



**SUPREME COURT OF CANADA**

**CITATION:** Mounted Police Association of Ontario v. Canada  
(Attorney General), 2015 SCC 1

**DATE:** 20150116  
**DOCKET:** 34948

**BETWEEN:**

**Mounted Police Association of Ontario and British Columbia Mounted Police  
Professional Association, on their own behalf and on behalf of all members  
and employees of the Royal Canadian Mounted Police**

Appellants

and

**Attorney General of Canada**

Respondent

- and -

**Attorney General of Ontario, Attorney General of British Columbia,  
Attorney General for Saskatchewan, Attorney General of Alberta,  
Association des membres de la Police Montée du Québec Inc.,  
Mounted Police Members' Legal Fund, Confédération des syndicats nationaux,  
Canadian Police Association, Canadian Labour Congress,  
Canadian Civil Liberties Association, Public Service Alliance of Canada and  
British Columbia Civil Liberties Association**

Interveners

**CORAM:** McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and  
Wagner JJ.

**JOINT REASONS FOR JUDGMENT:** McLachlin C.J. and LeBel J. (Abella, Cromwell,  
(paras. 1 to 158) Karakatsanis and Wagner JJ. concurring)

**DISSENTING REASONS:** Rothstein J.  
(paras. 159 to 270)

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MOUNTED POLICE ASS'N ONT. v. CANADA

Mounted Police Association of Ontario and

British Columbia Mounted Police Professional

Association, on their own behalf and

**on behalf of all members and employees of the Royal  
Canadian Mounted Police**

*Appellants*

v.

**Attorney General of Canada**

*Respondent*

and

Attorney General of Ontario,

Attorney General of British Columbia,

Attorney General for Saskatchewan,

Attorney General of Alberta,

Association des membres de la Police Montée du Québec Inc.,

Mounted Police Members' Legal Fund,

Confédération des syndicats nationaux,

Canadian Police Association,

Canadian Labour Congress,

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**Indexed as: Mounted Police Association of Ontario v. Canada (Attorney General)**

**2015 SCC 1**

File No.: 34948.

2014: February 18; 2015: January 16.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

*Constitutional law — Charter of Rights — Freedom of association — Right to collective bargaining — Scope of constitutional protection — Private associations of RCMP members challenging constitutionality of legislation excluding RCMP members from public service labour relations regime and imposing non-unionized regime — Legislatively imposed regime not independent from management*

*and not providing for employee choice of association or input into selection of collective goals — Whether impugned legislation substantially interferes with right to meaningful process of collective bargaining and thereby infringes constitutional guarantee of freedom of association — If so, whether infringement justifiable — Canadian Charter of Rights and Freedoms, ss. 1, 2(d) — Royal Canadian Mounted Police Regulations, 1988, SOR/88-361, s. 96 — Public Service Labour Relations Act, S.C. 2003, c. 22, s. 2(1) “employee” (d).*

RCMP members are not permitted to unionize or engage in collective bargaining. They have been excluded from the labour relations regime governing the federal public service since collective bargaining was first introduced in the federal public service, first, under the *Public Service Staff Relations Act* (“PSSRA”) and now under the *Public Service Labour Relations Act* (“PSLRA”). Instead, members of the RCMP are subject to a non-unionized labour relations scheme. At the time of the hearing of this appeal, that scheme was imposed upon them by s. 96 of the *Royal Canadian Mounted Police Regulations, 1988* (“RCMP Regulations”), since repealed and replaced by the substantially similar s. 56 of the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281.

The core component of the current RCMP labour relations regime is the Staff Relations Representative Program (“SRRP”). The SRRP is the primary mechanism through which RCMP members can raise labour relations issues (excluding wages), and the only form of employee representation recognized by

management. The SRRP is governed by a National Executive Committee and is staffed by member representatives from various RCMP divisions and regions elected for a two-year term by both regular and civilian members of the RCMP. Two of its representatives act as the formal point of contact with the national management of the RCMP. The aim of the program is that, at each level of the hierarchy, members' representatives and management consult on human resources initiatives and policies, with the understanding that the final word always rests with management.

A little over fifteen years ago, the Court held that the exclusion of RCMP members from collective bargaining under the *PSLRA*'s predecessor legislation did not infringe s. 2(d) of the *Charter*: *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989. That case did not involve a direct challenge to the sufficiency of the entire RCMP labour relations scheme. Since that decision was rendered, the RCMP labour relations regime has undergone a number of changes that have increased the independence afforded to the SRRP, but none of those changes has substantially altered its purpose, place or function within the RCMP chain of command.

In May 2006, a constitutional challenge was initiated by two private associations of RCMP members whose goal is to represent RCMP members in Ontario and British Columbia on work-related issues but who have never been recognized for the purpose of collective bargaining or consultation on workplace issues by RCMP management or the federal government. They sought a declaration

that the combined effect of the exclusion of RCMP members from the application of the *PSLRA* and the imposition of the SRRP as a labour relations regime unjustifiably infringes members' freedom of association. A judge of the Ontario Superior Court of Justice concluded that s. 96 of the *RCMP Regulations*, which imposed the SRRP as a labour relations regime, substantially interfered with freedom of association and could not be justified under s. 1 of the *Charter*. However, the judge also held that the exclusion of RCMP members from the federal public service labour relations regime did not infringe s. 2(d) of the *Charter*. The Court of Appeal allowed the Attorney General of Canada's appeal and held that the current RCMP labour relations scheme does not breach s. 2(d) of the *Charter*.

*Held* (Rothstein J. dissenting): The appeal should be allowed. Section 96 of the *RCMP Regulations*, which was in effect at the time of the hearing of this appeal, infringed s. 2(d) of the *Charter*. Similarly, para. (d) of the definition of "employee" in s. 2(1) of the *PSLRA* infringes s. 2(d). Neither infringement is justified under s. 1 of the *Charter*. Had s. 96 of the *RCMP Regulations* not been repealed, it would have been declared to be of no force or effect. The offending provision of the *PSLRA* is of no force and effect pursuant to s. 52 of the *Constitution Act, 1982*. This declaration of invalidity is suspended for a period of 12 months.

*Per McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ.:* The s. 2(d) guarantee of freedom of association protects a meaningful process of collective bargaining that provides employees with a degree of choice and

independence sufficient to enable them to determine and pursue their collective interests. However, the current labour relations regime denies RCMP members that choice, and imposes on them a scheme that does not permit them to identify and advance their workplace concerns free from management's influence.

Section 2(*d*) protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities. Viewed purposively, s. 2(*d*) guarantees the right of employees to meaningfully associate in the pursuit of collective workplace goals. This guarantee includes a right to collective bargaining. Collective bargaining is a necessary precondition to the meaningful exercise of the constitutional guarantee of freedom of association. It is not a derivative right protected only if state action makes it effectively impossible to associate for workplace matters. That said, however, the right to collective bargaining is one that guarantees a process rather than an outcome or a particular model of labour relations.

The government cannot enact laws or impose a labour relations process that substantially interferes with the right of employees to associate for the purpose of meaningfully pursuing collective workplace goals. Just as a ban on employee association impairs freedom of association, so does a labour relations process that substantially interferes with the possibility of having meaningful collective negotiations on workplace matters. Similarly, a process of collective bargaining will

not be meaningful if it denies employees the power to pursue their goals. Whatever the nature of the restriction, the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining.

A meaningful process of collective bargaining is a process that provides employees with a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them. But choice and independence are not absolute: they are limited by the context of collective bargaining.

The degree of choice required by the *Charter* for collective bargaining purposes is one that enables employees to have effective input into the selection of the collective goals to be advanced by their association. Moreover, accountability to the members of the association plays an important role in assessing whether employee choice is present to a sufficient degree in any given labour relations scheme. A scheme that holds representatives accountable to the employees who chose them ensures that the association works towards the purposes for which the employees joined together.

In the same vein, the degree of independence required by the *Charter* for collective bargaining purposes is one that ensures that the activities of the association are aligned with the interests of its members. Although the function of collective bargaining is not served by a process which is dominated by or under the influence of

management, like choice, independence in the collective bargaining context is not absolute. The degree of independence required is one that permits the activities of the association to be aligned with the interests of its members.

What is required to permit meaningful collective bargaining varies with the industry culture and workplace in question. As with all s. 2(d) inquiries, the required analysis is contextual. Choice and independence do not require adversarial labour relations; nothing in the *Charter* prevents an employee association from engaging willingly with an employer in different, less adversarial and more cooperative ways. However, whatever the labour relations model, the *Charter* does not permit choice and independence to be eroded such that there is substantial interference with a meaningful process of collective bargaining.

This is not a case of a complete denial of the constitutional right to associate. Rather, it is a case of substantial interference with the right to associate for the purpose of addressing workplace goals through a meaningful process of collective bargaining, free from employer control. The flaws in the SRRP process do not permit meaningful collective bargaining, and are inconsistent with s. 2(d) of the *Charter*. That process fails to respect RCMP members' freedom of association in both its purpose and its effects.

Section 96 of the *RCMP Regulations* imposed the SRRP on RCMP members for the purpose of preventing collective bargaining through an independent association. Not only are members represented by an organization they did not

choose and do not control, they must work within a structure that is part of the management organization of the RCMP and thus lacks independence from management. The SRRP process fails to achieve the balance between employees and employer that is essential to meaningful collective bargaining, and leaves members in a disadvantaged, vulnerable position.

The SRRP also infringes s. 2(d) in its effects. The relevant inquiry is directed at whether RCMP members can genuinely advance their own interests through the SRRP, without interference by RCMP management. On the record here, they cannot. Simply put, the SRRP is not an association in any meaningful sense, nor a form of exercise of the right to freedom of association. It is simply an internal human relations scheme imposed on RCMP members by management. The element of employee choice is almost entirely missing and the structure has no independence from management.

The second issue raised by the present constitutional challenge concerns the exclusion of RCMP members from the application of the *PSLRA* by para. (d) of the definition of “employee” in s. 2(1). This Court, in *Delisle*, held that the exclusion of the RCMP from the *PSSRA*, the *PSLRA*’s predecessor legislation, did not violate s. 2(d) of the *Charter*. Overturning precedents of this Court is not a step to be lightly taken. However, *Delisle* was decided before this Court’s shift to a purposive and generous approach to labour relations and *Delisle* considered a different question and

narrower aspects of the labour relations regime than those at issue here. It follows that the result in *Delisle* must be revisited.

The purpose of para. (d) of the definition of “employee” in s. 2(1) of the *PSLRA*, viewed in its historical context, violates s. 2(d) of the *Charter*. The *PSSRA* and, later, the *PSLRA* established the general framework for labour relations and collective bargaining in the federal public sector. A class of employees, the members of the RCMP, has, since the initial enactment of this regime, been excluded from its application in order to prevent them from exercising their associational rights under s. 2(d). The purpose of excluding a specific class of employees from the labour relations regime in order to deny them the exercise of their freedom of association impermissibly breaches the constitutional rights of the affected employees.

Section 2(d) gives Parliament much leeway in devising a scheme of collective bargaining that satisfies the special demands of the RCMP. Beyond this, s. 1 of the *Charter* provides additional room to tailor a labour relations regime to achieve pressing and substantial objectives, provided it can show that these are justified. In the present case, the infringement of the guarantee of freedom of association cannot be justified under s. 1 of the *Charter*.

Although the government’s objective of maintaining an independent and objective police force constitutes a pressing and substantial objective, the infringing measures are not rationally connected to their objective. First, it is not apparent how the exclusion of RCMP members from a statutorily protected collective bargaining

process ensures the neutrality, stability or even reliability of the Force. Second, it is not established that permitting meaningful collective bargaining for RCMP members would disrupt the stability of the police force or affect the public's perception of its neutrality.

While this conclusion is sufficient to dispose of the s. 1 analysis, denying RCMP members any meaningful process of collective bargaining is also more restrictive than necessary to maintain the Force's neutrality, stability and reliability. The RCMP is the only police force in Canada without a collective agreement to regulate the working conditions of its officers. It has not been shown how or why the RCMP is materially different from the police forces that have the benefit of collective bargaining regimes that provide basic bargaining protections. A material difference between the forces having not been shown, it is clear that total exclusion of RCMP members from meaningful collective bargaining cannot be minimally impairing.

Having found that s. 96 of the *RCMP Regulations* and para. (d) of the definition of "employee" in s. 2(1) of the *PSLRA* infringe the freedom guaranteed to RCMP members under s. 2(d) of the *Charter*, and that these provisions cannot be saved under s. 1, the appropriate remedy is to strike down the offending provision of the *PSLRA* under s. 52 of the *Constitution Act, 1982*. This declaration of invalidity is suspended for a period of 12 months. We would similarly strike down s. 96 of the *RCMP Regulations* were it not repealed. This conclusion does not mean that Parliament must include the RCMP in the *PSLRA* scheme. Section 2(d) of the

*Charter* does not mandate a particular model of labour relations. Should it see fit to do so, Parliament remains free to enact any labour relations model it considers appropriate to address the specific context in which members of the RCMP discharge their duties, within the constitutional limits imposed by the guarantee enshrined in s. 2(d) and s. 1 of the *Charter*.

*Per Rothstein J.* (dissenting): The language used by the majority creates greater rights, and imposes greater restrictions on the government, than either a plain or generous reading of s. 2(d) of the *Charter* can logically provide. The interpretation of a *Charter* right must be principled and must not be so divorced from the text of the provision as to depart from the foundation of the right. When, in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, and *Ontario (Attorney General v. Fraser)*, 2001 SCC 20, [2001] 2 S.C.R. 3, this Court recognized a derivative right to collective bargaining stemming from the purpose of s. 2(d) of the *Charter*, it extended constitutional rights beyond what had previously been accepted.

Now, less than four years after *Fraser* was decided, the majority further expands freedom of association and retreats from the effective impossibility test stated in that case. It also enshrines an adversarial model of labour relations as a *Charter* right, reversing this Court's findings in *Health Services* and in *Fraser* that s. 2(d) does not guarantee a particular model of collective bargaining or a particular outcome.

Section 2(d) of the *Charter* protects the right to associate to make collective representations and to have employers consider those representations in good faith. The majority in *Fraser* unambiguously held that, the test to find an infringement of s. 2(d) in the labour relations context is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals. The language in *Fraser* does not support the majority's revised — and lowered — s. 2(d) standard. There is no doubt that the majority in *Fraser* firmly established a high threshold for infringement of the derivative right to collective bargaining. Fairness and certainty require that where settled law exists, courts must apply it to determine the result in a particular case. They may not identify a desired result and then search for a novel legal interpretation to bring that result about.

The essential feature of a labour relations regime that allows employees to exercise their constitutional right to make meaningful collective representations on their workplace goals is representativeness. Representativeness is the constitutional imperative required in order to ensure that s. 2(d) rights are protected in the collective bargaining context and it is only where legislation impairs the right of employees to have their interests advanced honestly and fairly that legislation will be constitutionally deficient.

Neither the choice of the organization representing employees for bargaining purposes nor the independence of that association are necessary to ensure that meaningful collective bargaining can occur. Choice and independence are

central to Wagner-style labour relations and, by selecting choice and independence as constitutional requirements for meaningful collective bargaining, the majority mandates an adversarial model of labour relations and precludes others which may be just as or more effective in contributing to meaningful collective bargaining.

A statutorily designated bargaining model can ensure that employees' interests will be effectively represented to management even where the employees do not choose their individual representatives or the system in which this representation takes place. Section 2(d) requires that the voice with which employees communicate with their employer as a collective be representative of their interests. Provided that the spokespersons through whom employees make representations to their employer have a duty to represent the interests of all employees and that there is a means to hold those representatives to account, the workers' constitutional right to make collective representations and to have their collective representations considered in good faith is met. Representativeness is what *Fraser* mandates and there is no justification to embark upon the imposition of unnecessary constitutional constraints.

As with choice, the notion of independence is not an inherent aspect of collective bargaining. Where concerns are raised with respect to the independence of a legislatively prescribed employee association, the relevant question is not whether the association or process is independent in the sense that it segregates employees from management, but whether the process prevents employees, such as RCMP members, from associating to advance their collective workplace goals. To reiterate,

the touchstone is representativeness. So long as employees have recourse to ensure that their views are put forward to management and that their representatives are working in their interests, the labour relations process will not be dominated by management and employees will have the means to work towards their collective workplace goals. Any representative who limits representation based on what management permits or who places their own employment interests above the interests of all employees will be held accountable for his or her own actions.

In the case at bar, the context of a national police force led to the adoption of a statutory collaborative labour relations model, the SRRP. The correct standard against which the SRRP should be evaluated is whether the process renders meaningful collective bargaining effectively impossible. Whether the *Fraser*-mandated effective impossibility test or the majority's new substantial interference test is applied, it is clear that the SRRP does not infringe s. 2(d) of the *Charter*.

That Parliament chose a collaborative model like the SRRP as a means of facilitating employer-employee engagement for the national police force does not mean that that model has rendered it effectively impossible for RCMP members to achieve collective workplace goals. Although RCMP members did not choose their associational framework for bargaining purposes, they are able to democratically elect their representatives and those representatives have a statutory duty to represent employee interests. They can be replaced if they fail to uphold that duty. Management also has a constitutional obligation to consider in good faith the

representations made on behalf of RCMP members. In short, the evidence before this Court is that Staff Relations Representatives fairly advance employee interests to RCMP management and thus the SRRP meets the constitutional requirement of representativeness mandated under this Court's interpretation of s. 2(d).

The purpose of excluding RCMP members from the *PSLRA* is not to interfere with collective bargaining, but is driven by a legitimate concern that the model imposed under that legislation is ill suited to the national police force. The evolution in the legal understanding of s. 2(d) since *Delisle* bears no relation to the majority's finding in that case as to the purpose of the exclusion of RCMP members from the *PSLRA*'s predecessor legislation, and thus cannot be used to support revisiting the issues settled in *Delisle*. Although *Delisle* was decided before *Health Services* and *Fraser* ushered in a more expansive approach to labour relations, the jurisprudential developments since do not allow this Court to conclude that the purpose of the exclusion is to deny RCMP members' associational rights. In fact, changes to the SRRP since *Delisle* have reinforced the understanding that the program's goal is to enhance representation of the interests of RCMP members without the imposition of an adversarial model.

Even if *Delisle* had been incorrectly decided and the purpose of the exclusion contained in the *PSSRA* in 1967 was to deny RCMP members meaningful collective bargaining, it does not follow that this continues to be the purpose of para. (d) of the definition of "employee" in s. 2(1) of the *PSLRA* today. By 2003,

when the *PSSRA* was replaced by the *PSLRA*, the RCMP labour relations scheme was considerably changed from that which existed in 1967. The decision to continue the exclusion was made with the knowledge that doing so did not deny members collective bargaining rights. These individuals were subject to a parallel labour relations regime — the SRRP. To ignore the significantly different context in which the exclusion of RCMP members was re-enacted in the *PSLRA* disregards the current legislative reality.

Had para. (d) of the definition of “employee” in s. 2(1) of the *PSLRA* been found to breach s. 2(d) of the *Charter*, it would nonetheless constitute a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society and would therefore be justified under s. 1 of the *Charter*. Parliament is entitled to address concerns that an adversarial RCMP members’ association might order its members to refuse to intervene in certain circumstances involving the labour disputes of others or that belonging to such associations could inhibit members from responding to such situations impartially. The RCMP is materially different from other Canadian police forces. The government must be permitted to organize the Force’s labour relations in view of its distinctive and essential role as our national police force.

## **Cases Cited**

By McLachlin C.J. and LeBel J.

**Overruled:** *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989; **applied:** *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; **explained:** *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; **referred to:** *Meredith v. Canada (Attorney General)*, 2015 SCC 2; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *PSAC v. Canada*, [1987] 1 S.C.R. 424; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460; *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367; *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211; *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209; *Bernard v. Canada (Attorney General)*, 2014 SCC 13, [2014] 1 S.C.R. 227; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *R. v. National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477; *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *Metropolitan Church of Bessarabia v. Moldova*, No. 45701/99, ECHR 2001-XII; *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Alberta*

*(Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733; *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6; *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *R. v. Oakes*, [1986] 1 S.C.R. 103; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610; *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825.

By Rothstein J. (dissenting)

*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211; *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209; *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509; *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298; *Delisle v. Canada (Deputy Attorney General)*,

[1999] 2 S.C.R. 989; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *PSAC v. Canada*, [1987] 1 S.C.R. 424; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460; *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Meredith v. Canada (Attorney General)*, 2015 SCC 2; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825.

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*Agricultural Employees Protection Act, 2002*, S.O. 2002, c. 16.

*Canada Labour Code*, R.S.C. 1985, c. L-2, Part I, s. 6.

*Canadian Charter of Rights and Freedoms*, ss. 1, 2, 33.

*Commissioner's Standing Orders (Division Staff Relations Representative Program)* [made pursuant to s. 21(2) of the *Royal Canadian Mounted Police Act*, R.S.C. 1970, c. R-9; rep. SOR/2003-325].

*Commissioner's Standing Orders (Representation)*, 1997, SOR/97-399, s. 3(b).

*Constitution Act, 1982*, s. 52.

*Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393.

*Industrial Relations and Disputes Investigation Act*, S.C. 1948, c. 54.

*Interpretation Act*, R.S.C. 1985, c. I-21, s. 44(f).

*Labour Code*, CQLR, c. C-27, s. 4.

*National Labor Relations Act*, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169).

*Ontario Provincial Police Collective Bargaining Act, 2006*, S.O. 2006, c. 35, Sch. B.

*Police Act, 1990*, S.S. 1990-91, c. P-15.01, ss. 83 to 86.

*Public Service Labour Relations Act*, S.C. 2003, c. 22 [as en. by *Public Service Modernization Act*, S.C. 2003, c. 22, s. 2], s. 2(1) “employee” (d), Part 3.

*Public Service Staff Relations Act*, S.C. 1966-67, c. 72 [1970, c. P-35; 1985, c. P-35; rep. 2003, c. 22, s. 285], s. 2 “employee” (e), (g), (j).

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

*Royal Canadian Mounted Police Regulations, 1988*, SOR/88-361 [rep. 2014-281, s. 58], s. 96 [ad. 89-581].

*Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281, ss. 56, 58.

*Royal Newfoundland Constabulary Act, 1992*, S.N.L. 1992, c. R-17.

*School Boards Collective Bargaining Act, 2014*, S.O. 2014, c. 5.

*War Measures Act*, R.S.C. 1927, c. 206.

*Wartime Labour Relations Regulations*, P.C. 1003 (1944).

## **Treaties and Other International Instruments**

*Convention (No. 87) concerning freedom of association and protection of the right to organize*, 68 U.N.T.S. 17, art. 9.

*International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, art. 22.

*International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, art. 8.

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APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Rosenberg and Juriansz JJ.A.), 2012 ONCA 363, 111 O.R. (3d) 268, 292 O.A.C. 202, 350 D.L.R. (4th) 261, 260 C.R.R. (2d) 242, 220 L.A.C. (4th) 107, [2012] O.J. No. 2420 (QL), 2012 CarswellOnt 6781, setting aside a decision of MacDonnell J., 96 O.R. (3d) 20, 188 C.R.R. (2d) 225, 2009 CLLC ¶220-027, 2009 CanLII 15149, [2009] O.J. No. 1352 (QL), 2009 CarswellOnt 1780. Appeal allowed, Rothstein J. dissenting.

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*Peter Southey, Donnaree Nygard and Kathryn Hucal*, for the respondent.

*Robin K. Basu and Michael Dunn*, for the intervener the Attorney General of Ontario.

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*John D. R. Craig* and *Christopher D. Pigott*, for the intervener the  
Mounted Police Members' Legal Fund.

*Benoit Laurin* and *Éric Lévesque*, for the intervener Confédération des  
syndicats nationaux.

*Ian J. Roland* and *Michael Fenrick*, for the intervener the Canadian  
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*Steven Barrett* and *Ethan Poskanzer*, for the intervener the Canadian  
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*Ranjan K. Agarwal* and *Ashley L. Paterson*, for the intervener the  
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*Andrew Raven*, *Andrew Astritis* and *Morgan Rowe*, for the intervener the  
Public Service Alliance of Canada.

*Lindsay M. Lyster*, for the intervener the British Columbia Civil Liberties  
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The judgment of McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ. was delivered by

THE CHIEF JUSTICE AND LEBEL J. —

## I. Introduction

[1] In this appeal, we must decide whether excluding members of the Royal Canadian Mounted Police (“RCMP”) from collective bargaining under the *Public Service Labour Relations Act*, enacted by the *Public Service Modernization Act*, S.C. 2003, c. 22, s. 2 (“*PSLRA*”), and imposing a non-unionized labour relations regime violates the guarantee of freedom of association in s. 2(d) of the *Canadian Charter of Rights and Freedoms*. This requires us to review the nature and interpretation of the right guaranteed by s. 2(d) of the *Charter*, and to clarify the scope of the constitutional protection of collective bargaining recognized in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, and *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3.

[2] RCMP members are not permitted to unionize or engage in collective bargaining. They have been excluded from the *PSLRA* and its predecessor statute since collective bargaining was first introduced in the federal public service in the late

1960s. Instead, there exists a non-unionized labour relations regime with three core components. First, members can advance their workplace concerns through the Staff Relations Representative Program (“SRRP”). Second, members’ concerns regarding pay and benefits are communicated to management through the RCMP Pay Council process. Third, RCMP members have created the Mounted Police Members’ Legal Fund, a not-for-profit corporation funded through membership dues, which provides legal assistance to RCMP members for employment-related issues.

[3] A little over fifteen years ago, this Court held that exclusion of RCMP members from collective bargaining under the *PSLRA*’s predecessor legislation did not infringe s. 2(d): *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989. On this appeal we are asked to reconsider that decision as it relates to the *PSLRA*. Unlike this appeal, however, *Delisle* did not involve a direct challenge to the sufficiency of the SRRP: *Delisle*, at para. 34.

[4] This case was heard together with a related appeal, brought by two Staff Relations Representatives (“SRRs”) on behalf of all members of the RCMP, challenging the constitutionality of federal wage restraint legislation: *Meredith v. Canada (Attorney General)*, 2015 SCC 2. While the factual background of both appeals overlap, they raise different legal issues. *Meredith* addresses the question of whether a piece of legislation and its implementation unconstitutionally interfered with the existing RCMP labour relations scheme, but does not challenge that scheme as a whole as constitutionally deficient under s. 2(d). The present appeal is directed

at the constitutionality of the scheme comprising both the *PSLRA* exclusion and the SRRP process.

[5] We conclude that the s. 2(d) guarantee of freedom of association protects a meaningful process of collective bargaining that provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests. The current RCMP labour relations regime denies RCMP members that choice, and imposes on them a scheme that does not permit them to identify and advance their workplace concerns free from management's influence. Accordingly, we allow the appeal and find that s. 96 of the *Royal Canadian Mounted Police Regulations, 1988*, SOR/88-361 ("*RCMP Regulations*")<sup>1</sup>, which was in effect at the time of the hearing of this appeal, is inconsistent with s. 2(d) of the *Charter*. We also find that the exclusion of RCMP members from collective bargaining under para. (d) of the definition of "employee" in s. 2(1) of the *PSLRA* infringes s. 2(d) of the *Charter*. Neither infringement is justified under s. 1 of the *Charter*.

## II. The Parties

[6] The appellants are voluntary, private associations of RCMP members organized at the initiative of members. The Mounted Police Association of Ontario ("MPAO") is a non-profit corporation registered in Ontario, formed in 1998 from an amalgamation of two predecessor groups. It represents RCMP members in the

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<sup>1</sup> Repealed since the hearing of this appeal (SOR/2014-281, s. 58) and replaced by a substantially similar provision, s. 56 of the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281, ("*RCMP Regulations, 2014*").

National Division (the National Capital Region), Headquarters (RCMP national office in Ottawa) and “O” Division (Ontario, outside the National Capital Region). The British Columbia Mounted Police Professional Association (“BCMPPA”) is a non-profit society incorporated in British Columbia in 1994. Its members are principally drawn from “E” Division (British Columbia). A similar organization, the Association des membres de la Police Montée du Québec Inc., intervenes in this appeal. It represents the majority of members of “C” Division (Quebec) as well as French-speaking members across Canada.

[7] The goal of all three associations is to represent RCMP members on work-related issues. The associations engage in political lobbying, educational efforts, and social activities. They provide advice and assistance to their members in discipline and grievance matters. Their operations are funded through membership dues, and the associations have no full-time staff. None of the associations has ever been recognized for the purpose of collective bargaining or consultation on workplace issues by RCMP management or the federal government.

[8] The respondent, the Attorney General of Canada, joined by a number of provincial Attorneys General, opposes the appellants’ contention that the current labour relations scheme violates the guarantee of freedom of association under s. 2(d) of the *Charter*.

### III. The Current Process

[9] The labour relations system currently in place at the RCMP is composed of three bodies: the SRRP, the Pay Council and the Legal Fund. The core component of the scheme is the SRRP.

[10] The SRRP is the primary mechanism through which RCMP members can raise labour relations issues (excluding wages), and the only form of employee representation recognized by management. The program is the result of consultations that took place as early as 1974. It was formalized in s. 96 of the *RCMP Regulations*:

**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.

[11] The SRRP process is amplified by the RCMP Staff Relations Representative Program Constitution (“SRRP Constitution”), unilaterally adopted by the SRRP, and by an agreement between the National Executive Committee of the SRRP and the RCMP Commissioner addressing matters such as the composition of the program (the “Agreement”). The SRRP Constitution states the purpose of the program is to “promote mutually beneficial relations between Force management and the wider membership” (s. 2). To this end, the SRRP seeks to provide RCMP members “with fair and equitable representation in staff relations matters and to facilitate their participation in the development and implementation of Force policies and programs” (*ibid*).

[12] The SRRP was designed to resolve issues at the lowest possible level within the RCMP hierarchy. The aim is that at each level (divisional, regional and national), members' representatives and management consult on human resources initiatives and policies, with the understanding that the final word always rests with management.

[13] Both the current and former RCMP regulations (s. 96, *RCMP Regulations*; s. 56, *RCMP Regulations, 2014*) provide for SRRP staffing by elected representatives known as the Staff Relations Representatives or SRRs. Thirty-four SRRs are elected by both regular and civilian members of the RCMP for a two-year term and serve in this capacity full-time. Additionally, 150 part-time sub-representatives are elected but continue to perform their regular duties while acting as representatives.

[14] The SRRP is organized regionally and divisionally (generally corresponding to a province or territory) to align with the RCMP's nation-wide structure. The National Caucus is the collective body of elected SRRs. Regional Caucuses comprise all SRRs in a region, while Divisional Caucuses comprise all SRRs and sub-representatives in a province or territory. Regional and Divisional Caucuses provide the formal point of contact between membership and regional and divisional management.

[15] The National Executive Committee ("NEC") is the governing body of the SRRP, as well as the presiding body of the National Caucus. The National Caucus

elects two SRRs to fulfill a three-year term as full-time members of the NEC. In addition, one SRR is elected to the NEC by each of the five Regional Caucuses for a one-year term. The two full-time members of the NEC are the formal point of contact for the National Caucus with the national management of the RCMP (Commissioner, senior management, and the Minister of Public Safety and Emergency Preparedness). As such, they attend meetings of the RCMP's Senior Executive Committee, where strategic decisions are made.

[16] To fully understand the SRRP's role and function, it is necessary, as the application judge and the Court of Appeal did, to take a step back and review the history of labour relations at the RCMP and the origins of the SRRP. As we shall see, the SRRP has undergone a number of changes since its inception. None of them, however, has substantially altered its purpose, place or function within the RCMP chain of command.

#### A. *Origins of the Staff Relations Representative Program*

[17] RCMP members were forbidden from unionizing for much of the last century. From 1918 to 1974, *all* associational activities were prohibited on pain of instant dismissal, by virtue of Orders in Council P.C. 1918-2213 and later P.C. 174/1981 (1945). This policy was believed to be necessary to preserve the loyalty of RCMP members and their obedience to superior orders, which could have been disturbed by allegiance to fellow workers: *Delisle*, at paras. 92-96, *per* Cory and Iacobucci JJ., dissenting.

[18] Collective bargaining in the federal public service in Canada was implemented in 1967, with the adoption of the *Public Service Staff Relations Act*, S.C. 1966-67, c. 72 (“*PSSRA*”). Members of the RCMP were excluded from bargaining under that Act, as they continue to be excluded under the *PSLRA*. Prior to the enactment of the *PSSRA* in 1967, a committee struck by the government to examine whether and how to implement collective bargaining in the federal public service had expressed concerns related to loyalty and obedience within the Force. The concerns were of the same nature as the ones which had led to Orders in Council prohibiting all associational activities by RCMP members. In what is known as the Heeney Report, the committee recommended excluding RCMP members from the labour relations regime proposed by it: *Report of the Preparatory Committee on Collective Bargaining in the Public Service* (1965), at p. 27; *Delisle*, at paras. 97-98, *per Cory* and *Iacobucci JJ.*, dissenting. The Woods Report of 1968, however, recommended that federal law enforcement officials have the right to organize and engage in collective bargaining, subject to certain limitations (*Canadian Industrial Relations: The Report of the Task Force on Labour Relations*, (1969), at para. 440).

[19] Later, in the early 1970s, dissatisfaction within the RCMP led members to take steps towards the formation of a members’ association to advance their interests ((J. F. Hardy and A. Ponak, “Staff Relations in the Royal Canadian Mounted Police” (1983), 12 *J. Collective Negotiations* 87, at pp. 89-90). An exploratory committee was established in 1972 in the hopes of establishing an association, and, by early 1974, well-attended meetings to consider forming an association were being

held in Montréal, Toronto, Ottawa, Vancouver, and smaller centres (*SRR Challenge 2000 Review: Final Report* (January 2003) at pp. 10-11). In or around the same time, RCMP management began to show greater openness to members' concerns. The then-Commissioner began a series of annual meetings with members' representatives from each division. It is worth noting that those "representatives" were in some cases elected by the members, but in most cases, were simply appointed by their commanding officers and mandated to attend meetings in addition to their other full-time duties. Consultation occurred, but no agreement was reached on the issues that were raised.

[20] In May 1974, newly appointed RCMP Commissioner Maurice Jean Nadon met with representatives of RCMP members and proposed a plan to formalize labour relations within the RCMP. A referendum was held on the plan, and it was approved by members in all divisions except "C" Division (Quebec), where it was rejected. The Division Staff Relations Representative Program ("DSRRP") was, accordingly, implemented by Commissioner's Standing Order, which formed the program's legal basis from 1974 to 2003 (*Commissioner's Standing Orders (Division Staff Relations Representative Program)* (repealed by *Commissioner's Standing Orders Repealing the Commissioner's Standing Orders (Division Staff Relations Representatives Program)*, SOR/2003-325). It featured full-time, elected representatives and it was to be funded by Divisional Commanding Officers from within divisional budgets. The DSRRP was led by a program director appointed by the RCMP Commissioner.

[21] The program was progressively implemented within the RCMP. In 1987, a joint committee composed of management representatives and Division Staff Relations Representatives (“DSRRs”) was formed to review the program. It concluded that many features of the labour relations plan proposed by the Commissioner in 1974 had never been formally implemented, and were in fact unknown to many RCMP members. At the recommendation of the committee, a chapter dedicated to the DSRRP was then inserted in the RCMP administration manual as a first step towards the program’s formal recognition.

#### B. *The SRR Challenge 2000 Review*

[22] In 1999, a review of the inadequacies and shortcomings of the DSRRP was undertaken, partly in response to the constitutional challenge in *Delisle*. The SRR Challenge 2000 Review was the first review of the program to be undertaken at the initiative of the DSRRs. The Caucus of the DSRRP approached the Commissioner to discuss three key principles: independence and accountability; consultation and efficiency; and exclusive agency and caucus discipline (*SRR Challenge 2000 Review: Final Report*, at pp. 29-32).

[23] The SRR Challenge 2000 Review triggered two changes to the functioning of the program (whose name was changed to the SRRP and whose members are known as SRRs). The first change was the adoption by the SRRs of the SRRP Constitution as a governance scheme to replace Commissioner’s Standing Orders that had until that time governed the program. The Constitution formalized

matters such as the purpose of the program, its composition and its organization. The second change was the execution of the Agreement by the RCMP Commissioner and the NEC of the SRRP. Both changes were implemented in 2002.

[24] As a result of these changes, the Government of Canada repealed the redundant *Commissioner's Standing Orders (Division Staff Relations Representative Program)*. However, some Commissioner's Standing Orders and provisions of the RCMP administrative manual remained in place, to cover matters not addressed by the SRRP Constitution. For instance, s. 3(b) of the *Commissioner's Standing Orders (Representation)*, 1997, SOR/97-399, still limits the member representatives' rights to represent members in grievances, proceedings, preparations or appeals under the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, where that representation "could impair the efficiency, administration or good government of the Force".

[25] Undoubtedly, the SRR Challenge 2000 Review increased the independence afforded to the SRRP. Pursuant to the Agreement, the NEC now names the SRR Program Director. It also administers its annual budget. However, the reform left the SRRP largely unchanged with respect to its role within the RCMP chain of command.

#### IV. The Present Constitutional Challenge

[26] The current challenge to the SRRP and *PSLRA* was commenced in May 2006. The appellants' application was heard in the Ontario Superior Court of Justice

by MacDonnell J., who rendered his decision before this Court's judgment in *Fraser*: (2009), 96 O.R. (3d) 20. Applying the then-existing framework, he concluded that s. 96 of the *RCMP Regulations* substantially interfered with freedom of association because (i) the SRRP is not an independent association formed or chosen by members of the RCMP, and (ii) the interaction between the SRRP and management could not reasonably be described as a process of collective bargaining.

[27] The Court of Appeal for Ontario (Doherty, Rosenberg and Juriansz J.J.A.), in a decision rendered after this Court's decision in *Fraser*, reversed MacDonnell J.'s decision: 2012 ONCA 363, 111 O.R. (3d) 268. The court, *per* Juriansz J.A., focused on *Fraser's* description of collective bargaining as a "derivative right" (para. 109, citing *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815) and concluded that "a positive obligation to engage in good 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" (para. 111).

[28] The Court of Appeal held that it is not "effectively impossible" for RCMP members to meaningfully exercise their s. 2(d) right (para. 121) because of (1) the existence of voluntary associations such as the appellants; (2) the Mounted Police Members' Legal Fund, which assists members; and (3) the SRRP. The Court of Appeal recognized that the SRRP was "created by regulation", was "not institutionally independent", and did not allow members of the RCMP to choose "a

bargaining agent in a Wagner labour regime” (at para. 128). It nevertheless concluded that RCMP members could act collectively through the SRRP to pursue workplace issues in a meaningful way. Accordingly, it held that the current labour relations scheme does not breach s. 2(d) of the *Charter*.

## V. Issues

[29] On February 20, 2013, the Chief Justice stated the following constitutional questions:

1. 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*?
2. 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*?
3. Does paragraph (d) of the definition of “employee” at s. 2(1) of *Public Service Labour Relations Act*, S.C. 2003, c. 22, infringe s. 2(d) of the *Canadian Charter of Rights and Freedoms*?
4. 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*?

## VI. Analysis

### A. *Evolution of Section 2(d) Jurisprudence Toward a Purposive and Contextual Approach*

[30] The jurisprudence on freedom of association under s. 2(d) of the *Charter* — which developed mainly with respect to labour relations (J. Fudge, “Freedom of Association”, in E. Mendes and S. Beaulac, eds., *Canadian Charter of Rights and Freedoms* (5th ed. 2013), 527, at pp. 527-28) — falls into two broad periods. The first period is marked by a restrictive approach to freedom of association. The second period gradually adopts a generous and purposive approach to the guarantee.

[31] In what has come to be known as the Labour Trilogy, a majority of this Court held that s. 2(d) does not protect the right to bargain collectively or the right to strike: *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (the “*Alberta Reference*”); *PSAC v. Canada*, [1987] 1 S.C.R. 424; and *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460.

[32] The reasoning is set out most fully in the three opinions issued in the *Alberta Reference*. There Le Dain J., in brief reasons supported by Beetz and La Forest JJ., endorsed an interpretation of s. 2(d) that would protect “the freedom to work for the establishment of an association, to belong to an association, to maintain it, and to participate in its lawful activity without penalty or reprisal” (p. 391). However, he described collective bargaining and the right to strike as “modern rights” created by statute, and hence not protected by s. 2(d) (*ibid.*).

[33] McIntyre J. reached the same conclusion, but for somewhat different reasons. In his view, freedom of association rested on the following proposition: “. . . the attainment of individual goals, through the exercise of individual rights, is

generally impossible without the aid and cooperation of others” (p. 395). Accordingly, McIntyre J. held that freedom of association protected a right to engage collectively in those activities which are constitutionally protected for each individual:

The only basis on which it is contended that the *Charter* enshrines a right to strike is that of freedom of association. Collective bargaining is a group concern, a group activity, but the group can exercise only the constitutional rights of its individual members on behalf of those members. If the right asserted is not found in the *Charter* for the individual, it cannot be implied for the group merely by the fact of association. It follows as well that the rights of the individual members of the group cannot be enlarged merely by the fact of association. [pp. 398-99]

[34] After reviewing six possible approaches to the scope of s. 2(d), McIntyre J. concluded that freedom of association encompassed the right to form and join associations, the right to exercise other constitutional freedoms collectively, and the right to do in concert with others what an individual may lawfully do alone (p. 409). On the particular question before the Court, he found that an individual could not lawfully refuse to work, and that there was no individual equivalent of a strike conducted in accordance with labour legislation (p. 410). Accordingly, he concluded that the right to strike was not protected (p. 412).

[35] Dickson C.J., dissenting (Wilson J. concurring), would have allowed the appeal. He identified three possible approaches to s. 2(d). The first, which he termed the “constitutive” approach, protects the freedom to belong to or form an association (p. 362). The second, the “derivative” approach, goes beyond the constitutive

approach to protect associational activity that relates specifically to other constitutional freedoms enumerated in s. 2 (p. 364). Dickson C.J. rejected these alternatives as too restrictive and opted for a third approach. In his view, a purposive approach to freedom of association was needed. He identified the purpose and scope of s. 2(d) as follows, at pp. 365-66:

The purpose of the constitutional guarantee of freedom of association is, I believe, to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends. . . . As social beings, our freedom to act with others is a primary condition of community life, human progress and civilized society. Through association, individuals have been able to participate in determining and controlling the immediate circumstances of their lives, and the rules, mores and principles which govern the communities in which they live. . . .

Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict. . . .

What freedom of association seeks to protect is not association activities *qua* particular activities, but the freedom of individuals to interact with, support, and be supported by, their fellow humans in the varied activities in which they choose to engage.

[36] Dickson C.J. recognized as a starting point that s. 2(d) protected the right to do collectively what one may do as an individual. But he would also have held that the *Charter* protected some collective activities that have no true individual equivalents, including the right to strike.

[37] The approach to freedom of association endorsed by the majority in the Labour Trilogy was affirmed three years later in *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 (“*PIPSC*”). In that case, the *Public Service Act*, R.S.N.W.T. 1974, c. P-13, subjected the employees’ choice of bargaining agent to approval by the legislature of the Northwest Territories. Like the present appeal, *PIPSC* involved a challenge to a labour relations scheme that imposed a framework for collective bargaining on a group of public service employees, limiting their ability to represent themselves through a freely chosen association. But the association itself remained entirely independent from management (p. 408).

[38] The seven judges who heard the case wrote five separate opinions. The majority agreed with Sopinka J. who concluded that s. 2(*d*) protected only the ability to form and join unions, but did not protect the right to collective bargaining. Famously, he outlined four principles concerning the scope of s. 2(*d*) drawn from the *Alberta Reference*, at p. 402:

. . . first, that s. 2(*d*) protects the freedom to establish, belong to and maintain an association; second, that s. 2(*d*) does not protect an activity solely on the ground that the activity is a foundational or essential purpose of an association; third, that s. 2(*d*) protects the exercise in association of the constitutional rights and freedoms of individuals; and fourth, that s. 2(*d*) protects the exercise in association of the lawful rights of individuals.

[39] Sopinka J.’s disposition of the case was supported by Dickson C.J., La Forest J. and L’Heureux-Dubé J., but only L’Heureux-Dubé J. endorsed the third

and fourth propositions as limiting principles under s. 2(d). Dickson C.J. and La Forest J. each found that the appeal could be resolved by application of the Labour Trilogy's conclusion that s. 2(d) did not protect collective bargaining, without deciding the broader question of its scope.

[40] Cory J. (Wilson and Gonthier JJ. concurring), dissented on the scope of freedom of association. In his view, freedom of association permits individuals to work together for the purpose of achieving common goals. This freedom is fundamental to a free and democratic society and extends into the workplace. He succinctly stated one aspect of freedom of association in the workplace:

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. [Emphasis added; p. 380.]

[41] To recap, and notwithstanding noteworthy dissents, the majority of this Court in this early period maintained a narrow view of freedom of association, which protected only the bare formation of the association and the collective exercise of individual freedoms. This view prevailed for some time. Outside the labour relations context, the same approach was applied in *Canadian Egg Marketing Agency v.*

*Richardson*, [1998] 3 S.C.R. 157. And in the labour relations context, this approach resulted in the majority of this Court holding that the exclusion of RCMP members from the *PSSRA* did not violate s. 2(d) in the 1999 case of *Delisle*.

[42] Parallel to these cases, the Court considered the “negative” aspect of freedom of association — the freedom not to associate: *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211; *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209; affirmed in *Bernard v. Canada (Attorney General)*, 2014 SCC 13, [2014] 1 S.C.R. 227. But, *Lavigne* and *Advance Cutting* are significant because they applied a purposive approach to s. 2(d). In *Lavigne*, at p. 318, La Forest J. suggested that, in keeping with democratic ideals, the guarantee of freedom of association should be interpreted as protecting “the individual’s potential for self-fulfillment and realization as surely as voluntary association will develop it.” (See also *Lavigne*, at p. 344, *per* McLachlin J.; and *Advance Cutting*, at paras. 15-17, *per* Bastarache J., and at paras. 170-71, *per* LeBel J.) Both judgments emphasized the importance of a purposive interpretation of s. 2(d).

[43] These cases marked the beginning of a more generous, purposive approach to s. 2(d) — an approach that was resoundingly affirmed in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016. In that case, agricultural workers challenged their exclusion from the collective bargaining regime created by the Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A. Bastarache J., for the majority, began his analysis with a review of the existing case

law, concluding that Sopinka J.'s four principles could not capture all of the potential scope of s. 2(d). Justice Bastarache wrote, at para. 16:

In my view, while the four-part test for freedom of association sheds light on this concept, it does not capture the full range of activities protected by s. 2(d). In particular, there will be occasions where a given activity does not fall within the third and fourth rules set forth by Sopinka J. in *PIPSC*, *supra*, but where the state has nevertheless prohibited that activity solely because of its associational nature. These occasions will involve activities which (1) are not protected under any other constitutional freedom, and (2) cannot, for one reason or another, be understood as the lawful activities of individuals.

[44] This renewed focus on the collective aspect of freedom of association and on its purposive interpretation led to the express recognition of a s. 2(d) right to collective bargaining in *Health Services*. All seven judges who heard that appeal agreed that a purposive interpretation of s. 2(d) required constitutional protection for the right of employees to engage in a process of collective bargaining:

Based on the principles developed in *Dunmore* and in this historical and international perspective, the constitutional right to collective bargaining concerns the protection of the ability of workers to engage in associational activities, and their capacity to act in common to reach shared goals related to workplace issues and terms of employment.

(Para. 89, *per* McLachlin C.J. and LeBel J.; see also para. 174, *per* Deschamps J.)

[45] Finally, in *Fraser*, this Court reaffirmed that s. 2(d) confers the right to a process of collective bargaining, understood as meaningful association in pursuit of workplace goals. This process includes the employees' rights to join together, to

make collective representations to the employer, and to have those representations considered in good faith:

What s. 2(d) guarantees in the labour relations context is a meaningful process. A process which permits an employer not even to consider employee representations is not a meaningful process. . . . Without such a process, the purpose of associating in pursuit of workplace goals would be defeated, resulting in a significant impairment of the exercise of the right to freedom of association. One way to interfere with free association in pursuit of workplace goals is to ban employee associations. Another way, just as effective, is to set up a system that makes it impossible to have meaningful negotiations on workplace matters. [para. 42]

[46] In summary, after an initial period of reluctance to embrace the full import of the freedom of association guarantee in the field of labour relations, the jurisprudence has evolved to affirm a generous approach to that guarantee. This approach is centred on the purpose of encouraging the individual's self-fulfillment and the collective realization of human goals, consistent with democratic values, as informed by "the historical origins of the concepts enshrined" in s. 2(d): *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344.

## B. *Defining the Scope of the Section 2(d) Guarantee*

### (1) A Purposive, Generous and Contextual Approach

[47] As is the case with other *Charter* rights, the jurisprudence establishes that s. 2(d) must be interpreted in a purposive and generous fashion, having regard to "the larger objects of the *Charter* . . . , to the language chosen to articulate the . . . freedom,

to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*”: *Big M Drug Mart*, at p. 344. In a phrase, in order to determine whether a restriction on the right to associate violates s. 2(d) by offending its purpose, we must look at the associational activity in question in its full context and history. Neither the text of s. 2(d) nor general principles of *Charter* interpretation support a narrow reading of freedom of association.

[48] This interpretative approach to freedom of association is consistent with the approach to other basic rights connected with human activities and needs. The scope of freedom of religion, for example, is derived from its history and the range of activities to which it applies — holding, proclaiming and transmitting beliefs in the bosom of a secular state (R. Moon, “*Freedom of Conscience and Religion*”, in Mendes and Beaulac, 339). Similarly, the scope of freedom of expression is defined by the different forms it takes and the different interests it protects — including, notably, “the quest for truth, self-fulfillment, and an embracing marketplace of ideas”: *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at para. 171, *per* Rothstein J. for the Court; see also *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 766; P. B. Schabas, “The Ups and Downs of Freedom of Expression - Section 2(b)”, in R. Gilliland, ed., *The Charter at Thirty* (2012), 1; H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (5th ed. 2008), at p. 1060. An activity-based contextual approach is equally essential for freedom of association. Freedom of association, like the other s. 2 freedoms — freedom of expression,

conscience and religion, and peaceful assembly — protects rights fundamental to Canada’s liberal democratic society.

[49] Freedom of association is not derivative of these other rights. It stands as an independent right with independent content, essential to the development and maintenance of the vibrant civil society upon which our democracy rests.

[50] The purposes underlying *Charter* rights and freedoms may be framed at varying levels of abstraction. At the broadest level, a purposive interpretation must be consistent with the “larger objects of the *Charter*”, including “basic beliefs about human worth and dignity” and the maintenance of “a free and democratic political system”: *Big M Drug Mart*, at pp. 344 and 346; see also *Health Services*, at para. 81. At the same time, however, while *Charter* rights and freedoms should be given a broad and liberal interpretation, a purposive analysis also requires courts to consider the most concrete purpose or set of purposes that underlies the right or freedom in question, based on its history and full context. That is the task to which we now turn with respect to s. 2(d).

## (2) The Content of Section 2(d) Protection

[51] In his dissenting reasons in the *Alberta Reference*, Dickson C.J. identified three possible approaches to the interpretation of s. 2(d) — constitutive, derivative and purposive. We conclude that section 2(d) protects each of the aspects of freedom of association with which these approaches are concerned.

[52] The narrowest approach, the “constitutive”, would protect only the bare right to belong to or form an association. The state would thus be prohibited from interfering with individuals meeting or forming associations, but would be permitted to interfere with the *activities* pursued by the associations people form. This protection, while narrow, is not trivial; history is replete with examples of states that have banned associations or prevented people from associating, either absolutely or in terms of restrictions on the number of people who can associate for a particular purpose.

[53] The “derivative” approach would protect not only the right to associate, but also the right to associational *activity* that specifically relates to other constitutional freedoms. This approach prevails in the United States, where freedom of association is recognized insofar as it supports other constitutional rights, like freedom of religion and the political rights. Beyond this, however, associational activities would not be constitutionally protected.

[54] The purposive approach, adopted by Dickson C.J. in the *Alberta Reference*, defines the content of s. 2(d) by reference to the purpose of the guarantee of freedom of association: “. . . to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends” (*Alberta Reference*, at p. 365). The object of Dickson C.J.’s words is a concrete one, not an abstract expression of a desire for a better life. Elaborating on this interpretive approach, Dickson C.J. states that the purpose of the freedom of

association encompasses the protection of (1) individuals joining with others to form associations (the constitutive approach); (2) collective activity in support of other constitutional rights (the derivative approach); and (3) collective activity that enables “those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict”: *Alberta Reference*, at p. 366.

[55] The purposive approach thus recognizes that freedom of association is empowering, and that we value the guarantee enshrined in s. 2(d) because it empowers groups whose members’ individual voices may be all too easily drowned out. This conclusion is rooted in “the historical origins of the concepts enshrined” in s. 2(d) (*Big M Drug Mart*, at p. 344).

[56] The historical emergence of association as a fundamental freedom — one which permits the growth of a sphere of civil society largely free from state interference — has its roots in the protection of religious minority groups: M. Walzer, “The Concept of Civil Society”, in M. Walzer, ed., *Toward a Global Civil Society* (1995), 7, at p. 20. More recent history also illustrates how the freedom to associate has contributed to the women’s suffrage and gay rights movements: J. D. Inazu, *Liberty’s Refuge: The Forgotten Freedom of Assembly* (2012), at p. 45; and D. Carpenter, “Expressive Association and Anti-Discrimination Law After *Dale*: A Tripartite Approach” (2001), 85 *Minn. L. Rev.* 1515.

[57] Historically, those most easily ignored and disempowered as individuals have staked so much on freedom of association precisely because association was the means by which they could gain a voice in society. As Dickson C.J. put it in the *Alberta Reference*:

Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict. [Emphasis added; pp. 365-66.].

[58] This then is a fundamental purpose of s. 2(d) — to protect the individual from “state-enforced isolation in the pursuit of his or her ends”: *Alberta Reference*, at p. 365. The guarantee functions to protect individuals against more powerful entities. By banding together in the pursuit of common goals, individuals are able to prevent more powerful entities from thwarting their legitimate goals and desires. In this way, the guarantee of freedom of association empowers vulnerable groups and helps them work to right imbalances in society. It protects marginalized groups and makes possible a more equal society.

[59] The flip side of the purposive approach to freedom of association under s. 2(d) is that the guarantee will not necessarily protect all associational activity. Section 2(d) of the *Charter* is aimed at reducing social imbalances, not enhancing them. For this reason, some collective activity lies outside the *Charter*'s protection.

For example, associational activity that constitutes violence is not protected by s. 2(d): *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 107.

[60] Whether there are other categories of activity in addition to violence that are by their very nature entirely excluded from s. 2(d) protection need not be canvassed here. It suffices to note that a purposive interpretation of s. 2(d) confers *prima facie* protection on a broad range of associational activity, subject to limits justified pursuant to s. 1 of the *Charter*.

[61] The nature of a given associational activity and its relation to the underlying purpose of s. 2(d) may also be relevant to the s. 1 analysis, in the same way that the nature of particular expression is relevant in s. 2(b) cases. For instance, as Rothstein J. explains in *Whatcott*, at paras. 112 and 114:

Violent expression and expression that threatens violence does not fall within the protected sphere of s. 2(b) of the *Charter*: *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555, at para. 70. However, apart from that, not all expression will be treated equally in determining an appropriate balancing of competing values under a s. 1 analysis. That is because different types of expression will be relatively closer to or further from the core values behind the freedom, depending on the nature of the expression. This will, in turn, affect its value relative to other *Charter* rights, the exercise or protection of which may infringe freedom of expression.

...

Hate speech is at some distance from the spirit of s. 2(b) because it does little to promote, and can in fact impede, the values underlying freedom of expression. As noted by Dickson C.J. in *Keegstra*, expression can be used to the detriment of the search for truth (p. 763). As earlier discussed, hate speech can also distort or limit the robust and free

exchange of ideas by its tendency to silence the voice of its target group. It can achieve the self-fulfillment of the publisher, but often at the expense of that of the victim. These are important considerations in balancing hate speech with competing *Charter* rights . . . . [Emphasis added.]

[62] Section 2(d), we have seen, protects associational activity for the purpose of securing the individual against state-enforced isolation and empowering individuals to achieve collectively what they could not achieve individually. It follows that the associational rights protected by s. 2(d) are not merely a bundle of individual rights, but collective rights that inhere in associations. L'Heureux-Dubé J. put it well in *Advance Cutting*:

In society, there is an element of synergy when individuals interact. The mere addition of individual goals will not suffice. Society is more than the sum of its parts. Put another way, a row of taxis do not a bus make. An arithmetic approach to *Charter* rights fails to encompass the aspirations imbedded in it. [para. 66]

[63] It has been suggested that collective rights should not be recognized because they are inconsistent with the *Charter's* emphasis on individual rights, and because this would give groups greater rights than individuals. In our view, neither criticism is well founded.

[64] First, the *Charter* does not exclude collective rights. While it generally speaks of individuals as rights holders, its s. 2 guarantees extend to groups. The right of peaceful assembly is, by definition, a group activity incapable of individual performance. Freedom of expression protects both listeners and speakers: *R. v.*

*National Post*, 2010 SCC 16, [2010] 1 S.C.R. 477, at para. 28. The right to vote is meaningless in the absence of a social context in which voting can advance self-government: *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519, at para. 31. The Court has also found that freedom of religion is not merely a right to hold religious opinions but also an individual right to establish communities of faith (see *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567). And while this Court has not dealt with the issue, there is support for the view that “the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection” of freedom of religion (*Hutterian Brethren*, at para. 131, *per* Abella J., dissenting, citing *Metropolitan Church of Bessarabia v. Moldova*, No. 45701/99, ECHR 2001-XII (First Section), at para. 118). See also *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

[65] It has also been suggested that recognition of a collective aspect to s. 2(d) rights will somehow undermine individual rights and the individual aspect of s. 2(d). We see no basis for this contention. Recognizing group or collective rights complements rather than undercuts individual rights, as the examples just cited demonstrate. It is not a question of *either* individual rights *or* collective rights. Both are essential for full *Charter* protection.

[66] In summary, s. 2(d), viewed purposively, protects three classes of activities: (1) the right to join with others and form associations; (2) the right to join

with others in the pursuit of other constitutional rights; and (3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.

### C. *The Right to a Meaningful Collective Bargaining Process*

[67] Applying the purposive approach just discussed to the domain of labour relations, we conclude that s. 2(d) guarantees the right of employees to meaningfully associate in the pursuit of collective workplace goals, affirming the central holdings of *Health Services* and *Fraser*. This guarantee includes a right to collective bargaining. However, that right is one that guarantees a process rather than an outcome or access to a particular model of labour relations.

[68] Just as a ban on employee association impairs freedom of association, so does a labour relations process that substantially interferes with the possibility of having meaningful collective negotiations on workplace matters. Without the right to pursue workplace goals collectively, workers may be left essentially powerless in dealing with their employer or influencing their employment conditions. This idea is not new. As the United States Supreme Court stated in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), at p. 33:

Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment . . . [Emphasis added.]

[69] Similarly, this Court recently affirmed the importance of freedom of expression in redressing the imbalance inherent in the employer-employee relationship in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62, [2013] 3 S.C.R. 733, at paras. 31-32:

A person's employment and the conditions of their workplace can inform their identity, emotional health, and sense of self-worth . . . .

Free expression in the labour context can also play a significant role in redressing or alleviating the presumptive imbalance between the employer's economic power and the relative vulnerability of the individual worker . . . . It is through their expressive activities that unions are able to articulate and promote their common interests, and, in the event of a labour dispute, to attempt to persuade the employer. [Citations omitted.]

[70] The same reasoning applies to freedom of association. As we have seen, s. 2(d) functions to prevent individuals, who alone may be powerless, from being overwhelmed by more powerful entities, while also enhancing their strength through the exercise of collective power. Nowhere are these dual functions of s. 2(d) more pertinent than in labour relations. Individual employees typically lack the power to bargain and pursue workplace goals with their more powerful employers. Only by banding together in collective bargaining associations, thus strengthening their bargaining power with their employer, can they meaningfully pursue their workplace goals.

[71] The right to a meaningful process of collective bargaining is therefore a necessary element of the right to collectively pursue workplace goals in a meaningful

way (*Health Services; Fraser*). Yet a process of collective bargaining will not be meaningful if it denies employees the power to pursue their goals. As this Court stated in *Health Services*: “One of the fundamental achievements of collective bargaining is to palliate the historical inequality between employers and employees . . . ” (para. 84). A process that substantially interferes with a meaningful process of collective bargaining by reducing employees’ negotiating power is therefore inconsistent with the guarantee of freedom of association enshrined in s. 2(d).

[72] The balance necessary to ensure the meaningful pursuit of workplace goals can be disrupted in many ways. Laws and regulations may restrict the subjects that can be discussed, or impose arbitrary outcomes. They may ban recourse to collective action by employees without adequate countervailing protections, thus undermining their bargaining power. They may make the employees’ workplace goals impossible to achieve. Or they may set up a process that the employees cannot effectively control or influence. Whatever the nature of the restriction, the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining: *Health Services*, at para. 90.

[73] Against this conception, the Attorney General of Canada, relying on *Fraser*, argues that collective bargaining is at best a “derivative right” from the basic or “core” right to associate (the constitutive approach). It follows, according to the

Attorney General, that collective bargaining is protected only if state action makes it *effectively impossible* to associate for workplace matters. Here that impossibility is lacking, the Attorney General asserts, because the SRRP process is a means by which RCMP members can associate for workplace purposes. The Court of Appeal accepted this position. We disagree. We will address the terms “effectively impossible” and “derivative right” in turn.

[74] The reference in *Fraser* to the effective impossibility of achieving workplace goals must be understood with reference to the legislative schemes at issue. For instance, in discussing *Dunmore*, the majority in *Fraser* explained that Bastarache J. had “concluded that the absence of legislative protection for farm workers to organize in order to achieve workplace goals made meaningful association to achieve workplace goals impossible and therefore constituted a substantial interference with the right to associate guaranteed by s. 2(d) of the *Charter*” (para. 31 (emphasis added)). Similarly, the majority in *Fraser* explained that the legislation impugned in *Health Services* — legislation that unilaterally nullified terms concerning seniority and lay-offs in existing collective agreements and precluded future bargaining over those matters — “rendered the meaningful pursuit of [workplace] goals impossible and effectively nullified the right to associate of its employees” (para. 38).

[75] These passages from *Fraser* and *Health Services* use terms like “impossible” and “effectively nullified” to describe the effect of legislative schemes

(including legislative exclusions), not the legal test for infringement of s. 2(d). Explaining the reasoning in *Dunmore*, the majority in *Fraser* states that: “The effect of a process that renders impossible the meaningful pursuit of collective goals is to substantially interfere with the exercise of the right to free association . . .” (para. 33 (emphasis in original)). In *Fraser*, the majority further explains that there cannot “be any doubt that legislation (or the absence of a legislative framework) that makes achievement” of collective workplace goals “substantially impossible, constitutes a limit on the exercise of freedom of association” (para. 32 (emphasis added)). It is clear that such passages do not adopt “substantial impossibility” as the threshold test for finding an infringement of freedom of association. Rather, the passages demonstrate that the majority in *Fraser* adopts substantial interference as the *legal test* for infringement of freedom of association.

[76] Dissenting in the case at bar, Rothstein J. highlights the fact that the majority reasons in *Fraser* “referred to the test of impossibility — either effective or substantial impossibility — *no less than 12 times*, tracing its origins in the decisions of *Dunmore* and *Health Services* . . . see *Fraser*, at paras. 31-34, 38, 42, 46-48, 62 and 98” (para. 213 (emphasis in original)). In virtually every case (see paras. 31-33, 38, 42, 46-48, 62 and 98), the “impossibility” in question refers explicitly to the effect of legislation or the absence of a legislative framework. A test of substantial interference or substantial impairment is also explicitly stated as the standard for finding a s. 2(d) infringement at paras. 31, 33, 47-48 and 62. Finally, the majority in *Fraser* reaffirmed the holding in *Health Services* that “[t]he fundamental inquiry is

whether the state action would *substantially impair* the ability of ‘union members to pursue shared goals in concert’ (para. 96 (emphasis added))”: para. 64 (emphasis in original); see *Health Services*, at paras. 92 and 96.

[77] This said, we agree that some of the passages in *Fraser* seem to unnecessarily complicate the analysis by referring to both effective impossibility (as the effect of certain state action) and substantial interference or impairment (as the test for infringement of s. 2(d)). For the reasons just discussed, however, such references should be understood consistently with the majority reasons in *Fraser*, read in their entirety, and with this Court’s precedents in *Dunmore* and *Health Services*. More generally, they must be understood consistently with this Court’s purposive and generous approach to s. 2(d), as explained above.

[78] We turn now to use of the term “derivative right” in *Fraser*. On the Court of Appeal’s interpretation of *Fraser*, the right to a meaningful process of collective bargaining is “derivative” in the sense that it exists only where employees establish that it is effectively impossible for them to act collectively to achieve workplace goals (paras. 110-11 and 135). However, in *Fraser*, the majority explained that “collective bargaining is a derivative right” in the sense that it is “a ‘necessary precondition’ to the meaningful exercise of the constitutional guarantee of freedom of association”: para. 66. The majority cited *Criminal Lawyers’ Association* where the Court stated, at para. 30: “Access [to information in government hands] is a derivative right which may arise where it is a necessary precondition of meaningful

expression on the functioning of government” (emphasis added). The Court of Appeal understood this to mean that the right to collective bargaining similarly *may arise* as a necessary precondition to meaningful association in the workplace only where some other condition is first met. The Court of Appeal took that condition to be the effective impossibility of acting collectively to achieve workplace goals.

[79] However, the majority in *Fraser* did not qualify the right to collective bargaining in this way. It held that collective bargaining is “a ‘necessary precondition’ to the meaningful exercise of the constitutional guarantee of freedom of association”: para. 66. Similarly, at para. 99, “the right of an employees’ association to make representations to the employer and have its views considered in good faith” is described as “a derivative right under s. 2(d) of the *Charter*, necessary to meaningful exercise of the right to free association” (emphasis added). To the extent the term “derivative right” suggests that the right to a meaningful process of collective bargaining only applies where the guarantee under s. 2(d) is otherwise frustrated, use of that term should be avoided. Furthermore, any suggestion that an aspect of a *Charter* right may somehow be secondary or subservient to other aspects of that right is out of keeping with the purposive approach to s. 2(d).

[80] To recap, s. 2(d) protects against substantial interference with the right to a meaningful process of collective bargaining. Historically, workers have associated in order “to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict”, namely, their employers: *Alberta*

*Reference*, at p. 366. The guarantee entrenched in s. 2(d) of the *Charter* cannot be indifferent to power imbalances in the labour relations context. To sanction such indifference would be to ignore “the historical origins of the concepts enshrined” in s. 2(d): *Big M Drug Mart*, at p. 344. It follows that the right to a meaningful process of collective bargaining will not be satisfied by a legislative scheme that strips employees of adequate protections in their interactions with management so as to substantially interfere with their ability to meaningfully engage in collective negotiations.

D. *Essential Features of a Meaningful Process of Collective Bargaining Under Section 2(d)*

[81] We have concluded that s. 2(d) protects the right of employees to associate for the purpose of meaningfully pursuing collective workplace goals. The government therefore cannot enact laws or impose a labour relations process that substantially interferes with that right. This raises the question — what are the features essential to a meaningful process of collective bargaining under s. 2(d)? In this section, we conclude that a meaningful process of collective bargaining is a process that provides employees with a degree of choice and independence sufficient to enable them to determine their collective interests and meaningfully pursue them.

[82] Collective bargaining constitutes a fundamental aspect of Canadian society which “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” (*Health Services*, at para. 82). Put simply, its purpose is to preserve collective employee autonomy against the superior power of management and to maintain equilibrium between the parties. This equilibrium is embodied in the degree of choice and independence afforded to the employees in the labour relations process.

[83] But choice and independence are not absolute: they are limited by the context of collective bargaining. In our view, the degree of choice required by the *Charter* for collective bargaining purposes is one that enables employees to have effective input into the selection of the collective goals to be advanced by their association. In the same vein, the degree of independence required by the *Charter* for collective bargaining purposes is one that ensures that the activities of the association are aligned with the interests of its members.

[84] In the following subsections, we lay out the theoretical underpinnings of choice and independence and we explain how they are inherent to the nature and purpose of collective bargaining. We then explain how the requirements of choice and independence can be respected by a variety of labour relations models, as long as such models allow collective bargaining to be pursued in a meaningful way.

(1) Choice and Independence Are Inherent to the Nature and Purpose of Collective Bargaining

(a) *Employee Choice*

[85] The function of collective bargaining is not served by a process which undermines employees' rights to choose what is in their interest and how they should pursue those interests. The degree of choice required by the *Charter* is one that enables employees to have effective input into the selection of their collective goals. This right to participate in the collective is crucial to preserve employees' ability to advance their own interests, particularly in schemes which involve trade-offs of individual rights to gain collective strength (J.E. Dorsey, "Individuals and Internal Union Affairs: The Right to Participate", in K.P. Swan and K.E. Swinton, eds., *Studies in Labour Law* (1983), 193).

[86] Hallmarks of employee choice in this context include the ability to form and join new associations, to change representatives, to set and change collective workplace goals, and to dissolve existing associations. Employee choice may lead to a diversity of associational structures and to competition between associations, but it is a form of exercise of freedom of association that is essential to the existence of employee organizations and to the maintenance of the confidence of members in them (*PIPSC*, at p. 380, *per* Cory J., in dissent; P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law* (3rd. ed. 1983) at p. 200).

[87] Accountability to the members of the association plays an important role in assessing whether employee choice is present to a sufficient degree in any given labour relations scheme. Employees choose representatives on the assumption that *their* voice will be conveyed to the employer by the people *they* choose (A. Bogg and

K. Ewing, “A (Muted) Voice at Work? Collective Bargaining in the Supreme Court of Canada” (2012), 33 *Comp. Lab. L. & Pol’y J.* 379, at p. 405). A scheme that holds representatives accountable to the employees who chose them ensures that the association works towards the purposes for which the employees joined together. Accountability allows employees to gain control over the selection of the issues that are put forward to the employer, and the agreements concluded on their behalf as a result of the process of collective bargaining.

(b) *Independence From Management*

[88] The function of collective bargaining is not served by a process which is dominated by or under the influence of management. This is why a meaningful process of collective bargaining protects the right of employees to form and join associations that are independent of management (*Delisle*, at paras. 32 and 37). Like choice, independence in the collective bargaining context is not absolute. The degree of independence required by the *Charter* for collective bargaining purposes is one that permits the activities of the association to be aligned with the interests of its members.

[89] Just as with choice, independence from management ensures that the activities of the association reflect the interests of the employees, thus respecting the nature and purpose of the collective bargaining process and allowing it to function properly. Conversely, a lack of independence means that employees may not be able to advance their own interests, but are limited to picking and choosing from among

the interests management permits them to advance. Relevant considerations in assessing independence include the freedom to amend the association's constitution and rules, the freedom to elect the association's representatives, control over financial administration and control over the activities the association chooses to pursue.

[90] Independence and choice are complementary principles in assessing the constitutional compliance of a labour relations scheme. *Charter* compliance is evaluated based on the *degrees* of independence and choice guaranteed by the labour relations scheme, considered with careful attention to the entire context of the scheme. The degrees of choice and independence afforded should not be considered in isolation, but must be assessed globally always with the goal of determining whether the employees are able to associate for the purposes of meaningfully pursuing collective workplace goals.

[91] We now turn to the practical implications of choice and independence for labour relations models.

(2) Labour Relations Models Must Permit Collective Bargaining to Be Pursued in a Meaningful Way

[92] A variety of labour relations models may provide sufficient employee choice and independence from management to permit meaningful collective bargaining. As discussed, choice and independence are not absolute in the context of collective bargaining. By necessity, a collective framework not only serves

employees' interests, but imposes limits on individual entitlements in order to permit the pursuit of collective goals. Collective bargaining is "an exercise in solidarity in which individual interests are not simply aggregated but transformed in the process of democratic deliberation" (J. Fudge, "Introduction: Farm Workers, Collective Bargaining Rights, and the Meaning of Constitutional Protection", in F. Faraday, J. Fudge and E. Tucker, eds., *Constitutional Labour Rights in Canada: Farm Workers and the Fraser Case* (2012), 1, at p. 17; see also G. Murray and P. Verge, *La représentation syndicale: Visage juridique actuel et future* (1999), at pp. 2-3; Dorsey, at pp. 195 and 219). As Professor Wellington states: "Accommodating the interests of the dissenter and those of the majority is always difficult. The hallmark of a truly democratic society is its unwillingness to give up easily either majority rule or individual freedom" (*Labor and the Legal Process* (1968), at p. 129).

[93] This Court has consistently held that freedom of association does not guarantee a particular model of labour relations (*Delisle*, at para. 33; *Health Services*, at para. 91; *Fraser*, at para. 42). What is required is not a particular model, but a regime that does not substantially interfere with meaningful collective bargaining and thus complies with s. 2(d) (*Health Services*, at para. 94; *Fraser*, at para. 40). What is required in turn to permit meaningful collective bargaining varies with the industry culture and workplace in question. As with all s. 2(d) inquiries, the required analysis is contextual.

[94] The Wagner Act model of labour relations in force in most private sector and many public sector workplaces offers one example of how the requirements of choice and independence ensure meaningful collective bargaining. That model permits a sufficiently large sector of employees to *choose* to associate themselves with a particular trade union and, if necessary, to decertify a union that fails to serve their needs. The principles of majoritarianism and exclusivity, the mechanism of “bargaining units” and the processes of certification and decertification — all under the supervision of an independent labour relations board — ensure that an employer deals with the association most representative of its employees: G. W. Adams, *Canadian Labour Law* (2nd ed. (loose-leaf)), at paras. 2.3800 to 2.4030; D. D. Carter et al., *Labour Law in Canada* (5th ed., 2002), at pp. 286-87; P. Verge, G. Trudeau and G. Vallée, *Le droit du travail par ses sources* (2006) at pp. 41-42.

[95] The Wagner Act model, however, is not the only model capable of accommodating choice and independence in a way that ensures meaningful collective bargaining. The designated bargaining model (see, e.g., *School Boards Collective Bargaining Act, 2014*, S.O. 2014, c. 5) offers another example of a model that may be acceptable. Although the employees’ bargaining agent under such a model is designated rather than chosen by the employees, the employees appear to retain sufficient choice over workplace goals and sufficient independence from management to ensure meaningful collective bargaining. This is but one example; other collective bargaining regimes may be similarly capable of preserving an acceptable measure of employee choice and independence to ensure meaningful collective bargaining.

[96] Labour schemes are responsive to the interests of the parties involved and the particular workplace context. Different models have emerged to meet the specific needs of diverse industries and workplaces. The result has been ongoing debate on the desirability of various forms of workplace representation and cooperation and on their coexistence: D. J. Doorey, “Graduated Freedom of Association: Worker Voice Beyond the Wagner Model” (2013), 38 *Queen’s L.J.* 511; B. W. Burkett, “The Future of the *Wagner Act*: A Canadian-American Comparison” (2013), 38 *Queen’s L.J.* 363; D. Taras, “Reconciling Differences Differently: Employee Voice in Public Policymaking and Workplace Governance” (2007), 28 *Comp. Lab. L. & Pol’y J.* 167; Adams, at paras. 1.290 to 1.340.

[97] The search is not for an “ideal” model of collective bargaining, but rather for a model which provides sufficient employee choice and independence to permit the formulation and pursuit of employee interests in the particular workplace context at issue. Choice and independence do not *require* adversarial labour relations; nothing in the *Charter* prevents an employee association from engaging willingly with an employer in different, less adversarial and more cooperative ways. This said, genuine collective bargaining cannot be based on the suppression of employees’ interests, where these diverge from those of their employer, in the name of a “non-adversarial” process. Whatever the model, the *Charter* does not permit choice and independence to be eroded such that there is substantial interference with a meaningful process of collective bargaining. Designation of collective bargaining agents and determination of collective bargaining frameworks would therefore not

breach s. 2(d) where the structures that are put in place are free from employer interference, remain under the control of employees and provide employees with sufficient choice over the workplace goals they wish to advance.

[98] The respondent argues that this view of s. 2(d) would require an employer, even a government employer, to recognize and bargain with every association chosen by employees, whatever the size. In our view, this result does not follow. Freedom of association requires, among other things, that no government process can substantially interfere with the autonomy of employees in creating or joining associations of their own choosing, even if in so doing they displace an existing association. It also requires that the employer consider employees' representations in good faith, and engage in meaningful discussion with them. But s. 2(d) does not require a process whereby *every* association will ultimately *gain* the recognition it seeks (see M. Coutu et al., *Droit des rapports collectifs du travail au Québec* (2nd ed., 2013) vol. 1, *Le régime général*, at para. 98). As we said, s. 2(d) can also accommodate a model based on majoritarianism and exclusivity (such as the Wagner Act model) that imposes restrictions on individual rights to pursue collective goals.

[99] In summary, a meaningful process of collective bargaining is a process that gives employees meaningful input into the selection of their collective goals, and a degree of independence from management sufficient to allow members to control the activities of the association, having regard to the industry and workplace in

question. A labour relations scheme that complies with these requirements and thus allows collective bargaining to be pursued in a meaningful way satisfies s. 2(d).

[100] Before turning to the application of these principles to the constitutional questions raised in this case, we address Rothstein J.'s dissenting reasons. In Rothstein J.'s view, "[t]he essential feature of a labour relations regime that allows employees to exercise their constitutional right to make meaningful collective representations on their workplace goals is representativeness: the voice that speaks on behalf of employees must represent their interests and be ultimately accountable to them. Representativeness is the constitutional imperative required in order to ensure that s. 2(d) rights are protected in the collective bargaining context, nothing more" (para. 172).

[101] So stated, the notions of choice and independence, on the one hand, and representativeness, on the other, overlap considerably. However, we consider choice and independence best suited for the constitutional analysis at issue. If employees cannot choose the voice that speaks on their behalf, that voice is unlikely to speak up for their interests. It is precisely employee choice of representative that guarantees a representative voice. Similarly, if employees must "have confidence in their spokespersons" (Rothstein J.'s reasons, at para. 219), the way to ensure such confidence is through a sufficient degree of employee choice in the selection of representatives.

[102] Justice Rothstein argues that “the touchstone is representativeness” (para. 195). He acknowledges, however, that employees must be able to hold their representatives “to account” (paras. 193 and 222). Yet employees will be unable to hold representatives accountable if those employees lack sufficient choice in selecting their representatives or if their representatives are dependent on management (for instance, in determining the acceptable subject matter of employee grievances, or the relative priority of employee concerns).

[103] Representativeness and accountability rest on choice and independence. We conclude that the latter two principles are the most appropriate in assessing s. 2(d) compliance in the context of labour relations. That said, these principles are tools in an analysis that must in each case determine whether the right to the meaningful pursuit of collective workplace goals is respected. In our view, the disagreement between majority and Rothstein J. on the terminology of “choice and independence” versus “representativeness” is more semantic than real. The real difference lies in how the concepts are understood and applied.

[104] Against this background, we therefore turn to the constitutional questions raised in the case at bar, that is whether the imposition of the SRRP and the exclusion of RCMP members from the application of the *PSLRA* violate s. 2(d) of the *Charter*, and if so, whether the violation is a reasonable limit prescribed by law, which can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*.

E. *Whether the Imposition of the SRRP Infringes Section 2(d) of the Charter*

[105] This is not a case of a complete denial of the constitutional right to associate and of its related constitutional guarantees. It is rather a case of substantial interference with the right to associate for the purpose of addressing workplace goals through a meaningful process of collective bargaining, free from employer control, as understood by Dickson C.J. in the *Alberta Reference*. We conclude that the flaws in the SRRP process do not permit meaningful collective bargaining, and are inconsistent with s. 2(d). The SRRP process fails to respect RCMP members' freedom of association in both its purpose and its effects.

[106] Section 96 of the *RCMP Regulations* imposed the SRRP on RCMP members as the sole means of presenting their concerns to management. Section 56 of the current-day *RCMP Regulations, 2014* continues to impose the SRRP under nearly identical terms. RCMP members are represented by an organization they did not choose and do not control. They must work within a structure that lacks independence from management. Indeed, this structure and process are part of the management organization of the RCMP. The process fails to achieve the balance between employees and employer that is essential to meaningful collective bargaining, and leaves members in a disadvantaged, vulnerable position.

(1) The Purpose of the Imposition of the SRRP Infringes Section 2(d)

[107] We earlier described the history of RCMP labour relations. This history evidences a long-standing hostility on the part of RCMP management and successive Canadian governments to unionization in the Force. In the early 20th century, the

federal government deployed one of the RCMP's predecessor bodies — the Royal Northwest Mounted Police — to confront labour unrest, most famously in breaking the Winnipeg General Strike of 1919. At a time when municipal police forces in Canada were beginning to unionize, the Canadian government issued Order in Council P.C. 1918-2213, which prohibited members of the Dominion Police and the Royal Northwest Mounted Police from becoming “a member of or in any wise associated with any Trades Union Organization . . . or with any Union, Society or Association . . . connected or affiliated therewith” on penalty of immediate dismissal.

[108] This stance was softened in the early 1970s, with the repeal of P.C. 1918-2213 (P.C. 1974-1339), but the federal government continued to resist the formation of independent RCMP members' associations. The DSRRP, precursor to the present SRRP, was openly presented as an alternative to unionization. The year it was created, RCMP Commissioner Nadon commissioned a report on the effects of police associations and the advantages and disadvantages of implementing such an association in the RCMP: J. P. Middleton, *A Study Report on Police Associations* (1974). The Middleton report was largely supportive of the formation of an RCMP members' association or union. In circulating the report, however, Commissioner Nadon included a brief foreword, in which he stated:

At the outset I wish to make the Force's position very clear; the Force is opposed to the formation of an association or union of members and this position has been made known to our Minister. [p. i]

[109] Section 3(2) of the *Commissioner's Standing Orders (Division Staff Relations Representative Program)*, which formed the legal basis of the DSRRP from 1974 to 2003, prohibited DSRRs from promoting “*alternate* programs in conflict with the non-union status of the Division Staff Relations Representative Program”.

[110] Even before this Court, the Attorney General of Canada does not contend that the current-day SRRP provides RCMP members with an independent association. Indeed, the Attorney General appears to concede that the SRRP continues to be imposed on members of the RCMP for the purpose of preventing collective bargaining through an independent association. Its position is rather that s. 2(d) does not guarantee RCMP members a right to form and bargain through an association of their own choosing. We have rejected this view. Accordingly, it follows that the purpose of the imposition of the SRRP, to prevent the formation of independent RCMP members' associations for the purposes of collective bargaining, is unconstitutional.

(2) The Effects of the Imposition of the SRRP Infringe Section 2(d)

[111] While it would be sufficient to find a violation of s. 2(d) solely on the basis of the purposes of the imposition of the SRRP as a labour relations regime (*Big M Drug Mart*), we also find that imposing this regime infringes s. 2(d) in its effects. Our inquiry here is directed at whether RCMP members can genuinely advance their own interests through the SRRP, without interference by RCMP management. We are satisfied, on the record before us, that they cannot.

[112] The organizational structure of the SRRP has evolved significantly since its predecessor was first established in 1974. These changes are detailed above. While these changes have expanded the SRRs' freedom to direct the program, they nonetheless fall short of respecting RCMP members' right to join associations that are of their choosing and independent of management, to advance their interests.

[113] At the level of institutional structure, the SRRP is plainly not independent of RCMP management. Rather, it is squarely under its control. It is a part of the labour-management structure of the RCMP. In 1989, the Government of Canada formalized the SRRP (then known as the DSRRP) by adding s. 96 to the *RCMP Regulations*: SOR/89-581. The Regulatory Impact Analysis Statement that accompanied the amendment to the *RCMP Regulations* expressly stated that the DSRRP was "co-ordinated and monitored at R.C.M.P. Headquarters" and "subject to biannual reviews at R.C.M.P. Divisions with reports to the Commissioner from the Internal Communications Officer". Although not determinative nor exhaustive of a regulation's purpose or interpretation, regulatory impact analysis statements are a useful tool to understand how regulations are intended to work: see *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at para. 33; *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at pp. 352-53.

[114] The lack of independence of the current-day SRRP is further emphasized by the 2007 Brown Report: *Rebuilding the Trust: Report of the Task Force on*

*Governance and Cultural Change in the RCMP* (2007). In June 2007, an independent investigator raised issues regarding the RCMP's handling of reports of mismanagement or irregularities in the administration of the RCMP's pension and insurance plans in a report that was submitted to the Minister of Public Safety and the President of the Treasury Board: *A Matter of Trust: Report of the Independent Investigator into Matters Relating to RCMP Pension and Insurance Plans* (2007). The investigator recommended that the Government of Canada establish a task force to examine issues pertaining to the RCMP's governance and culture. This led to the Brown Report. While the Task Force did not focus exclusively on labour relations at the RCMP, it did consider comments from members and employees about the SRRP.

[115] In the Brown Report, the Task Force reported the comments of some officers who said they were not sure what happens to their concerns after they give them to SRRs: “. . . it is not clear whether they have been passed on by the SRRs at all, or whether management has decided not to act on them” (Brown Report, at p. 33). The Task Force also noted that the SRRs had become “part of the chain of command of the RCMP organization” (*ibid.*), specifically that the presence of SRRs as observers at meetings of the Senior Executive Committee, composed of the Commissioner and Deputy Commissioners, gave the impression of their concurrence with the decisions of RCMP management. The authors of the report expressed the view that “more distance from management [was] appropriate” (*ibid.*). They ultimately recommended that the SRRs “focus entirely on labour relations and thus be independent from management” (p. 34).

[116] We note the following additional areas of concern. First, pursuant to the Agreement between the Commissioner and the NEC of the SRRP, significant aspects of the program structure are determined by RCMP management, including the number of SRRs and the program budget. Members of the SRRP are prohibited from communicating with anyone outside the RCMP concerning RCMP programs and activities without permission of the Commissioner. An exception relating to conditions of work and employment exists, but the conditions for its exercise are narrowly restricted and obviously slanted toward management. The NEC must submit an annual report to management on its activities. The operation of the SRRP is to be regularly reviewed jointly by the SRRP and RCMP management, and the consent of both the SRRP and management is required to amend the program.

[117] Second, the SRRP deliberately restricts members' freedom to advocate for the ability to be represented by an independent association. As a matter of policy and practice, RCMP members who are active in such associations are excluded from full participation in the SRRP, and SRRs are prohibited from promoting alternative modes of representation for RCMP members. Yet members have no option outside of the SRRP to meet with management to promote their interests in other forms of representation.

[118] Simply put, in our view, the SRRP is not an association in any meaningful sense, nor a form of exercise of the right to freedom of association. It is simply an internal human relations scheme imposed on RCMP members by

management. Accordingly, the element of employee choice is almost entirely missing under the present scheme.

[119] While the Attorney General of Canada observes that adoption of the SRRP was endorsed by members in all divisions outside Quebec in a referendum in 1974, we do not consider this fact determinative, for two reasons. First, the referendum in question evidently offered the SRRP a “take it or leave it” proposition. It does not reflect whether members would have preferred representation through an independent association. Second, the referendum took place 40 years ago. Today, there is no opportunity for RCMP members to indicate their support for an alternative form of association. Members have no ability to opt out of participation in the SRRP, and there is no other means for them to communicate their workplace concerns to management. As we have seen, the structure has no independence from management; it is but a part of management itself.

[120] These constitutional defects in the SRRP are not cured by the election of SRRs. On this point we agree with the conclusion of the application judge, that “agreeing 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” (para. 63).

[121] In conclusion, s. 96 of the *RCMP Regulations*, which imposed the SRRP as the sole recognized vehicle for engagement between RCMP membership and senior management, constituted a substantial interference with freedom of association

in both its purpose and effects. Before considering whether that infringement could be justified under s. 1 of the *Charter*, we consider the related challenge to para. (d) of the definition of “employee” in s. 2(1) of the *PSLRA*.

F. *Whether Paragraph (d) of the Definition of “Employee” in Section 2(1) of the PSLRA Infringes Section 2(d) of the Charter*

[122] The appellants challenge the exclusion of RCMP members from the application of the *PSLRA* and ask that para. (d) of the definition of “employee” in s. 2(1) of that Act be struck down. Most employees in federally regulated workplaces are governed by the *Canada Labour Code*, R.S.C. 1985, c. L-2 (“*CLC*”), but the collective bargaining regime established by Part I of the *CLC* is inapplicable to employees of the Crown, with limited exceptions: s. 6.

[123] For employees in the federal public service, the *PSLRA* provides the general framework through which they can join and participate in employee associations; these associations can be certified as bargaining agents, and good faith collective bargaining can occur. The *PSLRA* provides for mediation, conciliation and arbitration when problems arise during collective bargaining and provides remedies for unfair labour practices. While being significantly different from private-sector labour relations models in many ways, the *PSLRA* and its predecessor, the *PSSRA*, are generally referred to as a Wagner Act model of labour relations (C. Rootham, *Labour and Employment Law in the Federal Public Service* (2007), at pp. 19-20).

[124] Paragraph (d) of the definition of “employee” in s. 2(1) of the *PSLRA* excludes RCMP members from the application of the *PSLRA*. This Court in *Delisle* held that the exclusion of the RCMP from the *PSSRA*, the *PSLRA*’s predecessor legislation, did not violate s. 2(d) of the *Charter*. This raises a threshold question: Should the Court’s decision in *Delisle* be reconsidered? In our view, it should, for two reasons.

[125] First, *Delisle* was decided before this Court’s decisions in *Health Services* and *Fraser*, which marked a shift to a purposive and generous approach to labour relations. At the time *Delisle* was decided, the right to a meaningful process of collective bargaining was not recognized as part of the s. 2(d) *Charter* guarantee. All three sets of reasons in *Delisle* make clear that the Court in that case was *not* addressing the issue of whether the purpose of the *PSSRA* exclusion was to prevent RCMP members from engaging in collective bargaining: para. 5, *per* L’Heureux-Dubé J.; para. 20, *per* Bastarache J.; paras. 51, 88 and 107, *per* Cory and Iacobucci JJ. As formulated by Bastarache J., writing for the majority, the question in *Delisle* was whether the purpose of the exclusion “was to prevent RCMP members from forming any type of independent association”: para. 20. The question of an interference with the right to a meaningful process of collective bargaining was neither asked nor answered in *Delisle*.

[126] Second, in *Delisle*, only part of the scheme governing the labour relations of RCMP members — their exclusion from the *PSSRA* — was before this Court. In

the present appeal, the challenge targets the entire labour relations scheme — the exclusion from the application of the *PSLRA* and the imposition of the labour relations regime that we have found is intended to deny RCMP members the right to form an independent association capable of engaging in a meaningful process of collective bargaining. In other words, the majority in *Delisle* found that the legislative exclusion, viewed in isolation, did not prevent the creation of an independent association, but the Court now considers the complete scheme which is clearly intended to prevent associational activity protected under s. 2(d) of the *Charter*.

[127] Overturning precedents of this Court is not a step to be lightly taken (*Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at para. 24; *Fraser*, at para. 56; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 47). However, as explained, *Delisle* was decided before this Court’s shift to a purposive and generous approach to the exercise of freedom of association and *Delisle* considered a different question and narrower aspects of the labour relations regime than those at issue here. It follows that the result in *Delisle* must be revisited.

[128] We therefore propose to examine whether para. (d) of the definition of “employee” in s. 2(1) of the *PSLRA* infringes s. 2(d) in its purpose.

(1) The Purpose of the *PSLRA* Exclusion infringes Section 2(d)

[129] The statutory exclusion of RCMP members must be read and its constitutionality assessed in relation to P.C. 1918-2213, the Order in Council that constituted the labour relations regime that applied to members of the RCMP at the time of enactment of the *PSSRA*. The blanket prohibition of associational activity in pursuit of workplace goals imposed by P.C. 1918-2213 unquestionably violates s. 2(d) of the *Charter*. The implementation of this labour relations regime was made possible by the exclusion of the RCMP members from the labour relations regime governing the federal public service under the *PSSRA*.

[130] Although they originated from different legal sources, the *PSSRA* exclusion and P.C. 1918-2213, working together, constituted a labour relations regime that was designed to interfere with the right to freedom of association of RCMP members. The *PSSRA* exclusion cannot be viewed in the abstract, independently from the Order in Council. These two prongs of the predecessor labour relations regime shared a common purpose. They were both intended to deny to RCMP members the constitutional exercise of their freedom of association. Like P.C. 1918-2213, para. (e) of the definition of “employee” in s. 2(1) of the *PSSRA*, now re-enacted as para. (d) of the definition of “employee” in s. 2(1) of the *PSLRA*, is tainted by an improper purpose and breaches s. 2(d) of the *Charter*.

[131] The purpose of para. (d) of the definition of “employee” in s. 2(1) of the *PSLRA*, viewed in its historical context, thus violates s. 2(d) of the *Charter*. The *PSSRA* and, later, the *PSLRA* established the general framework for labour relations

and collective bargaining in the federal public sector. A class of employees, the members of the RCMP, has, since the initial enactment of this regime, been excluded from its application in order to prevent them from exercising their associational rights under s. 2(d). Thus the issue to be addressed is whether the purpose of excluding a specific class of employees from the labour relations regime impermissibly breaches the constitutional rights of the affected employees. The issue is not whether Parliament must impose a new statutory labour relations regime in the presence of a legislative void.

[132] Paragraph (d) of the definition of “employee” in s. 2(1) of the *PSLRA* excludes every 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”.

[133] Before 1967, the concept of collective bargaining was unknown to the federal public service generally and, of course, to the RCMP specifically. Parliament adopted the *PSSRA* to implement a process of collective bargaining in the federal public service (Rootham, at p. 37; R. Caron, *Employment in the Federal Public Service* (loose-leaf), at para. 1:200; J. C. Anderson and T. A. Kochan, “Collective Bargaining in the Public Service of Canada” (1977), 32 *I.R.* 234, at p. 234). The *PSSRA*’s successor, the *PSLRA*, reflected a similar commitment to collective bargaining (see the preamble of the *PSLRA* and *Advisory Committee on Labour*

*Management Relations in the Federal Public Service, Working Together in the Public Interest* (2001), at p. 14).

[134] The exclusion of RCMP members from the *PSSRA* in 1967 — the only vehicle available for meaningful collective bargaining in the federal public service — was intended to prevent them from engaging in collective bargaining. The then-Commissioner of the RCMP acknowledged this in correspondence to the Solicitor General of Canada in 1980, stating: “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” (see A.F., at para. 106).

[135] The *PSSRA*’s successor, the *PSLRA*, reduced the categories of excluded public servants. RCMP members, however, continued to be excluded in identical terms as under the *PSSRA*, and no other statute permitted RCMP members to engage in a process of collective bargaining (*Delisle*, at para. 85, *per* Cory and Iacobucci JJ., dissenting; R. MacKay, “The Royal Canadian Mounted Police and Unionization”, Parliamentary Research Branch, September 3, 2003, at p. 20). Nothing indicated that the purpose of the initial exclusion of RCMP members from collective bargaining had changed: *Interpretation Act*, R.S.C. 1985, c. I-21, at s. 44(f); see also *R. v. Big M Drug Mart*, at p. 335. Indeed, the *PSLRA* exclusion makes possible the current imposition of the SRRP, which we have found to substantially interfere in both purpose and effect with RCMP members’ rights to a meaningful process of collective bargaining. Working in tandem with P.C. 1918-2213, the *PSSRA* exclusion had

similarly sought to deny the members of the RCMP the exercise of their right to freedom of association. The simple re-enactment of this exclusion in the *PSLRA* did not cure this constitutionally impermissible purpose. The *PSLRA* exclusion is but a part of a constitutionally defective regime of labour relations, designed to prevent the exercise of the s. 2(d) rights of RCMP members. We therefore conclude that the purpose of the *PSLRA* exclusion infringes s. 2(d) of the *Charter*.

(2) Summary

[136] We conclude that the purpose of the exclusion in s. 2(1) of the *PSLRA* substantially interferes with freedom of association. At this point, we need not consider the effects of the *PSLRA* exclusion independently from those of the imposition of the SRRP as a labour relations regime.

[137] This conclusion does not mean that Parliament must include the RCMP in the *PSLRA* scheme. As discussed above, s. 2(d) of the *Charter* does not mandate a particular model of labour relations. Our conclusion with respect to the constitutionality of the *PSLRA* exclusion means only that Parliament must not substantially interfere with the right of RCMP members to a meaningful process of collective bargaining, unless this interference can be justified under s. 1 of the *Charter*. For example, it remains open to the federal government to explore other collective bargaining processes that could better address the specific context in which members of the RCMP discharge their duties.

[138] We now turn to whether the infringements of s. 2(d) rights caused by the legislative imposition of the SRRP and by the exclusion of RCMP members from the application of the *PSLRA* are justified under s. 1 of the *Charter*.

G. *Are the Limits Imposed on the RCMP Members' Section 2(d) Rights Justified Under Section 1 of the Charter?*

[139] Section 1 of the *Charter* permits Parliament to enact laws that limit *Charter* rights if it establishes that the limits are reasonable and demonstrably justified in a free and democratic society. This requires that the objective of the measure be pressing and substantial, and that the means by which the objective is furthered be proportionate, i.e. that the means are rationally connected to the law's objective, minimally impair the s. 2(d) right, and are proportionate in effect (*R. v. Oakes*, [1986] 1 S.C.R. 103; *Health Services*, at paras. 137-39). The onus rests on the party seeking to uphold the limitation of the *Charter* right, and the burden of proof is a preponderance of probabilities (*RJR – MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paras. 137-38 (“*RJR – MacDonald (1995)*”). At the outset, we note that a *Charter*-infringing measure adopted by regulation is undoubtedly “prescribed by law” for the purposes of s. 1 (*Hutterian Brethren*, at paras. 39-40).

[140] We have already seen that s. 2(d) gives Parliament much leeway in devising a scheme of collective bargaining that satisfies the special demands of the RCMP. Beyond this, s. 1 provides additional room to tailor a labour relations regime

to achieve pressing and substantial objectives, provided it can show that these are justified.

[141] In their written submissions on s. 1, the parties addressed the limits imposed by s. 96 of the *RCMP Regulations* and para. (d) of the definition of “employee” in s. 2(1) of the *PSLRA* together. We do the same.

(1) Is the Objective of Imposing the SRRP Pressing and Substantial?

[142] The question at this stage is whether the objective of the infringing measure is sufficiently important to be capable in principle of justifying a limitation on the rights and freedoms guaranteed by the constitution (*RJR-MacDonald (1995)*, at para. 143). The Attorney General of Canada says the objective of excluding RCMP members from the *PSLRA* and the objective of the *RCMP Regulations* is to maintain and enhance public confidence in the neutrality, stability and reliability of the RCMP by providing a police force that is independent and objective. We conclude that the need for an independent and objective police force constitutes a pressing and substantial objective under s. 1 of the *Charter*.

(2) Are the Means by Which the Objective Is Furthered Proportionate?

(a) *Rational Connection*

[143] The government must demonstrate that the infringing measure is rationally connected to its objective. This test is “not particularly onerous” (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 228; *Health Services*, at para. 148). It is not necessary to establish that the measure will *inevitably* achieve the government’s objective. A reasonable inference that the means adopted by the government will help bring about the objective suffices (*Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 40; *Health Services*, at para. 149). The assessment is a matter of causal relationship.

[144] Philosophical, political and social claims are not always amenable to proof by empirical evidence: *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 104; *Sauvé*, at para. 18. For this reason, courts have not always insisted on direct proof of a relationship between the infringing measure and the legislative objective, accepting conclusions supported by logic and reason (*RJR-MacDonald (1995)*, at para. 154; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 101). However, this does not relieve the government from establishing that it was at least reasonable to conclude that a causal relationship existed between the *PSLRA* exclusion and the imposition of the SRRP and the preservation of neutrality, stability and reliability in the RCMP. As McLachlin J. (as she then was) wrote in *RJR-MacDonald (1995)*, at para. 129:

While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that

context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning.

[145] The position of the Attorney General of Canada is that the creation of a separate labour relations regime, free from collective bargaining and unionism, is rationally connected to the goal of ensuring a stable, reliable and neutral police force. In our view, the Attorney General has not established that this is a reasonable inference.

[146] First, it is not apparent how an exclusion from a statutorily protected collective bargaining process ensures neutrality, stability or even reliability. The exclusion of RCMP members from the federal public service collective bargaining regime when it was first enacted in 1967 fostered, rather than inhibited, dissatisfaction and unrest within the RCMP. This unrest was what ultimately led to the creation of the SRRP, which was introduced “after R.C.M.P. members began bringing employment-related grievances to the attention of the media and began to complain in public about the absence of mechanisms through which their grievances could be addressed” (Hardy and Ponak, at p. 89).

[147] Second, it is not established that permitting meaningful collective bargaining for RCMP members will disrupt the stability of the police force or affect the public’s perception of its neutrality. The government offered no persuasive evidence to that effect. Empirical research tends to show the opposite, as does

provincial experience with unionized police forces (see, e.g., D. Forcese, “Police Unionism: Employee-Management Relations in Canadian Police Forces” (1980), 4 *Canadian Police College Journal* 79: “There is nothing inherently disruptive about police unions” (p. 120)). Indeed, the evidence suggests that respecting associational rights has the potential to ensure, rather than undermine a positive working relationship and therefore enhance labour stability.

[148] We conclude that the government has failed to establish a rational connection between denying RCMP members’ their s. 2(d) right to meaningful collective bargaining, and maintaining a neutral, stable and reliable police force. While this conclusion is sufficient to dispose of the s. 1 analysis, we will nonetheless go on to address the requirement that the limit on the right be minimally impairing.

(b) *Minimal Impairment*

[149] At this stage, the question is whether the measure impairs the s. 2(d) right as little as possible in order to achieve the government’s objective. The government is not required to pursue the least drastic means of achieving its objective, but it must adopt a measure that falls within a range of reasonable alternatives:

The impairment must be “minimal”, that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement . . . . On the other hand, if the government fails to explain

why a significantly less intrusive and equally effective measure was not chosen, the law may fail. [Citations omitted.]

(*RJR-MacDonald (1995)*, at para. 160; see also *Hutterian Brethren*, at paras. 53-55; *Health Services*, at para. 150.)

[150] The appellants argue that (1) other police forces throughout Canada have access to meaningful collective bargaining regimes without disruption of their neutrality, stability or reliability; and (2) the government has not shown that the RCMP is different in any way that would make collective bargaining more disruptive to their neutrality, stability or reliability. It follows, they argue, that denying RCMP members any meaningful process of collective bargaining is therefore more restrictive than necessary to maintain the Force's neutrality, stability and reliability.

[151] The RCMP "is the only police force in Canada without a collective agreement to regulate the working conditions of its officers" (application judge's reasons, at para. 96). In the rest of the country, the police have the benefit of collective bargaining regimes that provide basic bargaining protections. In Ontario, Quebec, and Newfoundland and Labrador, provincial forces are regulated under their own statutes which provide for, among other things, the establishment of employee associations, the negotiation of collective agreements between management and employee associations, grievance procedures, conciliation and arbitration: *Ontario Provincial Police Collective Bargaining Act, 2006*, S.O. 2006, c. 35, Sch. B; *An Act respecting the Syndical Plan of the Sûreté du Québec*, CQLR, c R-14; *Royal Newfoundland Constabulary Act, 1992*, S.N.L. 1992, c. R-17. In other provinces, the

police are covered by general labour relations statutes, with specific provisions applicable to them. For example, in Saskatchewan, conciliation and arbitration are provided as a means of resolving labour disputes, and restrictions are placed on strikes and lock-outs, pursuant to *The Police Act, 1990*, S.S. 1990-91, c. P-15.01, ss. 83 to 86.

[152] Unless it is established that the RCMP is materially different from the provincial police forces, it is clear that total exclusion from meaningful collective bargaining cannot be minimally impairing. A material difference has not been shown. Moreover, concerns about the independence of the members of the Force could easily be considered in determining the scope of the police bargaining unit under schemes like the *PSLRA*, without requiring total exclusion from bargaining in the present regime. For example, s. 4 of the *Labour Code*, CQLR, c. C-27, restricts the membership and affiliations of municipal police associations.

[153] The only argument advanced by the Attorney General of Canada in order to support the view that the RCMP's particularities warrant the exclusion of members from the *PSLRA* and the imposition of the SRRP is that in the event of an unlawful strike or other debilitating job action by other police forces, or other security-related workers such as prisons guards, it could ultimately be left to the RCMP to provide policing services to the public affected by those events. While the RCMP's mandate differs from that of other police forces, there is no evidence that providing the RCMP a labour relations scheme similar to that enjoyed by other police forces would prevent

it from fulfilling its mandate. Again, no material difference in RCMP labour relations has been shown.

#### H. *Remedy*

[154] Within the impugned legislative scheme, the imposition of the SRRP and the exclusion in s. 2(1) of the *PSLRA* deny members of the RCMP the right to any meaningful process of collective bargaining. And, while s. 2(d) does not protect the right to any *particular* process of collective bargaining, it does protect the right to a *meaningful* process. Having found that s. 96 of the *RCMP Regulations* and para. (d) of the definition of “employee” in s. 2(1) of the *PSLRA* infringe the freedom guaranteed to RCMP members under s. 2(d) of the *Charter*, and that these provisions cannot be saved under s. 1, we conclude that the appropriate remedy is to strike down the offending provision of the *PSLRA* under s. 52 of the *Constitution Act, 1982*. We would similarly strike down s. 96 of the *RCMP Regulations* were it not repealed.

[155] The Attorney General of Canada argues that this conclusion would go against the proposition, which we accept, that s. 2(d) does not guarantee a right to a particular labour relations process. The Attorney General argues that striking down the offending provision of the *PSLRA* would constitutionalize the labour relations process set out in that Act.

[156] This argument misconstrues our conclusion. We do not conclude that the *PSLRA* process is constitutionalized, but rather that the existing labour relations

scheme and the purpose motivating the *PSLRA* exclusion are inconsistent with the *Charter* and fail under s. 52 of the *Constitution Act, 1982*. This conclusion does not mandate a particular labour relations regime or bar the federal government from pursuing an avenue other than the *PSLRA* to govern labour relations within the RCMP. Should it see fit to do so, Parliament remains free to enact any labour relations model it considers appropriate to the RCMP workforce, within the constitutional limits imposed by the guarantee enshrined in s. 2(d) and s. 1 of the *Charter*.

## VII. Conclusion

[157] We would allow the appeal, with costs to the appellants throughout, and answer the constitutional questions as follows:

1. 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*?

Yes.

2. 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*?

No.

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

Yes.

4. 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*?

No.

[158] Had s. 96 of the *RCMP Regulations* not been repealed, it would have been declared to be of no force or effect. Paragraph (d) of the definition of “employee” in s. 2(1) of the *PSLRA* is of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*. We suspend the declaration of invalidity for a period of 12 months.

The following are the reasons delivered by

ROTHSTEIN J. —

I. Introduction

[159] In a constitutional democracy, the judicial branch of government is entrusted to rule on whether laws enacted by the legislature pass constitutional

muster. But this Court's rulings are not subject to review. Its rulings are binding on the legislative branch, unless that branch invokes the rarely resorted-to s. 33 of the *Canadian Charter of Rights and Freedoms* to provide that its legislation will operate notwithstanding breaches of certain constitutional rights. This means that constitutional decisions of this Court have the power to freeze matters in time and restrict Parliament's ability to change course in the future, where facts and policy imperatives may suggest or require a different approach.

[160] It is fundamental, therefore, that the judicial and legislative branches of government have respect for the role and responsibility of the other. The legislative branch must respect the decisions of the courts and comply with them. Courts must equally respect the role of the democratically elected legislature and its policy choices. The judicial branch must not exercise its great constitutional power to make rulings that are not firmly rooted in the text, context, and purpose of Canadian constitutional law. While a purposive approach to *Charter* interpretation has long been accepted, in the words of Dickson J. (as he then was) in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, "it is important not to overshoot the actual purpose of the right or freedom in question". See also *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157, at para. 19, *per* Abella J.

[161] Courts must be especially cautious when dealing with questions of socio-economic policy. Just as the government and legislature must respect the courts'

expertise as judicial bodies, so too must courts appreciate that they are not best placed to make determinations as to which specific social or economic policy choice is most appropriate. The evaluation and implementation of social and economic policy require flexibility and fine-tuning. Courts should not expand *Charter* rights in such a way as to prevent governments from responding to new information or changing social and economic conditions.

[162] In my respectful opinion, the majority has departed from these core principles of constitutional law in this case. I am compelled to dissent. The courts must respect that concerns such as maintaining “the balance between employees and employer” and attaining “equilibrium” in labour relations (see majority reasons, at paras. 72 and 82) fall within the proper role and expertise of governments and legislatures, not the judiciary.

[163] Parliament enacted legislation creating a non-adversarial labour relations scheme for the Royal Canadian Mounted Police (“RCMP”) — the Staff Relations Representative Program (“SRRP”) — that balances the competing policy interests arising in the context of a national police force. RCMP members democratically elect Staff Relations Representatives (“SRRs”) to represent their interests directly to management. Members can also communicate their workplace concerns to SRRs through independent employee associations, such as the appellant associations. The evidence is that, as the constitutional protection of freedom of association now

guarantees, SRRs make collective representations on behalf of RCMP members and management considers those representations in good faith.

[164] This labour relations model permits RCMP members to exercise their freedom of association under s. 2(d) of the *Charter*. That the SRRP does not mimic the adversarial, Wagner model of labour relations prevalent in much labour legislation in Canada is of no consequence for constitutional purposes: *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at paras. 44-47. The majority in *Fraser* rejected the submission that *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, “constitutionalizes a full-blown Wagner system of collective bargaining” and clarified that *Health Services* “unequivocally stated that s. 2(d) does not guarantee a particular model of collective bargaining or a particular outcome”: paras. 44-45, *Health Services*, at para. 91.

[165] The majority now reverses this Court’s recent interpretation of s. 2(d) of the *Charter* in both *Fraser* and *Health Services* so as to effectively compel a single model of collective bargaining. I cannot agree with such an approach. The evolution of labour relations in Canada will surely inspire further legislative changes to address changing circumstances and accumulated experience. This Court should not interpret s. 2(d) so as to stymie future reform and progress in this area. As acknowledged in *Health Services*:

... it is impossible to predict with certainty that the present model of labour relations will necessarily prevail in 50 or even 20 years ([P. A. Gall,] “Freedom of Association and Trade Unions: A Double-Edged Constitutional Sword”, in J. M. Weiler and R. M. Elliot, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (1986), 245, at p. 248). [para. 91]

[166] Moreover, the majority in *Fraser* articulated the test for constitutionality under s. 2(d), in the labour relations context: whether the government action “makes meaningful association to achieve workplace goals effectively impossible” (para. 98). Now, less than four years after that case was decided, the majority resiles from this test as it does not justify the conclusion it wishes to reach.

[167] I respectfully disagree with this constitutional reversal. As this Court has indicated, once rendered, constitutional decisions should only be subject to change or reversal under limited and rigorous conditions: *Fraser*, at para. 57. In *Fraser*, this Court issued a stern warning: “The seriousness of overturning . . . recent precedents of this Court, representing the considered views of firm majorities, cannot be overstated” (para. 57). The majority in this case does precisely that.

## II. Facts and Judicial History

[168] I accept, in general terms, the majority’s summary of the facts and lower court decisions in this case. Where I disagree, it is noted in the analysis below.

## III. Analysis

A. *Freedom of Association*

[169] This Court has frequently been called upon to determine the ambit of freedom of association under s. 2(d) of the *Charter*. At its core, freedom of association protects an individual's ability "to act in association with others to pursue common objectives and goals" (*Fraser*, at para. 25). However, the way in which this general proposition applies in the labour relations context has been hotly contested. In its 2007 decision in *Health Services*, the Court departed from earlier decisions and found that s. 2(d) encompasses a right to collective bargaining that "requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation": para. 90. The majority of the Court affirmed this conclusion in 2011 in *Fraser*.

[170] Since the decisions in *Health Services* and *Fraser*, employees have had a constitutional right to make collective representations, which their employer must consider in good faith. The test to find an infringement of s. 2(d) in the labour relations context is "whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals" (*Fraser*, at para. 46). Collective bargaining is protected, but only "in the minimal sense of good faith exchanges" (*Fraser*, at para. 90; see also para. 42).

[171] Now, less than four years after *Fraser* was decided, the majority in this case expands freedom of association, requiring much more than good faith negotiations. It finds that the only way to have meaningful collective bargaining is

through a process which “provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests” (para. 5). The majority also retreats from the effective impossibility test. Instead, it finds that s. 2(d) will be infringed by “[a] process that substantially interferes with a meaningful process of collective bargaining by reducing employees’ negotiating power” (para. 71 (emphasis added)).

[172] By relaxing the standard required to find a s. 2(d) violation, the majority takes freedom of association far beyond the ordinary meaning of those words and well beyond what the concept of “association” has been held to include. *Health Services* and *Fraser* provide that s. 2(d) protects the right to associate to make collective representations and to have employers consider those representations in good faith. The essential feature of a labour relations regime that allows employees to exercise their constitutional right to make meaningful collective representations on their workplace goals is representativeness: the voice that speaks on behalf of employees must represent their interests and be ultimately accountable to them. Representativeness is the constitutional imperative required in order to ensure that s. 2(d) rights are protected in the collective bargaining context, nothing more. Only if legislation impairs the right of employees to have their interests advanced honestly and fairly will that legislation be constitutionally suspect. That is not the case here.

[173] Facially, the type of right described in s. 2(d) does not impose obligations on third parties. However, freedom of association has now been interpreted as

imposing obligations on others; in *Health Services* and *Fraser*, this Court found that employers are obliged to engage in good faith collective bargaining. Nonetheless, courts must be particularly cautious when considering an expansion of a constitutional right that would impose a constitutional obligation on a third party. The expansion of such rights, although beneficial for some, comes at the expense of the freedom of others, a trade-off that requires careful deliberation. This is particularly true given that such a decision removes matters from the scope of Parliament's powers to adjust the balance between parties as a matter of ordinary lawmaking.

[174] The interpretation of a *Charter* right must be principled and must not be so divorced from the text of the provision as to depart from the foundation of the right. When, in *Health Services* and *Fraser*, this Court recognized a derivative right to collective bargaining stemming from the purpose of s. 2(d) of the *Charter*, it extended constitutional rights beyond what had previously been accepted. To now add to that shaky foundation a further, attenuated addition — a derivative right onto the derivative — makes for an unsound and indefensible structure.

[175] The language used by the majority in this case creates greater rights, and imposes greater restrictions on the government, than either a plain or generous reading of s. 2(d) can logically provide, and rights beyond those that have been recognized in the context of s. 2 (a), (b) and (c) of the *Charter*. There is no basis in s. 2(d) for such a departure.

#### B. *A Meaningful Process of Collective Bargaining*

[176] What the majority proposes as a meaningful process of collective bargaining under s. 2(d) of the *Charter* now requires more than that “the parties . . . meet and engage in meaningful dialogue”: *Fraser*, at para. 41; see also *Health Services*, at para. 101. Now the majority says that the only way to achieve meaningful collective bargaining is through a process that “provides employees with a degree of choice and independence sufficient to enable them to determine and pursue their collective interests”.

[177] I would not dispute that individuals may generally form or join associations of their choosing and may have those organizations be independent from other entities. However, *Health Services* and *Fraser* construed s. 2(d) in a particular context: association for the purposes of engaging in meaningful collective bargaining. Neither the choice of the organization representing employees for bargaining purposes nor the independence of that association are necessary to ensure that meaningful collective bargaining can occur.

[178] Choice and independence are central to Wagner-style labour relations. As will be explained, by selecting choice and independence as constitutional requirements for meaningful collective bargaining, the majority mandates an adversarial model of labour relations and precludes others which may be just as or more effective in contributing to meaningful collective bargaining.

(1) Choice

[179] Individuals have the constitutional right to form or belong to lawful associations of their choosing and there is nothing in the record before us to suggest that such a right has been infringed. RCMP members are free to join the appellants or other employee associations to seek fulfillment, autonomy, and self-actualization. Through those organizations they can participate in lobbying, educational, social, and other incidental activities. Those associations can also seek to advance the workplace interests of RCMP members by communicating with SRRs on their members' behalf.

[180] However, the appellants and the majority in this appeal propose that freedom of association extends beyond the right of employees to form and belong to an association of their choosing and includes the right to choose the association to represent employee interests for bargaining purposes and with which the employer must bargain. However, recognizing that the Wagner model in place in workplaces across Canada imposes limits on choice, the majority does not suggest that freedom of association protects an *individual's* right to choose the association to which he or she wishes to belong. Instead, the majority limits the constitutional right to the ability of employees, *en masse*, "to form and bargain through an association of their own choosing" (majority reasons, at para. 110).

[181] The majority also acknowledges that even the collective right to bargain through an association of the group's choosing will not always be protected. For example, designated bargaining models such as the one established under Ontario's *School Boards Collective Bargaining Act, 2014*, S.O. 2014, c. 5, "may be acceptable"

(majority reasons, at para. 95), even though they provide the employee group with no choice of association. The bargaining agent for the group is designated. In order to legitimize its restriction on choice, the majority restates its requirement as a vague constitutional right to the “degree of choice . . . that enables employees to have effective input into the selection of [their] collective goals” (para. 83).

[182] However, logically, effective input into the selection of collective workplace goals is not a matter of the choice of representative; it is a matter of having the right to choose the priorities that should be advanced on behalf of employees. The majority states that employees’ ability “to set and change collective workplace goals” is one hallmark of employee choice (para. 86). But the ability to have one’s views represented in shaping workplace goals is more than a hallmark: it is the key element in meaningful collective bargaining. What the majority’s restatement describes is a right to fair representation by a spokesperson, not a right to choose that representative.

[183] In the labour relations context, “choice” is ill suited as a criterion upon which to base the constitutional protection afforded to collective bargaining. There are schemes in place throughout the country, based on the Wagner model, that provide a mechanism by which a single employee representative association is designated for the purposes of bargaining with the employer, under the principle of majoritarian exclusivity. This principle mandates that the employer recognize an exclusive bargaining agent selected by a majority of employees to represent their

interests within a given industry, sector, or business. However, there may be a large minority of employees whose preferred representative is not selected. Under such a model, their freedom of association will be constrained not only as to their choice of representative association, but also as to their ability to establish or join a rival association to bargain with management. Choice is similarly circumscribed for so-called Rand employees, who are denied the choice of paying union dues and refusing representation by the bargaining agent. Such a limit on choice has been recognized as a valid limit on employees' freedom of association, since permitting unbounded choice of association would undermine the collective bargaining strength of employees and render the process of good faith bargaining unworkable for employers: see *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211; *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70, [2001] 3 S.C.R. 209.

[184] The majority defines "choice" in terms of four hallmarks: "the ability to form and join new associations, to change [employee] representatives, to set and change collective workplace goals, and to dissolve existing associations" (para. 86). The majority asserts that a designated bargaining model, such as Ontario's *School Boards Collective Bargaining Act*, where specific bargaining agents are legislatively imposed, allows employees to "retain sufficient choice over workplace goals and sufficient independence from management to ensure meaningful collective bargaining" (para. 95). However, this model lacks three of the so-called hallmarks of choice: Ontario teachers cannot form and join new associations to bargain with employers, they cannot change the legislatively imposed bargaining agents that

represent them, and they cannot dissolve those bargaining agents. The hallmark that this model does possess is what I have termed “representativeness”: the ability to set and change collective workplace goals (that is, the ability of teachers to have their interests represented). This suggests that the constitutional standard of s. 2(d) is likely met. The majority’s acceptance of the Ontario *School Boards Collective Bargaining Act* model undermines its argument that choice is an essential element of freedom of association.

[185] Even the Wagner model does not rely exclusively on choice and independence to protect employee interests. The statutory provisions and associated case law recognize the central importance of representativeness by providing a number of protections for employee interests unrelated to choice or independence *per se*.

[186] Under the Wagner model of labour relations, the association designated as an exclusive bargaining agent cannot discriminate in carrying out its duties towards the employees it represents or go off in pursuit of its own agenda. Legislation and jurisprudence have evolved to guard against abuses of power by single bargaining agents, by imposing upon those agents a duty to represent all employees, even those who choose not to become “members” of that association: see the discussions in *Canadian Merchant Service Guild v. Gagnon*, [1984] 1 S.C.R. 509, at pp. 518-20; and *Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, [1990] 1 S.C.R. 1298, at pp. 1309-15. It is the jurisprudence and

legislation that ensures that the bargaining agent is representative of the interests of its constituency in whatever work that it undertakes on their behalf, whether the individual employees have chosen it or not.

[187] Similarly, a designated bargaining model, like Ontario's *School Boards Collective Bargaining Act*, only leads to meaningful collective bargaining where there are statutory safeguards built in to ensure that the designated bargaining agent represents the interests of all employees and is ultimately accountable to them.

[188] The majority claims that choice and independence "overlap considerably" with representativeness and that the difference between them "is more semantic than real" (paras. 101 and 103). With respect, such blurring of distinct concepts only creates confusion and ambiguity. Choice and independence may be a means by which representativeness is obtained, but there may be others, such as the statutory safeguards discussed above.

[189] A statutorily designated bargaining model such as the scheme established by the Ontario *School Boards Collective Bargaining Act*, can ensure that employees' interests will be effectively represented to management even where the employees do not choose their individual representatives or the system in which this representation takes place. Section 2(d) of the *Charter* requires that bargaining agents represent the interests and workplace concerns of employees, what I call representativeness. The method by which the representative is determined is not a constitutional diktat.

[190] Mandating choice and independence as constitutional requirements forecloses an entire class of collaborative bargaining approaches that could be designed to address particular contexts in which a Wagner model of labour relations may be ill suited.

[191] In the case at bar, the context of a national police force led to the adoption of a statutory collaborative labour relations model. Within that model, RCMP members democratically select their representatives and those representatives have a statutory duty to represent employee interests. They can be replaced if they fail to uphold that duty.

[192] What protects the interests of employees under the Wagner model, a designated bargaining model such as that found in the Ontario *School Boards Collective Bargaining Act* or the RCMP's SRRP scheme is the obligation of representatives to act honestly and fairly in putting forward the views of the employees they represent and the establishment of a mechanism to remove those representatives if they do not.

[193] Neither the choice of the associational framework (*Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, at para. 33) nor the selection of a particular bargaining agent is a necessary component of freedom of association. Rather, because employees have a right to a meaningful "process of collective action to achieve workplace goals" (*Fraser*, at para. 117), the voice with which they communicate with their employer as a collective must be representative of their

interests. Provided that the spokespersons through whom employees make representations to their employer have a duty to represent the interests of all employees and that there is a means to hold those representatives to account, the workers' "constitutional right to make collective representations and to have their collective representations considered in good faith" is met (*Fraser*, at para. 51). Representativeness is what *Fraser* mandates and there is no justification to embark upon the imposition of unnecessary constitutional constraints as the majority seeks to do in this appeal.

(2) Independence of the Association

[194] The majority says that independence of the employee association from management is constitutionally required. However, it concedes that independence may not be absolute. The argument is that independence is sufficient if it permits the activities of the association to be "aligned with the interests of its members" (para. 83).

[195] With respect, the relevant question is not whether a legislatively prescribed association or process is independent in the sense that it segregates employees from management, but whether that process prevents employees, such as RCMP members, from associating to advance their collective workplace goals. To reiterate, the touchstone is representativeness.

[196] The requirement that an employee association be independent from the employer originates from the *Wagner Act* (*National Labor Relations Act*, 49 Stat. 449 (1935)) — it did not pre-exist it. In recounting the history of labour relations in Canada, the majority of this Court in *Health Services* acknowledged that it was the *Wagner Act* that “explicitly recognized the right of employees to belong to a trade union of their choice, free of employer coercion or interference” and that “imposed a duty upon employers to bargain in good faith with their employees’ unions”: para. 56.

[197] In the years preceding the enactment of the *Wagner Act*, “company unions” — that is, employee associations featuring some degree of employer influence — were plentiful in both the United States and Canada: L. S. MacDowell, “Company Unionism in Canada, 1915-1948”, in B. E. Kaufman and D. G. Taras, eds., *Nonunion Employee Representation: History, Contemporary Practice, and Policy* (2000), 96, at p. 97. Though some company unions were contrived by employers to thwart legitimate worker representation, other non-union plans were designed to actively foster representation: see D. G. Taras, “Why Nonunion Representation Is Legal in Canada” (1997), 52 *R.I.* 763.

[198] In 1935, Senator Robert Wagner introduced in the U.S. Senate the bill that would become known as the *Wagner Act*. This Act effectively abolished company unions: B. E. Kaufman, “Accomplishments and Shortcomings of Nonunion Employee Representation in the Pre-Wagner Act Years: A Reassessment”, in Kaufman and Taras, 21, at p. 26.

[199] Canada implemented its own version of the *Wagner Act* in 1944: the *Wartime Labour Relations Regulations*, P.C. 1003. This Order in Council, made under the authority of the *War Measures Act*, R.S.C. 1927, c. 206, incorporated the Wagnerian principle that employee associations be independent from the employer. At the end of the war, the Wagner model was continued in Canada by the federal *Industrial Relations and Disputes Investigation Act*, S.C. 1948, c. 54, and similar legislation enacted by most of the provinces: R. J. Adams, “A Pernicious Euphoria: 50 Years of Wagnerism in Canada” (1995), 3 *C.L.E.L.J.* 321, at p. 328.

[200] Thus, the *Wagner Act* consciously introduced the notion that trade unions should be independent from the employer for the purposes of collective bargaining. Canadian labour legislation, largely modelled on the *Wagner Act*, likewise imported this principle of independence. The notion of independence gained popularity in this particular historical context. It is not however an inherent aspect of collective bargaining.

[201] But even if independence were an essential feature of meaningful collective bargaining, the SRRP satisfies two of the majority’s indicia of independence: the freedom to elect employee representatives and control the association’s financial administration and activities. RCMP members democratically select the SRRs who will bring their workplace goals to management for consideration, and the Staff Relations Sub-Representatives (“sub-SRRs”) have the power to replace those SRRs who are not representative of employee interests. The

SRRP administers its own budget. RCMP members cannot change their bargaining representative (the SRRP) without the consent of management and the government. But it is certainly open to them to change their SRRs if they are of the view that their collective workplace goals are not being adequately represented by the SRRP. Ontario teachers similarly cannot change their bargaining representatives without legislative approval. If the Ontario teachers' bargaining statute meets the majority's constitutional requirements, the SRRP must also meet those requirements.

[202] The majority states that "a lack of independence means that employees may not be able to advance their own interests, but are limited to picking and choosing from among the interests management permits them to advance" (para. 89). Similarly, the appellants suggest that employee representatives working within a cooperative employee-management labour relations model cannot properly represent the interests of employees. According to them, employees who are dependent on management for salary increases, performance appraisals, and promotions will be reluctant to put forward employee interests that may not be looked upon favourably by management.

[203] However, both the majority and the appellants ignore representativeness. Representatives must fairly represent the interests of all employees. Any representative who limits representation based on what management permits or who places their own employment interests above the interests of all employees will be held accountable for his or her own actions. So long as employees have recourse to

ensure that their views are put forward to management and that their representatives are working in their interests, the labour relations process will not be dominated by management and employees will have the means to work towards their collective workplace goals.

[204] Thus, the Wagner model is by no means the only way to achieve meaningful collective bargaining: alternative schemes could be equally or more effective. It is not the role of this Court to preclude legislative reform by entrenching key features of a particular system and shoehorning them into the fundamental *Charter* guarantee of freedom of association.

### C. *Adversarialism*

[205] By requiring independence, and defining it as it does, the majority constitutionalizes adversarial labour relations, a central feature of the Wagner model. As explained above, s. 2(d) of the *Charter* currently protects a process whereby employees may make representations and have them considered in good faith by employers. Nothing in that requirement mandates that employees must make their representations through an adversarial advocate rather than through a collaborative model.

[206] Research has suggested that adversarialism generates outcomes that are less beneficial for employees than systems involving labour-management cooperation: see R. J. Adams, “Public Employment Relations: Canadian

Developments in Perspective”, in G. Swimmer, ed., *Public-Sector Labour Relations in an Era of Restraint and Restructuring* (2001), 212, at p. 221. Critics have decried the inherently adversarial nature of the Wagner model of labour relations as inconsistent with modern “high performance workplace” systems, and have noted that the Wagner model’s encouragement of conflict may be associated with lower levels of performance: Adams, “A Pernicious Euphoria”, at pp. 344-45. Roy J. Adams has noted the negative consequences of the Wagner model, including the model’s encouragement of employee exclusion from managerial decision-making: *ibid.*, at pp. 342-45.

[207] It is a mistake to view an adversarial approach as essential to meaningful collective bargaining. Where there are discussions between employees and management allowing employee concerns to be taken into account in future planning, a collaborative form of negotiation can be better at furthering workplace goals than an adversarial negotiation that takes place after managerial planning and decisions have been made and positions hardened.

[208] No labour relations model is perfect. That is why governments need flexibility to select the appropriate model in any given situation and to adapt to changing circumstances. The majority concedes that there “has been ongoing debate on the desirability of various forms of workplace representation and cooperation and on their coexistence” and that “[t]he search is not for an ‘ideal’ model” (paras. 96-97). The majority also acknowledges that “nothing in the *Charter* prevents an employee

association from engaging willingly with an employer in different, less adversarial and more cooperative ways” (para. 97). I agree that s. 2(d) has not been interpreted to impose a particular type of labour relations framework, until now.

[209] By making the independence of an employee association a necessary condition to satisfy s. 2(d) of the *Charter*, the majority ensures that conflict-based rather than collaborative schemes will be inevitable. To say that parties are still free to cooperate with each other is unrealistic once this Court has entrenched a requirement for a Wagner-style scheme, which inescapably leads to confrontation and posturing. A bargaining agent that takes a cooperative approach to negotiating with an employer will be vulnerable to the same criticisms leveled by the appellants here — that they have become one with management and are not identifying and advancing employee workplace goals free from management influence or interference. Inevitably, bargaining agents will have to embrace a confrontational rather than cooperative style of negotiations, not only to justify their existence but to keep more aggressive, rival bargaining agents at bay. The result will be to widen differences between employee and employer bargaining positions and make negotiation and resolution more difficult to achieve.

[210] Implicit in the majority’s articulation of meaningful collective bargaining is the view that management is the enemy of the employees and the only way in which employees may improve their position is through adversarial confrontation. However, a collaborative model that provides an opportunity for employees to have

input and influence at the strategic planning stage of decision-making can enhance rather than undermine employee control over their working conditions. Collaborative models are consistent with the majority's holding in *Health Services*, that the employees' right to collective bargaining "requires both employer and employees to meet and to bargain in good faith, in the pursuit of a common goal of peaceful and productive accommodation" (para. 90 (emphasis added)).

[211] To hold that the derivative right to collective bargaining in s. 2(d) of the *Charter*, as determined in *Fraser*, mandates that workplace associations be structurally independent of the employer constitutionalizes an adversarial model of labour relations and effectively excludes collaborative models. To enshrine an adversarial model of labour relations as a *Charter* right reverses this Court's findings in *Health Services* and in *Fraser* that s. 2(d) does not guarantee a particular model of collective bargaining or a particular outcome: *Fraser*, at para. 45; *Health Services*, at para. 91. The majority in *Fraser* further noted that "the logic of *Dunmore* and *Health Services* is at odds with the view that s. 2(d) protects a particular kind of collective bargaining": para. 46. Less than four years after *Fraser*, the majority reverses not only the Labour Trilogy (*Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *PSAC v. Canada*, [1987] 1 S.C.R. 424; *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460), *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, and *Delisle*, but also *Health Services* and *Fraser* in order to arrive at the result it seeks in this case. In doing so, the majority ignores the caution given in *Fraser*:

The seriousness of overturning two recent precedents of this Court, representing the considered views of firm majorities, cannot be overstated. This is particularly so given their recent vintage. *Health Services* was issued only four years ago, and, when this appeal was argued, only two years had passed. [para. 57]

[212] As this Court recently observed in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101: “Certainty in the law requires that courts follow and apply authoritative precedents. Indeed, this is the foundational principle upon which the common law relies” (para. 38). Certainty in the law is essential: it permits Canadians to know what to expect from the courts, their governments, and each other. It is open to this Court to depart from its previous jurisprudence in some circumstances, but the importance and value of certainty demand that such departures be made infrequently and only where they have been carefully and explicitly considered to ensure that the departure is justified and that the implications of such a deviation from the normal rule of *stare decisis* have been fully and carefully analyzed. The majority has failed to do so and its departure from authoritative precedents does not satisfy this high standard.

D. *Is It Effectively Impossible to Achieve Workplace Goals?*

[213] In *Fraser*, the test for infringement of s. 2(d) of the *Charter* was stated to be whether the government action or legislation made it *effectively impossible* for employees to join in meaningful association to make representations to the employer and to have their views considered in good faith: para. 98. There is no escaping the majority’s decision in that case; it referred to the test of impossibility — either

effective or substantial impossibility — *no less than 12 times*, tracing its origins in the decisions of *Dunmore* and *Health Services* and then applying it to the case before the Court: see *Fraser*, at paras. 31-34, 38, 42, 46-48, 62 and 98. Despite the emphatic finding in *Fraser* that “the question is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals”: (para. 46 (emphasis added)), less than four years later, the majority now says that “the majority in *Fraser* adopts substantial interference as the *legal test* for infringement of freedom of association”: para. 75 (underlining added). With respect, by resiling from a test so recently established and refusing to acknowledge this departure, the majority undermines the legitimacy of its approach in this appeal.

[214] The majority attempts to excuse its departure from the *Fraser* standard by asserting that the Court in that decision used “effective impossibility” to describe the effect of a legislative scheme but used “substantial interference” as the legal test for infringement of s. 2(d). Inconveniently for my colleagues, at para. 46, the majority in *Fraser* unambiguously states: “In every case, the question is whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals” (emphasis added).

[215] Such clear language is now dismissed by the majority as “unnecessarily complicat[ed]” (para. 77). However, the real complication is that the language in *Fraser* does not support the majority’s revised s. 2(d) standard. There is no doubt that the majority in *Fraser* firmly established a high threshold for infringement of the

derivative right to collective bargaining. A labour relations regime that permits representatives to advance the interests of employees to the employer, who must in turn consider and discuss these representations in good faith, will not meet this threshold and therefore will not infringe s. 2(d) of the *Charter*.

[216] The majority, however, now lowers this threshold by adopting a substantial interference test, stating that “the ultimate question to be determined is whether the measures disrupt the balance between employees and employer that s. 2(d) seeks to achieve, so as to substantially interfere with meaningful collective bargaining” (para. 72). With respect, the majority’s numerous references to balance and equilibrium blur the true effect of its decision: to impose adversarial collective bargaining on the complex labour negotiation process.

[217] Despite *Fraser*’s repeated articulation of the effective impossibility test, the majority now reverts to a less stringent test in order to reach its desired outcome. It finds that the SRRP substantially interferes with the ability of RCMP members to associate to achieve collective workplace goals because the collaborative scheme does not achieve the employer-employee balance it says s. 2(d) of the *Charter* now requires. Fairness and certainty require that where settled law exists, courts must apply it to determine the result in a particular case. They may not identify a desired result and then search for a novel legal interpretation to bring that result about.

#### E. *Application to the Facts of This Case*

(1) The Imposition of the SRRP

[218] The majority finds that in both purpose and effect, the imposition of the SRRP violates s. 2(d) because RCMP members “are represented by an organization they did not choose and do not control”, the SRRP is not independent of management, and the “process fails to achieve the balance between employees and employer that is essential to meaningful collective bargaining”, leaving members in “a disadvantaged, vulnerable position” (para. 106). I respectfully disagree. The correct standard against which the SRRP should be evaluated is whether the process renders meaningful collective bargaining effectively impossible. Collective bargaining will be meaningful where the employee association is representative of employee interests. SRRs are able to fairly represent employee interests to management and the employer, in turn, considers their representations in good faith. Whether the *Fraser*-mandated effective impossibility test or even the majority’s new substantial interference test is applied, it is clear that the SRRP does not infringe s. 2(d) of the *Charter*.

(a) *Representativeness*

[219] RCMP members did not choose their associational framework for bargaining purposes. But this is not the crucial issue. Rather, this Court must consider whether the labour relations structure that was imposed by s. 96 of the *Royal Canadian Mounted Police Regulations, 1988*, SOR/88-361 (repealed and replaced by SOR/2014-281) enables RCMP members to have confidence in their spokespersons and whether those representatives have a duty to represent the interests of all

employees and can be held to account. Management then has a constitutional obligation to consider in good faith the representations made on behalf of RCMP members: see *Fraser*, at para. 99.

[220] The SRRP must represent “the interests of all members of the Royal Canadian Mounted Police” (SRRP Constitution, s. 1 (emphasis added)) and must “facilitate [the] participation” of RCMP members “in the development and implementation of Force policies and programs” (SRRP Constitution, s. 2; see also SRRP Agreement, s. 1). RCMP members within a particular division or zone elect SRRs and sub-SRRs for that area (SRRP Constitution, ss. 4 and 16; SRRP Agreement, s. 3), and any RCMP member who is not in a conflict of interest may run for election. SRRs serve for a two-year term. They must “[c]onsult with members and/or their representatives on issues affecting or potentially affecting them” (SRRP Constitution, s. 13(C)(3)), while sub-SRRs must “[e]stablish and maintain good working relations and open channels of communication with members, supervisors and the area commander” (SRRP Constitution, s. 14(B)(1)). The program is designed, in part, to “facilitate effective representation and participation at all appropriate levels” (SRRP Constitution, s. 3(D)). All sub-SRRs in a given division, zone or designated area may unanimously declare that they do not have confidence in an SRR, removing that SRR from office. Accordingly, SRRs can be held to account to ensure that they represent employee interests.

[221] RCMP members may also form and join independent employee organizations of their choice, such as the appellant organizations and the Mounted Police Members' Legal Fund: see *Delisle*, at para. 31. These associations are able to submit the concerns of their members about workplace issues to the SRRs and sub-SRRs. The SRRP Constitution specifies that SRRs have the duty to represent members' interests: this includes the duty to "[c]onsult with members and/or their representatives on issues affecting or potentially affecting them that are the subject of discussion in committees, at [the SRRP] Caucus or as part of studies or reviews" (s. 13(C)(3)). Sub-SRRs are similarly responsible for liaising between SRRs and members, and must "alert the SRR and management to emerging issues and concerns requiring redress at their level": SRRP Constitution, s. 14(B)(2).

[222] The appellants present some evidence that SRRs do not always engage with independent employee associations. But this does not render the system unconstitutional, as long as the SRRs represent the interests of all employees and can be held to account. Moreover, if it is the case that some SRRs don't fully represent the interests of the members, the situation can be remedied without abolishing the entire labour relations model and certainly without declaring the scheme unconstitutional.

[223] The current SRRP is far removed from the original target of U.S. Senator Wagner's labour bill: "... the sham or dummy union which is dominated by the employer, which is supported by the employer, which cannot change its rules or

regulations without his consent, and which cannot live except by the grace of the employer's whims": explanatory statement by Senator Wagner on February 21, 1935, in the Senate upon introducing bill S. 1958 (79 Cong. Rec. 2368, at 2372), in *Legislative History of the National Labor Relations Acts 1935*, vol. 1 (1949), at p. 313.

[224] Following this Court's decision in *Delisle*, a number of changes were made to the SRRP that, as the trial judge acknowledged, enhanced its autonomy. The Staff Relations Program Officer, chosen by the RCMP Commissioner, was replaced by a Program Director selected by, and accountable to, the SRRP's National Caucus. In 2003, the Commissioner's Standing Orders which had governed the SRRP were replaced with the SRRP Constitution and SRRP Agreement adopted the previous year. Further, SRRs are able to challenge the conduct of RCMP management, in the labour relations context, in the courts. The companion case *Meredith v. Canada (Attorney General)*, 2015 SCC 2, is an illustration of that fact.

[225] Should management or the government now attempt to unjustifiably strip away RCMP members' representational rights, the requirement to bargain in good faith will not be met. In these circumstances, the members will have judicial recourse to assert their *Charter* right to meaningful collective bargaining.

[226] The appellants point out that executive members or leaders of employee associations such as the appellant organizations have been prevented from running as SRRs. The appellants intimate that this is indicative of management interference with

freedom of association. However, the evidence is that the SRRP Caucus is responsible for this rule, not management. And nothing precludes other members of the appellant associations from running for SRR positions. Employee associations like the appellants are essentially rivals of the SRRP. Were a Wagner-type model in place for the RCMP, only one of the appellants could succeed in their bid to be the members' bargaining agent. Similar restrictions would apply against holding a leadership role within rival, independent employee associations. Restrictions of this nature reasonably seek to preclude conflicts of interest in the duties and commitments undertaken for competing associations. They do not indicate employer interference with the SRRP.

[227] In oral argument, the appellants expressed concerns that financial constraints on the SRRP may limit the efficacy of representation. However, the appellants conceded that there was no evidence that budgetary constraints had prevented the SRRP from representing members. It may be that a government employer cannot provide an unlimited budget for its collaborative model of labour relations. However, as the appellants know, independent employee associations also face funding limits based on their income from union dues and other sources.

[228] On an operational level, the SRRP benefits from a high level of financial autonomy: while the RCMP determines an annual budget for the SRRP, which is approved by managers at the various levels, the National Executive Council ("NEC") of the SRRP is responsible for managing it (SRRP Agreement, ss. 12 and 14). The

Commissioner does not influence, guide, or control the budgetary decisions of the NEC. The SRRP Agreement also contains a procedure through which the SRRP may request additional funding: s. 13.

[229] The SRRP allows for meaningful collective bargaining between RCMP members and their employer. The evidence before this Court is that SRRs fairly advance employee interests to management and thus the SRRP meets the constitutional requirement of representativeness mandated under this Court's interpretation of s. 2(d).

(b) *The SRRP Does Not Render Collective Bargaining Effectively Impossible*

[230] The majority contends that the imposition of the SRRP was designed to thwart association. It says that the SRRP's predecessor program was "openly presented as an alternative to unionization" (para. 108). Yet both the SRRP Constitution and the SRRP Agreement, which continued that program under its current form and name, indicate that the purpose of the SRRP is not to preclude freedom of association. Rather, its purpose is to create a collaborative system of labour relations "governed by the spirit of cooperation, mutual respect and trust in which the Program was conceived" (SRRP Constitution, s. 3(B)) and to ensure "the promotion of mutually beneficial relations (SRRP Agreement, s. 1). Further, the trial judge found as fact that "the collaboration that occurs between the SRRs and management is extensive and that it is carried out in good faith by everyone involved": (2009), 96 O.R. (3d) 20, at para. 31.

[231] As an alternative to the formation of an adversarial association, a collaborative labour relations scheme was a reasonable policy choice for a national police force. As noted by the Attorney General of Canada, the RCMP is the only police force wholly responsible for national security. It can be called upon to play a role when there are strikes among provincial correctional services workers, and may be the only provider of a particular police service in a geographical area. Those dependent upon its security services cannot be left vulnerable during a confrontational work stoppage, or doubt its neutrality during a prison strike. The constitutional inquiry is not whether the SRRP is sufficiently independent or adversarial, but, according to *Fraser*, whether it renders associative activities by RCMP members in order to achieve workplace goals effectively impossible. It plainly does not.

[232] The SRRP facilitates association insofar as it is “responsible for representation of the interests of all members of the Royal Canadian Mounted Police”, from Constable to Commissioner: SRRP Constitution, s. 1.

[233] Democratically elected SRRs and sub-SRRs are tasked with representing RCMP members at all levels of the Force before management. The specific duties of SRRs include providing information, guidance, and support to RCMP members; attempting to resolve workplace issues informally and at the lowest level possible; representing members’ interests and ensuring their participation in the overall management of the RCMP; and supporting the effectiveness of the SRRP: SRRP

Constitution, s. 13. Sub-SRRs have similar duties, and are also obliged to “liaise between the SRRs and members, dealing with first-level needs and notifying the SRR of emerging issues”: SRRP Constitution, s. 14(B). Both SRRs and sub-SRRs are expected to communicate with management at the appropriate level (SRRP Constitution, ss. 13(B) and 14(B)(1); SRRP Agreement, s. 9(a)) and to represent member interests in meetings, committees, and studies: SRRP Constitution, ss. 13(C) and 14(C); SRRP Agreement, s. 9(b) to (d). These procedures ensure that RCMP members may submit their workplace concerns to management through the SRRP.

[234] The SRRP also prescribes duties and obligations for management. For instance, the SRRP Constitution states that “[c]ommunication between Staff Relations Representatives and RCMP management will be conducted openly and honestly” and that “[r]equests for information or assistance should be met in the spirit of cooperation within reasonable time frames” (s. 3(G)). Management must also respond to SRR and NEC requests and proposals “in a timely and open fashion” (SRRP Agreement, s. 11(b)); grant access to documents necessary for the conduct of SRRP business (s. 11(c)); and “provide rationale for major decisions” (s. 11(d)). And, the trial judge accepted “that RCMP management listens carefully and with an open mind to the views of SRRs in the consultative process established by the SRRP” (para. 68). Viewed together, these duties ensure that management considers the representations of SRRs and sub-SRRs in good faith. It cannot be said that such a process makes it effectively impossible for RCMP members to pursue collective workplace goals.

[235] There is evidence of the effectiveness of the SRRP. While the achievement of workplace goals is not protected by s. 2(d) of the *Charter*, the fact that the SRRP has been effective in some respects supports a conclusion that the program does not render meaningful collective bargaining effectively impossible. Changes were made to RCMP pensions in response to concerns raised by an SRR. The SRRP was also successful in obtaining an increase both to members' entitled funeral expenses and to the minimum life insurance coverage for pensioners over 70 years of age, and in resolving inequities related to the Force's relocation program, to name a few examples. The action commenced by Messrs. Meredith and Roach challenging the *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393, in the companion case of *Meredith*, indicates that SRRs do bring challenges against the employer in defence of employee interests.

[236] *Meredith* deals with issues relating to the Pay Council, which is separate from the SRRP, but which is one of two other bodies forming part of the labour relations regime of the RCMP. Two SRRs sit on the Pay Council to advocate the views of RCMP members on issues that have been identified by the SRRP Caucus or by management. The Pay Council makes recommendations about pay and benefits of RCMP members to the RCMP Commissioner. The Pay Council's objective is that RCMP members receive compensation near the average of the total compensation of the top three comparator police forces in Canada. Between 2000 and 2008, that objective was achieved in all but one year.

[237] In *Meredith*, the majority indicates that notwithstanding its finding that the labour relations regime imposed on members of the RCMP infringes freedom of association, the record established that RCMP members used the Pay Council to advance their compensation-related workplace goals: para. 25. With respect, if the scheme in place permits employees to make representations for good faith consideration by management in pursuit of collective workplace goals such as ensuring competitive rates of compensation, there is no principled basis upon which to hold it unconstitutional.

[238] The evidence indicates that the labour relations model adopted by Parliament does not make it effectively impossible for RCMP members to achieve their collective workplace goals. Even according to the new test articulated by the majority, the imposition of the SRRP as a labour relations scheme does not substantially interfere with a meaningful process of collective bargaining for RCMP members.

[239] The trial judge ultimately held that the SRRP provides a process of consultation, but not collective bargaining. This conclusion appears to rest on the fact that, despite the process of consultation envisaged by the SRRP, final decisions are made by management: see trial reasons, at paras. 69-70.

[240] However, the constitutional right to collective bargaining prescribes no particular model of labour relations and does not necessitate a dispute resolution process. In *Fraser*, this Court held that the *Agricultural Employees Protection Act*,

2002, S.O. 2002, c. 16 (“*AEPA*”) applicable to Ontario agricultural workers satisfied the requirements of collective bargaining under s. 2(*d*) of the *Charter*: para. 117. It is incongruous for this Court to strike down the SRRP, which provides a process of collective bargaining that is more robust than the one contained in the *AEPA* and which was previously upheld by this Court. This inconsistent result is even all the more jarring given the vulnerability of Ontario agricultural workers when compared with the advantageous position of RCMP members, who are “educated, empowered, and organised” (R.F., at para. 86). This is yet further evidence that the majority in this case departs from this Court’s recent decision in *Fraser*.

[241] The SRRP facilitates “a process of collective action to achieve workplace goals’, requiring engagement by both parties”: *Fraser*, at para. 117. It also involves good faith consideration of employee representations by management. That Parliament chose a collaborative model like the SRRP as a means of facilitating employer-employee engagement for the national police force, does not mean that that model has rendered it effectively impossible for RCMP members to achieve collective workplace goals. The SRRP does not infringe s. 2(*d*) of the *Charter*.

(2) Paragraph (d) of the Definition of “Employee” in Section 2(1) of the *PSLRA*

[242] The *Public Service Staff Relations Act*, S.C. 1966-67, c. 72 (“*PSSRA*”), was enacted in 1967 and created the first comprehensive collective bargaining rights regime for federal public servants. However, a number of categories of federal public

servants were not included in this new regime, including casual employees, employees in managerial or confidential positions, and RCMP members (paras. (e), (g) and (j) of the definition of “employee” in s. 2).

[243] In 2003, the *PSSRA* was repealed and replaced by the *Public Service Labour Relations Act*, enacted by the *Public Service Modernization Act*, S.C. 2003, c. 22, s. 2 (“*PSLRA*”), which modernized labour relations in the federal public service. Section 2(1) of the *PSLRA* defines “employee” as a “person employed in the public service” subject to a list of exceptions. Paragraph (d) states that “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” is excluded from the definition of “employee”. The result of this provision is that the *PSLRA* labour relations scheme does not apply to RCMP members.<sup>2</sup>

[244] The majority finds that para. (d) of the definition of “employee” in s. 2(1) of the *PSLRA* infringes RCMP members’ rights under s. 2(d) of the *Charter*. However, it is evident that it is not the purpose of the exclusion of RCMP members from the *PSLRA* to interfere with freedom of association nor is the effect of this exclusion to render collective bargaining effectively impossible. Moreover, the appellants’ challenge to the exclusion of RCMP members from the federal public service labour relations regime was decisively dealt with in *Delisle*.

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<sup>2</sup> Note that RCMP members are not excluded from Part 3 of the *PSLRA* — Occupational Health and Safety.

[245] The majority finds that the exclusion of RCMP members from the definition of “employee” in s. 2(1) of the *PSLRA* was “intended to deny RCMP members the right to form an independent association capable of engaging in a meaningful process of collective bargaining” (para. 126). In other words, the majority concludes that it was Parliament’s intent to deny RCMP members’ freedom of association. However, in *Delisle*, Bastarache J. found that “para. (e) of the definition of ‘employee’ in s. 2 of the *PSSRA* does not infringe s. 2(d) of the *Charter* in its purpose”: para. 23.

[246] The conclusion of the majority in *Delisle* was that “the purpose of the exclusion of RCMP members is simply to not grant them any status under the *PSSRA* — trade union representation and all it entails — which does not violate the appellant’s freedom of association”: para. 22, *per* Bastarache J. The purpose of excluding RCMP members from the *PSLRA* is not to interfere with collective bargaining, but is driven by a legitimate concern that the model imposed under that legislation is ill suited to the national police force.

[247] It is true that *Delisle* was decided before *Health Services* and *Fraser* ushered in a more “purposive and generous approach to labour relations” (majority reasons, at para. 125). But the jurisprudential developments since *Delisle* do not allow this Court to conclude that the purpose of the exclusion is to deny RCMP members’ associational rights. On the contrary, the conclusion in *Delisle* was reaffirmed by this Court’s statements in *Health Services* and *Fraser* that s. 2(d) of the *Charter* does not

guarantee the right to a particular labour relations model or process. I do not agree with the reversal of these decisions.

[248] The evolution in the legal understanding of s. 2(d) bears no relation to the majority's finding in *Delisle* as to the purpose of the *PSSRA*, and thus cannot be used to support revisiting the issues settled in *Delisle*. Contrary to the majority's view in the case at bar, *Bedford* does not stand for the proposition that an evolution in one aspect of the law allows this Court (and lower courts) to discard all aspects of a previous decision. In this respect, *Bedford* merely stands for the proposition that courts can revisit *the particular legal issue* that has been found to have evolved dramatically.

[249] There has been no change of circumstances since this Court's 1999 decision in *Delisle* that would justify abandoning the determination of the purpose of the exclusion of RCMP members from the general federal public service labour relations scheme at issue in that case. In fact, quite the opposite: changes to the SRRP since 1999 have reinforced the understanding that the program's goal is to enhance representation of the interests of RCMP members without the imposition of an adversarial model. The SRRP Constitution, adopted in 2002, provides that its primary purpose is "to promote mutually beneficial relations between Force management and the wider membership" and states that the SRRP "will be recognized as the system and program of choice for management-employee relations for members of the RCMP" (ss. 2 and 3(A)). Likewise, an October 2002 agreement between the NEC of

the SRRP and the RCMP Commissioner states that “management at all appropriate levels will . . . recognize the role of the [SRRP], . . . respond to proposals . . . from [the SRRs] . . . in a timely fashion; and . . . provide rationale for major decisions” and that “[m]anagement and the [SRRP] will consult on specific human resources initiatives and national policy center committees in a timely and meaningful fashion” (SRRP Agreement, ss. 11(A), (B) and (D)). That Agreement also states that “[a]lthough final decisions rest with management, consultation will promote an active participatory regime” (s. 24).

[250] Even if we were to accept that *Delisle* was incorrectly decided and that the purpose of para. (e) of the definition of “employee” in s. 2 of the *PSSRA* in 1967 was to deny RCMP members meaningful collective bargaining, it does not follow that this continues to be the purpose of para. (d) of the definition of “employee” in s. 2(1) of the *PSLRA* today. The legislative context in which the exclusion operates has changed significantly since the *PSSRA* was enacted in 1967. To argue that Parliament may never revise its views as to the purpose of a statute or of a particular provision thereof in light of changes to the framework in which the statutory provision operates and must forever be held to the purpose it envisioned for the statute on the day of its initial enactment, is a fiction and fails to take into account the actual history of the legislative provision.

[251] When the *PSSRA* was enacted in 1967, there were two Orders in Council which forbade RCMP members from engaging in any collective bargaining activity.

These were later revoked and, in 1974, the Division Staff Relations Representative Program was created, the predecessor of the SSRP (*Commissioner's Standing Orders (Division Staff Relations Representative Program)*), made pursuant to s. 21(2) of the *Royal Canadian Mounted Police Act*, R.S.C. 1970, c. R-9).

[252] By 2003, when the *PSSRA* was replaced by the *PSLRA*, the RCMP labour relations scheme was considerably changed from that which existed in 1967. When s. 2 of the *PSSRA* was replaced by s. 2(1) of the *PSLRA*, Parliament reduced the number of exclusions from the definition of “employee” in the Act, thus expanding the categories of public servants who would be subject to the new statutory labour relations scheme. Parliament, however, maintained the exclusion of RCMP members. The decision to continue the exclusion was made with the knowledge that doing so did not deny members collective bargaining rights. These individuals were subject to a parallel labour relations regime — the SRRP.

[253] In *Big M Drug Mart*, this Court rejected the idea that legislative provisions could have shifting purposes in response to changing social conditions (see pp. 334-36). However, in this appeal, we are faced not with a question of social change, but of legislative change. The purpose of the exclusion of RCMP members from the *PSSRA* and subsequently from the *PSLRA* has changed, as can be seen in the evolution of relevant statutory and regulatory provisions. Subsequent legislative changes may evidence a change in the purpose of Parliament in re-enacting a statutory provision. This is precisely what has occurred in this case. To ignore the

significantly different context in which the exclusion of RCMP members was re-enacted in the *PSLRA* disregards the current legislative reality.

[254] Parliament chose to create a collaborative labour relations model for the RCMP, to address concerns about divided loyalties and interruptions in the essential services provided by this national police force. The majority now makes the policy choice that an adversarial Wagner type model of labour relations is necessary. With respect, Parliament, as the provider of the essential service delivered by the RCMP, must be accorded deference in the manner in which it ensures stability and reliability of that service. Courts must be cognizant of the delicate balance that labour relations regimes seek to maintain between employers, employees, and the public, and of the different contexts for which legislatures must adapt their labour relations policies. As earlier explained, para. (d) of the definition of “employee” in s. 2(1) of the *PSLRA* does not have the effect of infringing the constitutional right of RCMP members to a meaningful process of collective bargaining, and thus Parliament’s policy judgments should not be disturbed.

[255] The majority asserts that s. 2(d) of the *Charter* does not mandate the Wagner model of labour relations. With respect, the effect of its decision is precisely that: it has restricted the government to the *PSLRA* or a regime with essentially the same characteristics. The constitutional entrenchment of choice and independence show that the majority creates an illusion of flexibility by saying that “it remains open

to the federal government to explore other collective bargaining processes” for the RCMP (para. 137).

[256] Courts are not best placed to decide which specific labour relations scheme is best suited for a particular group of employees. In my view, requiring RCMP members to be included in the *PSLRA* or equivalent scheme is “to enter the complex and political field of socio-economic rights and unjustifiably encroach upon the prerogative of Parliament”: *Delisle*, at para. 23.

(3) Section 1 of the *Charter*

[257] Although my conclusions as to the constitutionality of both the imposition of the SRRP as a labour relations scheme and the exclusion of RCMP members from the application of the *PSLRA* make it unnecessary to consider whether *Charter* infringements are justified, I will nonetheless comment briefly on the s. 1 analysis conducted by the majority.

[258] The majority concedes that the government’s objective in this case — maintaining an independent and objective police force — is pressing and substantial. Although the majority acknowledges that the rational connection test is not onerous, it concludes that that test is not met in this case. To satisfy the rational connection test, the government must demonstrate that it is logical and reasonable to conclude that the impugned action will help bring about its objective — not that it will inevitably succeed: *Little Sisters Book and Art Emporium v. Canada (Minister of*

*Justice*), 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 228; *Health Services*, at paras. 148-49; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30, [2007] 2 S.C.R. 610, at para. 40.

[259] The state need not always adduce direct proof of a relationship between the infringing measure and the legislative objective. So long as it has been shown that logic and reason would lead one to conclude that the impugned measure will help the government attain its objective, the rational connection threshold has been met: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 154; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 101. The low threshold discussed above is met where the legislature has implemented a collaborative model of labour relations in order to achieve a neutral, stable, and reliable national police force. It is reasonable to conclude, as explained below, that a police force which is polarized by adversarial posturing or that could be called to inaction when other bargaining units are on strike, will be viewed as less objective, neutral and reliable by the public.

[260] The majority does not accept the argument made by the Attorney General of Canada that labour action by the RCMP could disrupt the stability of the Force and affect the perception of it as a neutral, law-enforcing body. The majority, however, disregards the fact that RCMP members play a special role in cases of national security, in emergency situations occurring in communities which do not have access to other police forces, and in situations where they can be called upon to interject in

the labour disputes of others. Although unionized provincial police forces do not generally have the right to strike, there have been incidents of working to rule and job actions by municipal police forces in Hamilton, Toronto, Montréal and Québec. Some have even resorted to illegal strikes. Parliament is entitled to address concerns that an adversarial association might order its members to refuse to intervene in certain circumstances involving the labour disputes of others or that belonging to such associations could inhibit members from responding to such situations impartially.

[261] In considering whether the SRRP minimally impairs freedom of association, the majority again starts from the premise that a labour relations scheme that is non-adversarial will not be within the range of reasonable alternatives that satisfy the minimal impairment standard. While acknowledging that the government is not bound to follow the least impairing means to achieve its end, the majority finds the SRRP inadequate in comparison to the adversarial labour relations schemes of provincial police forces. Again, the majority refuses to acknowledge that the RCMP is materially different from other Canadian police forces.

[262] The majority argues that

concerns about the independence of the members of the Force could easily be considered in determining the scope of the police bargaining unit under schemes like the *PSLRA*, without requiring total exclusion from bargaining in the present regime. For example, s. 4 of the *Labour Code*, CQLR, c. C-27, restricts the membership and affiliations of municipal police associations. [para. 152]

With respect, the scope of the bargaining unit is beside the point. A unionized national police force would be inconsistent with the government's pressing and substantial objective, as any adversarial, Wagner-style collective bargaining, whether the bargaining unit is restricted to RCMP members or not, risks compromising the objectivity and independence of the Force.

[263] As acknowledged by LeBel J., at para. 275 of *Advance Cutting & Coring*, “differences between legislative approaches to similar problems are part of the very fabric of the Canadian constitutional experience”. He observed that in a “system of divided legislative authority”, where members within the federation have different cultural and historical experiences, “the principle of federalism means that the application of the *Charter* in fields of provincial jurisdiction does not amount to a call for legislative uniformity” (*ibid.*). This reasoning also applies to the legislative policy choices of Parliament which must address not only local interests but also the broader public interest, including national security.

[264] It follows that the salutary effects of the imposition of the SRRP outweigh any deleterious effects.

[265] The RCMP is a unique Canadian law enforcement organization. Not only is it our national police force, but it also provides provincial and municipal policing services in much of the country, as well as providing police services to international airports and hundreds of Aboriginal communities. The RCMP provides protective services to Canadian and foreign dignitaries, security at significant national and

international events in Canada, and border policing. It provides specialized policing services to all police services in Canada, including criminal intelligence, biological evidence recovery, DNA analysis, fingerprint and criminal record information, and ballistics identification. The RCMP also runs the Canadian Firearms Program, the Canadian Police Information Centre, the Canadian Police College, the National Child Exploitation Coordination Centre, the National Sex Offender Registry, and the Technological Crime Program. Across Canada, the RCMP enforces a host of federal laws, including those dealing with commercial crime, counterfeiting, drug trafficking, organized crime, and terrorism.

[266] The government must be entitled to organize RCMP labour relations in view of the distinctive and essential role the Force plays as our national police force. Labour action by RCMP members could cause disruption on a different order of magnitude than that of similar action by other police forces. It could also have adverse effects on other law enforcement agencies across Canada.

[267] Parliament's decision to use a collaborative scheme for labour relations within the RCMP is consistent with international instruments regarding freedom of association. While international conventions and covenants do not prevent domestic law from granting associational rights to police forces, the wording of those instruments reflects the fact that other countries may find it reasonable to restrict such rights in comparable contexts. See, for example, the International Labour Organization's *Convention (No. 87) concerning freedom of association and*

*protection of the right to organize*, 68 U.N.T.S. 17, art. 9, the United Nations' *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, art. 8, and the United Nations' *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, art. 22.

[268] Even if para. (d) of the definition of "employee" in s. 2(1) of the *PSLRA* were found to breach s. 2(d) of the *Charter*, it constitutes a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society and is therefore justified under s. 1 of the *Charter*.

#### IV. Conclusion

[269] The appellants have failed to establish that the SRRP makes meaningful association to achieve workplace goals effectively impossible. This labour relations scheme is responsive to employee interests and accountable to employees. The majority departs from this Court's recent jurisprudence on freedom of association in order to justify a particular result in this case. So long as it is not effectively impossible for employees to make collective representations on workplace issues, through individuals who are representative of their interests, and that those representations are considered by management in good faith, there is no violation of s. 2(d) of the *Charter*.

[270] I would dismiss the appeal with costs to the respondent.

*Appeal allowed with costs, ROTHSTEIN J. dissenting.*

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