Court File No. 34948

IN THE SUPREME COURT OF CANADA
(on Appeal from the Court of Appeal for Ontario)

B E T W E E N:

THE MOUNTED POLICE ASSOCIATION OF ONTARIO AND THE BRITISH COLUMBIA MOUNTED POLICE PROFESSIONAL ASSOCIATION ON THEIR OWN BEHALF AND ON BEHALF OF ALL THE MEMBERS AND EMPLOYEES OF THE ROYAL CANADIAN MOUNTED POLICE

Appellants

-and-

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Respondent

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INDEX

PART I – OVERVIEW

1. This appeal is about whether a government employer can impose by regulation its own entity on employees through which it can engage in what it alleges is "meaningful dialogue" about workplace issues with its employees. The employer created entity is not one of the employees' own choosing, and any "dialogue" is effectively "between" the employer and itself.

2. This Court's jurisprudence has consistently held that this is not enough to satisfy s. 2(d). Yet, Canada says it has done nothing wrong by requiring RCMP members to populate an entity of management's own creation. According to Canada, there is no infringement of s. 2(d) because RCMP members are, on the one hand, free to form their own independent associations (like the appellant associations in this case), and, on the other, employees are able to engage in what Canada has characterized as a sufficient process of collective bargaining through the employer created entity, the Staff Relations Representative Program (the "SRRP"), mandated by regulation.

3. A careful review of this Court's decisions demonstrates that the major premise of Canada's argument is fatally flawed; specifically, Canada is incorrect that s. 2(d) protects two discrete and separate rights.

4. As this Court recently reaffirmed in *Fraser*,[1] the watershed moment in s. 2(d) jurisprudence occurred in *Dunmore* where this Court finally affirmed that "certain collective activities [not just individual activities] must be recognized if the freedom to form and maintain an association is to have any meaning".[2]

5. What Canada fails to appreciate is that this Court built the constitutional renovation in *Dunmore* on the foundation of long-settled doctrine that recognized the freedom to form and maintain an association independent of management through

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[1] *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 at para. 26 ("*Fraser*").
[2] *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 at para. 17 ("*Dunmore*").

which to carry out the lawful activities of its members.[3] In fact, Canada has turned this Court's s. 2(d) jurisprudence on its head. The appellants now find themselves fighting a rearguard action to defend what had long been settled law; namely, that the freedom to form and maintain an association independent of management to carry out certain collective activities must be recognized if those collective activities are to have any meaning.

6. Contrary to a purposive understanding of the *Charter*, Canada's position drives a wedge between the freedom to form an independent association, on the one hand, and the very activities that this Court has recognized render that freedom meaningful, on the other hand. It follows that the activity is itself rendered meaningless because it is carried out through an agent that is not a voluntary association freely chosen and independent of management. This is completely inconsistent with this Court's recognition in *Health Services* that *Charter* values, such as human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy, underlie constitutional recognition of a process of collective bargaining.[4] Canada's interpretation is not simply wrong; it undermines the very basis of *Charter* protection by replacing collective workplace autonomy with an entity imposed by the employer. For these reasons, the appeal must be allowed.

PART II – POSITION ON THE QUESTIONS IN ISSUE

7. At its heart, this appeal raises three issues concerning the scope of protection afforded by s. 2(d) of the *Charter*. First, does s. 2(d) protect a process of collective bargaining that is divorced from the freedom to form and maintain an association independent of the employer? Second, what did this Court mean when it characterized the s. 2(d) claim in *Fraser* as "derivative", and what if any bearing does the "derivative" claim in *Fraser* have on the right asserted in the present appeal?

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[3] See, e.g., *Professional Institute of the Public Service of Canada v. Northwest Territories*, [1990] 2 S.C.R. 367 at 402 ("*PIPSC*") and *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989 at paras. 10, 12, 36, 37 and 47.

[4] *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 at paras. 80-86 ("*Health Services*").

And, third, can s. 96 of the *Royal Canadian Mounted Police Regulation, 1988* (the "Regulation")[5] be saved by s. 1?

8. The Canadian Police Association ("CPA") supports the position of the Mounted Police Association of Ontario and the British Columbia Mounted Police Professional Association that s. 96 of the Regulation, which imposes the SRRP as the exclusive "representative" body for RCMP members, infringes s. 2(d) of the *Charter* and cannot be saved under s. 1.

9. By way of background, the CPA is an umbrella organization representing municipal, provincial, and federal police associations across Canada. It has approximately 160 member associations, which, in turn, represent approximately 54,000 front line police personnel stationed across Canada at the federal, provincial and municipal levels. The CPA is the only organization of its kind with a national perspective on policing issues that affect front line police officers and their associations. The CPA's member associations are the collective bargaining agents for their respective police membership. All of the member associations are independent of their respective police employers.

PART III - ARGUMENT

A. Section 2(d) Protects the Right to Form and Maintain an Independent Association Through Which To Bargain Collectively

10. In *Delisle*, Justices Cory and Iacobucci (in dissent, though not on this point) characterized the predecessor of the SRRP as "an employee advisory board created and ultimately controlled by RCMP management".[6] Since then, not much has changed. The record in this appeal demonstrates the bind in which RCMP officers find themselves: "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

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[5] *Royal Canadian Mounted Police Regulations, 1988*, SOR-88/361 (the "Regulation").
[6] *Delisle*, *supra* at para. 103.

recognition to fight from outside it."[7] In the meantime, the headlines across Canada demonstrate deep labour relations problems throughout the RCMP.

11. It is undisputed that the only "representative" body that RCMP management recognizes for the purpose of internal communications about staff relations is the SRRP. The SRRP is mandated by s. 96 of the Regulation, which provides that, "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." The SRRP was not freely formed by RCMP members. As the application judge found in this case, the SRRP was created at the behest of management, and RCMP officers "have never been given the opportunity to decide whether it is the body within which they wish to associate for labour relations purposes. ... [A]greeing to populate a structure created by management for the purpose of labour relations cannot reasonably be construed as a choice not to conduct labour relations through an association of the members' own making."[8]

12. However, the essence of Canada's position is that the SRRP is all the *Charter* requires because (1) the SRRP engages in a constitutionally sufficient process of collective bargaining; and (2) the inability of employees to choose the association to represent their interests is constitutionally irrelevant because RCMP members have the right to an independent association through which to carry out a process of association (but not collective bargaining). There are at least two serious problems with Canada's submission.

13. First, it is simply not possible to characterize the communications between the SRRP and the employer as a constitutionally sufficient process of collective bargaining. As this Court summarized the law in *Fraser*, s. 2(d) requires, among other things, that "the parties meet" and "engage in meaningful dialogue". They must "make a reasonable effort to arrive at an acceptable contract."[9]

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[7] Petre Affidavit, para. 25, AR Vol 4, Tab 33, p. 40.
[8] MacDonnell Reasons, para. 63, AR Vol 1, Tab 3, p. 28.
[9] *Fraser*, *supra* at para. 41.

14. However, there is no meaningful dialogue in the RCMP workplace. A good example is officer compensation. The *Royal Canadian Mounted Police Act* authorizes the Treasury Board to establish the pay and allowances paid to members of the RCMP unilaterally and in its sole discretion.[10] Treasury Board does not meet or make any effort to reach an agreement with members of the RCMP concerning pay, nor is it even required to consider any representations RCMP officers make.

15. Pay Council is the management imposed vehicle for making suggestions about RCMP officers' compensation; suggestions which may or may not ever make their way to Treasury Board. The Pay Council is comprised of five members: two Staff Representatives, two RCMP management representatives and a chairperson. The two Staff Representatives are the Chair of the SRRP Pay and Benefits Committee and an external compensation expert appointed by the Commissioner on the advice of the SRRP. Aside from the Chair of the SRRP Pay and Benefits Committee, the Commissioner appoints all of Pay Council's members. Pay Council makes recommendations to the Commissioner concerning pay, compensation, and other working conditions of members of the RCMP. The Commissioner in turn has discretion to accept or reject Pay Council's recommendation. If the Commissioner accepts the recommendation, he forwards it to the Minister responsible for the RCMP, who in turn may submit it to the Treasury Board. Ultimately, the Treasury Board can do as it likes and does not have to accept the Commissioner's recommendation, if it has been forwarded by the Commissioner or the intervening Minister at all.[11] This process cannot be constitutionally sufficient.

16. Second, Canada's submission that s. 2(d) can be satisfied where a process of collective bargaining is engaged in by an entity other than a freely chosen, independent association is incorrect.

17. The right that this Court has recognized since its early s. 2(d) jurisprudence is the right to form and maintain an association independent of the employer through

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[10] *Royal Canadian Mounted Police Act*, R.S.C., 1985, c. R-10, s. 22.
[11] See, e.g., *Canada (Attorney General) v. Meredith*, 2013 FCA 112 at paras. 16-19.

which to carry out the lawful activities of members. In *PIPSC*, Justice Sopinka, summarizing the earlier jurisprudence, held that "s. 2(d) protects the freedom to establish, belong to and maintain an association" as well as "the exercise in association of the lawful rights of individuals".[12] Similarly, in *Delisle*, this Court held that s. 2(d) protects "the establishment of an independent employee association and the exercise in association of the lawful rights of its members".[13]

18. As this Court held in *Fraser*,[14] it was *Dunmore* that transformed s. 2(d) jurisprudence by holding that freedom of association also protects collective activities undertaken in association, including certain aspects of collective bargaining.[15] However, *Dunmore* (as well as *Fraser*)[16] all confirm that s. 2(d) continues to protect the right to form and maintain an independent association through which to carry out collective activities. The right is a unitary one because the right to engage in a process of collective bargaining is only meaningful if it is carried out by an association that is both independent and freely chosen. This is merely the inverse of this Court's conclusion in *Dunmore* that certain aspects of collective bargaining must be protected so as to render the freedom to form and maintain an association meaningful.[17]

19. Canada's submission that the SRRP is constitutionally sufficient leads to the absurd result that it is enough to satisfy s. 2(d) that the employer engages in "dialogue" with itself. This is not "meaningful dialogue". Canada's decision to impose a "representative" organization on RCMP members is also inconsistent with *Charter* values, such as human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy. This Court justified its extension of protection to a process of collective bargaining based on these values.[18] However, instead of enhancing these values, the SRRP actually perpetuates a paternalistic

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[12] *PIPSC*, *supra* at 402.
[13] *Delisle*, *supra* at paras. 12. See also paras. 10, 36, 37 and 47.
[14] *Fraser*, *supra* at para. 26.
[15] *Dunmore*, *supra* at para. 17.
[16] *Fraser*, *supra* at paras. 25 and 33.
[17] *Dunmore*, *supra* at para. 17.
[18] *Health Services*, *supra* at paras. 80-86.

view of employees, i.e. that they are not capable of making their own decision about the formation and maintenance of their own independent association.

20. Canada's submission that independence is merely a feature of the Wagner model of labour relations, and so is not constitutionally required, is a red herring. What is required may not be the precise protections set out in different labour relations statutes (which themselves differ across Canada), but independence must mean more than inhabiting the master's own structure.

21. Finally, in the absence of s. 96 of the Regulation, RCMP members would be at liberty to form an independent association to engage with management in a meaningful dialogue about workplace issues. This is part and parcel of the direct access to the *Charter* that government employees have pursuant to s. 32.[19] Where, as here, there is no statutory requirement of majoritarian exclusivity, and the employer is government, the only logical conclusion would be that any independent association could require the government employer to meet with it to discuss workplace conditions with an eye to concluding a contract.

22. While Canada says that this Court cannot have intended a result that renders Wagner-style labour relations statutes presumptively unconstitutional, there is nothing odd in that result. This Court has emphasized repeatedly that it has not constitutionalized any particular model of collective bargaining, including the Wagner model.[20] In fact, this Court specifically rejected the argument in *Fraser* that s. 2(d) required majoritarian exclusivity.[21] Canada's position fails to recognize, though Canada implicitly acknowledges it by its protests, that, in the Wagner model, majoritarian exclusivity is a benefit to the employer,[22] one that Canada could legislate.

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[19] *Health Services*, *supra* at para. 88.
[20] See, e.g., *Health Services*, *supra* at para. 91.
[21] *Fraser*, *supra* at para. 47.
[22] *Fraser v. Ontario (Attorney General)*, 2008 ONCA 760 at para. 92.

23. Like the other fundamental freedoms, the ambit of freedom of association should be cast broadly subject only to government justification. There is no principles reason to distinguish freedom of association from freedom of speech or religion. Cast broadly, it is very likely that majoritarian exclusivity interferes with the freedom to associate. However, it is equally likely that majoritarian exclusivity would be upheld under s. 1 of the *Charter*, since it serves the important objective of promoting workable labour relations for both employers and employees. If the appellants are correct that the SRRP's lack of independence infringes the *Charter,* and Canada chooses not to enter the field with legislation, it does not lie in the mouths of the parties that oppose constitutional recognition of majoritarian exclusivity to now say it is a constitutional minimum.

B. Constitutionally Protected Collective Bargaining is Not a Derivative Right

24. Canada makes much of the fact that this Court described the constitutional issue in *Fraser* as "derivative".[23] This aspect of the Court's judgment has been criticized by academics, such as Professor Brian Langille,[24] because collective bargaining is not derivative; collective bargaining is the *raison d'être* of an employee association and, as *Dunmore* recognized, *Charter* recognition that some aspects of collective bargaining are protected is necessary for the freedom to form and maintain an association to be meaningful.[25] What is more properly characterized as "derivative" are the statutory supports that the agricultural workers requested in *Dunmore* and *Fraser*, such as protection against unfair labour practices or a system of rights arbitration during the term of an agreement.

25. Canada's position that employees and associations are not entitled to a limited process of collective bargaining short of "effective impossibility" cannot be correct. Canada has wrongly conflated circumstances where an applicant is asking the

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[23] *Fraser*, *supra* at para. 46.
[24] See, e.g., Brian Langille, "Why the Right-Freedom Distinction Matters to Labour Lawyers – And to All Canadians", The 2011 Innis Christie Public Lecture in Labour and Employment Law presented November 4, 2011 (accessible at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2006987>).
[25] *Dunmore*, *supra* at para. 17.

government to take positive legislative steps to protect a freedom (such as in *Dunmore* or *Fraser*[26]) as opposed to the case at bar wherein the appellants are asking the government simply to respect its freedoms. The claim in the present appeal is not "derivative" because the appellants do not require government legislative assistance to make their s. 2(d) right meaningful. They need Canada to exit the field by rescinding a regulation that prohibits the appellants from engaging in meaningful dialogue with their government employer. In any event, s. 96 of the Regulation does make it effectively impossibly for RCMP members to bargain collectively through an independent association because the section imposes the SRRP to the exclusion of an independent association.

C. The SRRP Cannot Be Saved By Section 1

26. Section 96 of the Regulation cannot be saved by s. 1 of the *Charter* because it is not minimally impairing. The very existence and labour relations success of the CPA's member associations (which are all independent) belies any argument Canada may have that police collective bargaining does not or cannot work.

27. Except for those employed by the RCMP, all front line police officers in Canada are entitled to bargain working conditions collectively through an independent association that has been freely chosen. Section 96 is, in effect, a blanket prohibition on an independent association representing members of the RCMP in a process of collective bargaining. There are numerous more carefully tailored approaches manifested by the relationships of the CPA's membership to police employers, including restrictions on the scope of bargaining and on the legislated right to strike, which are less destructive of an RCMP members' associational rights. Canada's response has instead fallen outside even a wide margin of appreciation of less impairing alternatives.

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[26] *Fraser*, *supra* at para. 18.

28. Moreover, s. 96 is also not proportional. Where the government itself is the employer and the competing interests of private actors need not be balanced (i.e. private employers, on the one hand, and employees, on the other) the government must act in a way that respects the freedoms granted by the *Charter*, even if the *Charter* may not require the government to act in comparable circumstances involving a private employer. The *Charter* binds governments, not private actors, and Canada as an employer must be held to the minimum standards the *Charter* protects.

PART IV: COSTS

29. The CPA does not seek costs, and asks that no costs be awarded against it.

PART V: ORAL ARGUMENT

30. The CPA requests permission to make oral submissions at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

September 19, 2013

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PART VI – TABLE OF AUTHORITIES

	Para(s)
1. Brian Langille, "Why the Right-Freedom Distinction Matters to Labour Lawyers – And to All Canadians", The 2011 Innis Christie Public Lecture in Labour and Employment Law presented November 4, 2011	24
2. *Canada (Attorney General) v. Meredith*, 2013 FCA 112	15
3. *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 SCR 989	5, 10, 17
4. *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94	4, 18, 24
5. *Fraser v. Ontario (Attorney General)*, 2011 SCC 20	4, 13, 18, 22, 24, 25
6. *Fraser v. Ontario (Attorney General)*, 2008 ONCA 760	22
7. *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27	6, 19, 21, 22
8. *Professional Institute of the Public Service of Canada v. Northwest Territories*, [1990] 2 S.C.R. 367	5, 17

PART VII – STATUTES CITED

Royal Canadian Mounted Police Act, R.S.C., 1985, c. R-10

Pay and allowances

22. (1) The Treasury Board shall establish the pay and allowances to be paid to members.

Reduction in pay where demotion

(1.1) Where, pursuant to this Act, a member is demoted, the rate of pay of that member shall be reduced to the highest rate of pay for the rank or level to which the member is demoted that does not exceed the member's rate of pay at the time of the demotion.

During imprisonment

(2) No pay or allowances shall be paid to any member in respect of any period during which the member is serving a sentence of imprisonment.

During suspension

(3) The Treasury Board may make regulations respecting the stoppage of pay and allowances of members who are suspended from duty.

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

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.

The Constitution Act, 1982, Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11

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.

2. Everyone has the following fundamental freedoms:

...

(d) freedom of association.

32. (1) This Charter applies

a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.