SCC Court File No. 40123

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC)

B E T W E E N :

SOCIÉTÉ DES CASINOS DU QUÉBEC INC.

Appellant

- and -

ASSOCIATION DES CADRES DE LA SOCIÉTÉ DES CASINOS DU QUÉBEC

Respondent

A N D B E T W E E N :

ATTORNEY GENERAL OF QUEBEC

Appellant

- and -

ASSOCIATION DES CADRES DE LA SOCIÉTÉ DES CASINOS DU QUÉBEC

Respondent

(CONT'D ON NEXT PAGE)

FACTUM OF THE INTERVENER, CANADIAN LABOUR CONGRESS

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

GOLDBLATT PARTNERS LLP
20 Dundas Street West
Suite 1039
Toronto, ON M5G 2C2

Steven Barrett
Telephone: (416) 977-6070
Fax: (416) 591-7333
Email: sbarrett@goldblattpartners.com

Colleen Bauman
Telephone: (613) 482-2463
Fax: (613) 235-5327
Email: cbauman@goldblattpartners.com

Counsel for the Intervener, the Canadian Labour Congress

- and -

ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF ALBERTA, ADMINISTRATIVE LABOUR TRIBUNAL, SOCIÉTÉ DES CASINOS DU QUÉBEC INC., CANADIAN ASSOCIATION OF COUNSEL TO EMPLOYERS, NATIONAL POLICE COMMISSIONED OFFICERS PROFESSIONAL ASSOCIATION, CANADIAN LABOUR CONGRESS, ONTARIO PRINCIPALS' COUNCIL, CATHOLIC PRINCIPALS' COUNCIL OF ONTARIO, ASSOCIATION DES DIRECTIONS ET DES DIRECTIONS ADJOINTES DES ÉCOLES FRANCO-ONTARIENNES AND DIRECTORS GUILD OF CANADA-ONTARIO, CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS, PUBLIC SERVICE ALLIANCE OF CANADA, CANADIAN CIVIL LIBERTIES ASSOCIATION, SYNDICAT PROFESSIONNEL DES INGÉNIEURS D'HYDRO-QUÉBEC INC., ASSOCIATION DES CADRES DES COLLÈGES DU QUÉBEC, ASSOCIATION DES CADRES MUNICIPAUX DE MONTRÉAL, ASSOCIATION DES CONSEILLERS EN GESTION DES RESSOURCES HUMAINES DU GOUVERNEMENT DU QUÉBEC, ASSOCIATION DES CADRES SCOLAIRES DU GRAND MONTRÉAL, ASSOCIATION DES CADRES SUPÉRIEURS DE LA SANTÉ ET DES SERVICES SOCIAUX, ASSOCIATION DES DIRECTEURS ET DIRECTRICES DE SUCCURSALE DE LA SOCIÉTÉ DES ALCOOLS DU QUÉBEC, ASSOCIATION PROFESSIONNELLE DES CADRES DE PREMIER NIVEAU D'HYDRO-QUÉBEC, ASSOCIATION QUÉBÉCOISE DES CADRES SCOLAIRES, ASSOCIATION QUÉBÉCOISE DU PERSONNEL DE DIRECTION DES ÉCOLES ET LA FÉDÉRATION QUÉBÉCOISE DES DIRECTIONS D'ÉTABLISSEMENT D'ENSEIGNEMENT

Interveners

ORIGINAL TO:

The Registrar
Supreme Court of Canada
301 Wellington Street,
Ottawa, ON K1A 0J1

COPIES TO:

LORANGER MARCOUX
2000 avenue McGill College
#1000
Montréal, QC H3A 3H3

Jean Leduc
Telephone: (514) 879-6255
FAX: (514) 879-6907
Email: jleduc@lorangermarcoux.com

Counsel for Société des casinos du Québec inc.

SUPREME ADVOCACY LLP
100- 340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Telephone: (613) 695-8855 Ext: 102
FAX: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

Ottawa Agent for Société des casinos du Québec inc.

PROCUREUR GÉNÉRAL DU QUÉBEC
Bernard, Roy (Justice-Québec)
1, rue Notre-Dame Est, Bureau 8.00
Montréal, QC H2Y 1B6

Michel Déom
Samuel Chayer
Marie Couture Clouâtre
Telephone: (514) 393-2336 Ext: 51498
FAX: (514) 873-7074
Email: michel.deom@justice.gouv.qc.ca

Counsel for Attorney General of Québec

NOËL ET ASSOCIÉS, S.E.N.C.R.L.
225, montée Paiement
2e étage
Gatineau, QC J8P 6M7

Pierre Landry
Telephone: (819) 503-2178
FAX: (819) 771-5397
Email: p.landry@noelassocies.com

Ottawa Agent for Attorney General of Québec

POUDRIER BRADET, S.E.N.C.
70, rue Dalhousie
Bureau 100
Québec, QC G1K 4B2

Sophie Cloutier
Telephone: (418) 780-3333
FAX: (418) 780-3334
Email: scloutier@poudrierbradet.com

Counsel for Association des cadres de la Société des casinos du Québec

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3

Marie-Christine Gagnon
Telephone: (613) 786-0086
FAX: (613) 563-9869
Email: Marie-Christine.Gagnon@ca.gowlingwlg.com

Ottawa Agent for Association des cadres de la Société des casinos du Québec

FITZBACK CHARBONNEAU
Fitzback Charbonneau / Tribunal administratif du travail
900, place D'Youville, bureau 700
Québec, QC G1R 3P7

Fitzback Charbonneau
Telephone: (514) 873-3761
FAX: (514) 873-9507
Email: fitzbackcharbonneau@tat.gouv.qc.ca

Counsel for Administrative Labour Tribunal

ATTORNEY GENERAL OF CANADA
Department of Justice Canada - National Litigation Sector
120 Adelaide Street West, Suite 400
Toronto, ON M5H 1T1

Sean Gaudet
Kirk Shannon
Telephone: (647) 256-7539
FAX: (416) 973-0809
Email: sean.gaudet@justice.gc.ca

Counsel for Attorney General of Canada

ATTORNEY GENERAL OF CANADA
Department of Justice Canada, Civil Litigation Section
50 O'Connor Street, 5th Floor
Ottawa, ON K1A 0H8

Christopher M. Rupar
Telephone: (613) 670-6290
FAX: (613) 954-1920
Email: christopher.rupar@justice.gc.ca

Ottawa Agent for Attorney General of Canada

ATTORNEY GENERAL OF ONTARIO
McMurty-Scott Building, 4th Floor
720 Bay St.
Toronto, ON M7A 2S9

Rochelle Fox
Savitri Gordian
Telephone: (416) 995-3288
FAX: (416) 326-4015
Email: rochelle.fox@ontario.ca

Counsel for Attorney General of Ontario

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, suite 1300
Ottawa, ON K1P 1J9

Nadia Effendi
Telephone: (613) 787-3562
FAX: (613) 230-8842
Email: neffendi@blg.com

Ottawa Agent for Attorney General of Ontario

ALBERTA JUSTICE
CONSTITUTIONAL AND
ABORIGINAL LAW
10th Floor, Oxford Tower
10025 - 102A Avenue N.W.
Edmonton, AB T5J 2Z2

Leah M. McDaniel
Telephone: (780) 422-7145
FAX: (780) 643-0852
Email: leah.mcdaniel@gov.ab.ca

Counsel for Attorney General of Alberta

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3

D. Lynne Watt
Telephone: (613) 786-8695
FAX: (613) 788-3509
Email: lynne.watt@gowlingwlg.com

Ottawa Agent for Attorney General of Alberta

MCCARTHY TÉTRAULT LLP
Toronto Dominion Bank Tower
Suite 5300
Toronto, ON M5K 1E6

Tim Lawson
Myriane Le François
Mathieu Bernier Trudeau
Andrew Weizman
Telephone: (416) 601-8200
FAX: (416) 868-0673
Email: timlawson@mccarthy.ca

Counsel for Canadian Association of Counsel to Employers

NELLIGAN O'BRIEN PAYNE LLP
50 O'Connor
Suite 300
Ottawa, ON K1P 6L2

Christopher C. Rootham
Andrew Montague-Reinholdt
Telephone: (613) 231-8212
FAX: (613) 238-2098
Email: christopher.rootham@nelliganlaw.ca

Counsel for National Police Commissioned Officers Professional Association

Jones Pearce
67 Yonge Street, 2nd floor
Toronto, ON M5E 1J8

Caroline v. (Nini) Jones
Lauren Pearce
Telephone: (416) 735-0678
Email: nini.jones@jonespearce.com

Counsel for Ontario Principals' Council, Catholic Principals' Council of Ontario, Association des directions et des directions adjointes des écoles Franco-Ontariennes and Directors Guild of Canada-Ontario

RYDER WRIGHT HOLMES BRYDEN NAM
333 Adelaide Street West, 3rd floor
Toronto, ON M5V 1R5

Mae J. Nam
Rebecca Jones
Telephone: (416) 340-9070
FAX: (416) 340-9250
Email: mjnam@ryderwright.ca

Counsel for Canadian Lawyers for International Human Rights

RAVEN, CAMERON, BALLANTYNE & YAZBECK LLP
220 Laurier Avenue
Suite 1600
Ottawa, ON K1P 5Z9

Andrew Astritis
Morgan Rowe
Telephone: (613) 567-2901
FAX: (613) 567-2921
Email: aastritis@ravenlaw.com

Counsel for Public Service Alliance of Canada

Champ and Associates
43 Florence Street
Ottawa, ON K2P 0W6

Bijon Roy
Telephone: (613) 237-4740
FAX: (613) 232-2680
Email: broy@champlaw.ca

Ottawa Agent for Ontario Principals' Council, Catholic Principals' Council of Ontario, Association des directions et des directions adjointes des écoles Franco-Ontariennes and Directors Guild of Canada-Ontario

CHAMP AND ASSOCIATES
43 Florence Street
Ottawa, ON K2P 0W6

Bijon Roy
Telephone: (613) 237-4740
FAX: (613) 232-2680
Email: broy@champlaw.ca

Ottawa Agent for Canadian Lawyers for International Human Rights

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP
155 Wellington Street West
35th Floor
Toronto, ON M5V 3H1

Danielle Glatt
Catherine Fan
Telephone: (416) 646-7440
FAX: (416) 646-4301
Email: danielle.glatt@paliareroland.com

Counsel for Canadian Civil Liberties Association

RIVEST, SCHMIDT
7712, rue St-Hubert
Montréal, QC H2R 2N8

Claude Tardif
Catherine Massé-Lacoste
Telephone: (514) 948-1888 Ext: 229
FAX: (514) 948-0772
Email: claudetardif@rivestschmidt.qc.ca

Counsel for Syndicat professionnel des ingénieurs d'Hydro-Québec inc.

MMGC
Bureau 200
871, Grande Allée Ouest
Québec, QC G1S 1C1

Michel Gilbert
Guillaume Grenier
Pierre Brun
Telephone: (418) 640-1773 Ext: 224
FAX: (418) 640-0474
Email: mgilbert@mmgc.quebec

Counsel for Association des cadres des collèges du Québec, Association des cadres municipaux de Montréal, Association des conseillers en gestion des ressources humaines du gouvernement du Québec, Association des cadres scolaires du grand Montréal

GOWLING WLG (CANADA) LLP
160 Elgin Street
Suite 2600
Ottawa, ON K1P 1C3

Jeffrey W. Beedell
Telephone: (613) 786-0171
FAX: (613) 563-9869
Email: jeff.beedell@gowlingwlg.com

Ottawa Agent for Canadian Civil Liberties Association

JURISTES POWER
130 rue Albert
bureau 1103
Ottawa, ON K1P 5G4

Maxine Vincelette
Telephone: (613) 702-5573
FAX: (613) 702-5573
Email: mvincelette@juristespower.ca

Ottawa Agent for Syndicat professionnel des ingénieurs d'Hydro-Québec inc.

MMGC
Bureau 200
871, Grande Allée Ouest
Québec, QC G1S 1C1

Michel Gilbert
Guillaume Grenier
Pierre Brun
Telephone: (418) 640-1773 Ext: 224
FAX: (418) 640-0474
Email: mgilbert@mmgc.quebec

Counsel for Association des cadres supérieurs de la santé et des services sociaux, Association des directeurs et directrices de succursale de la société des alcools du Québec, Association professionnelle des cadres de premier niveau d'Hydro-Québec

MMGC
Bureau 200
871, Grande Allée Ouest
Québec, QC G1S 1C1

Michel Gilbert
Guillaume Grenier
Pierre Brun
Telephone: (418) 640-1773 Ext: 224
FAX: (418) 640-0474
Email: mgilbert@mmgc.quebec

Counsel for Association québécoise des cadres scolaires, Association québécoise du personnel de direction des écoles et la Fédération québécoise des directions d'établissement d'enseignement

INDEX

PARTS I and II: Overview and Questions in Issue

1. The Canadian Labour Congress (CLC) intervenes to make submissions concerning the inapplicability of the positive rights analysis in the context of s. 2(d) collective bargaining exclusion challenges, the unconstitutional purpose underlying the exclusion, and the standard of review of expert tribunal factual findings in constitutional cases.

PART III: Statement of Argument

(a) Exclusion from collective bargaining legislation should not be analyzed or treated as a positive right claim

2. In determining whether a distinction should be made between positive and negative constitutional claims, it is necessary to consider the specific nature of the constitutionally protected activity at issue and the practical context in which the claim is advanced. While the *Baier* and *City of Toronto*[1] distinction between positive rights and negative rights applies to s. 2(b) claims, this approach should not be extended to s. 2(d) claims arising in the labour relations and collective bargaining context.[2] This is particularly the case where the s. 2(d) challenge is brought to a legislative provision

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[1] *Baier v. Alberta*, 2007 SCC 31 (CanLII), [2007] 2 SCR 673 [*Baier*]; *Toronto (City) v. Ontario* (Attorney General), 2021 SCC 34 (CanLII) [*City of Toronto*].

[2] Various cautions have been expressed by Justices of this Court about the difficulties in applying and maintaining a hard and fast distinction between positive and negative claims, particularly in the labour relations context: see for example Dickson CJC in *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at para. 77: the "the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms"; L'Heureux-Dube J. in *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 SCR [*Delisle*] at para 6: "[t]he contextual approach to Charter analysis must...take into account the history of the need for government intervention to make effective the rights of workers to associate together"; Bastarache J. in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 SCR 1016 [*Dunmore*] at para 22: "…without the necessary protection, the freedom to organize could amount 'to no more than the freedom to suffer serious adverse legal and economic consequences'" and at para. 42: "legislative protection is crucial if agricultural workers wish to unionize. Indeed, to suggest otherwise would contradict a widespread consensus among Parliament and the provincial legislatures that without certain minimum protections, the somewhat limited freedom to organize itself would be a hollow freedom"; *Ontario (Attorney General) v. Fraser*, 2011 SCC

that, on its face, explicitly and overtly excludes a group of employees from the protections of a comprehensive collective bargaining regime – a legislative regime which across Canada is synonymous with the instantiation of constitutionally protected collective bargaining and strike activity.

3. Although the *Baier* and *City of Toronto* s. 2(b) analysis was based on this Court's earlier decision in *Dunmore*, this Court did not apply the positive rights *Dunmore* analysis in *MPAO*,[3] which also involved the claim that exclusion from normative collective bargaining legislation infringed s. 2(d) of the *Charter*. Indeed, this Court recognized in *City of Toronto* that the challenge to the exclusion of agricultural employees in *Fraser* or of RCMP members in *MPAO* was not regarded as raising positive rights claim or attracting the *Baier* analysis.[4] In the CLC's submission, this reflects the Court's growing post-*Dunmore* recognition that the underlying purpose of s. 2(d) protection for collective bargaining and the right to strike is to redress the inherent power imbalance in the employment relationship[5], so that excluding employees from comprehensive collective bargaining regimes necessary to redress that imbalance may, in purpose or effect, substantially interfere with protected s. 2d activity.

4. In the context of a claim that s. 2(d) has been infringed as a result of exclusion from a legislated collective bargaining regime, it is critical to recognize the extent to which governments across Canada have extensively "regulated, structured and channeled' the method through which Canadian workers are able to organize, to the point where organizing a workers' association is 'virtually synonymous with unionizing under the legislative scheme."[6] Indeed, "history has shown and Canada's legislatures have recognized that a posture of government restraint in the area of labour relations will expose most workers not only to a range of unfair labour practices, but potentially to legal liability under common law inhibitions on combinations and restraints of trade." This Court has also emphasized that "the history of labour relations in Canada illustrates the profound connection between legislative protection

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20, [2011] 2 SCR 3 [*Fraser*], at paras 69 to 70: "This Court has consistently rejected a rigid distinction between "positive" freedoms and "negative" rights in the Charter…A purposive protection of freedom of association may require the state to act positively to protect the ability of individuals to engage in fundamentally important collective activities."

[3] *Mounted Police Association of Ontario v. Canada (Attorney General)*, [2015] 1 SCR 3, paras. 122-135 [*MPAO*].
[4] *City of Toronto*, *supra* at para. 21.
[5] *MPAO, supra* at paras. 69, 80; *Saskatchewan Federation of Labour v. Saskatchewan*, [2015] 1 SCR 245 [*SFL*] at paras. 56, 94.
[6] *Dunmore, supra* at para. 41.

and the freedom to organize", such that "[i]t may be suggested that legislative protection is so tightly woven into the fabric of labour relations that, while there is no constitutional right to protective legislation *per se*, the selective exclusion of a group from such legislation may substantially impact the exercise of a fundamental freedom" and "substantially orchestrate, encourage or sustain the violation of fundamental freedoms."[7]

5. Indeed, as most recently recognized in *MPAO*, collective bargaining legislation constitutes "the only vehicle available for meaningful collective bargaining,"[8] Given the unique role of s. 2(d) protection in overcoming the "historical inequality between employers and employees" and redressing "the imbalance inherent in the employer-employee relationship,"[9] the constitutional claim that the exclusion of specific groups of workers from a legislative collective bargaining regime that has been enacted as the intended and necessary mechanism for instantiating and protecting the constitutionally protected collective bargaining process simply cannot be equated with an ordinary claim for positive or affirmative legislative protection. Rather, as a matter of substance rather than form, a challenge to the exclusion of workers from comprehensive collective bargaining legislation should be more appropriately understood as involving the claim that the exclusion interferes with their ability access the very mechanism that has been established as the necessary and normative vehicle for instantiating the right and capacity of employees to engage in constitutionally protected associational activity.

6. In these circumstances, to superimpose a *Baier* or *City of Toronto* positive rights analysis would artificially ignore the larger legal, historical, structural and labor relations reality previously recognized by this Court. Indeed, given the extent to which collective bargaining legislation has, across Canada, become virtually synonymous with the capacity to engage in meaningful collective bargaining, the deliberate exclusion of a group of employee from collective bargaining legislation must be regarded as being prima facie tantamount to undermining their capacity to engage in a meaningful constitutionally protected collective bargaining process (as was found on the facts of this case by the TAT).[10] In short, the test for s. 2(d) infringement should simply be whether the purpose or effect of the legislative

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[7] Ibid *at* paras. 20, 41, 35 and 26.
[8] *MPAO, supra* at para. 134.
[9] *MPAO, supra* at paras. 69-72; *SFL, supra* at paras. 56, 94.
[10] TAT Decision, le 7 decembre 2016, 2016 qctat 6870 at paras. 301, 304, 306-348, 440, Dossier de l'Appelante ("DA"), Vol. 1, Tab 1, pp. 64-73, 92.

exclusion is to deprive "employees of adequate protections in their interactions with management so as to substantially interfere with their ability to meaningfully engage in collective negotiations."[11]

7. The inapplicability and artificiality of the distinction between positive and negative rights in the collective bargaining context is also supported by the international recognition of the need for legislative measures in order to make freedom of association effective. Canada is signatory to both ILO Convention No. 87, and since 2017 ILO Convention No. 98.[12] Under Convention No. 87, Canada has committed to "give effect" to the protections and rights contained in the Convention (Article 1), and to "to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise (Article 11)." Under Convention No. 98, Canada has undertaken in Articles 1, 3, and 4 to ensure that workers enjoy adequate protection against acts of anti-union discrimination in respect of their employment, to establish "machinery appropriate to national conditions" for the purpose of "ensuring respect for the right to organise" and "to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements." Across Canada, the machinery that has been universally adopted to give effect to the constitutional rights to bargain and to strike is comprehensive collective bargaining regimes.

8. Most recently, in *National Union of Professional Foster Carers v The Certification Officer,* the English Court of Appeal held, without applying any different or higher threshold to a case of interference by exclusion than to any other kind of interference, that "where a statutory scheme of recognition is in place, the exclusion of a trade union from access to that scheme may in certain circumstances be a breach of article 11. It is in such a case no answer to say that the trade union has the right to seek collective bargaining on a voluntary basis," and that "the fact that the NUPFC [the union] is precluded from applying for recognition under Schedule A1 constitutes an interference with its article 11 rights."[13] The English Court of Appeal in turn followed the decision of the European Court of Human Rights in *Demir and Baykara v. Turkey*, where the European Court held that with respect to the protection of

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[11] *MPAO, supra* at para. 80.

[12] *Convention (No. 87) concerning freedom of association and protection of the right to organize*, 68 U.N.T.S. 17, art. 3(1). *Convention (No. 98) concerning the application of the principles of the right to organise and to bargain collectively*, 96 U.N.T.S. 257, Art. 4.

[13] *National Union of Professional Foster Carers v The Certification Officer* [2021] EWCA Civ 548 (16 April 2021) at paras. 109, 111, and more generally see paras. 99-115 and 136-138.

freedom of association under Article 11 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*:[14]

a) "there may...be positive obligations on the State to secure the effective enjoyment of such rights. In the specific context of the present case, the responsibility of Turkey would be engaged if the facts complained of by the applicants – that is to say, principally, the non-recognition of their trade union by the State at the material time – resulted from a failure on its part to secure to the applicants under domestic law the rights set forth in Article 11 of the Convention." (para. 110); and

b) "whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the rights of an applicant under the Article or in terms of an interference by a public authority, to be justified in accordance with § 2 of the Article, the applicable principles are broadly similar" (para. 111).[15]

9. Finally, to the extent that one of the concerns expressed in the *City of Toronto* case is that "given the ease with which claimants can typically show a limit to free expression", s. 2(b) protection for freedom of expression would extend to virtually any activity intended to convey meaning and to virtually any statutory platform (para. 14), there is no such concern in the case at bar. The threshold for establishing a s. 2(d) violation is considerably higher than for s. 2(b), the right to collectively bargain and to strike are specific and limited in nature and lie at the core of *Charter* protection for freedom of association, and unlike freedom of expression, protection for freedom of association in the workplace context has been recognized to require legislative support and intervention.

(b) Requirements for Positive Rights Infringement Met

10. Alternatively, and as set out in the Respondent and other intervener factums, if this Court were to find that challenges to exclusions from collective bargaining brought under s. 2(d) attract a positive

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[14] *Convention for the Protection of Human Rights and Fundamental Freedoms or the European Convention on Human Rights* (ECHR), Rome, 4.XI.1950.

[15] *Demir and Baykara v. Turkey*, No 34503/97, [2008] ECHR 1345, (2009) 48 EHRR 54. See also *Sindicatul Păstorul cel Bun v Romania*, [2013] ECHR 646 at paras. 132: "The boundaries between the State's positive and negative obligations under Article 11 of the Convention do not lend themselves to precise definition. The applicable principles are nonetheless similar. Whether the case is analysed in terms of a positive duty on the State or in terms of interference by the public authorities which needs to be justified, the criteria to be applied do not differ in substance."

rights analysis, the evidence and the findings made by the expert tribunal below and by the ILO Freedom of Association Committee[16] as to the effect of legislatively excluding casino operations supervisors overwhelming demonstrate an infringement of core s. 2(d) protection for a meaningful collective bargaining process and the right to strike.

11. Contrary to the submissions of the AG Quebec, the constitutional claim in this case is no less rooted in constitutionally protected s. 2(d) activity than the claim for protection for organizing activity in *Dunmore*, where this Court recognized that collective bargaining legislation is the vehicle through which s. 2(d) protection is instantiated, but that nonetheless the underlying freedom to organize was, in that case, constitutionally protected.[17] Similarly, the right to collectively bargaining to strike, while instantiated through legislative protection, are now also constitutionally protected.

12. Furthermore, contrary to the submission of the appellant and the Attorney General of Quebec, any bare common or civil law right of employees to have recourse to the courts or to engage in strike activity does not mitigate against the substantial interference caused by the exclusion from the procedures and protections otherwise available under the Quebec *Labour Code*. Just as the failure to provide legislative unfair labour practice protection in *Dunmore* substantially interfered with the constitutionally protected right to organize, so too does the failure to provide legislative unfair labour practice protection for the post-*SFL* constitutionally protected right to strike. In this respect, the bare common law right to quit employment, with the possibility of eventual and uncertain recourse to the courts, falls well short of any meaningful s. 2(d) constitutional protection for the right to strike.[18] This is particularly the case in the context of exclusion from a collective bargaining regime that otherwise provides effective and speedy protection from termination or reprisals against workers engaging in constitutionally protected strike activity. Indeed, having regard to the power imbalance inherent in the

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[16] *Rapport du Comité sur la liberté syndicale, n° 335, novembre 2004, Cas no 2257 (Canada)* cited in TAT Decision, *supra* at paras. 71-84, DA, Vol. 1, Tab 1, pp. 17-21.

[17] *Dunmore, supra* at para. 36.

[18] In both *Dunmore* and *Fraser* this Court recognized that more than common law protection was constitutionally required. Indeed, this Court recognized that s. 2(d) requires protection against unfair labour practices (*Dunmore*), and a meaningful collective bargaining process (*Fraser*), both of which, as found by the Tribunal and Court of Appeal, are precluded by the exclusion from the Quebec Labour Code in the case at bar. This case is also different than *Fraser* since in *Fraser* there were no lower court findings about the purpose or effect of exclusion on constitutionally protected activity.

employment relationship and the widespread judicial acknowledgement that labour relations delayed are labour relations defeated and denied, excluding employees from legislative protection constitutes a profound deprivation of their associational freedom. As the ILO has recognized, meaningful and effective protection for the right to strike requires that striking workers be protected from termination of employment, reprisals or discrimination; otherwise, the right to strike is "devoid of content."[19]

(c) Assessing Unconstitutional Purpose in context of Legislative Exclusion from Collective Bargaining

13. Regardless of whether the distinction between claims for negative or positive rights is applicable, the CLC submits that where the purpose of a legislative exclusion is (as found by the TAT below and as upheld by the Court of Appeal)[20] to prevent employees from engaging in their constitutional right to a meaningful process of collective bargaining, an unconstitutional purpose is established, and the legislation infringes s. 2(d) of the *Charter*.[21] In this context, given the extent to which access to legislation is required to be able to engage in collective bargaining, the exclusion of a selective group of employees from that legislation should be seen to reflect, on its face, a deliberate and purposeful decision to deprive the excluded employees of their s. 2(d) right to engage in a meaningful collective bargaining process.

14. As noted above, in *MPAO* this Court recognized that legislation is "the only vehicle available for meaningful collective bargaining"[22] and that, as a result, the legislative exclusion "was intended to prevent them from engaging in collective bargaining." In the CLC's submission, the purpose underlying a decision to exclude a group of employees from collective bargaining legislation should, *prima facie* and in the absence of evidence to the contrary, be seen to include its reasonably foreseeable effect, namely, that the excluded employees will be precluded from engaging in a meaningful collective bargaining process.

15. Moreover, to the extent that the professed rationale for excluding all managerial employees from collective bargaining legislation is to avoid the supposed conflict of interest that would otherwise arise if they were permitted to engage in collective bargaining, this effectively concedes that the

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[19] ILO Committee of Experts, "Freedom of Association and Collective Bargaining", 1994, para. 139.
[20] TAT Decision, *supra* at para. 301, DA, Vol. 1, Tab 1, pp. 63-64; *Association des cadres de la Société des casinos du Québec c. Société des casinos du Québec*, 2022 QCCA 180 at para. 160, DA, Vol. 1, Tab 3, pp. 233.
[21] *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at para. 88.
[22] *MPAO, supra* at para. 134.

intended purpose of the exclusion is a deliberate attempt to deny the exercise by the excluded employees of their constitutional right to engage in collective bargaining.[23] While the concern with avoiding conflict of interest may be relevant to the section 1 inquiry, it in no way negates the compelling inference that the legislature has deliberately chosen to enact a measure which it specifically intended would suppress collective bargaining by any managerial employees. Of course, if the government can establish that the underlying policy rationale (such as avoiding conflicts of interest or divided loyalties) is pressing and substantial and meets the proportionality requirements, then the legislation will be upheld under s. 1 of the *Charter*. However, this is no way negates the existence of the immediate, deliberate and self-evident purpose and intention of the legislation, namely, to prevent employees from being able to engage in collective bargaining. That purpose is, in the CLC's submissions, constitutionally impermissible, absent section 1 justification.

16. Indeed, on the facts of this case, and as demonstrated by the legislative treatment of managerial employees of the City of Montreal (represented by the SPIVM) and of Hydro-Québec (represented by the SPIHQ), the Legislature knew that the exclusion of managerial employees from collective bargaining legislation meant that they would be unable to engage in a meaningful collective bargaining process. In 1970, the legislature passed specific legislative provisions for the managerial employees represented by the SPIVM and SPIHQ (both of which had been previously voluntarily recognized for the purposes of collective bargaining) so as to exempt them from the managerial exclusion in the Quebec *Labour Code*. Significantly, in moving second reading of the Bill to implement this amendment, the Minister of Labour at that time, Pierre Laporte, recognized that without this exemption bargaining for these two groups would have been eliminated, with the effect of their being returned to the "law of the jungle,"[24] i.e. to the inherent imbalance and vulnerability inherent in the employment relationship

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[23] See the reasons of Justices Cory and Iacobucci in *Delisle, supra* at para 99: "In its submissions before this Court, the respondent repeatedly endorsed this same view, i.e., 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."

[24] Québec, Assemblée Nationale, *Journal des débats*, 1ère sess., 29e légis., 16 juillet 1970, « Projet de loi no 36 – *Loi modifiant le Code du travail* » cited in TAT Decision, *supra* at para. 375, DA, Vol. 1, Tab 1, p. 78 and QCA Decision, *supra,* at paras 89-92, DA, Vol. 1, Tab 3, pp. 201-204.

that applies without access to the protection and instantiation of protected associational activity through collective bargaining legislation. [25]

17. While previous Supreme Court of Canada decisions (*Delisle* and *Dunmore)* suggested a relatively high threshold before a finding of unconstitutional purpose is made in the context of legislative exclusion from collective bargaining, these decisions were made in the context of a significantly narrower conception of the scope of s. 2(d) protection, i.e., one that did not include constitutional protection for collective bargaining or the right to strike (as this Court recognized in *MPAO*.[26]

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[25] For a similar analysis, see the reasons of Justices Cory and Iacobucci in *Delisle, supra* at paras 86-91, but reflecting this Court's subsequent *MPAO* understanding of s. 2(d) protection as being rooted in an imbalance of power: "The key consideration, in examining Parliament's purpose in excluding members of the RCMP from the PSSRA, is the reason for the decision to exclude. If Parliament's purpose in excluding a particular employee group from a labour statute was to ensure that the employee group remained vulnerable to management interference with labour association, this is impermissible in light of s. 2(d). Even though the effect of the exclusion may be simply to maintain the status quo of employees whereby they are burdened with the inherent imbalance of power in the employment context, the central consideration is whether Parliament's deliberate decision to exclude flowed from a purpose that conflicts with the fundamental freedom of employees to associate. It is of some relevance that the status quo in the labour relations context is one of inherent employee vulnerability to management interference with labour associations. It is simply not open to Parliament to enact a statutory provision where the motivation for enacting the provision is anti-associational, subject of course to s. 1 of the Charter."

[26] *MPAO*, *supra* at para. 25. See also this Court's observation in *Dunmore, supra* at paras. 46-47, albeit in relation to a narrower conception of s. 2(d) protection: "it is inappropriate for the Ontario Legislature to distant itself from the effects of the LRA…. the exclusion of an entire category of workers from the LRA can only be viewed as a foreseeable infringement of their *Charter* rights." Moreover, at trial in *Dunmore*, while collective bargaining was not then constitutionally protected, Justice Sharpe observed that he had no hesitation in finding that the legislative purpose of excluding agricultural employees was "undoubtedly to deny agriculture workers the right to bargain collectively" (see *Dunmore* at para. 8). This same observation applies in the case at bar, but collective bargaining is now constitutionally protected.

18. The CLC recognizes that in *MPAO,* the legislative exclusion found to have an improper constitutional purpose was coupled with an unconstitutionally imposed representational structure. However, there is no constitutionally significant difference between the scheme imposed in MPAO by Order in Council, and that imposed by the deliberate legislative decision to leave casino operations supervisors subject to the common law restrictions (as detailed in the CCLA factum) on their capacity to engage in meaningful collective bargaining, and so too subject to the employer's overriding power and authority.

(d) Deference to labour tribunal factual findings involving constitutional issues

19. The TAT made expert factual findings regarding the impact of the legislative exclusion on the ability of the affected operations supervisors to engage in constitutionally protected collective bargaining and strike activity, to which reviewing courts should defer. Contrary to the AG Quebec's submission, even in constitutional divisions of power cases, deference is owed to factual findings made by tribunals, with the degree of deference varying with the nature of the issue and the expertise of the decision-maker.[27] The principle of judicial deference to constitutional factual findings in *Charter* cases should be similar to the deference shown to factual determinations made by trial courts in constitutional cases,[28] particularly given that labour tribunals are courts of competent jurisdiction when it comes to determining constitutional issues,[29] and given that assessment of the extent to which exclusion from collective bargaining legislation precludes meaningful collective bargaining and the right to strike lies at the heart of the TAT's legal and labour relations expertise.

PARTS IV and V: Costs and Oral Argument

20. The CLC does not seek costs and asks that no costs be ordered against it. As set out in the order of Jamal J. dated February 16, 2023, the CLC has permission to present oral argument not to exceed five minutes.

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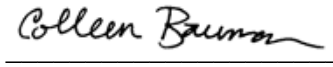
[27] *West Coast Energy v. Canada (National Energy Board),* 1998 CanLII 813, [1998] 1 SCR 322 at paras. 38 to 40; and *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters,* 2009 SCC 53, [2009] 3 SCR 407 at para. 26.

[28] *Canada (Attorney General) v. Bedford,* [2013] 3 SCR 1101 at paras. 48-56.

[29] *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board),* [1991] 2 SCR 5 at pp 18-19; and *R. v. Conway,* [2010] 1 SCR 765 at paras. 6, 80-82.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

March 30, 2023



for

Steven M. Barrett
Colleen Bauman
Counsel for the Intervener, the Canadian Labour Congress

PART VI: Table of Authorities

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Canada (Attorney General) v. Bedford, [2013] 3 SCR 1101	19
Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters, 2009 SCC 53, [2009] 3 SCR 407	19
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Delisle v. Canada (Deputy Attorney General), [1999] 2 SCR	2, 15, 16, 17
Demir and Baykara v. Turkey, No 34503/97, [2008] ECHR 1345, (2009) 48 EHRR 54	8
Dunmore v. Ontario (Attorney General), 2001 SCC 94, [2001] 3 SCR 1016	2, 3, 4, 11, 12, 17
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Labour Code, CQLR c C-27 *Code du travail*, RLRQ c C-27	12, 16