RCMP Regulations, 1988. This labour relations scheme does not constitute substantial interference with the freedom of association of RCMP members.[47]

[60] In my opinion, the position of the respondent and Treasury Board that requiring members of the RCMP to deal with management in relation to workplace issues through the SRRP does not constitute a substantial interference with freedom of association is untenable for two reasons: (i) the SRRP is not an independent association formed or chosen by members of the RCMP; (ii) the interaction between the SRRP and management cannot reasonably be described as a process of collective bargaining.

(i) Is the SRRP 'an independent association'?

[61] In *Delisle*, Justice Bastarache stressed that freedom of association in the labour context means the freedom to form "a genuine employee association that management does not control."[48] In the same case, albeit in dissent on the constitutional issues, Justices Iacobucci and Cory described the SRRP as "an employee advisory board created and ultimately controlled by RCMP management".[49] The history set forth earlier in these reasons amply supports that description of the SRRP at the time that *Delisle* was decided. Throughout the 20th Century, management of the RCMP was unequivocally hostile to the prospect of unionization of the Force. The Commissioner's agreement in the early 1970s to consult with representatives of the members, a step that led to the formation of the SRRP, did not mark a change in the RCMP's anti-associational attitude. The program that Commissioner Nadon suggested to the disgruntled members he met with in 1974 was never perceived to be an employees association. Rather, it was a means of heading off the formation of an employees association. This explains why Commissioner Nadon, while engaged in the creation of the SRRP, could simultaneously write in the *Middleton Report* that "the Force is opposed to the formation of an association or union of members..."[50]

[62] No doubt, the changes that were made to the SRRP in the aftermath of the *Delisle* litigation loosened its ties to management, but those changes cannot realistically be considered to have transformed the SRRP from an entity created by management to avoid unionization into an independent association constituted for the purpose of collective bargaining. As recently as December 2007, the Report of the *Brown Task Force* characterized the SRRP as "part of the chain of command of the RCMP organization".[51]

[63] Perhaps the most telling circumstance in relation to whether the SRRP is an independent association is not that it was created at the behest of management but that the members have never been given the opportunity to decide whether it is the body within which they wish to

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[47] Fourth Supplementary Application Record, Tabs R and S

[48] At paragraph 37

[49] At paragraph 103

[50] *Supra*, fn 13

[51] *Report of the Task Force on Governance and Cultural Change in the RCMP*, 4th Supplementary Application Record, Tab F, at page 33. The Task Force was initiated by the Minister of Public Safety to look into the "culture and governance" of the RCMP

associate for labour relations purposes. I recognize that when Commissioner Nadon proposed the program in 1974, representatives of the members took the proposal back to their divisions and that it received strong support (except in Quebec). However, there is no evidence that the option of dealing with management through an independent association was ever on the table. The SRRs are democratically elected by RCMP members, but agreeing to populate a structure created by management for the purpose of labour relations cannot reasonably be construed as a choice not to conduct labour relations through an association of the members' own making.

[64] The respondent places weight on the fact that the constitution of the SRRP that came into existence as a result of the *Challenge 2000 Review* was created and ratified by the SRRs without management interference. However, as Professor Lynk points out:

> While it is apparent...that feedback was requested of the membership during the preparation of the Challenge 2000 Report, it does not appear that the members were asked directly whether they wished to form an independent association. Indeed, I have not found any indication that the members of the RCMP have been given the opportunity to vote on their preference on whether they would prefer an independent employee association at any time since the inception of the DSRR/SRR Program in the early 1970s.[52]

[65] Even if it could be said that the consultative process of employee-management relations mandated by the SRRP is a process of collective bargaining, management's insistence on dealing only with the SRRP, an insistence that has deep anti-associational roots, denies members of the RCMP the freedom to form an *independent* association for that purpose. As counsel for the AMPMQ put it, "the DSRRP forces RCMP members into an association they have not chosen and that includes officers (management and supervisory positions) whose interests are often in conflict with the interests of non-commissioned members..."[53]

(ii) Does the SRRP provide 'a process of collective bargaining'?

[66] The respondent's position is that the SRRP provides RCMP members with "a process of collective bargaining through which Members band together to achieve particular work-related objectives" 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."[54]

[67] Counsel for the respondent stressed that the Supreme Court was careful to say in *BC Health Services* that ss. 2(d) does "not [guarantee]...a particular model of labour relations, nor...a specific bargaining method". They submitted that the traditional collective bargaining model, based on the American *Wagner Act,* is not the only one that is constitutionally

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[52] Affidavit of Michael Lynk, Application Record, volume one, Tab 2, at paragraph 90. Professor Lynk was retained by the applicants "to examine the employment rights and industrial relations status of the officers of the Royal Canadian Mounted Police".

[53] Factum of the AMPMQ, at paragraph 14

[54] At paragraph 268

acceptable. With respect to alternatives, they pointed to the evidence of Professor Richard Chaykowski, a recognized labour relations expert. In Professor Chaykowski's view, a central weakness of the traditional model is that it is "inherently adversarial and conflictual in nature". He stated that while this model remains appropriate and effective for many sectors and occupations, it is not well suited to all workplaces. Relying on Professor Chaykowski's evidence, the respondent submitted:

> Other forms of employee representation besides the traditional model of collective bargaining may provide a sensible and effective policy alternative in the public sector and in particular for the RCMP. The special nature of the public service, together with the unique services and workplace of the RCMP, even compared to other police forces, implies that labour relations models other than those involving unions and collective bargaining are also appropriate.[55]
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> ***
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> The current RCMP model for labour-management relations is one such model that has significantly advanced the employment outcomes and working conditions of employees, consistent with other employees in the primary sector of the labour market, and also in relation to other protective service workers; it has a well-developed and successful mechanism for providing industrial justice, through employee representation and by resolving employee grievances in a fair and effective manner; and has contributed to the development of a workplace culture that supports diversity, respect for employees, and fairness and equity.[56]

[68] For present purposes, I accept that RCMP management listens carefully and with an open mind to the views of SRRs in the consultative process established by the SRRP. It may also be, as the respondent submits, that the SRRP and Pay Council processes have significantly advanced the working conditions of members of the RCMP. The applicants challenge the latter proposition, and they have filed an extensive evidentiary record cataloguing the substantive failings of the existing system. The focus of both parties on outcomes appears to me to be misplaced. At this stage of the analysis, the issue is not the adequacy of the outcomes but the nature of the process by which they have been achieved. Specifically, the question is whether the outcomes, good or bad, have been purchased at the expense of the guarantee of freedom of association.

[69] The record before the court overwhelmingly demonstrates that throughout its entire 35 year history, the SRRP's interaction with management has been restricted to a process of consultation. The changes that flowed from the *Challenge 2000 Review* weakened management's influence and provided the SRRP with greater independence than it had enjoyed during the first 28 years of its existence, but the nature of its interaction with management did not change. The agreement with the Commissioner continues to make clear that at the end of consultation, "final decisions rest with management". To that reality, the authors of the report of the *Challenge 2000 Review* added a qualification:

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[55] Respondent's Factum, at paragraph 164
[56] *Ibid*, at paragraph 176

> It is acknowledged by the Caucus that following full consultation, final decisions rest with management, but the Commissioner has agreed that in any case where an issue remains unresolved at the highest level of the organization, he will consider, in concert with the Caucus, the referral of the issue to a third party expert who will be authorized to examine the dispute and to assist the parties in obtaining a resolution of their differences.[57]

[70] While the Commissioner's agreement to consider referring a particular dispute to a third party adds another layer to the consultative process, it does not change its nature: it is up to the Commissioner to determine whether to seek outside help, and even if such help is sought the Commissioner is not obliged to accept the result of the process.

[71] It is significant that the SRRs themselves do not regard what they do to be collective bargaining. The authors of the report of the *Challenge 2000 Review* make this clear:

> It is easy to say that because the Government of Canada has in its wisdom decided that RCMP members ought not to possess the right to collective bargaining, and that because the Supreme Court of Canada, with some qualifications held that position to be not unconstitutional, therefore the subject is closed and further consideration of it is inappropriate.
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> The Challenge 2000 Steering Committee was nevertheless of the view that because it is within the power and authority of the Government of Canada to extend collective bargaining rights to RCMP members, therefore at any time in the future the Government could be persuaded that there are sound reasons to amend its position in this regard. Again, as has been observed by various independent writers, most of those who approve of, and support the DSSR system of representation, do so in full acknowledgement of the powerlessness of the members and their SRRs, and with a recognition that the system depends upon the good will of management.
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> Sustained dissatisfaction by members with the conduct of RCMP management or of Parliament toward them could quite conceivably result in the kind of uprising that occurred in the early 1970s which in turn might just as conceivably persuade senior management and the Government to remove the existing restrictions on collective bargaining
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> ***
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> [From] the outset...the DSRR Caucus and its advisors were fully aware of the existence of a small minority of members who believed that only with the assignment of collective bargaining rights and a consequential right to binding arbitration in the event of an impasse, could the rank and file members of the RCMP obtain equity and justice in their dealings with management. These members' views were represented in the Caucus by a handful of DSRRs who were strong in their own similar belief...

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[57] *Supra*, fn 12 , at page 519

> That view was counterbalanced by an equally strong conviction on the part of a majority of the DSRRs who argued that the RCMP was distinct from other Canadian police forces whose members possess the right to form trade unions and to pursue collective bargaining within more or less narrow parameters, and who believed that it would be preferable to retain the basic foundation of the existing system, providing senior management was willing to confirm the right of members to be consulted and to have a voice on issues of importance to them.[58] [emphasis added]

[72] The report of the *Brown Task Force* is also instructive in relation to the nature of the interaction between the SRRP and management:

> Over time, the SRRs have become part of the chain of command of the RCMP organization. We believe that more distance from management is appropriate. In the first instance, the SRRs should not attend SEC meetings. It is important to maintain the distinction between management and employees. SRRs cannot be expected to be credible with employees when they sit at the management table. Their participation as observers at the SEC table, where decisions are being made, gives the impression that they have concurred with those decisions. That makes it difficult for them to objectively represent a member who may disagree with a particular decision. (The principle expressed above applies equally at the division level.)[59] [emphasis added]

[73] Earlier in these reasons, I explained why the "process of collective bargaining" contemplated by the Supreme Court of Canada in *BC Health Services* requires more than a process of consultation. As the Court stated, collective bargaining "cannot be reduced to a mere right to make representations". In *Fraser v. Ontario, supra*, the statutory scheme under review gave the agricultural workers the right to make representations to their employers in relation to workplace issues. The Court of Appeal held that this was not a process of collective bargaining. It would be unfair to liken the approach taken by the employers in *Fraser*, who barely listened to the representations of the workers, to the approach of RCMP management in relation the SRRP. I accept that unlike the employers in *Fraser*, RCMP management listens carefully and with an open mind to the views expressed by the SRRs. However, the fact remains that in relation to resolving differences of opinion with management, what members of the RCMP are able to do through the SRRP is not materially different from what the agricultural workers were able to do under the scheme held to be unconstitutional in *Fraser*.

[74] Not every interference with collective bargaining infringes ss. 2(d) of the *Charter*. The Supreme Court was clear that the interference must be so substantial that it interferes "with the very process that enables [employees] to pursue [their] objectives by engaging in meaningful negotiations with the employer." In my opinion, the SRRP not only substantially interferes with that process, it completely precludes it.

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[58] *Ibid*, at pp. 528-530

[59] *Supra*, fn 48, at page 33.

(iii) What is the source of the infringement?

[75] For the foregoing reasons, I conclude that the current RCMP labour relations scheme denies members of the RCMP the freedom to form an independent association for the purpose of collectively bargaining in relation to workplace issues. The applicants assert that the source of the infringement is the combined effect of ss. 2(1)(d) of the *PSLRA* and ss. 41 and 96 of the *Regulations*. They ask that all three provisions be struck down pursuant to s. 52 of the *Constitution Act, 1982* and that they be given "full access to the *PSLRA*".[60]

[76] The submission that the exclusion of members of the RCMP from the labour relations scheme of the *PSLRA* infringes ss. 2(d) of the *Charter* is substantially the same argument that a majority of the Supreme Court of Canada rejected ten years ago in *Delisle*. The legal landscape in relation to freedom of association has been significantly altered since *Delisle* was decided, in that a right to a process of collective bargaining is now protected under ss. 2(d). In my opinion, this does not require a reassessment of the determination of the majority that the purpose of the exclusion from the *PSSRA* was not to deny associational freedoms to members of the RCMP but merely to prevent them from being brought under a scheme considered unsuitable for their situation.[61] Nor does it affect the majority's conclusion that there were no "exceptional circumstances" giving rise to a positive obligation on government to include members of the RCMP within the *PSSRA* or any other statutory scheme of labour relations. To a large extent, the majority based the latter determination on the distinction, discussed earlier, between public and private sector employers. The test for a positive entitlement was subsequently refined in *Dunmore,* but the public/private distinction remains a key consideration. Justice Bastarache was clear in *Dunmore* that with respect to the question of a positive entitlement to a statutory scheme, the situation of farm workers was distinguishable from that of members of the RCMP.

[77] In my opinion, the source of the inability of members of the RCMP to exercise their freedom to engage in a process of collective bargaining is not ss. 2(1)(d) of the *PSLRA* but rather s. 96 of the *Regulations*. Section 96 entrenches the SRRP as the sole entity through which members of the RCMP can collectively interact with management in relation to labour relations issues. *Delisle* did not deal with s. 96, nor, for obvious reasons, did it consider the impact of s. 96 on the freedom of the members of the RCMP to engage in a process of collective bargaining. With respect to that question, *Delisle* does not provide an answer.

[78] Absent the SRRP, ss. 2(d) of the *Charter* would require management to recognize and bargain with a legitimate association of members of the RCMP. Accordingly, the question that remains is whether the limits that s. 96 places on ss. 2(d) can be justified under s. 1 of the *Charter*.

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[60] Applicants' Factum, at paragraph 364

[61] The purpose of a legislative provision is to be determined as of the time of the enactment of the provision: *R. v. Zundel*, [1992] 2 S.C.R. 731, at 761; *Delisle, supra*, at paragraph 77.

D. Section 1

[79] Section 1 of the *Charter* guarantees rights and freedoms "subject only to such reasonable limits, prescribed by law, as can be demonstrably justified in a free and democratic society".

[80] For the reasons set out above, I have concluded that s. 96 of the *Regulations* limits the freedom of association of members of the RCMP. Because the limit is set out in the *Regulations*, it is "prescribed by law". The issue to be determined is whether it is reasonable and can be demonstrably justified. It is well established that with respect to that issue two central criteria must be satisfied on a balance of probabilities[62]:

1. The limiting law must pursue an objective that is "of sufficient importance to warrant overriding a constitutionally protected right or freedom" and, at a minimum, must "relate to concerns which are pressing and substantial in a free and democratic society."

2. The means chosen to further the pressing and substantial objective must be proportionate in that
   (a) they are rationally connected to the objective;
   (b) they impair the right or freedom no more than is necessary to accomplish the objective; and
   (c) there is proportionality between the salutary and deleterious effects of the law.

[81] The burden of persuasion with respect to those matters is on the party seeking to uphold the limit.

1. Sufficiently Important Objective

[82] The respondent described the objective of the SRRP in the following terms:

> The pressing and substantial objective of a separate legislative and regulatory regime is to maintain and enhance public confidence in the neutrality, stability and reliability of the RCMP by providing a police force that is independent and objective. The exclusion from the definition of employee prevents the harm associated with unionization and the right to strike, namely the politicization of Members and their views and work actions which would impact the delivery of police services and the ability of Members to do struck work. If they were to unionize, Members of the RCMP could experience divided loyalty between service to the Canadian public and to their union brethren, leaving them unable to fulfill their mandate to protect and serve the public without conflict or hesitation... This separate regime ensures the Force will not be exposed to possible

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[62] *R. v. Oakes*, *supra*, fn 1, at 138-139

> labour action minimizing the risk of interruption to the provision of these services…[63] [emphasis added]

[83] The applicants submit that the real purpose of the SRRP is "to ensure that members are not able to form independent employee associations for the purposes of collective bargaining". They acknowledge, however, that legislative objects can be pitched at varying levels of generality, and they concede that at some level the SRRP might be said to have the objective asserted by the respondent. It is not seriously disputed that this objective is pressing and substantial. Accordingly I conclude that s. 96 of the *Regulations* has an objective that is sufficiently important to warrant overriding a constitutionally protected right or freedom.

2. Proportionality

(a) rational connection

[84] In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, Justice McLachlin described the rational connection test as follows:

> As a first step in the proportionality analysis, the government must demonstrate that the infringements of the right…worked by the law are rationally connected to the legislative goal... It must show a causal connection between the infringement and the benefit sought on the basis of reason or logic. To put it another way, the government must show that the restriction on rights serves the intended purpose. This must be demonstrated on a balance of probabilities.[64] [emphasis added]

[85] Stated in that fashion, the test might seem to require that the government establish that the means chosen will achieve the legislature's objective. In many cases, that would be a formidable and perhaps insurmountable hurdle. On subsequent occasions, the Supreme Court has articulated the test in a less stringent fashion. In *Adler v. Ontario*, [1996] 3 S.C.R. 609, Justice McLachlin asked: "As a matter of common sense, can it be said that the measure or legislative scheme in question may promote (as opposed to inevitably accomplish) the objective sought?"[65] In *BC Health Services*, after describing the test as "not particularly onerous", Chief Justice McLachlin and Justice LeBel stated: "Although the evidence does not conclusively establish that the means adopted by the Act achieve the government's objectives, it is at least logical and reasonable to conclude so".[66] Finally, in *Canada (Attorney General) v. JTI Macdonald Corp.*, [2007] 2 S.C.R. 610, Chief Justice McLachlin stated:

> Few cases have foundered on the requirement of rational connection. That, however, does not mean that this step is unimportant. The government must establish that the means it has chosen are linked to the objective. At the very least, it must be possible to argue that the means may help to bring about the objective… Deference may be appropriate in assessing whether the requirement of rational connection is made out.

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[63] Respondent's Factum, at paragraphs 306, 307 and 311.
[64] At paragraph 153
[65] At paragraph 218
[66] At paragraph 149

> Effective answers to complex social problems, such as tobacco consumption, may not be simple or evident. There may be room for debate about what will work and what will not, and the outcome may not be scientifically measurable. Parliament's decision as to what means to adopt should be accorded considerable deference in such cases.[67] [emphasis added]

[86] In support of its position that there is a rational connection between entrenching the SRRP as the exclusive representative of RCMP officers for labour relations purposes and the objective of securing a reliable and neutral police force, the respondent relies on, *inter alia*, a study of labour relations in Canadian police forces prepared by Professor Dennis Forcese[68] and an opinion prepared for the purposes of this case by Professor Chaykowski.

[87] Writing in 1980, Professor Forcese found that within the traditional model of unionism and collective bargaining "there has been an apparent increase in the aggressiveness of both [police] associations and management". He stated:

> Both seem also to have assumed a more aggressive posture vis-à-vis public policy-making. Especially, police associations are becoming 'political' insofar as seeking to influence law enforcement policy, and in doing so, are challenging the public's conception of the neutrality of the police... In addition, as police unions become involved in public controversy, a cost that will have to be borne is a deterioration in public confidence and respect, and a consequent decline in the quality of police community relations and cooperation.[69]

[88] Professor Chaykowski outlined the features of the traditional collective bargaining model that make relations between management and employees "inherently adversarial and conflictual". In his view, when the traditional model is superimposed on the public sector, the delivery of essential services can be adversely affected by job action even in the absence of a right to strike. He described alternative models of labour relations based on consultation and consensus that are in use in other industrialized countries. He described the SRRP, which he considered to be one such model, in the following terms:

> The current RCMP model of labour-management relations in which Treasury Board is the employer, is a viable and effective mechanism for the determination of wages and benefits, for improving working conditions, and for providing industrial justice. The current model has significantly advanced the earnings and workplace outcomes of RCMP employees in a manner that stands to support and promote harmonious employee-employer relations. The parties have also successfully adjusted and augmented the model to ways that are responsive to their needs.[70]

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[67] At paragraphs 40-41
[68] Of the Department of Sociology and Anthropology at Carlton University
[69] Fifth Supplementary Application Record, volume 1,Tab E, at page 5450
[70] Respondent's Record, volume 9, page 3546-3547

[89] The parties join issue with respect to whether the SRRP does more to help or to hinder the realization of the legislature's objectives in entrenching the SRRP. A similar debate occurred in *Delisle* in relation to the exclusion of members of the RCMP from the *PSSRA*. Justices Iacobucci and Cory concluded that the exclusion had not been shown to be rationally connected to the legislature's objectives.[71] That conclusion merits careful consideration, but I am not persuaded that it is determinative of the rational connection issue here. Justices Cory and Iacobucci were presented with a different record than has been presented in this case, they were expressing the views of two members of a seven-judge bench, and the limit they were considering was not s. 96 of the *Regulations*.

[90] In my view, the respondent has established on a balance of probabilities that the creation of a separate labour relations regime, based on consultation and co-operation, and free of unionism and collective bargaining, is rationally connected to the goal of ensuring a stable, reliable and neutral national police force. That is, it "may promote … the objective sought", and "it [is] possible to argue that the means may help to bring about the objective…" This is not one of the few cases that founder on the rational connection requirement.

(b) minimum impairment

[91] In *R. v. Oakes,* Chief Justice Dickson stated that the means adopted by the legislature, "even if rationally connected to the objective…should impair 'as little as possible' the right or freedom in question".[72] In subsequent cases, the Supreme Court has made it clear that this does not mean that the government must adopt the "least drastic means" of achieving its objective.[73] In *RJR-MacDonald Inc. v. Canada (Attorney General), supra,* Justice McLachlin explained:

> The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement.[74]

[92] The respondent submits that in the labour relations arena a degree of deference is called for when assessing whether legislative choices minimally impair *Charter* rights or freedoms. That submission is supported by the authorities. In *Delisle,* for example, Justices Iacobucci and Cory observed that "labour relations law is typically an area in which courts have shown the legislature a degree of deference, owing to the complexity and delicacy of the balance sought to be struck by legislation among the interests of labour, management, and the public."[75] They cautioned, however, that this was not an invitation to abandon constitutional analysis. The extent to which deference is appropriate is to be determined in context, taking into account:

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[71] At paragraphs 119-125
[72] At paragraph 70
[73] See, *e.g., BC Health Services, supra*, fn 33, at paragraph 150
[74] At paragraph 160
[75] At paragraph 126

> (1) the role of the legislature in striking a balance between the interests of competing groups, as distinct from the situation where the legislature is the "singular antagonist" of the individual whose *Charter* freedoms have been infringed; (2) the vulnerability of the group that the legislature seeks to protect, and that group's subjective fears and apprehension of harm; (3) the inability to measure scientifically a particular harm in question or the efficaciousness of a remedy; and (4) the low social value of the activity suppressed by the legislation.[76]

[93] In the case at bar, the first and third of those factors tend to support a measure of deference. In designating the SRRP as the labour relations model for members of the RCMP, Parliament was attempting to reconcile the interests of the public with the interests of members of the RCMP in an area where balancing is required. The conflicting evidence amply demonstrates the difficulty of determining conclusively whether the SRRP achieves Parliament's objectives. The second and fourth factors, on the other hand, suggest that deference should not be paid. The public is not a vulnerable group in the relevant sense,[77] and the social value of the activity that the SRRP limits – associational activity in support of a process of collective bargaining – is very high. A balancing of the four factors suggests a moderate degree of deference when assessing whether the means adopted by the legislature minimally impair ss. 2(d).

[94] The applicants and the interveners concede that some limits on the associational freedoms of employees who provide essential services in the public sector, such as police officers, can readily be justified under s. 1. They have been very clear that members of the RCMP ought not to be given a right to strike and they acknowledge that other restrictions on the process of collective bargaining may be appropriate. With respect to the kind of tailoring that Parliament might have considered in attempting to fit a collective bargaining process to the particular needs of the RCMP, they invited the court to consider the labour relations regimes under which other police forces operate.

[95] The submissions of counsel for the intervener *Canadian Police Association* (CPA) have been helpful in this respect. The CPA points out that the history of police collective bargaining in Canada goes back at least 60 years and that currently the labour relations of virtually every Canadian police force are governed by a statutory collective bargaining regime. All of those regimes recognize that it is not in the public interest to permit police officers to withhold their services. All of them mandate interest arbitration as the mechanism for the resolution of bargaining impasses. Provincial legislatures commonly impose other restrictions on the bargaining process. In Ontario, certain matters, such as the duties of a police officer, are not negotiable. In at least three provinces, police officers are not permitted to be members of trade unions and police associations are not permitted to be affiliated with trade unions. The applicants implicitly if not explicitly acknowledge that all of these limits are reasonable.

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[76] At paragraph 127

[77] The cases in support of this proposition are cited by Iacobucci and Cory JJ at paragraph 130 of *Delisle*

[96] The RCMP is the only police force in Canada without a collective agreement to regulate the working conditions of its officers. The respondent sought to distinguish the situation of the RCMP from that of all other police forces. It characterized the RCMP as "a unique Canadian institution", which "is simultaneously a national, federal, provincial and municipal policing body". The respondent pointed out that the RCMP operates internationally to protect Canadians and Canadian institutions against terrorism, organized crime and other criminal activity, that it has primary responsibility in respect of offences constituting a threat to the security of Canada, that it protects dignitaries, including the Prime Minister and foreign officials, that it has an International Peacekeeping Branch, and that it plays an important role in relation to First Nations Policing.

[97] The margin of difference between the functions performed by the RCMP and those performed by other Canadian police forces is disputed by the applicants and interveners. In its factum, the CPA set out the manner in which many of the responsibilities of the RCMP overlap with functions performed by the aggregate of municipal and provincial police forces.[78] For example, the Ontario Provincial Police (OPP) and the Sûreté du Québec (SQ) have units devoted to the provision of personal security services for provincial politicians and visiting dignitaries, and members of the OPP, SQ and other police forces "routinely work alongside RCMP members to fulfill Canada's commitment to United Nations peacekeeping responsibilities."[79]

[98] Whether or not the RCMP can accurately be described as unique, I accept that as the largest police force in the nation, with the widest range of responsibilities, and with some functions that are exclusively its responsibility, the RCMP stands apart. What the respondent has not shown is why those differences require greater limits on the associational freedoms of members of the RCMP. The importance of stable, reliable, neutral and uninterrupted service is common to all police forces. Why does the wider jurisdiction of the RCMP or its status as a uniquely Canadian institution make the labour relations models in place for other police forces inappropriate?

[99] I acknowledge that no particular model of collective bargaining is constitutionally guaranteed, that legislative uniformity across the country in relation to police labour relations is not required, and that Parliament's choices are not limited to the models in existence for other police forces. However, the experience with respect to other police forces is relevant to the minimum impairment analysis. As part of its inquiry into whether the Legislature had attempted to tailor a collective bargaining system to the challenges facing the agricultural sector, in *Fraser v. Ontario,* the Court of Appeal looked to other jurisdictions for examples of less restrictive measures that might have been adopted.[80] In holding that the legislation under review had not been shown to minimally impair the ss. 2(d) rights of farm workers, the Court of Appeal stated that the Legislature had made "no attempt to engage in a line-drawing exercise" or "to tailor appropriate protections for a feasible collective bargaining regime. Rather, the intent was to create an alternative process." A similar observation can be made in the case at bar.

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[78] Factum of the Canadian Police Association, at paragraphs 61-75
[79] Affidavit of Tony Cannavino, Fourth Supplementary Application Record, volume one, Tab 44, paragraph 121
[80] Supra, fn 38, at paragraph 134

[100] The respondent submitted that "the impairment is minimal" because "the government has provided the hallmarks of a collective bargaining regime" through the existing processes.[81] With respect, requiring employees to deal with management under a regime that has hallmarks of collective bargaining but no actual collective bargaining is not a minimal impairment of the freedom to collectively bargain.

[101] If Parliament had made an effort to tailor a labour relations scheme for members of the RCMP in a manner that took their ss. 2(d) rights into account, deference to the model that it created might have been appropriate. The respondent did not attempt to demonstrate that any such effort was made.

[102] The entrenchment of the SRRP not only denies independent associations the freedom to collectively bargain, it even denies them the freedom to consult. The respondent has not shown that such a complete denial of associational freedoms is the least drastic interference with ss. 2(d) that will achieve the objective of ensuring a stable, reliable and neutral national police force.

(c) disproportionate impact

[103] In light of my conclusion that the respondent has not shown that the entrenchment of the SRRP minimally impairs the freedom of association of members of the RCMP, it is not necessary to proceed to the final component of the *Oakes* proportionality inquiry.

V. Does s. 41 of the Regulations Infringe ss. 2(b) or 2(d)?

[104] The applicants contend that s. 41 of the *Regulations* infringes the freedom of expression guaranteed by ss. 2(b) of the *Charter*. In oral argument, they confined their challenge to s. 41 to a particular context, namely its impact on the efforts of RCMP members to exercise their associational freedoms. Their factum, as well, made it clear that ss. 2(d) was their real concern. In their "overview" of the application, they stated:

> 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... The members have brought this application prepared to convince this court that their *Charter* rights have been violated, as those rights were previously conceived; however this change in the law ushered in by the Supreme Court strongly reinforces, and indeed anticipates, the arguments advanced by the members of the RCMP. Theirs is a clear case where the Impugned Provisions have been used to smother their *Charter*

[81] Respondents Factum, at paragraph 326

> rights, and thus deny them the opportunity to work together to bargain for fair working conditions.[82] [emphasis added]

[105] In my view, there is no factual foundation for a consideration of whether s. 41 interferes with the efforts of RCMP members to unionize and to engage in collective bargaining. The applicants conceded that s. 41 has never been applied in that context, presumably because under the SRRP regime members of the RCMP have been unable to get to that stage of the process. The importance of an adequate factual context within which to assess a *Charter* challenge was stressed by the Supreme Court of Canada in *Mackay v. Manitoba*, [1989] 2 S.C.R. 357:

> *Charter* cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society... In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most *Charter* cases... *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues.[83]

[106] Should Parliament decide to enact a statutory scheme of collective bargaining to replace the SRRP, concrete issues in relation to the effect of s. 41 on the ability of members of the RCMP to exercise their associational freedoms may arise. It is premature to attempt to resolve those issues at this time.

[107] In their written submissions, the applicants did not entirely limit their challenge to the constitutionality of s. 41 to its impact on associational freedoms. Once again, the record is inadequate for a consideration of the merits of the challenge. The constitutionality of provisions placing limits on the freedom of expression of public servants involves a balancing of competing values in a factual context: *Fraser v. Public Service Staff Relations Board,* [1985] 2 S.C.R. 455, at paragraph 41. The only evidence relevant to that balancing in this case is a handful of complaints from individual members of the RCMP. None of those persons is a party to the application, and the applicants conceded that the court was not being asked to judge the merits of their complaints. The constitutionality of s. 41 of the *Regulations* ought not to be considered in the abstract.

[108] In light of the foregoing, it is unnecessary to consider the respondent's submission that the applicants do not have standing to assert an infringement of ss. 2(b).

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[82] Applicants' Factum, at paragraphs 5, 7
[83] Per Cory J., at paragraphs 8-9

VI. Section 15

[109] The applicants submit that the entrenchment of the SRRP in s. 96 of the *Regulations* and the concurrent exclusion of members of the RCMP from the *PSLRA* violates s. 15 of the *Charter* "because it subjects minority members of the Force, and specifically women and the disabled, to differential treatment and that differential treatment is substantively discriminatory."[84]

[110] The applicants do not base this submission on the difference between the labour relations treatment accorded to public sector workers who are included under the *PSLRA* and that accorded to members of the RCMP. In light of the judgments of the Supreme Court of Canada in *Baier v. Alberta*, [2007] 2 S.C.R. 673, *Delisle* and *BC Health Services*, and of the Ontario Court of Appeal in *Fraser v. Ontario,* such a submission could not succeed. The applicants' submission is more focused: they say that the designation of the SRRP as the exclusive labour relations scheme for the RCMP, while aimed at all members of the Force, has "a disproportionate impact on women, the disabled and other minorities for whom unionization has been shown to be beneficial elsewhere in the labour market. By creating the impugned provisions to disenfranchise all RCMP members, the government has discriminated in particular against minority members of the Force."[85]

[111] The evidence offered in support of this submission consists essentially of anecdotal accounts of discrimination against women, minorities and the disabled and of dissatisfaction with the manner in which complaints from those persons were handled. As I understand it, the argument is that in a traditional labour relations context, complaints of discrimination would be handled differently, and that while the RCMP's labour relations scheme does not provide an adequate process for anyone, the consequences of the inadequacy fall more heavily on protected groups.

[112] The fact that the SRRP does not purport to discriminate between, *e.g.*, male and female members of the Force does not end the s. 15 inquiry. A facially neutral law can infringe s. 15 if the adverse impact of the law falls disproportionately on a protected group. In *Vriend v. Alberta*, [1998] 1 S.C.R. 493, the s. 15 challenge was based on the failure of Alberta's human rights legislation (the *IRPA)* to include sexual orientation in the list of forbidden grounds of discrimination in employment. The law was neutral in the sense that it left both heterosexual and homosexual individuals without a remedy if subjected to discrimination on the basis of sexual orientation. However, as it was far more likely that homosexuals would suffer that kind of discrimination, Justice Cory held that "it…is apparent that there is a clear distinction created by the disproportionate impact which arises from the exclusion of the ground from the *IRPA*."[86]

[113] That is not this case. The adverse effects of the SRRP system impact <u>all</u> members with job-related complaints. Unlike *Vriend,* where only those with a particular characteristic could be

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[84] Applicants' Factum, at paragraph 291
[85] At paragraph 296
[86] At paragraph 82

expected to suffer the adverse effects in question, there is no evidence that women, minorities or the disabled are more likely to raise job-related complaints than members who do not fall into one of those groups. The applicants have not shown that the failings of the process, if they exist, fall more heavily on s. 15 protected groups.

[114] Further, assuming that the applicants have shown that members of the RCMP who are women, minorities or disabled suffer job-related discrimination, they have not shown that the impugned provisions are the cause of the failure to achieve equality.

[115] In light of the foregoing, the question of whether the applicants have standing to assert an infringement of s. 15 need not be addressed.

VII. Remedy

[116] The applicants have established that the RCMP labour relations scheme substantially interferes with the freedom of members of the RCMP to associate for the purposes of collective bargaining. For the reasons set forth earlier, I conclude that the cause of the interference is not ss. 2(1)(d) of the *PSLRA* but rather s. 96 of the *Regulations*, which entrenches the SRRP as the sole entity through which members of the RCMP can collectively interact with management in relation to labour relations issues.

[117] Determining the appropriate remedy has not been free from difficulty. Declaring s. 96 to be of no force or effect while at the same time affirming the constitutionality of ss. 2(1)(d) of the *PSLRA* will leave both the members of the RCMP and management without a statutory framework within which to identify the appropriate representative of the members and to conduct a process of collective bargaining. However, unionization and collective bargaining existed prior to the enactment of statutory regimes establishing the rights and responsibilities of the parties.[87] Effective processes of collective bargaining are not inherently dependent on statutory frameworks, although it is obvious that such frameworks greatly facilitate them. The absence of a statutory framework is only a constitutional issue if it leaves those seeking to exercise ss. 2(d) freedoms unable to do so. In *Dunmore*, the Supreme Court of Canada concluded that agricultural workers required a statutory regime. In coming to that conclusion, however, the Court specifically distinguished the agricultural workers' situation from that of members of the RCMP. The Court did so on the basis of several considerations, including the fact that members of the RCMP have direct access to the *Charter* to remedy any interference with their freedom to associate, and that "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".[88] In the circumstances, I am not persuaded that as a matter of constitutional law the applicants are entitled to anything more than a declaration that s. 96 is invalid.

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[87] *BC Health Services*, *supra* fn 33, at paragraphs 41-42

[88] *Dunmore*, *supra* fn 29, per Bastarache J., at paragraph 46

[118] Accordingly, pursuant to s. 52 of the *Constitution Act, 1982*, I declare that s. 96 of the *Regulations* is of no force or effect. In view of the practical difficulties that the absence of a statutory framework for collective bargaining will entail, it may be that Parliament will act to provide such a framework. Parliament will need time to consider the options in this respect. Therefore, I suspend this declaration for a period of 18 months from the date of these reasons.

[119] If the parties cannot agree on costs, they may file brief written submissions not exceeding three pages, double-spaced, within 20 days.

Ian MacDonnell, J.

MacDonnell, J.

Released: April 6 2009

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

Applicants

- and –

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT

MacDonnell, J.

Released: April 06, 2009