SUPREME COURT OF CANADA

CITATION: Meredith *v.* Canada (Attorney General), 2015 SCC 2

DATE: 20150116
DOCKET: 35424

BETWEEN:

Robert Meredith and Brian Roach
(representing all members 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, Canadian Labour Congress, Professional Institute of the Public Service of Canada, Canadian Union of Public Employees, Local 675, Public Service Alliance of Canada, Confédération des syndicats nationaux and Union of Canadian Correctional Officers
Interveners

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

JOINT REASONS FOR JUDGMENT: (paras. 1 to 32)	McLachlin C.J. and LeBel J. (Cromwell, Karakatsanis and Wagner JJ. concurring)
REASONS CONCURRING IN THE RESULT: (paras. 33 to 49)	Rothstein J.
DISSENTING REASONS: (paras. 50 to 72)	Abella J.

MEREDITH *v.* CANADA (ATTORNEY GENERAL)

Robert Meredith and

Brian Roach (representing all members 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,

Canadian Labour Congress,

Professional Institute of the Public Service of Canada,

Canadian Union of Public Employees, Local 675,

Public Service Alliance of Canada,

Confédération des syndicats nationaux and

Union of Canadian Correctional Officers *Interveners*

Indexed as: Meredith *v.* Canada (Attorney General)

2015 SCC 2

File No.: 35424.

2014: February 19; 2015: January 16.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Charter of Rights — Freedom of association — Right to collective bargaining — Wage rollback — Statutory limit on wage increases in public sector — Treasury Board unilaterally reducing previously agreed-upon wage increases for RCMP members — Federal wage restraint legislation subsequently enacted in response to global financial crisis, giving statutory effect to Treasury Board decision with respect to RCMP members — Whether legislation infringes constitutional guarantee of freedom of association — If so, whether infringement justifiable — Expenditure Restraint Act, S.C. 2009, c. 2, s. 393 — Canadian Charter of Rights and Freedoms, ss. 1, 2(d).

The Treasury Board establishes the pay and allowances paid to members of the RCMP. In setting their pay, the Treasury Board considers recommendations

developed through the Pay Council, an advisory board composed of representatives of RCMP management and RCMP members.

In June 2008 and in response to recommendations initially made by the Pay Council, the Treasury Board announced salary increases of 3.32%, 3.5% and 2% for RCMP members for the years 2008 to 2010, as well as increases in certain forms of supplemental compensation. A government-wide response to a global financial crisis led the Treasury Board to revisit its decision concerning RCMP wages for the fiscal years 2008-10. In December 2008, the Treasury Board communicated to the RCMP Commissioner a revised wage decision providing for salary increases of 1.5% in each of 2008, 2009 and 2010, in line with limits previously announced for the whole of the public sector. Members of the Staff Relations Representative Program's ("SRRP") National Executive Committee and the Pay Council approached Treasury Board officials and members of Cabinet to discuss the wage rollback. All of their proposals for change were rejected.

Finally, in March 2009, the *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393 ("*ERA*"), was enacted imposing a limit of 1.5% on wage increases in the public sector for the 2008 to 2010 fiscal years. The *ERA* also prohibited any other increases to compensation but contained an exception for RCMP members permitting the negotiation of additional allowances as part of transformational initiatives within the RCMP.

M and R, who are members of the National Executive Committee of the SRRP brought a constitutional challenge on behalf of all members of the RCMP, arguing that the December 2008 decision of the Treasury Board and the *ERA* violate the constitutional right to collective bargaining protected by s. 2(*d*) of the *Charter* by rolling back scheduled wage increases for RCMP members without prior consultation. They did not, however, challenge the constitutionality of the RCMP labour relations process.

A judge of the Federal Court declared that both the Treasury Board's December 2008 decision and the impugned provisions of the *ERA* violated s. 2(*d*) of the *Charter*. The judge found that the Pay Council was the only formal means by which RCMP members could collectively pursue goals relating to remuneration with the Treasury Board and that the Treasury Board's decision and the subsequently enacted *ERA* made it effectively impossible for the Pay Council to make representations on behalf of members of the RCMP and to have those representations considered in good faith. Neither violation was found to be saved by s. 1 of the *Charter*. The Federal Court of Appeal disagreed. Having found that the *ERA* gave statutory effect to the Treasury Board's December 2008 decision, and that it was the constitutionality of that Act which was truly at issue, the Court of Appeal found that the *ERA* did not violate the freedom of association of RCMP members. It allowed the appeal.

Held (Abella J. dissenting): The appeal should be dismissed. The *ERA* does not infringe s. 2(*d*) of the *Charter*. Rolling back scheduled wage increases for RCMP members without prior consultation does not infringe their constitutional right to collective bargaining.

Per **McLachlin** C.J. and **LeBel,** Cromwell, Karakatsanis and Wagner JJ.: For the reasons given in the companion case, *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 ("*MPAO*"), s. 2(*d*) of the *Charter* protects RCMP members' freedom to associate and pursue their workplace goals through collective bargaining. In the absence of a true collective bargaining process, RCMP members used the Pay Council to develop recommendations for members' pay and to advance their compensation-related goals. The *Charter* protects that associational activity, even though the Pay Council process is part of the scheme found to be constitutionally inadequate in *MPAO*. Despite the deficiencies in the Pay Council process, it nonetheless constitutes associational activity that attracts *Charter* protection.

Interference with a constitutionally inadequate labour relations process may attract scrutiny under s. 2(*d*). However, in this case, the *ERA* did not substantially interfere with the process so as to infringe RCMP members' freedom of association. The limits imposed by the *ERA* were shared by all public servants, were consistent with the going rate reached in agreements concluded elsewhere in the core public administration and did not preclude consultation on other

compensation-related issues, either in the past or the future. Furthermore, the *ERA* did not prevent the consultation process from moving forward. An exception for RCMP members included in the *ERA* allowed RCMP members to obtain significant benefits as a result of subsequent proposals brought forward through the existing Pay Council process. Actual outcomes are not determinative of a s. 2(*d*) analysis, but, in this case, the evidence of outcomes supports a conclusion that the impact of the enactment of the *ERA* on the associational activity of RCMP members was minor.

Simply put, the Pay Council continued to afford RCMP members a process for consultation on compensation-related issues within the constitutionally inadequate labour relations scheme that was then in place. The *ERA* and the government's course of conduct cannot be said to have substantially impaired the collective pursuit of the workplace goals of RCMP members. It is therefore unnecessary to comment on the application of s. 1 of the *Charter*.

Per **Rothstein** J.: There is agreement with the majority that there was no s. 2(*d*) violation in this case. However, the majority in *MPAO* made no findings with regard to the Pay Council process and the constitutionality of that process has not been challenged in this appeal. Accordingly, it must be assumed to be *Charter* compliant for the purposes of this appeal.

The December 2008 decision rolling back RCMP members' previously agreed-to wage increases was an interim measure designed to ensure that the RCMP's scheduled wage increases would not come into effect before wage restraint legislation

could be enacted. That decision was subsequently overridden by the enactment of the *ERA*. It is therefore the validity of the *ERA* that is at issue here and the correct framework to analyse its validity is to ask whether the Act rendered meaningful collective bargaining for RCMP members, via the Pay Council process, effectively impossible.

The facts of this case unfolded in the midst of the 2008 global financial crisis. Though not determinative, this context is relevant to the inquiry into the adequacy of the government's consultation with the Pay Council. That context does not excuse the government's failure to consult before the December 2008 decision, but it helps us to understand the manner in which the process leading to the enactment of the *ERA* unfolded.

A contextual approach in this case requires an examination of the impact of the *ERA* on the ability of the Pay Council to engage in good faith exchanges with RCMP management. The *ERA* did place limits on the wage increases of RCMP members for three fiscal years. However, it did not completely restrict all compensation increases and it did not make collective bargaining effectively impossible for RCMP members. While the *ERA* precluded negotiations on the issue of wages for a limited period of time, there were other areas in which the members could see their compensation increase. And, pursuant to s. 62 of the *ERA*, members were able to negotiate an allowance increase for themselves. Although results of collective bargaining are not guaranteed under s. 2(*d*) of the *Charter*, the fact that

such allowances were approved in a period of serious budgetary restraint is an important contextual factor in evaluating whether the *ERA* made collective bargaining effectively impossible for RCMP members.

After the December 2008 decision, members of the Pay Council and SRRP had several opportunities to meet with government representatives about the yet-to-be enacted *ERA*. These meetings constituted good faith and meaningful consultation that remedied the government's earlier failure to consult RCMP members. Government representatives demonstrated an openness to negotiate on compensation issues and to engage with the members.

The constitutionality of the *ERA* rests on whether its provisions make collective bargaining between the government and RCMP members effectively impossible, not on the manner in which the law was enacted. The restriction on wage increases imposed by the *ERA* was undoubtedly not the result that RCMP members hoped for. But so long as good faith consultation took place, their dissatisfaction with the result has no bearing on the constitutional analysis. The *ERA* did not make meaningful collective bargaining effectively impossible.

Per **Abella** J. (dissenting): The federal government's unilateral decision to roll back the agreed-upon RCMP pay increases through the *ERA* was unconstitutional. The increases themselves were the result of an extensive consultation process with the RCMP. The absence of any meaningful opportunity for the RCMP to make representations about the extent and impact of the rollbacks had

the effect of completely nullifying the right to a meaningful consultation process. This conduct was precisely what led this Court, in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, to find an unjustified infringement of s. 2(*d*).

An employer cannot unilaterally reduce employees' wages, and must give them an opportunity to make meaningful representations. The unilateral rollback of the RCMP's agreed-upon wage increases without any such prior consultation is a substantial interference with the bargaining process. The fact that the rollbacks were for a three-year period and did not preclude discussion on some other issues did not diminish the severity of the breach.

This breach does not survive the s. 1 proportionality analysis. The government's articulated objectives for the *ERA* were to reduce wage pressure in the private sector, to demonstrate leadership by showing economic restraint in the use of public funds and to manage public sector wage costs to ensure fiscal stability. Even in the midst of a fiscal crisis, however, there are limits on the extent to which the government can restrain public sector wages that are the subject of collective agreements.

While wage rollbacks may technically be seen to be rationally connected to fiscal stability and responsibility, the refusal to engage in any meaningful form of consultation is not. Treasury Board consulted directly with all 17 bargaining agents of the core public service before the *ERA* was enacted. There is nothing in the record

to explain what made the RCMP singularly ineligible for discussions about whether or how to roll back its agreed-upon wage package, or how refusing to engage in such discussions furthered the government's ability to address its fiscal concerns.

But even if rationally connected, the unilateral rollback cannot be said to be minimally impairing. Because meaningful consultation took place with almost every other bargaining agent in the core public service, it is clear that less infringing options than a complete absence of negotiations were available to the government. The breach of s. 2(*d*) cannot therefore be justified under s. 1.

Cases Cited

By McLachlin C.J. and LeBel J.

Referred to: *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1.

By Rothstein J.

Referred to: *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3; *Canada (House of*

Commons) v. Vaid, 2005 SCC 30, [2005] 1 S.C.R. 667; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319.

By Abella J. (dissenting)

Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia, 2007 SCC 27, [2007] 2 S.C.R. 391; *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313; *Re British Columbia Railway Co. and General Truck Drivers and Helpers Union, Local No. 31*, Board of Arbitration, Vancouver, June 1, 1976; *Workplace Health, Safety and Compensation Commission (Re)*, [2005] N.B.L.E.B.D. No. 60 (QL); *Re Canadian Union of Public Employees and Province of New Brunswick* (1982), 49 N.B.R. (2d) 31; *Halifax (Regional Municipality) and I.A.F.F., Loc. 268 (Re)* (1998), 71 L.A.C. (4th) 129; *New Brunswick (Board of Management) (Re)*, [2004] N.B.L.E.B.D. No. 36 (QL); *New Brunswick (Board of Management) (Re)*, [2004] N.B.L.E.B.D. No. 24 (QL); *New Brunswick (Board of Management) (Re)*, [2011] N.B.L.E.B.D. No. 12 (QL); *New Brunswick (Board of Management) and N.B.U.P.P.E.* (2010), 184 C.L.R.B.R. (2d) 72; *New Brunswick (Board of Management) v. N.B.U.P.P.E.*, 2006 CarswellNB 332; *Prince Edward Island (Department of Health & Wellness) v. P.E.I.U.P.S.E.*, 2010 CarswellPEI 78; *N.B.T.F. v. New Brunswick (Board of Management)*, 2004 CarswellNB 653; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199.

Statutes and Regulations Cited

Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures*, 2nd Sess., 40th Parl., cl. 393, s. 62 (first reading).

Budget Implementation Act, 2009, S.C. 2009, c. 2, s. 393.

Canadian Charter of Rights and Freedoms, ss. 1, 2(*d*).

Expenditure Restraint Act, S.C. 2009, c. 2, s. 393, ss. 16, 35, 38, 43, 44 to 49, 57, 62.

Health and Social Services Delivery Improvement Act, S.B.C. 2002, c. 2, Part 2.

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".

Royal Canadian Mounted Police Act, R.S.C. 1985, c. R-10, s. 22(1).

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International Labour Office. *Collective bargaining in the public service: A way forward*. International Labour Conference, 102nd Session, Report III (Part 1B). Geneva: The Office, 2013.

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APPEAL from a judgment of the Federal Court of Appeal (Nadon, Dawson and Trudel JJ.A.), 2013 FCA 112, 444 N.R. 129, 360 D.L.R. (4th) 352, 280

C.R.R. (2d) 158, [2013] CLLC ¶220-034, [2013] F.C.J. No. 465 (QL), 2013 CarswellNat 1114, setting aside a decision of Heneghan J., 2011 FC 735, 392 F.T.R. 25, 240 C.R.R. (2d) 204, [2011] F.C.J. No. 948 (QL), 2011 CarswellNat 2356. Appeal dismissed, Abella J. dissenting.

Christopher Rootham and *Alison McEwen*, for the appellants.

Peter Southey, *Donnaree Nygard* and *J. Sanderson Graham*, for the respondent.

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

Karen Horsman, *Jonathan Penner* and *Keith Evans*, for the intervener the Attorney General of British Columbia.

Graeme G. Mitchell, Q.C., for the intervener the Attorney General for Saskatchewan.

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Steven Barrett and *Ethan Poskanzer*, for the intervener the Canadian Labour Congress.

Fay Faraday, for the intervener the Professional Institute of the Public Service of Canada.

Annick Desjardins, for the intervener the Canadian Union of Public Employees, Local 675.

Andrew Raven, *Andrew Astritis* and *Morgan Rowe*, for the intervener the Public Service Alliance of Canada.

Éric Lévesque, for the interveners Confédération des syndicats nationaux and the Union of Canadian Correctional Officers.

The judgment of McLachlin C.J. and LeBel, Cromwell, Karakatsanis and Wagner JJ. was delivered by

THE CHIEF JUSTICE AND LEBEL J. —

I. Introduction

[1] This appeal raises the question whether the *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393 ("*ERA*"), violates the guarantee of freedom of association in s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*, and if so, whether the infringement is justified under s. 1. The appellants are serving members of the Royal

Canadian Mounted Police ("RCMP") who were elected to the national executive of the Staff Relations Representative Program ("SRRP"). They argue that the *ERA*, by rolling back scheduled wage increases for RCMP members without prior consultation, violates the members' constitutional right to collective bargaining, as recognized in *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391.

[2] This case was heard together with a related appeal challenging the constitutionality of the RCMP labour relations regime, which prohibits RCMP members from bargaining through an independent union or employee association: *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 ("*MPAO*"). In the companion case, we affirm and explain the protection afforded to collective bargaining by the freedom of association set out at s. 2(*d*) of the *Charter*.

[3] In *MPAO*, we have concluded that the imposition of the SRRP, combined with a prohibition on collective bargaining by RCMP members, infringes s. 2(*d*) and is not saved under s. 1. As stated at para. 9 of our reasons in that case, the SRRP is the "core component" of the labour relations system currently in place at the RCMP, though it is complemented by two other bodies — the Pay Council and the Mounted Police Members' Legal Fund, a non-profit corporation funded through membership dues that provides legal assistance to RCMP members on employment-related issues. As detailed below, the Pay Council process depends on the existence of the SRRP and therefore cannot survive (at least in its current form) the conclusion in *MPAO* that

the SRRP, within the existing RCMP labour relations system, unconstitutionally impairs the s. 2(*d*) rights of RCMP members. The Pay Council process is part of the scheme found to be constitutionally inadequate in *MPAO*.

[4] This creates difficulties in the present appeal, as we must determine whether s. 2(*d*) can apply in the absence of a constitutionally adequate process of collective bargaining. The appellants do not challenge the constitutionality of the Pay Council process in these proceedings; they take no position on that issue as it arises in *MPAO*. In our view, despite the deficiencies in the Pay Council process, it nonetheless constitutes associational activity that attracts *Charter* protection. The question to be determined on this appeal is whether the *ERA* amounted to substantial interference with that activity despite its constitutional deficiencies. We conclude that it did not and would dismiss the appeal.

II. Background

A. *The Pay Council*

[5] The definition of "employee" in s. 2(1) of the *Public Service Labour Relations Act* ("*PSLRA*"), enacted by the *Public Service Modernization Act*, S.C. 2003, c. 22, s. 2, excludes RCMP members from the labour relations regime governed by the *PSLRA*. They are not permitted to unionize or attempt to bargain collectively. The *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, s. 22(1), provides that the Treasury Board shall establish the pay and allowances paid to members of the

RCMP. The Treasury Board is a committee of the federal Cabinet and deals with public sector unions and employee representatives through intermediaries. In the case of RCMP members, the relevant intermediaries are the Minister of Public Safety and Emergency Preparedness ("the Minister") and the RCMP Commissioner. In setting members' pay, the Treasury Board responds to requests from the Minister, who, in turn, acts on recommendations received from the RCMP Commissioner. These recommendations are developed through an advisory board called the Pay Council.

[6] The Pay Council is a committee established by the RCMP Commissioner in 1996. It has no legislative basis. The Pay Council consists of five members: two representatives of management, two representatives of RCMP members, and a neutral chairperson appointed by the Commissioner. Of the two members' representatives, one is the Chair of the SRRP's Pay and Benefits Committee, and the other is an external compensation consultant appointed by the Commissioner on the advice of the SRRP National Executive Committee. The structure and operation of the SRRP is considered more fully in *MPAO*, released concurrently.

B. *The ERA and Its Impact on RCMP Wage Levels*

[7] The Pay Council develops its recommendations for RCMP members' pay and benefits with reference to a comparator group of eight Canadian police forces. The Pay Council aims to provide compensation placing the RCMP near the average of the top three comparator police forces. The anticipated wage increases at issue on this appeal were first discussed in 2007 and cover the years 2008, 2009 and 2010.

The Pay Council's recommendations for those years were forwarded to the Commissioner and, subsequently, to the Minister and the Treasury Board. On June 26, 2008, the Treasury Board announced salary increases of 3.32%, 3.5% and 2% for 2008-10. Certain supplemental compensation was also increased: a doubling of service pay (an annual lump sum payment based on years of service) and an increase in the Field Trainer Allowance. These pay levels would have placed total compensation within the Pay Council's target range, the average compensation of the top three Canadian comparator police forces.

[8] According to the respondent, a change in economic circumstances led the government to revisit these increases. The collapse of the U.S. housing market in the summer of 2007 resulted in a global financial crisis that reached its peak in the fall of 2008. As is well known, this crisis included the bankruptcy of the American investment bank Lehman Brothers and the near-collapse of other significant financial institutions. Projections of gross domestic product growth fell dramatically, and unemployment in Canada rose sharply in November 2008.

[9] The Minister of Finance, Hon. James M. Flaherty, delivered an economic and fiscal statement on November 27, 2008 (*Protecting Canada's Future: Economic and Fiscal Statement, November 27, 2008* (2008) ("*Statement*")). The *Statement* projected budget deficits for fiscal years 2009-10, 2010-11, and 2011-12 and proposed wide-ranging economic measures intended to stabilize the financial system and enhance credit availability to Canadian businesses affected by the global credit

crisis. At the same time, the government implemented a review of public spending, including public sector wages and salaries. As a result, the Treasury Board Secretariat recommended limiting spending on compensation. Where collective bargaining was underway, the Treasury Board Secretariat provided its negotiators with a mandate to bargain within certain wage increase limits. The *Statement* announced the government's intention to introduce wage restraint legislation — to limit or roll back wage increases for the public sector to 2.3% for 2007-8, and 1.5% for 2008-10 (p. 10).

[10] On December 4, 2008, the Governor General prorogued Parliament. Accordingly, the announced wage restraint legislation — the *ERA* — could not be introduced until early 2009. On December 11, 2008, however, the Treasury Board revisited its decision concerning RCMP wages for the fiscal years 2008-10. It communicated to the RCMP Commissioner a revised wage decision providing for salary increases of 1.5% in each of 2008, 2009 and 2010, in line with limits previously announced for the public sector.

[11] Members of the SRRP's National Executive Committee and the Pay Council approached Treasury Board officials and members of Cabinet to discuss the wage rollback. The appellants met with the Minister of Public Safety, Hon. Peter Van Loan, on January 27, 2009 and February 2, 2009, and with the President of the Treasury Board, Hon. Vic Toews, on February 5, 2009. On February 11, 2009, the Pay Council presented the President of the Treasury Board with a package of

recommendations concerning the announced rollback, but this proposal was rejected as inconsistent with the *ERA*.

[12] The *ERA* was enacted by s. 393 of the *Budget Implementation Act, 2009*, S.C. 2009, c. 2, which was tabled in the House of Commons on February 6, 2009, and received Royal Assent on March 12, 2009. Section 16 of the *ERA* imposed the following limits on wage increases in the public sector:

> **16.** Despite any collective agreement, arbitral award or terms and conditions of employment to the contrary, but subject to the other provisions of this Act, the rates of pay for employees are to be increased, or are deemed to have been increased, as the case may be, by the following percentages for any 12-month period that begins during any of the following fiscal years:
>
> (a) the 2006–2007 fiscal year, 2.5%;
>
> (b) the 2007–2008 fiscal year, 2.3%;
>
> (c) the 2008–2009 fiscal year, 1.5%;
>
> (*d*) the 2009–2010 fiscal year, 1.5%; and
>
> (*e*) the 2010–2011 fiscal year, 1.5%.

[13] The *ERA* prohibited any other increases to compensation. Any terms or conditions providing for such increases, for a period beginning December 8, 2008 and ending March 31, 2011, were of no effect pursuant to ss. 44 to 49. However, the *ERA* contained an exception for RCMP members:

> **62.** Despite sections 44 to 49, the Treasury Board may change the amount or rate of any allowance, or make any new allowance, applicable

> to members of the Royal Canadian Mounted Police if the Treasury Board is of the opinion that the change or the new allowance, as the case may be, is critical to support transformation initiatives relating to the Royal Canadian Mounted Police.

[14] On June 9, 2009, pursuant to s. 62, the Treasury Board approved compensation increases for RCMP members. A new policy was implemented increasing compensation for off-duty members required to be available for work. Service pay was also increased from 1% to 1.5% for every five years of service and extended, for the first time, to certain civilian members. The service pay increase had been first proposed by the Pay Council, in its February 11, 2009 recommendations to the Treasury Board.

III. Judicial History

A. *Federal Court, 2011 FC 735, 392 F.T.R. 25*

[15] The application judge, Heneghan J., allowed the application for judicial review of the Treasury Board's December 11, 2008 decision. She also declared that both the decision and ss. 16, 35, 38, 43, 46 and 49 of the *ERA* violated s. 2(*d*) of the *Charter*, and that neither violation was saved by s. 1.

[16] Heneghan J. found that the Pay Council was "the only formal means through which Members of the RCMP [could] collectively pursue goals relating to remuneration with their employer, the Treasury Board" (para. 72). She concluded

that the Treasury Board's 2008 decision and the subsequently enacted *ERA* made it effectively impossible for the Pay Council to make representations on behalf of members of the RCMP and to have those representations considered in good faith. The unilateral cancellation of the previous pay and benefits agreement was found to be a substantial interference with the right protected by s. 2(*d*) of the *Charter*. Given that the cancellation of the pay increases would have lasting effects on pension amounts and future wage increases, the trial judge held that the impact of the *ERA* was permanent.

[17] Turning to her s. 1 *Charter* analysis, the trial judge held that some of the stated aims of the Treasury Board's decision — such as providing leadership, showing restraint and demonstrating respect for public funds in a time of financial crisis — were political in nature and were not pressing and substantial. She went on to find that the Attorney General of Canada had not provided persuasive and cogent evidence to show a rational connection between the reduction of wage increases of RCMP members and the stated aims of reducing upward pressure on private sector wages in a time of economic turmoil, providing leadership and demonstrating restraint with public funds. On the issue of minimal impairment, the judge held that the impairment to be considered was not the financial impact to members of the RCMP but the impairment of the s. 2(*d*) *Charter* right, particularly of the Pay Council process. Noting that the Treasury Board had taken the time to consult 17 bargaining agents and that it, along with separate government agencies, had succeeded in signing upwards of 40 agreements with bargaining agents inside and outside of the core

public administration, the application judge found the Treasury Board's unilateral action and disregard for the Pay Council process to be not minimally impairing. Finally, the trial judge found that the only substantiated benefit — saving the Treasury Board an undisclosed amount of money — did not outweigh the detrimental effects of the *ERA*.

B. *Federal Court of Appeal, 2013 FCA 112, 444 N.R. 129*

[18] The Federal Court of Appeal (*per* Dawson J.A., Nadon and Trudel JJ.A. concurring) held that the application judge had committed an error of law by treating the Treasury Board decision and the *ERA* as a single limit on freedom of association and failing to conduct separate constitutional analyses of each. Having found that the *ERA* gave statutory effect to the Treasury Board's December 2008 decision, the Federal Court of Appeal conducted a *de novo* analysis of the constitutionality of the impugned provisions of the *ERA*. It found that the *ERA* did not violate the appellants' right of association and allowed the appeal.

[19] The Federal Court of Appeal identified two contextual factors relevant to its analysis of the constitutionality of the *ERA*: (i) the nature of the associational activity enjoyed by members of the RCMP, including the fact that the Treasury Board can act unilaterally as it is not obliged to consult or negotiate with the Pay Council or Staff Relations Representatives with respect to wages and benefits; and (ii) the purpose of the *ERA* and its effect upon members of the RCMP.

[20] The court concluded that the *ERA* did not substantially interfere with the process by which members of the RCMP pursue their associational activity, as it did not make it impossible for members of the RCMP to act collectively to achieve workplace goals. Rather, the *ERA* merely modified terms and conditions of employment which the Treasury Board was authorized by law to set. According to the Federal Court of Appeal, the *ERA* did not substantially interfere with the existing process by which associational activity was pursued because that process is one in which members do not bargain directly with their employer and where the employer, as the ultimate decision maker, was authorized to set the terms and conditions of employment without consultation or negotiation. Furthermore, the Pay Council continued to exert meaningful influence over certain working conditions other than pay and benefits, demonstrating that the associational process continued to function despite the enactment of the *ERA*. Accordingly, the *ERA* did not render the RCMP's associational process pointless.

[21] On the issue of the *ERA*'s purpose, the Federal Court of Appeal found that the purpose of the *ERA* was valid as part of a series of measures designed to stabilize the economy in a time of financial crisis. Moreover, the Federal Court of Appeal held that the measures contained in the *ERA* did not prohibit or make it substantially impossible for members of the RCMP to exercise their freedom of association in the future.

IV. Issues

[22] On November 4, 2013, the Chief Justice stated the following constitutional questions:

> 1. Do sections 16, 35, 38, 43, 46 and 49 of the *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393, 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*?

[23] The parties have also raised issues concerning the constitutionality of the Treasury Board decision of December 11, 2008, and the appropriate remedy. These issues are rendered moot by our decision in this case that the impugned provisions of the *ERA* are constitutionally valid, and by our decision in *MPAO* that the SRRP violates s. 2(*d*) and cannot be saved under s. 1 of the *Charter*.

V. Analysis

A. *Theoretical Foundations of Section 2(d)*

[24] For the reasons given in the companion case, *MPAO*, s. 2(*d*) of the *Charter* protects workers' freedom to associate and pursue their workplace goals through collective bargaining. In s. 2(*d*) cases, the courts must ask whether state action has substantially impaired the employees' collective pursuit of workplace goals. The test applicable to this question is set out in *Health Services*.

[25] Section 2(*d*) guarantees a right to a meaningful labour relations process, but it does not guarantee a particular outcome. What is guaranteed is the right of employees to associate in a meaningful way in the pursuit of collective workplace goals. In *MPAO*, we concluded that the imposition of the SRRP, combined with a prohibition on collective bargaining by RCMP members, infringes this right. At the same time, the record here establishes that, in the absence of a true collective bargaining process, RCMP members used the Pay Council to advance their compensation-related goals. In our view, the *Charter* protects that associational activity, even though the process does not provide all that the *Charter* requires. The legal alternatives available are not full collective bargaining or a total absence of constitutional protection. Interference with a constitutionally inadequate process may attract scrutiny under s. 2(*d*). Accordingly, we must examine whether the *ERA* substantially interfered with the existing Pay Council process, so as to infringe the appellants' freedom of association.

B. *Whether the ERA Infringes Section 2(d)*

[26] For the affected RCMP members, the *ERA* resulted in a rollback of scheduled wage increases from the previous Pay Council recommendations accepted by the Treasury Board, from between 2% and 3.5% to 1.5% in each of 2008, 2009, and 2010. The original increase would also have doubled service pay and increased the Field Trainer Allowance. Both of these were also eliminated by the *ERA*, subject to subsequent negotiations pursuant to s. 62 of that Act.

[27] The Attorney General of Canada acknowledges that wages are an important issue, but notes that the limits imposed by the *ERA* were time-limited in nature, were shared by all public servants, and did not permanently remove the subject of wages from collective bargaining. Accordingly, he suggests that the importance of the wage restraints does not rise to the level of a s. 2(*d*) violation. For the reasons that follow, we conclude that s. 2(*d*) was not breached.

[28] The facts of *Health Services* should not be understood as a minimum threshold for finding a breach of s. 2(*d*). Nonetheless, the comparison between the impugned legislation in that case and the *ERA* is instructive. The *Health and Social Services Delivery Improvement Act*, S.B.C. 2002, c. 2, Part 2, introduced radical changes to significant terms covered by collective agreements previously concluded. By contrast, the level at which the *ERA* capped wage increases for members of the RCMP was consistent with the going rate reached in agreements concluded with other bargaining agents inside and outside of the core public administration and so reflected an outcome consistent with actual bargaining processes. The process followed to impose the wage restraints thus did not disregard the substance of the former procedure. And the *ERA* did not preclude consultation on other compensation-related issues, either in the past or the future.

[29] Furthermore, the *ERA* did not prevent the consultation process from moving forward. Most significantly in the case of RCMP members, s. 62 permitted the negotiation of additional allowances as part of "transformation[al] initiatives"

within the RCMP. The record indicates that RCMP members were able to obtain significant benefits as a result of subsequent proposals brought forward through the existing Pay Council process. Service pay was increased from 1% to 1.5% for every five years of service — representing a 50% increase — and extended for the first time to certain civilian members. A new and more generous policy for stand-by pay was also approved. Actual outcomes are not determinative of a s. 2(*d*) analysis, but, in this case, the evidence of outcomes supports a conclusion that the enactment of the *ERA* had a minor impact on the appellants' associational activity.

[30] Simply put, the Pay Council continued to afford RCMP members a process for consultation on compensation-related issues within the constitutionally inadequate labour relations framework that was then in place. The *ERA* and the government's course of conduct cannot be said to have substantially impaired the collective pursuit of the workplace goals of RCMP members. This said, our conclusions, as they relate to the *ERA*'s impact on the Pay Council process, should not be taken to endorse the constitutional validity of that process or of similar schemes.

VI. Justification

[31] In view of our conclusion on the s. 2(*d*) question, we need not determine whether any infringement in this case is a reasonable limit justified in a free and democratic society. We will not comment on the application of s. 1 of the *Charter*.

VII. Conclusion

[32] We would dismiss the appeal, with costs to the respondent throughout, and answer the constitutional questions as follows:

1. Do sections 16, 35, 38, 43, 46 and 49 of the *Expenditure Restraint Act*, S.C. 2009, c. 2, s. 393, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

   No.

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*?

   It is not necessary to answer the question.

The following are the reasons delivered by

ROTHSTEIN J. —

I. Introduction

[33] I concur with the majority's disposition of this appeal. However, as their reasons apply the analytical framework of the majority reasons in the companion case of *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 ("*MPAO*"), in which I have dissented, I now issue separate reasons. The correct framework to analyse this case is to ask whether the *Expenditure Restraint Act*, S.C.

2009, c. 2, s. 393 ("*ERA*"), rendered meaningful collective bargaining for RCMP members, via the Pay Council process, effectively impossible. As meaningful collective bargaining occurred and the *ERA* did not preclude negotiations in the future, there is no violation of s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*.

II. Facts and Judicial History

[34] I accept the majority's summary of the facts and judicial history. Any departures or additions are in the analysis below.

III. Analysis

A. *The Effective Impossibility Test*

[35] In *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, this Court 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 *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, and set out the test for finding an infringement of s. 2(*d*) of the *Charter* in the labour relations context: ". . . whether the impugned law or state action has the effect of making it impossible to act collectively to achieve workplace goals"

(para. 46). Collective bargaining is protected, but only "in the minimal sense of good faith exchanges" (*Fraser*, at para. 90). An infringement of s. 2(*d*) will be found where employees or employee representatives can demonstrate that government action or legislation makes it effectively impossible to make collective representations and to have management consider these representations in good faith (*Fraser*, at para. 98).

B. *The Relevant Inquiry Is Into the Validity of the ERA*

[36] There is some debate between the parties to this appeal as to the relevant time period to consider when determining whether there was a s. 2(*d*) breach in the present case. That debate has focused on the timing and degree of consultation between the Treasury Board and the RCMP's Pay Council, a body designed to resolve pay and benefits issues with a cooperative and consultative approach. The Attorney General of Canada maintains that the validity of the *ERA* is what is ultimately at issue and that any consultation which occurred prior to its adoption by Parliament is relevant. The appellants, on the other hand, argue that the crucial period for determining whether there was an infringement of their rights under s. 2(*d*) of the *Charter* was before December 11, 2008, when the Treasury Board made its decision modifying the previously agreed upon wage increases for RCMP members (the "December 11 Decision"). Specifically, they say that meaningful consultation should have occurred between November 17, 2008 (when officials from the Treasury Board Secretariat met with the Commissioner of the RCMP about the wage increase limits to urge him to meet with the Pay Council) and the December 11 Decision. The

appellants argue that the *ERA*, which was introduced in the House of Commons on February 6, 2009, and received Royal Assent on March 12, 2009, was merely a codification of the December 11 Decision.

[37] The appellants' argument does not stand up to scrutiny. The December 11 Decision was an interim measure. It was designed, in light of the Governor General's December 4, 2008 prorogation of Parliament, to ensure that the RCMP's previously agreed to wage increases would not come into effect in January 2009, only to be rolled back a few months later when the *ERA* was brought into force. Even if the December 11 Decision had been made with appropriate consultation, it was overridden by the enactment of the *ERA*. It is therefore the validity of the *ERA* that is at stake here and any consultations having occurred prior to its enactment are relevant to the s. 2(*d*) analysis.

C. *The ERA Does Not Infringe Section 2(d) of the Charter*

(1) The Pay Council Process Must Be Assumed to Be Constitutionally Compliant

[38] The majority in *MPAO* found that the Staff Relations Representative Program ("SRRP") did not meet the requirements of s. 2(*d*) of the *Charter*. However, it made no findings with regard to the Pay Council process, and the appellants have not challenged the constitutionality of that process in this case. Respectfully, I cannot agree with the majority's finding that the Pay Council process "does not provide all

that the *Charter* requires" (para. 25) when the constitutional questions stated by the Chief Justice in this appeal do not deal with this issue. The appropriate analysis is that since the Pay Council process itself is not challenged, it must be assumed to be constitutionally compliant. In any event, there is no reason to believe, on the evidence as presented, that the Pay Council process renders meaningful collective bargaining effectively impossible for RCMP members.

(2) Sufficient Consultation After December 11, 2008

[39] The Attorney General of Canada conceded that there was no consultation with the Pay Council prior to the December 11 Decision limiting wage increases for RCMP members. At the hearing, counsel for Messrs. Meredith and Roach conceded that the government may rehabilitate any deficiency in the consultation process up until the time that the legislation receives Royal Assent. The question is thus whether the government subsequently remedied its failure to consult prior to the December 11 Decision by engaging in meaningful and good faith consultation with members of the Pay Council between December 11, 2008, and the enactment of the *ERA* on March 12, 2009.

[40] In assessing whether the consultations that took place after December 11, 2008, satisfied the requirements of the derivative right to collective bargaining under s. 2(*d*) of the *Charter*, this Court should adopt a broad, contextual approach, as advocated in *Health Services* (para. 92). The facts of this case unfolded in the midst of the 2008 global financial crisis. Though not determinative, this context is relevant

to the inquiry into the adequacy of the government's consultation with the Pay Council. The context of the financial crisis does not excuse the government's failure to consult before the December 11 Decision, but the existence of those exigent circumstances helps us to understand the circumstances in which the process leading to the *ERA* unfolded.

[41] A contextual approach in this case requires an examination of the impact of the *ERA* on the ability of the Pay Council to engage in good faith exchanges with RCMP management. The *ERA* did place limits on RCMP members' wage increases for three fiscal years, until 2011. However, it did not completely restrict all compensation increases and it did not make collective bargaining effectively impossible for RCMP members.

[42] While the freeze on wage increases precluded negotiations on that issue for a limited period of time, there were other areas in which the members could see their compensation increase (see *ERA*, s. 62). And RCMP members took advantage of these opportunities to subsequently negotiate an increase in allowances for members. Although results of collective bargaining are not guaranteed under s. 2(*d*), the fact that such allowances were approved in a period of serious budgetary restraint is an important contextual factor in evaluating whether the *ERA* made collective bargaining effectively impossible for RCMP members.

[43] After the December 11 Decision, Messrs. Meredith and Roach, among others associated with the SRRP and the Pay Council, had several opportunities to

speak with senior government officials about the yet-to-be introduced *ERA*. On January 27 and February 2, 2009, they met with the Honourable Peter Van Loan, then-Minister of Public Safety, to discuss alternatives to the wage increase restrictions. On February 5, 2009, they met with the Honourable Vic Toews, then-President of the Treasury Board. Mr. Toews was not willing to discuss changes to the wage increase limits in the *ERA*, because those limits were being imposed across the public sector. He did, however, indicate that he was open to discussion on changes to other aspects of compensation, specifically referencing allowances. When the *ERA* was introduced in the House of Commons on February 6, 2009, it included a provision specific to the RCMP:

> **62.** Despite sections 44 to 49 [the restraints on public sector wage increases], the Treasury Board may change the amount or rate of any allowance, or make any new allowance, applicable to members of the Royal Canadian Mounted Police if the Treasury Board is of the opinion that the change or the new allowance, as the case may be, is critical to support transformation initiatives relating to the Royal Canadian Mounted Police.
>
> (Bill C-10, *An Act to implement certain provisions of the budget tabled in Parliament on January 27, 2009 and related fiscal measures*, 2nd Sess., 40th Parl., cl. 393 (first reading))

Messrs. Meredith and Roach, along with other Staff Relations Representatives met with the RCMP Commissioner on March 3, 2009, to discuss compensation. At a meeting the following day, the Commissioner instructed the Pay Council to consider how existing allowances could be increased to advance transformation initiatives for the RCMP, in conformity with s. 62 of the *ERA*.

[44] These meetings constituted good faith and meaningful consultation that remedied the government's earlier failure to consult members of the RCMP. Government representatives demonstrated an openness to negotiate on compensation issues and to engage with the RCMP members' representatives. And, pursuant to s. 62 of the *ERA*, the appellants were able to secure a service pay increase from 1% to 1.5% for every five years of service (2011 FC 735, 392 F.T.R. 25, at para. 47).

[45] This Court has never recognized a duty on legislatures to consult with any affected individual or group before enacting legislation, even where a measure impacts constitutional rights (see *Health Services*, at para. 157). Under the doctrine of parliamentary privilege, legislatures' internal procedures are their own and are not for the judiciary to dictate (see *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319). The constitutionality of the *ERA* rests on whether its provisions make collective bargaining between the government and employee representatives effectively impossible, not on the manner in which the law was enacted.

[46] The *ERA* did not constrain future collective bargaining by the Pay Council. It is true that s. 57 of the *ERA* prevents it from negotiating a backward-looking lump sum payment to compensate for the difference in wages between the wage increases originally approved in June 2008 and the limits imposed during the restraint period. However, the fact that there is nothing in the *ERA* that overrides the

Pay Council's process of establishing compensation recommendations in reference to other police forces suggests that RCMP compensation is likely to remain in step with that of other police forces.

[47] As the majority says in *MPAO*, the fact that some goals are not ultimately achieved by the association does not mean that the interests served by collective bargaining have been frustrated: s. 2(*d*) "guarantees a process rather than an outcome" (para. 67). The restriction on wage increases imposed by the *ERA* was undoubtedly not the result that RCMP members and their representatives hoped for. But so long as good faith consultation took place, their dissatisfaction with the result has no bearing on the constitutional analysis.

[48] In sum, the *ERA* did not render meaningful collective bargaining effectively impossible for RCMP members. On the contrary, through meetings with various senior officials and the inclusion of s. 62 in the *ERA*, the government had engaged in meaningful consultations with RCMP members' representatives and evidenced an openness to continue the dialogue about compensation in the future. There was no breach of s. 2(*d*) of the *Charter*.

IV. Conclusion

[49] The Pay Council process itself has not been challenged in this appeal and it must be assumed to be *Charter* compliant. I agree with the majority that there was no s. 2(*d*) violation in this case. The *ERA* did not make meaningful collective

bargaining effectively impossible. There was consultation with RCMP members' representatives before the *ERA* received Royal Assent and s. 62 of the *ERA* explicitly allowed future negotiations on some issues of compensation. I would dismiss the appeal with costs.

The following are the reasons delivered by

ABELLA J. —

[50] I do not, with great respect, agree that the federal government's unilateral decision to roll back agreed-upon RCMP wage increases through the *Expenditure Restraint Act*, S.C. 2009, c. 2 is constitutional. These increases were the result of an extensive consultation process between the RCMP and the government. The absence of any real opportunity to make representations about the extent and impact of the rollbacks before they were approved by Treasury Board had the effect of completely nullifying the right to a meaningful consultation process and thereby denied members their s. 2(*d*) *Charter* rights. This failure to consult with the RCMP, particularly when almost every other bargaining agent in the core public service was consulted, was, in my respectful view, neither rationally connected to the government's objective of fiscal stability nor minimally impairing. It cannot, therefore, be justified under s. 1.

[51] The majority concludes that because the rollbacks applied for a limited three-year period and did not preclude discussion on some other issues, the impact of

the *Expenditure Restraint Act* on RCMP members' s. 2(*d*) rights was minor. I see the impact as being far more significant.

[52] A measure violates s. 2(*d*) of the *Canadian Charter of Rights and Freedoms* when it substantially interferes with the employees' ability to engage in meaningful associational bargaining activity (*Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391, at para. 90). Interference is obviously more likely to be found to be substantial if it relates to an issue that is central to the collective bargaining process (*Health Services*, at paras. 95-96).

[53] Ensuring fair wages is among the key purposes of collective bargaining. Dickson C.J. explained its salience in his dissent in *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, at p. 368:

> The role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers. The capacity to bargain collectively has long been recognized as one of the integral and primary functions of associations of working people. While trade unions also fulfil other important social, political and charitable functions, *collective bargaining remains vital to the capacity of individual employees to participate in ensuring fair wages, health and safety protections, and equitable and humane working conditions*. [Emphasis added.]

[54] That is why labour arbitrators have generally concluded that an employer cannot, no matter how benign its motives, unilaterally reduce the wages of employees

and must meet with the union to discuss the rollback (David J. Corry, *Collective Bargaining and Agreement* (loose-leaf), at pp. 21-9 and 21-11).

[55] The RCMP wage increases had been agreed to in June 2008 following a consultation process between the RCMP Pay Council, the RCMP Commissioner, the Minister responsible for the RCMP and Treasury Board. The Pay Council was established by the RCMP Commissioner in 1996 and is the RCMP members' only mechanism for making representations to management about compensation issues. The Pay Council's recommendations are submitted through the RCMP Commissioner to the Minister of Public Safety and then on to the employer, Treasury Board.

[56] The Pay Council process allows for, among other concerns, the ability to maintain competitive salaries to recruit and retain officers. The Pay Council recommendations at issue in this case were made in the spring of 2008 and sought to bring RCMP compensation into the target compensation range by increasing wages in 2008, 2009 and 2010. The proposed wage increases were agreed to by the Commissioner and the Minister of Public Safety, and accepted by Treasury Board. As a result, on June 26, 2008, Treasury Board announced wage increases at rates of 3.32% for 2008, 3.5% for 2009 and 2% for 2010, along with an increase in service pay and the Field Trainer Allowance.

[57] These increases were never implemented. Instead, on November 27, 2008, the federal government announced its intention to limit wage increases in the federal public service. The statutory mechanism for implementing these limits was

the *Expenditure Restraint Act*, which was enacted on March 12, 2009. It prohibited not only wage increases greater than 1.5% for the 2008-11 fiscal years, but also barred future bargaining to recoup the wages lost during this period. Treasury Board was responsible for implementing the wage limits.

[58] Prior to the government's announcement on November 27, Treasury Board had consulted with all 17 bargaining agents in the core public administration with whom it normally negotiated compensation issues. By early December 2008, it had signed 14 new agreements with those agents.

[59] In addition, Treasury Board met throughout November 2008 with the heads of federal agencies and Crown corporations, encouraging them to meet with their unions and seek agreements within the forthcoming *Expenditure Restraint Act* limits. By early December, these agencies and corporations had reached over 30 agreements with their respective bargaining agents.

[60] The RCMP, on the other hand, was given no opportunity to make meaningful representations about the forthcoming wage limits. Instead, on November 17, 2008, Treasury Board met with the RCMP Commissioner and *informed* him of the rollbacks and then, on December 11, 2008, confirmed that it would not implement the RCMP wage increases agreed to in June 2008.

[61] The Pay Council did not learn that the wage limits would apply to the wages agreed upon in June 2008 until it was informed by the Commissioner on

December 12, 2008, hours before the Commissioner notified the general membership of the RCMP of the rollbacks. The Pay Council representatives soon after requested the chance to meet with the President of Treasury Board and the Minister of Public Safety. They received no response until after the January 27, 2009 budget speech, when each agreed to meet with representatives of the Pay Council. Neither Minister was willing to discuss the rollbacks at the meetings. On February 11, 2009, the Pay Council submitted written representations concerning the wage rollbacks to the President of Treasury Board, but they were rejected without discussion.

[62] The unilateral rollback of three years of agreed-upon wage increases without any prior consultation is self-evidently a substantial interference with the bargaining process. This conduct was precisely what led this Court in *Health Services* to find an unjustified infringement of s. 2(*d*). I have difficulty seeing the distinction between that case and this one. The fact that the rollbacks were limited to a three-year period does not attenuate the key fact that they were unilateral. Nor does the fact that consultation was possible on other more minor compensation issues minimize the severity of the breach.

[63] The failure to engage in *any* discussion meant that the RCMP was denied its right to a meaningful negotiation process about wages, a central component of employment relationships generally and particularly for RCMP members whose other benefits — pensions, disability benefits, paid time off, and service pay — were tied to their wage amounts.

[64] This breach does not, in my respectful view, survive the s. 1 proportionality analysis. The government's articulated objectives for the *Expenditure Restraint Act* were to reduce wage pressure in the private sector; to demonstrate leadership by showing economic restraint in the use of public funds; and to manage public sector wage costs to ensure fiscal stability. To be rationally connected to these objectives, it must be reasonable to conclude that the means adopted by the government, in this case the *unilateral* imposition of rollbacks of the previously agreed to RCMP wage increases, would help meet the objectives.

[65] *The fact that there are fiscal concerns does not give the government an unrestricted licence in how it deals with the economic interests of its employees. In Re British Columbia Railway Co. and General Truck Drivers and Helpers Union, Local No. 31* (unreported, June 1, 1976), Chairman Owen Shime articulated what have come to be seen as six guiding criteria for assessing the fairness of wage settlements for public employees covered by collective agreements. His list of considerations, summarized in *Workplace Health, Safety and Compensation Commission (Re)*, [2005] N.B.L.E.B.D. No. 60 (QL), included the following criteria of particular relevance:

> Public employees should not be required to subsidize the community or the industry in which they work by accepting substandard wages and working conditions. . . . [o]n balance, if the community needs and demands the public service, then the members of the community must bear the necessary cost to provide fair and equitable wages and not expect the employees to subsidize the service by accepting substandard wages. If economies are required to cushion the taxes then they may have to be

> implemented by curtailing portions of the service rather than wages and working conditions . . . .
>
> . . .
>
> . . . Consideration should be given to the wage rates paid to workers performing similar jobs in other industries, in both the private and public sectors. What are the comparisons to that which prevails in other sectors of the economy? . . . [w]hat are the patterns set in similar occupations in private sector businesses? [para. 26]

[66] The Shime criteria continue to be relied on by arbitrators: *Re Canadian Union of Public Employees and Province of New Brunswick* (1982), 49 N.B.R. (2d) 31; *Halifax (Regional Municipality) and I.A.F.F., Loc. 268 (Re)* (1998), 71 L.A.C. (4th) 129 (N.S.); *New Brunswick (Board of Management) (Re)*, [2004] N.B.L.E.B.D. No. 36 (QL); *New Brunswick (Board of Management) (Re)*, [2004] N.B.L.E.B.D. No. 24 (QL); *New Brunswick (Board of Management) (Re)*, [2011] N.B.L.E.B.D. No. 12 (QL); *Workplace Health, Safety and Compensation Commission (Re)*; *New Brunswick (Board of Management) and N.B.U.P.P.E.* (2010), 184 C.L.R.B.R. (2d) 72 (N.B.L.E.B.); *New Brunswick (Board of Management) v. N.B.U.P.P.E.*, 2006 CarswellNB 332; *Prince Edward Island (Department of Health & Wellness) v. P.E.I.U.P.S.E.*, 2010 CarswellPEI 78; and *N.B.T.F. v. New Brunswick (Board of Management)*, 2004 CarswellNB 653.

[67] Additional guidance can be taken from the Committee of Experts on the Application of Conventions and Recommendations of the International Labour Organization (ILO), which expressed the view that even in the midst of a fiscal crisis,

there are limits on the extent to which governments can restrain public sector wages that are the subject of collective agreements (International Labour Office, *Collective bargaining in the public service: A way forward* (International Labour Conference, 102nd Session, 2013), at p. 124). Notably too the ILO has recognized a general principle that "any limitation on collective bargaining on the part of the authorities should be preceded by consultations with the workers' and employers' organizations in an effort to obtain their agreement" (*Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (5th (rev.) ed. 2006), at para. 999).

[68] All of these complexities and interrelated factors make the need for meaningful consultation with affected employees particularly crucial.

[69] While wage rollbacks may technically be seen to be rationally connected to fiscal stability and responsibility, the refusal to engage in any meaningful form of consultation is not. Treasury Board consulted directly with all 17 bargaining agents of the core public service before the *Expenditure Restraint Act* was enacted. There is nothing in the record to explain what made the RCMP singularly ineligible for discussions about whether or how to roll back its agreed-upon wage package, or how refusing to engage in such discussions furthered the government's ability to address its fiscal concerns.

[70] But even if rationally connected, a measure must also be "carefully tailored so that rights are impaired no more than necessary" (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160).

[71] Because meaningful consultation took place with almost every other bargaining agent in the core public service, it is clear that less infringing options than a complete absence of negotiations were available to the government. The unilateral rollback of wages through the *Expenditure Restraint Act* cannot, therefore, be said to be minimally impairing.

[72] I would allow the appeal.

Appeal dismissed with costs, ABELLA J. *dissenting.*

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