COURT FILE NO.: 06-CV-311508PD2
DATE: 20090406

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
MOUNTED POLICE ASSOCIATION OF ONTARIO/ASSOCIATION DE LA POLICE MONTÉE DE L'ONTARIO and B.C. MOUNTED POLICE PROFESSIONAL ASSOCIATION on their own behalf and on behalf of ALL MEMBERS AND EMPLOYEES OF THE ROYAL CANADIAN MOUNTED POLICE	) Laura C. Young and Martin J. Doane, for the Applicants	
	) James R.K. Duggan, for the Intervener Association des Membres de la Police Montée du Québec Inc.	
	) Ian Roland and Jean-Claude Killey, for the Intervener Canadian Police Association	
Applicants	)	
	)	
- and -	)	
	)	
	)	
THE ATTORNEY GENERAL OF CANADA	)	
	) Kathryn Hucal and Joseph Cheng, for the	
Respondent	) Respondent	
	)	

HEARD: December 8, 9, 10 and 11, 2008

MacDonnell J.:

I. Overview

[1] This is an application by the *Mounted Police Association of Ontario* ("MPAO") and the *B.C. Mounted Police Professional Association* ("BCMPPA") for a declaration that the combined effect of ss. 2(1)(d) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22 ("*PSLRA*") and ss. 41 and 96 of the *Royal Canadian Mounted Police Regulations, 1988*, SOR/88-361 ("the *Regulations*") is to unjustifiably infringe the guarantees of freedom of expression and association and the right to equal protection and benefit of the law, set forth in ss. 2(b), 2(d) and 15 of the *Canadian Charter of Rights and Freedoms*. The applicants seek an order pursuant to s. 52 of the *Constitution Act, 1982* declaring that the impugned provisions are of no force or effect.

[2] The MPAO is an association of approximately 500 Ontario-based members of the RCMP that was incorporated in 1998 as a successor to associations established for 'O Division' in 1990 and the National Capital Region in 1995. The BCMPPA was incorporated in 1994 as a non-profit society for employees of the RCMP based in British Columbia. It has about 2000 members. Both associations were formed to provide a collective means of resolving employment issues with RCMP management. RCMP management does not recognize either association for that purpose.

[3] The *Association des Membres de la Police Montée du Québec Inc.* ("the AMPMQ") was established in 1985 and claims to represent the majority of the members of the RCMP in Quebec. The *Canadian Police Association* (CPA) is an umbrella group that represents 172 police associations across Canada. Those associations are made up of approximately 56,800 police personnel at the federal, provincial and municipal levels. On November 15, 2007, pursuant to the order of Justice Low, the AMPMQ and the CPA were granted leave to intervene in this application.

[4] The *PSLRA* establishes a labour relations scheme that enables most employees of the federal public service to engage in a process of collective bargaining with management. Subsection 2(1)(d) of the *PSLRA* excludes members of the RCMP from that regime. Section 96 of the *Regulations* establishes a separate employee relations scheme for members of the RCMP – the *Staff Relations Representative Program*. Section 41 of the *Regulations* prohibits members of the RCMP from publicly criticizing the Force.

[5] While the applicants allege that ss. 2(1)(d) of the *PSLRA* and ss. 41 and 96 of the *Regulations* violate ss. 2(b), 2(d) and 15 of the *Charter*, the focus of the application is squarely on the impact of those provisions on the associational freedoms guaranteed by ss. 2(d). In the applicants' "overview", they state:

> Most importantly, this application contends that the Impugned Provisions effectively prevent the formation and maintenance of labour unions by members of the RCMP for the purposes of engaging in collective bargaining, in violation of their constitutional rights to association, expression and equality... Theirs is a clear case where the Impugned Provisions have been used to smother their *Charter* rights, and thus deny them the opportunity to work together to bargain for fair working conditions.[1] [emphasis added]

[6] The respondent challenges the standing of the applicants to assert the *Charter* violations alleged. Assuming standing, the respondent submits that the impugned provisions, whether considered alone or in combination, do not violate the freedom of association or the right to equality of members of the RCMP, and that even if they do the infringement is justifiable under s. 1 of the *Charter*. The respondent further submits that the factual record is insufficient to permit a consideration of whether s. 41 of the *Regulations* unjustifiably limits freedom of expression.

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[1] Applicants' Factum, at paragraphs 5, 7.

[7] For the reasons that follow, I conclude:

(a) The applicants have standing to assert that the impugned provisions infringe the freedom of association guaranteed by ss. 2(d) of the *Charter*. It is unnecessary to decide if they have standing to assert infringements of ss. 2(b) and s. 15.

(b) Subsection 2(1)(d) of the *PSLRA* does not infringe ss. 2(d) of the *Charter*.

(c) Section 96 of the *Regulations*, which establishes a separate labour relations scheme for the RCMP, violates ss. 2(d) of the *Charter* because it substantially interferes with the freedom of members of the RCMP to engage in a process of collective bargaining.

(d) Section 96 of the *Regulations* and ss. 2(1)(d) of the *PSLRA*, whether considered alone or in combination, do not infringe the equality guarantees of s. 15 of the *Charter*.

(e) There is an insufficient factual record to permit consideration of the constitutionality of s. 41 of the *Regulations*.

(f) Section 96 of the *Regulations* is not a reasonable limit on ss. 2(d) of the *Charter* and cannot be justified under s. 1 because it fails the minimum impairment branch of the proportionality test laid down in *R. v. Oakes*[2].

(g) Accordingly, s. 96 of the *Regulations* is unconstitutional. However, the declaration of unconstitutionality is suspended for a period of 18 months to permit the government time to consider an appropriate response.

II. The Impugned Provisions

A. Public Service Labour Relations Act, S.C. 2003, c. 22

Preamble

Recognizing that

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

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

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[2] [1986] 1 S.C.R. 103

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

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

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

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

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

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

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

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

S. 41 A member shall not publicly criticize, ridicule, petition or complain about the administration, operation, objectives or policies of the Force, unless authorized by law.

S.96 (1) The Force shall have a Division Staff Relations Representative Program to provide for representation of the interests of all members with respect to staff relations matters.

(2) The Division Staff Relations Representative Program shall be carried out by the division staff relations representatives of the members of the divisions and zones who elect them.

III. Standing

(a) the alleged infringement of ss. 2(d) of the Charter

[8] With respect to the standing of the applicants to assert that the impugned provisions infringe ss. 2(d) of the *Charter*, the respondent makes two submissions. First, the respondent submits that there is no factual or legal basis to support the applicants' claim that they are bringing the application "on behalf of all members and employees of the Royal Canadian Mounted Police". Second, the respondent submits that while individual members of the applicant associations could assert infringements of ss. 2(d), "a real question exists… whether a corporation, itself a separate legal entity, can raise or assert the ss. 2(d) associational freedom of anyone but itself".[3]

[9] I agree with the respondent's first submission. The evidentiary record makes it clear that not all members and employees of the RCMP support the applicants' position. However, I am nonetheless satisfied that the applicant associations have standing to assert that the impugned provisions infringe the freedom of association of their own members.

[10] The fact that employees have banded together in an association or union does not give the association or union unrestricted rights to represent the employees' interests in *Charter* litigation: *Christian Labour Ass'n v. British Columbia* (2001), 201 D.L.R. (4th) 407, at paragraph 34 (BCCA). In this case, however, the alleged infringements of the *Charter* go to the very root of the reason why individual members of the RCMP brought the applicant associations into existence, namely as vehicles for their collective interaction with management. As will be developed in these reasons, RCMP management has a constitutional obligation to recognize associations formed for that purpose. The core issue in this application is whether management has refused to honour that obligation. In these circumstances, the applicants have a direct interest that falls within the scope of the guarantee of freedom of association and they have standing to assert that the guarantee has been infringed: *cf. City of Charlottetown v. Prince Edward Island* (1998), 167 D.L.R. (4th) 268 (P.E.I.C.A.).

[11] Had it been necessary to do so, I would have granted the applicants public interest standing to argue the issue of whether the impugned provisions infringe the freedom of association of their members.

(b) the alleged infringements of ss. 2(b) and 15 of the Charter

[12] The respondent also challenges the standing of the applicants to assert infringements of ss. 2(b) and 15 of the *Charter*. Having regard to my conclusion that there is an insufficient factual record to consider the constitutionality of ss. 2(b) and that no violation of s. 15 has been established, it is not necessary to consider this issue.

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[3] Respondent's Factum, at paragraph 217

IV. Do the Impugned Provisions Infringe ss. 2(d) of the Charter?

A. Labour Relations within the RCMP

(i) The Staff Relations Representative Program and Pay Council

[13] The effect of ss. 2(1)(d) of the *PSLRA* is to exclude members of the RCMP from the collective bargaining regime provided for most other employees in the federal public service. In its place, ss. 96(1) of the *Regulations* establishes the *Staff Relations Representative Program* (the "SRRP") "to provide for representation of the interests of all members [of the RCMP] with respect to staff relations matters".

[14] The SRRP was conceived 35 years ago as a means through which a process of consultation could occur between the management and the members of the RCMP. It has evolved over the course of its existence, and its structure and processes have become formalized, but the essential nature of its interaction with management has remained the same.

[15] The work of the SRRP is carried out by Staff Relations Representatives ("SRRs"). As required by ss. 96(2) of the *Regulations*, SRRs are democratically elected by the members of the RCMP. The collective body of SRRs is the National Caucus, which meets about four times a year. There are also Regional and Divisional Caucuses. At the present time, 34 SRRs are elected by the members and an additional five "national representatives" are elected by the National Caucus. In addition, there are 150 elected part-time sub-SRRs.

[16] As set out in the SRRP Constitution,[4] the duties of SRRs include the provision of information, guidance and support to RCMP members and the representation of members' interests in the management of the RCMP. In furtherance of the latter duties, SRRs attend division management meetings at which issues impacting on the employment conditions of their constituents are considered. The agreement between the RCMP Commissioner and the SRRP provides that "management at all appropriate levels will... recognize the role of the SRRP, respond to proposals and requests from SRRs ... in a timely and open fashion [and] provide rationale for major decisions." The agreement also provides that "management and the *Staff Relations Representative Program* will consult on specific human resources initiatives and national policy center committees in a timely and meaningful fashion [and that] although final decisions rest with management, consultation will promote an active participatory regime..."[5]

[17] The SRRP is administered by a Director and an Assistant Director. It is organized divisionally (by province or territory) and regionally to align with the management configuration of the RCMP. The National Executive Committee (NEC) of the SRRP is comprised of one SRR from each of the RCMP's five regions and two full-time SRRs who are elected by the National Caucus.

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[4] *SRRP Constitution*, Application Record, volume 2, Tab N

[5] *Agreement Between the Commissioner and the SRRP*, Application Record, volume 2, Tab O, Clauses 11 and 24

[18] The agreement between the SRRP and the Commissioner provides that the two full-time SRRs on the NEC "shall be the formal point of contact for the SRR Caucus, and its Committees, with the Commissioner, Senior Management, and the Solicitor General of Canada."[6] They attend all meeting of the RCMP's Senior Management Team, which is made up of the "top 45-50 RCMP senior managers [who] meet 3 times a year to identify and consider the key issues in policing and law enforcement confronting the RCMP over a 3 to 5 year horizon."[7] They also attend meetings of the Senior Executive Committee, the senior decision making forum established by the Commissioner for the development of force-wide policies.

[19] Pursuant to s. 22 of the *Royal Canadian Mounted Police Act,* R.S., 1985. c. R-10, Treasury Board has the ultimate authority to establish pay and allowances for RCMP members. In that regard, Treasury Board receives the recommendations of the RCMP Pay Council. Pay Council "was established in May 1996 to provide a modern and efficient alternative to the traditional collective bargaining model set out in the *Public Service Labour Relations Act.*"[8] Two SRRs sit on Pay Council, as do two representatives of management and an impartial chair. Pay Council has an extensive mandate on issues concerning pay and benefits. Before making its recommendations, it solicits the views and input of the membership of the RCMP. Its recommendations are then presented to the Commissioner, and if they are accepted by the Commissioner they form the basis of a Treasury Board submission. The submission is first reviewed by the Minster of Public Safety, and if the Minister approves it, it is presented to Treasury Board on behalf of the Commissioner.

(ii) The Historical Background

[20] The applicants' challenge to the constitutional adequacy of the *Staff Relations Representative Program* seeks as its context the history of labour relations within the RCMP over the course of the past ninety years. The pre-1974 segment of that history was summarized by Justices Iacobucci and Cory in *R. v. Delisle*:

> Between 1918 and 1974, members of the Royal Northwest Mounted Police and subsequently of the RCMP were expressly prohibited by Order-in-Council P.C. 1918-2213 from any union-related activity, on pain of instant dismissal... The policy underlying this Order-in-Council of 1918 was founded upon the fear that the organization of RCMP members into an employee association would result in members experiencing a "divided loyalty" or conflict of interest between their allegiance to their fellow workers and their required obedience to superior orders... This concern was particularly pronounced in relation to the role of the RCMP in quelling labour unrest. The federal government felt that RCMP members might refuse to obey the command to subdue labour uprisings, or to fill in for a striking local police force, if their allegiance to their fellow employees came into conflict with such a command. Hence the government sought to attack the perceived problem at its source, by prohibiting even informal employment-related associations... The same policy was

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[6] *Ibid,* Clause 18

[7] Affidavit of Staff-Sergeant Legge, Respondent's Record, volume 2, Tab 2, paragraph 82

[8] Respondent's Factum, at paragraph 95

> apparent almost 30 years later in the enactment by the federal government in 1945 of Order-in-Council P.C. 174/1981, which approved the coming into force of new *Rules and Regulations for the Government and Guidance of the Royal Canadian Mounted Police Force of Canada*, (1945) 79 *Canada Gazette* 1577 ("*Rules and Regulations*"). Section 31(*a*) of the *Rules and Regulations* also prohibited RCMP employee associations... These complete prohibitions on RCMP employee associations remained in effect throughout the course of much of this century.[9]

[21] Those prohibitions on associational activity were in force in 1967 at the time of the enactment of the *Public Service Staff Relations Act* (*PSSRA*), the first comprehensive labour relations regime for members of the federal public service. Prior to enacting the *PSSRA*, the government struck a *Preparatory Committee on Collective Bargaining in the Public Service.* The *Committee* recommended the exclusion of members of the RCMP from the *PSSRA* on the basis of the divided loyalty concern referred to by Justices Iacobucci and Cory. The government accepted the *Committee's* recommendation and accordingly the *PSSRA*, like the *PSLRA* today, excluded RCMP members from its application.[10]

[22] The 1918 Order-in-Council, which exposed members of the RCMP to instant dismissal for being "a member or in any wise associated with any trade union organization", remained in force until it was revoked in 1974. With respect to the revocation, Justices Iacobucci and Cory observed:

> At the time of the revocation, Assistant Deputy Minister Robin Bourne of the Department of the Solicitor General wrote a letter to RCMP Commissioner Nadon, advising the Commissioner as to how to respond to press queries on point. The Commissioner was advised to inform the press that: "In taking this action, the Government has responded to the wishes of the majority of members of the RCMP who recognized that this Order-in-Council was now redundant, particularly in view of the provisions of the Public Service Relations Act [*sic*] which was passed by Parliament in 1967. This Act deliberately excludes members of the RCMP in the definition of 'employee' under the Act."[11]

[23] The absence of a process for dealing with employee-management issues was the source of discontent within the rank and file of the Force, and by the early 1970s rumblings were being heard about forming an employees association. In an effort to quell the restiveness, the Commissioner initiated a practice of meeting annually with representatives of each Division. Some of the representatives had been elected by the members, but most were appointed by their commanding officers. The annual meeting with the Commissioner failed to put an end to the nascent associational movement. According to the report of the *Challenge 2000 Review:*

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[9] [1999] S.C.R. 98, at paragraphs 92-95.
[10] The *PSLRA* replaced the *PSSRA* in 2002. For the purposes of this application, there is no material difference between the two statutes.
[11] *Supra*, fn 9, at paragraph 96

> In early 1974, well-attended meetings of RCMP members were held in Montreal, Toronto, Ottawa and Vancouver as well as other smaller centres in order to consider the formation of an association and access to them was provided to the media. On May 3, 1974, the "representatives" of the divisions met with newly appointed Commissioner Nadon…and voiced their growing dissatisfaction over a number of issues. Their expression of dissatisfaction was supported by a gathering of 2,500 members that same evening in Ottawa.
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> On the following day, Commissioner Nadon proposed a 14 point plan for a more formal employee relations system featuring full-time, elected representatives of the members. The "representatives" who were in attendance agreed to take the proposal back to their divisions, hold a referendum on it, and report back to the Commissioner… On May 30, 1974, the "representatives" who had attended the…meetings in Ottawa reported the overwhelming acceptance of Commissioner Nadon's proposals by their members in every division except "C" Division whose members had voted against them. Thus was born the Division Staff Relations Representative (DSRR) Program with Divisional COs funding the new full-time representative positions from within their own divisional budgets.[12]

[24] The birth of the SRRP was not a sign that the anti-associational stance of RCMP management was softening. For example, part of the agreement between the representatives and Commissioner Nadon was the initiation of a study of the advantages and disadvantages of a police association.[13] Even though the study stopped short of recommending an association, Commissioner Nadon felt compelled to include the following by way of a foreword to the study's report:

> 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. The reasons for this stand are numerous, but a few of them are highlighted for your consideration…[14]

[25] In December 1989, the status of the program was formalized when the *Regulations* were amended to add s. 96, which requires the RCMP to have the SRRP "to provide for representation of the interests of all members with respect to staff relations matters." The Analysis Statement that accompanied the amendment pointed out that the program had been created "to provide members of the RCMP with a mechanism to have their problems and concerns brought directly to the attention of senior management of the RCMP", and that the representatives "have direct access to all levels of management and participate in the policy making process of the RCMP through regular meetings and consultation with senior management." The Statement further

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[12] *SRR Challenge 2000 Review, Final Report,* Application Record, volume 2, Tab E. at page 523. The *Challenge 2000 Review*, which is discussed further *infra*, was a comprehensive three-year internal review of the SRRP conducted by the SRRs between 1999 and 2002.

[13] *A Study Report on Police Associations*, Application Record, volume 1, Tab C. The study was conducted by by Staff Sergeant Middleton, and the parties have referred to his report as the *Middleton Report*.

[14] *Ibid,* at p.154

noted: "This program is co-ordinated and monitored at RCMP Headquarters. It is also subject to biannual reviews at RCMP Divisions with reports to the Commissioner from the Internal Communications Officer."

[26] The extent to which management co-ordinated and monitored the program is illustrated by the fact that the program's director was a commissioned officer "hand-picked" by the Commissioner and reporting directly to him. Further, the organization of the SRRP and the roles and responsibilities of the representatives were governed by the Commissioner's Standing Orders, which provided, among other things, that representatives could not engage in activities that "promote alternate programs in conflict with the non-union status of the Division Staff Relations Representative Program..." In the circumstances, it was hardly surprising that in *Delisle,* in 1999, Justices Iacobucci and Cory characterized the SRRP as "an employee advisory board created and ultimately controlled by RCMP management..."[15]

[27] That characterization of the SRRP was at the root of the litigation in *Delisle,* which began in 1987 when the president of the AMPMQ, Mr. Delisle, brought a motion before the Superior Court of Quebec alleging that the exclusion of RCMP members from the *PSSRA* infringed ss. 2(d) of the *Charter*. Mr. Delisle was unsuccessful in the Superior Court and in the Quebec Court of Appeal. His further appeal to the Supreme Court of Canada was heard on October 7, 1998 and dismissed on September 2, 1999.

(iii) The 2002-2003 Changes to the SRRP

[28] While Mr. Delisle had failed to have the RCMP brought under the labour relations regime of the *PSSRA*, he did cause the SRRP to launch the *Challenge 2000 Review*:

> The possibility that the Supreme Court might in effect affirm the right of RCMP members to seek union status highlighted for the DSRR Caucus leadership the inadequacies and shortcomings of the Program and caused it in 1998 to seek professional advice and then to take measures to prepare Caucus for another round of Program reform... Shortly following the rendering by the Supreme Court of its decision in September 1999... notwithstanding the Court's apparent confirmation of the status quo, it was decided that a new initiative should be undertaken to address the perceived shortcomings of the Program. By contrast with all the earlier Program reviews, this initiative was advanced and driven by DSRR Caucus, which nevertheless recognized that the success of any reform initiative would in large measure depend upon the degree of support it would receive from senior management.[16]

[29] Arising out of the *Challenge 2000 Review*, two important steps were taken to enhance the autonomy of the SRRP. First, the SRRP adopted a constitution to replace the Commissioner's Standing Orders. The constitution provides, *inter alia*, that the primary purpose of the SRRP is "to promote mutually beneficial relations between Force management and the wider

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[15] *Supra*, fn 9, at paragraph 103
[16] *Supra,* fn 12, at pp. 526-527

membership" and that the SRRP "will be recognized as the system and program of choice for management-employee relations for members of the RCMP."[17] Second, a formal agreement was executed between the Commissioner and the SRRP. The effect of these changes was summarized in the report of the *Challenge 2000 Review:*

> As far as the independence of the Program is concerned, giant strides have been made, and the Commissioner is to be applauded for having agreed to replace his own hand-picked Staff Relations Program Officer, reporting directly to him and acting in many ways as the intermediary between the Caucus and himself, with a Program Director selected by the Caucus and accountable the Caucus for his actions....
>
> The Agreement between the Commissioner and the SRR Caucus spells out that the Program will receive a dedicated annual budget which is to be administered by the Caucus...
>
> Almost as important as anything else that was achieved by the *Challenge 2000* project is the authorization given to the SRR Program to manage its own affairs and to govern the conduct of its member SRRs within a framework of well-defined, reasonable and fair standards. For all practical purposes, the Program has been recognized as what amounts to the exclusive representative of members across the Force, and although the Supreme Court of Canada has affirmed that RCMP members are entitled to form any number of associations for the very limited purpose of representing individual members in such matters as disciplinary proceedings, the Commissioner has agreed that in the matter of consultation and participation by members in the policy formulation and decision making by RCMP management, he will look to the SRR Program for input on behalf of all members.[18]

[30] With respect to the nature of the interaction between the SRRP and RCMP management, however, the status quo was retained. From its conception in 1974, the SRRP was meant to be a mechanism for consultation in relation to workplace conditions and policies, not a vehicle for bargaining. Supporters of the SRRP submit that the consultation it enables is of an enhanced kind. In an affidavit relied upon by the respondent, Staff Sergeant Kenneth Legge explained that the interaction between the SRRP and management "goes beyond simple consultation and information about management plans or decisions." He stated that "members, via input given to their SRRs, make an invaluable contribution to the effectiveness of management's decisions, as SRRs attend joint meetings with management at the divisional, regional and national levels and participate on national committees, where members' ideas and concerns are communicated and addressed."[19]

[31] I accept that the collaboration that occurs between the SRRs and management is extensive and that it is carried out in good faith by everyone involved. However, it remains a

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[17] *Supra*, fn 4, at page 577
[18] Supra, fn. 12, at page 572
[19] Affidavit of Kenneth Legge, Respondent's Record, volume 2, Tab 2, at paragraph 25

process of consultation only. The changes brought about by the *Challenge 2000 Review* did not alter that reality, as the 2002 agreement between the SRRP and the Commissioner makes clear:

> Management and the Staff Relations Representative Program will consult on specific human resources initiatives and national policy center committees in a timely and meaningful fashion. Although final decisions rest with management, consultation will promote an active participatory regime... Staff Relations Representatives will be consulted in relation to any new policy directions or organizational initiatives that impact terms and conditions of employment, as those directions are initially formulated... Staff Relations Representatives designated by Caucus shall participate in such national, regional and divisional decision making and policy formation committees as may, from time to time, be determined by the Commissioner in consultation with NEC.[20] [emphasis added]

B. The Law re ss. 2(d)

[32] A convenient starting point for a discussion of the constitutional principles that apply to this case is the decision of the Supreme Court of Canada in *Delisle*.[21] As was discussed earlier, Mr. Delisle was the president of the AMPMQ, an association formed in 1985 for the purpose of representing the job-related interests of Quebec-based members of the RCMP. Like the present applicants, Mr. Delisle challenged the exclusion of members of the RCMP from the *PSSRA* on the basis of an alleged violation of ss. 2(d) of the *Charter*. The Quebec Superior Court dismissed the challenge, and the Quebec Court of Appeal affirmed the decision of the Superior Court. Mr. Delisle appealed further to the Supreme Court of Canada.

[33] In a trilogy of cases decided a decade earlier, the Supreme Court had held that the guarantee of freedom of association in ss. 2(d) did not protect either a right to strike or a process of collective bargaining: *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 ("*Alberta Reference*"), *PSAC v. Canada*, [1987] 1 S.C.R. 424, and *RWDSU v. Saskatchewan*, [1987] 1 S.C.R. 460. Accordingly, Mr. Delisle confined his ss. 2(d) argument to the question of whether the purpose or effect of the exclusion of RCMP members from the *PSSRA* was to interfere with their freedom to participate in an employees association. In a 5:2 division, the Supreme Court held that it was not. Justice Bastarache (Gonthier, McLachlan and Major JJ. concurring) wrote for the majority. Justice L'Heureux-Dubé wrote separate concurring reasons. Justices Iacobucci and Cory dissented.

[34] Justice Bastarache stressed that in the labour context ss. 2(d) protects the freedom to form employee associations that are independent of management and free from management interference. He stated:

> Since this Court's decision in *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, *supra*, it is clear that under the trade union

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[20] *Supra*, fn 5, Clauses 24 to 26
[21] Supra, fn 9

> certification system, the government may limit access to mechanisms that facilitate labour relations to one employee organization in particular, and impose certain technical rules on that organization. It goes without saying that it must, however, be a genuine employee association that management does not control. Otherwise, there would be a violation of ss. 2(*d*). This said, I repeat that there is no general obligation for the government to provide a particular legislative framework for its employees to exercise their collective rights. However, they may freely set up an independent employee association which is protected against employer interference in its business by ss. 2(*d*) of the *Charter* and which may carry on any lawful activity that its members may carry on individually, including representing their interests.[22] [emphasis added]

[35] Justices Iacobucci and Cory agreed with Mr. Delisle that the exclusion of members of the RCMP from the *PSSRA* had the "the improper purpose of seeking to maintain the inability of RCMP members to associate into labour associations, aside altogether from any negative effects that the provision may have upon such associations."[23] The majority of the Court, however, disagreed with that assessment. Justice Bastarache stated:

> Knowing that the legislative context shows that the purpose of the statute is to govern labour relations in the public sector under a regime of collective bargaining and trade union representation of workers, and having regard to the various applicable presumptions of legality, including the presumption of validity…I cannot find that the purpose of the statute infringes ss. 2(*d*). In the case at bar, the evidence that suggests that the purpose of para. (*e*) of the definition of "employee" in s. 2 of the *PSSRA* violates the appellant's freedom of association is not very compelling. Cory and Iacobucci JJ. draw our attention to the Report of the Preparatory Committee, the social and historical context, the expert reports and the Crown's own submissions in this appeal. That, in my view, confuses possible ultimate or strategic motives of some government players with the purpose of the statute. At best these sources show the fear Parliament felt about the divided loyalty that the existence of an RCMP members' union association might create. That in no way suggests that the purpose of the statute at issue was to prevent RCMP members from forming any type of independent association, but merely that Parliament did not want the appellant to be entitled to the benefits of the *PSSRA*, or to be governed by a statute it considered inappropriate to the appellant's situation.[24] [emphasis added]

[36] Justice Bastarache further held that the effects of the exclusion from the *PSSRA* did not infringe ss. 2(d). He pointed out that s. 2 of the *Charter* concerns freedoms, and that a constitutional guarantee of freedoms "generally imposes a negative obligation on the government and not a positive obligation of protection or assistance". He observed that "except perhaps in exceptional circumstances", all that is required of Parliament is not to interfere with the exercise of the freedom.[25]

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[22] At paragraph 37
[23] At paragraph 52
[24] At paragraph 20
[25] At paragraphs 26-27

[37] Justice Bastarache did not have to decide what might constitute "exceptional circumstances" giving rise to a positive entitlement to the protection of a statutory scheme because, he noted, Mr. Delisle and other RCMP members had in fact been able to form independent associations without that protection. Further, exclusion from the *PSSRA* did not leave the associational activities of RCMP members vulnerable to management interference because, unlike employees in the private sector, RCMP members had direct access to the *Charter*:

> [It] certainly cannot be claimed in the case at bar that the exclusion under para. (*e*) of the definition of "employee" in s. 2 of the *PSSRA* leaves RCMP members without any protection against the employer's attempts to interfere with the establishment of an independent employee association. If RCMP management has used unfair labour practices with the object of interfering with the creation of [the AMPMQ], or if the internal regulations of the RCMP contemplate such a purpose or effect, it is open to the appellant or any other party with standing to challenge these practices directly by relying on ss. 2(*d*), as the RCMP is part of the government within the meaning of s. 32(1) of the *Charter*.[26]

[38] In her concurring reasons, Justice L'Heureux-Dubé made a similar point:

> I recognize that in cases where the employer does not form part of government, there exists no *Charter* protection against employer interference. In such a case, it might be demonstrated that the selective exclusion of a group of workers from statutory unfair labour practice protections has the purpose or effect of encouraging private employers to interfere with employee associations. It may also be that there is a positive obligation on the part of governments to provide legislative protection against unfair labour practices or some form of official recognition under labour legislation, because of the inherent vulnerability of employees to pressure from management, and the private power of employers, when left unchecked, to interfere with the formation and administration of unions.[27]

[39] In the case at bar, the respondent submitted that the Supreme Court's rejection of Mr. Delisle's ss. 2(d) claims "has definitively affirmed the constitutionality of the labour relations scheme at the RCMP."[28] I accept that in a number of respects *Delisle* remains authoritative, but I do not agree that it provides a complete answer to the ss. 2(d) questions raised in this case. It must be remembered that *Delisle* was decided at a time when the scope of freedom of association in the labour law context was relatively narrow. There was a constitutional right to form an employees' association to deal with workplace issues without management interference but there was no obligation on management to listen to, let alone to bargain with, such an association. In the absence of those obligations, ss. 2(d) offered fairly meagre assistance to the

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[26] At paragraph 32
[27] At paragraph 7
[28] Respondent's Factum, at paragraph 235

union movement. The door to a more robust guarantee, however, opened a crack with the judgment of the Supreme Court of Canada in *Dunmore v. Ontario (Attorney General)*.[29]

[40] Apart from the fact that it was grounded in a different workplace, the issue presented to the Supreme Court in *Dunmore* seemed indistinguishable from the issue decided in *Delisle*. Agricultural workers had historically been excluded from the protections of the Ontario *Labour Relations Act* (*LRA*) by a clause identical in effect to the clause that excluded RCMP members from the *PSSRA*. In 1994, the Legislature enacted *the Agricultural Labour Relations Act* (*ALRA*), which incorporated many of the provisions of the *LRA*, including the ban on unfair labour practices. The *ALRA* enabled agricultural workers to unionize and to collectively bargain, although it prohibited strikes. Eighteen months after the *ALRA* came into force, a new government repealed it, leaving agricultural workers once again without statutory support for the exercise of their ss. 2(d) freedoms. They brought an application challenging the constitutionality of the repealing legislation. Like Mr. Delisle, they argued that they had an entitlement to inclusion in a statutory scheme of protection. Unlike Mr. Delisle, they were able to persuade a majority of the Supreme Court to accept their position. A different result was justified, the Court concluded, because of the deeper vulnerability of the agricultural workers. Writing once again for a majority of the Court, Justice Bastarache stated:

> [The] mere fact of exclusion from protective legislation is not conclusive evidence of a *Charter* violation; as I observed in *Delisle, supra*, RCMP officers had the strength to form employee associations in several provinces despite their exclusion from the *PSSRA*. That being said, it is possible to draw a distinction between groups who are "strong enough to look after [their] interests without collective bargaining legislation" and those "who have no recourse to protect their interests aside from the right to quit"... [A]gricultural workers fall into the latter category.. Not only have agricultural workers proved unable to form employee associations in provinces which deny them protection but, unlike the RCMP officers in *Delisle*, they argue that their relative status and lack of statutory protection all but guarantee this result. Distinguishing features of agricultural workers are their political impotence, their lack of resources to associate without state protection and their vulnerability to reprisal by their employers...Moreover, unlike RCMP officers, agricultural workers are not employed by the government and therefore cannot access the *Charter* directly to suppress an unfair labour practice.[30] [emphasis added]

[41] Justice Bastarache held that to come within the category of cases in which there was a positive entitlement to inclusion in protective legislation, a three-part test must be satisfied: (i) the claim of underinclusion must be grounded in fundamental *Charter* freedoms rather than in access to a particular statutory regime; (ii) the claimant must demonstrate that exclusion permits a substantial interference with the exercise of protected activity; and (iii) the context must be such that the state can be held accountable for any inability to exercise the freedom.

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[29] [2001] 3 S.C.R. 1016

[30] At paragraph 41

[42] In Justice Bastarache's view, the agricultural workers were able to satisfy all three parts of this test. That is, (i) they were not seeking access to a particular statutory regime, (ii) in light of their relative powerlessness and their inability to access the *Charter* directly, exclusion from protection substantially interfered with their ability to organize, and (iii) exclusion had not only reinforced their powerlessness but had sent a chilling message in relation to their efforts to organize and had encouraged employers to resist. With respect to the last point, the distinction between public and private employers was significant because, Justice Bastarache noted, "a government employer is less likely than a private employer to take exclusion from protective legislation as a green light to commit unfair labour practices, as its employees have direct recourse to the *Charter*."[31]

[43] The fact that the agricultural workers succeeded where Mr. Delisle had failed did not in itself signal that the door closed to Mr. Delisle might yet be reopened. The Supreme Court had distinguished *Delisle*, not reconsidered it. What was significant, however, was the Court's recognition that in the labour context ss. 2(d) encompasses more than a mere right to form an independent association. When discussing what the Legislature was required to do to protect the agricultural workers, Justice Bastarache stated:

> ... I conclude that at minimum the statutory freedom to organize in s. 5 of the *LRA* ought to be extended to agricultural workers, along with protections judged essential to its meaningful exercise, such as freedom to assemble, to participate in the lawful activities of the association and to make representations, and the right to be free from interference, coercion and discrimination in the exercise of these freedoms.[32] [emphasis added]

[44] The Court's acknowledgement that making representations was a protected activity within freedom of association stopped short of importing protection for the collective bargaining process, but it brought that result within sight. The journey was completed in *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia.*[33] ("*B.C. Health Services*").

[45] Responding to a crisis of sustainability in the health care sector, the British Columbia Legislature enacted legislation that undid certain aspects of concluded collective agreements and removed others from the purview of future bargaining. In light of the interpretation of ss. 2(d) settled by the Supreme Court of Canada some 20 years earlier, interference with the collective bargaining process should not have raised a constitutional question. Based on the opening created by *Dunmore*, the unions argued that the issue should be revisited. Acknowledging that its earlier jurisprudence was wrong, a majority in the Supreme Court of Canada agreed.

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[31] At paragraph 46
[32] At paragraph 67
[33] [2007] 2 S.C.R. 391

[46] According to the majority, ss. 2(d) protects not only the capacity of employees to make representations in relation to working conditions but also a process of collective bargaining with respect to those conditions. Speaking for the majority, McLachlin C.J.C. and LeBel J. stated:

> In brief, the protected activity might be described as employees banding together to achieve particular work-related objectives. Section 2(*d*) does not guarantee the particular objectives sought through this associational activity. However, it guarantees the process through which those goals are pursued. It means that employees have the right to unite, to present demands to health sector employers collectively and to engage in discussions in an attempt to achieve workplace-related goals… It follows that the state must not substantially interfere with the ability of a union to exert meaningful influence over working conditions through a process of collective bargaining conducted in accordance with the duty to bargain in good faith. Thus the employees' right to collective bargaining imposes corresponding duties on the employer. It 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… The right to collective bargaining thus conceived is a limited right…Moreover, the right is to a general process of collective bargaining, not to a particular model of labour relations, nor to a specific bargaining method. … Finally, and most importantly, the interference, as *Dunmore* instructs, must be substantial — so substantial that it interferes not only with the attainment of the union members' objectives (which is not protected), but with the very process that enables them to pursue these objectives by engaging in meaningful negotiations with the employer.[34] [emphasis added]

[47] Perhaps not surprisingly, the parties to the present application take different positions with respect to what a "a general process of collective bargaining" entails. In my opinion, while the majority in *BC Health Services* described the process variously as one of "consultation", "discussion" and "dialogue", their reasons as a whole make it clear that it encompasses more than simple consultation. For example, they stated that the process cannot be reduced to a mere right to make representations,[35] and that "the duty to consult and negotiate in good faith" is "the fundamental precept of collective bargaining."[36][emphasis added] It is difficult to conceive of as a negotiation, let alone as bargaining, a process in which employees can make no offer to management of a *quid pro quo* because management can have the *quid* regardless of whether it surrenders the *quo*.

[48] It is instructive that the majority adopted the definition of collective bargaining offered by Professor Bora Laskin (as he then was):

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

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[34] At paragraphs 89-91
[35] At paragraph 114
[36] At paragraph 97

> procedure through which terms and conditions of employment may be settled by negotiations between an employer and his employees on the basis of a comparative equality of bargaining strength.[37] [emphasis added]

[49] While the first sentence of that definition might describe a process of consultation, the second demonstrates that something more is required. If one side can unilaterally determine the outcome of the 'negotiations', it can hardly be said that there is a comparative equality of bargaining strength.

[50] Support for the proposition that the "process of collective bargaining" contemplated by *BC Health Services* involves more than an opportunity to consult emerges from the recent decision of the Ontario Court of Appeal in *Fraser v. Ontario (Attorney General)*.[38] *Fraser* was the second round of the dispute that had given rise to *Dunmore v. Ontario (Attorney General), supra.*

[51] In *Dunmore*, the Supreme Court had held that farm workers were unable to meaningfully exercise their freedom to associate in the absence of statutory support. In response, the Ontario Legislature enacted the *Agricultural Employees Protection Act (AEPA)*, which specifically protected the right of agricultural employees to organize and to make representations with respect to the conditions of their employment. As had the Supreme Court of Canada, however, the Legislature stopped short of requiring employers to actually engage in a process of bargaining.

[52] As it turned out, employers would meet with the agricultural workers union and listen (albeit briefly) to what they had to say, but they would not engage in bargaining. Frustrated, the union brought an application to have the *AEPA* declared unconstitutional for failing to impose an obligation on employers to bargain. The application judge held that the legislation complied with the requirements of *Dunmore*. The union appealed to the Court of Appeal. While the appeal was pending, the Supreme Court of Canada delivered its judgment in *BC Health Services*, holding that the guarantee of freedom of association protected not only the freedom to unionize but also a process of good faith collective bargaining. The issue before the Court of Appeal, therefore, was whether the *AEPA* satisfied the obligations imposed by both *Dunmore* and *BC Health Services*.

[53] In the opinion of the Court of Appeal, it did not. Speaking for the Court, Chief Justice Winkler held that the *AEPA* "substantially impairs the right of agricultural workers to bargain collectively because it provides no statutory protections for collective bargaining." He declared the *AEPA* unconstitutional and ordered the government "to provide agricultural workers with sufficient protections to enable them to exercise their right to bargain collectively..."[39]

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[37] At paragraph 29
[38] (2008), 92 O.R. (3d) 481; leave to appeal to the Supreme Court of Canada granted, April 2, 2009
[39] At paragraph 138

[54] With respect to what had to be done to guarantee a process of collective bargaining, Chief Justice Winkler stated:

> If legislation is to provide for meaningful collective bargaining, it must go further than simply stating the principle and must include provisions that ensure that the right can be realized. At a minimum, the following statutory protections are required to enable agricultural workers to exercise their right to bargain collectively in a meaningful way: (1) a statutory duty to bargain in good faith; (2) statutory recognition of the principles of exclusivity and majoritarianism; and (3) a statutory mechanism for resolving bargaining impasses and disputes regarding the interpretation or administration of collective agreements.
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> [L]egislation dealing with collective bargaining must also provide a mechanism for resolving bargaining impasses. The bargaining process is jeopardized if the parties have nothing to which they can resort in the face of fruitless bargaining. There exists a broad range of collective bargaining dispute resolution mechanisms. I reiterate that the appellants have stated that they do not seek the right to strike as the dispute resolution mechanism.[40] [emphasis added]

C. Application of the Law to the Facts

[55] The authorities discussed above establish that members of the RCMP have a constitutional right to form an independent association for labour relations purposes, free of management interference or influence. Any attempt to interfere with the exercise of that right would infringe ss. 2(d) of the *Charter*. Further, subject to principles of majoritarian exclusivity, freedom of association in the labour relations context requires management not only to receive the representations of an independent association with respect to the conditions of employment but also to engage in good faith negotiations. That is, subject to s. 1 of the *Charter*, the freedom of association guaranteed to members of the RCMP carries with it a right to a process of collective bargaining.

[56] While it was not made completely clear, the respondent's position appeared to be that although employees have a constitutional right to form an independent association for labour purposes and a constitutional right to a process of collective bargaining, they have no constitutional right to participate in the process through their independent association. In its factum, the respondent stated:

> The question for this court to answer is not whether these *associations* have the freedom to collectively bargain but whether all the *Members* of the RCMP, as a collective, have the freedom to collectively bargain through the current regime, which includes the Staff Relations Representative Program and Pay Council.[41] [italics supplied by the Respondent]

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[40] At paragraphs 80, 82 and 83

[41] Respondent's Factum, at paragraph 243

[57] If the submission of the respondent is that a collective bargaining process in which employees are not permitted to be represented by an association of their own choosing is constitutionally acceptable, I reject it.[42] The Supreme Court of Canada was clear in *BC Health Services* that what is protected under ss. 2(d) is "the capacity of members of labour unions to engage, in association, in collective bargaining on fundamental workplace issues."[43] The majority stated that "[this] means that employees have the right to unite, to present demands to… employers collectively and to engage in discussions in an attempt to achieve workplace-related goals."[44] The majority also referred to Justice Bastarache's observation, in *Dunmore*, that "the law must recognize that certain union activities [such as] making collective representations to an employer… may be central to freedom of association even though they are inconceivable on the individual level".[45] In my view, those passages make it clear that the right to form a labour association and the right to a process of collective bargaining are not disconnected rights, and that the latter right is an emanation of the former.

[58] The respondent accepts that subject to s. 1 of the *Charter* members of the RCMP have a constitutional right to a process of collective bargaining. The respondent's submission is that the interaction between the SRRP and RCMP management is a constitutionally adequate form of collective bargaining, and that "as a consequence the exclusion from the *PSLRA* does not 'seriously undercut or undermine' the employees' ability to collectively put forward demands nor does it compromise the essential integrity of a process of collective bargaining."[46]

[59] The respondent's position mirrors that of Treasury Board, as expressed by the Assistant Secretary of the Treasury Board Secretariat in a letter to the president of the AMPMQ on September 13, 2007, three months after the release of the Supreme Court of Canada's reasons in *BC Health Services*. The letter was responding to a request by the AMPMQ for recognition for the purpose of collective bargaining. In words that plainly were written with *BC Health Services* in mind, the Assistant Secretary stated:

> As you know, the *Public Service Labour Relations Act (*PSLRA) regulates collective bargaining for persons employed in the public service. Section 2(1) of the *PSLRA* excludes RCMP members, special constables, and those employed under substantially the same terms and conditions, from the definition of "employee". There are existing mechanisms that allow RCMP members collectively to have meaningful input into terms and conditions of employment, including the RCMP Pay Council and the Staff Relations Representative Program, as established under the authority of s. 96 of the

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[42] The respondent relies on the decision of the Supreme Court of Canada in *R.v. Advance Cutting and Coring*, 2001 SCC 70, [2001] 3 S.C.R. 209. One of the issues in that case was whether a restriction on the number of unions workers in the Quebec construction industry could join infringed the workers' freedom of association. Four judgments were delivered, but the only one that dealt with this issue in a manner that is relevant to the present discussion was that of Iacobucci J. He held, at paragraph 288, that the restriction infringed ss. 2(d).

[43] *Supra*, fn 33, at paragraph 19

[44] *Ibid*, at paragraph 89

[45] *Ibid*, at paragraph 28. The reference is to paragraph 17 of *Dunmore*.

[46] Respondent's Factum, at paragraphs 263 and 268