

(a) at any time, if the parties have not entered into a collective agreement and no request for arbitration has been made by either party since the commencement of the bargaining; or

(b) not later than seven days after a collective agreement is entered into by the parties, in any other case.

Contents of notice

(3) The party requesting arbitration must

(a) specify in the notice every term or condition of employment in respect of which it requests arbitration and its proposals concerning the award to be made in respect of that term or condition; and

(b) annex to the notice a copy of the most recent collective agreement entered into by the parties.

Notice to other party

(4) On receiving the notice, the Chairperson must send a copy to the other party.

Request for arbitration of additional matters

(5) The other party may, within seven days after receiving the copy, by notice in writing to the Chairperson, request arbitration in respect of any other term or condition of employment that may be included in an arbitral award and that remained in dispute when the first request for arbitration was made.

Notice to include proposal

(6) The party making the request under subsection (5) must specify in the notice its proposal concerning the award to be made in respect of every term or condition of employment in respect of which it requests arbitration.

S.161 (1) Either party may, by notice in writing to the Chairperson, request conciliation in respect of any term or condition of employment that may be included in a collective agreement.

Contents of notice

(2) The party requesting conciliation must

(a) specify in the notice the terms or conditions of employment in respect of which it requests conciliation, and its proposals concerning the report to be made in respect of that term or condition; and

(b) annex to the notice a copy of the most recent collective agreement entered into by the parties.

Notice to other party

(3) On receiving the notice, the Chairperson must send a copy to the other party.

Request for conciliation of additional matters

(4) The other party may, within seven days after receiving the copy, by notice in writing to the Chairperson, request conciliation in respect of any other term or condition of employment that may be included in a collective agreement and that remained in dispute when the first request for conciliation was made.

Notice to include proposal

(5) The party making the request under subsection (4) must specify in the notice its proposal concerning the report to be made in respect of the term or condition of employment in respect of which it requests conciliation.

S.186 (1) Neither the employer nor a person who occupies a managerial or confidential position, whether or not the person is acting on behalf of the employer, shall

(a) participate in or interfere with the formation or administration of an employee organization or the representation of employees by an employee organization; or

(b) discriminate against an employee organization.

Unfair labour practices — employer

(2) Neither the employer nor a person acting on behalf of the employer, nor a person who occupies a managerial or confidential position, whether or not that person is acting on behalf of the employer, shall

(a) refuse to employ or to continue to employ, or suspend, lay off or otherwise discriminate against any person with respect to employment, pay or any other term or condition of employment, or intimidate, threaten or otherwise discipline any person, because the person

(i) is or proposes to become, or seeks to induce any other person to become, a member, officer or representative of an employee organization, or participates in the promotion, formation or administration of an employee organization,

(ii) has testified or otherwise participated, or may testify or otherwise participate, in a proceeding under this Part or Part 2,

(iii) has made an application or filed a complaint under this Part or presented a grievance under Part 2, or

(iv) has exercised any right under this Part or Part 2;

(b) impose, or propose the imposition of, any condition on an appointment, or in an employee's terms and conditions of employment, that seeks to restrain an employee or a person seeking employment from becoming a member of an employee organization or exercising any right under this Part or Part 2; or

(c) seek, by intimidation, threat of dismissal or any other kind of threat, by the imposition of a financial or other penalty or by any other means, to compel a person to refrain from becoming or to cease to be a member, officer or representative of an employee organization or to refrain from

(i) testifying or otherwise participating in a proceeding under this Part or Part 2,

(ii) making a disclosure that the person may be required to make in a proceeding under this Part or Part 2, or

(iii) making an application or filing a complaint under this Part or presenting a grievance under Part 2.

Exception

(3) The employer or a person does not commit an unfair labour practice under paragraph (1)(a) by reason only of

(a) permitting an employee or a representative of an employee organization that is a bargaining agent to confer with the employer or person, as the case may be, during hours of work or to attend to the business of the employee organization during hours of work without any deduction from wages or any deduction of time worked for the employer; or

(b) permitting an employee organization that is a bargaining agent to use the employer's premises for the purposes of the employee organization.

Exception

(4) The employer or a person does not commit an unfair labour practice under paragraph (1)(b)

(a) if the employer or person is acting in accordance with this Part or a regulation, a collective agreement or an arbitral award; or

(b) by reason only of receiving representations from, or holding discussions with, representatives of an employee organization.

Exception

(5) The employer or a person does not commit an unfair labour practice under paragraph (1)(a) or (b) by reason only that the employer or person expresses their point of view, so long as they do not use coercion, intimidation, threats, promises or undue influence.

Exception

(6) The employer or a person does not commit an unfair labour practice under any of paragraphs (1)(a) or (b) or (2)(a) to (c) by reason only of any act or thing done or omitted in relation to a person who occupies, or is proposed to occupy, a managerial or confidential position.

S.187 No employee organization that is certified as the bargaining agent for a bargaining unit, and none of its officers and representatives, shall act in a manner that is arbitrary or discriminatory or that is in bad faith in the representation of any employee in the bargaining unit.

S.188 No employee organization and no officer or representative of an employee organization or other person acting on behalf of an employee organization shall

(a) except with the consent of the employer, attempt, at an employee's place of employment during the employee's working hours, to persuade the employee to become, to refrain from becoming, to continue to be or to cease to be a member of an employee organization;

(b) expel or suspend an employee from membership in the employee organization or deny an employee membership in the employee organization by applying its membership rules to the employee in a discriminatory manner;

(c) take disciplinary action against or impose any form of penalty on an employee by applying the employee organization's standards of discipline to that employee in a discriminatory manner;

(d) expel or suspend an employee from membership in the employee organization, or take disciplinary action against, or impose any form of penalty on, an employee by reason of that employee having exercised any right under this Part or Part 2 or having refused to perform an act that is contrary to this Part; or

(e) discriminate against a person with respect to membership in an employee organization, or intimidate or coerce a person or impose a financial or other penalty on a person, because that person has

(i) testified or otherwise participated or may testify or otherwise participate in a proceeding under this Part or Part 2,

(ii) made an application or filed a complaint under this Part or presented a grievance under Part 2, or

(iii) exercised any right under this Part or Part 2.

S.189 (1) Subject to subsection (2), no person shall seek by intimidation or coercion to compel an employee

(a) to become, refrain from becoming or cease to be, or, except as otherwise provided in a collective agreement, to continue to be, a member of an employee organization; or

(b) to refrain from exercising any other right under this Part or Part 2.

Exception

(2) A person does not commit an unfair labour practice referred to in subsection (1) by reason of any act or thing done or omitted in relation to a person who occupies, or is proposed to occupy, a managerial or confidential position.

Loi sur les relations de travail dans la fonction publique **L.C. 2003, ch. 22, art. 2**

Préambule

Attendu :

que le régime de relations patronales-syndicales de la fonction publique doit s'appliquer dans un environnement où la protection de l'intérêt public revêt une importance primordiale;

que des relations patronales-syndicales fructueuses sont à la base d'une saine gestion des ressources humaines, et que la collaboration, grâce à des communications et à un dialogue soutenu, accroît les capacités de la fonction publique de bien servir et de bien protéger l'intérêt public;

que la négociation collective assure l'expression de divers points de vue dans l'établissement des conditions d'emploi;

que le gouvernement du Canada s'engage à résoudre de façon juste, crédible et efficace les problèmes liés aux conditions d'emploi;

que le gouvernement du Canada reconnaît que les agents négociateurs de la fonction publique représentent les intérêts des fonctionnaires lors des négociations collectives, et qu'ils ont un rôle à jouer dans la résolution des problèmes en milieu de travail et des conflits de droits;

que l'engagement de l'employeur et des agents négociateurs à l'égard du respect mutuel et de l'établissement de relations harmonieuses est un élément indispensable pour ériger une fonction publique performante et productive,

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

"employee"

d) qui est membre ou gendarme auxiliaire

5. Le fonctionnaire est libre d'adhérer à l'organisation syndicale de son choix et de participer à toute activité licite de celle-ci.

54. Sous réserve de l'article 55, toute organisation syndicale peut solliciter son accréditation comme agent négociateur pour un groupe de fonctionnaires qui, selon elle, constitue une unité habile à négocier collectivement. Elle doit alors faire la demande à la Commission en conformité avec les règlements et celle-ci avise l'employeur de la demande sans délai.

66. (1) La Commission n'accorde pas l'accréditation si elle conclut que l'employeur ou toute personne agissant en son nom a participé ou participe à la formation ou à l'administration de l'organisation syndicale, et qu'elle estime que cela compromet

l’aptitude de cette organisation à défendre les intérêts des fonctionnaires qui font partie de l’unité de négociation.

106. Une fois l’avis de négociation collective donné, l’agent négociateur et l’employeur doivent sans retard et, en tout état de cause, dans les vingt jours qui suivent ou dans le délai éventuellement convenu par les parties :

a) se rencontrer et entamer des négociations collectives de bonne foi ou charger leurs représentants autorisés de le faire en leur nom;

b) faire tout effort raisonnable pour conclure une convention collective.

108. (1) Sous réserve des directives qu’il estime indiquées, le président peut à tout moment, sur demande ou de sa propre initiative, nommer un médiateur chargé de conférer avec les parties à un différend et de favoriser entre eux un règlement à l’amiable de la façon que le médiateur juge appropriée, notamment au moyen de la médiation, de la facilitation ou d’une enquête.

(2) À la demande des parties ou du président, le médiateur peut faire des recommandations en vue du règlement du différend.

136. (1) L’une ou l’autre partie peut, par avis écrit adressé au président, demander le renvoi à l’arbitrage d’un différend sur une condition d’emploi qui peut figurer dans une décision arbitrale.

(2) La demande d’arbitrage peut intervenir :

a) à tout moment dans le cas où aucune convention collective n’a été conclue et aucune autre demande d’arbitrage n’a été présentée par l’une ou l’autre partie depuis le début des négociations;

b) au plus tard sept jours après la conclusion d’une convention collective dans les autres cas.

(3) La partie qui demande l’arbitrage :

a) précise dans l’avis la condition d’emploi à l’égard de laquelle elle demande l’arbitrage et ses propositions quant à la décision arbitrale qui doit être rendue en l’espèce;

b) annexe à l’avis une copie de la dernière convention collective conclue par les parties.

(4) Sur réception de l’avis, le président en envoie copie à l’autre partie.

(5) Le destinataire de cette copie peut, dans les sept jours suivant sa réception, par avis adressé au président, demander l’arbitrage à l’égard de toute autre condition d’emploi qui peut figurer dans une décision arbitrale et qui restait en litige au moment où la demande d’arbitrage mentionnée au paragraphe (1) a été faite.

(6) La partie qui demande l’arbitrage au titre du paragraphe (5) précise, dans l’avis, ses propositions quant à la décision qui doit être rendue en l’espèce.

161. (1) L’une ou l’autre des parties peut, par avis écrit adressé au président, demander le renvoi à la conciliation d’un différend sur toute condition d’emploi qui peut figurer dans une convention collective.

(2) La partie qui demande la conciliation :

a) précise dans l’avis la condition d’emploi à l’égard de laquelle elle demande la conciliation et ses propositions quant au rapport qui doit être fait en l’espèce;

b) annexe à l’avis une copie de la dernière convention collective conclue par les parties.

(3) Sur réception de l’avis, le président en envoie copie à l’autre partie.

(4) Le destinataire de cette copie peut, dans les sept jours suivant sa réception, par avis adressé au président, demander la conciliation à l’égard de toute autre condition d’emploi qui peut figurer dans une convention collective et qui restait en litige au moment où la demande de conciliation mentionnée au paragraphe (1) a été faite.

(5) La partie qui demande la conciliation au titre du paragraphe (4) précise, dans l’avis, ses propositions quant au rapport qui doit être fait en l’espèce.

186. (1) Il est interdit à l’employeur et au titulaire d’un poste de direction ou de confiance, qu’il agisse ou non pour le compte de l’employeur :

a) de participer à la formation ou à l’administration d’une organisation syndicale ou d’intervenir dans l’une ou l’autre ou dans la représentation des fonctionnaires par celle-ci;

b) de faire des distinctions illicites à l’égard de toute organisation syndicale.

(2) Il est interdit à l’employeur, à la personne qui agit pour le compte de celui-ci et au titulaire d’un poste de direction ou de confiance, que ce dernier agisse ou non pour le compte de l’employeur :

a) de refuser d’employer ou de continuer à employer une personne donnée, ou encore de la suspendre, de la mettre en disponibilité, ou de faire à son égard des distinctions illicites en matière d’emploi, de salaire ou d’autres conditions d’emploi, de l’intimider, de la menacer ou de prendre d’autres mesures disciplinaires à son égard pour l’un ou l’autre des motifs suivants :

(i) elle adhère à une organisation syndicale ou en est un dirigeant ou représentant — ou se propose de le faire ou de le devenir, ou incite une autre personne à le faire ou à le devenir —, ou contribue à la formation, la promotion ou l’administration d’une telle organisation,

(ii) elle a participé, à titre de témoin ou autrement, à toute procédure prévue par la présente partie ou la partie 2, ou pourrait le faire,

(iii) elle a soit présenté une demande ou déposé une plainte sous le régime de la présente partie, soit déposé un grief sous le régime de la partie 2,

(iv) elle a exercé tout droit prévu par la présente partie ou la partie 2;

b) d'imposer — ou de proposer d'imposer —, à l'occasion d'une nomination ou relativement aux conditions d'emploi, une condition visant à empêcher le fonctionnaire ou la personne cherchant un emploi d'adhérer à une organisation syndicale ou d'exercer tout droit que lui accorde la présente partie ou la partie 2;

c) de chercher, notamment par intimidation, par menace de congédiement ou par l'imposition de sanctions pécuniaires ou autres, à obliger une personne soit à s'abstenir ou à cesser d'adhérer à une organisation syndicale ou d'occuper un poste de dirigeant ou de représentant syndical, soit à s'abstenir :

(i) de participer, à titre de témoin ou autrement, à une procédure prévue par la présente partie ou la partie 2,

(ii) de révéler des renseignements qu'elle peut être requise de communiquer dans le cadre d'une procédure prévue par la présente partie ou la partie 2,

(iii) de présenter une demande ou de déposer une plainte sous le régime de la présente partie ou de déposer un grief sous le régime de la partie 2.

(3) Ne constitue pas une violation de l'alinéa (1)*a*) le seul fait pour l'employeur ou le titulaire d'un poste de direction ou de confiance de prendre l'une ou l'autre des mesures ci-après en faveur d'une organisation syndicale qui est l'agent négociateur d'une unité de négociation groupant ou comprenant des fonctionnaires travaillant pour lui :

a) permettre à un fonctionnaire ou représentant syndical de conférer avec l'employeur ou la personne, selon le cas, ou de s'occuper des affaires de l'organisation syndicale pendant les heures de travail, sans retenue sur le salaire ni réduction du temps de travail effectué pour lui;

b) permettre l'utilisation de ses locaux pour les besoins de l'organisation syndicale.

(4) L'employeur ou le titulaire d'un poste de direction ou de confiance n'enfreint pas l'alinéa (1)*b*) dans le cas où :

a) il agit en conformité avec la présente partie, un règlement, une convention collective ou une décision arbitrale;

b) il ne fait que recevoir les observations des représentants d'une organisation syndicale ou qu'avoir des discussions avec eux.

(5) L'employeur ou le titulaire d'un poste de direction ou de confiance n'enfreint pas les alinéas (1)*a*) ou *b*) du seul fait qu'il exprime son point de vue, pourvu qu'il n'ait pas

indûment usé de son influence, fait des promesses ou recouru à la coercition, à l'intimidation ou à la menace.

(6) Aucune action ou omission ne saurait constituer un manquement à l'un des alinéas (1)*a*) et *b*) et (2)*a*) à *c*) si elle vise le titulaire d'un poste de direction ou de confiance ou la personne proposée pour un tel poste.

187. Il est interdit à l'organisation syndicale, ainsi qu'à ses dirigeants et représentants, d'agir de manière arbitraire ou discriminatoire ou de mauvaise foi en matière de représentation de tout fonctionnaire qui fait partie de l'unité dont elle est l'agent négociateur.

188. Il est interdit à l'organisation syndicale, à ses dirigeants ou représentants ainsi qu'aux autres personnes agissant pour son compte :

a) sans consentement de l'employeur, de tenter, sur le lieu de travail d'un fonctionnaire et pendant les heures de travail de celui-ci, de l'amener à adhérer ou continuer d'adhérer, ou à s'abstenir ou cesser d'adhérer à une organisation syndicale;

b) d'expulser un fonctionnaire de l'organisation syndicale ou de le suspendre, ou de lui refuser l'adhésion, en appliquant d'une manière discriminatoire les règles de l'organisation syndicale relatives à l'adhésion;

c) de prendre des mesures disciplinaires contre un fonctionnaire ou de lui imposer une sanction quelconque en appliquant d'une manière discriminatoire les normes de discipline de l'organisation syndicale;

d) d'expulser un fonctionnaire de l'organisation syndicale, de le suspendre, de prendre contre lui des mesures disciplinaires ou de lui imposer une sanction quelconque parce qu'il a exercé un droit prévu par la présente partie ou la partie 2 ou qu'il a refusé d'accomplir un acte contraire à la présente partie;

e) de faire des distinctions illicites à l'égard d'une personne en matière d'adhésion à une organisation syndicale, d'user de menaces ou de coercition à son égard ou de lui imposer une sanction, pécuniaire ou autre, pour l'un ou l'autre des motifs suivants :

(i) elle a participé, à titre de témoin ou autrement, à une procédure prévue par la présente partie ou la partie 2, ou pourrait le faire,

(ii) elle a soit présenté une demande ou déposé une plainte sous le régime de la présente partie, soit déposé un grief sous le régime de la partie 2,

(iii) elle a exercé un droit prévu par la présente partie ou la partie 2.

189. (1) Sous réserve du paragraphe (2), il est interdit à quiconque de chercher, par menace ou mesures coercitives, à obliger un fonctionnaire :

a) à adhérer ou à s’abstenir ou cesser d’adhérer à une organisation syndicale, ou encore, sauf disposition contraire dans une convention collective, à continuer d’y adhérer;

b) à s’abstenir d’exercer tout autre droit qu’accorde la présente partie ou la partie 2.

(2) Aucune action ou omission ne saurait constituer une pratique déloyale visée au paragraphe (1) si elle vise le titulaire d’un poste de direction ou de confiance ou la personne proposée pour un tel poste.

Royal Canadian Mounted Police Regulations, 1988 (SOR/88-361)

S.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.

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

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.

(3) [Abrogé, DORS/98-262, art. 6]